

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 25-

SCA EFiled: Jun 23 2025
08:12PM EDT
Transaction ID 76516379

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.

RESPONSE BRIEF OF RESPONDENT MARY F. MYERS

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TABLE OF CONTENTS

QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	1
A. Introduction.....	1
B. Procedural Background.....	6
C. Complaint Allegations	8
D. Circuit Court Orders	11
SUMMARY OF ARGUMENT	15
STATEMENT REGARDING ORAL ARGUMENT	18
ARGUMENT	18
A. Standard of Review	18
B. Discussion	23
1. The Circuit Court Properly Found That a Common Law Claim of “Deliberate Indifference” for Money Damages Is a Viable Cause of Action in West Virginia.	24
2. “Deliberate Indifference” Has Long Been Recognized as a Valid Claim in West Virginia and Petitioner Presents No Basis for Ignoring Such Precedence.....	32
CONCLUSION	39
CERTIFICATE OF SERVICE	40

TABLE OF AUTHORITIES

Cases

<i>Aluise v. Nationwide Mut. Fire Ins. Co.</i> , 218 W.Va. 498, 625 S.E.2d 260 (2005).....	14
<i>Amaechi v. West</i> , 237 F.3d 356 (4 th Cir. 2001)	35
<i>Ballard v. Delgado</i> , 241 W. Va. 495, 826 S.E.2d 620 (2019)	25, 26, 33
<i>Booker v. S.C. Dep’t of Corr.</i> , 855 F.3d 533 (4 th Cir. 2017).....	34
<i>Cannon v. Univ. of Chi.</i> , 441 U.S. 677 (1979).....	29, 32
<i>Cent. W. Va. Reg’l Airport Auth. v. Canady</i> , 181 W. Va. 811, 384 S.E.2d 852 (1989)....	19
<i>Cowie v. Roberts</i> , 173 W.Va. 64, 312 S.E.2d 35 (1984)	19
<i>Crawford v. McDonald</i> , No. 21-0732, 2023 W. Va. LEXIS 85 (Mar. 31, 2023)	26, 33
<i>Crawford v. Taylor</i> , 138 W.Va. 207, 75 S.E.2d 370 (1953).....	19
<i>Davis v. Monroe Cnty. Bd. of Educ.</i> , 526 U.S. 629 (1999).....	29, 32
<i>Dean v. McKinney</i> , 976 F.3d 407 (4 th Cir. 2020.)	32
<i>Doe v. Charlotte Mecklenburg Bd. of Educ.</i> , 3:18-cv-00586-RJC-DSC (W.D. N.C. Jan 25, 2023)	29, 32
<i>Doe v. Logan Cnty. Bd. Educ.</i> , 242 W.Va. 45, 829 S.E.2d 45 (2019)	14
<i>Doe v. Taylor Indep. Sch. Dist.</i> , 15 F.3d 443 (5 th Cir. 1994).....	29
<i>Duff v. Kanawha Cnty. Comm’n</i> , Docket 23-43 LEX 1032109882 (W.Va. Apr. 22, 2024)	37
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).	17, 33
<i>Farmer v. Brennan</i> , 511 U.S. 835 (1994).....	29
<i>Fields v. Mellinger</i> , 851 S.E.2d 789 (W.Va. 2020).....	12, 31
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 524 U.S. 274 (1998).....	29, 32
<i>Hager v. Robinson</i> , No. 2:03-cv-0094, 2005 U.S. Dist. LEXIS 49455 (S.D. W.Va. Feb. 1, 2005)	31
<i>Harrah v. Leverette</i> , 165 W.Va. 665, 271 S.E.3d 322 (1980).....	30
<i>Hodgson v. W. Va. Div. of Corr.</i> , No. 16-0495, 2017 W. Va. LEXIS 274, at *8-9 (Apr. 21, 2017)	33, 37
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 479 S.E.2d 649 (1996)	14, 17
<i>In the Interest of Tiffany Marie S.</i> , 196 W.Va. 223, 470 S.E.2d 177 (1997).....	23
<i>Jennings v. Univ. of N.C.</i> , 482 F.3d 686 (4 th Cir. 2007)	29, 32
<i>Kessel v. Monongalia Cty. Gen. Hosp. Co.</i> , 220 W. Va. 602, 648 S.E.2d 366 (2007)....	14
<i>Koon v. North Carolina</i> , 50 F.4th 398 (4 th Cir. 2022).....	28
<i>Koon v. North Carolina</i> , 50 F.4th 398, 400 (4 th Cir. 2022)	32
<i>Nobles v. Duncil</i> , 202 W. Va. 523, 505 S.E.2d 442 (1998)	passim
<i>Owens ex rel. Owens v. Lott</i> , 372 F.3d 267 (4 th Cir. 2004)	34
<i>Safeco Ins. Co. of Am. V. Burr</i> , 551 U.S. 47 (2007).....	28, 32
<i>Smoot v. Green</i> . No. 2:13-cv-10148, 2013 U.S. Dist. LEXIS 156887, 2013 WL 5918753 (S.D. W.Va. Nov. 1, 2013).....	31
<i>State ex rel v. Miller v. Reed</i> , 203 W.Va. 673, 510 S.E.2d 507 (1998).....	19
<i>State ex rel. Allen v. Bedell</i> , 193 W.Va. 32, 454 S.E.2d 77 (1994)	21

<i>State ex rel. Allstate Ins. Co. v. Gaughan</i> , 220 W.Va. 113, 640 S.E.2d 176 (2006)	19
<i>State ex rel. Am. Elec. Power Co. v. Nibert</i> , 237 W. Va. 14, 784 S.E.2d 713 (2016)	19
<i>State ex rel. Bobrycki v. Hill</i> , 202 W. Va. 335, 504 S.E.2d 162 (1998)	20
<i>State ex rel. Hoover v. Berger</i> , 199 W.Va. 12, 483 S.E.2d 12 (1996)	20, 22
<i>State ex rel. Justice v. King</i> , 852 S.E.2d 292 (W. Va. 2020)	20
<i>State ex rel. Mountaineer Gas Co. v. Tatterson</i> , No. 22-639, 2023 W. Va. LEXIS 205, at *7 (June 8, 2023)	3, 19
<i>State ex rel. Owners Ins. Co. v. McGraw</i> , 233 W.Va. 776, 760 S.E.2d 590 (2014)	23
<i>State ex rel. Paul B. v. Hill</i> , 201 W.Va. 248, 496 S.E.2d 198 (1997)	21
<i>State ex rel. Stewart v. Alsop</i> , 207 W. Va. 430, 533 S.E.2d 362 (2000)	20
<i>State ex rel. Suriano v. Gaughan</i> , 198 W. Va. 339, 480 S.E.2d 548 (1996)	19
<i>State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson</i> , 248 W. Va. 471, 889 S.E.2d 44 (2023)	28
<i>State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson</i> , 248 W. Va. 471, 889 S.E.2d 44 (2023)	34
<i>State ex rel. W. Va. Mut. Ins. Co. v. Salango</i> , 246 W. Va. 9, 866 S.E.2d 74 (2021)	19
<i>State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell</i> , 223 W. Va. 222, 672 S.E.2d 358 (2008)	3, 19
<i>State ex rel. West Virginia Div. of Natural Resources v. Cline</i> , 200 W. Va. 101, 488 S.E.2d 376 (1997)	20
<i>State ex rel. West Virginia Fire Cas. Co. v. Karl</i> , 199 W.Va. 678, 487 S.E.2d 336 (1997)	19
<i>Taylor v. Hill</i> , 2014 W.Va. Lexis 1243 (W.Va. Supreme Court November 21, 2014)	33, 37
<i>W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.</i> , 234 W.Va. 492, 766 S.E.2d 751 (2014)	30
<i>White v. Pauly</i> , 580 U.S. 73 (2017)	17
<i>Williams v McBride</i> , 2014 W. Va. LEXIS 939 *, 2014 WL 4667266 (W.Va. Supreme Court September 19, 2014)	33
<i>Wilson v. Kittoe</i> , 337 F.3d 392, 402 (4th Cir.2003)	34
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999)	35
<i>WVDCR v. Iacovone</i> , 23-ICA-148 (W.Va. ICA, July 14, 2024)	passim

Statutes

42 U.S.C. §1983	17, 24, 28
W. Va. Code § 29-12A-1	29
W.Va. Code § 55-7B-9b	30
W.Va. Code §53-1-1	15, 18

Rules

W.Va. R.Civ. P. Rule 8	13
W.Va. R. App. P. Rule 16	18
W.Va. R. App. P. Rule 20	18

Other Authorities

<i>Bailey v. WVDCR, et al</i> , Civil Action No. 19-C-1163 (2024).....	16
<i>Bell v. WVDCR, et al.</i> , Civil Action No. 22-C-409 (2022)	16, 35
<i>Bircher v. WVDCR, et al</i> , Civil Action No. 23-C-605 (2023).....	16
<i>Claypool v. WVDCR, et al.</i> , Civil Action No. 24-C-753 (2024)	16
<i>Estep v. WVDCR, et al.</i> , Civil Action No. 23-C-462 (2023)	16
<i>Griffin v. WVDCR, et al.</i> , Civil Action No. 23-C-605 (2023).....	16
<i>Pyles v. WVDCR, et al.</i> , Civil Action No. 22-C-475 (2022)	16, 35
<i>Topeka v. Wexford Health, et al.</i> , Civil Action No. 24-C-1138 (2024).....	16, 35
 <i>Prosser and Keeton</i> § 34.....	 28, 33

RESPONSE BRIEF OF RESPONDENT MARY F. MYERS

Respondent Mary F. Myers, individually and as the Administratrix of the Estate of Ronald M. Myers, by and through her counsel, hereby responds to the *Petition for Writ of Prohibition* filed by the State of West Virginia *ex rel.* West Virginia Division of Corrections and Rehabilitation and prays that the petition be denied in its entirety.

QUESTION PRESENTED

Did the Honorable Tera Salango of the Circuit Court of Kanawha County properly find that a common law claim of “deliberate indifference” for money damages is a viable cause action in West Virginia in a ruling consistent with orders entered by the Honorable Stephanie Abraham and the Honorable David Hardy and the West Virginia Intermediate Court of Appeals in similar cases where the West Virginia Department of Corrections and Rehabilitation failed to provide assistance to inmates suffering serious medical needs?

STATEMENT OF THE CASE

A. Introduction

“Deliberate indifference” is more than a term of art – it is a valid cause of action in West Virginia, one which legal authorities in this state, including this Honorable Court, have recognized for over a quarter of a century. Deliberate indifference is a viable cause of action in either federal or state courts and is not exclusive only to federal constitutional claims. West Virginia recognizes the stand-alone tort of deliberate indifference to clearly established laws, whether those laws be the Constitution, statutes, rule or prior decisions rendered by this Honorable Court or courts in other jurisdictions. The actions of the West Virginia Division of Corrections and Rehabilitation (“WVDCR”) constitute a violation of a valid tort, for which damages are permitted, whether through an award of monetary compensation, injunctive relief, other means as allowed by law.

The Circuit Court of Kanawha County committed no error in recognizing Respondent's claim and did not exceed its jurisdiction. There is simply no basis for the extraordinary remedy of a writ of prohibition in law or in fact.

In fact, the State of West Virginia has been subject to these exact same deliberate indifference causes of action in a multitude of cases in West Virginia Courts over many years and has done nothing in its petition to explain how suddenly this is a matter that rises to the level of extraordinary relief. For instance, the WVDCR recently made a virtually identical argument regarding deliberate indifference prior to trial in *Bailey v. WVDCR, et al*, Kanawha County Civil Action No. 19-C-1163. See Rsp. Myers' Appx. Rec. No. 4, *Bailey Pre-Trial Motions*. After pretrial motions were denied in *Bailey*, the trial commenced in August of 2024 and the State of West Virginia settled that matter during trial, and after horrific testimony detailing the corrections officers actions, for the State's insurance policy limits of One Million Dollars (\$1,000,000.00). See Rsp. Myers' Appx. Rec. No. 2, *Iacovone and Bailey Settlement Approvals*. While the State certainly could have allowed that matter to proceed to verdict, had it believed the cause of action being claimed

did not exist, and then attempted an appeal, instead the State paid their insurance policy limits in a case where the cause of action was again, deliberate indifference¹².

A writ of prohibition is an extraordinary remedy and may not be used as a substitute for an appeal. *State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 227, 672 S.E.2d 358, 363 (2008) (per curiam); *State ex rel. Mountaineer Gas Co. v. Tatterson*, No. 22-639, 2023 W. Va. LEXIS 205, at *7 (June 8, 2023). Petitioner West Virginia Division of Corrections and Rehabilitation (“WVDCR”) has already filed an appeal of the Circuit Court’s *Order Denying Defendant West Virginia Division of Corrections and Rehabilitation’s Motion to Dismiss Plaintiff’s Complaint* entered March 19, 2025, denying its *Motion to Dismiss*.³ In its appeal, Petitioner argues, in part, error on the part of the

¹ The West Virginia Attorney General’s Office has filed an *amicus curiae* brief in this matter in support of the WVDCR’s Petition. This position by the State that there is no cause of action for deliberate indifference claims comes on the heels of two notable 2024 settlements in which the State, under a prior administration, paid significant money damages for cases tried on this exact cause of action, among many other settlements paid by the State for these claims over the years. For instance, in 2024 a \$700,000.00 settlement was paid by the State following a trial verdict on the theory of deliberate indifference and a subsequent appeal (discussed *infra*) in *WVDCR v. Iacovone*, 23-ICA-148 (W.Va. ICA, July 14, 2024), and a policy limit \$1,000,000.00 settlement was paid in *Bailey v. WVDCR, et al*, Kanawha County Civil Action No. 19-C-1163 by the State during trial for this exact same cause of action. See Rsp. Myers’ Appx. Rec. No. 2, *Iacovone and Bailey Settlement Approvals*. Notably, the State approved these settlements as recently as last year and yet now the same State of West Virginia, and its chief legal officer, are taking the position that the cause of action that the prior administration paid these settlements based upon does not really exist and now it needs extraordinary relief from this Honorable Court.

² Essentially, through this *amicus* filing, the State attempts to provide two separate legal filings on behalf of itself, as the Attorney General is the State’s chief legal officer and yet, the State has already filed its Petition through outside counsel in this matter on behalf of the WVDCR, which is also the State of West Virginia. This is redundant and only serves to allow the State two filings on the same issue and on behalf of the same entity. The Attorney General’s Office no doubt could have undertaken to represent WVDCR in this extraordinary proceeding, but instead has allowed outside counsel to engage in the representation and yet still attempts to provide a supporting opinion. The *amicus curiae* brief improperly provides the State/WVDCR multiple strikes at the same ball. As pointed out in email communications between Plaintiff’s counsel and the Attorney General’s Office Deputy Solicitor General prior to the filing, as opposed to cases where the Attorney General’s Office routinely weighs in as to legal issues pending in this Court to make the State’s position known, in this instance, the Attorney General’s Office is attempting to file a brief on behalf of the State where the State has already weighed in on its own behalf through the filing of the Petition.

³ See, *Myers v. WVDCR, et al.*, Civil Action No. 24-C-842, *Notice of Appeal* filed April 18, 2025, Docket No. 25-242.

Circuit Court in finding WVDCR is not entitled to qualified immunity. The appeal did not address the issue of deliberate indifference, since that issue is not proper for an interlocutory appeal, and the present *Petition for Writ of Prohibition* is merely an end-run around Petitioner's procedural inability to raise the issued before this Court prior to the summary judgment stage or trial.

Most significantly, the present action is not a matter of first impression. The Circuit Court has not created a new common law tort, nor has it invented a new type of liability against the State of West Virginia or Petitioner WVDCR. West Virginia courts have recognized deliberate indifference for decades, and each of those cases resulted in monetary damages being awarded to the plaintiffs. The decision of the Honorable Tara Salango was not clear error but rather was consistent with multiple decisions recently made by the Honorable Stephanie Abraham and the Honorable David Hardy, both sitting on the Circuit Court of Kanawha County, among other decisions made throughout many years of litigation over this cause of action.

Petitioner's decedent, Ronald M. Myers, became an inmate at the Eastern Regional Jail ("ERJ"), a facility operated by the DCR, on June 23, 2022. Appx. 024-029. Mr. Myers had a significant history of serious health problems, including heart surgery and related conditions which required daily medications. Appx. 026 – 027. Respondent's Complaint asserts that Mr. Myers evidenced signs of cognitive impairment when he was processed at ERJ, but did ask jail personnel to contact his wife about his health issues and his daily medications. Appx. 026. Respondent alleges that no one at the jail did so, and Ronald Myers went for over a week without his prescribed medications or even meals. Appx 027. On or about July 11, 2022, jail personnel found Mr. Myers unresponsive

in his cell. Appx. 027. The Complaint asserts that Mr. Myers' cellmate stated that Ronald Myers had been in an altered state for a few days. Appx. 027. WVDCR called for emergency services, and paramedics transported Ronald M. Myers to the WVU Berkely Medical Center. Appx. 027. Physicians there determined that Mr. Myers suffered a stroke. He died on July 19, 2022. Appx. 029.

Respondent filed her Complaint against WVDCR, Wexford Health Sources, Inc. ("Wexford"), Nilay B. Thanker, D.O., and unnamed John Doe and Jane Doe correctional officers. Appx. 023. Count III of the Complaint alleges "Deliberate Indifference in Violation of Clearly Established West Virginia Law" on the part of WVDCR and its employees. Appx. 030. Respondent maintains that WVDCR and its employees and agents knew that Mr. Myers was sick and exhibited signs of cognitive impairment for days prior to being transferred to the hospital, and that they failed to obtain medical attention for him for days. Appx. 030-031. They purportedly knew that he was not eating, that he was not receiving his prescribed medication, and nevertheless were deliberately indifferent to his medical needs and failed to obtain medical attention for him. Appx. 031. Respondent asserts that the Respondent and its employees clearly violated the prohibitions in the West Virginia Constitution against cruel and unusual punishment and violated policies and/or directives respecting humane and reasonable care of Ronald Myers. Appx. 031.

The WVDCR filed its *Motion to Dismiss* on December 4, 2024. After extensive briefing by both parties, The Circuit Court denied the *Motion to Dismiss* by order entered March 19, 2025. The order reflects that Respondent's Count III is not a novel cause of action. The United States Supreme Court and the West Virginia Supreme Court of Appeals have recognized deliberate indifference of clearly established law as a valid

cause of action. Not only do the federal and state constitutions prohibit cruel and unusual punishment, a plethora of decisions over the last three decades have recognized deliberate indifference as a valid claim in both federal and state courts. The Circuit Court of Kanawha County properly recognized the stand-alone cause of action, and did not err nor exceed its legal authority by denying the Petitioner's *Motion to Dismiss*.

Respondent has the right to file her claims against the WVDCR in any forum she chooses. In addition to the negligence and wrongful death claims included in her *Complaint*, she has the right to file a claim for deliberate indifference to clearly established laws in state court. She has not created "an entirely new common law tort that would duplicate existing federal law" but has asserted a cause of action that has been established in West Virginia for quite some time.

Petitioner should not be permitted to utilize its *Petition for Writ of Prohibition* as an early and inappropriate interlocutory appeal.⁴ Inasmuch as Petitioner has other remedies that could address the issue of deliberate indifference (a motion for summary judgment, a jury verdict in its favor, or an appeal of either), the WVDCR would suffer no prejudice by this Court's refusal of its *Petition for Writ of Prohibition*. Wherefore, Respondent prays that the petition be **REFUSED**.

B. Procedural Background

Respondent Mary F. Myers is the widow of Ronald M. Myers, who died on July 19, 2022, as a result of an untreated acute myocardial infarction that occurred while incarcerated at the ERJ, a facility operated by Petitioner WVDCR. Appx. 025. Respondent filed her *Complaint* in this matter on August 8, 2024, asserting various claims against

⁴ As noted in its Petition, the WVDCR has appealed the Circuit Court's order denying its *Motion to Dismiss* as to the issue of qualified immunity, Docket No. 24-242.

Defendant WVDCR, its corrections officers, and Wexford and its employees, the medical providers for ERJ. Appx. 023. The *Complaint* included as Count III a claim of “Deliberate Indifference in Violation of Clearly Established West Virginia Law,” which asserted that WVDCR and its employees were deliberately indifferent to Mr. Myers’ serious need for medical care. Respondent WVDCR filed its *Motion to Dismiss* on December 4, 2024, alleging, in part, that there was no cause of action for deliberate indifference. By order entered March 19, 2025, the Honorable Tera Salango of the Circuit Court of Kanawha County denied the *Motion to Dismiss* on all counts, including Respondent’s argument regarding deliberate indifference. Appx. 001. Respondent filed its *Notice of Appeal* from that order on April 18, 2025, Docket No. 25-242. Respondent then filed its present *Petition for Writ of Prohibition* on May 21, 2025.

Prior to the entry of the order denying its *Motion to Dismiss*, Respondent filed a *Motion for Certified Question* with Judge Salango on February 5, 2025, again asserting that deliberated indifference is not a valid claim or cause of action under West Virginia law. Appx. 248. WVDCR noted that the same claim had been presented in multiple other cases filed in Kanawha County and asserted that it was imperative that the question of whether the claim of deliberate indifference is a valid claim is answered uniformly in this Circuit. Appx. 250. Defendant asserted that deliberate indifference is a claim that can only be brought under federal law, namely 42 U.S.C. §1983, and that there is no cause of action under West Virginia law. Appx. 251.

Respondent filed her *Response in Opposition to Motion to Certify Question* on February 26, 2025,, asserting that West Virginia has long recognized the legal concept of “deliberate indifference” in the context of an inmate or pre-trial detainee’s serious medical

needs under both state and federal law, and that the civil claim of “deliberate indifference” exists under West Virginia law. Appx. 255, 262. Respondent maintained that since West Virginia common law recognizes valid civil claims for deliberate indifference under state law, and since the West Virginia Supreme Court of Appeals has recognized such a claim, there was no need for a certified question. Defendant filed its *Reply to Plaintiff’s Response* on March 6, 2025. Appx 271.

On March 31, 2025, Judge Salango entered her *Order Denying Motion for Certified Question*. Appx. 288. The Circuit Court noted that it had already addressed the issue of deliberate indifference in its *Order Denying Defendant West Virginia Division of Corrections and Rehabilitation’s Motion to Dismiss Plaintiff’s Complaint* entered on March 19, 2025. Appx. 289. The Circuit Court found that a certified question in this matter was unnecessary since deliberate indifference is clearly recognized as a state law claim under Syl. Pt. 4, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998) and subsequent decisions of the West Virginia Supreme Court of Appeals. Appx. 289.

C. Complaint Allegations

Plaintiff’s decedent, Ronald M. Myers, was born on February 28, 1943. Appx. 025, 086. On or about June 23, 2022, Martinsburg Police Department officers arrested Mr. Myers and took him to the ERJ, a facility operated by Respondent WVDCR in Berkeley County. Appx. 025, 086. As alleged in the *Complaint*, Ronald Myers had a history of serious medical issues, including an acute myocardial infarction, acute respiratory failure with hypoxia, chronic kidney disease State 3, coronary artery disease, chronic heart failure with reduced ejection fraction, and a non-ST elevated myocardial infarction. Appx. 026, 087 – 088. Mr. Myers was required to take a chewable aspirin, atorvastatin (Lipitor),

carvedilol, clopidogrel (Plavix), ascorbic acid, cephalexin, cholecalciferol, doxycycline, and zinc gluconate daily. Appx. 027, 088.

Plaintiff asserted in her *Complaint* that when Ronald Myers arrived at ERJ, on June 23, 2022, he evidenced signs of cognitive impairment. Appx. 026, 087. Plaintiff further claimed that Mr. Myers could not recall the names of the medications prescribed to him or the name of the prescribing physician at that time. Appx. 026, 087. Plaintiff notes that Mr. Myers advised the intake staff that his wife would know the names of his medications and his physician. Plaintiff has asserted that there is no record that anyone tried to communicate with Mrs. Myers to obtain Mr. Myer's medication information or the name of his treating physician. Appx. 026, 087.

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

Plaintiff indicated that jail records reflect that the medical staff finally issued orders for Lipitor and Plavix on July 8, 2022, – fifteen days later - without recording any vital signs. Appx. 027, 088. Plaintiff asserts that the effects of not having these crucial heart medications became obvious. Plaintiff states that the cell mate of Mr. Myers reported that he had been "altered" for several days. Appx. 027, 088. Plaintiff also alleges that jail staff

later noted that Mr. Myers had not been eating for a week and had altered mental status and lethargy, and that the corrections officers did nothing to ensure that Ronald Myers received the treatment he required for his serious medical needs despite this obvious condition. Appx. 027, 088.

The Complaint alleges that on the morning of July 11, 2022, two days after medical staff issued Lasix and Plavix for Mr. Myers, Corrections Officers John/Jane Doe found Ronald Myers unresponsive in his cell. Appx. 088. Plaintiff claims that these corrections officers observed Mr. Myers lying on his bunk “presumably asleep” and that John/Jane Doe Corrections Officers did not check Mr. Myers to determine if he was actually sleeping or was ill that morning, nor did they attempt to determine why he did not move for several hours, essentially ignoring his condition. Appx. 027, 088.

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

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

employees were deliberately indifferent to the medical needs of Ronald Myers during the entirety of his incarceration at ERJ. Appx. 031.

As argued by Respondent in her *Response* to Petitioner's *Motion to Dismiss*, given the medical history of Ronald Meyers, his failure to properly receive required prescriptive medicines, his lethargy and altered state of mind, his inability to eat, and other actions or inactions, any reasonably trained corrections officer should have recognized that Mr. Meyers was suffering serious medical conditions that required treatment and would not have ignored his needs. Appx. 077. Respondent further argued in her *Response* to the *Petition for Certification of Question* that reasonably trained corrections officers would have known that time is of the essence in treating a stroke and that their deliberate acts in ignoring Mr. Myers medical conditions caused a worsening of his condition and ultimate death. Appx. 257.

D. Circuit Court Orders

On March 19, 2025, the Circuit Court of Kanawha County entered its *Order Denying Defendant West Virginia Division of Corrections and Rehabilitation's Motion to Dismiss Plaintiff's Complaint*. Appx. 001. In keeping with prior decisions of this Honorable Court and with prior orders from her Court and other judges in the Kanawha County Circuit Court, Judge Salango properly found that there was no basis in fact or law to support the motion, both with regards to qualified immunity and deliberate indifference.⁵ The opinion below did not create a new common law tort cause of action. Judge Salango properly

⁵ Petitioner WVDCR has filed a separate appeal regarding the issue of qualified immunity. Its present *Petition for Writ of Prohibition* is, purportedly, based solely on the issue of deliberate indifference. Any arguments or positions taken regarding qualified immunity, heightened standards of pleading, etc. are not properly before this Honorable Court and Respondent prays that they will not be considered.

recognized that the duty and breach of duty in a deliberate indifference claim may be averred in a complaint and further recognized precedent decisions that established such a claim.

In considering the applicable case law, both federal and state, the *West Virginia Rules of Civil Procedure*, and other sources, the Circuit Court properly ruled that there is a stand-alone tort of deliberate indifference in West Virginia, and did not exceed her legitimate powers by creating a new cause of action.⁶

Petitioner blatantly ignores the holding of this Honorable Court in *Nobles v. Duncil*, which held: “Deliberate 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, *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442. As further established hereinbelow, Petitioner also blithely ignores multiple subsequent holdings by this Court acknowledging the cause of action, as well as other recent orders issued by the Circuit Court of Kanawha County.

Petitioner’s attempt to distinguish the finding by the West Virginia Intermediate Court of Appeals that deliberate indifference is a valid cause of action by obfuscating the purpose of the appeal of a jury verdict against it is absolutely misplaced. Contrary to Petitioner’s assertions, the issue of deliberate indifference in *WVDCR v. Iacovone*, 23-ICA-148 (W.Va. ICA, July 14, 2024) was squarely before the West Virginia Intermediate Court of Appeals:

On appeal, WVDCR presents seven assignments of error, which, broadly speaking, fall into one of three categories: (1) the circuit court’s rulings on

⁶ Because deliberate indifference of clearly established laws is a state tort claim and not a constitutional violation claim, the Circuit Court also properly held that *Fields v. Mellinger*, 851 S.E.2d 789 (W.Va. 2020) is not applicable in this matter.

witness testimony were erroneous and prevented WVDCR from mounting a meaningful defense at trial; (2) the circuit court erred in instructing the jury regarding mitigation of damages and the elements of deliberate indifference; and (3) the circuit court erred in its calculations of pre- and post-judgment interest.

Iacovone, 23-ICA-148, p. 6 (emphasis added).

A major point of the WVDCR appeal of a substantial jury verdict in *Iacovone* was that the Circuit Court erred in giving proper instructions *for deliberate indifference*.

Respondent's proposed instructions, which were adopted by the circuit court and read to the jury, set forth the legal elements of a deliberate indifference claim (footnote omitted). However, WVDCR argues its proposed instruction was the proper instruction for the jury, as without the definition of serious medical need, the jury did not adequately consider an objective element of the claim. We disagree. While the provided instruction does not break down the considerations into discrete elements, a plain reading of the instruction references that Respondent needed to "show that the defendants . . . ignored a detainee's serious need for medical care[.]" in order to satisfy its burden.

Id. pp. 10-11. The ICA then found that the Circuit Court properly instructed the jury with an instruction that stated, in part: "In order to state a claim for denial of adequate medical care, Plaintiff must prove that the actions of Defendant or its failure to act amounted to *deliberate indifference to a serious medical need*." *Id.*, (emphasis added).

Read in its entirety, *Iacovone* is on point. West Virginia recognizes deliberate indifference of a serious medical need as a valid cause of action.

Deliberate indifference of clearly established laws has been recognized and acknowledged by courts at all levels in this State, and Petitioner is clearly wrong when it asserts that the cause of action is a novel concept.⁷ The Circuit Court properly applied the requirements of Rule 8 of the *W. Va. R. Civ. P.* However, in the event that the *Complaint*

⁷The clearly established laws in effect as of the filing of the *Complaint* include the Constitutions of the United States and the State of West Virginia and the holdings in *Nobles v. Duncil* and subsequent decisions as noted herein.

in this matter is deemed to lack the heightened pleadings required in actions involving a governmental immunity defense, the case may be remanded to permit the plaintiff to do so. See, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996); *Doe v. Logan Cnty. Bd. Educ.*, 242 W.Va. 45, 829 S.E.2d 45 (2019).

The Circuit Court's use of both federal and state laws as a basis for recognizing the independent action of deliberate indifference is a traditional procedure for clarifying a decision where the same issue is addressed in both forums. See, e.g., *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260 (2005); *State ex rel. Paige v. Canady*, 197 W. Va. 154, 475 S.E.2d 154 (1996); *Kessel v. Monongalia Cty. Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007). The cases cited by the Circuit Court did vary by issues and claims, but they all remained consistent in recognizing a cause of action for deliberate indifference of a clearly established law.⁸

As noted previously, on March 31, 2025, Judge Salango entered her *Order Denying Motion for Certified Question*, Appx. 288, which confirmed her holding regarding the issue of deliberate indifference reflected in the order denying Respondent's *Motion to Dismiss* in greater detail. Appx. 289. There, the Circuit Court relied on *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 (1998); *WVDCR v. Iacovone*, 23-ICA-148 (W.Va. ICA, July 14, 2024), and multiple other state-court opinions and decisions that recognize a cause of action for deliberate indifference.

WVDCR's *Petition* fails to comply with the requirements for a writ of prohibition. In order to obtain the extraordinary relief requested, Respondent must show that the Circuit

⁸ Respondent acknowledges that the provisions of *W.Va. Code* § 15A-3-18 sunset Title 95 of the *W.Va. Code of State Rules* as of July 1, 2021, and that the WVDCR has failed to promulgate new rules as required by said statute.

Court had no jurisdiction or, having such jurisdiction, exceeded its legitimate powers. *W.Va. Code §53-1-1*. There is no such showing in the present matter, and Respondent prays that the *Petition* be **REFUSED**.

SUMMARY OF ARGUMENT

A writ of prohibition is an extraordinary measure reserved for extraordinary circumstance, and Petitioner fails to present a basis for either. The Circuit Court of Kanawha County did not exceed its legitimate authority when it denied Petitioner's *Motion to Dismiss* and recognized that the independent cause of action for the tort of "deliberate indifference" exists under West Virginia law. Petitioner's claims that an emergency exists are contrary to substantial decisions and opinions support the Circuit Court's denial of the *Motion to Dismiss*. Petitioner cannot, through the present Petition, make this matter a roundabout appeal of the Circuit Court's *Order Denying Motion for Certification* on the question of deliberate indifference.

Deliberate indifference to clearly established laws is not simply a term of art limited to federal causes of action. It is a recognized, valid cause of action in state courts pursuant to *Nobles* and subsequent decisions of this Court. The ICA decision in *Iacovone* is not a red herring but rather is directly on point in recognizing the claim. Moreover, Petitioner's arguments are completely contrary to multiple orders contemporaneously issued by three judges in the Circuit Court of Kanawha County, West Virginia, which decided the same issue through various means.

Petitioner WVDCR is desperately attempting to avoid multiple cases where the Plaintiff, as in this matter, has asserted a claim for deliberate indifference to clearly established laws. The WVDCR has filed motions to dismiss, motions for summary

judgment, and motions for certification of question before Judges Salango, Abraham, Hardy, Bailey and Webster in the Circuit Court of Kanawha County in a least ten different cases, all seeking to avoid liability for its employees who exhibited deliberate indifference to the serious medical needs of inmates. Despite these efforts the Circuit Court of Kanawha County has routinely determined that there was a stand-alone cause of action for deliberate indifference and denied the respective motions. See Rsp. Myers' Appx. Rec. No. 1, *Collective Circuit Court Orders: Bailey v. WVDCR, et al*, Civil Action No. 19-C-1163 (2024) (Judge Salango, *Motion for Summary Judgment* denied); *Bell v. WVDCR, et al.*, Civil Action No. 22-C-409 (2022) (Judge Abraham, *Motion for Certified Question* denied, *Motion for Summary Judgment* denied); *Pyles v. WVDCR, et al.*, Civil Action No. 22-C-475 (2022) (Judge Hardy, *Motion for Certified Question* denied, *Motion to Dismiss* denied); *Topeka v. Wexford Health, et al.*, Civil Action No. 24-C-1138 (2024) (Judge Abraham, *Motion to Dismiss* denied).

In several other Kanawha County Circuit Court cases, similar motions are pending. See, e.g., *Bircher v. WVDCR, et al*, Civil Action No. 23-C-230 (2023) (Judge Webster, *Motion to Dismiss* pending); *Griffin v. WVDCR, et al.*, Civil Action No. 23-C-605 (2023) (Judge Abraham, *Motion for Certified Question* pending); *Estep v. WVDCR, et al.*, Civil Action No. 23-C-462 (2023) (Judge Bailey, *Motion for Certified Question* and *Motion to Dismiss* pending). In *Claypool v. WVDCR, et al.*, Civil Action No. 24-C-753 (2024) the parties voluntarily dismissed the matter prior to the entry of an order by Judge Abraham on the *Motion for Certified Question*.⁹

⁹ Although Petitioner argues that Circuit Court orders to do not constitute precedence, it did not fail to mention these cases in its *Motion for Certified Question*, asserting the need for an imminent review of the issue of deliberate indifference so as to ensure uniform decisions. Appx. 250.

A plaintiff is not restricted to federal courts as the exclusive means of asserting violations of state or federal law. See, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (circuit courts are courts of general jurisdiction and have original jurisdiction for §1983 claims.)

Petitioner's deliberate indifference to the serious medical needs of Ronald Myers was a violation of clearly established laws harkening as far back as *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). As later held by the United States Supreme Court in analyzing a qualified immunity issue: "While case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law. *White v. Pauly*, 580 U.S. 73, 74, (2017). Deliberate indifference to serious medical needs has been clearly established, existing precedent in the United States Supreme Court since at least 1976 and was recognized as a state law claim in West Virginia in *Nobles* in 1998. The WVDOC and its employees knew or should have known that their actions violated clearly established law when they allowed Mr. Myers to languish, untreated, in his prison cell until he died.

The fact that the decision in *Nobles* was a decision issued in conjunction with the issuance of a writ of mandamus is not a basis for ignoring the holding of this Honorable Court in considering a claim filed through a state-court complaint. While West Virginia does not have a state statute analogous to 42 U.S.C. §1983, it does have recognized causes of action under common law and precedent decisions for deliberate indifference to clearly established laws. While there may be an argument regarding monetary damages for constitutional claims, other relief available to the Respondent has not been

challenged. Inasmuch as the *Complaint* in this matter seeks not only compensable damages, which can be awarded under the negligence and negligent training claims, but also all other relief “recognized, permitted and warranted by applicable law,” the deliberate indifference count should not be disregarded or dismissed.

The Circuit Court did not exceed its legitimate authority in denying Petitioner’s *Motion to Dismiss* and recognizing Respondent’s cause of action for deliberate indifference of clearly established laws. There is no credible evidence to support the Petitioner’s *Petition for a Writ of Prohibition*, no basis for a stay pending consideration of the *Petition*, and no reason this matter cannot proceed in Circuit Court. Respondent Mary F. Myers therefore prays that the *Petition* be **REFUSED**.

STATEMENT REGARDING ORAL ARGUMENT

Respondent Mary F. Myers asserts that oral argument in this matter is not required inasmuch as the Petition for Writ of Prohibition does not present any novel issues of fact or law and no issues of first impression that cannot be determined by a memorandum opinion of this Honorable Court. In the event this Court determines that oral argument is necessary, the Respondent requests twenty minutes of time for argument pursuant to *W.Va. R. App. P.* Rule 20.

ARGUMENT

A. Standard of Review

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code* §53-1-1; *W.Va. R. App. P.* Rule 16; Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977)

Prohibition is an extraordinary remedy and may not be used as a substitute for an appeal. See *State ex rel. W. Va. Mut. Ins. Co. v. Salango*, 246 W. Va. 9, 13, 866 S.E.2d 74, 78 (2021); *Cent. W. Va. Reg'l Airport Auth. v. Canady*, 181 W. Va. 811, 384 S.E.2d 852 (1989) (per curiam); *State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 227, 672 S.E.2d 358, 363 (2008) (per curiam).

Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari."

Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953); Syl. Pt. 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984); Syl. Pt. 2, *State ex rel v. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998).

This Court has made it clear that it is "restrictive in its use of prohibition as a remedy." *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997); *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 118, 640 S.E.2d 176, 182, (2006).

Indeed, we have stated that "prohibition is a *drastic, tightly circumscribed*, remedy which should be invoked only in extraordinary situations." *Id.* at 228, 672 S.E.2d at 364 (emphasis added).

State ex rel. Mountaineer Gas Co. v. Tatterson, No. 22-639, 2023 W. Va. LEXIS 205, at *7 (June 8, 2023)

A writ of prohibition is reserved only to "really extraordinary causes." *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996); *State ex rel. Am. Elec. Power Co. v. Nibert*, 237 W. Va. 14, 19, 784 S.E.2d 713, 718 (2016). Historically, this Court has limited its exercise of original jurisdiction in prohibition "because it is an extraordinary remedy reserved for extraordinary cases." *State ex rel. Justice v. King*, 852

S.E.2d 292, 297 (W. Va. 2020); *State ex rel. West Virginia Div. of Natural Resources v. Cline*, 200 W. Va. 101, 105, 488 S.E.2d 376, 380 (1997); *State ex rel. Bobrycki v. Hill*, 202 W. Va. 335, 337, 504 S.E.2d 162, 164 (1998). “For this reason, this Court will grant a writ of prohibition ‘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.’” *State ex rel. Justice v. King*, 852 S.E.2d at 297. Those legal errors must be precise:

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).

To justify the extraordinary remedy inherent to a writ of mandamus, the Petitioner has the burden of showing “that the lower court’s jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.” *State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362, 364; (internal punctuation omitted); *State ex rel. Paul B. v. Hill*, 201

W.Va. 248, 254, 496 S.E.2d 198, 204 (1997); *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 454 S.E.2d 77 (1994).

WVDCR cannot meet any of the requirements needed for a writ of prohibition. First, the WVDCR cannot be heard to argue that it has no other adequate means to obtain its desired relief (a clarification of whether there is a cause of action for deliberate indifference.) Petitioner has at least two more bites at that proverbial apple that allow both the Circuit Court and potentially the Intermediate Court of Appeals or this Honorable Court to consider such an argument. While the order denying the motion to dismiss on the issue of deliberate indifference is not subject to an early interlocutory appeal, the WVDCR can assert such argument at the summary judgment stage before the Circuit Court, and after factual developments regarding all claims and relief that might be available. Petitioner WVDCR also has the potential to prevail on a motion for summary judgment or even succeed at trial – or not – and these events create the possibility of other opportunities for appeal of the issue.

Moreover, WVDCR has at least eight other cases, if not more, pending in which the exact same issue is raised, and it has the opportunity to appeal those decisions. Indeed, WVDCR has single-mindedly chosen to inundate every tribunal available with its motions, appeals and petitions regarding deliberate indifference, all of which require extensive research and writing. As such, the Petitioner should not be heard to complain about wasteful financial burdens when it creates a significant burden itself as opposed to moving forward with the litigation, which would no doubt proceed in some form regardless of the decision on this issue.

WVDCR secondly bemoans that it will be prejudiced because it will not be

permitted to invoke its affirmative defense of qualified immunity, which will then, in turn, cost both the Petitioner and the Circuit Court valuable resources and time. However, the WVDCR has already asserted qualified immunity in its *Answer* and in its *Motion to Dismiss*, so the ship carrying that allegedly wasteful burden has already sailed. The Circuit Court denied the *Motion to Dismiss* based on qualified immunity, and, following the interlocutory appeal brought by the WVDCR, that schooner is now rocking in the harbor, awaiting this Court's review.

The WVDCR also wails that the novel common-law cause of action nullifies qualified immunity "as evidenced by its name alone," *Petition*, p. 13, yet offers no decision or statute that supports its contention. To the contrary, decisions such as *White v. Pauly*, 580 U.S. 73, 74, recognized the cause of action for deliberate indifference, and then promptly knocked it out of court based on qualified immunity. Obviously, such cases are to be considered on a case-by-case basis, and blanket fears of prejudice are simply unfounded. Deliberate indifference is not a "novel common law cause of action" – it is a long-established and recognized tort claim. While deliberate indifference may be a factor in determining qualified immunity, it is not the only factor. Petitioner's cries of prejudice are unfounded.

The third and extremely important *Hoover v. Berger* factor is likewise missing from WVDCR's argument. There is a significant burden of proof required to demonstrate that a circuit court's finding is clearly erroneous. "A finding is 'clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have

decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, in part, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1997); *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. 776, 780, 760 S.E.2d 590, 594, (2014).

The Circuit Court of Kanawha County did not clearly err as a matter of law. It did not exceed its legitimate powers, and did not expand the scope of common law. The lower court properly, and with sufficient foundation, recognized a long-standing state law cause of action. Judge Salango did not improperly expand the scope of the common law cause of action; she merely recognized and recited it. The Circuit Court decision does not provide any definite and firm conviction or indication that a mistake has been made. Petitioner's assertion that the tort of deliberate indifference to clearly established law was "never adopted by this Court" *Petition*, p. 13, is simply wrong in light of the controlling law contained in Syl. Pt. 4 of *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 – a syllabus point that established a basis for the cause of action known as deliberate indifference of clearly established laws.

The order entered by Judge Salango is not an "oft repeated error of late" as alleged by the WVDCR. *Petition*, p. 14. It is, instead, a consistent holding agreeing with other judges in Kanawha County and with this very Court. The collective and tremendous resources WVDCR is expending on now fighting the issue of deliberate indifference is of its own making by failing to recognize clearly established law. Finally, there is nothing new in the finding that Respondent has a valid cause of action with her count of deliberate indifference, and this matter should be permitted to proceed for discovery and trial.

B. Discussion

1. The Circuit Court Properly Found That a Common Law Claim of “Deliberate Indifference” for Money Damages Is a Viable Cause of Action in West Virginia.

West Virginia has long recognized the legal concept of “deliberate indifference” in the context of an inmate or pre-trial detainee’s serious medical needs under both state and federal law, and that the civil claim of “deliberate indifference” exists under West Virginia law as well as federal law. A federal action under 42 U.S.C. §1983 is not the exclusive legal mechanism for bringing a “deliberate indifference” claim. West Virginia common law recognizes valid civil claims for “deliberate indifference” under state law.

This Honorable Court has explicitly recognized the claim of “deliberate indifference,” holding:

“Deliberate 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, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (in part) (emphasis supplied). “Deliberate indifference may be demonstrated by either actual intent or reckless disregard.” *Id.*, 202 W. Va. at 533, 505 S.E.2d at 452.

The *Nobles* Syllabus Point did not limit the application of a deliberate indifference claim to federal law but explicitly recognized the claim in state law and that such a claim would be in violation of both the Federal and State Constitutions. Subsequent decisions of this Court have specifically recognized that the holding in *Nobles* set the standard for deliberate indifference. See, *Hodgson v. W. Va. Div. of Corr.*, No. 16-0495, 2017 W. Va. LEXIS 274, at *8-9 (Apr. 21, 2017) (Memorandum Decision) (The standard an inmate must meet to demonstrate deliberate indifference by DOC employees is exacting; per *Nobles* the treatment, or lack thereof, must be so grossly incompetent, inadequate,

or excessive as to shock the conscience or be intolerable to fundamental fairness); *Taylor v. Hill*, 2014 W.Va. Lexis 1243 (W.Va. Supreme Court November 21, 2014) (Memorandum Decision) (recognizing that *Nobles* established standard required to show prison official's "deliberate indifference" to inmate's serious medical need, treatment, or lack thereof); *Williams v McBride*, 2014 W. Va. LEXIS 939 *, 2014 WL 4667266 (W.Va. Supreme Court September 19, 2014) (Memorandum Decision) (citing *Nobles* and holding: "Similarly, the fact that an alleged deprivation may be too fleeting to allow for appellate review is of less importance when the standard for measuring the seriousness of any deprivation has already been provided by this Court for the circuit court to utilize.")

Much of the case law regarding deliberate indifference to inmates in West Virginia references the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment and the federal statute 42 U.S.C. §1983. However, as demonstrated by Syl. Pt. 5 of *Nobles, supra*, a state law cause of action for deliberate indifference has been clearly recognized by this Court.

The various citations in case law to 42 U.S.C. §1983 and the Eighth Amendment are often the result of an individual Plaintiff's phrasing of their cause of action in their complaint. Plaintiffs may include federal law, or citations in pleadings, and Court rulings from the vast federal jurisprudence on deliberate indifference claims. Nevertheless, as *Nobles* states, West Virginia recognizes the claim of deliberate indifference under state law.

There are numerous decisions of this Honorable Court following the *Nobles* opinion that continue to recognize state law deliberate indifference claims. For example, in *Ballard v. Delgado*, 241 W. Va. 495, 826 S.E.2d 620 (2019) the Court examined an

appeal from the denial of summary judgment in a deliberate indifference case in Kanawha County Circuit Court. In affirming Judge Tabit's order, this Court noted:

Again, we express no view on the merits of Inmate Delgado's deliberate indifference claim. However, in drawing "any permissible inference from the underlying facts in the light most favorable to the party opposing the motion[.]" *Painter*, 192 W.Va. at 192, 451 S.E.2d at 758, and in adopting . . . [his] version of the facts[.]" *Scott*, 550 U.S. at 378, we find there are genuine issues of material fact concerning the objective and subjective components of Inmate Delgado's deliberate indifference claim. In particular, there are genuine issues of material fact regarding the extent of Inmate Delgado's injuries, as well as the officers' actions and inactions toward him following the deployment of the OC spray. These material issues of fact prevent us from awarding summary judgment to the petitioner officers on the basis of qualified immunity. It will be for a jury, not this Court, to determine the truth of the matter.

Id. While Delgado's claim was couched in terms of the Eighth Amendment, the Court recognized the deliberate indifference claim pending in the State Court. There was absolutely no indication that the claim was invalid under West Virginia law, and in fact, the Court upheld the denial of summary judgment on the deliberate indifference claim.

In a memorandum decision, this Court of Appeals again recognized the deliberate indifference cause of action in *Crawford v. McDonald*, No. 21-0732, 2023 W. Va. LEXIS 85 (Mar. 31, 2023), holding that "Deliberate indifference requires a showing that the inmate had a sufficiently serious medical need and that the defendant knew of and disregarded an excessive risk to the inmate's health or safety." *Id.* at 17. The Court in *Crawford* stated, "Viewing the facts in the light most favorable to Mr. McDonald, as we must at the summary judgment stage, there are genuine issues of material fact regarding

his claim of excessive force. The same can be said about Mr. McDonald's claim for deliberate indifference to his medical needs.” *Id.* at 16-17.¹⁰

In 2024 the Intermediate Court of Appeals in *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA-148 FN 15 (W.Va. ICA July 15, 2024), examined a claim involving deliberate indifference in an appeal of a jury verdict from Kanawha County Circuit Court awarding over \$700,000.00 to the estate of deceased inmate that brought claims for deliberate indifference to medical needs causing death. On appeal, the WVDCR asserted that the Circuit Court had utilized an improper instruction on deliberate indifference when the Court instructed the jury as follows:

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

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

West Virginia Division of Corrections and Rehabilitation v. Iacovone, No. 23-ICA-148 FN 15 (W.Va. ICA July 15, 2024).

The Intermediate Court, in reviewing the *Iacovone* instruction, affirmed the verdict and held:

While the provided instruction does not break down the considerations into discrete elements, a plain reading of the instruction references that

¹⁰ The claim in *Crawford* was pled under the federal statute and cited the federal constitutional provisions, but as recognized by *Nobles*, *supra*, there is a separate state law claim for deliberate indifference.

Respondent needed to “show [] that the defendants . . . ignored a detainee’s serious need for medical care[.]’ in order to satisfy its burden.”

Id. at p.19.

In *Iacovone*, as here, the Plaintiff had pursued a state law claim for deliberate indifference and did not proceed under 42 U.S.C. §1983. The Intermediate Court upheld the verdict and denied the WVDCR appeal regarding the deliberate indifference instruction. This further demonstrates that a claim of deliberate indifference exists under West Virginia law separate and apart from federal law.

Further, in a 2023 case involving the same defendant as in this matter, this Court of Appeals rejected the WVDCR’s assertion that they were health care providers under the Medical Professional Liability Act (MPLA), *W.Va. Code* § 55-7B-1, *et seq*, and specifically recognized that the claims brought by the Plaintiff included a claim for deliberate indifference but not a medical negligence claim. See, *State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 889 S.E.2d 44 (2023). Once again, the opinion in *Ferguson* demonstrates that West Virginia recognizes deliberate indifference claims in the context of ignoring an inmate’s serious medical needs.

Significantly, deliberate indifference is a valid legal claim recognized in many contexts other than claims under 42 U.S.C. §1983 or the Eighth Amendment. “The deliberate-indifference standard is a common one in the law.” *Koon v. North Carolina*, 50 F.4th 398, 400 (4th Cir. 2022) (recognizing the American With Disabilities Act uses a two-step deliberate indifference test.) Deliberate indifference, or reckless indifference, is the essence of recklessness at common law. See *Prosser and Keeton* § 34, at 213; *Safeco Ins. Co. of Am. V. Burr*, 551 U.S. 47-70 (2007) (Fair Credit Reporting Act violations). Deliberate indifference to known acts of harassment is a basis for a Title

IX cause of action. See, *Doe v. Charlotte Mecklenburg Bd. of Educ.*, 3:18-cv-00586-RJC-DSC (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); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998).

The claim of deliberate indifference has been recognized by courts throughout the nation as a cause of action existing between negligence and intent and as *Nobles, supra*, demonstrates the West Virginia Supreme Court of Appeals has recognized the claim in the context of state law in addition to federal claims. The United States Supreme Court has described the claim as “With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.” See, *Farmer v. Brennan*, 511 U.S. 835 (1994). As the Fourth Circuit Court of Appeals determined, “Gross negligence” is not the same as “deliberate indifference.” The terms “gross negligence” and “deliberate indifference” are sometimes confused and interchanged; however, “deliberate indifference” is a stricter standard. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994). “Gross negligence” is a heightened degree of negligence, whereas “deliberate indifference” is a “lesser form of intent.” *Id.* at n.7.

When these definitions are considered, it is obvious that deliberate indifference is recognized in many clearly established laws in West Virginia as a form of recklessness. (See, e.g., *The West Virginia Governmental Tort Claims and Insurance Reform Act*, W. Va. Code § 29-12A-1, *et seq.*, which contemplates claims for negligence, malice, bad faith, or acts performed in a wanton or reckless manner. *The Medical Professional Liability*

Act, *W.Va. Code* § 55-7B-9b provides that an action may be maintained against a health care provider who “rendered or failed to render health care services in willful and wanton or reckless disregard of a foreseeable risk of harm to third persons.” *Id.*

As Syllabus Point 4 of *Nobles* makes clear, West Virginia recognizes the valid legal claim of “deliberate indifference” under both state and federal law. Although there are many cases in West Virginia jurisprudence referencing federal law in the context of deliberate indifference, those cases do not negate the West Virginia Supreme Court’s precedential decisions recognizing the claim in State law. Likewise, Petitioner’s reliance on cases that find mandamus and habeas corpus are the only means of asserting a constitutional violation claim is unfounded. In fact, the case cited by Petitioner, *Harrah v Leverette*, specifically lists the remedies available to a party who suffered injuries as a result of a constitutional violation:

- (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, *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.3d 322 (1980) (emphasis added) *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). Respondent Myers has opted for the fourth item: a civil action in tort; specifically, the civil action of deliberate indifference to clearly established law, and deliberate indifference to serious medical needs. As noted by Petitioner, an individual can recover money damages under state law if the conduct of the defendant also constitutes a violation of the tort law of the

State of West Virginia or federal constitutional rights. That is exactly what Respondent Mary Myers has done – she has sought recovery under currently existing tort law, the tort of deliberate indifference.

Throughout its Petition WVDCR alleges that federal law and circuit court decisions are not precedent in determining the issues in the matter. However, Petitioner does not hesitate to cite to federal court decisions in support of its position that monetary damages cannot be recovered for constitutional violations. Those cases, however, still allow a state law tort claim, and claims were dismissed only to the extent that they sought monetary relief under the West Virginia Constitution. See, *Hager v. Robinson*, No. 2:03-cv-0094, 2005 U.S. Dist. LEXIS 49455 (S.D. W.Va. Feb. 1, 2005) (memorandum opinion); *Smoot v. Green*, No. 2:13-cv-10148, 2013 U.S. Dist. LEXIS 156887, 2013 WL 5918753 (S.D. W.Va. Nov. 1, 2013). Since Respondent Myers has not made a federal or state constitutional violation claim, the holding in *Fields v. Mellinger*, 851 S.E.2d 789 (W.Va. 2000) is not applicable to this case. Respondent has asserted only state-law claims and specifically stated in her *Complaint* that there are no constitutional claims.

Petitioner also presumes much by asserting Respondent Myers claims may only seek money damages. Just because a claim for deliberate indifference may implicate a constitutional violation, for which there may be an argument that money damages are not available, the count should still remain to allow a Plaintiff to recover other damages as available by law. Such damages could include injunctions, mandates, reconstruction of a facility to meet higher, more efficient standards of supervision of inmates for medical purposes, or any other creative means of ensuring that inmates such as Ronald Myers would not meet their demise in such a horrible, painful, and lonely manner. Further, even

if a claim for money damages were later determined not to be available, which Respondent of course opposes and believes to be improper, that should be addressed on appeal and not through an extraordinary writ as it is uncontested that non-monetary relief is still available.

Additionally, deliberate indifference is a cause of action for many federal actions, including those brought under the Americans With Disabilities Act (See, *Koon v. North Carolina*, 50 F.4th 398, 400 (4th Cir. 2022); Fair Credit Reporting Act (*Safeco Ins. Co. of Am. V. Burr*, 551 U.S. 47, 69-70 (2007); harassment under Title IX (*Doe v. Charlotte Mecklenburg Bd. of Educ.*, 3:18-cv-00586-RJC-DSC (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); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

Deliberate indifference is also a cause of action in West Virginia State Courts. As argued hereinbelow, multiple valid decisions have been handed down by this Honorable Court and the ICA, as well as decisions in other jurisdictions, that recognized a stand-alone cause of action for deliberate indifference separate and apart from constitutional claims. Petitioner's *Motion* presents nothing new; nothing erroneous; and nothing that calls for the extraordinary remedy of a writ of prohibition.

2. "Deliberate Indifference" Has Long Been Recognized as a Valid Claim in West Virginia and Petitioner Presents No Basis for Ignoring Such Precedence.

"Some things are so obviously unlawful that they don't require detailed explanation" *Dean v. McKinney*, 976 F.3d 407, 418 (4th Cir. 2020.) Deliberate indifference to the serious medical needs of an inmate is one of those things. Deliberate, or reckless

indifference, is the essence of recklessness at common law. See *Prosser and Keeton* § 34, at 213.

The United States Supreme Court of Appeals acknowledged the claim for deliberate indifference long ago, when it held 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. “This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Id.*, 429 U.S. at 105.

West Virginia courts have also found that deliberate indifference can be brought as a state-court claim. “Deliberate 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, *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (in part). “Deliberate indifference may be demonstrated by either actual intent or reckless disregard.” *Id.*, 202 W.Va. at 533, 505 S.E.2d at 452; *Hodgson v. W. Va. Div. of Corr.*, No. 16-0495, 2017 W. Va. LEXIS 274, at *8-9 (Apr. 21, 2017) (Memorandum Decision) *Taylor v. Hill*, 2014 W.Va. Lexis 1243 (W.Va. Supreme Court November 21, 2014) (Memorandum Decision); *Williams v McBride*, 2014 W. Va. LEXIS 939 *, 2014 WL 4667266 (W.Va. Supreme Court September 19, 2014) (Memorandum Decision); *Ballard v. Delgado*, 241 W. Va. 495, 826 S.E.2d 620 (2019); *Crawford v. McDonald*, No. 21-0732, 2023 W. Va. LEXIS 85 (Mar. 31, 2023); *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA-148 FN 15

(W.Va. ICA July 15, 2024); *State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 889 S.E.2d 44 (2023).

In looking to federal court decisions for guidance, it is clear that there is a hierarchy in finding precedent cases that establish clearly established law. To determine if a constitutional right was clearly established, courts must examine controlling authority in their jurisdiction, which includes the decisions of the United States Supreme Court, the federal circuit, and the highest court of the state in which the case arose. See, *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). "If "there are no such decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions if such exists." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017) (quoting *Owens*, 372 F.3d at 280). "We must consider not only 'specifically adjudicated rights,' but also 'those manifestly included within more general applications of the core constitutional principles invoked.'" *Booker*, 855 F.3d at 538 (citing *Wall v. Wade*, 741 F.3d 492 (4th Cir. 2014)).

In viewing clearly established laws in the context of qualified immunity, the Fourth Circuit has held that to be clearly established, the right violated must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279. This determination "is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Id.* at 279 (citing *Wilson v. Kittoe*, 337 F.3d 392, 402 (4th Cir.2003)). "'Clearly established' does not mean that 'the very action in question has previously been held unlawful,' but it does require that, 'in the light of pre-existing law the unlawfulness [of the official's conduct]

must be apparent.' " *Owens*, 372 F.3d at 279; *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Amaechi v. West*, 237 F.3d 356, 362 (4th Cir. 2001). ("exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established").

Recent decisions from the Circuit Court of Kanawha County have followed the precedent established by this Court in *Nobles* and other cases and found that there is indeed a valid, stand-alone tort of deliberate indifference to clearly established laws. See Rsp. Appx. No. 1, *Bailey v. WVDCR, et al*, Civil Action No. 19-C-1163; *Bell v. WVDCR, et al.*, Civil Action No. 22-C-409; *Pyles v. WVDCR, et al.*, Civil Action No. 22-C-475; *Topeka v. Wexford Health, et al.*, Civil Action No. 24-C-1138.

If Petitioner believes an emergent situation exists in the continued recognition of a cause of action for deliberate indifference, it has passed up multiple opportunities to address the same. For example, in *Iacovone*, during a pre-trial hearing, counsel for Plaintiff made clear that the claims being pursued were based upon deliberate indifference, stating: "Your Honor, our claims against the West Virginia DOC are for deliberate indifference, it's the actions of the guards." Counsel for the WVDCR *expressly confirmed* that these causes of action were distinct from 42 U.S.C. §1983 and made clear that the claims were for a state-court deliberated indifference cause of action. "And this is not a 1983 case. That's a misstatement. It is a deliberate indifference case I will agree with that. But this is not a 1983 case." See, Rsp. Myers' Appx. Rec. No. 3, *Iacovone Transcripts*¹¹. Furthermore, immediately prior to trial, the parties agreed upon a statement of the case for the Circuit Court to instruct the jury. That statement, agreed to by WVDCR,

¹¹ Respondent submits only the relevant portions of the *Iacovone* transcripts reflecting pre-trial arguments over the course of several days.

clearly provided, in part: “In this case Plaintiff contends that the Defendant and their employees were deliberately indifferent to the medical needs of Rocco Iacovone in the days and hours before his death and that their indifference caused or contributed to his death. The Plaintiff alleges that Rocco Iacovone was suffering from a serious medical condition and in need of urgent medical assistance and that his medical conditions were ignored by the Defendant Division of Corrections and Rehabilitation’s employees. It is Plaintiff’s contention that this deliberate indifference to Rocco Iacovone’s illness caused or contributed to his death.” Rsp. Myers’ Appx. Rec. No. 3, *Iacovone Transcripts*.

In *Iacovone* WVDCR appealed several issues to the ICA, which included issues involving the instructions for the deliberate indifference claim. As noted herein, the ICA recognized a claim for deliberate indifference and the WVDCR never furthered an appeal of that decision. Instead, it settled the claim as discussed previously.

In addition, Petitioner WVDCR has specifically raised the issue of deliberate indifference in many other cases without seeking this Court’s review. For instance, WVDCR filed its pre-trial *Motion in Limine Regarding Clearly Established Law and West Virginias Constitutional Violations by Defendant WVDCR* in the matter of *Bailey v. WVDCR, et al*, Civil Action No. 19-C-1163, and failed with that attempt when the Circuit Court denied the motion and matter proceeded to trial and, four days later, settlement. See, Rsp. Myers’ Appx. Rec. No. 4, *Bailey Pre-Trial Motions*, and Rsp. Myers’ Appx. Rec. No. 2, *Iacovone and Bailey Settlement Approvals*.

Petitioner is clearly wrong in asserting there is no precedent for finding that deliberate indifference is a valid cause of action. The holding in *Nobles* has been clearly established law since 1998. The subsequent decisions of this Court found that *Nobles* set

the standard for deliberate indifference. See, *Hodgson v. W. Va. Div. of Corr.*, No. 16-0495, 2017 W. Va. LEXIS 274, at *8-9 (Apr. 21, 2017) (Memorandum Decision); *Taylor v. Hill*, 2014 W.Va. Lexis 1243 (W.Va. Supreme Court November 21, 2014).

Petitioner discounts decisions of the West Virginia Intermediate Court of Appeals, such as the one in *Iacovone* as not being a binding precedent decision regarding the present issue. Respondent emphasizes that, having never been appealed to this Honorable Court, the decision in *Iacovone* was precedent for the Circuit Court of Kanawha County, and that decision should be given deference and considered persuasive as a basis for the Circuit Court's decision:

On appeal of a decision of the West Virginia Workers' Compensation Board of Review from the Intermediate Court of Appeals of West Virginia to the Supreme Court of Appeals of West Virginia, the Supreme Court of Appeals is bound by the statutory standards contained in West Virginia Code § 23-5 12a(b) (eff. Jan. 13, 2022). Questions of law are reviewed de novo, while findings of fact made by the Board of Review are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Duff v. Kanawha Cnty. Comm'n, Docket 23-43 LEX 1032109882 (W.Va. Apr. 22, 2024) (emphasis added). Likewise, the multiple decisions out of the Circuit Court of Kanawha County constitute persuasive decisions that this Court should consider. They involved similar parties and legal issues and reflect the opinions of multiple Circuit Judges. Principles of uniformity, accuracy, reliance, and judicial economy should require a careful and balanced consideration of each of these decisions, all of which will ensure consistency and efficiency within the state court systems.

WVDCR has not provided sufficient support or evidence that its *Petition for a Writ of Prohibition* should be granted. The WVDCR improperly seeks an extraordinary remedy that is not and should not be available to it at this stage of the proceedings. The Circuit

Court of Kanawha County did not commit clear legal error in entering its order of March 19, 2025, denying Petitioner's Motion to Dismiss. The present *Petition* is an attempt to appeal an issue that is not one subject to an interlocutory appeal. The relief sought by the WVDCR is not extraordinary, given the other remedies available to WVDCR in not only this matter, but at least nine other cases as well. The Petitioner will hardly be prejudiced when it could possibly have a dozen opportunities to file a proper appeal on this issue at the appropriate time in the proceedings of multiple pending cases.

WVDCR failed in its attempts to obtain a certified question from not only Judge Salango, but from Judge Abraham and Judge Hardy as well. It should not be permitted to use this case and a writ of mandamus to circumvent and appeal those orders. Moreover, Petitioner should not be allowed to turn a blind eye to the long line of cases in this State recognizing that deliberate indifference is a state tort claim for which Respondent is entitled to relief, including monetary damages.

Petitioner fails to present any novel issues of law or matters of first impression that require a writ of prohibition. WVDCR has not shown that the Circuit Court of Kanawha County exceeded its authority in denying the *Motion to Dismiss* and recognizing deliberate indifference as a valid cause of action. As such, Respondent prays that the WVDCR's *Petition* be **REFUSED**.

CONCLUSION

Therefore, the undersigned respectfully prays that the Petition for Writ of Prohibition be **DENIED**.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true and accurate copies of the foregoing “Response Brief of Respondent Mary F. Myers” were served upon the following counsel of record on June 23, 2025, by electronic delivery via the e-court filing system:

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