

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-777

SCA EFiled: Jan 17 2023

01:55PM EST

Transaction ID 68904077

(Cabell County Circuit Court Civil Action No. 19-C-369)

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DIVISION OF
CORRECTIONS AND REHABILITATION,

Petitioner,

v.

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

Respondents.

VERIFIED RESPONSE OF MARY JANE MCCOMAS
TO PETITION FOR WRIT OF PROHIBITION

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Petitioner,**

v.

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

Respondents.

**VERIFIED RESPONSE OF MARY JANE MCCOMAS TO
PETITION FOR WRIT OF PROHIBITION**

The Respondent, Mary Jane McComas, as Administratrix of the Estate of Deanna R. McDonald, hereby submits her brief in opposition to the Petition for a Writ of Prohibition filed by the Petitioner, the West Virginia Division of Corrections and Rehabilitation.

The Petitioner's writ is but an appeal of the Circuit Court of Cabell County's order denying a motion to dismiss, and is a totally inappropriate procedural maneuver. A writ of prohibition may not be used as a substitute for an appeal. *State ex rel. West Virginia Nat. Auto Ins. Co., Inc. v. Bedell*, 672 S.E.2d 358, 223 W.Va. 222 (2008). An order granting or denying a motion to dismiss is an appealable order, and the appeal should be filed 30 days after entry of the order pursuant to Rule 5 of the *W. Va. Rules of Appellate Procedure*. The Petitioner failed to file a timely appeal, and its use of an extraordinary measure now should not be permitted.

The Respondent's Amended Complaint contains general state-law and negligence claims, and allegations of civil rights violations against the Respondent. The original Complaint and Amended Complaint were filed by Woelfel & Woelfel, LLP, on August 20, 2019. Co-counsel

Calwell Luce DiTrapano, PLLC and Forbes Law Offices, PLLC, filed a Notice of Appearance of Counsel on August 31, 2022. In between such times the Petitioner, the West Virginia Division of Corrections and Rehabilitation, filed its Motion to Dismiss the Amended Complaint, construing the general negligence claims as medical malpractice claims, and seeking the protections of the Medical Professional Liability Act, *W.Va. Code § 55-7B-6*.

Contrary to the assertions of the Petitioner, the Respondent's Amended Complaint does NOT include professional medical negligence claims, and therefore the pre-suit notice and certification requirements of *W.Va. Code § 55-7B-6* do not apply. The Circuit Court properly denied the Motion to Dismiss arguing these positions, and the Petitioner provides no basis in fact or law to support either an appeal or its writ of prohibition. Therefore, the Respondent prays that the writ be **DENIED**, and that her civil action be remanded for further discovery and trial.

Even if the use of an extraordinary remedy is appropriate in this matter, Petitioner has failed to meet the stringent standards for obtaining a writ of prohibition. There is no clear error as a matter of law in the orders issued by the Circuit Court of Cabell County, which adopted clarifying findings of fact and conclusions of law, as requested by both parties, and which denied the Petitioner's Motion to Dismiss the claims filed against the West Virginia Division of Corrections and Rehabilitation for intentional infliction of emotional distress, negligent infliction of emotional distress, failure to provide adequate medical care, failure to protect the Respondent's decedent from disease and foreseeable death, general negligence and carelessness, and civil rights violations.

Finally, the Petitioner's Writ is not timely. The Respondent's Amended Complaint was filed on June 4, 2020. After much procedural confusion and, finally, clarification, the order entered by the Circuit Court denying the Petitioner's Motion to Dismiss was entered September 22, 2020. A proper appeal of the order should have been filed within 30 days. However, Petitioner did

nothing for over two years, and now seeks an extraordinary remedy that is not only without basis in fact or law, but is also not timely.

Therefore, the Petition for a Writ of Prohibition should be denied, and the Respondent should be permitted to proceed to trial on the claims included in her Amended Complaint.

QUESTIONS PRESENTED

- 1. Whether the Circuit Court of Cabell County properly denied the Petitioner's Motion to Dismiss because the Respondent's Amended Complaint did not include any medical professional liability claims.**
- 2. Whether the Circuit Court properly held that the Respondent was not subject to statutory notice and certification requirements for medical professional liability claims when the Amended Complaint did not include any claim against a medical provider for medical professional negligence.**
- 3. Whether the Circuit Court has jurisdiction to consider civil rights violation claims against an individual agent or employee of a state agency.**
- 4. Whether the petition for writ of prohibition is an appropriate remedy when the Petitioners cannot demonstrate that it will be damaged or prejudiced in any way that is not correctable on appeal; cannot demonstrate that the Circuit Court's order is an oft-repeated error or manifests a persistent disregard for the law; and cannot demonstrate a new or important issue of first impression.**

STATEMENT OF THE CASE

This matter arises out of the death of Deanna R. McDonald, a 49-year-old woman who was incarcerated at Western Regional Jail ("WRJ"), a facility owned by the State of West Virginia and operated by the West Virginia Division of Corrections and Rehabilitation ("WVDCR"). Ms. McDonald entered the facility as a pretrial detainee on August 19, 2017. A00312. At the time of her booking, Deana McDonald supposedly underwent standard intake procedures and medical screening. Records reflect that Ms. McDonald reported that she had psychiatric issues, was being treated for psychiatric problems at St. Mary's Medical Center, abused drugs and alcohol, and was going through drug and alcohol detoxification and withdrawal. A00106. She also reported that she

suffered from seizure disorder and multiple allergies, and that she was having night sweats, fever, chills, and vomiting. A00312.

There is no indication, however, that anyone went beyond asking Ms. McDonald the basic entry questions, and no one asked appropriate mental health questions, scored the answers given by Ms. McDonald, or conducted a suicide risk assessment. A00109The evaluator also failed to notice that Ms. McDonald was clearly intoxicated. The WVDCR placed Ms. McDonald in a regular incarceration unit as opposed to a medical unit or hospital. A00106.

PrimeCare Medical of West Virginia, Inc., (“PrimeCare”) is a West Virginia corporation that provides medical services to inmates at facilities run by the WVDCR pursuant to a contract for such services. A00108. PSIMed, Inc. is also a corporation which provides contractual medical services, including mental health services, to inmates at facilities run by the Respondent. A00124.

Two days later, on August 21, 2017, Deana McDonald was found lying supine on her bed in her cell, unresponsive and not breathing. A00002. Inmate witnesses reported that Ms. McDonald made odd noises during the night, and that they believed she had aspirated after lying face-down in her own vomit. A00003. Records from WVDCR reflect that Ms. McDonald was found with her face and shoulder facing downward “in a pile of suicide smocks.” A00002. The autopsy report for Ms. McDonald opined that the death was “due to combined fentanyl, norfentanyl, carfentanil, and nordiazepam intoxication with other significant conditions: seizure disorder, hepatitis B, and hepatitis C.” In short, Ms. McDonald died of an overdose of drugs and seizures.

The jail records also reflect that no one performed a wellness check on Ms. McDonald, and no one visibly monitored her medical status, even though she was going through detox and had been placed on suicide watch. A00329.

On August 20, 2019, Mary Jane McComas, as Administratrix of the Estate of Deanna R. McDonald, filed her complaint against the West Virginia Division of Corrections and Rehabilitation and “John Doe, unknown employees or agents of the above entity, in their individual capacities, and as employees or agents of the above entity. The Complaint asserted Count I (Negligence); Count II (Medical Professional Negligence) and Count II (Other Causes of Action Against Doe, the State Agency and Defendant Dorsey.) A

Count II of the original Complaint clearly included a claim for medical professional negligence. Paragraph 6 cited the applicable statutory language regarding pre-suit notice: “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.” The statutory notice of a medical professional liability claim was provided to PrimeCare. The Plaintiff also stated that her counsel had insufficient time to obtain a screening certificate of merit, also required by statute.

In the original Complaint, Plaintiff alleged that “during the screening process, defendants and their representatives, employees and agents, failed to ask appropriate mental health questions, failed to appropriately score responses and answers to the questions they did ask, failed to appropriately assess Ms. McDonald’s suicide risk, failed to take steps to prevent and treat the mental health and withdraw risks present, failed to review intake notes and material, and failed to assess her medical conditions and mental health conditions. Defendants, jointly and severally, each was reckless, willful, wanton and grossly negligent in

failing to immediately obtain the prior mental health records of the decedent. This failure was a proximate cause of, and served to causally contribute to the decedent's death."

To say that the subsequent filings in this matter constitute a procedural nightmare would be an understatement. The WVDCR did not file an answer to the Complaint, but instead filed a Motion to Dismiss on February 7, 2020, arguing that the Circuit Court should dismiss the medical professional liability claims against the WVDCR, because the WVDCR was a state agency and not a healthcare provider. The WVDCR also alleged that the Plaintiff did not comply with the statutory pre-requisites for asserting medical professional liability claims.

On June 4, 2020, Plaintiff/Respondent filed a Motion for Leave to File an Amended Complaint, specifically deleting any claims for medical professional negligence, and relying solely on various state-law claims, general negligence, and civil rights violations. The Motion attached as an exhibit a copy of the proposed Amended Complaint. The docket sheet for this matter reflects the motion was stamped and filed on June 4, 2020. Although there was no separate filing letter, the docket sheet also reflects that the Amended Complaint was stamped and filed on June 4, 2020. A00444. As noted by the Respondent, there was no separate letter filing the Amended Complaint, only the motion for Leave with Attachments. A00682.

The Amended Complaint named the WVDCR and "John Doe, unknown employees or agents of the above entity, in their individual capacities, and as employees or agents of the above entity." A00445-00453. The Amended Complaint asserted under Count I state law and common law claims of intentional infliction of emotional distress, negligent infliction of emotional distress, failure to provide adequate medical care, and failure to protect Ms. McDonald from "disease" and her foreseeable, preventable death. A00447-00449. Count II includes claims for negligence, gross negligence, and recklessness by the WVDCR and

unknown employees. A00449-00450. Under Count III, the Amended Complaint asserted that the individual Defendant Doe acted in a deliberately indifferent manner to the physical safety, health, and well-being of Ms. McDonald, which was a violation of her constitutional rights and the Due Process Clause. A00451-00452. Count III also includes claims against the WVDCR for negligent hiring, retention, and supervision, as well as vicarious liability under the doctrine of *respondeat superior*.¹ A00451-00452.

The Amended Complaint contains no claim for medical negligence against any individual, facility, or provider. The Amended Complaint never used the title or even the phrase “medical professional negligence” as noted in Count II of the original Complaint, nor did it include the mandatory language regarding statutory notice and certification required for medical negligence case. The Amended Complaint was merely for state-law claims, general negligence, and civil rights violations.

On June 5, 2020, the WVDCR filed its Third-Party Complaint Against PrimeCare Medical of WV, Inc., asserting that PrimeCare and its subcontractors were solely responsible for all work performed for the WVDCR; that PrimeCare and/or its agents were at fault for any medical negligence; and that the third-party defendant should indemnify WVDCR for any damages awarded to the Estate of Deanna McDonald. PrimeCare, of course, filed its own Motion to Dismiss on October 1, 2020. A00114-00121.

Afterwards, as set forth in great detail by the Respondent, there were a series of responses, replies, motions, orders, more motions for clarification by all parties, rescinded orders, and long periods of inactivity in the matter. The Petitioner’s writ of prohibition appears to be questioning three separate orders:

- Order of August 24, 2020, which clarified that the “operative pleading” in the case was the Amended Complaint.
- Order of September 22, 2020, granting the WVDCR’s Motion Requesting Findings of Fact and Conclusions of Law and Denying Its Motion to Dismiss.
- Order of November 10, 2021, Granting PrimeCare’s Motion to Dismiss WVDCR’s Amended Third-Party Complaint.

The WVDCR seeks a writ prohibiting the enforcement of the September 22, 2020 Order granting its motion requesting findings of fact and conclusions of law and denying its motion to dismiss the Amended Complaint. (Writ, p. 17.) The Petitioner argues the order is clearly erroneous as a matter of law, and the Circuit Court lacks subject matter jurisdiction over the MPLA claims because the Plaintiff had not complied with statutory prerequisites for notice and certification.

None of the factual or legal arguments of the Petitioner form a sufficient basis for the extraordinary relief of a writ of prohibition. Just as the Petitioner asserts that the Amended Complaint for state-law claims is really a medical professional negligence claim in disguise, so is the present writ merely an untimely appeal of the order denying the motion to dismiss operating under the pretense of an extraordinary writ.

Accordingly, the Petition for Writ of Prohibition should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues presented by the Petitioner are frivolous under Rule 18 of the *W.Va. Rules of Appellate Procedure*, which makes oral argument unnecessary. The Respondent’s Amended Complaint does not include a claim for medical professional negligence, so there was no need for pre-suit notice or certification. The Petitioner presents no new or novel issues. To the contrary, its arguments are moot since there is no claim for medical negligence and thus no requirement for statutory notices or certification. There are no dispositive issues to be decided, and no case of first

impression as required by Rule 20. Respondent does not believe oral argument is necessary. However, should the Court grant oral argument, Respondent certainly welcomes the same and believe that this case would fall under Rule 19 of the *W.Va. Rules Appellate Procedure* since it is a matter involving an alleged error in the application of settled law or an abuse of discretion.

ARGUMENT

A. Standard of Review.

The standard of review applicable to a writ of prohibition is set forth in the provisions of *W.Va. Code §53-1-1, et seq.*, and Rule 16 of the *W.Va. Rules Appellate Procedure*. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only be an 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*, 233 S.E.2d 425, 160 W.Va. 314 (1977).

The Petitioner has not and cannot demonstrate its entitlement to relief by way of prohibition. "To justify this extraordinary remedy, the Petitioners have the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362, 364, 207 W. Va. 430 (2000) (internal punctuation omitted)(citing *State ex rel. Paul B. v. Hill*, 496 S.E.2d 198, 204, 201 W. Va. 248, 254 (1997) and *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 82, 193 W. Va. 32, 37 (1994)).

A writ of prohibition is an extraordinary proceeding – one that is not to be used as a substitute for an appeal. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl.

Pt. 1, *Crawford v. Taylor*, 75 S.E.2d 370, 138 W.Va. 207 (1953). This Court is particularly “restrictive in its use of prohibition as a remedy.” *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 487 S.E.2d 336, 341, 199 W.Va. 678, 683 (1997); *State ex rel. Allstate Ins. Co. v. Gaughan*, 640 S.E.2d 176, 182, 220 W.Va. 113, 118 (2006).

Extraordinary writs should only be a means for relief in “really extraordinary causes.” *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 554, 198 W. Va. 339, 345 (1996); *State ex rel. Am. Elec. Power Co. v. Nibert*, 784 S.E.2d 713, 718, 237 W. Va. 14, 19 (2016). “Historically, we have limited our exercise of original jurisdiction in prohibition because it is an extraordinary remedy reserved for extraordinary cases.” *State ex rel. Justice v. King*, 852 S.E.2d 292, 297 (W. Va. 2020) (citing *State ex rel. West Virginia Div. of Natural Resources v. Cline*, 200 W. Va. 101, 105, 488 S.E.2d 376, 380 (1997) and *State ex rel. Bobrycki v. Hill*, 202 W. Va. 335, 337, 504 S.E.2d 162, 164 (1998)). “For this reason, this Court will grant a writ of prohibition ‘to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.’” *State ex rel. Justice v. King*, 852 S.E.2d at 297 (internal citations omitted).

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. 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." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12, 199 W.Va. 12 (1996).

There is a significant burden of proof required to demonstrate that a circuit court's finding is clearly erroneous. "A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, in part, *In the Interest of Tiffany Marie S.*, 470 S.E.2d 177, 196 W.Va. 223 (1997); *State ex rel. Owners Ins. Co. v. McGraw*, 760 S.E.2d 590, 594, 233 W. Va. 776, 780 (2014).

B. Questions Presented.

- 1. A writ of prohibition is not an appropriate remedy to question the entry of an order denying the motion to dismiss the Respondent's Amended Complaint that contains no claims for medical professional liability against a state agency.**

The Petitioner is wrong in its assertion that the allegations contained in the Amended Complaint are for medical professional liability against the WVDCR. Especially when compared to the original Complaint, the Amended Complaint is merely a claim for various state-law claims, general negligence, and civil rights Due Process violations. There is

absolutely nothing in the Amended Complaint that speaks of medical professional negligence, and all of the arguments in the writ of prohibition are incorrect, misleading, and without any sufficient factual basis. The Petitioner is correct in that claims for medical professional liability can only be asserted against healthcare providers. However, the Respondent has not made any such claim for medical negligence against the WVDCR or any other person. The Amended Complaint does not name or include any health care providers, and none of the allegations allude to anything more than general negligence.

The negligence claims of the Respondent are not based upon liability for damages based on health care services rendered by a health care provider or facility. The claims are against the WVDCR and its employees or agents who failed to even provide Ms. McDonald with a health care provider and his or her service. The WVDCR failed 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. None of these actions involve the rendering of medical care, nor do they qualify as medical negligence issues.

Petitioner relies heavily on the case of *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019), in which this Court did grant a petition for writ of prohibition filed by PrimeCare, finding that the plaintiff in that case failed to comply with the pre-suit notice requirements of the Medical Professional Liability Act, which then deprived the circuit court of subject matter jurisdiction. This case is distinguishable, however, because, unlike the plaintiff in *Faircloth*, (1) the Respondent makes no medical negligence claim against anyone, and especially not a healthcare provider; and (2) because there is no claim of medical negligence against a healthcare provider, the notice and

certification requirements of the MPLA do not apply. As noted by the Petitioner in its writ, the decision in *Faircloth* held that “all of the estate’s claims against PrimeCare were subject to the MPLA.” (Writ, p. 25.)

PrimeCare is not a defendant in this matter; not under the Amended Complaint, and not under the Third-Party Complaint filed by the Petitioner and dismissed. The only defendants in this case are the WVDCR, a state agency, and the John Doe defendants. None of them are healthcare providers, and none of them have any rights under the MPLA.

The Respondent’s attempts to apply the holding in *Faircloth* to the present matter fails for the exact reason it echoes exhaustively throughout these proceedings: the WVDCR is not a healthcare provider. The arguments of the Petitioner contradict themselves: The MPLA should apply, but because the WVDCR is not healthcare provider, it should not. The logic is elusive.

Moreover, the Petitioner has not shown any of the elements necessary to support its request for a Writ of Prohibition. Under the first element – whether the party seeking the writ has no other adequate means to obtain the desired relief – the WVDCR did have other adequate means to obtain the desired relief but failed to timely act to preserve that means. In most civil actions, a motion to dismiss filed under Rule 12(b)(6) may be the subject of appeal – if timely filed 30 days after the entry of the order.

An order granting or denying a motion to dismiss filed under Rule 12(b)(6) is subject to a timely appeal. Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. See, Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); *Boardwine v. Kanawha Charleston Humane Ass’n* (W. Va. 2013). “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not

dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977); Syl. Pt. 2, *Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010); *Cunningham v. Hooker* (W. Va. 2017).

The Petition here is nothing more than an untimely appeal of the Circuit Court's two-year old order denying the Motion to Dismiss the Amended Complaint. An appeal of that order should have been filed in October 2020, not two years after the fact.

The Petitioner also fails to meet the second element needed to support its appeal in disguise. It cannot show that the WVDCR will be damaged or prejudiced in a way that is not correctable on appeal. Even though the Petitioner has slept on its right to appeal the initial order denying the motion to dismiss, it still has at least two shots left – an appeal on the issue of summary judgment, and an appeal of a possible trial verdict.

The Circuit Court's decision was not clearly erroneous as a matter of law. As noted previously, the original Complaint clearly contained an allegation of medical professional negligence and even included the statutory language regarding notice. The Amended Complaint eliminated that claim altogether, and therefore the notice and certification requirements of *W. Va. Code* § 55-7B-6.

There is no evidence that the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law.

Any novel, new, or important problems or issues of law of first impression in this matter occur only because the Petitioner has misconstrued the obvious intent of the Amended Complaint – to assert state-law claims, general negligence, and civil rights violations. There is absolutely no

attempt by the Respondent to incorporate medical negligence into the Amended Complaint, and no reason to require the Respondent to comply with the requirements of *W.Va. Code § 55-7B-6*.

2. The Respondent has not filed a medical professional liability claim against any party, and therefore the Amended Complaint is not subject to the statutory provisions for pre-suit notice and certification.

The Circuit Court of Cabell County held as a matter of law that the WVDCR was not a “healthcare facility” as defined in *W.Va. Code § 55-7B-2(f)*, and further held as a matter of law that the WVDCR is not a “healthcare provider” as defined in *W.Va. Code § 55-7B-2(g)*. The Respondent agrees. The Petitioner spends dozens of pages arguing that it is not a healthcare provider or facility before asserting that the Respondent failed to adhere to the requirements of the Medical Professional Liability Act (“MPLA”) that applies only to healthcare providers and facilities.

Petitioner illogically “interprets” claims that Respondent has not made, and then uses those perceived claims to allege violations of the MPLA. For example, the Petitioner asserts in its second argument the “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.” (Writ, p. 27.)

Once again: the Amended Complaint contains no allegations of medical professional liability and contains no allegations of medical negligence against any healthcare professionals or facility. The Plaintiff has merely invented arguments to circumvent the fact that it failed to file a timely appeal of the motion to dismiss, which was correct and proper under the circumstances and well within the discretion of the Circuit Court. The Petitioner

seeks to turn a discretionary matter into a jurisdictional matter but has no basis for either in the facts of this case.

"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. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 233 S.E.2d 425, 160 W.Va. 314; Syl. Pt. 1, *State ex rel. Owners Insurance Co. v. McGraw*, 760 S.E.2d 590, 233 W. Va. 776.

The Circuit Court of Cabell County clearly and specifically distinguished the present case from the cases cited by the Petitioner, especially *Faircloth*. See, *Order*, ¶9. Yet the Petitioner continues to rely upon *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579, as well as *Davis v. Mound View Health Care, Inc.*, 220 W.Va. 28, 640 S.E.2d 91 (1996); and *Damron v. PrimeCare Medical of West Virginia, Inc.*, No. 20-0862, 2022 W.Va. LEXIS 456, 2022 WL 2078178 (W.Va. June 9, 2022) as a basis for its assertion that the Circuit Court did not have proper jurisdiction because Respondent needed to comply with the MPLA and submit a pre-suit notice of claim and certification.

What the Circuit Court found – and what the Petitioner ignores - is that in each of the cited cases this Court found that the plaintiffs were indeed attempting to avoid application of the MPLA in their actions against healthcare providers by asserting general negligence claims instead of medical professional negligence claims against healthcare providers. Notably, NONE of those cases involved a general negligence claim against a non-healthcare provider or facility. While the WVDCR may have been involved in the cases, the holdings by this Court applied to the healthcare providers, who were named defendants. The opinions could not apply to the WVDCR because there, as here, the WVDCR was simply a state agency, and

not a medical provider.

The Petitioner's claims that the Respondent did not comply with the MPLA are made merely to question the jurisdiction of the Circuit Court and fail. The Amended Complaint included no medical professional liability claims; nor did it name a healthcare provider or facility as a defendant. Therefore, the Plaintiff was not required to comply with the provisions of the MPLA. With no clear violation of the MPLA, the Circuit Court definitely has jurisdiction over the state-law and common law claims of the Respondent.

The fact that the WVDCR is not a healthcare provider or facility does not negate its duty to the inmates housed there under the applicable statutes, rules, and policies noted by the Respondent in her Amended Complaint. As properly noted by the Circuit Court, the WVRRCR is required to adhere to a multitude of state rules, including C.S.R. §95-1-14 – Medical and Health Care Services; C.S.R. §95-1-18.3 – Admission, Orientation, Property Control and Release – Minimum Admission Requirements; C.S.R. §95-1-18.4 – Admission, Orientation, Property Control and Release – Housing of Alcoholics; and C.S.R. §95-1-18.5 – Admission, Orientation, property Control and Release – Intoxicated or Drugged Inmates. Other rules cited in the Amended Complaint include those regarding classification of inmates, special management of certain inmates, and the observation and protection of inmate. None of these activities constitute the practice of medicine, and the violation of said rules do not apply to healthcare providers, but rather to the WVDCR and/or the WRJ. While the WVDCR does not owe any inmate, including the Respondent's decedent Deanna McDonald, a duty of care with respect to the provision of health care, the Petitioner does owe all persons housed in the facility the duty to ensure that the health care is available, and that the inmate has access to it. That is not providing health care, it is ensuring it.

Had the WVDCR ensured that Deanna McDonald was properly processed, monitored, visited, and provided with access to medical care, she would not have died such a horrible, lonely death. The failure of the jail employees to keep Ms. McDonald on suicide watch was not professional medical negligence – it was plain and simple negligence of employees who failed to perform their required general duties. The defendants named in the Amended Complaint were not healthcare providers subject to the protections and requirements of the MPLA; they were jail employees who failed to perform their basic duties in ensuring the safety and protection of inmates, including Deanna McDonald.

3. The denial of the Petitioner’s motion to dismiss the Amended Complaint and the granting of the motion to dismiss the Third-Party Complaint against PrimeCare are not conflicting orders and do not create a case of first impression.

The Petitioner appears to be calling foul because the Circuit Court properly denied its motion to dismiss the Amended Complaint filed by the Respondent against the WVDCR, but granted the motion to dismiss WVDCR’s Third-Party Complaint filed against the healthcare provider PrimeCare (who might have rendered medical treatment to Deana McDonald had employees of WVDCR provided her access to health care in a timely manner.) As noted by the Circuit Court, the two motions are not the same – the Amended Complaint is for state-law, general negligence and civil rights claims against WVDCR, who is not a healthcare provider or facility. The Third-Party Complaint filed by the WVDCR IS a medical professional negligence claim filed against PrimeCare, who IS a healthcare provider.

Notwithstanding the clear language used in the Amended Complaint, the Petitioner continues to improperly assert that Count I and Count II are medical professional liability claims which cannot be asserted against the WVDCR because it is not a healthcare provider. The Petitioner is only partially correct: The WVDCR is not a healthcare provider. There are,

however, no medical professional liability claims against ANYONE in the Amended Complaint, and especially not against the WVDCR.

The Petitioner erroneously asserts that the Circuit Court of Cabell County failed to complete an analysis of the matter and entered no findings. The Circuit Court order of September 30, 2020, specifically notes that the “court has examined the provisions of the Medical Professional Liability Act (MPLA).” The Circuit Court then found as a matter of law that WVDCR was not a healthcare provider, nor a healthcare facility. (Order, ¶8.) The Court then considered the MPLA and *Faircloth*, and concluded that PrimeCare Medical is a healthcare provider per the MPLA. (Order, ¶9.) The Court rejected the attempts by the WVDCR to label itself as either a healthcare provider or a healthcare facility, and further found that the plaintiff’s claims contained in the Amended Complaint against the WVDCR were not subject to the mandatory pre-suit provisions of the MPLA.

Contrary to the Petitioner’s assertions, the Circuit Court spent almost three whole pages of its order identifying the facts and multiple claims of the Plaintiff, and then finds that the Amended Complaint sufficiently sets for a claim for relief under Rule 8 of the *W.Va. Rules of Civil Procedure*. The Court specifically found the facts state in the initial three pages of the Amended Complaint “are accepted at this state to be true, and the court finds they sufficiently raise a right to relief beyond a speculative level. The Amended Complaint sets forth grounds for an entitlement to relief beyond mere labels and conclusions, and, therefore, the Motion to Dismiss the Amended Complaint lacks merit.” (Order, ¶6.)

The Circuit Court clearly conducted a thorough analysis of the facts, the claims, the motions and the law, and, without any abuse of discretion or being clearly wrong, entered an order that was proper under the circumstances. There is no basis for the present claims that

the Circuit Court erred in any way, and no basis for granting a writ of prohibition setting that order aside. The writ should be denied, and the Respondent should be permitted to continue with her discovery and proceed to trial.

4. The statutory pre-suit notice and certification are not required in a civil action that alleges general negligence and not medical professional negligence.

The Petitioner continues to harp on an issue that it has created out of an improper misconstruction of the claims asserted by the Respondent. There can be no violation of the MPLA by the Respondent because there is no medical professional negligence claim filed against the WVDCR or anyone else. The Amended Complaint includes state-law claims, general negligence claims, and allegations of civil rights violations. There are NO claims that fall under the purview of the MPLA, and no requirement on the part of the Respondent to provide notice or certification under the provisions of *W.Va. Code* § 55-7B-6.

A comparison of the original Complaint, which does include a medical negligence claim and is specifically titled as such, with the Amended Complaint, clearly shows that the medical negligence claim was dropped. The Amended Complaint names the WVDCR and John Doe, an unknown employee or agent; only includes allegations intentional infliction of emotional distress, negligent infliction of emotional distress, failure to provide adequate medical care; failure to protect the decedent from “disease” and her foreseeable, preventable death; negligence, gross negligence, and recklessness; and deliberate indifference on the part of the Doe defendants. There is no claim for medical professional negligence against anyone, and therefore the argument of the WVDCR regarding the Respondent’s failure to comply with the requirements of the MPLA fails.

Contrary to the argument propounded by the Petitioner, the Circuit Court Order

specifically noted the facts contained in the Amended Complaint; specifically held that the WVDCR was not a medical provider; and specifically held that the notice requirements of the MPLA did not apply. The order did indeed include a logical corresponding analysis of the issues raised by the Petitioner in its Motion to Dismiss, and correctly held that the motion was lacking in fact, law, or merit.

Petitioner still has provided no logical basis for the writ of prohibition, or any relief sought thereunder. As such, the writ should be DENIED.

5. There is no need for Supreme Court intervention when Circuit Court has the appropriate jurisdiction to consider civil rights claims against an individual employee or agent of a state agency.

The Petitioner's last gasp at its appeal-in-disguise is to argue that even the clearly-stated claims for deliberate indifference on the part of the individual John Doe defendant smacks of medical professional liability against the WVDCR. Just as the WVDCR turns general negligence into medical professional negligence, so it also turns a civil rights claim for deliberate indifference on the part of an individual into medical professional claims against the WVDCR, a state agency that is not a healthcare provider nor a healthcare facility.

The Amended Complaint was filed against the WVDCR and John Doe, unknown employees or agents of the WVDCR. Count III – the deliberate indifference claim – is made only against John Doe, the individual. The Amended Complaint specifically states: “The acts and omissions of defendants Doe are actionable and give rise to legal claims in favor of plaintiff against Doe. Defendants Doe acted in a deliberately indifferent manner to the physical safety, health and well-being of Ms. McDonald. The identities of those individuals who violated her constitutional rights will be revealed via discovery.” Amended Complaint, Count III (emphasis added.)

This Court has long recognized that inmates who have been unlawfully injured while in the custody of the State have available to them a wide array of remedies. A complaint for money damages claimed as a result of constitutional violations may be brought in federal court or in state court, against the agency and against the individuals:

A person brutalized by state agents while in jail or prison may be entitled to:

(a) A reduction in the extent of his confinement or his time of confinement;

(b) Injunctive relief, and subsequent enforcement by contempt proceedings, including but not limited to, prohibiting the use of physical force as punishment, requiring psychological testing of guards, and ordering guards discharged if at a hearing they are proved to have abused inmates;

(c) A federal cause of action authorized by 42 U.S.C § 1983; and

(d) A civil action in tort.

Syllabus Point 4, *Harrah v. Leverette*, 165 W. Va. 665, 271 S.E.2d 322 (1980).

The right to such relief was later recognized and explained in Syllabus Point 2 of *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996):

Unless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, §10 of the West Virginia Constitution.

Id. In *Hutchison*, after noting that the parties did not dispute the existence of a state constitutional tort claim, Justice Franklin Cleckley observed, “To suggest otherwise, would make our constitutional guarantees of due process an empty illusion.” *See also*, Syllabus Point 3, *Tiernan v. Charleston Area Medical Center, Inc.*, 203 W.Va. 135, 506 S.E.2d 578 (1998).

The very case cited by Petitioner supports the Respondent's claim for deliberate indifference on the part of the defendant John Doe. In *Preval v. Reno*, the Fourth Circuit first recognized the difference between a convicted criminal inmate and a pre-trial detainee, finding that a detainee is entitled to due process protections under the Fourteenth Amendment. The *Preval* Court then explained that "deliberate indifference entails something more than mere negligence [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Preval v. Reno*, 57 F.Supp.2d 307, 312 (E.D. Va. 1999) (memorandum opinion) citing, *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The *Preval* Court then held:

In this regard, "[p]retrial detainees, like inmates under active sentence, are entitled to medical attention, and prison officials violate detainee's [sic] rights to due process when they are deliberately indifferent to serious medical needs." *Gordon v. Kidd*, 971 F.2d 1087 (4th Cir.1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). See also, *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir.1988) (applying *Estelle* to pretrial detainee's medical care claim).

Preval v. Reno, 57 F.Supp.2d at 312.

The Respondent clearly has a civil rights cause of action against the WVDCR and against the individual defendant John Doe. None of those causes of action include professional medical negligence, however, and there is no basis in either fact or law for the Petitioner's writ. Petitioner overlooks the constitutional obligation of Petitioner to provide medical treatment to inmate's in need of medical attention. Petitioner fails to consider its on intake booking procedure outlined in West Virginia Regional Jail and Correctional Facility Authority, Policy and Procedure Statement, Document No. 17001, that the booking officer to make inquiries regarding the inmate's physical condition and to record the condition in jail log. Most importantly, Petitioner fails to address Petitioner's duty to perform suicide checks of Deanna McDonald every 15

minutes and Petitioner's failure to perform these duties. The duty to perform these suicide (health and safety) checks rested entirely on the employees of Petitioner. Likewise, Petitioner fails to address Petitioner's policy and procedures to seek medical assistance when an inmate is evidencing signs and symptoms of a medical need. The record reflects that another inmate informed Petitioner's employee's that Deanna McDonald had vomited in her cell and that Petitioner's employee's did not check on Deanna McDonald. A00091.

CONCLUSION

Petitioner has not met the standard for obtaining a writ of prohibition. There is no showing that the Circuit Court of Cabell County exceeded its legitimate powers, nor that there is any clear legal error. There has been no showing of an abuse of discretion, and no basis for an extraordinary writ of prohibition. Petitioner failed to timely appeal the denial of its motion to dismiss by the Circuit Court, and now improperly seeks an extraordinary writ in order to override the lower court's clearly discretionary decision.

The Amended Complaint does not include any allegations of medical professional liability against any person or any facility. Therefore, the provisions of the MPLA do not apply, and the Respondent was not required to provide notice or certification to anyone.

For the foregoing reasons, Respondent respectfully requests that this Honorable Court **DENY** the Petitioner's Writ of Prohibition.

Respectfully submitted,

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*Counsel for Mary Jane McComas, Administratrix
of the Estate of Deanna R. McDonald*

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

(Cabell County Circuit Court Civil Action No. 19-C-369)

**STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DIVISION OF
CORRECTIONS AND REHABILITATION,**

Petitioner,

v.

**HONORABLE ALFRED E. FERBUSON, 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

I, W. Jesse Forbes counsel for Respondent, Mary Jane McComas, Administratrix of the Estate of Deanna R. McDonald, do hereby that a true copy of the foregoing Verified Response of Mary Jane McComas to Petition for Writ of Prohibition, was served upon counsel of record this 17th day of January, 2023, electronically via *File & ServeXpress*:

s/s W. Jesse Forbes, WVSB 9965
W. Jesse Forbes (WVSB 9956)
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**In the Supreme Court of Appeals of West Virginia
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**STATE OF WEST VIRGINIA ex rel.
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MARY JANE MCCOMAS, as Administratrix of the
Estate of Deanna R. McDonald,**

Respondents.

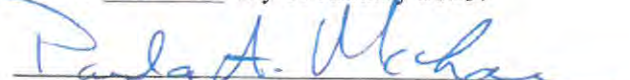
VERIFICATION OF MARY JANE MCCOMAS

**STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to-wit:**

I, Mary Jane McComas, as Administratrix of the Estate of Deanna R. McDonald, being duly sworn, depose and say that I have reviewed the foregoing "Verified Response of Mary Jane McComas to Petition for Writ of Prohibition" and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.


Mary Jane McComas

Taken, subscribed, and sworn to before me, the undersigned Notary Public in and for the county and state aforesaid, by Mary Jane McComas on this 14th day of January 2023.


Notary Public

My Commission Expires: February 20, 2027

