

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-328

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**STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA
DIVISION OF CORRECTIONS
AND REHABILITATION,**

Petitioner,

v.

**THE HONORABLE TERA SALANGO,
Judge of the Circuit Court of Kanawha County,
and MARY F. MYERS, Individually and as
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,**

Respondents.

**BRIEF OF AMICUS CURIAE STATE OF WEST VIRGINIA
IN SUPPORT OF PETITIONER**

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Respondent Mary Myers seeks money damages for inadequate medical care that a relative allegedly received in a State correctional facility. A similar plaintiff usually has two potential avenues for monetary relief: a claim premised on a federal constitutional violation (vindicated through 42 U.S.C. § 1983) or a recognized West Virginia common law claim. Respondent asserted neither.

Rather than plead an established claim, Respondent floated a first-of-its-kind cause of action for the common law tort of “deliberate indifference to clearly established laws”—and the circuit court bought it. In the process, it created a “deliberate indifference” cause of action (for damages) against the State. This Court has never recognized deliberate indifference as a common law tort. Neither has any other State. And for good reason. Deliberate indifference is a standard of proof, not a cause of action.

In recognizing this new cause of action, the circuit court stepped outside its lane. West Virginia courts recognize new common law causes of action sparingly—and only when no alternative remedy exists. But the circuit court never conducted that analysis. Rather, it borrowed language from cases applying a deliberate indifference standard to statutory and constitutional claims and refashioned them into a judge-made standalone tort. That’s not how this Court draws the “line ... between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability.” *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 256, 685 S.E.2d 219, 231 (2009).

It may be that the circuit court was trying to create something like a state analogue to a federal Section 1983 claim. But that decision wasn’t the circuit court’s to make. The Legislature chose not to pass such a statute, and the circuit court cannot upset that choice.

New causes of action are of significant concern to the State. And the circuit court’s order imposes a new type of liability against the State without legislative enactment. If that order—and its process for recognizing new causes of action—stands, then it risks warping the United States and West Virginia Constitutions into tort-law menus from which plaintiffs can pick and choose. The State of West Virginia thus writes as amicus to urge the Court to grant the petition for writ of prohibition and reject the circuit court’s unjustified new cause of action. *See* W. Va. R. App. P. 30(a) (permitting the State of West Virginia to “file an amicus brief without the consent of parties or leave of ... the Supreme Court”).

SUMMARY OF THE ARGUMENT

I. This Court should reject the circuit court’s effort to hatch a new common-law tort for deliberate indifference to clearly established laws. Our common law—a collection of precedents establishing non-statutory law—has not recognized a “deliberate indifference” cause of action. Indeed, the concept of deliberate indifference sprang from the federal Constitution. And it’s a standard of proof for certain violations of the U.S. Constitution, made actionable against state actors by Congressional enactment. States that have incorporated the deliberate indifference standard for their own constitutions have done so through the legislative process, too. West Virginia hasn’t. And our State Constitution’s “cruel and unusual punishment” clause does not provide a private right of action, either. So, for deliberate indifference to be actionable, this Court must have previously recognized it as a standalone cause of action. But this Court hasn’t. In holding otherwise, the circuit court misinterpreted several cases and, in the process, created a new tort scheme not enacted by the Legislature.

II. West Virginia doesn’t need a new deliberate indifference common-law tort. When remedies already exist for alleged tortious conduct, this Court avoids creating a new one. Plaintiff

alleges tortious behavior in her Complaint that already has a remedy—namely, through a Section 1983 claim or a recognized common-law tort. So this Court doesn’t need to craft a new one here.

III. By creating this first-of-its-kind tort, the circuit court also subverted this Court’s qualified immunity cases. Decades of opinions insist on heightened pleading for claims implicating qualified immunity. But now, barebones notice pleading will be enough to get around that immunity. That workaround defeats the very purpose of qualified immunity. And it makes little sense, as deliberate indifference to “clearly established laws” is part of this Court’s qualified immunity test.

ARGUMENT

I. The Court Should Not Create A Cause Of Action Not Adopted By The Legislature Or Implied In The Constitution.

This Court has never recognized a common-law cause of action for deliberate indifference to clearly established laws. And “deliberate indifference” isn’t derived from common law—it’s a standard of proof used for certain violations of the U.S. Constitution. Those violations are actionable against state actors under *federal* law because Congress enacted Section 1983. But the West Virginia Legislature hasn’t enacted an analogue to Section 1983 for violations of the West Virginia Constitution. And West Virginia’s precedents don’t provide support for this first-of-its-kind tort, either.

A. Deliberate Indifference Is Not A Cause Of Action In West Virginia Common Law Or Anywhere Else.

Deliberate indifference is not a common law innovation. In 1863, the West Virginia Constitution adopted “the common law” and “the laws of this state” so long as they are not “repugnant” to the Constitution or “altered or repealed by the Legislature.” W. VA. CONST. art. 8, § 13. The “common law” then referred to the common law of England, and the “laws of this state”

referred to the laws of the “general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three.” W. Va. Code § 2-1-1. Neither the common law of England nor Virginia law recognized a cause of action for deliberate indifference. Indeed, the concept of deliberate indifference isn’t common law at all.

Common law refers to a body of “unwritten law” distinct from legislatively enacted statutes. *Hogan v. State*, 441 P.2d 620, 621 (Nev. 1968). In contrast, written laws—statutes, constitutions, and the like—are not common law. See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1192 (2007) (defining common law as the “uncodified (or nonstatutory) rules and principles applied by judges to decide the cases that came before them”). So “‘common law’ encompasses two components: first, a body or collection of case precedents extending from the present time back into the ancient courts of England; second, and of more importance, a system of reasoning from case to case precedent that permits the common law to grow with and adapt to changing conditions of society.” *Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 873, 253 S.E.2d 666, 675 (1979). Following this, judicial interpretation and application of written statutes and constitutions are not common law. See *Shaw v. Merchants’ Nat. Bank*, 101 U.S. 557, 565 (1879) (observing that “no statute” can be “construed as making an innovation on common law” unless the statute “fairly expresses it”).

Deliberate indifference is born out of constitutional interpretation. Following the lead of the U.S. Court of Appeals for the Second Circuit just a few years earlier, see *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970), the U.S. Supreme Court first applied that standard in *Estelle v. Gamble*, 429 U.S. 97 (1976). The Court used it as a way of evaluating whether a plaintiff has sufficiently stated a claim for “cruel and unusual punishment in violation of the Eighth Amendment,” which was made actionable against state actors by Congress’ enactment of 42

U.S.C. § 1983. *Id.* at 101. Because the “[Eighth] Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency,” the government has an “obligation to provide medical care” for inmates. *Id.* at 102-03. But “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Id.* at 106. Instead, “to state a cognizable claim” under the Eighth Amendment for inadequate medical care, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Id.* The Court concluded “that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.” *Id.* at 104 (cleaned up). Only “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under [Section] 1983.” *Id.* at 105.

So deliberate indifference isn’t a common-law cause of action or a cause of action at all. It’s a standard used to determine whether a prisoner has sufficiently stated a Section 1983 claim for violation of the Eighth Amendment. This standard differentiates medical malpractice from a constitutional violation. In other words, it differentiates common law negligence from conduct violative of the Eighth Amendment, such as “prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104-05. So, as a constitutional standard, deliberate indifference is “intended to be separate and different from a common law tort.” *Paradis v. Brady*, No. CV-03-150-N-BLW, 2005 WL 8165017, at *2 (D. Idaho May 4, 2005). The circuit court incorrectly conflated the two in its order.

B. The Legislature Has Not Adopted A Section 1983 Equivalent For Claims Premised On The West Virginia Constitution.

By conflating statutory and common law, the circuit court judicially enacted an analogue to Section 1983 for violations of the West Virginia Constitution.

Congress enacted Section 1983 pursuant to its power under section 5 of the Fourteenth Amendment to adopt “appropriate legislation” to enforce the Fourteenth Amendment. *Quern v. Jordan*, 440 U.S. 332, 351 n.3, 355 (1979) (Brennan, J., concurring). Section 1983 “creates a remedy for violation of” constitutional rights. *State ex rel. W. Va. Attorney-General, Medicaid Fraud Control Unit v. Ballard*, 249 W. Va. 304, 315, 895 S.E.2d 159, 170 (2023) (quoting *State v. Chase Sec., Inc.*, 188 W. Va. 356, 359, 424 S.E.2d 591, 594 (1992)). In other words, Section 1983 is the “procedural vehicle of constitutional enforcement.” Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1441 (1989).

To be sure, some states have enacted Section 1983 analogues applicable to their own state constitutions. *See, e.g.*, ARK. CODE ANN. § 16-123-105 (Arkansas’ analogue); CAL. CIV. CODE § 52.1(c) (California’s analogue); COLO. REV. STAT. ANN. § 13-21-131 (Colorado’s analogue applicable only to peace officers and only to the state constitution’s bill of rights); 5 M.R.S.A. § 4682 (Maine’s limited analogue); MASS. GEN. LAWS CH. 12, § 11i (Massachusetts’ analogue); NEB. REV. STAT. § 20-148 (Nebraska’s analogue); N.J. REV. STAT. § 10:6-2 (New Jersey’s analogue).

West Virginia hasn’t. And the circuit court can’t enact its own analogue by common law fiat. “[T]he courts of this state are forbidden ... to exercise legislative authority of any kind.” *State ex rel. Cnty. Ct. of Marion Cnty. v. Demus*, 148 W. Va. 398, 401, 135 S.E.2d 352, 355 (1964). “No Judge should take unto himself activities or functions which are delegated to other branches of the government.” *In re Goldston*, 246 W. Va. 61, 73, 866 S.E.2d 126, 138 (2021).

C. The West Virginia Constitution Lacks An Implied Private Right Of Action For Deliberate Indifference.

The West Virginia Constitution implies a private right of action for money damages for violation of only two provisions, neither of which is at issue here. *First*, this Court acknowledged

a private cause of action for violation of Article 3, § 9, which prohibits the taking or damaging of private property for public use without paying “just compensation.” W. VA. CONST. art. 3, § 9. Section 9 is, however, “self-executing.” Syl., *Thorne v. City of Clarksburg*, 88 W. Va. 251, 106 S.E. 644 (1921). “A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.” *Id.*, 106 S.E. at 646 (internal citations omitted). Section 9 identifies the right (private property) and the remedy (just compensation) and, “when required,” the means of enforcement (an impartial jury of twelve freeholders). W. VA. CONST. art. 3, § 9. So Section 9 “may be enforced without the aid of legislative enactment.” Syl., *Thorne, supra*. Now contrast Section 9 with Article 3, § 5, which does not address any remedies, enforcement procedures, and even defines the right in only broad strokes.

Second, this Court acknowledged a private cause of action for violation of Article 3, § 10, which prohibits the deprivation “of life, liberty, or property, without due process of law, and the judgment of his peers.” W. VA. CONST. art. 3, § 10. But in doing so, the Court “provided no analysis” and “merely observed” that there was no dispute among the parties that a private right of action existed. *Fields v. Mellinger*, 244 W. Va. 126, 130, 852 S.E.2d 789, 793 (2020) (citing *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996)). The *Hutchison* Court then found that statutory immunity barred the plaintiff’s constitutional claim. *Hutchison*, 198 W. Va. at 150, 479 S.E.2d at 660. Given the lack of analysis, however, *Hutchison* offers no real guideposts for the Court here.

Outside those provisions, this Court has not recognized implied rights of action in the West Virginia Constitution. For example, this Court held that “West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution,” which prohibits unreasonable searches and seizures. Syl. pt. 3, *Fields*, *supra*. The reasons are instructive. *First*, “patently absent from [that] provision is any allowance for a private right of action for monetary damages.” *Id.* at 129, 851 S.E.2d at 792. *Second*, no West Virginia precedent “creat[ed] a cause of action for monetary damages” for that provision. *Id.* at 132, 851 S.E.2d at 795. *And finally*—as the “deciding factor”—“alternative remedies” offering meaningful relief exist. *Id.* at 134-35, 851 S.E.2d at 797-98.

Applying these factors, the Court has already said that Article 3, § 5 lacks “an implied cause of action for a constitutional violation.” *Fields*, 244 W. Va. at 132, 851 S.E.2d at 795. Alternative remedies exist for inmates alleging violation of the “cruel and unusual punishment” clause of Article 3, § 5 of the West Virginia Constitution. These include “a reduction” of confinement, “[i]njunctive relief,” “[a] federal cause of action authorized by 42 U.S.C. § 1983,” and “[a] civil action in tort.” Syl. pt. 4, *Harrah v. Leverette*, 165 W. Va. 665, 271 S.E.2d 322 (1980), *superseded by statute on other grounds as recognized by W. Va. Reg’l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 515 n.30, 766 S.E.2d 751, 774 n.30 (2014). Those remedies obviate the need for a new implied cause of action.

While Plaintiff lacks a cause of action under Article 3, § 5 of the West Virginia Constitution, she could have pursued a Section 1983 claim (against a person, not the State) for alleged violation of the Eighth Amendment. But Plaintiff expressly disclaimed any federal cause of action, opting instead to plead a claim for “deliberate indifference to clearly established laws.” Neither the United States Constitution nor the West Virginia Constitution is a “font of tort law.”

Paul v. Davis, 424 U.S. 693, 701 (1976). But the circuit court has made them one. While the Supreme Court of the United States has “noted the ‘constitutional shoals’ that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law,” *id.* (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971)), the circuit court cast itself on the rocks by deriving from *federal* civil rights statutes a body of general *state* tort law.

D. Prior Precedents Have Not Recognized A Cause Of Action For Deliberate Indifference.

The circuit court believed it wasn’t going alone. Beyond its reliance on this Court’s decisions in Section 1983 cases and on federal courts’ rulings in cases relying upon other statutes, the circuit court pointed to three cases (including one in its Order Denying Motion for Certified Question) for support. But none of those cases supports the recognition of a common law tort of deliberate indifference.

For starters, *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA-148, 2024 WL 3412261 (W. Va. Ct. App. July 15, 2024), didn’t address the issue of whether deliberate indifference is a recognized cause of action. There, the father of a deceased inmate filed suit against WVDCR and its contracted health care providers for claims related to the inmate’s death. *Id.* at *1. The plaintiff alleged, “among other claims, deliberate indifference,” but the other claims—along with the non-WVDCR defendants—were dismissed before trial. *Id.* at *2. The Intermediate Court “limit[ed its] discussion of the trial to events relevant to th[e] appeal.” *Id.* at *2 n.4. At trial, WVDCR contested jury instructions “defin[ing] the elements of deliberate indifference” but didn’t contest the cause of action itself. *Id.* at *3. WVDCR believed “its proposed instruction was the proper instruction for the jury” and that the plaintiff’s proposed instruction “did not include a necessary component of the deliberate indifference standard.” *Id.* at *7. WVDCR’s proposed instruction was based on the *Estelle* standard for Eighth Amendment

claims. *Id.* at *8 n.16. And it took exception to the instruction’s lack of a “definition of serious medical need.” *Id.* at *7. The court found that other instructions “indicate[d] that [plaintiff] was required to prove ... that [the decedent] suffered from serious medical need.” *Id.* at *8. So the court concluded that the jury was instructed on “its need to consider whether a ‘serious medical need’ existed.” *Id.*

That decision went no further. Nor could it. Our appellate courts “will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.” *WesBanco Bank, Inc. v. Ellifritz*, 248 W. Va. 600, 611, 889 S.E.2d 682, 693 (2023) (quoting Syl. pt. 3, *Dean v. W. Va. Dep’t of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (internal quotation marks omitted)). Indeed, this Court has been clear that “an issue neither asserted by the parties nor addressed in this Court’s opinions” is not binding. *Kanawha Cnty. Public Library Bd. v. Board of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013). The propriety or existence of a standalone common law cause of action was neither asserted by the parties nor addressed by the Intermediate Court. And that court’s silence should not be construed as a binding proclamation of its adoption of a first-of-its-kind common law cause of action—not that it could bind *this* Court anyway. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”)

Next up is *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998), which the circuit court relied upon in its Order Denying Motion for Certified Question. In *Nobles*, inmates petitioned for a writ of mandamus concerning prison conditions. *Id.* at 526-27, 505 S.E.2d at 445-46. It’s true that this Court held that “[d]eliberate indifference to the serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain which is proscribed by the prohibition on

cruel and unusual punishment in the Federal and State Constitutions.” Syl. pt. 4, *id.* But this Court didn’t hold that violation of the State Constitution provided a private right of action for money damages. Nor did this Court recognize a common law cause of action for deliberate indifference. Rather, this Court held that “[m]andamus is a proper remedy to compel the performance of” non-discretionary, ministerial duties “but not to prescribe the manner in which they must be carried out.” *Id.* at 535, 505 S.E.2d at 454.

Plaintiff here doesn’t seek mandamus. She seeks money damages. *Nobles* provides no support for that request.

Finally, the circuit court relied upon *West Virginia Division of Corrections and Rehabilitation v. Robbins*, 248 W. Va. 515, 889 S.E.2d 88 (2023). But Plaintiff finds no support there either. *Robbins* concerned a “§ 1983 claim predicated on the alleged violation of his rights under the Eighth Amendment to the United States Constitution (deliberate indifference).” *Id.* at 521, 889 S.E.2d at 94. So the Court’s deliberate indifference analysis was limited to the standard articulated in *Farmer v. Brennan*, 511 U.S. 825 (1994), as applied to the plaintiff’s federal statutory claim. *Robbins*, 248 W. Va. at 525, 889 S.E.2d at 98. The plaintiff didn’t assert a common law “deliberate indifference” claim, and this Court didn’t recognize one *sub silentio*.

While this Court has never directly addressed the viability of a common-law deliberate indifference claim, other courts have. And those courts have either rejected the notion that deliberate indifference is a cause of action or simply acknowledged it for what it is—a standard of proof. See *Bertolette v. Little*, No. 2:23-CV-330, 2024 WL 4479838, at *1 n.1 (W.D. Pa. Aug. 6, 2024) (“[D]eliberate indifference is an element of a § 1983 claim and not a standalone cause of action.”); see also *Naranjo v. Little*, No. CV 22-1890, 2024 WL 5479147, at *11 (W.D. Pa. July 18, 2024) (“The principle of deliberate indifference is part of an Eighth Amendment conditions of

confinement analysis – not a separate cause of action.”); *Shehan v. Barrone*, No. 3:22CV879 (OAW), 2023 WL 122039, at *7 (D. Conn. Jan. 6, 2023) (“[D]eliberate indifference constitutes a constitutional violation but is not stand-alone common law tort under Connecticut law.”); *Ratcliff v. Nash*, No. 219CV00880JADBNW, 2020 WL 8474702, at *3 (D. Nev. Oct. 6, 2020) (“Deliberate indifference is not an independent cause of action. Rather, it is a standard for determining whether an individual is liable for some other claim, such as deliberate indifference to a serious medical need.”); *Scott v. Manenti*, No. CV 15-7213 (JBS-AMD), 2016 WL 80640, at *6 (D.N.J. Jan. 7, 2016) (“Deliberate indifference is an element of an Eighth Amendment denial of medical care claim, it is not an independent cause of action.”); *Brooks v. Humphrey*, No. 5:12-CV-281 CAR, 2012 WL 5866293, at *2 (M.D. Ga. Nov. 19, 2012) (“‘Deliberate indifference’ is merely one element of an Eighth Amendment ‘failure to protect’ claim; it is not a separate cause of action.”); *Cannon v. City of Wilmington Police Dep’t*, No. CIV.A. 11-136 GMS, 2012 WL 4482767, at *4 (D. Del. Sept. 27, 2012) (“The court is unfamiliar with a Delaware tort cause of action for ‘deliberate indifference,’ and [the plaintiff] fails to guide the court to any relevant law in support of this claim.”); *Lawson v. Williams*, No. 11-11163, 2012 WL 5267903, at *8 (E.D. Mich. Sept. 26, 2012) (“In other words, deliberate indifference does not state a separate cause of action but, rather, must be connected with some other claim to be viable.”); *Harris v. Harris Cnty.*, No. CV H-02-2698, 2006 WL 8451605, at *5 (S.D. Tex. Aug. 31, 2006) (“there is no independent cause of action for malicious prosecution or deliberate indifference. Instead, both malicious prosecution and deliberate indifference are elements of proof within a § 1983 case.”); *Hughes v. City of Chicago*, No. 02 C 7267, 2003 WL 21518592, at *4 (N.D. Ill. July 2, 2003) (“Deliberate indifference is not an independent cause of action.”); *Luther v. Compton*, 5 S.W.3d 635, 641 (Tenn. 1999) (holding that intermediate appellate court erred in finding deliberate indifference to be “a claim independent

of the plaintiff's negligence and 42 U.S.C. § 1983 claims against the defendants"). This Court should hold the same and reject the circuit court's recognition of deliberate indifference as a new, stand-alone common law tort.

II. West Virginia Doesn't Need A Common Law Deliberate Indifference Claim.

Before this Court creates a new common law cause of action, it considers if "a sufficient remedy already exists for the conduct at issue." *Hannah v. Heeter*, 213 W. Va. 704, 710, 584 S.E.2d 560, 567 (2003). Caution and care guide this analysis—for a "tempt[ation] [exists] to impose new duties, and concomitantly liabilities, regardless of the economic and social burden." *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 256, 685 S.E.2d 219, 231 (2009) (quoting *Mallet v. Pickens*, 206 W. Va. 145, 156 n.15, 522 S.E.2d 436, 447 n.15 (1999)). But "[w]hen there is a statutory or regulatory regime that addresses the wrongful acts that the courts might otherwise hold are tortious ... the pressure to create a new cause of action will be less intense than it would otherwise be." Kenneth S. Abraham, G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L.R. 2089, 2103 (2019). So before creating a new remedy, this Court looks at whether the alleged wrongful act is subsumed within an already-recognized cause of action. For example, this Court refused to "recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action" because alternative remedies were available. *Hannah*, 213 W. Va. at 710, 584 S.E.2d at 566. There, the Court found that "the adverse inference instruction and the sanctions provided by [Rule 37] are sufficient remedies," so a new cause of action was unnecessary. *Id.* at 711, 584 S.E.2d at 567.

In this case, the Court need look no further than the Complaint to identify alternative remedies. Plaintiff asserts claims for negligence and negligent training. Appx. 032-33. And

apparently recognizing that Section 1983 would otherwise provide her a cause of action, Plaintiff disclaims reliance on it. Appx. 025. This Court declined to recognize a private right of action for violation of Article 3, Section 6 of the West Virginia Constitution precisely because Section 1983 already afforded complete relief. *See Fields*, 244 W. Va. at 136, 851 S.E.2d at 799 (declining to recognize a private right of action because the plaintiff “asserted state law claims for negligence in the hiring, retention, and/or supervision of employees; battery; and outrageous conduct” and “federal claims” under Section 1983). So too here.

This Court should decline to recognize a new, duplicative cause of action.

III. This New Tort Subverts Existing Law.

Not only did the circuit court create a new cause of action, but it also applied it in a way that renders meaningless this Court’s qualified immunity cases. For each claim, the circuit court found that WVDCR wasn’t entitled to qualified immunity because Plaintiff vaguely alleged “violations of clearly established laws.” Appx. 018-21. And the circuit court found that Rule 8 “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.” Appx. 011 (emphasis in *Order*). So in the process of creating a new cause of action, the circuit court developed a qualified-immunity-proof magic bullet. A plaintiff need only plead “deliberate indifference”—generally—“to clearly established laws”—vaguely—to overcome qualified immunity. That level of pleading is incompatible with this Court’s jurisprudence.

First, it’s not enough to allege violation of a statute or constitution to overcome qualified immunity: “[Q]ualified immunity is not so fickle as to abandon state actors upon mere mention of a constitutional provision or statute.” *Moorhead v. W. Va. Army Nat’l Guard*, No. 23-476, 2025 WL 1275889, at *7 (W. Va. May 2, 2025). For example, in *West Virginia Regional Jail &*

Correctional Facility Authority v. A.B., 234 W. Va. 492, 766 S.E.2d 751 (2014), the plaintiff claimed the WVDCR’s predecessor violated the Prison Rape Elimination Act, which she contended was a “clearly established law.” *Id.* at 515, 766 S.E.2d at 774. This Court rejected that contention. *Id.* It determined that PREA was not a “clearly established law” for purposes of qualified immunity because it “does not grant prisoners any specific rights.” *Id.* (citations omitted). And this Court is “wary of allowing a party to overcome qualified immunity by cherry-picking a violation of any internal guideline irrespective of whether the alleged violation bears any causal relation to the ultimate injury.” *Crouch v. Gillispie*, 240 W. Va. 229, 237, 809 S.E.2d 699, 707 (2018). So the Court has been careful when identifying clearly established laws. *See id.* at 235, 809 S.E.2d at 705 (determining that Child Protective Services guidelines were not clearly established law); *see also* Syl. pt. 4, *W. Va. Dep’t of Human Servs. v. David B.*, 251 W. Va. 217, 911 S.E.2d 884 (2024) (“For purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively approved are not, and cannot be used to create clearly established statutory rights or law of which a reasonable person would have known.”).

The circuit court ran afoul of this Court’s precedents when it relied upon repealed legislative rules, W. Va. Code St. R. § 95-1-1, *et seq.*, as “clearly established law.” Appx. 018. And it sidestepped entirely the requirement that the “acts or omissions” violative of clearly established law be those “of which a reasonable person would have known” are unlawful. Syl. pt. 4, *Ballard, supra*. The circuit court instead relied upon the name of the novel cause of action as sufficient proof. Appx. 019 (“Plaintiff alleges deliberate indifference in violation of clearly established laws.”). That’s not enough. Rather, a “plaintiff must make a ‘particularized showing’ that a ‘reasonable official would understand that what he is doing violated [a] right’ or that ‘in the

light of preexisting law the unlawfulness’ of the action was ‘apparent.’” *A.B.*, 234 W. Va. at 517, 766 S.E.2d at 776 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (additional citation omitted). The circuit court’s application of this new tort dodges this crucial inquiry.

Second, and complementary, “a claim implicating qualified immunity must meet a heightened pleading standard.” *Ballard*, 249 W. Va. at 322-23, 895 S.E.2d at 177-78. “[T]he purpose of requiring heightened pleading by a plaintiff permits a framework by which a circuit court may engage in an analysis to determine whether a plaintiff has a sufficient claim to overcome the qualified immunity.” *W. Va. Reg’l Jail & Corr. Fac. Auth. v. Estate of Grove*, 244 W. Va. 273, 282, 852 S.E.2d 773, 782 (2020) (cleaned up). That means “plaintiffs ‘should supply in their complaints or other supporting materials greater factual specificity and particularity than is usually required.’” *Id.* (quoting *Elwood v. Rice Cty.*, 423 N.W.2d 671, 676 (Minn. 1988)). This Court has refused to give a pass to plaintiffs who merely refer to laws without showing a violation that “bears any causal relation to the ultimate injury.” *Crouch*, 240 W. Va. at 237, 809 S.E.2d at 707; *see also* *W. Va. Dep’t of Human Servs. v. A.R.*, 249 W. Va. 590, 601-02, 900 S.E.2d 16, 27-28 (2024) (holding that the plaintiff’s “references to the Human Rights Act, the Human Trafficking Act, and Article 3, § 10 of the West Virginia Constitution also fail to overcome the Department’s qualified immunity defense”).

So a plaintiff may not simply “aver generally” deliberate indifference to clearly established laws to overcome a defendant’s qualified immunity. But by recognizing and applying this new cause of action, the circuit court subverted this Court’s qualified immunity jurisprudence. It creates a would-be trump card to an immunity intended to “insulate the decisionmaking process from the harassment of prospective litigation.” *Crouch*, 240 W. Va. at 236, 809 S.E.2d at 706. After all, qualified immunity “is not just a defense, but rather ‘an entitlement not to stand trial.’”

W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove, 244 W. Va. 273, 282, 852 S.E.2d 773, 782 (2020) (quoting *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015)). Creating the magic-bullet cause of action of “deliberate indifference to clearly established laws” defeats the very purpose of qualified immunity. This Court should reject both its recognition and the circuit court’s application of it.

CONCLUSION

In deciding the petition, the Court should reject the circuit court’s recognition of a new cause of action for deliberate indifference to clearly established laws.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-328

**STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA
DIVISION OF CORRECTIONS
AND REHABILITATION,**

Petitioner,

v.

**THE HONORABLE TERA SALANGO,
Judge of the Circuit Court of Kanawha County,
and MARY F. MYERS, Individually and as
ADMINISTRATRIX OF THE ESTATE OF
RONALD M. MYERS,**

Respondents.

CERTIFICATE OF SERVICE

I, Caleb B. David, do hereby certify that the foregoing **Brief of Amicus Curiae State of West Virginia** is being served on counsel of record by File & Serve Xpress this the 29th day of May 2025.

/s/ Caleb B. David
Caleb B. David