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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. \_\_\_\_\_

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STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA ATTORNEY-GENERAL/  
MEDICAID FRAUD CONTROL UNIT; and  
NATHAN R. LYLE, in his individual capacity and in  
his capacity as an employee of the West Virginia  
Attorney-General, Medicaid Fraud Control Unit,

*Petitioners,*

v.

THE HONORABLE KENNETH D. BALLARD,  
Judge, Circuit Court of Kanawha County, and  
HISEL BAILEY,

*Respondents.*

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PETITION FOR WRIT OF PROHIBITION

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From the Circuit Court of Kanawha County,  
Case No. 22-C-145

Caleb B. David, Esq. (WVSB # 12732)

[cdavid@shumanlaw.com](mailto:cdavid@shumanlaw.com)

Tyler L. Rittenhouse, Esq. (WVSB # 14097)

[trittenhouse@shumanlaw.com](mailto:trittenhouse@shumanlaw.com)

SHUMAN MCCUSKEY SLICER PLLC

1411 Virginia Street East, Suite 200

Charleston, West Virginia 25301

*Counsel for Petitioners*

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## **QUESTIONS PRESENTED**

1. Whether the circuit court committed clear legal error and exceeded its legitimate powers when it found that respondent's claim under 42 U.S.C. § 1983 could be maintained against a state agency and an agent of a State agency acting in his official capacity.
2. Whether the circuit court committed clear legal error and exceeded its legitimate powers when it found that respondent's claim under the Whistle-Blower Law could be maintained against a non-employer.

## **STATEMENT OF THE CASE**

### **I. Introduction**

This case arises out of an adverse employment decision against Respondent Hisel Bailey by his employer, the West Virginia Department of Health and Human Resources ("DHHR"), following an incident in which Bailey was alleged to have abused a patient at Mildred Mitchell-Bateman Hospital ("MMBH"). Following the incident, an investigation was undertaken by Legal Aid of West Virginia, Inc., and the matter was then referred to the Medicaid Fraud Control Unit ("MFCU"), which operates within the Office of the Attorney General. MFCU and Respondent Nathan Lyle investigated the incident, including an interview of Bailey, and referred the matter to the Cabell County Prosecuting Attorney's Office for possible criminal prosecution. The Cabell County Prosecuting Attorney's Office reviewed the MFCU's investigation report and decided to file criminal charges against Bailey. Subsequently, a Cabell County Magistrate reviewed the evidence presented in support of that criminal complaint and determined that probable cause existed to justify issuing an arrest warrant. Bailey was charged with four crimes, but the Cabell County Prosecuting Attorney's Office later unilaterally dismissed by those charges by exercising its prosecutorial discretion. Bailey filed a grievance against his employer, DHHR, and succeeded, resulting in DHHR being ordered to return Bailey to his prior employment position and to remit backpay to Bailey. Bailey then filed suit against DHHR, two DHHR officials, MFCU and Lyle, Legal Aid of West Virginia, Inc., and two employees of Legal Aid.

Respondent asserts claims against Petitioners alleging, *inter alia*, violation of his Fourth Amendment rights through 42 U.S.C. § 1983 and violation of the West Virginia Whistle-Blower Law. Petitioners filed a Motion to Dismiss seeking dismissal of, *inter alia*, Respondent's Section 1983 and Whistle-Blower claims. Petitioners moved for dismissal of Respondent's Section 1983 claim on the grounds that neither MFCU nor Lyle, acting in his official capacity, is a "person" under 42 U.S.C. § 1983, and, therefore, Respondent cannot maintain a Section 1983 claim against them. Petitioner Lyle also moved for dismissal of Respondent's Whistle-Blower Law claim on the grounds that Lyle is not Respondent's employer and, therefore, cannot be held liable under West Virginia Code § 6C-1-3. Following briefing, the Circuit Court entered an Order denying Petitioners' Motion on August 15, 2022.

## **II. Complaint**

On February 25, 2022, Respondent Hisel Bailey filed his Complaint in the Circuit Court of Kanawha County. Appendix "Appx." at 014. Respondent alleges that he was employed by the DHHR at MMBH as a registered nurse. Appx. 018. Respondent alleges that, on January 7, 2019, he and a health services worker walked patient M.C. and a group of patients to the cafeteria for dinner. Appx. 019. Respondent claims that, on the way to the cafeteria, M.C. began talking about wanting to beat and kill his mother, which resulted in Respondent and the other employee attempting to redirect M.C. from his behavior. Appx. 019. Respondent alleges that, before getting to the doors of the cafeteria, M.C. "got mad and punched the wall which caused his knuckles to bleed and then stated that he liked to see his own blood and that he would bite himself." Appx. 019-020. Respondent alleges that M.C. then raised his forearm up to his mouth, and Respondent intervened to stop M.C. from hurting himself, which led to a struggle resulting in Respondent and M.C. going to the floor and M.C. suffering an injury to his forehead. Appx. 020.

Respondent alleges that, on January 11, 2019, Michelle Woomer, a behavioral health advocate employed by Legal Aid of West Virginia, Inc. (“LAWV”), saw M.C. and noted that he had a black eye. Appx. 021. Respondent alleges that Woomer asked M.C. how he got his black eye, and M.C. stated that Respondent banged his head against a wall and then later told Woomer that Respondent banged his head against the floor. Appx. 021. Respondent alleges that, following this conversation, Woomer took it upon herself to investigate, which included viewing video of the incident and making a referral to Adult Protective Services. Appx. 021-022. Respondent alleges that the Director of Nursing at MMBH separately filed a patient grievance form, which then resulted in Craig Richards, CEO of MMBH, assigning Woomer to investigate the incident with Olivia Susan Shields. Appx. 023. Respondent claims he was suspended from his employment pending the investigation. Appx. 023.

Respondent alleges that, on February 25, 2019, Woomer submitted her investigation report, which substantiated the allegations of physical abuse against Respondent. Appx. 024. Respondent alleges that the report contains factual inaccuracies and false opinions and that the investigation was improperly conducted. Appx. 024. Respondent alleges that he was terminated, but he successfully availed himself of the grievance process through the Public Employees Grievance Board and was granted reinstatement with back pay, interest, restoration of benefits, and removal of the incident from his personnel file. Appx. 025, 045-046.

Respondent alleges that, following his reinstatement, he was “immediately suspended again pending criminal charges related to the same incident of January 7, 2019, because Richards, Shields, MMBH, Woomer, and/or LAWV had caused a criminal complaint to also be filed against [Respondent] Hisel Bailey and had made report to [Petitioner] MFCU which opened an investigation into the incident of January 7, 2019 ....” Appx. 046-047. Respondent alleges that

“Defendant MFCU initiated an investigation and demanded by letter of October 4, 2019, that Respondent Hisel Bailey submit to a custodial interrogation by its agents.” Appx. 048.

Respondent alleges that, on December 2, 2019, MFCU, through Defendant Lyle and two other employees of the Attorney General’s Office, conducted a “custodial interrogation.” Appx. 048. Respondent claims that these Defendants “knew or should have known that the investigation by Defendants Woomer and LAWV was significantly flawed and unreliable and that WVPEGB had cleared Respondent Hisel Bailey of all charges against him.” Appx. 048. Respondent claims that Petitioners “provided information based on their investigation to the Cabell County Prosecuting Attorney’s Office for the deliberate, intentional, fraudulent, and oppressive purpose of causing Respondent Hisel Bailey to be subject to criminal investigation that could lead to loss of his liberty.” Appx. 048-049.

Respondent alleges that, on December 17, 2019, MFCU and Lyle authored a report related to the incident of January 7, 2019. Appx. 049. Respondent alleges that the findings of the report were wrongly concluded. Appx. 049-050. Respondent also alleges that the report wrongly referred the matter to the Cabell County Prosecuting Attorney, which resulted in criminal charges being filed against Respondent. Appx. 054. Respondent alleges that a Magistrate found probable cause against Respondent related to the incident of January 7, 2019; however, on March 2, 2021, the Cabell County Prosecuting Attorney dismissed all charges against Respondent. Appx. 055.

Respondent alleges as Count I that MFCU and Lyle’s investigation and the subsequent prosecution by the Cabell County Prosecuting Attorney violated Respondent’s Fourth Amendment right against unreasonable and unlawful seizure of the person. Appx. 055-057. Respondent further alleges as Count III that Lyle’s investigation violated the West Virginia Whistle-Blower Law, West Virginia Code § 6C-1-1, *et seq.* Appx. 060-062.

### **III. Circuit Court Order**

On August 15, 2022, the Circuit Court entered an Order denying the Petitioners' Motion to Dismiss. Regarding Respondent's Section 1983 claim, the Circuit Court found that the issue of whether Lyle was acting in his official or individual capacity "is a question of fact and cannot be the subject of a Motion to Dismiss." Appx. 003. The Circuit Court further held that, "[w]hile [Petitioner] MFCU may not be a 'person,' it is vicariously liable for the acts or omissions of its employee, [Petitioner] Lyle." Appx. 004. Without referring to Section 1983 or pertinent case law, the Circuit Court found that this Court held in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234, W. Va. 492, 766 S.E.2d 751 (2014), that State agencies are vicariously liable for the acts of their employees under Section 1983. Appx. 004. Based upon these clear legal errors, the Circuit Court denied Petitioners' Motion to Dismiss.

Regarding Respondent's Whistle-Blower Law claim, the Circuit Court found that, although Lyle did not supervise Respondent and was not his employer, Respondent was an employee of the State of West Virginia, and Respondent alleges that Lyle acted in concert with Defendants Shields and Richards, who were Respondents' employer. Appx. 013. The Circuit Court also found that the Whistle-Blower Law permits claims against an "agent of a public body." Appx. 013. Thus, the Circuit Court held that Lyle may be held liable under the Whistle-Blower Law as an agent of MFCU even though neither MFCU nor Lyle employed Respondent. Appx. 013. Based upon these clear legal errors, the Circuit Court denied Petitioners' Motion to Dismiss.

### **SUMMARY OF ARGUMENT**

The Circuit Court committed clear error when it found that Respondent's claim under 42 U.S.C. § 1983 could be maintained against a State agency and an agent of a State agency acting in his official capacity. In order to state a claim for damages under 42 U.S.C. §1983, an aggrieved party must sufficiently allege he was injured by "the deprivation of any [of his] rights, privileges,

or immunities secured by the [U.S.] Constitution and laws” by a “person” acting “under color of state law.” *See* 42 U.S.C. § 1983; *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). Claims under 42 U.S.C. § 1983 are specifically directed at “persons.” *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). Both the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit have found that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Id.* at 71; *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000) (unpublished). Because neither MFCU, as a State agency, nor Lyle, as a State official acting in his official capacity, is a “person” under Section 1983, Respondent cannot recover against Petitioners for any alleged violations of Plaintiff’s rights under Section 1983. Therefore, the Circuit Court committed clear legal error and exceeded its legitimate powers in denying Petitioners’ Motion to Dismiss.

Further, the Circuit Court committed clear legal error when it found that Respondent’s claim under the Whistle-Blower Law could be maintained against Petitioner Lyle, who is not Respondent’s employer. West Virginia Code § 6C-1-3 prohibits an employer from taking adverse employment action against an employee for reporting wrongdoing or waste or for participating in an investigation or hearing. W. Va. Code § 6C-1-3(a)-(c). An “employer” is defined as “a person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.” W. Va. Code § 6C-1-2(c). As this Court held in *State ex rel. Grant Cty. Comm’n v. Nelson*, 244 W. Va. 649, 856 S.E.2d 608 (2021), the Whistle-Blower Law vests an employee with the right to file claims against his or her employer, and, because Petitioner Lyle is not Respondent’s employer, denial of Petitioners’ Motion to Dismiss was clearly erroneous. Therefore, the Circuit Court committed clear legal error and exceeded its legitimate powers in denying Petitioners’ Motion to Dismiss.

Accordingly, this Court should stay further proceedings in the Circuit Court of Kanawha County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, and direct the Circuit Court to grant Respondents' Motion to Dismiss as to Counts I and III.

### **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the Circuit Court's clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

### **ARGUMENT**

#### **I. Standard**

This Court's original jurisdiction is recognized in Rule 16 of the West Virginia Rules of Appellate Procedure. A writ of prohibition is proper whenever an inferior court does not have jurisdiction or has jurisdiction but exceeds its legitimate powers. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003).

Petitioners seek a writ of prohibition because the Circuit Court committed clear legal error and exceeded its legitimate powers when it found that Respondent's claim under 42 U.S.C. § 1983 could be maintained against a State agency and an agent of a State agency acting in his official capacity. Petitioners also seek a writ of prohibition because the Circuit Court committed clear legal error and exceeded its legitimate powers when it found that Respondent's claim under the Whistle-Blower Law could be maintained against Petitioner Lyle, who was not Respondent's employer. In such instances, this Court has established the following standard of review for issuing a writ of prohibition:

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*, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. West Virginia Nat'l Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 672 S.E.2d 358 (2008); Syl. Pt. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); Syl. Pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997).

The first two factors unquestionably are present here. Petitioners have no other means of direct appeal, and, thus, if forced to defend this matter through trial, Petitioners will suffer prejudice. The third and most important factor – that the lower tribunal's order is clearly erroneous as a matter of law – also exists here. The Circuit Court's Order misapplies State vicarious liability jurisprudence in the place of federal law and decades of controlling precedent from the Supreme Court of the United States and the Fourth Circuit interpreting Section 1983. Additionally, the Circuit Court's Order erroneously interprets the plain language of the Whistle-Blower Law and ignores this Court's recent decision in *State ex rel. Grant Cty. Comm'n v. Nelson*, 244 W. Va. 649, 856 S.E.2d 608 (2021), which held that the Whistle-Blower Law vests an *employee* with the right to file claims against his or her *employer*. *Id.* at 657, 856 S.E.2d at 616. Although Respondent admits, and the Circuit Court recognized, that no employment relationship exists between



Petitioner Lyle and Respondent, the Circuit Court's Order erroneously permits Respondent to maintain a claim against Petitioner Lyle pursuant to the Whistle-Blower Law.

## II. Discussion

### A. The Circuit Court committed clear legal error and exceeded the scope of its authority when it found that Respondent's claim under Section 1983 could be maintained against a State Agency and employee acting in his official capacity.

Respondent has asserted in Count I of his Complaint that Petitioners MFCU and Lyle violated his Fourth Amendment rights by allegedly conducting a "custodial interrogation" and by investigating him for potential crimes. Respondent asserts this claim pursuant to 42 U.S.C. § 1983. Appx. The Circuit Court committed clear legal error and exceeded the scope of its authority when it found that Respondent's Section 1983 claim could be maintained against a State agency and State employee acting in his official capacity.

No claims can be brought against Defendants MFCU and Lyle pursuant to 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 he was injured by "the deprivation of any [of his] rights, privileges, or immunities secured by the [U.S.] Constitution and laws" by a "person" acting "under color of state law." See 42 U.S.C. § 1983; *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Claims under 42 U.S.C. § 1983 are specifically directed at "persons." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). Both the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit have found that "**neither a State nor its officials acting in their official capacities are 'persons' under § 1983.**" *Id.* at 71 (emphasis added); *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000) (unpublished).

It is clear that MFCU, as a State agency, is not a "person" under 42 U.S.C. § 1983 and is not subject to suit under that statute. *Will*, 491 U.S. at 71. Respondent specifically alleges that

Petitioner Lyle was acting in his official capacity at the time of the alleged wrongful conduct: “The false report and investigation by Defendants Richards, Shields and Lyle were under color of the authority of their official capacity as employees of the Defendant WVDHHR and/or Defendants WVAG and MFCU.” Appx. 056. Thus, because Lyle was acting in his official capacity as an employee of MFCU during the events described in Respondent’s Complaint, he also is not a “person” under 42 U.S.C. § 1983 and is not subject to suit under that statute. *See Kerr v. McKay*, Civil Action No. 2:20-cv-00190, 2020 U.S. Dist. LEXIS 244321, \*18-19 (S.D.W. Va. Aug. 17, 2020) (dismissing Section 1983 claim against State official sued in his official capacity) *adopted by Kerr v. McKay*, Civil Action No. 2:20-cv-00190, 2020 U.S. Dist. LEXIS 243766 (S.D.W. Va. Dec. 29, 2020) (citing *Adams v. Ferguson*, 884 F.3d 219, 225 (4th Cir. 2018) (quoting *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1985))).

The Circuit Court’s Order makes the following findings related to the applicability of Section 1983 to Petitioners:

14. Whether Defendant Lyle was acting in his official capacity, or outside his official capacity, is a question of fact and cannot be the subject of a Motion to Dismiss.

15. While Defendant MFCU may not be a “person,” it is vicariously liable for the acts or omissions of its employee, Defendant Lyle.

16. The Supreme Court of Appeals of West Virginia so held in *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 766 S.E.2d 751 (W. Va. 2014) citing *Parkulo v. W. Va. Bd. of Probation and Parole*, 483 S.E.2d 507 (W. Va. 1986).

Appx. 003-004. The Circuit Court’s Order is clearly erroneous for several reasons.

The applicability of Section 1983 is a question of law. Federal Courts in West Virginia and this Court agree that statutory interpretation is a question of law. *See, e.g., Ohio Valley Envtl. Coalition v. Coal-Mac, Inc.*, 775 F. Supp. 2d 900, 919 (S.D.W. Va. 2011) (“This is an area of law where this Court has expertise—statutory interpretation. The Court is confident in its ability to determine these questions of law.”); *King v. Nease*, 233 W. Va. 252, 254, 757 S.E.2d 782, 784

(2014) (“The issue of statutory interpretation raised by the parties indisputably presents a question of law.”); Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review”). Here, the Circuit Court was asked to interpret the meaning of “person” within Section 1983. This was a question of law for the Circuit Court to decide. The Circuit Court’s Order instead appears to conflate the issues of individual versus official capacity with scope of employment. Whether Lyle was acting within the scope of his employment is irrelevant to Petitioners’ Motion to Dismiss. Rather, the essential issue is whether Respondent can maintain a Section 1983 claim against a State agency and/or against an official of State agency being sued in his official capacity. Respondent’s Complaint specifically states that Lyle was acting “under color of the authority of [his] official capacity as employee[] of ... MFCU.” Appx. 056. Thus, there is no factual dispute because Respondent has asserted his Section 1983 claim against Lyle in his official capacity. Therefore, the only question before the Circuit Court was a legal question of statutory interpretation, and the Circuit Court erroneously failed to rule as to the applicability of Section 1983 to Lyle and erroneously found that MFCU could be held vicariously liable for Section 1983 claims.

While conceding that MFCU is not a “person” for purposes of Section 1983 liability, the Circuit Court’s Order nonetheless found that MFCU could be subject to Section 1983 claims under a theory of vicarious liability. Appx. 004. The Circuit Court’s Order also holds that State agency liability under Section 1983 was established by this Court in *W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). Appx. 004. The Circuit Court’s findings are clearly erroneous.

*A.B.* does not apply to Section 1983 claims. Indeed, 42 U.S.C. § 1983 is a federal statute and is governed by federal law. Furthermore, in *A.B.*, the plaintiff’s “complaint expressly asserted that it was making no claims against the [West Virginia Regional Jail and Correctional Facility Authority] under Section 1983 ....” *A.B.*, 766 S.E.2d at 758. Thus, this Court stated that “analysis utilized in Section 1983 cases as to respondeat superior is simply inapplicable to the case *sub judice*....” *Id.* at 762-63. The *A.B.* Court specifically stated that Section 1983 claims are not actionable against State agencies and their officials:

Factually similar cases addressing immunity found in federal caselaw are cases brought pursuant to 42 U.S.C. § 1983, **which actions do not lie against the State.** *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (“[N]either a state nor its officials acting in their official capacities are ‘persons’ under § 1983.”). Further, attempts to draw analogies between the contours of actionable claims pursuant to § 1983 and those alleged herein are inadequate since § 1983 jurisprudence is *constrained by the federal courts’ interpretation of the language of § 1983 itself*.

*A.B.*, 766 S.E.2d at 763, n. 13 (bold emphasis added) (italicized emphasis in original). Thus, not only is *A.B.* inapplicable to Respondent’s Section 1983 claim, but the *A.B.* Court also expressly stated that Section 1983 claims do not lie against the State, consistent with the Supreme Court of the United States’ decision in *Will*.

Simply put, Section 1983 claims cannot be maintained against State agencies or their officials acting in their official capacities. Petitioner MFCU is a State agency, and Respondent’s Complaint alleges that Petitioner Lyle was acting in his official capacity at the relevant time. Therefore, Section 1983 claims do not lie against Petitioners, and the Circuit Court committed clear legal error in denying Petitioners’ Motion to Dismiss as to Count I of Respondent’s Complaint.

**B. The Circuit Court committed clear legal error and exceeded the scope of its authority when it found that Respondent’s claim under the Whistle-Blower Law could be maintained against a non-employer.**

Respondent has asserted in Count III of his Complaint that Petitioner Lyle violated the Whistle-Blower Law. Appx. 060-062. The Circuit Court committed clear legal error and exceeded the scope of its authority when it found that Respondent's Whistle-Blower Law claim could be maintained against Lyle, who was not Respondent's employer.

West Virginia Code § 6C-1-3 outlines prohibited actions under the Whistle-Blower Law:

- (a) **No employer** may discharge, threaten, or otherwise discriminate or retaliate against an employee ... because the employee ... makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste.
- (b) **No employer** may discharge, threaten, or otherwise discriminate or retaliate against an employee ... because the employee is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry held by an appropriate authority or in a court action.
- (c) **No employer** may deny a whistle-blower covered by the civil service system, because of his or her status or actions as a whistle-blower, a promotion or other increase in compensation that the whistle-blower otherwise would have received.

W.Va. Code § 6C-1-3 (emphasis added). An “employer” is defined as “a person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.” W. Va. Code § 6C-1-2(c).

In *State ex rel. Grant Cty. Comm'n v. Nelson*, 244 W. Va. 649, 657, 856 S.E.2d 608, 616 (2021), the plaintiff, a former employee at a hospital, filed suit against the defendant, a county commission that owned the hospital, for, *inter alia*, violations of the Whistle-Blower Law. *Id.* at 652, 856 S.E.2d at 611. The defendant county commission appealed the Circuit Court's denial of its motion to dismiss and sought a writ of prohibition, arguing that the plaintiff was not its employee and, therefore, could not maintain a claim against it under the Whistle-Blower Law. *Id.* This Court granted the county commission's requested writ of prohibition and reversed the Circuit Court's denial of the defendant's motion to dismiss, holding,

Because the Whistle-Blower Law and the Human Rights Act vest an employee with the right to file claims against his or her employer for violations of these provisions,

and because the Commission is not [the plaintiff's] employer, the circuit court's denial of the [defendant]'s motion to dismiss on the grounds that such claims were improperly asserted against it because it was not [the plaintiff's] employer was clearly erroneous.

*Id.* at 657, 856 S.E.2d at 616.

Here, Respondent alleges that he “was employed as a Registered Nurse by Defendant MMBH, a psychiatric facility operated by Defendant DHHR.” Appx. 018. Respondent also alleges that Defendant Lyle was “an employee of the West Virginia Attorney-General/Medicaid Fraud Control Unit ....” Appx. 016. Thus, Lyle was not Respondent’s employer. Because Lyle was not Respondent’s employer, Respondent cannot maintain a claim against Lyle for alleged violations of the Whistle-Blower Law.

Below, Respondent argued, and the Circuit Court adopted, two erroneous positions. First, while acknowledging that Lyle was not Respondent’s employer, the Circuit Court’s Order nevertheless found that Lyle could be held liable under the Whistle-Blower Law because Respondent alleged that Lyle “acted in concert” with Respondent’s employer. Appx. 012-013. Neither Respondent nor the Circuit Court cited to any law to support the position that allegations of concerted action of a non-employer are sufficient to overcome the clear statutory language of the Whistle-Blower Law only permitting claims against employers. Second, the Circuit Court’s Order found that Lyle could be held liable under the Whistle-Blower Law based upon the definition of “employer” because the definition includes “an agent of a public body.” W. Va. Code § 6C-1-2(c). Again, neither Respondent nor the Circuit Court cited to any case law to support this position.

The Circuit Court’s Order finds that the phrase “or an agent of a public body” transforms the Whistle-Blower Law into an all-encompassing private right of action against any State employee. This Court has routinely held that “a statute should not be construed in such a manner as to reach an absurd result.” *Vanderpool v. Hunt*, 241 W. Va. 254, 262, 823 S.E.2d 526, 534

(2019). The Circuit Court's interpretation reaches an absurd result. Indeed, under the Circuit Court's interpretation of the statute, Respondent could assert a Whistle-Blower claim against Coach Bob Huggins or Coach Neal Brown because they are "agents of a public body." This Court has never interpreted the Whistle-Blower Law so expansively.

Indeed, in *State ex rel. Grant Cty. Comm'n v. Nelson, supra*, this Court found that the trial court's denial of a county commission's motion to dismiss was clearly erroneous because the county commission was not the plaintiff's employer. *See generally id.* There, the plaintiff, a former employee at a hospital, filed suit against the defendant, a county commission that owned the hospital, for, *inter alia*, violations of the Whistle-Blower Law. *Id.* at 652, 856 S.E.2d at 611. The defendant appealed the Circuit Court's denial of its motion to dismiss, arguing that the plaintiff was not its employee and, therefore, could not maintain a claim against it under the Whistle-Blower Law. *Id.* Despite the defendant county commission being a "public body," this Court reversed the Circuit Court's order and held that the plaintiff could not maintain a Whistle-Blower claim against the County Commission because the county commission was not the plaintiff's employer. *Id.* at 657, 856 S.E.2d at 616.

The Circuit Court has made the same clear error here. Petitioner Lyle is not Respondent's employer. Thus, Respondent lacks any right to file a claim against Lyle for alleged violation of the Whistle-Blower Law. The Circuit Court's Order denying Petitioners' Motion to Dismiss on the grounds that Respondent's Whistle-Blower Law claim was improperly asserted against Lyle because Lyle was not his employer was clearly erroneous. Therefore, the Circuit Court committed clear legal error in denying Petitioners' Motion to Dismiss as to Count III of Respondent's Complaint.

## CONCLUSION

Petitioners request that this Court stay further proceedings in the Circuit Court of Kanawha County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, and direct the Circuit Court to grant Respondents' Motion to Dismiss as to Counts I and III.



Caleb B. David, Esq. (WVSB # 12732)

[cdavid@shumanlaw.com](mailto:cdavid@shumanlaw.com)

Tyler L. Rittenhouse, Esq. (WVSB # 14097)

[trittenhouse@shumanlaw.com](mailto:trittenhouse@shumanlaw.com)

SHUMAN MCCUSKEY SLICER PLLC

1411 Virginia Street East, Suite 200

Charleston, West Virginia 25301

*Counsel for Petitioners*



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**NO. \_\_\_\_\_**

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**STATE OF WEST VIRGINIA ex rel.  
HEALTH CARE ALLIANCE, INC. and  
HCFS HEALTH CARE FINANCIAL SERVICES, LLC  
d/b/a ALCOA BILLING CENTER,**

***Petitioner***

**v.**

**THE HONORABLE ERIC O'BRIANT,  
Judge, Circuit Court of Logan County and  
KELSEY STARR,**

***Respondents.***

**VERIFICATION**


I, Caleb B. David, after first being duly sworn upon oath, respectfully state that I am counsel for Petitioners named in the foregoing Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.



Caleb B. David, Esquire (WVSB #12732)

Taken, sworn to and subscribed before me this 14<sup>th</sup> day of October, 2022.

My commissions expires: March 26, 2025.



Notary Public

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**NO. \_\_\_\_\_**

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**STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA ATTORNEY-GENERAL/  
MEDICAID FRAUD CONTROL UNIT; and  
NATHAN R. LYLE, in his individual capacity and in  
his capacity as an employee of the West Virginia  
Attorney-General, Medicaid Fraud Control Unit,**

***Petitioners,***

**v.**

**THE HONORABLE KENNETH D. BALLARD,  
Judge, Circuit Court of Kanawha County, and  
HISEL BAILEY,**

***Respondents.***

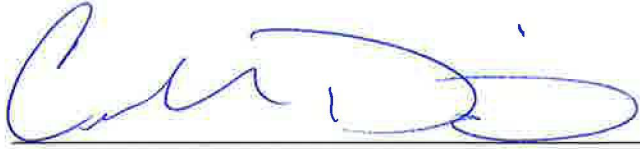
**CERTIFICATE OF SERVICE**

I, Caleb B. David, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing “Petition for Writ of Prohibition” upon the parties whom a rule to show cause should be served by placing said copies in the United States mail, with first-class postage prepaid, on this day, October 14, 2022, addressed separately as follows:

Scott H. Kaminski, Esquire (WVSB #6338)  
Ray, Winton & Kelley, PLLC  
109 Capitol Street, Suite 700  
Charleston, WV 25301  
ScottKaminski@rwk-law.com  
***Counsel for Respondent***

Hon. Kenneth D. Ballard, Circuit Judge  
Thirteenth Judicial Circuit  
Circuit Court of Kanawha County  
Kanawha County Judicial Building  
P.O. Box 2351

111 Court Street  
Charleston, WV 25301

A handwritten signature in blue ink, appearing to be 'Caleb B. David', written over a horizontal line.

Caleb B. David, Esquire (WVSB #12732)  
Tyler L. Rittenhouse, Esquire (WVSB #14097)  
*Counsel for Petitioners*