# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**No. 20-0862**



**ZACH DAMRON,**

**Petitioner,**

**v.**

**Appeal from final order of the Circuit Court of Kanawha County (Civil Action No. 18-C-1391)**

**PRIMECARE MEDICAL OF WEST VIRGINIA, INC., and JOHN/JANE DOE EMPLOYEES AND JOHN/JANE DOE CORRECTIONAL OFFICERS/ADMINISTRATORS,**

**Respondent.**



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## APPELLANT'S BRIEF

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# I.

# ASSIGNMENTS OF ERROR

The Court Erred by Dismissing Appellant's Constitutional Claim For Deliberate Indifference Pursuant To 42 U.S.C §1983 By Requiring A Certificate Of Merit When It Applied The WVMPLA to Appellant's Cause of Action.

# II.

# STATEMENT OF THE CASE

## A. *Proceedings in the Court below.*

Appellant filed this matter in the Circuit Court of Kanawha County, alleging that Respondent PrimeCare violated Appellant's rights under the Constitution of West Virginia by subjecting him to cruel and unusual punishment as well as intentional infliction of emotional distress. JA 1-5. Appellant filed an Amended Complaint that included a claim for violation of his Constitutional rights under the Eighth Amendment pursuant to 42 U.S.C. § 1983 as well as a claim for negligence. JA 6-12. Respondent PrimeCare filed a motion to Dismiss and Memorandum of Law to which the Appellant responded and to which the Respondent replied. JA 14-62. The Motion and Response included copies of Appellant's medical records as well as a notice of claim filed on behalf of the Appellant. A hearing was held, and the Court entered an Order requiring Appellant to submit a certificate of merit. JA 63-65. Appellant did not submit a certificate of merit and Respondent filed a renewed motion to dismiss and memorandum of law. JA 66-95. Appellant responded to the motion by proceeding solely on the Eighth Amendment claim and by providing case law supporting Appellant's position that expert testimony was unnecessary under

federal law. JA 96-100. Respondent filed a reply and a hearing was held wherein the Court rejected Appellant's argument and indicated that it would rule in Respondent's favor. Prior to entry of that Order, Appellant filed a Motion to Reconsider that incorporated West Virginia case law that supported Appellant's argument that the Circuit Court should apply federal law to the federal cause of action filed in State Court. Additional briefing took place, after which the Circuit Court entered Orders dismissing Appellant's claim pursuant to 42 U.S.C. § 1983 as well as denying Appellant's Motion to Reconsider. Appellant now appeals the Circuit Court's Order dismissing his action filed pursuant to 42 U.S.C. § 1983.

## III.

## SUMMARY OF ARGUMENT

Appellant argues that the Medical Professional Liability Act (W.Va. Code §55-7B-1 *et. seq.*) does not apply to the action against Respondent alleging violations of Appellant's rights under the Eighth Amendment of the United States Constitution. Specifically, Respondent argues that Appellant was required to provide a certificate of merit prior to filing suit. Appellant disagrees and asserts that federal law controls when filing an action alleging a violation of an inmate's constitutional rights under the Eighth Amendment pursuant to 42 U.S.C. §1983. Appellant relies upon federal precedent that holds deliberate indifference claims are not medical malpractice actions, do not require pre-suit certificates of merit, do not require expert testimony, and provide a mechanism for protecting constitutional rights as determined under federal substantive law. Appellant also relies on West Virginia precedent that has consistently applied federal law to federal causes of action filed in a state court.

## IV.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After considering the criteria listed in **W.Va. R.App. p. 18(a)**, Mr. Damron asks that oral argument be granted in this case pursuant to **W.Va. R.App. p. 20**. This is a case involving the proper application of federal and state law and issues of fundamental public importance. Accordingly, Mr. Damron believes that oral argument will be useful to the Court in its deliberative process.

## V.

## ARGUMENT

### A. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss is *de novo*. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E. 2d 516 (1995). Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, a *de novo* standard of review applies, Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E. 2d 415 (1995).

### B. THE COURT ERRED BY DISMISSING APPELLANT'S CONSTITUTIONAL CLAIM FOR DELIBERATE INDIFFERENCE PURSUANT TO 42 U.S.C §1983 BY REQUIRING A CERTIFICATE OF MERIT WHEN IT APPLIED THE WVMPLA TO APPELLANT'S CAUSE OF ACTION.

#### a) The Eighth Amendment Guarantees an Inmate's Right to Medical Care.

The Eighth Amendment entitles sentenced prisoners to "adequate food, clothing, shelter,

sanitation, medical care and personal safety." *Green v. Rubenstein*, 644 F. Supp 2d 723, 730 (S.D.W.Va. 2009) (quoting *Wolfish v. Levi*, 573 F. 2d 118, 125 (2d Cir. 1978), *rev'd on other grounds, Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979.)) *See also Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed. 2d 811 (1994)(Supreme Court noted that the Eighth Amendment imposes certain duties upon prison officials to "ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"), (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S.Ct. 3194, 3200, 82 L.Ed. 2d 393 (1984). Prisoners are therefore constitutionally guaranteed adequate medical/dental care under the Eighth Amendment. However, as set forth herein, the requirements to prove a constitutional violation is vastly different than a medical professional liability action. Appellant's amended complaint clearly sets forth a claim for deliberate indifference to a serious medical need and should not have been dismissed for lack of certificate of merit. *See* JA 6-13. For reasons set forth herein, Appellant's 42 U.S.C. § 1983 action is not controlled by the West Virginia Medical Professional Liability Act but by federal law. Respondent seeks to limit Appellant's constitutional rights through application of a state statute. This attempt is simply unconstitutional.

**b) Appellant's Amended Complaint Alleges That Respondent Was Deliberately Indifferent to a Serious Medical Need.**

Count II of Appellant's amended complaint sets forth a cause of action alleging that Respondent was deliberately indifferent to Appellant's medical condition and his suffering. JA 10. In response to Respondent's Motion to Dismiss, Appellant specifically stated that he was not

pursuing a medical negligence action but was proceeding solely on the claim made pursuant to 42 U.S.C. § 1983. JA 96. In *Green v. Rubenstein* the United States District Court discussed at length the legal precedent governing claims for deliberate indifference. The District Court explained, "A medical need serious enough to give rise to a constitutional claim involves a condition that places the inmate at a substantial risk of serious harm, usually loss of life, or permanent disability, or a condition for which lack of treatment perpetuates severe pain." *Green v. Rubenstein*, 644 F. Supp 2d 723, 741 (S.D.W.Va. 2009)(emphasis added); *See also Farmer*, 511 U.S. at 832-835; *Sosebee v. Murphy*, 797 F.2d 182-83 (4th Cir. 1986). "Neither mere malpractice, *Estelle*, 429 U.S. [97] at 105-06, S.Ct. 285 [(1976)], nor mere negligence in diagnosis give rise to an eighth amendment claim." *Rubenstein*, 644 F. Supp 2d at 731 (citing *Sosebee v. Murphy*, 797 F.2d 179, 181 (4th Cir. 1986)). "Rather, to be actionable, the treatment, or lack thereof, 'must be so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Rubenstein*, 644 F. Supp 2d at 731 (quoting *Miltier v. Beorn*, 896 F. 2d 848, 851 (4th Cir. 1990)).

Appellant argued before the Circuit Court that Respondent's failure to treat/refer Appellant to a specialist or any medical provider for bilateral broken mandibles and nasal fractures for approximately a month, is a condition that would perpetuate severe pain or potential permanent disability as described in *Sosebee,* therefore giving rise to an action under the Eighth Amendment. Failure to timely evaluate, assess and treat a broken mandible can also be considered cruel and unusual punishment. Finally, Appellant argued that the conditions suffered by Appellant are the very type Courts have consistently found to substantiate 42 U.S.C. §1983 claims. *See Loe v. Armistead*, 582 F. 2d 1291(4th Cir. 1978), cert. denied, 446 U.S. 928, 100 S. Ct. 1865, 64 L.Ed.2d

281 (1980)(Pretrial detainee's allegations of delay in treatment of his broken arm indicated a reasonable basis for inferring deliberate indifference to his serious medical needs.). Respondent's own medical records establish that Mr. Damron was denied appropriate medical care for a serious medical condition in direct violation of his Constitutional rights. The record below establishes that it was approximately one month before Appellant was referred to a specialist. *See* JA 56. Appellant alleges that he was injured on the 5th of October 2016 and did not see a specialist until November 3, 2016. On its face, Respondent was deliberately indifferent to Appellant's serious medical needs. Because Appellant clearly stated a federal claim for deliberate indifference, the matter should be remanded to the Circuit Court for trial.

**c) Federal Law Controls Actions for Violations of an Inmate's Constitutional Rights.**

In *Green v. Rubenstein*, the plaintiff filed both a claim for a violation of his Eighth Amendment right for failure to provide adequate medical care as well as a claim for medical negligence. The District Court dismissed the medical negligence action because the plaintiff had failed to comply with the WVMPLA. The District Court however denied the motion to dismiss plaintiff's deliberate indifference claim against the corporate entity contracted to provide medical care for the inmates. The Court in its ruling made a clear distinction between actions brought pursuant to state law and plaintiff's Eighth Amendment claim, a claim not governed by the WVMPLA. *Green v. Rubenstein*, 644 F. Supp 2d 723, 738 (S.D.W.Va. 2009).

The West Virginia Supreme Court of Appeals has consistently held that "federal law is controlling when public officials are sued in state court for violations of federal rights under 42

U.S.C §1983." *Lunsford v. Shy,* 842 SE 2d 728 (W.Va. 2020) (quoting *Robinson v. Pack*, 223 W.Va. 828, 834 (2009)); *See also Brumfield v. Workman* No. 16-109 (W.Va. Mar 26, 2019)(memorandum decision holding that federal actions filed in state court are controlled by federal law). In addition to the United States Court of Appeals for the Fourth Circuit, other jurisdictions have held that pre-suit certificate requirements are not applicable to claims made pursuant to 42 U.S.C. § 1983 because such actions are not medical malpractice claims. *See Arnett v. Webster*, 658 F. 3d 742, 751 (7th Cir. 2011)(deliberate indifference claims are fundamentally distinct from a medical malpractice claim.); *Harbison v. Tanner*, 1:12-cv-01623-WTL-MJD,(S.D. Ind. 2013) (Pacer) (Dinsmore, Magistrate Order on Motion to Dismiss)(court dismissed plaintiff's claim's under the Indiana Medical Malpractice Act but did not dismiss plaintiff's 42 U.S.C. §1983 claim for deliberate indifference against the doctor).

**d) It is Well Established That Expert Testimony is Unnecessary to Establish Claims Under the Eighth Amendment for Deliberate Indifference.**

It is also well established that:

> There is no requirement, however, that a Appellant alleging deliberate indifference present expert testimony to support his allegations of serious injury or substantial risk of serious injury. Rather, the Federal Rules of Evidence apply, and expert testimony is necessary – indeed, permissible- only when it will "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). When laypersons are just "as capable of comprehending the primary facts and of drawing correct conclusions from them" as are experts, expert testimony may properly be excluded. *Salem v. U.S. Lines Co.,* 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed. 2d 313 (1962). As a result, when the seriousness of an injury or illness and the risk of leaving that injury or illness untreated would be apparent to a layperson, expert testimony is not necessary to establish a deliberate indifference claim. *See, e.g., Blackmore v. Kalamazoo Cty.*, 390 F. 3d 890, 899-900 (6th Cir. 2004); *Boring v. Kozakiewicz*, 833 F.2d 468, 473 (3d Cir. 1987).

*Scinto v. Starsberry,* 841 F. 3d 219, 230 (4th Cir. 2016).

The Court in *Scinto* went on to discuss how other circuits have also found expert testimony unnecessary in Eighth Amendment claims. In these cases, inmates alleged that prison officials deprived diabetics of insulin. *See, Lolli v. City of Orange*, 351 F. 3d 4110 (9th Cir. 2003), *Natalie v. Camden City Corr. Facility*, 318 F. 3d 575 (3rd Cir. 2003). Because it is well established that expert testimony is unnecessary in claims for deliberate indifference brought pursuant to the Eighth Amendment of the United States Constitution, Appellant should not have been required to submit a certificate of merit.

In *Sherron v. Correction Care Director I,* the Magistrate Judge recognized the distinction between a medical malpractice action and a claim for deliberate indifference when it declined to dismiss the plaintiff's lawsuit for failure to meet the pre-suit requisites for a medical professional liability action. *Sherron v. Corr. Care Dir I.*, 1:15-cv-852 at 5 (M.D. N.C. October 17, 2016) (Fastcase) (Auld, Magistrate Opinion Order and Recommendation adopted by District Court November 18, 2016). North Carolina is similar to West Virginia in that it requires a certificate from a qualified expert that they have reviewed the available medical records and that there was a breach of the standard of care. In recommending that the 42 U.S.C. § 1983 claim not be dismissed, the Court rejected the Respondent's contention that Appellant had failed to comply with N.C.R. Civ. P. 9(j) which requires certification in medical malpractice actions. *Id* at 5*; See also Deal v Central Prison Hosp.*, Civil Action No. 5:09-CT-3182-FL, 2011 WL 322403, at *4 (E.D.N.C. Jan. 27, 2011) (dismissing medical malpractice claim for failure to comply with Rule 9(j), but denying Rule 12(b)(6) motion to dismiss § 1983 claim). A similar opinion out of the Middle District of

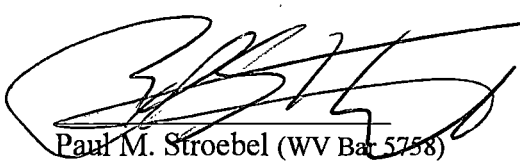
North Carolina held Rule 9(j) applies solely to medical malpractice claims and lacks relevance to section 1983 claims. *Durand v. Charles, M.D.,* 1:16-cv-86 at 17-18 (M.D. N.C. December 30, 2016) (Auld, Magistrate Opinion Order and Recommendation adopted by District Court January 26, 2017). *See also Tucker v. Duncan*, 499 F. 2d 693 (4th Cir. 1974) (Section 1983 was intended to protect only federal rights guaranteed by federal law, and not tort claims for which there are adequate remedies under state law.). Because Federal and state jurisprudence has consistently held that federal law controls actions arising under federal law, the Circuit Court's Dismissal should be overturned and the matter should be remanded for trial.

## VI.

## CONCLUSION

For the reasons set forth above, Appellant respectfully asks the Court to overturn the Dismissal Order entered below and remand the case to the Circuit Court for trial.

Respectfully submitted,
ZACH DAMRON,
By Counsel



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## CERTIFICATE OF SERVICE

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I, Paul M. Stroebel, Esq., counsel for the Appellant, do hereby certify that on the 29th day of January 2021. I caused true copies of the forgoing Appellant's Brief to be served on the Petitioner by United States First Class Mail to:

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