IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-777

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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.

PETITIONER'S REPLY BRIEF

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

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I. STATEMENT OF THE CASE

For purposes of considering whether the circuit court erred in denying the WVDCR's Motion to Dismiss, the allegations in the Amended Complaint are to be taken as true.[1] *Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.*, 242 W. Va. 650, 653, 838 S.E.2d 734, 737 (2019), quoting *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Ms. McComas is also bounded by the facts as alleged in the Amended Complaint and may not embellish, add to, or change those facts in briefing. *Id.,* 242 W. Va. at 653, 838 S.E.2d at 737. To the extent that Respondent's Brief purports to provide a statement of facts based upon anything other than the allegations contained in the pleadings or documents attached to the pleadings, such information should not be considered.[2] *Id.*, 242 W. Va. at 654 n.1, 838 S.E.2d at 738 n.1. The dispute presently before the Court centers around the factual allegations made in the Amended Complaint, and whether they state claims sounding in medical professional liability, or something else. This Court should confine its review of this issue to the four corners of the pleadings submitted by Ms. McComas and not to matters outside the record or characterizations made in briefing.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The WVDCR disputes Ms. McComas's characterization of the Petition as frivolous. To the contrary, it is squarely founded in this Court's analysis and reasoning interpreting the MPLA, including *State ex rel. PrimeCare Med. Of W.Va., Inc., v. Faircloth*, 242 W. Va. 335, 342, 835 S.E.2d 579, 586 (2019), and *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).

[1] The WVDCR disputes many of the factual allegations contained in the Amended Complaint.
[2] For example, a reference is made on p. 4 of Respondent's Brief to an autopsy report which is not mentioned in the Amended Complaint and is not contained in the record.

The WVDCR maintains that oral argument is appropriate pursuant to Rule 20 as set forth in its Petition. However, in light of the fact that Respondent has conceded the central point that a medical professional liability claim may not be asserted against a party that is not a healthcare provider, oral argument may also be appropriate under Rule 19(a)(1) and (2).

III. ARGUMENT

A. Denial of a Motion to Dismiss is Not Ordinarily Immediately Appealable.

Ms. McComas argues that the WVDCR had other adequate means to obtain the desired relief, specifically an appeal of the denial of its motion to dismiss, but if failed to timely appeal. Resp. Br., p. 13. Ms. McComas asserts that in "most civil actions, a motion to dismiss filed under Rule 12(b)(6) may be the subject of an appeal - if timely filed 30 days after the entry of the order." Resp. Br., p. 13. This is incorrect. While it is true that an order *granting* a motion to dismiss is immediately appealable, this is because a dismissal disposes of claims. However, an order *denying* a motion to dismiss is interlocutory precisely because it does not dispose of claims and is not generally subject to appeal unless other grounds exist for an immediate appeal, which have not been invoked here.

This Court explained the distinction in *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (1998). When a circuit court grants a Rule 12(b)(6) motion, the decision is appealable, and the standard of review is de novo. *Id.*, 204 W.Va. at 119, 511 S.E.2d at 744. By contrast, the denial of a motion for failure to state a claim upon which relief can be granted is interlocutory and is ordinarily not immediately appealable. *Id.*, citing Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995); *Hutchison v. City of Huntington*, 198 W.Va. 139, 147, 479 S.E.2d 649, 657 (1996). Contrary to the arguments of Ms. McComas, the WVDCR has not

slept on any appeal rights, because the circuit court's Order as it related to the MPLA was not immediately appealable.

Ms. McComas also incorrectly posits that the WVDCR would have an opportunity to appeal these issues if denied summary judgment. Resp. Br. p. 14. As this Court has held, ordinarily, "an order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial, and is not appealable except in special instances in which an interlocutory order is appealable." *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 99-100, 576 S.E.2d 807, 826-827 (2002), quoting Syl. pt. 8, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). A party may "appeal . . . a denial of summary judgment after the conclusion of a trial and the entry of a final order." *Id.*, quoting *Coleman v. Sopher*, 201 W. Va. 588, 594 n.3, 499 S.E.2d 592, 598 n.3 (1997).

That leaves only one possibility. The only opportunity to appeal the denial of a Rule 12(b)(6) motion not subject to interlocutory appeal is to raise it on appeal after a final judgment. *Kessel*, 204 W.Va. at 119, 511 S.E.2d at 744. Absent intervention by this Court in this extraordinary writ, the WVDCR would be required to go through contested legal proceedings and "appeal from a final judgment." *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996). This will cause prejudice not correctible on appeal. "The unreasonableness of the delay and expense is apparent." *Id.* For these reasons, this Court should issue a writ of prohibition in this matter to correct clear legal error.

B. Ms. McComas Agrees That Claims for Medical Professional Liability May Only Be Asserted Against Healthcare Providers.

Ms. McComas concedes the first question presented in the Petition, specifically that claims for medical professional liability can only be asserted against healthcare providers. Resp. Br. p. 12. With this critical legal point agreed by both parties, the question this Court must resolve in

connection with this Petition is more focused. This Court need only evaluate the allegations contained in the Amended Complaint to determine whether the claims sound in medical professional negligence. If they do, they may not be asserted against the WVDCR, who Respondent agrees is not a healthcare provider. Resp. Br., p. 13.

C. The Amended Complaint Asserts Claims for Medical Professional Liability.

Ms. McComas argues that, because she did not title her claims "medical professional liability" and because she did not identify a healthcare provider as a defendant, her claims cannot possibly be considered to be for medical professional liability. This is contrary to this Court's case law interpreting the MPLA. 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). Whether or not claims are subject to the MPLA is based upon the statute's definition of "health care." *State ex rel. W. Va. Univ. Hosps., Inc. v. Scott*, 866 S.E. 2d 350, 357 (2021). Ms. McComas cannot avoid the MPLA with creative pleading. *Id.*, 866 S.E.2d at 359.

What constitutes "medical professional liability" under the MPLA 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 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.

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).

Based on this definition, the allegations contained in the Amended Complaint are asserting claims for medical professional liability against the WVDCR. 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.

The Amended Complaint alleges that "Ms. McDonald was diagnosed upon her jail intake as having 'current medical conditions' of being suicidal, fevers, 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).

Before this Court, Ms. McComas now argues that the claims asserted in her Amended Complaint relate to access to medical care, not the provision of medical care itself. She asserts that "the WVDCR and its employees or agents [] failed to even provide Ms. McDonald with a health care provider and his or her service." Resp. Br., p. 12. The problem with this argument is that it is contrary to the Amended Complaint itself. The Amended Complaint does not allege that Ms. McDonald was not seen by medical personnel. To the contrary, the pleading expressly alleges that she was. It states that "[a]n intake medical screening was conducted by an individual identified in records as Shannon Estep who is believed to have been employed by PrimeCare Medical." A00106. The Amended Complaint acknowledges that this is a medical provider, stating that 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 Amended Complaint alleges that Ms. McDonald's "intake" was done by Shannon Estep. A00106. Thus, contrary to the allegations in Respondent's Brief, the Amended Complaint expressly alleges that Ms. McDonald was seen upon intake by medical staff, who completed her

intake and conducted a medical screening. Thus, any criticisms contained in the Amended Complaint regarding the manner in which the screening was conducted or the absence of any follow-up can only be read as allegations that the medical personnel conducting this screening, to which Ms. McDonald clearly had access, did not do it properly. This is medical professional liability. Additionally, there are no allegations contained in the Amended Complaint that employees of WVDCR denied Ms. McDonald access to medical staff at any time. Instead, the allegations pertain to the negligent exercise of medical judgment and negligent failure to follow through on a plan of care based on medical symptoms and diagnoses, all of which pertain to the provision of health care.

Ms. McComas argues that her claims related to the WVDCR failing in its "duty to properly question Ms. McDonald when she first entered the jail, failed to properly ascertain her condition (intoxicated), and failed to properly do wellness checks and perform virtual inspections to ensure her safety." Resp. Br., p. 12. Ms. McComas asserts that "none of these actions involve the rendering of medical care." Resp. Br. p. 12. Again, this is contrary to the Amended Complaint itself, which acknowledges that the "intake medical screening" was conducted by an employee of PrimeCare Medical, Shannon Estep, and not WVDCR personnel. A00106. Further, tasks such as "properly ascertain[ing]" the condition of an individual and performing "wellness checks" clearly involve the exercise of medical judgment and expertise, and fall within the provision of health care, as these are tasks that "should have been rendered, by a health care provider." W. Va. Code § 55-7B-2(i); *Faircloth*, 242 W. Va. at 342, 835 S.E.2d at 586.

Count I of the Amended Complaint expressly asserts "[a] claim of failure to provide adequate medical care" against the WVDCR. A00107. It also purports to assert three other tort claims: intentional infliction of emotional distress, negligent infliction of emotional distress, and

"failure to protect Ms. McDonald from 'disease.'" A00107. The factual basis for each of these claims is the alleged failure to provide medical care which meets the appropriate standard of care, so in reality they are really all are asserting medical professional liability as defined by the MPLA.

As the basis for Count I, the Amended Complaint alleges that "[d]uring her medical screening, Ms. McDonald revealed she had psychiatric issues and had been treated for psychiatric problems by physicians at St. Mary's Medical Center. Ms. McDonald also indicated she had a history of abusing drugs and alcohol." A00109. It further 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. The Amended Complaint alleges negligence in "failing to immediately obtain and review the prior health records of [Ms. McDonald]. The Amended Complaint concludes that the WVDCR "denied Ms. McDonald appropriate medical care proximately causing her eventual death." A00109.

Each of these alleged failures sound in medical professional liability because they assert "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." W. Va. Code § 55-7B-2(i); *Faircloth*, 242 W. Va. at 342, 835 S.E.2d at 586. Moreover, they involve the failure 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." W. Va. Code § 55-7B-3(a).

Count I of the Amended Complaint alleges 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 also constitutes medical professional liability 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. Although Ms. McComas now wants to re-characterize her claims as asserting lack of access to health care, her Amended Complaint clearly shows that Ms. McDonald not only had access to medical personnel, but her intake medical screening was conducted by medical personnel. Nowhere in the Amended Complaint does it state that Ms. McDonald was denied access to medical personnel while at WRJ.

Count II of the Amended Complaint similarly sounds in medical professional liability. It alleges negligence "in assessing and treating Deanna R. McDonald's mental and physical health along with [] failure to recognize signs of an impending health crisis" caused her death. A00110. The Amended Complaint identifies this 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. There is simply no way to read these allegations other than asserting that the 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 these claims, regardless of how they were pled, sound in medical professional liability and cannot be asserted against WVDCR, who is not a healthcare provider. The circuit court below even acknowledged that "the allegations in Plaintiff's Complaint concerned the rendering of health care services." A00010. Nonetheless, it allowed the claims to proceed against WVDCR, which is in error.

Ms. McComas argues that Count III asserts viable claims for deliberate indifference pursuant to 42 U.S.C. § 1983. The WVDCR asserts that this claim is simply a strategy in "an attempt to avoid application of the MPLA" similar to that employed in *Damron v. PrimeCare Medical of West Virginia, Inc.*, No. 20-0862, 2022 W. Va. LEXIS 456, at *2, 2022 WL 2078178 (W. Va. June 9, 2022) (Memorandum Opinion). In *Damron*, 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 here and find that all of Plaintiff's claims sound in medical professional liability and must be dismissed.

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. 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 the 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.

Ms. McComas argues that *Preval v. Reno*, *supra.*, supports her position that a claim exists against John Doe for deliberate indifference. Resp. Br., p. 23. However, even if a claim exists that an alleged John Doe defendant was deliberately indifferent to the medical needs of Ms. McDonald, this does not give rise to any viable claim against the WVDCR, who is not a "person" subject to liability under 42 U.S.C. § 1983. 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. Ms. McComas seems to acknowledge this, stating that Count III "is made only against John Doe, the individual." Resp. Br., p. 21 (emphasis in original). Based on this, it was clear error for the circuit court to conclude that these claims could be pursued against the WVDCR.

Ms. McComas also quotes from Syllabus Point 2 of *Hutchison v. City of Huntington,* 198 W. Va. 139, 479 S.E.2d 649 (1996), on page 22 of Respondent's Brief. This quote does not change

the outcome here, as it relates to local governments and municipalities, neither of which describes WVDCR as a state agency. Ms. McComas appears to be arguing the existence of a state constitutional tort claim, which is irrelevant here because her Amended Complaint does not assert any such claim.

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. 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.

Ms. McComas attempts to distinguish *Faircloth* because, unlike this matter, PrimeCare was a party in *Faircloth*. However, Ms. McComas does not explain why that fact alone would alter the way in which this Court conducts an analysis of the allegations to determine whether they meet the definition of "health care," particularly because Ms. McComas controls who she joins as a defendant. In the instant matter, like in *Faircloth*, it is the actions and inactions of PrimeCare in providing health care to individuals in a jail setting that is really at issue. Ms. McComas would have this Court adopt reasoning that would allow her to pursue claims related to PrimeCare's negligence in health care simply because she is attempting to hold the WVDCR liable for that negligence, and not PrimeCare. Such a result is unfair, nonsensical, and contrary to law.

Ms. McComas generally characterizes the arguments in the Petition for Writ of Prohibition as "misleading." Resp. Br., p. 12. The WVDCR denies that its arguments are misleading in any way. Without any specific example of any argument to which Ms. McComas is referring, the WVDCR is unable to further respond to this statement with any specificity.

Essentially, Ms. McComas argues that the Amended Complaint departs from the initial Complaint in a significant way because it does not expressly designate a claim for medical professional negligence, and because it removes any suggestion that PrimeCare is intended to be named as a party. However, a fair comparison of the initial Complaint and the Amended Complaint demonstrates that, factually, they are based upon the same substantive allegations of failure to provide medical care to Ms. McDonald. Ms. McComas's claims are based upon medical professional liability and have been since the outset of this case. She should not be rewarded for failure to join PrimeCare and subsequent artful pleading to make it appear as though her claims lie against the WVDCR instead, who is not a healthcare provider and who did not owe her a duty of care in connection with the provision of medical treatment.

D. Ms. McComas Agrees That She Has Failed to Comply With Mandatory Pre-suit Notice Provisions, So Subject Matter Jurisdiction is Lacking.[3]

The 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.

Ms. McComas argues that she is not asserting claims for medical professional liability, and she has not sued a healthcare provider, so there is no requirement to comply with pre-suit provisions contained in the MPLA. As discussed in Petitioner's Brief and at length above, the allegations in the Amended Complaint meet the definition of medical professional liability. Thus, the MPLA applies to the claims. And although Ms. McComas has not sued a healthcare provider, her allegations relate to inadequate care by a healthcare provider whose alleged actions and omissions are at issue. Ms. McComas's failure to comply with the pre-suit notice provisions provides an independent reason that her claims may not proceed.

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[3] As discussed *supra.,* the WVDCR's primary position is that claims for medical professional liability cannot be maintained against it, regardless of compliance with statutory requirements, because it is not a healthcare provider. However, the argument related to pre-suit notice under the MPLA is raised in the alternative in light of the circuit court's ruling to the contrary. In the event that such claims can proceed at all (and the WVDCR asserts they should not), they should be subject to the same statutory requirements that apply to any medical professional liability action.

The reasons underlying the pre-suit notice provisions of the MPLA support this conclusion. 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). Ms. McComas is attempting to create a "loophole" whereby she asserts medical professional liability claims against a party that is not a healthcare provider, thus asserting that she does not have to demonstrate that the claims are not frivolous, and that she does not have to contend with the pre-suit resolution process. This should not be permitted by this Court. 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 the Plaintiff is relying. Ms. McComas did not do this, utterly failing to comply with the statute in any respect.

IV. 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, Ms. McComas has agreed that claims for medical professional liability may not be asserted against a party that is not a healthcare provider. This is precisely what the circuit court has allowed here. 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. Because this is a question of law, 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. 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,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-777

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 PETITIONER'S REPLY BRIEF was served upon counsel of record this 7th day of February, 2023, electronically via *File & ServeXpress*:

The Honorable Alfred E. Ferguson
Circuit Court of Cabell County
Cabell County Courthouse
750 Fifth Avenue
Huntington, W5701

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