
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 25-242

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WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION,

Petitioner,

v.

MARY F. MYERS, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,

Respondents.

Response of Mary Myers to Petitioner's Brief

From the Circuit Court Of Kanawha County,

Case No. 24-C-842

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**MARY F. MYERS, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,**

Respondents.

RESPONSE OF MARY MYERS TO PETITIONER'S BRIEF

The Respondent, Mary F. Myers, as Administratrix of the Estate of Ronald M. Myers, hereby submits her brief in opposition to the Petition filed by the Petitioner, the West Virginia Division of Corrections and Rehabilitation.

PROCEDURAL HISTORY

Respondent Mary F. Myers is the widow of Ronald M. Myers, who died on July 19, 2022, as a result of an untreated acute myocardial infarction that occurred while incarcerated at the ERJ, a facility operated by Petitioner WVDCR. Appx. 025. Respondent filed her *Complaint* in this matter on August 8, 2024, asserting various claims against Petitioner WVDCR, its corrections officers, and Wexford and its employees, the medical providers for ERJ. JA 023. The *Complaint* included as Count III a claim of “Deliberate Indifference in Violation of Clearly Established West Virginia Law,” which asserted that WVDCR and its employees were deliberately indifferent to Mr. Myers’ serious need for medical care. Respondent WVDCR filed its *Motion to Dismiss* on December 4, 2024, alleging, in part, that there was no cause of action for deliberate indifference. By order entered March 19, 2025, the Honorable Tera Salango of the Circuit Court of Kanawha

County denied the *Motion to Dismiss* on all counts, including Respondent's argument regarding deliberate indifference. JA 001. Respondent filed its *Notice of Appeal* from that order on April 18, 2025, Docket No. 25-242. Respondent then filed its *Petition for Writ of Prohibition* on May 21, 2025.

Prior to the entry of the order denying its *Motion to Dismiss*, Respondent filed a *Motion for Certified Question* with Judge Salango on February 5, 2025, again asserting that deliberated indifference is not a valid claim or cause of action under West Virginia law. Respondent filed her *Response in Opposition to Motion to Certify Question* on February 26, 2025, asserting that West Virginia has long recognized the legal concept of "deliberate indifference" in the context of an inmate or pre-trial detainee's serious medical needs under both state and federal law, and that the civil claim of "deliberate indifference" exists under West Virginia law. Respondent maintained that since West Virginia common law recognizes valid civil claims for deliberate indifference under state law, and since the West Virginia Supreme Court of Appeals has recognized such a claim, there was no need for a certified question. Petitioner filed its *Reply* to Respondent's *Response* on March 6, 2025.

On March 31, 2025, Judge Salango entered her *Order Denying Motion for Certified Question*. The Circuit Court noted that it had already addressed the issue of deliberate indifference in its *Order Denying Petitioner West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss Respondent's Complaint* entered on March 19, 2025. The Circuit Court found that a certified question in this matter was unnecessary since deliberate indifference is clearly recognized as a state law claim under Syl. Pt. 4, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998) and subsequent decisions of the West Virginia Supreme Court of Appeals.

ASSIGNMENT OF ERROR

The Circuit Court of Kanawha County did not err by denying portions of the West Virginia Division of Corrections and Rehabilitation's ("WVDCR") Motion to Dismiss seeking dismissal of claims for negligent hiring and training because WVDCR is entitled to qualified immunity as a State agency for its discretionary actions. Providing medical treatment to inmates is not discretionary. Wherefore, Respondent respectfully prays that the petition of WVDCR be **DENIED**, and the judgment entered by the Circuit Court of Kanawha County be **AFFIRMED**.

STATEMENT OF FACTS

Respondent's decedent, Ronald M. Myers, was born on February 28, 1943. JA 025. On or about June 23, 2022, Martinsburg Police Department officers arrested Mr. Myers and took him to the ERJ, a facility operated by Respondent WVDCR in Berkeley County. JA. 025. As alleged in the *Complaint*, Ronald Myers had a history of serious medical issues, including an acute myocardial infarction, acute respiratory failure with hypoxia, chronic kidney disease State 3, coronary artery disease, chronic heart failure with reduced ejection fraction, and a non-ST elevated myocardial infarction. JA. 026.. Mr. Myers was required to take a chewable aspirin, atorvastatin (Lipitor), carvedilol, clopidogrel (Plavix), ascorbic acid, cephalexin, cholecalciferol, doxycycline, and zinc gluconate daily. JA. 027.

Respondent asserted in her *Complaint* that when Ronald Myers arrived at ERJ, on June 23, 2022, he evidenced signs of cognitive impairment. JA. 026. Respondent further claimed that Mr. Myers could not recall the names of the medications prescribed to him or the name of the prescribing physician at that time. JA 026. Respondent notes that Mr. Myers advised the intake staff that his wife would know the names of his medications and his physician. Respondent has

asserted that there is no record that anyone tried to communicate with Mrs. Myers to obtain Mr. Myer's medication information or the name of his treating physician. JA. 026.

The *Complaint* alleged that Mr. Myers went from June 23, 2022, to July 8, 2022, without his daily medications, not even an aspirin. JA 088. Respondent further alleges that there are no records of medical staff prescribing him medications during that period; he was never required to be on daily med passes, and, notwithstanding his medical history, his need for daily medications, and his high blood pressure upon intake, there are no indications that his vital signs were taken or recorded between dated of intake and July 11, 2022. JA 027, 031, 088, 092. Corrections officers last reported Mr. Myers as being "normal" on July 10, 2022. JA 027, 088.

Respondent indicated that jail records reflect that the medical staff finally issued orders for Lipitor and Plavix on July 8, 2022, – fifteen days later - without recording any vital signs. JA 027, 088. Respondent asserts that the effects of not having these crucial heart medications became obvious. Respondent states that the cell mate of Mr. Myers reported that he had been "altered" for several days. JA 027, 088. Respondent also alleges that jail staff later noted that Mr. Myers had not been eating for a week and had altered mental status and lethargy, and that the corrections officers did nothing to ensure that Ronald Myers received the treatment he required for his serious medical needs despite this obvious condition. JA 027, 088.

The *Complaint* alleges that on the morning of July 11, 2022, two days after medical staff issued Lasix and Plavix for Mr. Myers, Corrections Officers John/Jane Doe found Ronald Myers unresponsive in his cell. JA 088. Respondent claims that these corrections officers observed Mr. Myers lying on his bunk "presumably asleep" and that John/Jane Doe Corrections Officers did not check Mr. Myers to determine if he was actually sleeping or was ill that morning, nor did they

attempt to determine why he did not move for several hours, essentially ignoring his condition. JA 027, 088.

Respondent further alleges that later that afternoon jail staff found Mr. Myers to have an altered mental state and discovered he had not left his bed all day. JA 027, 088. An ambulance was then called, which transported Mr. Meyers to the WVU Berkley Medical Center. JA 027, 088. Ronald Myers died as the result of an acute myocardial infarction on July 19, 2022. JA 029.

Respondent Mary Myers filed her *Complaint* on August 8, 2024, against WVDCR, Wexford, and their employees. JA 023, 084. Count III of the *Complaint* asserts that WVDCR and its employees knew that Ronald Myers was sick, had not eaten for days, had not received his prescribed medications for weeks, and exhibited signs of cognitive impairment for days prior to being transferred to the hospital, and yet they failed to obtain medical attention for him. JA 030 – 032. Respondent asserts that WVDCR and its employees were deliberately indifferent to the medical needs of Ronald Myers during the entirety of his incarceration at ERJ. JA 031.

As argued by Respondent in her *Response* to Petitioner’s *Motion to Dismiss*, given the medical history of Ronald Meyers, his failure to properly receive required prescriptive medicines, his lethargy and altered state of mind, his inability to eat, and other actions or inactions, any reasonably trained corrections officer should have recognized that Mr. Meyers was suffering serious medical conditions that required treatment and would not have ignored his needs. JA 077.

ARGUMENT

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, 563 (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 Respondent 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 Respondent. *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[.]” *State ex rel McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). 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 Respondent will prevail.” *McGinnis v. Cayton*, 173 W. Va. 102, 104, 312 S.E.2d 765, 768 (1984). The question is not whether a Respondent 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.*, 246 W.Va. 91, 101, 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 Respondent’s factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the Respondent.” *Id.* A Respondent “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 Fire & Rescue Equip., LLC v. City Nat’l Bank of W.Va.*, 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020). Dismissal of a complaint under Rule 12(b)(6) is inappropriate “unless it appears beyond doubt that the Respondent 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 (emphasis added).

The factual allegations set forth in Respondent’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 Respondent. Moreover, Petitioner'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. Petitioner's motion is wholly without merit and should be **DENIED** in its entirety.

B. Petitioner is Not Entitled to Qualified Immunity

Petitioner 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 Respondent's Complaint are clearly stated; are directed specifically against Petitioner 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 (2010).

The first step under *Kent* is to categorize the party claiming immunity, which, in the present matter, is easy: Petitioner 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, Petitioner WVDCR is not entitled to the statutory immunity provided by the Tort Claims Act. Likewise, Petitioner WVDCR is not entitled to qualified immunity under the immunity analysis set forth in the *Grove* decision:

[W]henever a Petitioner 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).

Petitioner 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 Respondent 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 Respondent 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.

Rule 95-1-14.1. of the *West Virginia Code of State Rules* 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.”) *W. Va. Code R. §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*.

The WVDCR adopted the National Commission on Correctional Health Care Standards (NCCHC) standards pursuant to *WVDCR Policy Directive 101.01*. NCCHC Standard J-A-01 (essential) Access to Care provides, “Inmates have access to care for their serious medical, dental, and mental health needs.” According to the NCCHC, this fundamental principle on which all NCCHC standards are based is the basic principle established by the U.S. Supreme Court in the 1976 landmark case *Estelle v. Gamble*, 429 U.S. 97 (1976). According to NCCHC, “Unreasonable barriers to inmates’ access to health services are to be avoided.” The NCCHC determined that unreasonable barriers include, “Having an understaffed, underfunded, or poorly organized system with the result that it is not able to provide appropriate and timely access to care.” *See* NCCHC Standard J-A-01.

Presently, the allegations in Respondent’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. Further, even if the Court determines additional factual allegations are needed the appropriate relief would be to allow Respondent to amend her Complaint and not dismissal.

Respondent 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.

Respondent'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 Petitioner has been guilty of some act or omission in violation of a duty owed to the Respondent. 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). Respondent clearly asserted that WVDCR and its employees 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 Petitioners had a duty to comply with those policies and provide proper medical care for Mr. Myers. Petitioners 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 Respondent'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.

Respondent's Complaint clearly states that Petitioner had a duty to provide Mr. Myers with appropriate medical care. Petitioner 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. Respondent 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.

Petitioner relies greatly on the memorandum decision of *W.Va. Dept. of Hum. Servs. v. A.R.*, 249 W.Va. 590, 900 S.E.2d 16, W.Va. LEXIS 101 (2024), which recognized that with regard to discretionary functions, “a reviewing court must determine whether the Respondent 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 Respondent’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.” *A.R.*, 249 S.E.2d at 597., (emphasis original.) The Court noted that Respondent 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.* 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.

Respondent's *Complaint* specifically sets out in Count III a claim for deliberate indifference of clearly established laws. The *Complaint* refers to the West Virginia Constitution and policies and directives having the force of law which require respecting humane and reasonable care. As such, the reliance on the holding of *A.R.* is misplaced.

CONCLUSION

Petitioner WVDCR is not entitled to qualified immunity under West Virginia law. Respondent clearly stated in several paragraphs of her *Complaint* that Petitioner 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 Petitioner of the claims made against it and the violations of clearly established laws.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing
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