

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**MARY F. MYERS, Individually and as
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,**

Plaintiff,

v.

**Civil Action No. 24-C-842
Judge Tera Salango**

**WEXFORD HEALTH SOURCES, INC.,
NILAY B. THAKER, D.O., and JOHN/JANE
DOE CORRECTIONS OFFICERS,
WEST VIRGINIA DIVISION OF
REHABILITATION,**

Defendants.

**ORDER DENYING DEFENDANT WEST VIRGINIA
DIVISION OF CORRECTIONS AND REHABILITATION'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

On this 19th day of March 2025, having considered Defendant West Virginia

Division of Corrections and Rehabilitation's Motion to Dismiss, Plaintiff's Response to Motion to Dismiss, and Defendant West Virginia Division of Corrections and Rehabilitation's Reply to Plaintiff's Response to Defendant West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss the Court **FINDS** there is no basis of fact or law to support Defendant West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss, and, therefore Defendant's Motion is hereby **DENIED** for the reasons set forth below.

FINDINGS OF FACTS

Plaintiff's decedent, Ronald M. Myers' date of birth is February 28, 1943, and was an elderly man when he arrived at Eastern Regional Jail in June 2022. The health care provided by Defendant Wexford to Ronald Myers was to include intake medical screenings and ongoing assessments so as to determine any physical and mental health conditions which would necessitate

care, immediate or otherwise, to be provided by Defendant Wexford itself at the ERJ or to be provided by a different health care facility or individual provider outside of the ERJ.

The medical screenings and assessments should have included obtaining accurate and sufficient information respecting Ronald Myers' diabetes and the risks and medical concerns carried with his acute myocardial infarction, acute respiratory failure with hypoxia, chronic kidney disease Stage 3, coronary artery disease, chronic heart failure, with reduced ejection fraction, and non-ST elevated myocardial infarction so that proper care could ensue. After Ronald Myers' arrival at ERJ, on June 23, 2022, he evidenced signs of cognitive impairment. Specifically, Mr. Myers could not recall the names of the medications prescribed to him or the name of the prescribing physician. No referral was placed to have Mr. Myers evaluated by a psychologist. Mr. Myers did advise the intake medical staff that his wife would know the names of his medications and his physician. It does not appear that the medical staff made an effort to communicate with Mrs. Myers to obtain Mr. Myer's medication information or the name of his treating physician.

Ronald Myers' vitals were taken on June 23, 2022, and on the day he was found unresponsive. The medical records from Wexford include a medical refusal dated July 10, 2022, that is not signed by Mr. Myers. On July 11, 2022, the Wexford medical staff and the ERJ corrections staff informed the emergency room staff at WVU Berkeley Medical Center that Mr. Myers had refused to take his medication for a couple of days and that on the morning of July 11, 2022. Discovery will show that medical staff cannot check on inmates without corrections officer present.

According to John/Jane Doe Corrections Officer on the morning of July 11, 2022, Mr. Myers was found lying on his bunk "presumably asleep" and later that afternoon found to have an altered mental state and had not left the bed all day. John/Jane Doe Corrections Officers did not

check Mr. Myers to determine if he was sleeping that morning or to determine why he did not move for several hours that day. In addition to complete “left-sided neglect” being reported by John/Jane Doe Corrections Officers, it was also reported that Ronald Myers was last “normal” on July 10, 2022.

Wexford medical staff informed emergency room staff at WVU Berkeley Medical Center that Mr. Myers had not eaten for a week and that he had been off his Plavix and cholesterol medication. They further indicated that Mr. Myers’ cellmate stated that Mr. Myers had been altered for a few days. None of the information provided to the emergency room medical staff by the Wexford staff and the corrections staff, including John/Jane Doe Corrections Officer, were included in the medical records and inmate files for ERJ.

As alleged in the Complaint, Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, had knowledge that Mr. Myers was sick and exhibited signs of cogitative impairment for days prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *See* Exhibit 1, Complaint, paragraph 48, pgs. 8-9. Plaintiff’s Complaint further asserts Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, had knowledge that Mr. Myers was not eating for days prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *Id.* at paragraph 49, pg. 9. Plaintiff continues to allege Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, had knowledge that Mr. Myers was not receiving his prescribed medication for several weeks prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *Id.* at paragraph 50, pg. 9.

CONCLUSIONS OF LAW

A. Standard of Review

Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* allows dismissal of a claim for “failure to state a claim upon which relief can be granted.” W. Va. R. Civ. P. 12(b)(6). Such a motion “is viewed with disfavor.” *Fass v. Newsco Well Service, Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 51 (1986). As the Supreme Court of Appeals of West Virginia explained:

The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 53, 717 S.E.2d 235, 239 (2011) (internal quotation marks and citations omitted). See also, *Boone v. Activate Healthcare, LLC*, 245 W. Va. 476, 859 S.E.2d 419, 422 (2021); *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977); *Conley v. Gibson*, 355 U.S. 41, (1957). The court must construe the factual allegations in the light most favorable to the plaintiff. *Boone*, 859 S.E.2d at 442. In considering a motion to dismiss, it is a basic tenet that a court must accept all the factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Rule 12(b)(6) authorizes a party to file a motion to dismiss for “failure to state a claim upon which relief can be granted” in lieu of filing a responsive pleading to a claim, counterclaim, cross-claim, or third-party claim. This procedural device provides a means of “test[ing] the sufficiency of the complaint[.]” *Cantley v. Lincoln Cnty. Comm’n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (per curiam), and exists to “weed out unfounded suits[.]” *Scott Runyan Pontiac-Buick*, 194 W. Va. at 776, 461 S.E.2d at 522. The West Virginia Supreme Court of Appeals held, “Our review

of the case is limited to the sufficiency of the complaint[.]” *Id.* at 522 n.7.

However, “[a] court should not dismiss a case simply because it believes it is unlikely that the plaintiff will prevail.” *McGinnis v. Cayton*, 173 W. Va. 102, 104, 312 S.E.2d 765, 768 (1984). The question is not whether a plaintiff has “a strong case, but rather whether [he or she] ha[s] any case.” *Id.* at 105, 312 S.E.2d at 768 (emphasis added). West Virginia law reflects a “preference . . . to decide cases on their merits[.]” *Yurish v. Sinclair Broad. Grp., Inc.*, 866 S.E.2d 156, 161 (2021) (quoting *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008) (per curiam)). Therefore, we require “[a] trial court considering a motion to dismiss under Rule 12(b)(6) [to] liberally construe the complaint so as to do substantial justice.” *Cantley*, 221 W. Va. at 470, 655 S.E.2d at 492 (emphasis added). Indeed, we have stated that “motions to dismiss are viewed with disfavor,” and we have “counsel[ed] lower courts to rarely grant such motions.” *Forshey v. Jackson*, 222 W. Va. 743, 749, 671 S.E.2d 748, 754 (2008).

When a party files a motion to dismiss under Rule 12(b)(6), “the pleading party has no burden of proof. Rather, the burden is upon the moving party to prove that no legally cognizable claim for relief exists.” *Mountaineer*, 244 W. Va. at 520, 854 S.E.2d at 882. The “court reviewing the sufficiency of a complaint . . . should presume all of the plaintiff’s factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff.” *Id.* A plaintiff “is not required to establish a prima facie case at the pleading stage.” *Id.* at 522, 854 S.E.2d at 884. On the contrary, “to survive a motion under Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable claim), would justify some form of relief.” *Mountaineer*, 244 W. Va. at 521, 854 S.E.2d at 883. Dismissal of a complaint under Rule 12(b)(6) is inappropriate “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (emphasis added).

The factual allegations set forth in Plaintiff's *Complaint* (as well as all reasonable inferences that can be drawn from such allegations) must be: (1) accepted as true; and (2) viewed in the light most favorable to Plaintiff. Moreover, Defendant's motion raises issues of fact which have not had the benefit of discovery, and which preclude resolution by way of a motion to dismiss.

B. Deliberate Indifference of Clearly Established Laws is Valid Cause of Action.

Deliberate indifference in West Virginia can be inferred based upon specific, often reckless, actions on the part of a defendant that violate duties and standards recognized in precedent decisions or related state statutes. The duty and breach of duty in a deliberate indifference claim may be averred generally in a complaint. As noted by the West Virginia Supreme Court: "W. Va. R. Civ. P. 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Negligence may be averred generally, as may malice, intent, knowledge, and other condition of mind of a person. *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W. Va. 515, 520 (2023)(emphasis added.)

The West Virginia Intermediate Court of Appeals recently recognized a cause of action for deliberate indifference of a serious medical need filed as a state-law claim. *See, West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA-148 (W.Va. ICA July 15, 2024) (*See Exhibit 3*). In *Iacovone*, the plaintiff filed his complaint in the Circuit Court of Kanawha County and included Count III, Violations of Clearly Established Law. Plaintiff alleged constitutional violations of his decedent, an inmate at a WVDCR facility; alleged that employees of WVDCR failed to properly treat Mr. Iacovone or provide him the care necessary to survive; and asserted that WVDCR intentionally, willfully, and wantonly chose to ignore Mr. Iacovone's

condition. In upholding a jury verdict in favor of the Plaintiff and denying an appeal of Defendant's Rule 59 motion for new trial, the Intermediate Court of Appeals accepted the instruction offered by Plaintiff regarding deliberate indifference. The proffered instruction adopted by the Circuit Court and the Intermediate Court stated:

This Court instructs the jury that to be liable, "[d]eliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care."

This Court instructs the jury that deliberate indifference is more than mere negligence, but less than acts or omissions done for the very purpose of causing harm or with knowledge that harm will result. Deliberate indifference to the rights of others is the conscious or reckless disregard of the consequences of one's acts or omissions. While deliberate indifference is more than mere negligence or ordinary lack of due care, it is less than acting with a specific purpose to cause harm or less than having knowledge that a harm will result.

West Virginia Division of Corrections and Rehabilitation v. Iacovone, No. 23-ICA-148 FN 15 (W.Va. ICA July 15, 2024). The Intermediate Court of Appeals held: "While the provided instruction does not break down the considerations into discrete elements, a plain reading of the instruction references that Respondent needed to 'show [] that defendants . . . ignored a detainee's serious need for medical care[.]' in order to satisfy its burden." *Id.* at p.11.

The West Virginia Supreme Court recently agreed that "some actions can be so obvious that there is no requirement for there to be a specific case, statute, or regulation on point to meet the clearly established law requirement. *See W.Va. Dep't of Hum. Servs. v. David B.*, LEXIS 504, FN 13. (W.Va. Supreme Court, November 14, 2024) (*See Exhibit 4*). A plaintiff must only identify some predicate body of law from which the alleged right at issue emanated. *Id.*, citing *Simms v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018) (the exact conduct at issue need not previously have been deemed unlawful for the law governing an officer's actions to be clearly established; determine whether pre-existing law makes the unlawfulness apparent.)

Deliberate indifference is similar to many of the tort claims recognized in West Virginia which are not based on any particular statute, but rather, have developed as a matter of course from common law. For example, there is no statute that declares “negligence” as a cause of action, but the claim has been clearly established by case law and recognized in multiple statutes.¹ A plaintiff pursuing a negligence claim must satisfy four elements: duty, breach, causation, and damages. “In order to recover in an action based on negligence the plaintiff must prove that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury of which the plaintiff complains.” Syl. Pt. 1, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953); *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118, 2 S.E.2d 898, 899 (1939); *Orso v. City of Logan*, 249 W. Va. 602, 607, 90 S.E.2d 28, 33 (2024). “In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.” *Id.*; Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981). “Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute; but is always relative to some circumstances of time, place, manner, or person.” *Orso*, 249 W.Va. at 607, 90 S.E. 2d at 33; Syl. Pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S.E. 582 (1895). A claim for negligence cannot be based upon an intentional act. *Clark v. Dunn*, 465 S.E.2d 374, 375 (W. Va. 1995).

Deliberate indifference is often compared to negligence or gross negligence. However, “Gross negligence” is not the same as “deliberate indifference.” The terms “gross negligence” and

¹ West Virginia Governmental Tort Claims and Insurance Reform Act, *W. Va. Code* § 29-12A-1, *et seq.* provides that political subdivisions are liable for various negligent acts of employees but contains no precise definition of “negligence.”

“deliberate indifference” are sometimes confused and interchanged; however, “deliberate indifference” is a stricter standard. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994). “Gross negligence” is a heightened degree of negligence, whereas “deliberate indifference” is a “lesser form of intent.” *Id.* at n.7 (citation omitted). A showing of heightened negligence is insufficient to state a claim for deliberate indifference. *Bd. of the Cty. Comm’rs of Bryan Cty., Okla. V. Brown*, 520 U.S. 397, 407 (1997); *Christensen v. Mejia*, Civil Action No. 3:15-CV-854-L (N.D. Tex. Jul 03, 2017).

Deliberate indifference is distinguished by its own particular and specified standards and duty of care. As noted by the United States Supreme Court in considering deliberate indifference as it applied to a civil rights claim under 42 U.S.C. §1983:

Although we have never paused to explain the meaning of the term “deliberate indifference,” the case law is instructive. The term first appeared in the United States Reports in *Estelle v. Gamble*, 429 U. S., at 104, and its use there shows that deliberate indifference describes a state of mind more blameworthy than negligence. In considering the inmate’s claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished “deliberate indifference to serious medical needs of prisoners,” *ibid.*, from “negligence in diagnosing or treating a medical condition,” *id.*, at 106, holding that only the former violates the Clause. We have since read *Estelle* for the proposition that Eighth Amendment liability requires “more than ordinary lack of due care for the prisoner’s interests or safety.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Farmer v. Brennan, 511 U.S. 825, 835 (1994), *abrogated on other grounds by Bistrrian v. Levi*, 912 F.3d 79, 84 (3d Cir. 2018) (emphasis added.)

The United States Supreme Court in the *Farmer* decision went on to explain that while deliberate indifference in a constitutional violation context entails something more than mere negligence, a claim for deliberate indifference can be satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result., and must show more than indifference, deliberate or otherwise. *Farmer v. Brennan*, 511 U.S. 835. “With

deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.” *Id.* (emphasis added).

The United States Supreme Court later relied again on *Farmer* when it applied a claim for reckless indifference to the Fair Credit Reporting Act (FCRA):

While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); see *Prosser and Keeton* § 34, at 213-214. The Restatement, for example, defines reckless disregard of a person's physical safety this way:

"The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Restatement (Second) of Torts* § 500, p 587 (1963-1964).

It is this high risk of harm, objectively assessed, that is the essence of recklessness at common law. See *Prosser and Keeton* § 34, at 213 (recklessness requires "a known or obvious risk that was so great as to make it highly probable that harm would follow").

Safeco Ins. Co. of Am. V. Burr, 551 U.S. 47, 69-70 (2007).

In short, in the light of pre-existing law, the unlawfulness of an act must be apparent. *Anderson v. Creighton*, 483 U.S. 635, 640, (1987); *Hope v. Pelzer*, 536 U.S. 730 (2002). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Malley v. Briggs*, 475 U.S. 335, 341, (1986). If there are no such decisions from courts of controlling authority, one may look to a consensus of cases of persuasive authority from other jurisdictions if such exists. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017). "We must consider not only 'specifically adjudicated rights,' but also

“those manifestly included within more general applications of the core constitutional principles invoked.” *Id.*, 855 F.3d at 538.

Deliberate indifference is also recognized in other clearly established laws in West Virginia. Rule 8 of the *W.Va. R. Civ. P* contemplates deliberate indifference or a form of intent when it states that a pleading only needs to aver generally a condition of mind of a person. Many claims for acts that are obviously unlawful, reflect a condition of mind, and result in violations of clearly established laws are alleged as “reckless conduct” which, like negligence, is not necessarily defined by statute. The West Virginia Governmental Tort Claims and Insurance Reform Act, *W. Va. Code* § 29-12A-1, *et seq.* contemplates claims for negligence, malice, bad faith, or acts performed in a wanton or reckless manner. The Medical Professional Liability Act, *W.Va. Code* § 55-7B-9b provides that an action may be maintained against a health care provider who “rendered or failed to render health care services in willful and wanton or reckless disregard of a foreseeable risk of harm to third persons.” *Id.*

In applying precedent cases such as *Iacovone*, as well as statutes that acknowledge claims for recklessness, deliberate indifference to clearly established laws is a valid and recognized cause of action in West Virginia. It is based upon common law principles of a duty, a condition of mind of a person, and a breach of that duty. The breach is a violation of clearly established laws, including, but not necessarily limited to, decisions that recognize recklessness and a disregard of the safety of a person. On a state basis, deliberate indifference does not need to include violations of the West Virginia Constitution.

C. “Deliberate Indifference” Applies to More Than Constitutional Claims.

In the federal court arena, the term “deliberate indifference” of clearly established laws has long been the standard for violating federal statutes, mainly 42 U.S.C. §1983. However, “deliberate

indifference” does not only apply to civil rights violations; it is also a standard for other actions that are not considered constitutional claims.

The Fourth Circuit, for example, has held that deliberate indifference comes into play when considering a Title XI violation for harassment. *See, Doe v. Charlotte Mecklenburg Bd. of Educ.*, 3:18-cv-00586-RJC-DSC (W.D. N.C. Jan 25, 2023) (upheld discrimination claim under 20 U.S.C. § 1681); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc). These cases recognize the “paradigm of actual notice and deliberate indifference that was formulated by the Supreme Court and further developed by the Fourth Circuit. In defining the contours of the private cause of action that it implied under Title IX, see *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979), the Supreme Court has explained that “a private damages action may lie against the school board in cases of student-on-student harassment . . . where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities,” *Davis*, 526 U.S. at 633 (emphasis added); see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (explaining that “it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district” for sexual harassment “without actual notice to a school district official”).

The United States Supreme Court also applied a deliberate indifference standard to violations of the Fair Credit Reporting Act (FCRA) *See, Safeco Ins. Co. of Am. V. Burr*, 551 U.S. 47 (2007). The Fourth Circuit has also applied a deliberate indifference standard to the American with Disabilities Act:

The deliberate-indifference standard is a common one in the law. In essence, the deliberate-indifference standard starts with determining whether there was, objectively speaking, an ongoing or likely violation of some federal right, and then moves on to determining whether a defendant had the appropriate mental state, subjectively speaking, toward that federal-rights violation. In other words, there is

an objective question about rights and duties, and then a follow-up question about subjective mens rea. Was there a violation, and did they know about it?

In the ADA context, other circuits have used a two-step deliberate-indifference test that requires: (1) knowledge that a federally protected right is substantially likely to be violated, and (2) failure to act despite that knowledge. *See, e.g., S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 265 (3d Cir. 2013); *Barber ex rel. Barber v. Colo. Dep't of Rev.*, 562 F.3d 1222, 1229 (10th Cir. 2009). We largely agree with that formulation, with the caveat that a plaintiff must begin by showing an ongoing or likely violation of a federally protected right before moving on to prove deliberate indifference through knowledge of that right and a failure to respond appropriately.

Koon v. North Carolina, 50 F.4th 398, 400 (4th Cir. 2022).

While deliberate indifference can be demonstrated by pointing to violations of clearly established laws such as federal statutes (civil rights, discrimination, ADA), it may also be asserted when a defendant violates clearly established actions recognized in pre-existing case law decisions and referenced in applicable statutes. As noted in *Cannon* and *Doe*, *supra*, a private cause of action for deliberate indifference can be implied.

In the present matter, Defendant had a duty of care to protect the interests and safety of Mr. Myers and intentionally breached that duty by not alerting medical staff that Mr. Myers was not eating his meals and was evidencing cognitive issues. *See, Whitley v. Albers, supra*. Likewise, in equating deliberate indifference with reckless disregard, Defendant acted in an “essence of recklessness at common law” as recognized by *Safeco Ins. Co. of Am. V. Burr, supra*.

Deliberate indifference, in the form of recklessness, is included in the West Virginia Governmental Tort Claims and Insurance Reform Act, *W.Va. Code* § *W. Va. Code* § 29-12A-1, *et seq.*, which is a clearly established law prohibiting such acts. Taken in totality with pre-existing decisions and adopting the premise that “some actions can be so obvious that there is no requirement for there to be a specific case, statute, or regulation on point to meet the clearly established law requirement” noted in *W.Va. Dep't of Hum. Servs. v. David B., supra.*, there is

no question that deliberate indifference is a recognized and valid cause of action in West Virginia, and that it is not always a constitutional claim.

D. Plaintiff Does Not Allege That Defendant is a Health Care Provider; Plaintiff Stated that Defendant Failed to Obtain Needed Medical Care

At no point in the Complaint does Plaintiff allege that Defendant is a health care provider. Plaintiff does assert that Defendant had a duty to obtain medical treatment for Mr. Myers and failed to obtain medical treatment for Mr. Myers despite knowledge that Mr. Myers was sick. As stated in the Complaint, Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, knew that Mr. Myers was sick and exhibited signs of cognitive impairment for days prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *See* Complaint, paragraph 48, pgs. 8-9. Plaintiff's Complaint further states Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, had knowledge that Mr. Myers was not eating for days prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *Id.* at paragraph 49, pg. 9. Plaintiff continues to state that Defendant WVDCR, through its employees, agents, representatives and officials, including John/Jane Doe Corrections Officers, had knowledge that Mr. Myers was not receiving his prescribed medication for several weeks prior to being transferred to the hospital and failed to obtain medical attention for Mr. Myers for several days. *Id.* at paragraph 50, pg. 9.

E. Defendant is Not Entitled to Qualified Immunity

Defendant WVDCR is not entitled to qualified immunity for its deliberate indifference, negligence, gross negligence, negligent hiring, or negligent supervision and training under state law standards, nor is it entitled to any immunities provided by the *West Virginia Governmental Tort Claims and Insurance Reform Act*, *W.Va. Code* § 29-12A-1. The allegations of Plaintiff's

Complaint are clearly stated; are directed specifically against Defendant WVDCR; are recognized by state law; are not precluded by any assertions of qualified immunity.

The Supreme Court of Appeals of West Virginia recently recognized that “Immunity law can be difficult to understand under the best of circumstances, as it involves three separate and distinct legal analyses which apply to claims against three separate and distinct categories of entities and individuals.” *Kent v. Sullivan*, 22-0428, 2024 W.Va. LEXIS 204, *1 (2024)(See Exhibit 5). The Court then simplified a two-step analysis: “1) categorize the party claiming immunity; and 2) determine whether the party is entitled to immunity under the facts and circumstances presented.” *Id.*, LEXIS 204, *10.

The Court then recognized that “there are three sources of immunity in our jurisprudence: constitutional or “sovereign” immunity, common law “qualified immunity,” and statutory immunity as set forth in the Tort Claims Act:

It is well established that claims for both constitutional and common law qualified immunity are available only for the State, its agencies, officials, and/or employees. *See* W.Va. Const. art VI, §35; *see also A.B.*, 234 W.Va. at 502; 766 S.E.2d at 761 (“In West Virginia, however, the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §29-12A-1 *et seq.*, is limited to political subdivisions and their employees and does not cover claims made against the State or its agencies.” *Estate of Grove*, 244 W.Va. at 283, 852 S.E.2d at 783 (“[W]e have developed a significant body of law in order to determine whether a state agency, a state employee, or both are entitled to be protected from suit by the doctrine of qualified immunity.”)

Id.; *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014).

Statutory immunity, such as that provided by the Tort Claims Act, “is available only to political subdivisions and their employees. *Kent*, LEXIS 204, *12; *W.Va. Code* § 29-12A-3. The West Virginia Supreme Court has repeatedly recognized that the Tort Claims Act does not apply to claims against the State. *Kent*, LEXIS 204, *14, n. 18; *A.B.*, 234 W.Va. at 499 n. 4., 766 S.E.3d

at 758, n.4; *State v. Chase Sec., Inc.*, 188 W.Va. 356, 358, 424 S.E.2d 591, 593 (1992); *Hess v. W.Va. Div. Corrections*, 227 W.Va. 15, 18 n. 6, 705 S.E.2d 125, 128 n. 6 (1010).

The first step under *Kent* is to categorize the party claiming immunity, which, in the present matter is easy: Defendant WVDCR is clearly a state agency. The second step is to determine whether WVDCR is entitled to immunity under the facts and circumstances presented. Being a state agency, Defendant WVDCR is not entitled to the statutory immunity provided by the Tort Claims Act. Likewise, Defendant WVDCR is not entitled to qualified immunity under the immunity analysis set forth in the *Grove* decision:

[W]henever a defendant raises the issue of qualified immunity in a motion to dismiss, the circuit court must look to our qualified immunity body of law and follow the steps this Court expressly has outlined to make the determination of whether qualified immunity applies under the specific circumstances of that particular case. Specifically, these steps include whether: (1) a state agency or employee is involved; (2) there is an insurance contract waiving the defense of Qualified immunity; (3) the *West Virginia Governmental Tort Claims and Insurance Reform Act*, *W.Va. Code § 29-12A-1, et seq.* would apply; (4) the matter involves discretionary judgments, decisions, an/or actions; (5) the acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive; and (6) the State employee was acting within his/her scope of employment.

W.Va. Reg'l Jail and Corr. Facility v. Estate of Grove, 244 W.Va. 273, 283, 852 S.E.2d 773, 783 (2020); *Kent v. Sullivan*, 22-0428 (W.Va. May 9, 2024)

Defendant WVDCR is a state agency; there is no insurance contract waiving the defense of qualified immunity; and its actions do not fall within the purview of the *West Virginia Governmental Tort Claims and Insurance Reform Act*, *W.Va. Code § 29-12A-1*. The only remaining factors to consider under *Grove* are whether the allegations involve discretionary judgments or decisions; whether the acts and omissions were in violation of clearly established

statutory or constitutional rights or laws of which a reasonable person would have known; and whether the employees and agents of WVDCR were acting within their scope of employment.

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.3d 591 (1992). In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. Syl. Pt. 11, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). If the correctional officers were acting within the scope of their employment or duties, the state agency may be held vicariously liable for those acts or omissions. *Id.* at Syl. Pt. 12. A state agency is not entitled to qualified immunity if a plaintiff has demonstrated that the alleged acts or omissions are in violation of clearly established statutory or constitutional laws of which a reasonable person would have known. Syl. Pt. 10, *A.B.*, 234 W.Va. at 491, 766 S.E.2d at 751; *W.Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W.Va. 515, 889 S.E.2d 88 (2023).

The United States Supreme Court established a two-part test for courts to apply in ruling on a qualified immunity issue: Taken in the light most favorable to the party asserting the injury, do the facts alleged show a constitutional right and, if so, was the right clearly established? *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Robbins*, 248 W.Va. at 524, 889 S.E.2d at 97. A violation of a constitutional right may be clearly established if the violation is so obvious that a reasonable state actor would know that what he is doing violates the Constitution. It may also be established if a

closely analogous case establishes that the conduct is unconstitutional. See, *Maston v. Wagner*, 236 W.Va. 488, 506, 781 S.E.2d 936, 954 (2015).

The Eighth and Fourteenth Amendments apply to inmates in jail facilities and require that government officials not be deliberately indifferent to any serious medical needs of a detainee. *Tarashuk v. Givens*, 53 F.4th 154, 163 (4th Cir. 2022); *Belcher vv. Oliver*, 898 F.2d 32 (4th Cir. 1990); *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988). “A prisoner’s right to adequate medical care and freedom from deliberate indifference to medical needs has been clearly established by the Supreme Court and this Circuit since at least 1976 . . .” *Tarashuk*, 53 F.4th at 163.

West Virginia has codified an incarcerated person’s right to medical care. The *West Virginia Code of State Regulations Rule §95-1-15.9*, provides, “Protection. Inmates shall be protected from personal abuse, corporal punishment, personal injury, disease, property damage and harassment.” *W. Va. Code R. § 95-1-15*. Moreover, *West Virginia Code of State Regulations Rule §95-1-14.1*, provides, “Right to medical care. All inmates shall have prompt access to necessary medical, dental and psychiatric care provided in a reasonable manner by licensed personnel.” *W. Va. Code R. § 95-1-14*. See generally *Am. Jur. 2d Penal and Correctional Institutions §158* (2014) (footnotes omitted)(“A jailer owes a duty to prisoners to keep them safe, protect them from unnecessary harm, and exercise reasonable and ordinary care for their life and health. Custodians may have particular duties, depending on their knowledge of risks to inmates, if an inmate’s suicidal tendencies are known, the custodian’s duty is elevated.”).

Presently, the allegations in Plaintiff’s Complaint are simple, concise, and direct, and clearly provide more than enough information to outline the elements of each claim or permit inference to be drawn that such elements exist. See *Fass v. Newsco Well Serv. Ltd.*, 177 W.Va. 50, 350 S.E.2d 562 (1986); *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W.Va. 515, 889 S.E.2d 88.

The allegations permit the inferences that WVDCR and its employees knew that the health and safety of Mr. Myers was under threat due to their direct knowledge of his altered mental state and inability to eat for several days prior to being found in a partially paralyzed, unresponsive state.

Plaintiff alleges deliberate indifference in violation of clearly established laws. The facts and the allegations contained in the Complaint clearly outline that WVDCR and its employees had actual and constructive knowledge of Mr. Myers inability to eat, his altered mental state, and that his deteriorating physical condition was ongoing and obvious to any reasonable and reasonably trained correction officer.

Plaintiff's allegation of negligence contained in the Complaint establishes the essential elements for a negligence claim: duty, breach of that duty, and damages. "In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Syl. Pt. 3, *Wheeling Park Comm'n v. Dattoli*, 237 W.Va. 275, 787 S.E.2d 546 (2016); Syl. pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981). Plaintiff clearly asserted that WVDCR and its employees, including Defendants John/Jane Doe Corrections Officers, were subject to various policies, rules, procedures, and protocols regarding the identification of, and care for, an inmate in a health crisis, and that said Defendants had a duty to comply with those policies and provide proper medical care for Mr. Myers. Defendants breached that duty of care and showed deliberate indifference to the substantial risk of serious harm presented by the inability to eat and altered mental state of Plaintiff's decedent, resulting in the slow and agonizing death of Mr. Myers while he languished in his jail cell before being sent to a hospital.

Plaintiff's Complaint clearly states that Defendant had a duty to provide Mr. Myers with appropriate medical care. Defendant WVDCR also had a duty of care to notify the medical staff of Mr. Myers's serious need for medical care and a duty to provide necessary information to other medical professionals. Such actions without doubt amount to grossly negligent, reckless, malicious and unreasonable conduct.

The negligent supervision and training allegations in the Complaint are state law claims recognized where a state agency has, in the course of a discretionary action, violated clearly established statutory or constitutional rights or laws of which a reasonable person would have known. In such cases, the state agency is not entitled to qualified immunity. See *W.Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W.Va. at 528, 889 S.E.2d 101. Plaintiff specifically alleged that WVDCR violated clearly established rights and/or laws with respect to the training and/or supervision of its employees and contractors. *W.Va. Code* §15A-3-5.

Defendant relies greatly on the memorandum decision of *W.Va. Dept. of Hum. Servs. V. A.R.*, 2024 W.Va. LEXIS 101, which recognized that with regard to discretionary functions, "a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability." *Id.*, Syl. Pt. 7.

In *A.R.*, the West Virginia Supreme Court reversed a denial of the state agency's motion to dismiss the plaintiff's negligence and negligent hiring/supervision claims because "we do not see that A.R. has alleged a violation of a clearly established statutory or constitutional right or law by

the Department.” *Id.*, LEXIS * ---- (emphasis original.) The Court noted that plaintiff had to “do more than allege than an abstract right has been violated;” that she had to allege that the Department did or failed to do something that it would have reasonably understood to be unlawful. *Id.*, LEXIS *---. The Court then dismissed Counts VI (negligence) and VII (negligent hiring/supervision) as against the state agency, but otherwise REMANDED the case back to Circuit Court, where it is currently set for trial.

The Plaintiff in this matter clearly stated in several paragraphs of her Complaint that Defendant WVDCR and its employees and representatives violated the constitutional and statutory rights of Ronald Myers and violated its own policies and procedures. The allegations are more than sufficient to advise Defendant of the claims made against it and the violations of clearly established laws.

CONCLUSION

WHEREFORE, the Court, having considered and heard the parties arguments and responses, reviewed all filings, reviewed and considered the entire record of this proceeding, heard argument of counsel, and consulted pertinent legal authority, is of the opinion to and hereby does **DENY** Defendant West Virginia Division of Corrections and Rehabilitation’s Motion to Dismiss for the reasons stated above and in accordance with Rule 12 (b)(6) of the West Virginia Rules of Civil Procedure.

Defendant’s Motion to Dismiss is **ORDERED** and **ADJUDGED DENIED**.

The Clerk of this Court shall provide certified copies of this Order to all counsel of record.

ENTERED this 19th day of March, 2025.


HONORABLE TERA L. SALANGO, JUDGE

Prepared by:

/s/ Amanda J. Davis

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