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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25-328 – *State of West Virginia ex rel. West Virginia Division of Corrections and Rehabilitation v. The Honorable Tera Salango, Judge, Circuit Court of Kanawha County, and Mary F. Myers, individually and as Administratrix of the Estate of Ronald M. Myers*

And

No. 25-385 – *State of West Virginia ex rel. West Virginia Division of Corrections and Rehabilitation v. The Honorable David J. Hardy, Judge, Circuit Court of Kanawha County, and Gregory Pyles, Administrator of the Estate of Jacqueline V. Pyles*

Flanigan, Justice, dissenting, with whom Justice Wooton joins:

The novel issue in the two cases before us is whether West Virginia recognizes a cause of action for "deliberate indifference to clearly established laws." The Circuit Court of Kanawha County denied the West Virginia Division of Corrections and Rehabilitation's ("DCR") motions to dismiss those claims in two complaints. The DCR now invokes this Court's original jurisdiction, asking this Court to prohibit the circuit court from enforcing those orders. I am troubled that the majority granted the writs of prohibition by finding that the circuit court clearly erred as a matter of law in failing to dismiss the claims when the absence of controlling precedent weighs strongly against the majority's finding of clear error. Therefore, I respectfully dissent.

A writ of prohibition is an extraordinary measure. We have explained that this Court will only grant writs of prohibition when a circuit court has exceeded its jurisdiction or legitimate powers. *See* Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75

S.E.2d 370 (1953) ("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 [a petition for appeal] or certiorari."). Courts will not issue a writ of prohibition "to prevent a simple abuse of discretion by a trial court." Syl. Pt. 2, in part, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). Rather, courts will issue writs of prohibition "to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate[.]" Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute*, W. Va. Code § 56-1-1(b), *on other grounds as stated in*, *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014).

The Court considers several factors to guide its consideration of whether to issue a writ when a lower court is accused of exceeding its legitimate powers:

> 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). The party seeking the writ bears the burden of proving these factors. *Id.* Here, the majority finds that the DCR has met this burden. I respectfully disagree.

The third *Hoover* factor, "whether the lower tribunal's order is clearly erroneous as a matter of law," is granted substantial weight. *Id.* An order is clearly erroneous as a matter of law "when it incorrectly chooses, interprets, or applies the law." *State ex rel. W. Va. Reg'l Jail Auth. v. Webster*, 242 W. Va. 543, 551, 836 S.E.2d 510, 518 (2019) (quotation omitted). The majority finds that the circuit court committed clear error in failing to dismiss the claims of deliberate indifference to clearly established laws in the relevant complaints. However, I do not think the majority's conclusion—that there is no cause of action for deliberate indifference—is clearly established. Before this decision, a question remained as to whether a cause of action for deliberate indifference existed. In fact, the majority admits, "We have not affirmatively disclaimed deliberate indifference to a clearly established law as a cause of action."

As Justice Workman aptly stated in her dissenting opinion to *State ex rel. Universal Underwriters Insurance Co. v. Wilson*, 241 W. Va. 335, 825 S.E.2d 95 (2019) (Workman, J., dissenting):

> In my almost twenty-three years as an appellate court judge, one thing I have learned is that the development of new law by a judicial body is a lot better when, like a good stew, it is cooked slowly and thoroughly. The full processing of a new or novel legal issue by its being fully considered by a lower court,

> a lower court making a ruling, the parties then briefing and arguing the issue at the appellate level results in much sounder law and much fairer results than this Court embarking on creating new law and then granting prohibition because the lower court failed to follow the (as-yet) established law.

Id. at 355, 825 S.E.2d at 115.

It is difficult to understand how the circuit court's order could be "clearly erroneous as a matter of law" when this Court has never previously considered this issue. Indeed, the majority recognizes that in *West Virginia Division of Corrections and Rehabilitation v. Iacovone*, No. 23-ICA-148, 2024 WL 3412261 (W. Va. Ct. App. July 15, 2024) (memorandum decision), the Intermediate Court of Appeals of West Virginia ("ICA") affirmed a jury verdict on a cause of action of deliberate indifference. The question before the ICA was whether the circuit court abused its discretion by giving the jury certain instructions on the deliberate indifference claim. *Id.* at *4. Although the ICA did not consider whether a deliberate indifference claim existed in the first place, its decision implies that a deliberate indifference cause of action exists.

From the circuit courts' perspective, *Iacovone*, as a memorandum decision from the ICA, served as persuasive evidence that a stand-alone deliberate indifference claim may exist. *See id.* at *8. As an appellate court, the majority analyzes the existing law and definitively finds there is no cause of action for deliberate indifference; however, it is difficult for a circuit court, faced with a case like *Iacovone*, to do the same.

I do not think the circuit courts' orders are clearly erroneous as a matter of law because, before the majority decided this case, it was not clearly established that no cause of action for deliberate indifference existed. Therefore, I do not think the DCR has met its burden as to the third, and most important, *Hoover* factor.

As to the first *Hoover* factor, "whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief," the DCR could appeal the circuit court's denial of its motion to dismiss after the circuit court enters a final appealable judgment. 199 W. Va. at 15, 483 S.E.2d at 15, Syl. Pt. 4, in part. Whether a cause of action exists for deliberate indifference is a question capable of review on appeal. In fact, the majority acknowledges that the DCR can appeal the issue.

Additionally, under the second *Hoover* factor, "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal," the DCR would not be prejudiced in any way not correctable on appeal. *Id.* In *Iacovone*, the DCR litigated a deliberate indifference claim through trial and appealed to the ICA. The DCR did not raise the question of whether a deliberate indifference claim existed in the *Iacovone* appeal. Moreover, the DCR admits it has settled cases involving deliberate indifference claims. The DCR's argument that it will be prejudiced if the Court does not issue a writ lacks merit because it has previously litigated and settled deliberate indifference claims. In my view, the DCR would not be prejudiced in any way not correctable on appeal if it were required

to litigate these causes of action to a final judgment and appeal the issue of whether such a claim exists.

For these reasons, I do not believe extraordinary circumstances exist requiring the Court to issue a writ in either case. Therefore, I respectfully dissent. I am authorized to state that Justice Wooton joins in this dissent.