

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

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STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DIVISION
OF CORRECTIONS AND
REHABILITATION,

Petitioner,

v.

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

Respondents.

PETITION FOR WRIT OF PROHIBITION

From the Circuit Court of Kanawha County
Case No. 24-C-842

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QUESTION PRESENTED

1. Did the Circuit Court commit clear legal error and exceed the scope of its authority when it found that a common law claim of “deliberate indifference” for money damages is a viable cause of action in West Virginia?

STATEMENT OF THE CASE

A. Introduction

“Deliberate indifference” is a term of art that has been developed by federal jurisprudence regarding claims under the Eighth and Fourteenth Amendments to the United States Constitution, as well as federal statutory claims. There is no legal authority that supports the existence of an alleged common law tort claim for money damages for deliberate indifference under West Virginia law as asserted in Count III of the Complaint. Thus, the Circuit Court committed clear error in recognizing such a claim.

The West Virginia Division of Corrections and Rehabilitation (“WVDCR”) asks this Court to issue a writ of prohibition because this case presents a matter of first impression, specifically, whether West Virginia law recognizes a common law tort for money damages for “deliberate indifference.” The WVDCR asks this Court to intervene and find that the lower court permitting a common law tort for “deliberate indifference” to proceed against the WVDCR is clear error. The lower court committed clear error by failing to dismiss Plaintiff’s common law tort claim for money damages for “deliberate indifference” against the WVDCR because this claim has never been recognized by this Court outside of 42 U.S.C. § 1983 and the West Virginia Legislature has never enacted a state analog. This issue should be resolved prior to the parties engaging in discovery and the remainder of the proceedings below to prevent an onerous and wasteful use of judicial resources, as well as the WVDCR’s resources, in this and other similar matters currently pending in Kanawha County. For these reasons, the WVDCR petitions this Honorable Court for

relief at this time, asking that this Court grant the Writ of Prohibition, prohibiting the Circuit Court from recognizing a cause of action for deliberate indifference as a common law tort claim as alleged in Count III of the Complaint.

This case arises out of a medical emergency experienced by Ronald M. Myers, age 79, while an inmate at Eastern Regional Jail (“ERJ”), a facility operated by the WVDCR, and his death eight days later. Appx. 024-029. According to the Complaint, Mr. Myers was incarcerated at ERJ beginning on or about June 23, 2022. Appx. 026. The Complaint alleges that on or about July 11, 2022, Mr. Myers was found unresponsive in his cell and transported to WVU Berkeley Medical Center. Appx. 027. It further alleges that on July 19, 2022, Mr. Myers suffered a stroke and passed away. Appx. 029. Respondent Mary F. Myers, individually and as the Administrator of the Estate of Ronald M. Myers, filed suit against Petitioner WVDCR, Wexford Health Sources, Inc. (“Wexford”), Nilay B. Thaker, D.O. (a Wexford employee), and unnamed John/Jane Doe correctional officers. Appx. 023.

In what appears to be an attempt to circumvent clear state and federal precedent, Respondent asserts a novel cause of action – “deliberate indifference in violation of clearly established West Virginia law” – in Count III of the Complaint. Appx. 030. The WVDCR filed a Motion to Dismiss seeking dismissal of, *inter alia*, this purported deliberate indifference cause of action on the grounds that no such cause of action for money damages for the common law tort of “deliberate indifference in violation of clearly established West Virginia law” exists under West Virginia common law. Appx. 037.

Following briefing, the Circuit Court entered the Order submitted by Respondent Myers denying Petitioner’s Motion to Dismiss. Appx. 001. The Circuit Court’s Order recognizes a claim for “deliberate indifference” as a stand-alone common law tort under West Virginia law, for which

money damages may be sought. Appx. 011. This conclusion is inconsistent with this Court's precedent which recognizes "deliberate indifference to the serious medical needs of prisoners" as proscribed by Article III, Section 5 of the Constitution of West Virginia, for which money damages are *not* an available form of relief.

Existing law provides Respondent adequate means of seeking relief under the circumstances presented. For example, Respondent may seek relief under the law of West Virginia for negligence resulting in wrongful death (which she did assert in Counts IV and V, Appx. 032-033). Further, if Respondent believes that a constitutional violation occurred, a claim for money damages may be sought pursuant to 42 U.S.C. § 1983 for deliberate indifference to a serious medical need in violation of the Eighth or Fourteenth Amendment to the United States Constitution. However, Respondent is expressly employing a strategy which disavows any claim under federal law. Appx. 024-025. Whatever the reason for this chosen strategy, there is neither a legal nor a practical basis for creating an entirely new common law tort that would duplicate existing federal law, and this Court has certainly not done so.

Petitioner seeks a Writ of Prohibition in this Court to prohibit the Circuit Court from recognizing that "deliberate indifference" is a stand-alone common law tort in West Virginia because no such claim exists.¹ This issue should be resolved by this Court immediately. In addition to this matter, Petitioner is aware of two other orders recently entered in the Circuit Court of Kanawha County similarly allowing claims of "deliberate indifference" to proceed as common law torts seeking money damages. "Order Denying Defendant West Virginia Division of Corrections

¹ The Circuit Court erred in denying the WVDCR's Motion to Dismiss on the additional basis that the WVDCR is entitled to qualified immunity for the two counts of negligence asserted against it (Counts IV and V). This separate error is the subject of an interlocutory appeal, docketed in this Court as No. 25-242.

and Rehabilitation’s Motion to Dismiss Plaintiff’s Complaint and Motion to Certify” in *Ted A. Topeka, Sr. v. Wexford Health Sources, Inc., et al.*, Kanawha County Civil Action No. 24-C-1138 (entered May 5, 2025); “Order Denying Defendant West Virginia Division of Corrections and Rehabilitation’s Motion to Dismiss Deliberate Indifference Count on Plaintiff’s Second Amended Complaint and Motion for Certified Question” in *Gregory Pyles, Administrator v. PrimeCare Medical of West Virginia, Inc. et al.*, Kanawha County Civil Action 2022-C-475 (entered May 8, 2025). Claims of “deliberate indifference” under West Virginia common law have been asserted in several additional pending matters, as discussed more fully below. A decision by this Court is needed to provide clarification on this important issue and to achieve a consistent application of West Virginia law.

B. Procedural Background

Respondent’s Complaint asserts claims against the WVDCR for (1) “deliberate indifference”; (2) negligence; and (3) negligent training. Appx. 030-033. Respondent’s Complaint explicitly disclaimed all claims under federal law, specifically disclaiming all claims under 42 U.S.C. § 1983. Appx. 025. Respondent’s Complaint asserts a common law claim for “deliberate indifference” against the WVDCR under West Virginia law and seeks monetary damages. Appx. 030-031.

The WVDCR moved to dismiss Respondent’s claim for deliberate indifference (Count III) on the grounds that there is no cognizable claim for monetary damages for “deliberate indifference” under West Virginia law. Appx. 037-047. To the contrary, in relevant part, “deliberate indifference” refers to a component of a federal claim for constitutional violations under the Eighth or Fourteenth Amendment to the United States Constitution. The exclusive

vehicle to bring a claim for monetary damages for deliberate indifference is 42 U.S.C. § 1983; however, Respondent disclaimed any federal claims under 42 U.S.C. § 1983. Appx. 024-025.

Respondent mistakenly asserts that her claim for “deliberate indifference” is based on long-established state law. Appx. 063-064. Because this question was not appropriate for appeal under Rule 54(b) of the West Virginia Rules of Civil Procedure, and it appeared that this question has never been squarely addressed by this Court, the WVDCR filed a motion to certify this question in the interests of judicial economy. Appx. 248. The Circuit Court denied the Motion, finding that this Court “has explicitly recognized the claim of deliberate indifference in the context of state law.” Appx. 294.

Accordingly, Petitioner now seeks extraordinary relief from this Honorable Court regarding the purported common law cause of action for money damages entitled “deliberate indifference to a clearly established law.”

C. Complaint Allegations

According to the Complaint, Ronald M. Myers was incarcerated at ERJ beginning on or about June 23, 2022. Appx. 025. Respondent alleges that Wexford was to provide health care to Mr. Myers that included an intake screening and assessments to determine his medical conditions. Appx. 026. Respondent alleges that, during an intake screening, Wexford should have determined that Mr. Myers had a significant medical history, including diabetes, acute myocardial infarction, acute respiratory failure with hypoxia, chronic kidney disease, coronary artery disease, chronic heart failure with reduced ejection fraction, and non-ST elevated myocardial infarction. Appx. 026.

Respondent alleges that, during his intake on June 23, 2022, Mr. Myers showed signs of cognitive impairment, including that he could not recall the names of his prescription medications

or his physicians. Appx. 026. Respondent alleges that Mr. Myers advised Wexford that his wife would know the names of his medications and physicians, but no efforts were made to contact his wife. Appx. 026. Respondent alleges that on July 11, 2022, Mr. Myers was found unresponsive in his cell. Appx. 027. Respondent alleges that two days prior, Wexford employee Nilay Thaker, D.O., ordered Mr. Myers to receive atorvastatin and clopidogrel. Appx. 027. Respondent alleges that medical records from Wexford indicate that Mr. Myers refused medical care on July 10, 2022. Appx. 027.

Respondent alleges that on July 11, 2022, Mr. Myers was transported to WVU Berkeley Medical Center. Appx. 027. Respondent alleges that medical records from that visit state that Wexford staff and ERJ staff reported that Mr. Myers had been found lying on his bunk presumably asleep and was found later that afternoon to have an altered mental state. Appx. 027. Respondent alleges that Wexford staff also reported to the WVU Berkeley Medical Center staff that Mr. Myers had not eaten or taken his medication for a week. Appx. 027. Respondent alleges that Mr. Myers' cellmate stated that he had been altered for a few days. Appx. 027. Respondent alleges Mr. Myers passed away due to these events. Appx. 029.

Count III of the Complaint alleges "deliberate indifference in violation of clearly established West Virginia law." Appx. 030. According to Respondent, this claim purports to assert a stand-alone common law tort claim under West Virginia law and seeks money damages. Appx. 031, 063.

D. Circuit Court Order

On March 19, 2025, the Circuit Court entered an Order denying the WVDCR's Motion to Dismiss. Not only was the ultimate decision clearly erroneous, but the Order fails to provide any meaningful support for the Circuit Court's consequential recognition of a new common law cause

of action. The Order further fails to apply the requisite heightened pleading standard in this case, which clearly implicates immunities. Appx. 006. Instead, the Order erroneously relies on the tenets of notice pleading only under Rule 8 of the West Virginia Rules of Civil Procedure. Appx. 006. The Order also fails to meaningfully reconcile its findings with this Court’s decision in *Fields v. Mellinger*, 244 W.Va. 126, 131-132, 851 S.E.2d 789, 794-795 (2020). It fails to make any distinction between sources of law, specifically between cases interpreting federal causes of action and cases interpreting state law. Instead, the Circuit Court’s conflated conclusion that “deliberate indifference of clearly established laws” is a valid cause of action is based upon a patchwork of irrelevant legal statements and quotations sourced from unrelated legal concepts, taken out of any logical context. For example, the Circuit Court stated that “[d]eliberate 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 recent decisions or related state statutes.” Appx. 006. Immediately following this statement, the Order makes puzzling references to “duty and breach of duty” and the requirements of Rule 8 of the West Virginia Rules of Civil Procedure for stating a claim. Appx. 006.

Other portions of the Circuit Court’s Order quote case law relating to the defense of qualified immunity, and what constitutes “clearly established law” in the context of that affirmative defense.² Appx. 007; 010; 011; 013. This disjointed analysis purports to be legal support for recognizing the existence of a new common law tort cause of action. These legal citations are taken wholly out of context and demonstrate a distinct misunderstanding of those

² Although the issue of qualified immunity is the subject of an interlocutory appeal, it is noteworthy that the Circuit Court’s Order fails to identify what “clearly established law” was allegedly violated. After an immaterial digest of various inapplicable immunities, the Circuit Court’s Order only refers to Title 95 of the West Virginia State Code of Regulations, which are no longer valid regulations. Appx. 018.

cases and their discussion of “clearly established law” in the context of qualified immunity analysis.

Tellingly, the portions of the Circuit Court’s Order which purport to define deliberate indifference and its contours rely on *federal* law and cases describing federal constitutional and statutory causes of action, rather than West Virginia common law. For example, the Circuit Court quotes extensively to *Farmer v. Brennan*, 511 U.S. 825, 835 (1994), which the Circuit Court acknowledged is a case where the Supreme Court of the United States applied the concept of deliberate indifference to a civil rights claim under 42 U.S.C. §1983. Appx. 009.

The only potentially relevant discussion refers to the West Virginia Intermediate Court of Appeals (“ICA”) decision in *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, 2024 W. Va. App. LEXIS 203, 2024 WL 3412261 (W.Va. ICA July 15, 2024). However, the existence of a common law tort deliberate indifference cause of action was not raised before the ICA in *Iacovone*. Instead, the WVDCR appealed other trial-related issues, none of which squarely placed before the ICA whether a state cause of action for deliberate indifference existed. Therefore, the Circuit Court’s Order is clearly erroneous, and Petitioner is entitled to the requested extraordinary relief of prohibiting the Circuit Court from permitting a common law cause of action for “deliberate indifference.”

SUMMARY OF ARGUMENT

The Circuit Court committed clear error and exceeded its legitimate authority when it found that an independent cause of action for money damages for “deliberate indifference” exists under West Virginia common law. “Deliberate indifference” is not a stand-alone claim in any context.³ It

³ In an effort to seek this Court’s clarification on this issue, the Petitioner sought relief by certified question, which was denied. Appx. 248, 288. Despite denying this request, the Circuit Court entered an Order making specific findings of fact and conclusions of law in accordance with *State*

is a term of art that has been developed by federal jurisprudence in connection with claims for violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as other claims under federal statutory law. Deliberate indifference to a medical need of a pretrial detainee is actionable under the Fourteenth Amendment to the United States Constitution. *Short v. Harman*, 87 F.4th 593, 611 (4th Cir. 2023). An individual whose federal civil rights have been violated may seek money damages because the United States Congress has expressly provided for such relief. As explained more fully below, there is no West Virginia statutory analog. Rather, the exclusive vehicle for seeking money damages for violation of federal civil rights, such as deliberate indifference to a serious medical need, is 42 U.S.C. § 1983. Respondent in this matter expressly disclaimed any federal claims under 42 U.S.C. § 1983 and chose not to seek such relief. Appx. 024-025.

Like the United States Constitution, Article III, Section 5 of the Constitution of West Virginia contains various individual rights and protections, including a prohibition of infliction of cruel and unusual punishment. As this Court stated in Syl. Pt. 4, *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 (1998), “[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.” *Id. Nobles* specifically concerned the contours of a final order following a *writ of mandamus* issued by this Court related to conditions at Huttonsville Correctional Center. *Id.*, 202 W.Va. at 527, 505 S.E.2d at 446 (emphasis added). Here, Respondent does not seek the extraordinary remedy of mandamus but, instead, seeks money damages. This distinction is critically important to the analysis.

ex rel. ERx, LLC v. Cramer, 247 W. Va. 739, 743, 885 S.E.2d 870 (2023). Therefore, the Circuit Court’s Order is ripe for extraordinary review because the factors set forth in Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) are satisfied.

Unlike the United States Constitution, which is complemented by 42 U.S.C. § 1983, providing a private cause of action for monetary relief, the Constitution of West Virginia has no corresponding statutory analog which provides for monetary relief for constitutional violations. The West Virginia Legislature has simply not enacted corresponding legislation, and it would be inappropriate for this Court to usurp that legislative authority to create such a cause of action. In *Fields v. Mellinger*, 244 W. Va. 126, 131-132, 851 S.E.2d 789, 794-795 (2020), this Court confirmed there is no cause of action for monetary damages under Section 5 of Article III.

This should be the end of any inquiry with respect to a claim for “deliberate indifference” as asserted in Count III of the Complaint. However, in responding to the WVDCR’s Motion to Dismiss, Respondent asserted that the present action does not include constitutional claims but, rather, asserts “a common law cause of action for deliberate indifference.” Appx. 063. Respondent stated that all references to the West Virginia Constitution were included in the Complaint for the sole purpose of rebutting the affirmative defense of qualified immunity. Appx. 063. Respondent stated that she is not asserting a constitutional violation claim. Appx. 063. This argument appears contrary to the language of Count III on its face. Appx. 030-032. Moreover, “deliberate indifference” is not a common law claim under West Virginia law. A tort claim for money damages cannot be maintained against the WVDCR for “deliberate indifference” because no such claim exists under West Virginia law. The Circuit Court committed clear error and exceeded its legitimate powers in denying Petitioner’s Motion to Dismiss as to Count III.

Accordingly, this Court should stay further proceedings in the Circuit Court of Kanawha County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this matter for Rule 20 argument, enter an order granting the Writ of Prohibition, and prohibit the Circuit Court from allowing Count III of the Complaint to proceed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter will aid this Court in its decision process under Rule 20(a)(1) because this case involves a matter of first impression regarding whether there is a West Virginia common law claim of deliberate indifference. Oral argument will also aid this Court in its decision process under Rule 20(a)(2) because it involves issues of fundamental public importance in clarifying the viability of a novel common law claim of deliberate indifference against a State agency.

ARGUMENT

A. Standard of Review

This Court's original jurisdiction is recognized in Rule 16 of the West Virginia Rules of Appellate Procedure. A writ of prohibition is proper whenever an inferior court does not have jurisdiction or has jurisdiction but exceeds its legitimate powers. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003). "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1; see also syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Syllabus point one, in pertinent part, of *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014), held:

[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Petitioner seeks a writ of prohibition because the Circuit Court committed clear legal error and exceeded its legitimate powers when it found that West Virginia recognizes a common law cause of action for “deliberate indifference” that can be asserted against a State agency. Such a ruling is a substantial and clear-cut legal error that contravenes this Court’s precedent and the separation of powers principle in the absence of legislative action.

In such instances, this Court has established the following standard of review for issuing a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. West Virginia Nat’l Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 672 S.E.2d 358 (2008); Syl. Pt. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); Syl. Pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997).

All five factors are unquestionably present here. First, Petitioner has no other means of direct appeal. Second, if forced to defend this matter through trial, Petitioner will suffer prejudice and not be permitted to invoke its affirmative defense of qualified immunity; the parties will needlessly expend significant resources, time, and expense; and the Court’s judicial resources will

be wasted. These wasteful burdens can be avoided only by the instant writ and will not be correctable on appeal after a trial. Moreover, State defendants are entitled to evaluate the applicability of various immunities, including qualified immunity. This novel common law cause of action of “deliberate indifference to a clearly established law” improperly nullifies qualified immunity as evidenced by its name alone. This is grossly prejudicial to Petitioner.

The third and most important factor – that the lower tribunal’s order is clearly erroneous as a matter of law – also exists here. “In determining the third factor, the existence of clear error as a matter of law, we will employ a de novo standard of review, as in matters in which purely legal issues are at issue.” *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002); *State ex rel. Maxxim Shared Servs., LLC v. McGraw*, 242 W. Va. 346, 350, 835 S.E.2d 590, 594 (2019) (granting a writ of prohibition when the circuit court “exceeded its legitimate powers and was clearly erroneous” when it attempted to expand the scope of the common law cause of action for negligent infliction of emotional distress.). The Circuit Court’s Order improperly expands West Virginia common law to include a novel cause of action entitled “deliberate indifference to a clearly established law” never adopted by this Court. This Court recently reiterated that “[W]e have made it clear that the language utilized in our syllabus points, rather than our dicta, is controlling. As we have repeatedly stated, ‘ . . . [n]ew points of law . . . will be articulated through syllabus points as required by our state constitution.’” *Camden Clark Mem’l Hosp. Corp. v. Marietta Area Healthcare, Inc.*, 2025 W. Va. LEXIS 175, *15, fn 8, 2025 LX 23376 (W. Va. May 14, 2025) (quoting *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 42-43, 829 S.E.2d 35, 42-43 (2019) (citations omitted)). This Court has never adopted a common law cause of action for “deliberate indifference” for money damages. Thus, the Order is clearly

erroneous in concluding this cause of action in common law exists and therefore exceeded its legitimate powers by usurping this Court's authority.

Fourth, the Circuit Court's ruling has become an oft repeated error of late and manifests a disregard for this Court's substantive precedential law as can be seen in multiple cases currently pending in the Circuit Court of Kanawha County which assert this novel common law cause of action of "deliberate indifference," including *Pyles v. WVDCR, et al.*, Civil Action No. 22-C-475 (Hardy); *Bircher v. WVDCR, et al.*, Civil Action No. 23-C-320 (Webster); *Bettis v. WVDCR, et al.*, Civil Action No. 23-C-462 (Bailey); *Griffin v. PrimeCare Medical of West Virginia, Inc., et al.*, Civil Action No. 23-C-605 (Abraham); *Goss v. WVDCR, et al.*, Civil Action No. 23-C-709 (Hardy); *Stump v. Wexford et al.*, Civil Action No. 24-C-837 (Bailey); *Thomas v. WVDCR, et al.*, Civil Action No. 24-C-1123 (Webster); and *Topeka v. WVDCR, et al.*, Civil Action No. 24-C-1138 (Abraham). Orders have been entered in *Pyles* and *Topeka* allowing a common law claim of "deliberate indifference" to proceed. Collectively, tremendous resources are being devoted to litigating this issue which could be resolved by this Court in the instant matter by issuing the requested writ of prohibition. This issue should be resolved prior to the parties engaging in discovery and the remainder of the proceedings below, to prevent an onerous and wasteful use of judicial resources as well as the WVDCR's resources. Finally, the Circuit Court's Order raises new and important legal issues of first impression because this Court has not expressly adopted a common law cause of action for "deliberate indifference."

B. Discussion

1. The Circuit Court Committed Clear Legal Error And Exceeded The Scope Of Its Authority When It Found That A Common Law Claim of “Deliberate Indifference” for Money Damges Is a Viable Cause of Action in West Virginia.

An alleged common law claim for deliberate indifference is not a viable cause of action in West Virginia, and the Circuit Court committed clear error in recognizing such a claim.

The legal phrase “deliberate indifference” refers to federal constitutional violations under the Eighth or Fourteenth Amendment to the United States Constitution. The Supreme Court of the United States held in *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976), *quoting Gregg v. Georgia*, 428 U.S. 153, 173 (joint opinion of Stewart, Powell, and Stevens, JJ.). The Supreme Court therefore held that “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.” *Id.*, 429 U.S. at 105. In *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974 (1994), the Supreme Court reiterated that “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974 (1994), *citing Helling v. McKinney* 509 U.S. 25, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993); *Wilson v. Seiter*, 501 U.S. 294, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991); *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). In *Farmer*, the Supreme Court defined the term “deliberate indifference” as it relates to an Eighth Amendment claim. *Id.* Deliberate indifference to a medical need of a pretrial detainee is actionable under the Fourteenth Amendment to the United States Constitution. *Short v. Harman*, 87 F.4th 593, 611 (4th Cir. 2023). Claims for “deliberate indifference” in the context of an incarcerated individual give rise to claims for money damages

through the sole vehicle of 42 U.S.C. § 1983, enacted by the United States Congress. The exclusive vehicle for seeking money damages for violation of civil rights, such as deliberate indifference to a serious medical need, is 42 U.S.C. § 1983. There is no West Virginia statutory analog.

In order to state a claim for damages under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that (s)he was injured by “the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution and laws” by a “person” acting “under color of state law.” See 42 U.S.C. § 1983; *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Respondent, however, has expressly disclaimed any federal claims under 42 U.S.C. § 1983, and is not seeking relief under that statute. Appx. 024-025.

Article III, Section 5 of the Constitution of West Virginia contains a prohibition of infliction of cruel and unusual punishment. In *Nobles v. Duncil*, this Court acknowledged that deliberate indifference to the serious medical needs of prisoners can constitute a constitutional violation under Article III, Section 5. Syl. Pt. 4, *id.*, 202 W.Va. 523, 505 S.E.2d 442 (1998). However, this does not translate to a claim for money damages. *Nobles* concerned relief *in mandamus* related to conditions at Huttonsville Correctional Center. *Id.*, 202 W.Va. at 527, 505 S.E.2d at 446. Respondent in this matter does not seek the extraordinary remedy of mandamus but, instead, seeks money damages. This distinction is important based on this Court’s prior decisions.

Claimants whose civil rights under the United States Constitution have been violated may seek money damages through 42 U.S.C. § 1983. However, the Constitution of West Virginia has no corresponding statute which provides for monetary relief for constitutional violations. The West Virginia Legislature has not enacted any statute providing for such relief. In *Fields v. Mellinger*, 244 W.Va. 126, 131-132, 851 S.E.2d 789, 794-795 (2020), this Court confirmed there is no cause of action for monetary damages under Section 5 of Article III. *Fields* was decided long after

Nobles, and affirms what has long been the case – that extraordinary relief such as habeas corpus and mandamus may be sought based upon West Virginia’s cruel and unusual punishment clause, but that money damages are not a form of relief available under Article III, Section 5. Nothing cited by Respondent establishes a claim for money damages for “deliberate indifference” under West Virginia common law.

This Court has held that, “[h]abeas corpus lies to secure relief from conditions of imprisonment which constitute cruel and unusual punishment in violation of the provisions of Article III, Section 5, of the Constitution of West Virginia.” Syl. Pt. 1, *State ex rel. Pingley v. Coiner*, 155 W. Va. 591, 186 S.E.2d 220 (1972). The relief available to an inmate claiming to have suffered a violation of rights is limited to the following:

- (a) A reduction in the extent of his confinement or his time of confinement;
- (b) Injunctive relief, and subsequent enforcement by contempt proceedings, including but not limited to, prohibiting the use of physical force as punishment, requiring psychological testing of guards, and ordering guards discharged if at a hearing they are proved to have abused inmates;
- (c) A federal cause of action authorized by 42 U.S.C. § 1983; and
- (d) A civil action in tort.

Syl. pt. 4, in part, *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). In this civil action, Respondent has not requested injunctive relief or habeas corpus relief. It is a claim solely for money damages. Any cause of action for money damages lies in the existing West Virginia tort law or 42 U.S.C. § 1983. There is no separate, independent cause of action for money damages based upon violation of Article III of the Constitution of West Virginia. Syllabus point 4 in *Harrah v. Leverette*, *supra.*, stands for the proposition that, if any conduct occurred which allegedly gives rise to a violation of

an individual's constitutional rights, the individual can only recover money damages under state law if that conduct also constitutes a violation of either the tort law of the State of West Virginia or federal constitutional rights. Plaintiff must seek redress under existing tort law, and not under the West Virginia Constitution itself.

Courts have repeatedly interpreted *Harrah v. Leverette*, *supra.*, to hold that monetary relief is unavailable under Article III of the Constitution of West Virginia in similar matters. In its Memorandum Order in the case of *Hager, et al. v. Robinson, et al.*, No. 2:03-cv-0094, 2005 U.S. Dist. LEXIS 49455 (S.D.W. Va. Feb. 1, 2005), the U.S. District Court for the Southern District of West Virginia determined that, to the extent the plaintiff sought solely monetary relief against a state agency, "such relief is only available through a civil action in tort" and there is "no independent claim for monetary damages under article III, § 5 of the Constitution of West Virginia." *Hager*, 2005 U.S. Dist. LEXIS 49455, at *29-30 (S.D.W. Va. Feb. 1, 2005). This holding was reiterated in another Memorandum Opinion and Order dated November 1, 2013, in the substantially similar case of *Smoot v. Green, et al.*, No. 2:13-cv-10148, 2013 U.S. Dist. LEXIS 156887, 2013 WL 5918753 (S.D.W. Va. Nov. 1, 2013). In the *Smoot* Memorandum, the District Court stated that "the decision in *Harrah* does not contemplate a damages award for Article III violations in this setting" and ordered that, to the extent that the Plaintiff sought monetary relief under Article III of the Constitution of West Virginia, such claims were dismissed as a matter of law. *Id.*, 2013 U.S. Dist. LEXIS 156887, at *12 (S.D.W. Va. Nov. 1, 2013); *see also Murray v. Matheney*, No. 2:13-CV-15798, 2017 U.S. Dist. LEXIS 177670, 2017 WL 4849113, at *8 (S.D.W. Va. Oct. 26, 2017) (granting summary judgment to defendants as to plaintiff's claims for money damages for violations of Article III, Section 5 of the Constitution of West Virginia, because "monetary damages under the West Virginia Constitution [are] outside the scope of those

contemplated by the *Harrah* court”); *McMillion-Tolliver v. Kowalski*, No. 2:13-CV-29533, 2014 U.S. Dist. LEXIS 44365, 2014 WL 1329790, at *2 (S.D.W. Va. Apr. 1, 2014) (concluding that “[t]he *Harrah* court did not include a cause of action under the state constitution for money damages among the remedies it listed”).

In *Fields v. Mellinger*, 244 W. Va. 126, 851 S.E.2d 789 (2020), this Court confirmed there is no cause of action for monetary damages under Section 5 of Article III. This Court in *Fields* directly determined 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.” Syl. Pt. 3, *id.* This Court explained that any allowance for a private right of action for monetary damages was “patently absent” from the constitutional provision relied upon by Plaintiff. *Id.*, 244 W. Va. at 129, 851 S.E. 2d at 792. Similarly, this Court in *Fields* concluded that *Harrah* had been correctly interpreted as not providing a cause of action under the state constitution for money damages for violations of Article III Section 5 of the Constitution of West Virginia. *Id.*, 244 W. Va. at 131-132, 851 S.E. 2d at 794-795. The *Fields* Court also noted that **“[t]here simply is no language in *Harrah* adopting an implied cause of action for a constitutional violation.”** *Fields v. Mellinger*, 244 W. Va. at 132, 851 S.E.2d at 795 (emphasis added).

Based on this straightforward analysis, it should be clear that “deliberate indifference” as asserted in Count III of the Complaint is not a valid cause of action. However, Respondent distanced herself from the Complaint and asserted that the present action does not include constitutional claims but, rather, asserts “a common law cause of action for deliberate indifference.” Appx. 063. Respondent stated that all references to the Constitution of West Virginia were included in the Complaint for the sole purpose of rebutting the affirmative defense of

qualified immunity. Appx. 061. Respondent stated that she is not asserting a constitutional violation claim. Appx. 063.

“Deliberate indifference” is not a stand-alone cause of action under West Virginia common law or otherwise. Respondent has cited to no case from this Court declaring the existence of a common law claim of deliberate indifference or defining its scope and interplay with the defense of qualified immunity. To the contrary, in terms of a claim for money damages, “deliberate indifference” is a description of a state of mind necessary for proving certain claims under federal law.

In support of its Order recognizing a private cause of action for deliberate indifference under West Virginia common law, the Circuit Court reasoned that deliberate indifference is not limited to claims under 42 U.S.C. § 1983 but is also a standard for other federal claims. Appx. 011-012. As an initial matter, federal courts do not create or establish West Virginia common law. Any reliance on federal courts defining the contours of causes of action based upon federal law, whether constitutional or statutory, does not establish the existence of West Virginia common law.

As acknowledged in the Circuit Court’s Order, federal courts have adopted deliberate indifference as the *state of mind* necessary to prove other claims under federal statutory law, such as Title IX and the Americans with Disabilities Act (“ADA”). However, in each of these examples, “deliberate indifference” refers to an element of proving some other, underlying statutory cause of action. It is not a stand-alone claim under federal law.

The Circuit Court offered, as an example, that the Fourth Circuit Court of Appeals “has held that deliberate indifference comes into play when considering a Title XI [sic IX] violation for harassment.” Appx. 012, citing *Doe v Charlotte Mecklenburg Bd. of Educ.*, 2023 U.S. Dist. LEXIS 13204, **3-5 (W.D.N.C. Jan. 25, 2023); *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). Instead of supporting Respondent’s position, these cases further demonstrate that deliberate indifference is not itself a cause of action. The cause of action is a private cause of action for harassment that is implied under Title IX. *Doe v Charlotte Mecklenburg Bd. of Educ.*, 2023 U.S. Dist. LEXIS 13204, **3-5 (W.D.N.C. Jan. 25, 2023). Deliberate indifference in this context is merely a standard adopted for the state of mind necessary to prove a necessary element of a Title IX action. *Id.* It is not a stand-alone federal tort.

The Circuit Court’s Order incorrectly asserts that “[t]he United States Supreme Court also applied a deliberate indifference standard to violations of the Fair Credit Reporting Act (FCRA).” Appx. 012, citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). A search of *Safeco Ins. Co. of Am.* reveals that the opinion does not utilize the phrase “deliberate indifference,” so this case should not have been relevant to the decision, and the Circuit Court’s reliance here is unexplained. However, the *Safeco* case utilizes the term “reckless” and is an example that the cause of action at issue is a statutory claim under the FCRA, and the term “reckless” describes the manner in which a particular statutory violation can be proved.

The Circuit Court’s Order states that “a deliberate indifference standard” has also been applied to the Americans with Disabilities Act (“ADA”). Appx. 012-013, quoting *Koon v. North Carolina*, 50 F.4th 398, 400 (4th Cir. 2022). Again, this supports the WVDCCR’s position, not the Respondent’s. In this example, the cause of action is statutory under the ADA. *Koon v. North Carolina*, 50 F.4th 398, 404 (4th Cir. 2022). Deliberate indifference operates only as a standard for proving a state of mind that is part of the elements of a claim under the ADA. *Id.* It is not a stand-alone cause of action.

The Circuit Court’s reasoning based on state law fares no better. The Circuit Court’s Order found that a claim for “[d]eliberate indifference in West Virginia can be inferred based upon specific, often reckless, actions on part of a defendant that violate duties and standards recognized in precedent decisions and related state statutes.” Appx. 006. This is precisely what the *Fields* Court warned against. The Circuit Court’s Order seemingly equates deliberate indifference with recklessness. However, this does not support the existence of deliberate indifference as a stand-alone cause of action. It simply means that courts have found it instructive to define certain legal terms by referencing and relating them to other terms. This comparison has no bearing on the existence of a new cause of action for deliberate indifference. Indeed, each example relied upon by Respondent utilizes deliberate indifference as an element of proving some other, underlying cause of action.

The Circuit Court’s Order also inexplicably quotes case law relating to the issue of qualified immunity, and what constitutes “clearly established law” in the context of that affirmative defense, as purported support for recognizing the existence of a new common law tort cause of action. These quotations are taken out of context and do not support the Court’s conclusion. Examples include *W.Va. Dep’t of Hum. Servs. v. David B*, 911 S.E.2d 884, 894 FN13, 2024 W.Va. LEXIS 504, *27 FN13 (W.Va. Supreme Court, November 14, 2024), Appx. 007; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), Appx. 010; *Hope v. Pelzer*, 536 U.S. 730 (2002), Appx. 010; *Malley v. Briggs*, 475 U.S. 335, 341 (1986), Appx. 010; *Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 538-539 (4th Cir. 2017), App. 010-011.

The Circuit Court Order also found that a cause of action for deliberate indifference of a serious medical need was recognized by the West Virginia Intermediate Court of Appeals (“ICA”) in *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA 148 (W. Va.

ICA July 15, 2024) (memorandum decision). This is an overstatement of *Iacovone*. The existence of such a cause of action was not raised before the ICA. Instead, the WVDCR appealed other issues, none of which squarely placed before the ICA whether a state common law cause of action for deliberate indifference existed. Thus, *Iacovone* provides no support for the Circuit Court's decision that "deliberate indifference" exists as a state law tort claim. Furthermore, the Circuit Court's Order states that in *Iacovone*, among other claims, "Plaintiff alleged constitutional violations of his decedent." Appx. 006. It is unclear to what extent the inclusion of constitutional claims had an impact in *Iacovone*. Respondent has disavowed any constitutional claims in this matter.

Lower court decisions have no precedential value before this Court. *State ex rel. Miller v. Stone*, 216 W.Va. 379, 382 fn. 3 (2004). Additionally, the existence of unaddressed defects has no precedential value on subsequent cases where such defects are raised. *See, e.g., Kanawha County Pub. Library Bd. v. Bd. of Educ. of Kanawha*, 231 W.Va. 386, 396, 745 S.E.2d 424, 434 (2013) (in context of questions of jurisdiction, and noting that questions "which merely lurk in the record" are nonbinding) (additional citations omitted). Because the WVDCR did not challenge the existence of a state cause of action for "deliberate indifference" in *Iacovone*, the ICA's decision regarding other issues is nonbinding on the threshold question of the existence of a cause of action in the first instance. Or, in the alternative, to the extent that "deliberate indifference" was recognized as a stand-alone cause of action, the ICA simply erred in *Iacovone*. This Court has the opportunity to correct this outlier decision which, in any event, is nonbinding on this Court.

The Circuit Court Order additionally found that "[d]eliberate indifference, in the form of recklessness, is included in the West Virginia Governmental Tort Claims and Insurance Reform Act, *W. Va. Code* 29-12A-1, *et seq.*, which is a clearly established law prohibiting such acts."

Appx. 013. Any discussion of the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, is irrelevant to the determination of the existence of a claim for deliberate indifference under state common law. Statutory sources of law are, by definition, distinct from common law. Additionally, by its own terms, the Governmental Tort Claims and Insurance Reform Act does not apply to the WVDCR, which is a state agency. *See* W. Va. Code § 29-12A-3(e) (defining “State” as not including political subdivisions). Moreover, repetition of the phrase “clearly established law” demonstrates further confusion and an attempt to conflate “clearly established law” in the context of qualified immunity analysis with the distinct concept of deliberate indifference. The fact that the Governmental Tort Claims and Insurance Reform Act may mention negligence or other legal terms or phrases has no bearing on whether West Virginia recognizes a separate common law claim of “deliberate indifference.”

Simply put, a state law claim for “deliberate indifference” seeking money damages cannot be maintained against the WVDCR because no such claim exists under West Virginia law. Any claim for money damages for “deliberate indifference” related to civil rights violations must be brought pursuant to 42 U.S.C. § 1983, not under state law. Therefore, the Circuit Court committed clear legal error in denying the WVDCR’s Motion to Dismiss as to Count III of Respondent’s Complaint.

2. There Is No Basis to Recognize A Common Law Tort Claim For “Deliberate Indifference” And Several Reasons Caution Against Such Recognition.

A new common law cause of action should not be created lightly, without full consideration of the implications. Here, the effect of recognizing a common law cause of action for “deliberate indifference” under West Virginia law is inconsistent with this Court’s precedent. Further, it effectively circumvents decades of federal jurisprudence that has shaped deliberate indifference

claims as they exist under federal law. It will most certainly lead to a rise in litigation to explore the contours and limits of such a cause of action and the effect of various legal defenses.

For example, in recognizing a claim for “deliberate indifference” under West Virginia common law, the Circuit Court provided no justification for concluding that such a claim is viable against a State agency, as opposed to an individual. This runs contrary to federal law surrounding deliberate indifference. Claims alleging deliberate indifference asserted pursuant to 42 U.S.C. § 1983 must be asserted against a person alleged to have violated an individual’s rights and cannot be asserted against a State agency. There is logic to this, because deliberate indifference refers to a state of mind, something that does not exist in the context of a State agency. In order to state a claim for damages under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that she was injured by “the deprivation of any [of her] rights, privileges, or immunities secured by the [United States] Constitution and laws” by a “person” acting “under color of state law.” See 42 U.S.C. § 1983; *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Claims under 42 U.S.C. §1983 are specifically directed at “persons.” 42 U.S.C. §1983; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). Both the United States Supreme Court and the Fourth Circuit Court of Appeals have found that “[N]either a State nor its officials acting in their official capacities are ‘persons’ under §1983.” *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000) (unpublished). The WVDCR is not a “person” under 42 U.S.C. §1983, and, therefore, it is not subject to suit under that statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989). Instead, such claims must be asserted, if at all, against the individual allegedly violating plaintiff’s rights. The Circuit Court has provided no analysis supporting its decision to allow a claim that is based upon a mental state to be asserted against a State agency, as opposed to a person.

Similarly, under federal law, “[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), citing *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691 (1978). By creating a common law tort for “deliberate indifference” and allowing it to proceed against a State agency, the Circuit Court has, without any analysis or acknowledgment, imported the concept of vicarious liability into this new claim without any delineation regarding for whom the WVDCR is potentially liable.

Furthermore, the defense of qualified immunity can be asserted in response to federal claims for violation of the Eighth and Fourteenth Amendments to the United States Constitution. The Circuit Court’s Order recognizing the common law tort of “deliberate indifference” is silent with respect to the defense of qualified immunity and appears to completely invalidate the defense of qualified immunity by the very definition of this new cause of action for “deliberate indifference to a clearly established law.”

One of the most compelling reasons not to create a new common law cause of action for “deliberate indifference” is that it is completely unnecessary. Violations of civil rights are redressable under federal law and certain existing common law torts if the facts warrant (i.e., negligence, battery, etc.). Count III of Respondent’s Complaint aspires to assert what amounts to a federal constitutional claim, based upon federal jurisprudence, using the elements of a federal constitutional claim, disguised as a state common law claim. In recognizing a novel common law claim never adopted by this Court, the Circuit Court has permitted Respondent to circumvent the body of federal case law that governs claims asserting deliberate indifference to a serious medical need in the context of the U.S. Constitution and avoid valid defenses typically available to the State and its officials. The Circuit Court has not only recognized a new common law cause of

action out of whole cloth, but has also expanded the concept of deliberate indifference beyond the parameters that have been crafted by federal jurisprudence.

Deliberate indifference is a mental state that must be shown before an individual can be held liable for an Eighth or Fourteenth Amendment violation under the United States Constitution. *W.Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W.Va. 515, 525, 889 S.E.2d 88, 98 (2023). In *Robbins*, the *cause of action* was a violation of the Eighth or Fourteenth Amendment of the United States Constitution, for which money damages are made expressly available through the statutory vehicle of 42 U.S.C. § 1983. Deliberate indifference is *an element to be proved* as part of that cause of action. The *Robbins* case did not find, nor does it even suggest, that “deliberate indifference” is a cause of action under West Virginia law. To the contrary, the Plaintiff in *Robbins* expressly made claims alleging deliberate indifference pursuant to 42 U.S.C. § 1983 based upon alleged violations of the Eighth Amendment to the United States Constitution. *Id.*, 248 W. Va. at 521. This Court in *Robbins* referred to deliberate indifference only in the context of those Eighth Amendment claims:

[A]n inmate may establish that a prison official violated the inmate’s Eighth Amendment rights by failing in his duty of protection if the inmate demonstrates that (1) he was “incarcerated under conditions posing a substantial risk of serious harm,” an objective component; and (2) the allegedly culpable prison official had a “sufficiently culpable state of mind,” a subjective component. An inmate satisfies the latter, subjective component by showing that a prison official acted (or failed to act) with the mental state of “deliberate indifference.”

Id., 248 W. Va. at 525, quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Far from being a stand-alone claim, “deliberate indifference” refers to the mental state required to establish the subjective component of an Eighth Amendment claim pursuant to federal law interpreting the Eighth Amendment. It is an element of a federal civil rights claim under 42 U.S.C. § 1983. It has not been, nor should it be, recognized as a cause of action under West Virginia law.

CONCLUSION

The WVDCR asks this Court to issue a writ of prohibition because this case presents a matter of first impression, specifically, whether West Virginia law permits a common law tort for “deliberate indifference.” The WVDCR asks this Court to intervene and find that the lower court permitting a common law tort for “deliberate indifference” against the WVDCR is clear error. Finally, the lower court committed clear error by failing to dismiss Plaintiff’s common law tort claim for money damages for “deliberate indifference.” The WVDCR also requests that this Honorable Court issue a rule to show cause and stay proceedings in the underlying action pending the outcome of this Petition.

For all of the reasons set forth herein, the WVDCR petitions this Honorable Court to enter an order granting the writ of prohibition, prohibiting the Circuit Court from recognizing a cause of action for deliberate indifference as a common law tort claim as alleged in Count III of the Complaint. Petitioner requests any additional relief this Court deems just.

/s/Natalie C. Schaefer

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Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION,

Petitioner,

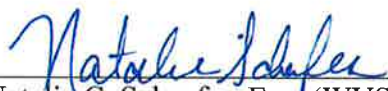
v.

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

Respondents.

VERIFICATION

I, Natalie C. Schaefer, after first being duly sworn upon oath, respectfully state that I am counsel for Petitioners named in the foregoing Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.



Natalie C. Schaefer, Esq. (WVSB #9103)

Taken, sworn to and subscribed before me this 21st day of May, 2025.

My commissions expires: May 30, 2027.





Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

**WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION,**

Petitioner,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Natalie C. Schaefer, counsel for Petitioner, hereby certify that on the 21st day of May, 2025, I filed the foregoing “Petition for Writ of Prohibition” via File & ServeXpress which will serve the following parties:

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