IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. _____

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STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION,

Defendant Below, Petitioner,

v.

HONORABLE ALFRED E. FERGUSON, Judge of the Circuit Court of Cabell County, West Virginia, and MARY JANE MCCOMAS, as Administratrix of the Estate of Deanna R. McDonald,

Respondents.

PETITION FOR WRIT OF PROHIBITION

Action Pending in the Circuit Court of Cabell County
Civil Action No. 19-C-369

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I. QUESTIONS PRESENTED

This petition presents the following questions for review:

1. Pursuant to West Virginia law, can a claim for medical professional liability be asserted against a party that is not a healthcare provider?

2. Pursuant to West Virginia law, can a claim for medical professional liability proceed where Plaintiff has failed to comply with statutory pre-requisites for asserting a medical professional liability claim contained in West Virginia Code § 55-7B-6 as part of the Medical Professional Liability Act ("MPLA"), without which the lower court lacks subject matter jurisdiction over the action?

3. Should this Honorable Court intervene here, where the lower tribunal has permitted a claim for medical professional liability to be asserted against a party that is not a healthcare provider, while dismissing claims against the healthcare provider, which is a matter of first impression, and where this Court otherwise would not have the opportunity to clarify this point of law before unnecessary discovery and unnecessary use of judicial resources, and where proceeding will lead to delay and unnecessary cost for which an appeal cannot compensate?

4. Should this Honorable Court intervene here, where the lower tribunal has misapplied or ignored West Virginia statutory law which requires the Plaintiff to comply with necessary pre-requisites for asserting a medical professional liability claim, where the statutory pre-requisites are mandatory, and without which the lower court lacks subject matter jurisdiction over the action?

5. Should this Honorable Court intervene here, where the lower tribunal has misapplied or ignored federal law which provides that claims for money damages based on violations of constitutional rights, such as deliberate indifference, may not be asserted against a state agency because a state agency is not a "person" subject to suit pursuant to 42 U.S.C. § 1983, where this Court otherwise would not have the opportunity to address this clear error before unnecessary discovery and unnecessary use of judicial resources, and where proceeding will lead to delay and result in unnecessary cost for which an appeal cannot compensate?

II. STATEMENT OF THE CASE

The underlying wrongful death action arises from the death of Plaintiff's decedent, Deanna R. McDonald, on August 21, 2017, while incarcerated at Western Regional Jail ("WRJ"), a facility operated by the West Virginia Division of Corrections and Rehabilitation ("WVDCR"). A00105-00106.[1] It is alleged that, at the time of her death, Ms. McDonald had been an inmate at WRJ for approximately two days, from August 19, 2017, until her death on August 21, 2017. A00105-00106. It is further alleged that Ms. McDonald died because she was denied appropriate medical care. A00109. The allegations for which the Estate of Ms. McDonald seeks redress all relate to the alleged negligent provision of, or failure to provide, medical and/or mental health treatment to Ms. McDonald during her short incarceration at WRJ. A00107-00112. However, the lower court has permitted the Estate to pursue these claims against the WVDCR, a party that is not a healthcare provider, which is clearly erroneous in light of West Virginia law.

At the time of the events in issue, PrimeCare Medical of West Virginia, Inc. ("PrimeCare") provided medical services to inmates at facilities operated by the WVDCR, including WRJ. A00108-00109. The WVDCR entered into a contract with PrimeCare to provide these medical and health related services. A00134-00258, A00274-00277. Despite the Estate of Deanna McDonald acknowledging this relationship, PrimeCare was not named as a party defendant in the underlying suit. A00109, A00105. Instead, suit was initiated against the WVDCR, which the Estate has stipulated is not a healthcare provider. A00105, A00313.

The Amended Complaint alleges that Plaintiff's decedent was denied appropriate medical care, which proximately caused her eventual death. A00109. It alleges that "Ms. McDonald was diagnosed upon her jail intake as having 'current medical conditions' of being suicidal, fevers,

[1] Citations to the Appendix filed contemporaneously with this Petition are in the format "A" followed by the corresponding Bates numbers.

vomiting, daily abuse of opiates and as having seizures. Ms. McDonald was placed on a detox protocol, however, no referral for psychological medications, psychological evaluations or a medical examination was made[.]" A00105-00106. It further alleged that "Ms. McDonald also reported having an 'infection in her spine (septic)'. Ms. McDonald was placed in a holding cell under "full" suicide and detox 'precautions until cleared by a psychologist or psychiatrist.' No follow-up care or evaluation was afforded prior to her death." A00106.

The Amended Complaint alleges that, "No physician, physician assistant, registered nurse or other certified or licensed healthcare professional examined Ms. McDonald for her existent fevers, seizure disorder or septic infection. Her intake in WRJ commenced August 20 at 1:42 a.m. and was done by Shannon Estep. The next entry on her WRJ 'patient history' was August 21, at 12:05 p.m. after she had been pronounced dead at St. Mary's Medical Center." A00106.

The Amended Complaint alleges that, "From the completion of intake at 2:07 a.m. August 20, no healthcare professional examined her to ascertain Ms. McDonald's medical status until she was discovered lifeless on a 'vital check' at approximately 9:50 a.m. August 21." A00106 (emphasis in original). The Amended Complaint asserts claims for failure to provide adequate medical care, failure to protect Ms. McDonald from "disease" and her foreseeable, preventable death, as well as claims for intentional and negligent infliction of emotional distress. A00107.

The Amended Complaint alleges that various failures proximately caused, and served to contribute to, Ms. McDonald's death, including "fail[ure] to ask appropriate mental health questions, fail[ure] to appropriately score responses and answers to the questions they did ask, fail[ure] to appropriately assess Ms. McDonald's health risks, fail[ure] to take steps to prevent and treat the mental health and substance abuse withdrawal risks present, fail[ure] to review intake notes and material, and fail[ure] to assess her medical conditions including her mental health

conditions," as well as "fail[ure] to recognize the mental health and drug and alcohol abuse withdraw[al] issues present[.]" A00109.

Plaintiff's Amended Complaint alleges that the actions and inactions "in assessing and treating Deanna R. McDonald's mental and physical health along with their failure to recognized signs of an impending health crisis" were negligent and caused her death. A00110. Plaintiff's Amended Complaint identifies alleged negligence to include:

a. Failure to follow well-established mental health treatment protocols for mental health and substance abuse disorders and withdrawal symptoms.
b. Failure to adequately monitor Ms. McDonald during drug and alcohol detox and withdrawal.
c. Failure to carefully and regularly conduct mental health checks on Deanna R. McDonald during her incarceration.
d. Conducting an intake interview upon Ms. McDonald when she was intoxicated.
e. Failing to properly assess the mental health conditions present and seek medical and hospital clearance prior to incarcerating her.
f. Failing to obtain readily available prior health care records and by failing to give appropriate scores and weight to dangers present.

A00110. In summary, Plaintiff's Amended Complaint alleges that injuries and damages to Deanna McDonald and, ultimately, her death were caused by the failure to provide appropriate medical and mental healthcare and treatment to Ms. McDonald at WRJ. All of her claims, regardless of how pled, sound in medical professional liability.

The treatment at issue which Plaintiff alleges to have caused her damages was not provided by WVDCR, but by its contracted medical provider, PrimeCare. On or about July 14, 2016, the WVDCR's predecessor agency, the West Virginia Division of Corrections, entered into a Medical Services Contract with PrimeCare, whereby PrimeCare agreed to provide medical services for inmates housed in various Regional Jail facilities located throughout the State of West Virginia, including WRJ. A00134-00258, A00137. This contract was in effect during the time Deanna McDonald was incarcerated at WRJ in August of 2017. A00201-00227.

Pursuant to the Contract, PrimeCare was required to provide all personnel, equipment, and supplies necessary for the provision of the comprehensive health care obligations. A00150.[2] According to the Contract, PrimeCare was required to perform the following services at all facilities outlined in the contract: Receiving Medical Screening, Health Appraisal, Access to Treatment, Daily Triage of Complaints, Sick Call, and Medical Observation Unit. A00154. The Contract further required PrimeCare to "provide a Licensed Mental Health Professional to address and treat emotional and mental disorders of inmates on suicide watch." A00159. PrimeCare was further required to provide drug and alcohol detoxification services. A00164.

Further, PrimeCare agreed to provide all services according to applicable law and standards of care. Pursuant to the Contract, all comprehensive health and mental health care services provided are required to be according to, and in compliance with, all applicable federal legislation; all applicable statutes, regulations, rules, and any standards of care implemented by the State of West Virginia; National Commission on Correctional Health Care (NCCHC) current Standards for Health Services; PrimeCare's own policies, procedures, and protocols; and other specified standards. A00151. Further, all inmate medical services provided under the Contract are required to be in accordance with West Virginia statutory and regulatory laws which were in effect at the time, including W. Va. C.S.R. § 95-1-1, *et seq.* A00151.

As part of the Contract, PrimeCare was responsible for selecting, supervising, and compensating any and all individuals employed pursuant to the terms of the contract. A00144. PrimeCare agreed to be "solely responsible for all work performed under the contract and shall assume prime contractor responsibility for all services offered and products to be delivered under the terms of this contract." A00145. Upon information and belief, PrimeCare subcontracted with

[2] The Medical Services Contract expressly incorporates the original specifications contained in the Agency's Request for Quotation and makes them a part of the Contract. A00229.

PSIMED, Inc., and/or PSIMED Corrections, LLC, for the provision of mental health services under the Medical Services Contract.

The medical care that is at issue in this case was performed either as part of the Medical Services Contract by employees, agents or representatives of PrimeCare and/or pursuant to a subcontract between PrimeCare and PSIMED, Inc., and/or PSIMED Corrections, LLC. Pursuant to the Medical Services Contract, PrimeCare is solely responsible for all work performed under the contract and is responsible for the services provided by its subcontractor, PSIMED, Inc., and/or PSIMED Corrections, LLC.

West Virginia has a specific statutory scheme which applies to civil lawsuits involving the provision of medical care. Claims for medical professional liability are governed by the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-1, *et seq*. According to the MPLA, medical professional liability is "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W. Va. Code § 55-7B-2(i); *State ex rel. PrimeCare Med. Of W.Va., Inc., v. Faircloth*, 242 W. Va. 335, 342, 835 S.E.2d 579, 586 (2019).

The MPLA speaks in terms of claims against healthcare providers. This is both an obvious concept and one that is embodied in the statute itself. The elements of proof specifically relate to the conduct of a "health care provider." W. Va. Code § 55-7B-3. Notably, the WVDCR is not a health care provider as defined by the Act, and as stipulated by the Plaintiff. A00313. The MPLA contemplates that any cause of action related to the provision of healthcare must be filed against

the *health care provider*, regardless of how a plaintiff attempts to characterize the claim. This Court has held:

> Where . . . alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W.Va. Code § 55-7B-2(e) (2006) (Supp. 2007), the [West Virginia Medical Professional Liability] Act applies regardless of how the claims have been pled.

Syl. pt. 3, *Faircloth*, 242 W.Va. 335, 835 S.E.2d 579, *quoting* Syl. pt. 4, in part, *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 656 S.E.2d 451 (2007). Because the WVDCR is not a healthcare provider, the claims asserted in the Amended Complaint based upon medical professional liability, no matter how they are pled, must be dismissed against it. Despite this clear directive, the lower court has denied WVDCR's Motion to Dismiss on this ground. A00001-00006. This is clear error.

In addition, the lower Court compounded its error by allowing claims based upon medical professional liability to proceed against the WVDCR, even though Plaintiff failed to comply with the pre-requisites for filing a claim pursuant to the MPLA. These requirements, set forth in W. Va. Code § 55-7B-6, require notice of a claim and a screening certificate of merit from a qualified expert healthcare provider indicating that a defendant's conduct violated the applicable standard of care, which resulted in injury to the plaintiff, served on the proposed defendant at least 30 days prior to filing suit. *Davis v. Mound View Health Care, Inc.*, 220 W.Va. 28, 32, 640 S.E.2d 91, 95 (2006). Failure to comply with these requirements deprives the circuit court of subject matter jurisdiction over all claims subject to the MPLA. *Faircloth*, 242 W.Va. 335, 345, 835 S.E.2d 579, 589 (2019). Despite these clear statutory mandates, the lower court has denied WVDCR's Motion to Dismiss on this ground, which is clear error. A00001-00006. As a result, the lower court is proceeding without subject matter jurisdiction over the action.

Notably, PrimeCare agreed to "indemnify, defend and hold harmless the State and the WV Regional Jail Authority, their officers, and employees from and against: (1) Any claims or losses

for services rendered by any subcontractor, person or firm performing or supplying services, materials or supplies in connection with the performance of the contract; (2) Any claims or losses resulting to any person or entity injured or damaged by the Vendor, its officers, employees, or subcontractor by the publication, translation, reproduction, delivery, performance, use or disposition of any data used under the contract in a manner not authorized by the contract, or by Federal or State statutes or regulations; and (3) Any failure of the Vendor, its officers, employees or subcontractor to observe State and Federal laws, including but not limited to labor and wage laws." A00144-00145.

At all times relevant to the Amended Complaint, the WVDCR relied upon, and was entitled to rely upon, the professional judgment of trained medical personnel in carrying out the terms of the Medical Services Contract and providing medical services to inmates. In the event of any breach of the standard of care, or breach of any applicable law or standard applicable to the provision of medical or mental health care by PrimeCare or its subcontractor, PSIMED, Inc., and/or PSIMED Corrections, LLC, the WVDCR is entitled to contractual indemnification from PrimeCare.

Because PrimeCare is the healthcare provider with respect to the care at issue, and because PrimeCare contractually agreed to be responsible for the care and treatment and to indemnify WVDCR, WVDCR filed a Third-Party claim against PrimeCare in the underlying action. However, the lower court dismissed the Third-Party claim while allowing Plaintiff's claim against the WVDCR to proceed. A00007-00018, A00001-00006. This is clear error. Granting PrimeCare's Motion to Dismiss without granting the WVDCR's Motion to Dismiss created the illogical and unfair result of allowing Plaintiff to proceed against the WVDCR on a claim that its contracted medical provider, PrimeCare, did not provide adequate care to Ms. McDonald, while depriving the

WVDCR of the opportunity to make PrimeCare a party in the lawsuit based upon its alleged conduct. This is a particularly unfair result where, as here, the WVDCR has a written contract with PrimeCare, pursuant to which PrimeCare has agreed to indemnify the WVDCR under circumstances at issue in this lawsuit.

Further, the lower court's rulings are inconsistent because it enforced the statutory pre-requisites of the MPLA with respect to claims against PrimeCare, while it did not do so regarding the same claims asserted against the WVDCR. The inconsistent rulings in this case have placed the WVDCR in an untenable position of having to defend against claims of alleged medical professional negligence that was allegedly committed by PrimeCare, while at the same time being denied the opportunity to maintain claims against the alleged wrongdoer, PrimeCare.

Notably, the record demonstrates Plaintiff was fully aware that her claims lie, if at all, against PrimeCare as the healthcare provider, and she initially intended to name PrimeCare as a defendant. This is evidenced by the fact that, prior to filing suit, Plaintiff provided PrimeCare with a document entitled "Notice of Claim per §55-7B-6(b), West Virginia Code." A00512, A00521. The document listed theories of liability and included a section entitled "Screening Certificate of Merit" stating that counsel had insufficient time to obtain a screening certificate of merit. A00521. This notice was not provided to WVDCR; however, it appears that Plaintiff either was not diligent or was unwilling to comply with mandatory pre-suit requirements in a timely manner, resulting in an inability to join PrimeCare. A00512.

Additionally, the initial Complaint reads as though PrimeCare was intended to be named as a defendant, as paragraph 1 of the Complaint identifies PrimeCare as the entity which provides medical services to inmates at WRJ. A00056. Paragraph 6 of the Complaint states:

> Pursuant to the West Virginia Medical Professional Liability Act, *W.Va. Code* § 55-7B-1, *et seq.*, prior to filing this action a notice of claim has been sent to the

> healthcare providers and the provisions of *W.Va. Code* §55-7B-1, *et seq.*, have been complied with by the plaintiff. The filing requirements and provisions of *W.Va. Code* §55-7B-6 have been complied with by the plaintiff informing the defendants of their notice of claim as well in accordance with all relevant legal authority.

A00057. In fact, however, Plaintiff had not complied with any provisions of W. Va. Code § 55-7B-6 in connection with claims against the WVDCR, the only named Defendant at the time of filing. Apparently, Plaintiff never provided a Screening Certificate of Merit to PrimeCare and allowed the statute of limitations to run against PrimeCare. A00512. Plaintiff did not follow through with joining PrimeCare in the suit, a decision that should be fatal to her claims of medical professional liability based on PrimeCare's provision of medical care to the decedent. The lower court's decision to allow such claims to be asserted against the WVDCR instead is clearly erroneous, and this Court should intervene to correct the error.

Though the issues sought to be reviewed in this petition are straightforward, the underlying matter has been procedurally lengthy and complicated. This procedural complexity does not affect the legal analysis to be applied by this Court; however, a description of the procedural history is necessary to place the underlying court orders in their proper context and are discussed here in an effort to avoid confusion.

The initial Complaint was filed on August 20, 2019. A00056, A00682. In lieu of an Answer, the WVDCR timely filed a Motion to Dismiss based on two primary grounds. A00066-00085. First, the WVDCR argued that the Complaint asserts claims against the WVDCR for medical professional liability and must be dismissed because the WVDCR is not a healthcare provider. A00069-00074. Second, in the alternative, the WVDCR argued the court lacks subject matter jurisdiction to hear the claims of medical professional liability because Plaintiff did not comply with the statutory pre-requisites for asserting such a claim pursuant to the Medical

Professional Liability Act. A00074-00077. In May of 2020, Plaintiff filed a Response to this Motion, and the WVDCR filed a Reply. A00089-00094, A00095-00100.

While the Motion to Dismiss was pending, on June 4, 2020, Plaintiff filed a Motion for Leave to File an Amended Complaint. A00101-00113, A00682. It was served by regular mail and received by counsel for the WVDCR on June 10, 2020. The Motion for Leave states that "a copy of the proposed Amended Complaint is attached." A00101. The Motion clearly refers to the Amended Complaint as a proposed filing. A00101. However, the copy of the Amended Complaint provided to counsel for the WVDCR was itself stamped "filed" by the Court Clerk on June 4, 2020. A00105. This suggested that Ms. McComas had filed a Motion seeking leave to file an amended pleading, while simultaneously filing an Amended Complaint without leave of Court.[3]

On June 18, 2020, the WVDCR filed its Response in Opposition to the Motion for Leave to File an Amended Complaint, on the basis that the Amended Complaint was received beyond 180 days from service of the original Complaint on the WVDCR, so it is beyond the timeframe for asserting third-party complaints. A00261-00269. The WVDCR argued that leave should not be given to the Ms. McComas to amend her pleading if doing so would preclude the WVDCR from pursuing its third-party claims. A00262. The WVDCR had previously filed its Third-Party Complaint Against PrimeCare and sought to preserve its rights in connection with those claims. A00114-00260. On June 19, 2020, the WVDCR filed its Amended Third-Party Complaint Against PrimeCare. A00270-00289.

Because of the appearance that the Amended Complaint had been filed, on June 19, 2020, the WVDCR filed its Motion to Dismiss the Amended Complaint. A00290-00310. In the Amended

[3] The docket sheet does not show the Amended Complaint being separately filed on June 4, 2020, only the Motion for Leave with attachments. A00682. The Docket Sheet indicates that a Certificate of Service for the Motion for Leave and the Amended Complaint was filed on June 5, 2020. A00682.

Complaint, Plaintiff attempted to recharacterize the claims as simply "negligence," as opposed to medical professional liability. However, the factual support for the claims remained virtually unchanged, and the claims sound in medical professional liability no matter how the Plaintiff attempts to characterize them. The Motion to Dismiss the Amended Complaint was based upon the same two primary grounds stated in opposition to the initial Complaint. First, the Amended Complaint asserts claims against the WVDCR for medical professional liability, which must be dismissed because the WVDCR is not a healthcare provider. A00295-00300. Second, in the alternative, the court lacks subject matter jurisdiction to hear the claims of medical professional liability because Ms. McComas did not comply with the statutory pre-requisites for asserting such a claim pursuant to the MPLA. A00300-00302. In June of 2020, Ms. McComas filed a Response to this Motion. A00311-00326.

At that time, both the Motion to Dismiss the Complaint and the Motion to Dismiss the Amended Complaint were pending. On June 22, 2020, Plaintiff submitted a proposed Order to the Court. A00343-00350. The Proposed Order, if entered, would deny both the Motion to Dismiss the Complaint and the Motion to Dismiss the Amended Complaint. A00347-00348. On June 26, 2020, the WVDCR submitted Objections to Plaintiff's Proposed Order, objecting, *inter alia*, to the fact that it combined a ruling on the Motion to Dismiss the initial Complaint as well as the Motion to Dismiss the Amended Complaint. A00384-00388. As there can only be one operative pleading, i.e., either the Complaint or the Amended Complaint, the WVDCR reasoned in its Objections that, depending upon whether the Court granted leave to Plaintiff to file the Amended Complaint, only one of the Motions to Dismiss would need addressed, not both. A00385. The WVDCR also objected to the fact that Plaintiff's proposed order omitted any discussion of the MPLA or its statutory pre-requisites. A00385. At the same time, the WVDCR submitted separate proposed

Orders, one of which, if entered, would grant its Motion to Dismiss Plaintiff's Complaint, and one of which, if entered, would grant its Motion to Dismiss Plaintiff's Amended Complaint. A00351-383. Plaintiff filed objections to the WVDCR's proposed orders. A00389-00399.

On May 12, 2020, staff in the Judge's office indicated informally to staff in undersigned counsel's office that the Judge intended to recuse himself in this matter due to being a friend of a former administrator at WRJ. A00267, A00402. On July 20, 2020, when no Notice of Recusal had been received, an assistant to counsel for the WVDCR called the Judge's office to request a hearing on the Motions to Dismiss. A00404. At that time, the assistant was advised by the Judge's staff that the Judge had changed his position on recusal upon learning his friend was not working at WRJ at the time of the events in question. A00404-00405. Further, the assistant was advised that the Order Granting WVDCR's Motion to Dismiss Plaintiff's Complaint, as well as the Order Granting WVDCR's Motion to Dismiss Plaintiff's Amended Complaint, had been entered on July 10, 2020. A00404. Counsel for the WVDCR requested and obtained copies of these two Orders, which it had not previously received. A00023-00051. No mention was made of any Orders to the contrary, so it appeared the case had been dismissed.

On August 11, 2020, counsel for the WVDCR received a copy of an entered Order Setting Aside Order Granting West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss Plaintiff's Complaint and Plaintiff's Amended Complaint. A00052-00053. Upon receiving this Order, counsel for the WVDCR learned for the first time that the circuit court had entered *three* orders on the same issue—the two Orders *Granting* Defendant's Motion to Dismiss the Complaint and Defendant's Motion to Dismiss the Amended Complaint and a mutually

exclusive Order *Denying* Defendants' Motion to Dismiss.[4] (Emphasis added.) A00019-00022. Upon receipt of the Order Setting Aside, counsel for the Defendant requested and obtained a copy of the Order Denying Defendant, West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss, as it had not previously been provided with a copy.

The Order Setting Aside Order Granting West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss Plaintiff's Complaint and Plaintiff's Amended Complaint acknowledges that the Court "inadvertently entered three orders on the same issue." A00052. It further states that the "standing order should be the Order Denying Defendant's Motion to Dismiss." A00052. While clarifying one issue, the Order created an ambiguity regarding the operative pleading. The singular Order Denying Defendant, West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss addresses two separate motions related to two separate pleadings: the initial Complaint and the Amended Complaint. A00019-00022. The Order does not specify which pleading—the Complaint or the Amended Complaint--is the operative pleading moving forward, but, in fact, acknowledges both. As a result, the WVDCR filed a Motion Seeking Clarification, asking, *inter alia,* the Court to rule on Plaintiff's outstanding Motion for Leave to File an Amended Complaint and clarify whether the WVDCR should file an answer to the initial Complaint or the Amended Complaint. A00400. Plaintiff filed a separate Motion Seeking Clarification and a proposed Order. A00443-00461. The Order was entered on August 24, 2020, which clarified that the operative pleading was the Amended Complaint. WVDCR had previously filed an Answer to the Amended Complaint on August 17, 2020. A00428.

[4] In fact, the circuit court entered duplicate copies of the Order Denying Defendant, West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss, one on July 1, 2020, and one on July 10, 2020, the same day that the competing Orders were entered. A00019-00022, A00682.

The circuit court's Order which denied the WVDCR's Motion to Dismiss the Amended Complaint does not include any findings of fact or conclusions of law setting forth the basis for the Court's ruling. A00019-00022. The WVDCR filed a Notice of Intent to File Writ of Prohibition and Motion Requesting Findings of Fact and Conclusions of Law, requesting that the circuit court set forth its findings and conclusions to permit review in this Court. A00462-00467. Plaintiff submitted a proposed order, and the WVDCR filed objections to the proposed order. A00468-00500, A00501-00509. The lower court adopted Plaintiff's proposed order, virtually unaltered, over the objection of the WVDCR, and entered its Order of September 22, 2020, granting the WVDCR's Motion Requesting Findings of Fact and Conclusions of Law and denying its Motion to Dismiss. A00001-00006. Because the Order contains numerous clear errors, and because the lower court lacks subject matter jurisdiction, the WVDCR seeks extraordinary relief in this Court.

Shortly after entry of the Order granting the WVDCR's Motion Requesting Findings of Fact and Conclusions of Law, and denying its Motion to Dismiss, Third-Party Defendant PrimeCare filed its Motion to Dismiss WVDCR's Amended Third-Party Complaint. A00510. In its Motion, PrimeCare states:

> Plaintiff initially attempted to bring an action against PrimeCare, but was barred from doing so because she failed to timely comply with the MPLA's mandatory pre-suit notice requirements resulting in the expiration of the statute of limitations on any such claims. [] Instead, Plaintiff commenced this action against the [WVDCR] which now seeks to bring PrimeCare into this action likely because of Plaintiff's inability to do so.

A00511. As grounds for dismissal, PrimeCare relied upon the MPLA and argued that the WVDCR had not complied with mandatory pre-suit requirements set forth in W. Va. Code § 55-7B-6. A00514-00516. This precise argument, when raised by the WVDCR, had been rejected by the circuit court.

The WVDCR filed a Response to PrimeCare's Motion to Dismiss. A00523-00539. The WVDCR argued that granting PrimeCare's Motion would create the absurd and unfair result of allowing the Plaintiff to proceed against the WVDCR on a claim that its contracted medical provider, PrimeCare, did not provide adequate care to Ms. McDonald, while depriving the WVDCR of the opportunity to make PrimeCare a party in the lawsuit based upon its alleged conduct. A00524. This is especially true in light of the contract with PrimeCare, pursuant to which PrimeCare has agreed to indemnify the WVDCR under circumstances at issue in this lawsuit. A00524. With respect to the pre-suit requirements, the WVDCR argued that the WVDCR is not asserting that PrimeCare breached a standard of care. A00524. Plaintiff is the party making such claims. A00524. Rather, the WVDCR is asserting its contractual right to indemnification in the event Plaintiff prevails on her claims. A00524. The third-party claims are based upon the same factual allegations as Plaintiff's claims. The WVDCR argued that, if the court determines that the claims at issue are subject to the MPLA, and that they must be dismissed against PrimeCare, the claims must also be dismissed against the WVDCR because Plaintiff has not complied with the statutory prerequisites mandated by the MPLA for bringing such claims. A00524. Plaintiff, as the party asserting breaches in the standard of care, is the party which must comply with the MPLA if that statute is found to apply to her claims. A00524. Otherwise, absurd and unjust results necessarily follow. A00524. Therefore, the WVDCR requested in the alternative that the circuit court exercise its inherent power to revisit its earlier interlocutory ruling, recognized in Syl. pt. 4, *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003), and find that Plaintiff's claims are subject to the MPLA and that Plaintiff did not comply with the MPLA, and that, therefore, no claims based upon alleged failure to provide medical care to Deanna McDonald may

proceed as to any party. A00535-00536. PrimeCare filed a Reply in support of its Motion. A00540-A00548. PrimeCare summarized the issue as follows:

> The instant action presents this Court with quite the quagmire given than Plaintiff's claims exclusively concern the alleged actions and/or omissions of PrimeCare, but Plaintiff, by reason of her failure to comply with the MPLA, is statutorily barred from pursuing any such claims against PrimeCare.

A00543-544.

Because resolution of PrimeCare's Motion to Dismiss had potential bearing upon the WVDCR's anticipated request for relief in this Court, no request for extraordinary relief was pursued while the motion was pending. In response to a request from the circuit court to submit proposed orders, the WVDCR submitted two proposed orders which reflect alternative potential rulings upon the motion. A00567-00595. PrimeCare submitted a competing proposed order. A00596-00607. On November 21, 2021, after the motion had been pending for more than one year, the circuit court entered an Order Granting PrimeCare's Motion to Dismiss WVDCR's Amended Third-Party Complaint. A00007-00018.

In the meantime, on August 3, 2021, Plaintiff filed a Motion for Leave to File A Second Amended Complaint. A00608. If leave were to be granted, the intervening second amended pleading would arguably moot the court's prior order denying the WVDCR's Motion to Dismiss the Amended Complaint. Therefore, while the motion for leave was pending, in order to conserve judicial resources, relief in this Court was not sought. The circuit court did not rule on the motion, and on May 13, 2022, Plaintiff withdrew her Motion for Leave to File A Second Amended Complaint. A00679.

WVDCR now petitions this Honorable Court for a writ prohibiting the enforcement of the September 22, 2020 Order granting WVDCR's Motion requesting findings of fact and conclusions of law and denying its Motion to Dismiss Plaintiff's Amended Complaint. The Order is clearly

erroneous as a matter of law, and the circuit court lacks subject matter jurisdiction over these MPLA claims because the Plaintiff has not complied with statutory pre-requisites. WVDCR requests that this Court issue a Rule to Show Cause why the writ should not issue and stay proceedings in the underlying action pending the outcome. Petitioner requests the relief this Court deems just.

III. SUMMARY OF ARGUMENT

None of the claims asserted in the Amended Complaint, which arise from alleged negligence with respect to the provision of medical and/or mental health care, can be maintained against the WVDCR. Plaintiff's initial Complaint correctly identified these claims as claims of medical professional liability. In the Amended Complaint, Plaintiff is still making claims of medical professional liability, but is attempting to disguise them as simply "negligence." However, the claims and their factual bases remain the same, no matter how Plaintiff manipulates the language of the Amended Complaint. Such claims cannot be maintained against the WVDCR because it is not a healthcare provider. For purposes of this action, Plaintiff has stipulated that the WVDCR is not a healthcare provider. A00313.

Additionally, the circuit court lacks subject matter jurisdiction over Plaintiff's claims because Plaintiff has failed to comply with the mandatory pre-suit requirements in connection with her claims that are clearly covered by the MPLA. Therefore, the circuit court can take no further action other than to dismiss the claims.

In denying the WVDCR's Motion to Dismiss, the circuit court adopted Plaintiff's proposed order virtually unchanged, thereby omitting any meaningful discussion of the grounds raised by the WVDCR in its Motion. Its determination is clearly erroneous as a matter of law. Whereas direct appeal could eventually be available, the WVDCR would spend unnecessary time and expense in

defending against litigation that should be dismissed as a matter of statutory law, and unnecessary judicial resources will be expended in meritless proceedings. Additionally, Plaintiff should not be rewarded at the expense of the WVDCR for failing to timely assert her claims against the alleged wrongdoer, PrimeCare. WVDCR seeks relief from the Order below and asks this Court to intervene because the lower court lacks subject matter jurisdiction over the action and because it exceeded its legitimate powers by proceeding where a cause of action does not lie.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure, oral argument is indicated in this instance because this case presents an issue of first impression, specifically, whether a medical professional liability claim may be asserted against a party that is not a healthcare provider. Oral argument would also be appropriate pursuant to Rule 20(a)(2), as this case involves an issue of fundamental public importance in clarifying a key aspect of the MPLA. Oral argument would be appropriate pursuant to Rule 20(a)(4) as this case involves an inconsistency in the lower court's decisions in this matter.

V. ARGUMENT

A. Standard of Review

It is well-settled that this Court may intervene, in an original action, in instances where the lower court lacks jurisdiction or has exceeded its legitimate powers. W. Va. Code § 53–1–1; Syl. pt. 1, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003). This Court has explained the standard of review applicable to a writ of prohibition as follows:

> " 'A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53–1–1.' Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)." Syl. pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994).

Syl. pt. 1, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003), *quoting* Syl. pt. 1, *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997). "When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies." Syl pt. 2, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003), quoting Syl. pt. 10, *Jennings v. McDougle*, 83 W. Va. 186, 98 S.E. 162 (1919).

This Court should issue a writ of prohibition because the lower court lacks subject matter jurisdiction over the action. With respect to jurisdiction, this Court has explained that "to enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction." *State ex rel. Farber v. Mazzone*, 213 W. Va. at 666, 584 S.E.2d at 522, quoting *West Virginia Secondary School Activities Commission v. Wagner*, 143 W. Va. 508, 520-521, 102 S.E.2d 901, 909 (1958) (citing *Morris v. Calhoun*, 119 W. Va. 603, 195 S.E. 341 (1938)). Because the MPLA applies to the claims asserted, Plaintiff must comply with the requirements set forth in W. Va. Code § 55-7B-6. *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 31-32, 640 S.E.2d 91, 94-95 (2006). Failure to comply with these requirements deprives the circuit court of subject matter jurisdiction over all claims subject to the MPLA. *Faircloth*, 242 W. Va. 335, 345, 835 S.E.2d 579, 589 (2019). Because all claims asserted by Plaintiff are MPLA claims, the circuit court lacks subject matter jurisdiction over the action.

In cases not involving an absence of jurisdiction, but where it is claimed that the lower court exceeded its legitimate powers, the following five factors may be considered in determining whether to issue a writ of prohibition:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or

> prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). This Court has found these factors to be "general guidelines," further finding that not all of the factors need to be met for this Court to act. *Id.* "Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.*

As alternative grounds for seeking a writ of prohibition, WVDCR asserts that the lower court's order is clearly erroneous as a matter of law because it has allowed a claim for medical professional liability to be asserted against a party that is not a healthcare provider. Though this conclusion is inescapable based upon the MPLA, this raises an issue of first impression in West Virginia, and this Court should intervene to clarify this point of law. Additionally, to the extent that Plaintiff construes any of her claims as claims for violations of constitutional rights, such as deliberate indifference, such claims must be asserted against those individuals alleged to have violated Plaintiff's rights, and may not be maintained against the WVDCR, a state agency. The lower court has exceeded its legitimate authority by ignoring or misconstruing West Virginia and federal law in denying the WVDCR's Motion to Dismiss and permitting these claims to proceed. If the WVDCR is compelled to defend against these claims, it will incur unnecessary expense and devote time and energy to the litigation, for which an appeal, even if successful, cannot compensate. This is analogous to *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21, where, applying the five factors set forth above, this Court found that the petitioner had no "plain, speedy, and adequate remedy in the ordinary course of law" because "[t]he aggrieved party

would be compelled to go through a contested hearing and appeal from a final judgment." *Id.* The remedy by appeal was deemed inadequate, with this Court commenting that "[t]he unreasonableness of the delay and expense is apparent." *Id.* For the same reason, this Court should issue a writ of prohibition in this matter.

B. Questions Presented

1. **Pursuant to West Virginia law, can a claim for medical professional liability be asserted against a party that is not a healthcare provider?**

Based on the allegations contained in the Amended Complaint, Plaintiff is asserting claims for medical professional liability against the WVDCR.[5] The circuit court has acknowledged that "the allegations in Plaintiff's Complaint concerned the rendering of health care services." A00010. Claims for medical professional liability are governed by the MPLA, W. Va. Code § 55-7B-1, *et seq*. The conclusion that claims for medical professional liability can only be asserted against healthcare providers is inescapable based upon the MPLA's definition of "medical professional liability" and its required elements of proof. What constitutes "medical professional liability" is broadly defined. *State ex rel. PrimeCare Med. Of W.Va., Inc., v. Faircloth*, 242 W.Va. 335, 342, 835 S.E.2d 579, 586 (2019). According to the MPLA, medical professional liability is "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all

[5] *See* pp. 2-4, above. "Count I" of Plaintiff's Amended Complaint purports to assert four tort claims: intentional infliction of emotional distress, negligent infliction of emotional distress, failure to provide adequate medical care, and failure to protect Ms. McDonald from disease. The factual basis for each of these claims is the alleged failure to provide medical care which meets the appropriate standard of care, so they really all are asserting the same thing: medical professional liability as defined by the MPLA. Medical professional liability is also the only claim asserted in "Count II" of the Amended Complaint.

in the context of rendering health care services." W. Va. Code § 55-7B-2(i); *Faircloth*, 242 W. Va. at 342, 835 S.E.2d at 586. Based upon this definition alone, it is nonsensical for a court to conclude that claims meeting the definition of "medical professional liability" can be asserted against any party that is not a healthcare provider.

Further illustrating the point, the elements of proof of such a claim are as follows:

> (a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:
>
> > (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
> >
> > (2) Such failure was a proximate cause of the injury or death.

W. Va. Code § 55-7B-3(a). The MPLA speaks only in terms of claims against health care providers and does not contemplate that such claims may be brought against any party not meeting that definition. Notably, the WVDCR is not a health care provider as defined by W. Va. Code § 55-7B-2(g), a fact to which the Plaintiff has stipulated. A00313. The MPLA contemplates that any cause of action related to the provision of health care must be filed against the health care provider, regardless of how a Plaintiff attempts to characterize the claim. This Court has held:

> Where . . . alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W.Va. Code § 55-7B-2(e) (2006) (Supp. 2007), the [West Virginia Medical Professional Liability] Act applies regardless of how the claims have been pled.

Syl. pt. 3, *Faircloth*, 242 W.Va. 335, 835 S.E.2d 579, *quoting* Syl. pt. 4, *in part, Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007). Because the WVDCR is not a health care provider, the claims asserted in the Amended Complaint, which are based upon medical professional liability, regardless of how pled, should be dismissed against it.

Plaintiff has alleged the WVDCR has a duty "to provide adequate and appropriate medical care and to ensure that those persons to whom they assign this duty are appropriately providing medical care including mental health services." A00109. This claim should also be dismissed, because supervision of a healthcare provider is also considered to be health care and can only be done by a healthcare provider. For purposes of the MPLA, health care includes "[t]he process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." W. Va. Code § 55-7B-2(e)(3). In other words, oversight or supervision of a health care provider constitutes "health care." Thus, any claim alleging negligent oversight or supervision of a health care provider must itself be asserted against a health care provider.

Additionally, to the extent the Amended Complaint purports to assert claims against the WVDCR for negligently hiring, retaining, or supervising healthcare providers, such claims must be dismissed. As explained above, the WVDCR is not a health care provider and cannot be liable for the negligent provision of health care, which includes "[t]he process employed by health care providers and health care facilities for the appointment, employment, . . . and supervision of health care providers." W. Va. Code § 55-7B-2(e)(3).

To the extent the Amended Complaint alleges that Western Regional Jail staff were assigned to perform tasks incidental to the provision of medical care to Ms. McDonald this Court has found that such conduct is subject to the MPLA. In *State ex rel. PrimeCare Med. Of W.Va., Inc., v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019), this Court found that the types of allegations raised by Plaintiff in this matter are subject to the MPLA. In *Faircloth*, the estate of a deceased inmate filed suit against the West Virginia Regional Jail Authority and a correctional officer, alleging that the inmate had committed suicide while an inmate at Eastern Regional Jail.

Id., 242 W. Va. at 337, 835 S.E.2d at 582. The estate later amended its complaint to join PrimeCare Medical of West Virginia, Inc., as a defendant. *Id.* The amended complaint included allegations that PrimeCare "provided medical screening and monitoring of Eastern Regional Jail inmates on behalf of, and in concert with" the Regional Jail Authority. *Id.*, 242 W.Va. at 339, 835 S.E.2d at 583. It further alleged that PrimeCare and the Regional Jail Authority had acted negligently in connection with the employment of the defendant correctional officer, including negligently supervising and training him, negligently retaining him, negligently firing him, negligently staffing the jail. *Id.* The amended complaint alleged generally that the defendants had allowed the decedent to kill himself while in protective custody. *Id.*

In *Faircloth*, PrimeCare moved to dismiss the amended complaint in its entirety because the estate had not complied with the pre-suit requirements of the MPLA. *Id.*, 242 W. Va. at 342, 835 S.E.2d at 586. The estate opposed the motion, arguing that "at least several" of its claims did not involve medical professional negligence. *Id.* This Court analyzed the claims in the context of the MPLA's broad definition of "medical professional liability," and found that all of the estate's claims against PrimeCare were subject to the MPLA. *Id.*, 242 W. Va. at 342-343, 835 S.E.2d at 586-587. This Court concluded:

> A fair reading of the amended complaint reveals that the Estate blames PrimeCare for (a) failing to properly assess [the decedent's] potential for suicide, (b) failing to properly house and monitor [the decedent] in light of his (allegedly) known potential for suicide, and (c) failing to properly train, monitor, and discipline [the defendant correctional officer], whom the Estate blames, in particular, for failing to properly monitor [the decedent]. Applying the definitions set forth in Section 2 of the MPLA, these allegations state a claim for "medical professional liability" because the acts or omissions in question were "*health care services rendered*, or which should have been rendered, by a *health care provider or health care facility* to a patient."

Id., 242 W. Va. at 343, 835 S.E.2d at 587, *quoting* W. Va. Code § 55-7B-2(i) (emphasis in original). This Court emphasized that decisions about staffing, custodial care, and similar patient

services are included in the definition of "health care," including "acts performed or omitted 'during the patient's . . . confinement[.]'" *Id.*, 242 W. Va. at 343, 835 S.E.2d at 587.[6]

By this same reasoning, all claims asserted in this case against the WVDCR constitute claims of medical professional liability and are subject to the MPLA. Because the WVDCR is not a health care provider, these claims should be dismissed.

Other aspects of the MPLA support this conclusion. The MPLA provides that liability for medical professional liability is several, and not joint. W. Va. Code § 55-7B-9(c). This underscores the fact that the Plaintiff is obligated to bring claims of medical professional negligence directly against the health care provider(s) alleged to have deviated from the accepted standard of care. Here, the Plaintiff is attempting to allege medical professional liability claims for violations of the standard of care by PrimeCare against the WVDCR, which is not a health care provider, and therefore, does not owe the Plaintiff any duty with respect to the accepted standard of medical care. This argument was asserted in the WVDCR's Motion to Dismiss. A00295-00300. Plaintiff's Response to the Motion to Dismiss, other than stipulating that the WVDCR is not a healthcare provider, offered no argument, legal support, or analysis whatsoever in opposition to the WVDCR's arguments that the MPLA applies to Plaintiff's claims, that such claims must be made against the healthcare provider whose care is at issue. A00311-00319. Thus, all of Plaintiff's claims should be dismissed.

[6] This Court noted that "health care provider" includes "any person taking actions or providing service or treatment pursuant to or in furtherance of a [physician's plan of care, a] health care facility's plan of care, medical diagnosis or treatment[.]"*Faircloth*, 242 W. Va. at 343, 835 S.E.2d at 587. There is no indication in the MPLA that the term "person" would include a State agency such as the WVDCR.

2. **Pursuant to West Virginia law, can a claim for medical professional liability proceed where Plaintiff has failed to comply with statutory pre-requisites for asserting a medical professional liability claim contained in West Virginia Code § 55-7B-6 as part of the Medical Professional Liability Act ("MPLA"), without which the lower court lacks subject matter jurisdiction over the action?**

In the event this Court should conclude that Plaintiff may assert claims of medical professional liability against the WVDCR, Plaintiff's claims must nonetheless be dismissed because Plaintiff has failed to comply with the pre-requisites for filing a claim pursuant to the MPLA. These requirements, set forth in W. Va. Code § 55-7B-6, require notice of a claim and a screening certificate of merit from a qualified expert health care provider indicating that a defendant's conduct violated the applicable standard of care, which resulted in injury to the Plaintiff, served on the proposed defendant at least 30 days prior to filing suit. *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 32, 640 S.E.2d 91, 95 (2006). Failure to comply with these requirements deprives the circuit court of subject matter jurisdiction over all claims subject to the MPLA. *Faircloth*, 242 W. Va. 335, 835 S.E.2d 579, 589. It should be beyond debate that these requirements apply to any plaintiff asserting claims meeting the definition of medical professional liability.

This Court has previously treated obvious attempts at avoiding the MPLA, such as this, with justified skepticism. This case is extremely similar to *Damron v. PrimeCare Medical of West Virginia, Inc.*, No. 20-0862, 2022 W. Va. LEXIS 456, at *8, 2022 WL 2078178 (W. Va. June 9, 2022) (Memorandum Opinion). In *Damron*, petitioner stated in his pleadings that he was not asserting a medical negligence claim and agreed to dismiss any MPLA claims. *Id.*, at *2-3. This Court found this strategy to be "an attempt to avoid application of the MPLA." *Id.*, at *2. The *Damron* petitioner's pleading contained five separate causes of action, including deliberate indifference to a serious medical need and other torts. *Id.*, at *4. The circuit court found that "[a]ll

of Plaintiffs [sic] claims in this action, regardless of how they are pled, stem solely from the rendering, or alleged failure to render, 'health care' and therefore sound in terms of medical negligence." *Id.*, *6-7. Further, the circuit court held that "[a]ccordingly, Plaintiff is not permitted to hide behind the guise of a constitutional claim in order to avoid the mandatory application of the MPLA or otherwise excuse his failure to provide a [s]creening [c]ertificate of [m]erit." *Id.*, at *7. This Court affirmed, reiterating that "[i]t goes without saying that [a plaintiff] cannot avoid the MPLA with creative pleading." *Id.*, at *9, quoting *State ex rel. W.Va. Univ. Hosp. v. Scott*, 246 W. Va. 184, 866 S.E.2d 350, 359 (2021). This Court should reach the same result in this matter and find that all of Plaintiff's claims sound in medical professional liability, no matter how creatively they have been pled.

West Virginia Code §55-7B-6(a) requires that certain prerequisites be satisfied before a claimant is entitled to file a medical malpractice action against a health care provider, thereby limiting a court's subject matter jurisdiction over such matters. Specifically, "[a]t least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation." W. Va. Code §55-7B-6(b). "The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit" executed under oath by a health provider qualified as an expert under the West Virginia Rules of Evidence. W. Va. Code § 55-7B-6(b). Plaintiff has failed to comply with these requirements; therefore the circuit court lacks subject matter jurisdiction and the action must be dismissed as a matter of law.

This Court has explained that "under W. Va. Code § 55-7B-6 the purposes of requiring a pre-suit notice of claim and screening certificate of merit are: (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims." *Hinchman v. Gillette*, 217 W. Va. 378, 385, 618 S.E.2d 387, 394 (2005). As this Court has further explained, "a circuit court has no authority to suspend the MPLA's pre-suit notice requirements" because "[t]o do so would amount to a judicial repeal of W. Va. Code § 55-7B-6. *Faircloth*, 242 W.Va. at 345, 835 S.E.2d at 589, citing *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 419, 647 S.E.2d 848, 855 (2007). Dismissal is required based on Plaintiff's failure to comply with the statutory pre-requisites of the MPLA. *Id.* This Court has repeatedly applied the requirements of W. Va. Code § 55-7B-6(b) in just this manner, upholding dismissal of a plaintiff's complaint for failure to provide a pre-suit notice of claim. *See Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91 (2006); *McLaughlin v. Murphy*, No. 17-0453, 2018 W. Va. LEXIS 349 at *18, 2018 WL 2175705 (W. Va., May 11, 2018), (Memorandum Decision).

In *Davis*, the plaintiff filed a complaint without providing pre-suit notice of claim or a screening certificate of merit. *Davis*, 220 W. Va. at 30-31, 640 S.E.2d at 93-94. Defendant then moved to dismiss, citing the failure to provide pre-suit notice, and the circuit court granted the motion. *Id.*, 220 W. Va. at 31, 640 S.E.2d at 94. Citing the circuit court's logic that "the statute is clear[:] Notice is mandatory," this Court held: "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *Id*. (citing Syl. pt. 5, *State v. General. Daniel Morgan Post, V. F. W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959)).

Plaintiff's Response to the Motion to Dismiss, other than stipulating that the WVDCR is not a healthcare provider, offered no argument, legal support, or analysis whatsoever in opposition to the arguments asserted by the WVDCR that the MPLA applies to Plaintiff's claims, and that they must be dismissed for Plaintiff's failure to comply with the pre-suit requirements contained in the MPLA. Plaintiff takes the position that because the WVDCR is not a healthcare provider, the MPLA does not apply at all to her claims. A00389. This is contrary to the MPLA's definition of "medical professional liability," contrary to the purposes of requiring a pre-suit notice of claim and screening certificate of merit, and contrary to this Court's reasoning in *Faircloth* and *Damron*, *supra.* Plaintiff should be required to comply with the mandatory pre-suit requirements set forth in W. Va. Code § 55-7B-6 to the same extent as any other individual in West Virginia asserting claims for medical professional liability. Instead, Plaintiff is seeking to completely skirt around the requirements of the MPLA by bringing her claims against the WVDCR and claiming that, because the WVDCR is not a healthcare provider, she is not required to provide a screening certificate of merit or notice of claim. Plaintiff's position is flawed because the WVDCR, as it is not a health care provider, does not owe her a duty of care with respect to the provision of health care. Because Plaintiff's claims fit the definition of medical professional liability, they are governed by the MPLA and subject to the requirements of that statute, including that the claims be brought against the healthcare provider whose conduct is at issue. In enacting the MPLA, the Legislature has clearly required a screening certificate of merit and notice of claim to the healthcare provider whose conduct is at issue, setting forth the deviations from the standard of care upon which she is relying. Plaintiff did not do this, utterly failing to comply with the statute in any respect.

In granting PrimeCare's Motion to Dismiss, the circuit court found that "the WVDCR's claims against PrimeCare are based on 'medical professional liability'." A00015. Further, it found that dismissal of the third-party claims was therefore mandatory and warranted based upon WVDCR's failure to provide pre-suit notice under the MPLA. A00015-00016. Because the WVDCR's third-party claims were based entirely on Plaintiff's theories of liability, these findings establish the obvious conclusion that Plaintiff's claims are also based on medical professional liability. Thus, dismissal of Plaintiff's claims is mandatory and warranted based upon Plaintiff's failure to provide pre-suit notice under the MPLA. The WVDCR asserted this argument in its Motion to Dismiss, and it was rejected. A00300-00302. Under these circumstances, the law is very clear that Plaintiff cannot proceed against any party based upon her claims of failure to meet the standard of medical or mental health care as it relates to Ms. McDonald. Therefore, all claims against the WVDCR must be dismissed.

3. **Should this Honorable Court intervene here, where the lower tribunal has permitted a claim for medical professional liability to be asserted against a party that is not a healthcare provider, while dismissing claims against the healthcare provider, which is a matter of first impression, and where this Court otherwise would not have the opportunity to clarify this point of law before unnecessary discovery and unnecessary use of judicial resources, and where proceeding will lead to delay and unnecessary cost for which an appeal cannot compensate?**

The lower court's Order of September 22, 2020, finds that the WVDCR is neither a healthcare provider nor a healthcare facility as defined in the MPLA. A00004. It cites absolutely no legal support and contains no analysis for its finding that, though the WVDCR is neither a healthcare provider nor a healthcare facility, Plaintiff may nonetheless maintain a claim against it based on factual allegations that constitute medical professional liability.

The lower court's Order of September 22, 2020, does not differentiate any findings of fact and conclusions of law in connection with the analysis of individual legal claims asserted by

Plaintiff. Several paragraphs in the proposed Order generally accept Plaintiff's recitation of facts but do not provide any analysis with respect to how these facts support each of the claims. A00003-00004. Plaintiff has asserted essentially three claims. The first is for medical professional liability (Counts I and II), which cannot be asserted against the WVDCR because it is not a healthcare provider, and, therefore, it owes Plaintiff no duty with respect to the provision of medical care. Plaintiff has also failed to comply with statutory pre-requisites pertaining to these claims. The second and third claims purport to be for deliberate indifference to a medical need and due process violations pursuant to 42 U.S.C. § 1983 (Count III), which cannot be asserted against a State agency because it is not a "person" subject to that statute.[7] Even assuming all of the factual allegations contained in Plaintiff's Amended Complaint are true, the proposed Order fails to specify how any of the facts support these three claims going forward against the WVDCR.

In its Motion to Dismiss, the WVDCR argued that all of the tort claims asserted by Plaintiff constitute medical professional liability as defined in the MPLA. The Order does not address this argument in any way, does not indicate how the circuit court resolved this issue, and does not contain any citation to a case, statute, or any other legal authority which supports the court's conclusion. This Court has explained that its "precedent relative to the MPLA requires a circuit court, and this Court, to look beyond the labels of causes of action and artful pleading and instead critically examine the allegations pled to determine whether the plaintiff's complained-of conduct falls under the MPLA's provisions." *Damron v. PrimeCare Medical of West Virginia, Inc.*, No. 20-0862, 2022 W. Va. LEXIS 456, at *8, 2022 WL 2078178 (W. Va. June 9, 2022) (Memorandum Opinion). The circuit court did not conduct any such analysis, and its conclusions are erroneous.

[7] The WVDCR asserts that these claims sound in medical professional liability, not deliberate indifference, as this Court found under similar circumstances in *Damron v. PrimeCare Medical of West Virginia, Inc.*, No. 20-0862, 2022 W. Va. LEXIS 456, at *8, 2022 WL 2078178 (W. Va. June 9, 2022) (Memorandum Opinion). Additional arguments with respect to these claims are addressed separately under Question 5.

Paragraph 9 of the Order purports to distinguish *Faircloth, supra.*, and states the lower court's conclusion, as a matter of law, "that the multiple claims of Ms. McComas, in this civil action, asserted on behalf of her decedent, Deanna McDonald, are clearly distinguishable from claims asserted against PrimeCare Medical by the Estate of Cody Grove. This court notes PrimeCare Medical is a healthcare provider per the MPLA." A00004. However, the Order does not identify "the multiple claims of Ms. McComas in this civil action" which it concludes to be distinguishable from the claims asserted in *Faircloth,* nor does the Order provide any analysis of the alleged distinction between the claims raised in *Faircloth* and those raised in this matter.

Similarly, Paragraph 14 of the Order states that, "[t]he court finds, contrary to the circumstances in *PrimeCare v. Faircloth,* that the Estate of Ms. McDonald asserts viable claims against the [WVDCR] for her pre-death suffering and death, given a fair reading of the Amended Complaint." A00005. Beyond this conclusory statement, the Order does not identify those claims that it finds to have been asserted by Plaintiff and viable, nor does it include any legal analysis of any such claims.

Paragraph 15 purports to recognize viable claims without identifying what they are and what facts in the Amended Complaint support those claims. It states:

> The court concludes the claims and causes of action asserted by the plaintiff in her Amended Complaint against the West Virginia Division of Corrections and Rehabilitation are grounded in other clearly established law which vested clearly established rights possessed by Deanna McDonald while she was in the legal and physical custody of the West Virginia Regional Jail and Correctional Facility Authority, now the West Virginia Division of Corrections and Rehabilitation.

A00005. Again, the Order does not identify those claims and causes of action it finds to be "grounded in other clearly established law which vested clearly established rights possessed by Deanna McDonald;" it does not specifically identify any such "clearly established law" or "clearly established rights," and it does not include any legal analysis of any such claims or the factual

basis for them. As asserted in the WVDCR's Motion to Dismiss, the Amended Complaint does not describe any alleged violations, or any conduct at all, that allegedly caused Ms. McDonald's injuries and damages, other than the medical professional liability claims, which cannot be asserted against the WVDCR.

To the extent the Order failed to provide any meaningful analysis of this issue and failed to justify its conclusion that Plaintiff's claims, which constitute medical professional liability, may proceed against a party that is not a healthcare provider, it is clearly erroneous and cannot stand.

4. **Should this Honorable Court intervene here, where the lower tribunal has misapplied or ignored West Virginia statutory law which requires the Plaintiff to comply with necessary pre-requisites for asserting a medical professional liability claim, where the statutory pre-requisites are mandatory, and without which the lower court lacks subject matter jurisdiction over the action?**

The lower court's Order of September 22, 2020, fails to provide any analysis of its conclusion that it has subject matter jurisdiction, despite the clear mandates of W. Va. Code § 55-7B-6. Paragraph 10 of the Order states simply that "[t]he court concludes it possesses subject matter jurisdiction in this civil action." A00004. This is clearly in error, as the Order fails to acknowledge that the facts alleged by Plaintiff state claims for medical professional liability, which are governed by the MPLA. The proposed Order does not contain any citation to a case, statute, or any other legal authority which supports the Court's conclusion or sheds light on its analysis of this issue.

Paragraph 13 states, "the plaintiff's claims contained in the Amended Complaint against the [WVDCR] are not subject to the mandatory pre-suit provisions of the MPLA." A00005. The Order contains no corresponding analysis of what claims Plaintiff has asserted or why the court does not consider them subject to the MPLA in light of the fact that "medical professional liability" includes "any liability for damages resulting from the death or injury of a person for any tort or

breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W. Va. Code § 55-7B-2(i); *Faircloth*, 242 W. Va. at 342, 835 S.E.2d at 586. These findings and conclusions are contrary to the facts and law, are unsupported and unexplained, and are clearly erroneous as a matter of law. Where the circuit court lacks jurisdiction, a writ of prohibition should issue.

5. **Should this Honorable Court intervene here, where the lower tribunal has misapplied or ignored federal law which provides that claims for money damages based on violations of constitutional rights, such as deliberate indifference, may not be asserted against a state agency because a state agency is not a "person" subject to suit pursuant to 42 U.S.C. § 1983, where this Court otherwise would not have the opportunity to address this clear error before unnecessary discovery and unnecessary use of judicial resources, and where proceeding will lead to delay and unnecessary cost for which an appeal cannot compensate?**

In a further attempt to avoid the mandates of the MPLA, Plaintiff is attempting to assert claims for deliberate indifference pursuant to 42 U.S.C. § 1983. The WVDCR asserts that the claims sound in medical professional liability, not deliberate indifference. However, even if this Court concludes that factual support exists for a deliberate indifference claim, it is settled law that such claims must be asserted against those individuals alleged to have violated Plaintiff's rights and may not be maintained against the WVDCR, a state agency. Therefore, to the extent Plaintiff is attempting to characterize any of her claims as deliberate indifference claims, they fail as a matter of law against the WVDCR for this additional reason.

The exclusive vehicle for seeking money damages for violation of civil rights, such as deliberate indifference to a serious medical need, is 42 U.S.C. § 1983. In order to state a claim for damages under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that she was injured by "the deprivation of any [of her] rights, privileges, or immunities secured by the [United States]

Constitution and laws" by a "person" acting "under color of state law." *See* 42 U.S.C. § 1983; *Monell v. Department of Social Services,* 436 U. S. 658, 691 (1978). Claims under 42 U.S.C. § 1983 are specifically directed at "persons." 42 U.S.C. §1983; *Will v. Michigan Dept. of State Police,* 491 U. S. 58, 60 (1989). Both the United States Supreme Court and the Fourth Circuit Court of Appeals have found that "[N]either a State nor its officials acting in their official capacities are 'persons' under §1983." *Will v. Michigan Dept. of State Police,* 491 U. S. 58, 71 (1989); *Preval v. Reno,* 203 F.3d 821 (4th Cir. 2000) (unpublished). Therefore, it is clear that he WVDCR is not a "person" under 42 U.S.C. § 1983, and therefore, it is not subject to suit under that statute. *Will v. Michigan Dept. of State Police,* 491 U. S. at 71. For this same reason, claims cannot be maintained against the WVDCR for violation of the Fourteenth Amendment to the United States Constitution mentioned in Count III. This argument was asserted by the WVDCR in its Motion to Dismiss and was not addressed in the circuit court's Order. A00302-00303.

Paragraph 7 of the Order states:

> The court finds that the plaintiff's decedent, Deanna McDonald, received some level of medical care while she was housed at Western Regional Jail prior to her death August 21, 2017. The court concludes, as a matter of law, that WVRJCFA/WVDOCR officials "must ensure that inmates receive adequate . . . medical care." *Farmer v. Brennan*, 511 U.S. 825 (1994) at 832.

A00004. The citation to *Farmer v. Brennan* provides no context within the case or the arguments asserted by the WVDCR and is not responsive to the argument asserted by the WVDCR that it is not considered a "person" subject to suit for violations of constitutional rights. In fact, it demonstrates that any claim Plaintiff may have for deliberate indifference to a medical need lies, if at all, only against individual State officials, not the State itself. Paragraph 7 does not support denial of the WVDCR's motion to dismiss Plaintiff's claim for deliberate indifference to a medical

need, or the fourteenth amendment due process violation claim, and the Order otherwise makes no findings or conclusions supporting or explaining its ruling with respect to these claims.

Paragraph 16 also appears to address the constitutional claims:

> The court further distinguishes the *PrimeCare* case from the facts and circumstances existent in this civil action in a material and substantive way in that the McDonald Estate's Amended Complaint contains sufficient factual support for plaintiff's constitutional claims, sufficient factual support for her claims arising from the agency's alleged violation of its own duly promulgated State rules as well as contains factual support for additional tort claims asserted against the West Virginia Division of Corrections and Rehabilitation. To illustrate this court's position, the court refers to Page 13 of the *PrimeCare v. Faircloth* opinion, third to last and penultimate sentences.

A00005 (emphasis in original). While it is unclear precisely to what sentences this is referring, it appears that the lower court is referring to the following language from *Faircloth*:

> The amended complaint's constitutional claims cannot be considered in isolation, because they appear without any immediate factual support. Thus, in order to regard them as anything other than wholly conclusory, we must resort to allegations set forth elsewhere in the amended complaint.

A00494.[8] It is not obvious from Paragraph 16 what support the lower court has relied upon in finding constitutional claims against the WVDCR to be viable. Its Order does not provide any analysis or support for the conclusion that any constitutional claims can legally proceed against the WVDCR as a State agency and ignores all law to the contrary. The remainder of Paragraph 16 is vague and lacking in legal analysis with respect to identifying the claims that the court believes have been asserted and are viable against the WVDCR. The Order does not identify the "factual support" for any individual claim asserted in the Amended Complaint, and, thus, it would not appear to be distinguishable from *PrimeCare v. Faircloth* as alleged in the Order.

[8] It appears that the reference to "Page 13 of the *PrimeCare v. Faircloth* opinion" is not a legal citation, but a reference to the copy of *Faircloth* that was submitted by Plaintiff with the proposed Order. A00494.

VI. CONCLUSION

Because Plaintiff has pled claims of medical professional liability but has not complied with statutory pre-requisites for filing such claims, the lower court lacks subject matter jurisdiction and can take no further action other than to dismiss the claims. The WVDCR asks this Court to issue a writ of prohibition based upon the absence of jurisdiction.

Additionally, this case presents a matter of first impression, specifically, whether claims for medical professional liability may be asserted against a party that is not a healthcare provider. The WVDCR asks this Court to intervene and find that the lower court permitting such claims to proceed against the WVDCR is clear error. Finally, the lower court has committed clear error by failing to dismiss Plaintiff's claims for deliberate indifference and due process violations against the WVDCR, as such claims cannot be asserted against a State agency. Each of these issues should be resolved prior to the parties engaging in discovery and the remainder of the proceedings below, to prevent an onerous and wasteful use of judicial resources as well as the WVDCR's resources. For these reasons, WVDCR petitions this Honorable Court for relief at this time, seeking a finding that the Order is clearly erroneous and cannot stand.

For all of the reasons set forth herein, the WVDCR petitions this Honorable Court for relief from the Order granting WVDCR's Motion Requesting Findings of Fact and Conclusions of Law, and denying its Motion to Dismiss, entered by the Circuit Court of Cabell County on September 22, 2020. The WVDCR requests that this Court issue a Rule to Show Cause why the writ should not issue and stay proceedings in the underlying action pending the outcome of this Petition. Petitioner requests the relief this Court deems just.

WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION,

By Counsel.

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VERIFICATION

I, Lou Ann S. Cyrus, counsel of record for the West Virginia Division of Corrections and Rehabilitation in Cabell County Civil Action No. 19-C-369, hereby verify as follows:

(1) That I have read the foregoing Petition for Writ of Prohibition; and

(2) That, after reasonable inquiry, to the best of my knowledge, information and belief, the request for relief is well grounded in fact and is warranted by either existing law or a good faith argument for the extension, modification, or reversal of existing law; that there is evidence sufficient to support the relief requested; and that the petition is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. _____

STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION
Defendant Below, Petitioner,

v.

HONORABLE ALFRED E. FERGUSON, Judge of the Circuit Court of Cabell County, West Virginia, and MARY JANE MCCOMAS, as Administratrix of the Estate of Deanna R. McDonald,
Respondents.

CERTIFICATE OF SERVICE

Action Pending in the Circuit Court of Cabell County
Civil Action No. 19-C-369

The undersigned counsel for the Petitioner, West Virginia Division of Corrections and Rehabilitation, hereby certifies that a true copy of the foregoing PETITION FOR WRIT OF PROHIBITION and APPENDIX were served upon counsel of record this 14th day of October, 2022, electronically via *File & ServeXpress*:

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