No. 28716 -- ***State of West Virginia ex rel. Patrica E. McLaughlin, by her Committee, Cynthia J. Ward v. The West Virginia Court of Claims, David M. Baker and Benjamin Hays Webb, II, Judges of the West Virginia Court of Claims, and Cheryl M. Hall, Clerk of the West Virginia Court of Claims***

The West Virginia Department of Transportation, Division of Highways, Intervenor

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McGraw, Chief Justice, dissenting:

As the majority notes in footnote 8, supra, there is a great "potential for inequity inherent in the current statutory scheme." Nonetheless, the majority goes on to deny the petitioner relief by making use of our current, inequitable statutory scheme.

First I disagree with the majority's interpretation of the duty of the Court of Claims to re-docket the petitioner's claim, for that portion of the award in excess of the insurance coverage. As the majority notes, Ms. McLaughlin was able to file suit in the ordinary courts of this state by virtue of W. Va. Code § 29-12-1, *et seq*., but her recovery was limited to $1,000,000. In the instant case, she seeks another opportunity to ask the state to provide her the rest of her award, which she argues is a separate claim that the Court of Claims must consider.

As the majority points out, the Court of Claims was created to determine whether or not the state might have a "moral obligation" to compensate an injured party, even though the state would otherwise enjoy statutory immunity from suit. As a former President of the West Virginia State Senate, I

appointed judges to the Court of Claims, with the understanding that the members of that court had a duty to find such moral obligations when the facts of a particular case demanded it. The question the Court of Claims must ask is not, "how much can we afford to pay?" but rather "do we have a moral obligation to this injured party?"

In the instant case, a jury of West Virginia citizens determined that Ms. McLaughlin was entitled to $16,000,000 in damages. As we have stated before, "the juror is an integral part of our democratic ideal, representing the conscience of the community." *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W. Va. 492, 513, 345 S.E.2d 791, 813 (1986) (McGraw, J., dissenting). If the jury is the conscience of the community, who better to provide guidance as to what is and what is not a moral obligation?

The enabling statute sets forth the general powers of the Court of Claims: "The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the State. . . ." W. Va. Code § 14-2-12 (1977). Because of the limits of the state's liability insurance, we have a case where the state was not immune, up to the first $1,000,000, and then the state "regained" its sovereign immunity for every dollar thereafter.

Essentially, the $15,000,000 of the jury verdict she did not receive has become a separate claim against the state. With respect to this amount, she is in the same position any other claimant is in who is unable, for whatever reason, to make a claim under W. Va. Code §. 29-12-1 *et seq*. Thus I would find

that Ms. McLaughlin indeed has a claim that, "but for the constitutional immunity of the State from suit . . . could be maintained in the regular courts of the State," and as such, should be examined by the Court of Claims.

I have additional concerns about this opinion, however. While the outcome of this particular case turned upon the duty of the Court of Claims to re-docket this claim, the real issue in this case is the immunity of the state from suit. I believe the Court rejected an invitation to re-examine our sovereign immunity[1] jurisprudence.

Ms. McLaughlin won a jury verdict in excess of $16,000,000 because of her serious injuries, and her lifelong need for medical care. Due to the cost of medical care, especially for those

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[1]There are varying theories over the source of this concept:

> The origins of sovereign immunity remain clouded. Some maintain that it began with the personal prerogatives of the King of England. As Justice Traynor explained, In the feudal structure the lord of the manor was not subject to suit in his own courts. The king, the highest feudal lord, enjoyed the same protection: no court was above him. Before the sixteenth century this right of the king was purely personal. Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state.
>
> Others believe that sovereign immunity probably had its origin in the old theory that sovereignty was inherent in the crown, and that the king could do no wrong, and hence could not be sued.

Kelley H. Armitage, *It's Good to Be King (At Least it Used to Be and Could Be Again): A Textualist View of Sovereign Immunity*, 29 Stetson L. Rev. 599, 601-02 (2000) (footnotes and internal quotations omitted).

suffering permanent injury, it is not uncommon for accident victims to sustain millions and millions of dollars in damages. However, because of the constitutional artifact of state immunity from suit,[2] Ms. McLaughlin was left with only 1/16th the compensation a jury thought she deserved. As I have mentioned before, this system is beset with problems, chief among them that the state actually benefits from a *lack* of insurance coverage:

> A major problem with this system is that, because activity that is "not covered" by insurance is immune, the system inadvertently creates an incentive for the state's insurers and their lawyers to argue at every opportunity that a given activity is not covered by any insurance. This sentiment, which is the perverse opposite of the desires of a normal insured party who wants maximum coverage in an accident, runs counter to the goals of risk spreading and protection from catastrophic loss that our law has come to favor:

Ayersman v. West Virginia Div. of Environmental Protection ____ W. Va. ___, ____ , 542 S.E.2d 58, 62 (2000) (*per curiam*) (McGraw, J., concurring).

I agree that the state should be immune from suit for its true decision-making duties, and that the possible availability of insurance coverage should not eliminate that immunity. When the state acts as a policy maker, it is, arguably, just manifesting the will of a majority of the people. If the Legislature raises the speed limit from 55 to 70, it is really the people, acting as a democracy, that raised the limit.

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[2]For a thorough overview of the history of sovereign immunity in Anglo-American jurisprudence, see Louis L. Jaffe, *1 Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

Because a majority of our citizens, acting through their representatives, chose to raise the limit, it cannot be "negligent" to have done so. To find otherwise could cripple any government function. In one of our leading cases on this subject, Justice Albright explained this dilemma:

> In short, it is deceptively inviting to conclude that no common-law immunities apply which are not expressly set out in the State's insurance policies, and that a private action should therefore lie for the breach of any duty by any agency or instrumentality of the State. Under that analysis, in the absence of immunities and other defenses unique to the status of a prospective defendant as an instrument of government, a private suit might lie against the Legislature--if not legislators--for any number of real or imagined deficiencies in legislation, appropriations, or other actions, or against the courts--if not the judges and other quasi-judicial officers--for any negligence alleged in the judicial processes and against a variety of public offices, agencies, or instrumentalities, so long as the alleged wrong is covered by insurance and not expressly excluded by the terms of the policy or policies.

Parkulo v. West Virginia Board of Probation and Parole, 199 W. Va. 161, 170, 483 S.E.2d 507, 516 (1996).

However, when the state is not producing the will of the people, but is simply acting, as any private party would act, the immunity makes less sense. When the state or one of its subdivisions is unloading a steamroller (*White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992)), failing to maintain an elevator (*Pittsburgh Elevator v. W. Va. Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983)), or parking a police car in the in middle of the road over the crest of a hill (*Westfall v. City of Dunbar*, 205 W. Va. 246, 517 S.E.2d 479 (1999)), it makes little sense to treat the state differently than any private individual.

In each of those cases, the plaintiff was able to recover based upon the "insurance exception" in our law. We have made many other such exceptions to sovereign immunity:

> Nevertheless, over the years this Court has carved exceptions from the prohibition against suing the State. "The facial absoluteness of Section 35 ... has not prevented this Court from recognizing several contexts in which litigation may go forward even though the State government--and sometimes, even, the State treasury--could be seriously affected by the outcome of the litigation." *Gribben v. Kirk*, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995). These exceptions include injunctions to restrain or require State officers to perform ministerial duties, *C & O R'y Co. v. Miller, Auditor*, 19 W. Va. 408 (1882), aff'd, 114 U.S. 176, 5 S.Ct. 813, 29 L.Ed. 121 (1885); suits against State officers acting or threatening to act, under allegedly unconstitutional statutes, *Blue Jacket Consol. Copper. v. Scherr*, 50 W. Va. 533, 40 S.E. 514 (1901); recognition of a moral obligation by the State, *State ex rel. Davis Trust Co. v. Sims*, 130 W. Va. 623, 46 S.E.2d 90 (1947); counterclaims growing out of transactions wherein the State institutes actions at law against a citizen, *State v. Ruthbell Coal Co.*, 133 W. Va. 319, 56 S.E.2d 549 (1949); suits for declaratory judgment, *Douglass v. Koontz*, 137 W. Va. 345, 71 S.E.2d 319 (1952); mandamus relief to require the State Road Commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes, *Stewart v. State Road Commission of West Virginia*, 117 W. Va. 352, 185 S.E. 567 (1936); suits alleging liability arising from the State's performance of proprietary functions, *Ward v. County Court of Raleigh County*, 141 W. Va. 730, 93 S.E.2d 44 (1956); suits against quasi-public corporations which have no taxing power or dependency upon the State for financial support, *Hope Natural Gas v. West Virginia Turn. Com'n*, 143 W. Va. 913, 105 S.E.2d 630 (1958); mandamus relief to compel State officers, who have acted arbitrarily, capriciously or outside the law, to perform their lawful duties, *State ex rel. Ritchie v. Triplett*, 160 W. Va. 599, 236 S.E.2d 474 (1977); suits in which constitutional immunity is superseded by federal law, *Kerns v. Bucklew*, 178 W. Va. 68, 357 S.E.2d 750 (1987); suits that seek recovery under and up to the limits of the State's liability insurance coverage, *Pittsburgh Elevator v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983); and suits by state employees seeking an award of back wages which is prospective in nature, *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995).

University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf,

205 W. Va. 118, 122-23, 516 S.E.2d 741, 745-46 (1998)(*per curiam*). This list suggests that the exceptions may be in the process of swallowing the rule. As my colleague stated in his dissent to the same case: "Someday, I think, a number of thorny sovereign immunity issues should and will be more thoroughly addressed by this Court. My sense is that our sovereign immunity jurisprudence has come to be--from a theoretical or academic perspective--fairly confused." *Id*. 205 W. Va. at 124, 516 S.E.2d 741 at 747 (Starcher, J., dissenting).

Because the majority failed to either address this confusion, or, in the alternative, require the Court of Claims to reconsider the merits of Ms. McLaughlin's claim, I must respectfully dissent.