

This is a per curiam order.

No. 33059 *State of West Virginia ex rel. West Virginia Regional Jail Authority v. The Honorable John L. Henning, Judge of the Circuit Court of Randolph County, West Virginia; Frank J. Staud; and Shell Equipment Company, Inc.*

FILED

June 14, 2006

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Per Curiam:

On a former day, to-wit, June 7, 2006, this original proceeding was submitted to this Court upon the petition of the West Virginia Regional Jail Authority asking this Court to prohibit the respondent, the Honorable John L. Henning, Judge of the Circuit Court of Randolph County, from enforcing an order entered on February 9, 2006, in the underlying action. That action, filed on June 13, 2005, is styled *Frank J. Staud and Shell Equipment Company, Inc., v. West Virginia Regional Jail Authority; Circle M Enterprises, Inc.; and Randall McCauley*, civil action no. 05-C-116 (Randolph County).

In the action, Staud and Shell Equipment alleged, *inter alia*, that the Regional Jail Authority breached a contract to sell them certain stockpiled coal by, instead, transferring the coal to Circle M Enterprises, Inc., and Randall McCauley. Pursuant to the order of February 9, the Circuit Court denied the Authority's motion to dismiss. On March 29, 2006, this Court issued a rule to show cause why relief in prohibition should not be granted. This Court now has before it the petition of the Regional Jail Authority, the responses thereto, all matters of record and the argument of counsel. Upon careful consideration, and as more fully set forth

below, this Court concludes that the Regional Jail Authority is entitled to relief in prohibition with regard to the February 9, 2006, order.

In its motion, the Authority, by special appearance, alleged that dismissal was appropriate because Staud and Shell Equipment failed to provide the Authority and the West Virginia Attorney General with the pre-suit notice required by *W.Va. Code, 55-17-3(a)(1)* (2002). That section provides, in part:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of the action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired.

As acknowledged by the parties, and as expressly found by the Circuit Court, Staud and Shell Equipment did not provide the required notice to the chief officer of the Regional Jail Authority or to the Attorney General prior to filing the underlying action. Nevertheless, the Circuit Court concluded that, inasmuch as the statute “does not provide for any remedy, sanction or penalty” for failure to provide the notice, the Authority’s motion to dismiss should be denied. This Court is of the opinion, however, that the Circuit Court’s conclusion in that regard would render the provisions of *W.Va. Code, 55-17-3(a)(1)* (2002), of no consequence, especially in view of the statute’s mandatory language to the effect that “[n]otwithstanding any provision of law to the contrary,” the required notice “must” be

given. *See, Ashby v. City of Fairmont*, 216 W.Va. 527, 532, 607 S.E.2d 856, 861 (2004) (stating that “[t]ypically, the word ‘must’ is afforded a mandatory connotation.”).

Accordingly, the motion to dismiss should have been granted, and, regardless of whether in denying the motion the Circuit Court was acting without or in excess of its jurisdiction, relief in prohibition is appropriate. *See*, syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) (indicating that relief in prohibition is appropriate where “the lower tribunal’s order is clearly erroneous as a matter of law”) and syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) (indicating that relief in prohibition may be granted where “there is a high probability that the trial will be completely reversed if the error is not corrected in advance”). In so holding, this Court does not address the assertion of Circle M Enterprises, Inc., and Randall McCauley that they are also entitled to be dismissed from the action. That assertion is more appropriately before the Circuit Court following the entry of this order.

Upon all of the above, it is ADJUDGED and ORDERED that the writ of prohibition be granted, as moulded. This matter is remanded to the Circuit Court of Randolph County, West Virginia, with directions: (1) that the motion to dismiss filed by the West Virginia Regional Jail Authority be granted, without prejudice, and (2) that Frank J. Staud and Shell Equipment Company, Inc., be permitted pursuant to the refiling provisions of *W.Va. Code*,

55-2-18 (2001), to refile their claim against the Authority following compliance with the notice requirements of *W.Va. Code*, 55-17-3(a)(1) (2002).

It is further ORDERED that service of an attested copy of this order upon the respondent Judge and the other respondents shall have the same force and effect as service of a formal writ.