

No. 26364 - State of West Virginia ex rel. The Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO, and all those similarly situated v. William F. Vieweg, Commissioner, Bureau of Employment Programs, and Compensation Programs Performance Council

Starcher, Chief Justice, dissenting:

To preserve and promote the rule of law, this Court has the power and duty to act -- in a principled and appropriately limited fashion -- to see that fundamental principles of justice are not violated.

Was the rule of law being violated in a fundamental way, when 18 large coal companies allegedly carried out a sustained program of using undercapitalized shell corporations to mine the companies' coal -- thereby avoiding huge environmental and worker liabilities?

That remains to be seen, because the companies have not yet been brought to account for their actions before a trial court.

However, based on the limited record before us, it is clear that the State had made out a good case, in the underlying lawsuits, that the use of contract mining companies to avoid paying the full cost of mining coal -- including workers compensation premiums -- was a scam that took \$200,000,000 from the workers of West Virginia and put it in the hands of the stockholders of a few large coal companies.

As the United Mine Workers of America ably argue in their brief *amicus curiae*, there are plenty of excellent and viable legal theories that allow recovery of the fruits of a scam from a wrongdoer -- even decades after the scam is finished.

I'd like to present several hypothetical situations that resemble the instant case. In these situations, would this Court step in to uphold the rule of law?

If a prosecuting attorney who had been a senior partner of a law firm when the firm defrauded elderly people, dismissed criminal fraud charges against his former cronies -- would this Court step in?

If the Department of Welfare cut a deal with a parent who had abused their children to drop all abuse charges, because a group of other parents had agreed to pay for therapy for the abused children -- would this Court step in?

If a child was orphaned by a drunk driver, and the child's guardian, who was the best friend of the drunk driver, dismissed the child's lawsuit against the driver -- would this Court step in?

My answer to each of these questions is "yes" -- this Court would step in to prohibit conduct that was clearly wrongful and contrary to the ends of justice and the rule of law.

And so we should step in in this case. We should temporarily require that these lawsuits not be dismissed, and remand the case for a thorough review by a circuit court of the circumstances surrounding the lawsuits' proposed dismissal.

What especially concerns me is that a public official files a number of lawsuits in 1998, and the same public official then dismisses the suits in 1999. In doing so, the action goes a long way toward immunizing the public official's former business colleagues from any attempt by *a future administration* to collect these debts.

What a blow to West Virginia workers! What a sweet deal for the coal companies that made a fortune using contract mining companies! And what a sour deal for the West Virginia businesses -- including responsible coal companies -- that played by the rules, and paid their fair share of workers' compensation premiums!

Finally, what a stain on the public face of government! It just looks terrible for a former coal company executive to spearhead a move that has the effect of giving his former business colleagues immunity from civil liability.

Of course, it would take some careful legal crafting for this Court to fashion a remedy in this case that would not excessively intrude on the legitimate prerogatives of the executive branch. But this Court can take on and perform difficult tasks -- that is what we are paid to do.

As a result of this Court's courage and creativity in the past, our state is a better place. We should show that courage and creativity in this case. We should step in to protect justice and the rule of law.¹

¹I note that the narrow issue decided in the majority opinion is whether the petitioners are entitled to a writ of prohibition or mandamus *in this Court*. The decision in the majority opinion is not controlling on the issue of whether the petitioners or any other person may seek to block the dismissal of the lawsuits against the coal companies in the circuit courts where those cases are filed. Circuit courts, of course, have a much broader original jurisdiction than does this Court. The petitioners may consider whether taking action in circuit court would serve the interests of West Virginia and her people.