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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0862

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ZACH DAMRON

*Petitioner (Plaintiff Below),*

v.

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

*Respondent (Defendants Below).*

# BRIEF OF RESPONDENT, PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

*ZACH DAMRON v. PRIMECARE MEDICAL OF WEST VIRGINIA, INC., et al.*
Circuit Court of Kanawha County, West Virginia
Civil Action No. 18-C-1391

PRIMECARE MEDICAL OF WEST VIRGINIA, INC.

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## STATEMENT OF CASE

This action has a complex and extended procedural history which is utterly predominant to the legal issues presented in this appeal. Petitioner's brief summation of this procedural history omits numerous and pertinent details which are necessary for this Court's appropriate consideration of this matter. As detailed below, the trail of pleadings which led to this appeal are riddled with Petitioner's juggling of various arguments and causes of action, all with the obvious intent of avoiding the application of the statutory protections afforded to health care providers, such as PrimeCare Medical of West Virginia, Inc. ("Respondent"), by the West Virginia Medical Professional Liability Act (W.Va. Code § 55-7B-1, *et seq.*) (the "MPLA"). By doing so, Petitioner whittled away his claims to a mere Eighth Amended deliberate indifference claim which could not be supported by the facts and the Circuit Court properly dismissed.

### A. *Petitioner's Claims Below*

On or about October 5, 2016, Petitioner, Zach Damron ("Petitioner"), was incarcerated at the Western Regional Jail where he suffered an injury to his jaw during an altercation with another inmate. (*See* Compl., at ¶¶ 1, 7, *Joint Appendix*, at pp. 1-2.). Two years and twenty-seven days after his alleged injury, Petitioner, by counsel, submitted a Notice of Claim, pursuant to West Virginia Code § 55-7B-6(c), putting Respondent on notice of his potential medical malpractice claim and his belief that a Screening Certificate of Merit was not required because his anticipated claim was based on a "well-established legal theory of liability that does

not require expert testimony supporting a breach of the standard of care." (*See* Notice of Claim, *Joint Appendix*, at p. 45). More specifically, Petitioner asserted that he was delayed in being referred to a maxillofacial surgery specialist for treatment of a broken jaw and that "such failure to provide timely care is an obvious breach of the standard of care that does not require expert testimony." (*Id.*). The day after mailing his Notice of Claim, Petitioner filed his Complaint in the Circuit Court of Kanawha County, West Virginia.[1] [2] (*See generally* Compl., *Joint Appendix*, at pp. 1-5).

Petitioner's initial Complaint asserted causes of action for (i) "Violation of Plaintiff's Right Under the Constitution of the State of West Virginia and Violation of Public Policy, West Virginia Code and Policy Directives[,]" and (ii) "Intentional Infliction of Emotional Distress / Outrageous Conduct" against Respondent and John/Jane Doe Employees and Correctional Officers / Administrators. (*See* id.). A fair reading of the Complaint confirms that Petitioner's claims stemmed exclusively from his allegation that while he initially did receive medical treatment by Respondent, he "was not taken to [a] medical specialist [*i.e.*, a maxillofacial surgeon] until November 3, 2016" and "[u]pon being seen by the [maxillofacial surgeon]...was informed that nothing could be done for his jaw because extensive time had elapsed

[1] In his initial Complaint, Petitioner stated that he "is not asserting a cause of action under or pursuant to any federal law" and that he "is also not asserting an action alleging medical negligence" – despite having provided a purported pre-suit Notice of Claim required by the MPLA. (*See* Compl. at ¶¶ 5, 14 *Joint Appendix*, at pp. 2-3).

[2] The underlying record does not reveal that Respondent was ever served with this initial Complaint. (*See generally*, Docket, *Joint Appendix*, at p. 221).

from the time of his injury."[3] (*See* id.). Of note, this is the only factual basis alleged in support of any of his legal claims. (*Id.*)

Prior to perfecting service of his initial Complaint Petitioner filed an Amended Complaint on December 10, 2018, asserting the same two prior causes of action and asserting three additional causes of action for: (i) Violation of the United States Constitution Deliberate Indifference (42 U.S.C. § 1983), (ii) Negligence, and (iii) Violation of Policy and Procedure Right To Medical Care. (*See generally* Amended Compl., *Joint Appendix*, pp. at 6-13). However, yet again, the only factual basis alleged for any of these claims was the aforementioned alleged delay in sending Petitioner to an outside maxillofacial surgery specialist for further medical treatment of a broken jaw.[4] (*Id.*) On December 17, 2018, Respondent sent Petitioner's counsel notice, pursuant to *Hinchman v. Gillette*, 217 W.Va. 378, 618

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[3] Petitioner's statement in his initial Complaint that "[t]he Complaint as currently drafted does not assert a claim for medical negligence[,]" despite all of his allegations being derived from an alleged failure to provide proper medical care, is exemplary of Petitioner's targeted efforts to avoid the application of the MPLA from the inception of this action.

[4] Additionally, Petitioner's Amended Complaint contained the exact same statement as his initial Complaint – "[t]he Complaint as currently drafted does not assert a claim for medical negligence[,]" – even though Amended Complaint actually contained a specific count of "Negligence" specifically alleging that:

> 30. To the extent this action would be considered medical negligence, Defendant PrimeCare and its John/Jane Doe employees, breached a well-known standard of care by failing to provide medical care and treatment for individuals that suffer fractures. Failing to send an inmate for treatment of a jaw fracture is so obvious a breach of the standard of care that an expert is not required.
>
> 31. As a proximate result of defendants' failure to provide or transport plaintiff for treatment in accordance with the accepted standard of reasonable medical care, plaintiff has been seriously and permanently injured as well as being subjected to serious and ongoing pain and suffering.

(*See* id. at ¶¶ 14, 30, 31, *Joint Appendix*, at pp. 9, 12).

S.E.2d 387 (2005), asserting its objection to Petitioner proceeding without providing a Screening Certificate of Merit. (*See Hinchman* Notice, *Joint Appendix*, at pp. 46-48). At the time of this notice, Respondent had not yet been served with the initial Complaint or the Amended Complaint and had no knowledge that either had been filed. On April 4, 2019, Petitioner perfected service of his Amended Complaint on Respondent.

**B. *Respondent's Initial Motion To Dismiss***

On April 30, 2019, Respondent filed its initial motion to dismiss seeking dismissal of Petitioner's claims for the following reasons:

- Respondent is "health care provider" as defined by the MPLA and Petitioner failed to properly adhere to the MPLA's pre-suit filing requirements;
- Petitioner's claims are untimely and outside of the two-year statute of limitations;
- Petitioner cannot recovery monetary damages for violations of the West Virginia Constitution according to well-established law;
- Petitioner's allegations do not meet the high evidentiary threshold for a viable Eighth Amendment Claim; and
- Petitioner's claims against the John/Jane Doe defendants failed to comply with the pleading requirements of the West Virginia Rules of Civil Procedure.

(*See generally*, Def., PrimeCare Med. of W.Va., Inc.'s, Memo. of Law In Support of Motion To Dismiss and Alt. Motion for Summary Judgment, *Joint Appendix*, at pp. 14-48). Petitioner filed his Response to Respondent's motion to dismiss on May 15, 2019 arguing, *inter alia*, that he had sufficiently complied with the MPLA and that his claims should therefore not be dismissed. (*See generally*, Response to Def.'s

Motion to Dismiss, *Joint Appendix*, at pp. 49-56). Of critical note, at no time did Petitioner challenge the MPLA's application to his asserted claims. (*Id.*) Respondent filed its Reply on July 15, 2019 and a hearing was held thereafter. (*See generally*, PrimeCare Med. of W.Va., Inc.'s, Reply to Plf.'s Response to Motion to Dismiss, *Joint Appendix*, at pp. 57-62).

With regard to Respondent's motion to dismiss, the Circuit Court applied the MPLA's provisions to *all* of Petitioner's claims and ruled, in pertinent part, as follows:

> ...The Court finds that the statute of limitations was tolled, pursuant to Plaintiff filing his Notice of Claim on November 2, 2019. *The Court determines that pursuant to the Medical Professional Liability Act, Plaintiff should have filed a Screening Certificate of Merit in conjunction with his Notice of Claim. Plaintiff is hereby given sixty (60) days from the entry of this Order to provide a certificate of merit and amend his Complaint to comply with the Medical Professional Liability Act;*
>
> ***
>
> ...the Court FINDS that plaintiff's Eight Amendment claim will require expert testimony. Plaintiff shall have 30 days from the entry of this Order to substantiate a viable Eight Amendment claim by filing a Screening Certificate of Merit, unless good cause exists for extensions.

(*See* Order, at ¶¶ 1, 3, *Joint Appendix*, at pp. 63-65 (emphasis added)).[5] At no time after the Circuit Court's entry of this Order did Petitioner seek relief from the

[5] Of note, the Circuit Court also: (i) denied Respondent's argument that Petitioner's claims were outside of the two year statute of limitations, (ii) granted Respondent's motion to dismiss Petitioner's claim for monetary damages for violation of the West Virginia Constitution, and (iii) instructed Petitioner to provide a short and plain statement of the claim showing he is entitled to relief as to the John/Jane Doe defendants. (*Id.* at ¶¶ 1, 2, 4, *Joint Appendix*, at pp. 63-65).

Circuit Court's application of the MPLA to all his claims, nor did he in any way comply with the Order by providing a Screening Certificate of Merit as he was directed to do. Petitioner's failure to comply with the Circuit Court's Order, *inter alia*, prompted Respondent to renew its motion to dismiss as discussed *infra*.

### C. *Respondent's Renewed Motion To Dismiss*

On December 19, 2019, Respondent filed a renewed motion to dismiss in light of Petitioner's failure to comply with the Circuit Court's prior Order and in direct response to this Court's November 12, 2019, decision in *State ex rel. PrimeCare Med. of W.Va., Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019, which was issued just a little over a month after the Circuit Court's Order discussed *supra*. (*See generally*, Def. PrimeCare Med. of W.Va., Inc.'s, Renewed Motion to Dismiss and Alt. Motion for Summary Judgment with Supplemental Incorporated Memo. Of Law, *Joint Appendix*, at 66-95). In its renewed motion to dismiss, Respondent essentially argued that this Court's decision in *Faircloth* confirmed that the MPLA pre-suit filing requirements are jurisdictional in nature and that a circuit court has no authority to suspend such requirements and proceed in a matter without proper subject-matter jurisdiction. (*Id.*). Therefore, given that the Circuit Court had already found the MPLA applicable to *all* of Petitioner's claims (a ruling Petitioner had not challenged), it had no authority to extend the time for Petitioner to provide a Screening Certificate of Merit and because Petitioner had failed to do so, the Court lacked subject-matter jurisdiction. (*Id.*)

On January 21, 2020, Petitioner filed his response to the renewed motion to dismiss and therein abandoned his prior arguments and asserted that he "agrees to the dismissal of any claims brought pursuant to the West Virginia MPLA." (*See generally*, Response to Def.'s Motion To Dismiss Compl., *Joint Appendix*, pp. 96-102). However, Petitioner asserted that his claim for "deliberate indifference made pursuant to 42 U[.]S[.]C[.] § 1983" is not subject to the provisions of the MPLA and therefore, "not deficient in any manner." (*Id.*) This argument was, of course, inconsistent with the Circuit Court's prior rulings. (*See* Order, at ¶¶ 1, 3, *Joint Appendix*, at pp. 63-65). On February 5, 2020, Respondent filed its reply in support of its renewed motion to dismiss wherein it asserted, *inter alia*, that Petitioner's claims all sound in medical negligence and he is therefore "not permitted to hide behind the guise of a constitutional claim in order to avoid the mandatory application of the [MPLA]." (*See generally*, Def. PrimeCare Med. of W.Va., Inc.'s Reply In Support of Its Renewed Motion to Dismiss And Alt. Motion for Summary Judgment, *Joint Appendix*, at pp. 103-146).

A hearing was held on the pending renewed motion to dismiss on March 9, 2020, and on September 28, 2020, the Circuit Court entered an Order granting the motion, thereby dismissing Petitioner's claims with prejudice,[6] and setting forth various well-reasoned findings of fact and conclusions of law, including the following which are specifically relevant to the instant appeal:

[6] Respondent asserted that dismissal with prejudice was warranted because the Circuit Court had found that all of Petitioner's claims were subject to the MPLA and he had failed to provide a Screening Certificate of Merit as he was required to do; therefore, he was not entitled to any tolling of the statute of limitations afforded by the MPLA.

13. In this action, it is undisputed that PrimeCare is a "health care provider[,]" as the term is defined in the MPLA.

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15. This Court's October 13, 2019 Order specifically found that, in order to comply with the MPLA's pre-suit notice requirements, "Plaintiff should have filed a Screening Certificate of Merit in conjunction with this Notice of Claim." Accordingly, the Court have Plaintiff sixty days from the entry of that Order "to provide a certificate of merit and amend his Complaint to comply with the [MPLA.]"

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17. During the pendency of this action, the West Virginia Supreme Court of Appeals issued a *per curium* opinion in *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, recognizing that "[t]he pre-suit notice requirements contained in the [MPLA] are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction. Syl. Pt. 2, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 2019 W.Va. LEXIS 565, 835 S.E.2d at 579.

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19. Accordingly, when a claimant, such as Plaintiff in the matter *sub judice*, fails to comply with the MPLA's mandatory pre-suit requirements prior to commencing a civil action against a health care provider, such as PrimeCare, a circuit court is not permitted to take any further action other than to dismiss the action from its docket.

20. In the case at bar, the exclusive basis for Plaintiff's claims against PrimeCare concerns its alleged delay in referring Plaintiff to a maxillofacial specialist despite his numerous complaints regarding his broken jaw. *See generally* Comp.; *see also generally* Amend. Comp.

> 21. The West Virginia Supreme Court of Appeals has made clear that "[w]here the alleged tortious acts or omissions are committed by a health care provider within the context of rendering 'health care'...the [MPLA] applies regardless of how the claims have been pled." *See* Syl. Pt. 4, in part, *Blankenship*, 221 W.Va. at 700, 656 S.E.2d at 451.
>
> 22. All of Plaintiff's claims in this action, regardless of how they are pled, stem solely from the rendering, or alleged failure to render, "health care" and therefore sound in terms of medical negligence.
>
> 23. Accordingly, Plaintiff is not permitted to hide behind the guise of a constitutional claim in order to avoid the mandatory application of the MPLA or otherwise excuse his failure to provide a Screening Certificate of Merit.

(*See* Order Granting Def. PrimeCare Med. of W.Va., Inc.'s Renewed Motion to Dismiss And Alt. Motion For Summary Judgment, at ¶¶ 13., 15, 17, 19, 20, 21, 22, 23, *Joint Appendix*, at pp. 209-218 (certain internal citations omitted)). Prior to the entry of this Order, Petitioner filed a motion for reconsideration to which Respondent filed a response in opposition. (*See generally*, Motion to Reconsider Ruling Dismissing Plf.'s Claims Pursuant To 42 U.S.C. § 1983, *Joint Appendix*, at pp. 147-180; *see also generally*, Def., PrimeCare Med. of W.Va., Inc.'s, Resp. In Opp. To Plf.'s Motion to Reconsider Ruling Dismissing Plf.'s Claims Pursuant To 42 U.S.C. § 1983, *Joint Appendix*, at pp. 181-187). Petitioner subsequently filed a memorandum in support of his motion for reconsideration. (*See generally*, Memo. In Support of Plf.'s Motion to Reconsider Ruling Dismissing Plf.'s Claims Pursuant To 42 U.S.C. § 1983, *Joint Appendix*, at pp. 188-208). The Circuit Court entered an Order denying the motion to reconsider on October 8, 2020. (*See* Order Denying

Plf.'s Motion to Reconsider Ruling Dismissing Plf.'s Claims Pursuant To 42 U.S.C. § 1983, *Joint Appendix*, at pp. 219-220). Petitioner now seeks review by this Court of the Circuit Court's September 28, 2020 Order.

## SUMMARY OF ARGUMENT

This Court should affirm the decision of the Circuit Court and thereby find that it appropriately dismissed Petitioner's claims. The record below demonstrates that all of Petitioner's claims, regardless of the labels he assigned to them, sound solely in terms of medical negligence and thus are subject to the pre-suit notice requirements of the MPLA. This Court has previously expressed its disfavor of claimants playing "the name game" with their purported causes of action with the sole purpose of avoiding the legislative protections afforded to health care providers by the MPLA. Further, even if this Court finds that Petitioner's alleged deliberate indifference claim is not subject to the MPLA, the Circuit Court still properly dismissed such claim because the allegations set forth by Petitioner are utterly insufficient to substantiate a viable Eighth Amendment claim for deliberate indifference to a serious medical need. Accordingly, this Court should affirm the decision below.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent respectfully asserts that, pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is warranted in this matter pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure as this case involves assignments of error in the application of

settled law. *See* W.Va. R. App. P. 19(a). Further, Respondent respectfully asserts that a Memorandum Decision pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure is appropriate in this matter given that Petitioner's appeal does not raise any substantial question of law and presents no prejudicial error.

## STANDARD OF REVIEW

The appellate standard of review of a circuit court's order granting of a motion to dismiss a complaint 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); *see also, Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W.Va. 450, 454, 693 S.E.2d 815 (2010).

## ARGUMENT

This Court should affirm the decision of the Circuit Court dismissing Petitioner's claims for three fundamental reasons. First, the record below clearly demonstrates that Petitioner's claims (although deceitfully named) truly all sound in terms of medical negligence and are therefore subject to the MPLA and were properly dismissed based on Petitioner's failure to comply with the MPLA's pre-suit notice requirements. Second, even if Petitioner could demonstrate that he truly has a separate Eighth Amendment deliberate indifference claim, his allegations are utterly insufficient to substantiate such a claim and the Circuit Court thus properly dismissed his action. Third, permitting claimants, such as Petitioner, to proceed with such thinly-disguised "non-MPLA" claims when the true import of their allegations all sound in terms of medical negligence denies critical legislative

protections afforded by the MPLA to health care providers who choose to practice in underserved areas of public health such as Correctional Medicine.

### A. THE CIRCUIT COURT DID NOT ERROR IN ITS DISMISSAL OF ALL OF PETITIONER'S CLAIMS, INCLUDING HIS CONSTITUTIONAL CLAIM FOR DELIBERATE INDIFFERENCE PURSUANT TO 42 U.S.C. § 1983, BECAUSE THE UNDERLYING NATURE OF ALL OF SUCH CLAIMS INVOLVED THE RENDERING OR ALLEGED FAILURE TO RENDER HEALTH CARE MAKING THEM SUBJECT TO THE PROVISIONS OF THE MPLA.

Petitioner advocates for this Court to acknowledge and accept a "hide and seek" standard pursuant to which, regardless of the actual factual basis of a purported claim, a claimant can call his medical professional liability action by any other name (*e.g.*, an Eighth Amendment deliberate indifference claim) and thus simply avoid the legislatively-mandated protections afforded to health care providers by the MPLA. Here, the record below leaves no doubt that the fundamental basis of *all* of Petitioner's claims is solely that of medical negligence. This is unequivocally demonstrated by, *inter alia*, his pre-suit filing (although deficient) of an MPLA-required Notice of Claim, his briefing below in opposition to dismissal of his Amended Complaint asserting that he had, in-fact, complied with the MPLA notice requirements and the factual basis that he pled in support of his claims. (*See* Notice of Claim, *Joint Appendix*, at p. 45; *see also* Response to Def.'s Motion to Dismiss Complaint, at pp. 3-4, *Joint Appendix*, at pp. 51-52; *see also generally*, Amend. Compl., *Joint Appendix*, at pp. 6-13). In fact, the only substantive factual allegations set forth in Petitioner's Amended Complaint were that:

> After October 5, 2016, defendants PrimeCare and John/Jane Doe employees violated jail policy when they failed to obtain timely medical care for plaintiff after learning that he had suffered a broken jaw. Shortly after plaintiff suffered the broken jaw, defendants learned through x-rays that plaintiff's jaw was fractured. Despite their knowledge, defendants delayed sending plaintiff to a specialist for treatment.

(Amend. Compl. at ¶ 8, *Joint Appendix*, at p. 8).

Petitioner is not permitted to hide behind the guise of a constitutional claim in order to avoid the mandatory application of the MPLA. This Court has made unmistakably clear that "[w]here the alleged tortious acts or omissions are committed by a health care provided within the context of rendering 'health care'...the act applies regardless of how the claims have been pled." *See* Syl. Pt. 4, in part, *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 656 S.E.2d 451 (2007); *see also* Syl. Pt. 3, *State ex rel. PrimeCare Med. of W.Va., Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019). Petitioner's attempt to mask his claims under the veil of a constitutional claim as an excuse for his failure to comply with the MPLA does not shield his claims from the MPLA and therefore save them from dismissal. *See* Syl. Pt. 4, in part, *Blankenship*, 221 W.Va. at 700, 656 S.E.2d at 451 ("The failure to plead a claim as governed by the [MPLA], does not preclude application of the Act.").

In the matter *sub judice*, there is no dispute that Respondent is a "health care provider"[7] as the term is defined in the MPLA. *See* W.Va. Code § 55-7B-2(g);

[7] "Health care provider" means a person, partnership, ***corporation***, professional limited liability company, health care facility, entity or institution ***licensed by, or certified in, this state or another state, to provide health care or professional health care services***, including, but not

(*see also* Amend. Compl. at ¶ 3, *Joint Appendix*, at p. 7 (stating PrimeCare is "responsible for facilitating the transportation of inmates for medical care when needed."); *see also* Response to Def.'s Motion to Dismiss Compl. at p. 1, *Joint Appendix*, at p. 96 (stating PrimeCare "is a health service business...responsible for providing proper and timely care to the plaintiff.")). Further, there is no dispute that all of Petitioner's claims, regardless of how they are plead, stem solely from the rendering of, or alleged failure to render, "health care,"[8] and therefore sound exclusively in terms of medical negligence. (*See generally* Amend. Compl., *Joint Appendix*, at pp. 6-13.) Specifically addressing Plaintiff's "deliberate indifference" claim, he asserted only that Respondent violated his medical needs by allegedly delaying the rendering of outside medical treatment for his broken jaw. (*See* id. at ¶ 19, *Joint Appendix*, at p. 10). Those allegations, although labeled as "deliberate indifference" by Petitioner, fit precisely into the MPLA's definition of "medical

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limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment. *See* W.Va. Code § 55-7B-2(g) (emphasis added).

[8] "Health care" means...(2) ***any act, service or treatment*** performed or furnished, ***or which should have been performed or furnished, by any health care provider*** or person supervised by or acting under the direction of a health care provider or licensed professional ***for, to or on behalf of a patient during the patient's medical care, treatment or confinement***, including, but not limited to, staffing, ***medical transport, custodial care or basis care***, infection control, positioning, hydration, nutrition and similar patient services. *See* W.Va. Code § 55-7B-2(e)(2) (emphasis added).

professional liability." *See* W.Va. Code § 55-7B-2(i). Specifically, the MPLA defines "medical professional liability" as follows:

> ...*any liability for damages resulting from the* death or *injury of a person* <u>*for any tort*</u> or breach of contract *based on health care services* rendered, or <u>*which should have been rendered*</u>, *by a health care provider* or health care facility to a patient. **It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided**, all in the context of rendering health care services.

*Id.* (emphasis added). Petitioner's claims, regardless of the arbitrary labels he assigns to them, are simply claims for "damages resulting from the injury of a person based on health care services which should have been rendered by a health care provider." (*See generally* Amend. Compl, *Joint Appendix*, at pp. 6-13); *cf.* id. It is clear, especially in light of the analysis set forth *infra*, that Petitioner's deliberate indifference claim is merely a contemporaneous claim ultimately relating to the rendering, or alleged failure to render, health care services. Therefore, he cannot avoid the MPLA's application in this matter and, as result of his failure to properly comply with the MPLA's pre-suit notice requirements, the Circuit Court appropriately dismissed his claims. Therefore, this Court should affirm the decision of the Circuit Court.

### B. EVEN IF PETITIONER CAN DEMONSTRATE THAT HIS CLAIM FOR DELIBERATE INDIFFERENCE PURSUANT TO 42 U.S.C. § 1983 IS NOT SUBJECT TO THE MPLA, THE CIRCUIT COURT'S DISMISSAL OF SUCH CLAIM WAS NOT IN ERROR BECAUSE HE FAILED TO PLEAD ALLEGATIONS SUFFICENT TO SUBSTANTIATE A VIABLE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE CLAIM.

Even assuming *arguendo* that Petitioner is correct and can show that his Eighth Amendment deliberate indifference claim is truly separate and distinct form his other claims and arguably not subject to the MPLA, the Circuit Court's ultimate dismissal of such claim was not in error.

As Petitioner notes in his brief, the Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, including the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). To comply with the Eighth Amendment, each State must provide its sentenced prisoners with "adequate food, clothing, shelter, and medical care...." *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d. 251 (1976). A prison official, including a correctional medical professional, violates the Eighth Amendment when he or she responds to a prisoner's serious medical need with deliberate indifference. *See Estelle*, 429 U.S. at 104; *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

In 1976, the United States Supreme Court set the standard for evaluating whether a prisoner's Eighth Amendment right to be free from cruel and unusual punishment was violated based upon a prison health care provider's deliberate indifference to the prisoner's serious medical needs. *Estelle*, 429 U.S. at 97. The standard is of a two-pronged nature and includes a subjective prong (*i.e.*, deliberate indifference) and an objective prong (*i.e.*, to a serious medical need). *See* id. Addressing the objective prong first, "serious medical needs" are those which have been diagnosed by a physician as mandating treatment or that are so obvious that

even a lay person would easily recognize the necessity for a doctor's attention. *Gaudreault v. Munic of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990); *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (quoting *Henderson v. Sheanhan*, 196 F.3d 839, 846 (7th Cir. 1976).

Second, the subjective prong of "deliberate indifference" is an extraordinarily high bar to overcome. *See Gaylor v. Dagher*, 2011 U.S. Dist. LEXIS 12400, at *20, 2011 WL 482834 (S.D.W. Va. January 14, 2011) ("The burden of demonstrating deliberate indifference to a serious medical need by...health care providers is very high"). This subjective prong requires that an inmate show that the prison health care provider "knows of and disregards" the risk posed by the serious medical needs of the inmate. *Farmer*, 511 U.S. at 837. Thus, buried within the test for the subjective prong are two additional and specific elements of the prison health care provider's state of mind that *must* be shown to sufficiently establish the subjective prong of "deliberate indifference." First, *actual knowledge* of the risk of harm to the inmate is required. *Young v. City of Mt. Ranier*, 238 F.3d 567, 575-76 (4th Cir. 2001); *see also Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) ("It is not enough that the officer *should* have recognized it."). Second, beyond such actual knowledge, the prison health care official must also have "recognized that his [or her] actions were insufficient" to mitigate the risk of harm to an inmate arising from his medical needs. *Parrish*, 372 F.3d at 303.

Critically, a simple delay of medical care does not axiomatically translate into a "constitutional liability[;]" nor do mere disagreements between medical providers

and inmates. *See Farmer*, 511 U.S. at 834; *see also, Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985) ("Disagreements between an inmate and a physician over the inmate's proper medical care do not state a § 1983 claim unless exceptional circumstances are alleged."). The subjective prong of "deliberate indifference" entails "something more than mere negligence." *See* id. Neither mere malpractice, nor mere negligence in diagnosis gives rise to an Eighth Amendment claim. *See Green v. Rubenstein*, 644 F. Supp. 2d 723, 731, 2009 U.S. Dist. LEXIS 22368, *9-10 (S.D. W.Va., March 18, 2009) (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 conscious or to be intolerable to fundamental fairness" *Green*, 644 F. Supp. 2d at 731-32, 2009 U.S. Dist. LEXIS 22368, at *10 (citing *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990)).[9]

In the matter *sub judice*, the record below demonstrates that Petitioner suffered an injury to his jaw during an alternation with another inmate and received prompt medical attention by Respondent. (*See* Def., PrimeCare Med. of W.Va., Inc. Memo. of Law In Support of Motion to Dismiss and Alt. Motion for Summary Judgment at pp. 2-4, *Joint Appendix*, 15-17). During the course of receiving medical care by Respondent, Petitioner indisputably received x-rays, a computed tomography (CT) scan, was housed in a medical unit and arrangements

[9] It should also be noted that "[m]ultiple courts have held that inmates are not entitled to unqualified access to healthcare" and "inmates are not entitled to be best medical care or the particular medical care of the inmate's choosing." *See Stevens v. Jividen*, 2021 U.S. Dist. LEXIS 39480, at *43-44 (N.D.W.Va. January 5, 2021) (citing *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977); *Wright*, 776 F.2d at 841-849; *Witherspoon v. United States*, 2010 U.S. Dist. LEXIS 107159 *10 (S.D.W. Va. September 27, 2010)).

were made for Petitioner to be seen by an outside maxillofacial surgery specialist. (*Id.*) Of course, as one would reasonably expect, all of this medical care was not instantaneous. Petitioner was not immediately seen by the outside maxillofacial surgery specialist shortly after his injury as he apparently believes he should have been. Instead, Petitioner first received other forms of medical care such as x-rays and a CT scan all of which were necessary prerequisites to diagnosing his injuries and ultimately determining the need for an outside specialist. (*Id.*)

In fact, Petitioner summarized his undisputed treatment course in his briefing below to the Circuit Court as follows:

> Defendant's medical records set forth the following timeline:
>
> 1) October 6, 2016 – Inmate seen in medical for jaw pain.
>
> 2) October 8, 2016 – Damron informs correctional offices that he has a fractured jaw and has not been seen despite putting in sick calls.
>
> 3) October 8, 2016 – EMDS called for x-ray.
>
> 4) October 8, 2016 – Mandible x-ray, Films electronically limited – limited study with nondisplaced fracture of the right mandible.
>
> 5) October 9, 2016 – called on doctor for x-ray, results orders obtained.
>
> 6) October 11, 2016 – Continue in medical due to fx jaw.
>
> 7) October 11, 2016 – Continue to house in medical unit CT Scan completed.
>
> 8) October 14, 2016 – will f/u with oral surgery and CT.

9) October 21, 2016 – CT scan shows both right and left mandibular fractures as well as nasal bone fractures.

10) October 31, 2016 – awaiting follow-up with oral surgeon for fractured mandible.

11) November 3, 2016 – note from maxillofacial surgeon – no treatment.

(Response to Def.'s Motion to Dismiss Compl., at pp. 1-2, *Joint Appendix*, at pp. 49-50; *see also*, Response to Def.'s Motion to Dismiss Compl. at p. 2, *Joint Appendix*, at p. 97). Petitioner's own summary demonstrates that Petitioner was promptly treated subsequent to this injury and that Respondent appropriately coordinated with outside entities for the testing necessary to diagnosis the scope of Petitioner's injury. (*Id.*) It is undisputed that Petitioner was promptly seen and evaluated in the medical unit. (*Id.*; *see also* Def., PrimeCare Med. of W.Va., Inc. Memo. of Law In Support of Motion to Dismiss and Alt. Motion for Summary Judgment at pp. 2-4, *Joint Appendix*, 15-17). The medical unit evaluation included a physical examination and vitals check. (*Id.*) Thereafter, when Petitioner had continued complaints of pain, an x-ray was obtained which showed a questionable nondisplaced fracture and thus required further diagnostic testing, including a CT. (*Id.*) A CT was obtained within thirteen days of the questionable x-ray and an appointment with an outside maxillofacial surgery specialist was obtained within thirteen days after the CT. (*Id.*)

However, this record also indisputably shows that the delays which did occur were the result of obtaining x-ray and CT services from outside providers, as well as delays in scheduling with the outside maxillofacial surgery specialist – despite

documented routine follow up requests by Respondent. (*Id.*) The timing of such events is outside of Respondent's control and Respondent cannot be said to have acted with deliberate indifference because of delays caused by outside providers. *See e.g.*, *Madera v. Ezekwe*, 2013 U.S. Dist. LEXIS 171948, 2013 WL 6231799, * 12 (E.D.N.Y. December 2, 2013) (observing that courts have "refused to find deliberate indifference where delays in treatment were caused by circumstances that were outside the control of the charged officials."); *see also e.g.*, *Henderson v. Sommer*, 2011 U.S. Dist. LEXIS 37202, 2011 WL 1346818 (S.D.N.Y. April 1, 2011) (holding that where an inmate "was treated regularly with pain medication and orthopedic consults prior to surgical intervention, where any delay before surgery appears to have resulted from a third-party's scheduling constraints...[p]laintiff's Eighth Amendment claim must fail.") (internal quotation marks and citations omitted).

In his brief, Petitioner relies almost exclusively, on the United States District Court for the Southern District of West Virginia's decision in *Green v. Rubenstien*, 644 F. Supp. 2d 723, 2009 U.S. Dist. LEXIS 22368, (S.D.W .Va., March 18, 2009) in support of his argument that a slight delay in being seen by an outside medical specialist is sufficient to substantiate s viable deliberate indifference claim. *See* Petitioner's Brief at pp. 5-6. However, even a rudimentary reading of *Green* reveals the opposite. In *Green*, the plaintiff argued, *inter alia*, that a prison dentist's delay in providing medical care (*i.e.*, removing a tooth fragment) caused him pain and suffering in violation of the Eighth Amendment and that he was entitled to relief. *Id.* The District Court assumed for purposes of analysis that the plaintiff's medical

needs were sufficiently serious and thus the objective prong of the Eighth Amendment standard was satisfied. *Id.* at 732, 2009 U.S. Dist. LEXIS 22368, at *10. However, in determining whether the plaintiff's complaint set forth sufficient factual allegations to satisfy the subjective prong and show that the prison dentist was deliberately indifferent, the District Court in *Green* noted the following facts:

> Plaintiff alleges that Dr. DeVere became aware that Plaintiff needed dental care to remove a tooth fragment or bone on September 8, 2006, but did not treat Plaintiff until May 3, 2007. The medical records show that Dr. DeVere provided Plaintiff with dental services four other times between those dates – on September 11, 2006, September 27, 2006, January 12, 2007, and April 26, 2007. Notably, the record indicates that in April 26, 2007, Dr. DeVere examined Plaintiff in response to Plaintiff filing a G-1 grievance form on April 19, 2006. During that examination, Dr. DeVere recorded in Plaintiff's medical record that Plaintiff's tooth fragment needed to be removed. On May 3, 2007, Dr. DeVere performed oral surgery on Plaintiff.
>
> During the eight-month time period in question, Plaintiff received medical attention five times and refused treatment one other time. The record indicates that some of Plaintiff's examinations were regarding adjustments of his dentures rather than the removal of his tooth fragment. Nevertheless, five meetings in the course of eight months indicates that Dr. DeVere provided treatment that was far from grossly inadequate.

*Id.* at 732, 2009 U.S. Dist. LEXIS 22368, at *10-11. Thus, even the factual allegations presented to the District Court in *Green*, demonstrating an eight month delay in removing the plaintiff's tooth fragment (an assumed serious medical need), did not ultimately amount to deliberate indifference.[10]

[10] As Petitioner notes in his Brief, the Magistrate Judge's Proposed Findings and Recommendations in *Green* noted that the plaintiff could maintain a medical negligence action subject to the MPLA

*Green* represents just one of many examples in which courts have refused to recognize the validity of purported deliberate indifference claims when the true nature of the claim at issue is simply a disagreement over proper medical care – especially so in cases involving an alleged delay in medical treatment. In such cases, the courts have found that such claims involve medical negligence, at best, which does not satisfy the requirements of a deliberate indifference claim. *See Farmer*, 511 U.S. at 834; *see also, Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). Other examples include the United State District Court for the Southern District of West Virginia's decision in *Gaylor v. Daugher* where the plaintiff alleged that he suffered an injury to his eye during a procedure which required a follow up procedure to immediately correct. *Gaylor*, 2011 U.S. Dist. LEXIS 12400, at *2-6. The plaintiff in *Gaylor* further alleged, *inter alia*, that he wanted to obtain a second option from an outside provider prior to proceeding with the needed second procedure and was denied the opportunity to do so. *See* id.

The District Court in *Gaylor* thoroughly examined the plaintiff's alleged deliberate indifference claim and concluded that "the allegations do not rise to the level of deliberate indifference. At most, [the] [p]laintiff's allegations amount to a claim of negligence, which is not cognizable under section 1983."[11] *Id.* at *22.

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independent of his Eighth Amendment claim, but ultimately dismissed his medical negligence claim for failure to comply with the MPLA and proceeded to separately analyze the plaintiff's Eighth Amendment claim. *See generally, Green v. Rubenstein*, 664 F. Supp. 2d 723, 2009 U.S. Dist. LEXIS 122993 (S.D.W. Va. February 26, 2009). This approach is similar to that analysis undertaken by the Circuit Court in this matter.

[11] The *Gaylor* court also noted that "in *Sosebee*, the Fourth Circuit found that if prison guards were aware that a steak bone had pierced an inmate's esophagus, causing infection that resulted in the

Further, the District Court in *Gaylor* went on to explain that the plaintiff's allegations may have supported a medical negligence claim, but that the plaintiff (much like Petitioner here) could not proceed with such claim due his failure to comply with the MPLA's pre-suit notice requirements. *Id.* at *23-29. Further, such position is also supported by the United States Court of Appeals for the Fourth Circuit's decision in *Wester v. Jones* where the plaintiff made numerous complaints about pain after an initial eye examination, but was never reexamined despite such complaints. *See Wester v. Jones*, 554 F.2d 1285, 1977 U.S. App. LEXIS 13313, at *2-3 (4th Cir. 1977). The court in *Wester* summarily concluded that such allegations of medical negligence failed to give rise to a claim for deliberate indifference. (*Id.*)

In this action, Petitioner's factual allegations amount to nothing more than claims of alleged ***medical negligence*** and do not contain any allegations of actual intent or reckless disregard that would rise to the level of deliberate indifference. The Circuit Court was obviously conscious of such and thus recognized that based on the allegations set forth by Petitioner an MPLA medical negligence claim was likely his only cognizable avenue of recovery. However, after the Circuit Court provided Petitioner with an opportunity to save his purely medical negligence based claims by affording him additional time to provide a Screening Certificate of Merit,[12] Petitioner refused to comply to his own detriment, and his claims were

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inmate's death, and the guards had intentionally abstained from seeking medical help, such conduct ***might*** establish deliberate indifference to a serious medical need." *See* id. at *21.

[12] Though inconsistent with this Court's holding in *State ex rel PrimeCare Med. of W. Va., Inc.*, 242 W.Va. 335, 835 S.E.2d 579, which had not yet been decided.

therefore dismissed. Accordingly, the Circuit Court's dismissal of such claims was not in error and should therefore be affirmed by this Court.

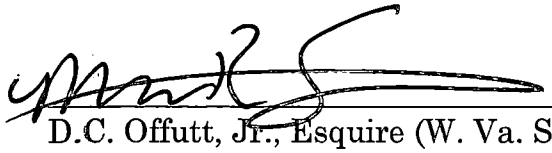
## CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Court affirm the decision of the Circuit Court and further grant it any and all other relief that this Court deems just and proper.

**RESPECTFULLY SUBMITTED**

**PRIMECARE MEDICAL OF WEST VIRGINIA, INC.**

**By Counsel:**



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## CERTIFICATE OF SERVICE

I, Mark R. Simonton., counsel for Respondent, PrimeCare Medical of West Virginia, Inc., do hereby personally certify that a true and correct copy of the foregoing ***"Brief of Respondent, PrimeCare Medical of West Virginia, Inc."*** was served upon the following by depositing an envelope containing the same in the United States Mail, First Class, postage prepaid, this **15th** day of **March, 2021** addressed as follows:

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