IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0784

STATE OF WEST VIRGINIA ex rel.
STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner,

v.

THE HONORABLE TERA L. SALANGO, Judge of the Circuit Court of Kanawha County, and RENE G. DENISE,
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTION PRESENTED

This is a verified petition for a writ of prohibition seeking interlocutory review of an order entered on June 8, 2020 retaining jurisdiction over this matter, even allowing Rene G. Denise ("Denise") to amend her Complaint for a second time, irrespective of the lack of the requisite, statutory pre-suit notice of suit against a nurse manager in a hospital ran by the State of West Virginia Department of Health and Human Resources ("DHHR"). The question presented is whether the Respondent Judge is improperly exercising jurisdiction over DHHR in direct contravention to *Motto v. CSX Transp. Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007). Because review of the foregoing issue meets the standards for interlocutory review through this Court's prohibition jurisdiction, Petitioner respectfully requests that this Court issue a rule to show cause prohibiting the Circuit Judge from allowing this case to proceed against DHHR, given that the Circuit Court has no jurisdiction.

II. STATEMENT OF THE CASE

The Respondent Judge has allowed Rene G. Denise's ("Denise") claims against the state and its supervisory personnel to proceed in Circuit Court despite the lack of jurisdictionally required pre-suit notice.

This action arises out of Denise's employment with Sunbelt Staffing, LLC ("Sunbelt"), and placement at the William R. Sharpe, Jr. Hospital ("Sharpe Hospital") operated by DHHR. [*See* Compl.; Am. Compl., Appx. 0001-0010, 0011-0020]. Denise brings claims for hostile work environment and reprisal under the West Virginia Human Rights Act ("WVHRA"). [*See generally id.*].

Through her employment with Sunbelt, Denise was assigned to work at Sharpe Hospital. [Am. Compl. at ¶ 13, Appx. 0013]. Denise alleges that former Defendant,[1] Scott Starcher, was a co-worker at Sharpe Hospital who made "unwelcomed comments and inappropriately" touched her, creating "an uncomfortable and hostile work environment" which she reported to Frances Stump, a "supervisor/agent of DHHR". [*Id.* 0013-0014].

On October 21, 2019, Denise, by counsel, sent a letter to Cabinet Secretary Bill J. Crouch and the Attorney General, purporting to be a "Notice of Anticipated Lawsuit" in accordance with *W. Va. Code* § 55-17-3(a)(1). [Appx. 0169]. In that letter, Denise advised that she intended to file various employment-related claims "arising out of her [alleged] joint employment with William R. Sharpe, Jr., a hospital under the West Virginia Department of Health and Human Resources/Office of Health Facilities and Sunbelt Staffing, LLC." [*Id.*]. ***The very next day***, October 22, 2019, Denise filed a Complaint in Circuit Court naming Sunbelt Staffing, Scott Starcher, Francis Stump, and Jane Doe as Defendants. [Appx. 0001-0010]. Denise's Complaint specifically alleged that she was "jointly employed by Defendant Sunbelt and DHHR," and asserted that all named individuals were acting in the scope of their employment with DHHR. [*Id.* ¶¶ 2-7]. Denise did ***not*** name DHHR as a party, but averred in a footnote that she had sent a statutory pre-suit notice letter and "intend[ed] on amending th[e] Complaint to add DHHR as a party upon the expiration of the thirty-day notice period. [*Id.* n. 1].

On November 22, 2019, Denise filed an Amended Complaint. [Appx. 0011-0020]. The ***only*** substantive difference between the Amended Complaint and the original is that DHHR was not named as a party Defendant in the suit original. [*Id.* at Case Style, ¶ 4]. Both complaints

[1] Having been voluntarily dismissed from this case by Denise. [Appx. 0023].

asserted identical claims of hostile work environment, retaliation, and failure to hire. [*Compare* Appx. 0001-0010 *with* 0011-0020].

Subsequently, despite identifying him as the alleged bad actor, Denise voluntarily dismissed Scott Starcher. [Appx. 0023]. Moreover, in apparent recognition of the arbitration provision in her contract with Sunbelt, Denise voluntarily dismissed Sunbelt. [Appx. 0024].

DHHR moved to dismiss this matter because, amongst other reasons, Denise failed to provide the requisite, statutory pre-suit notice as to suit against Frances Stump and; therefore, the Circuit Court lacks jurisdiction over the case. [Appx. 0025-0027]. Denise sought to amend her amended complaint to assert that recovery was sought only from the State of West Virginia's insurance carrier. [Appx. 0074-0077]. DHHR opposed the proposed amendment as futile given (among other reasons) that the Circuit Court lacked jurisdiction. [Appx. 0225-0233].

On or about June 8, 2020, despite the lack of the required pre-suit notice of suit against DHHR nurse manager, Francis Stump, the Circuit Judge denied DHHR's Motion to Dismiss, or in the Alternative, Motion to Compel Arbitration. Rather, the Circuit Judge retained jurisdiction over this matter, granting Denise leave to file a Second Amended Complaint against DHHR and its nurse manager, Francis Stump. [Appx. 0292-0314].

The Circuit Judge exceeded her authority by maintaining a case on her docket, and allowing an amended pleading to be filed in the case, when she lacks jurisdiction over the suit. "'Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.'" *State ex rel. Dale v. Stucky,* 232 W. Va. 299, 304, 752 S.E.2d 330, 335 (2013). DHHR asks that this Court issue a rule to show cause prohibiting the Respondent Judge from allowing this case to proceed against DHHR, given that she has no jurisdiction.

III. SUMMARY OF ARGUMENT

This Court has long recognized that the "[p]roceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act.'" Syl., *Perkins v. Hall*, 123 W.Va. 707, 17 S.E.2d 795 (1941). As commentators have stated, "[w]ithout jurisdiction, a court cannot proceed at all in any cause, and has no authority to act, hear, or determine a case, or address the merits of the action, except to determine that it has no jurisdiction and dismiss the action." 21 C.J.S. *Courts* § 104 (footnotes omitted).

The instant case is subject to the pre-suit notice required by the West Virginia Code, which provides as follows:

> Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an 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. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.

W. VA. CODE § 55-17-3(a)(1). Indeed, this Court has held that compliance with the pre-suit notification provisions set forth in *W. Va. Code* § 55-17-3(a)(1) is a mandatory, jurisdictional pre-requisite for filing an action against a government agency, and failure to provide notice in compliance with the statute is grounds for dismissal. *Motto v. CSX Transp. Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007); *See also State ex rel. Dale v. Stucky*, 232 W.Va. 299, 752 S.E.2d 330, n. 5 (2013). Despite the admitted lack of statutory notice to Ms. Stump, an alleged State actor in her capacity as a supervisor with DHHR, the Respondent Judge did not dismiss this case as instructed by this Court in *Motto*.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

W.Va. R. App. P. 19(a)(1) oral argument is appropriate in this case as it involves an "assignment[ ] of error in the application of settled law". Alternatively, to the extent that this appeal involves issues of fundamental public importance, Petitioner requests oral argument pursuant to Rule 20. There is public interest in this matter because if the Circuit Judge is permitted to compel the Petitioner's further participation in this case, the State and its taxpayers will incur prohibitive and unnecessary expenditures of costs and resources. DHHR submits that the ten (10) minutes of argument afforded under *W.Va. R. App. P.* 19(e) is sufficient.

V. ARGUMENT

A. THE STANDARD OF REVIEW FOR A PETITION FOR WRIT OF PROHIBITION WHEN THE CIRCUIT COURT LACKS JURISDICTION OVER A CASE.

The failure to provide statutory pre-suit notice is a bar to subject matter jurisdiction over a suit. *See, e.g., Motto v. CSX Transp., Inc.*, 220 W.Va. 412, 647 S.E.2d 848 (2007). As reiterated in the opinion this Court issued in *State ex rel. TermNet Merchant Services, Inc. v. Jordan*, " '[A writ of] [p]rohibition lies . . . to restrain inferior courts from proceeding in cases over which they have no jurisdiction . . . .'" 217 W.Va. 696, 619 S.E.2d 209, Syl. pt. 2 (2005) (Quoting Syl. Pt. 1, in part, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)).

In *State ex rel. Dale v. Stucky*, this Court recognized:

> This Court has stated that "jurisdiction implies or imports the power of the court" . . . Syl. Pt. 9, in part, *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 161, 423 S.E.2d 560, 564 (1992). As we observed in *Hanson v. Board of Education of the County of Mineral*, 198 W. Va. 6, 479 S.E.2d 305 (1996), "the literal meaning of jurisdiction comes from 'juris' and 'dico' and means 'I speak the law.' ***Jurisdiction is not related to the rights of the parties but concerns the power to decide a justiciable controversy between the parties."*** *Id.* at 11n. 3, 479 S.E.2d at 310 n. 3 (citing *State ex rel. Summerfield v. Maxwell*, 148 W. Va. 535, 539, 135 S.E.2d 741, 745 (1964)); *see also Hansbarger v. Cook*, 177 W. Va. 152, 157, 351 S.E.2d 65, 70 (1986) ""Jurisdiction deals with the power of the court . . . ."""

> (internal citations omitted)). Furthermore, we have explained that "[j]urisdiction consists of two elements. One of these elements is jurisdiction over the person. Jurisdiction of the subject matter must exist as a matter of law. Jurisdiction of the person may be conferred by consent of the parties or the lack of such jurisdiction may be waived." . . .
>
> Indeed, the law is well settled that "***[t]o enable a court to hear and determinate an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties***; both are necessary and the absence of either is fatal to jurisdiction." . . . Moreover, "'it is fundamental to the doctrine that 'jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or some statute.'"

232 W. Va. 299, 303-4, 752 S.E.2d 330, 334-5 (2013) (citations omitted) (emphasis added). Critically, "'[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.'" *State ex rel. Dale v. Stucky, supra* at 335 (citations omitted). Indeed, while discussing subject matter jurisdiction, the *Stucky* Court recognized:

> '[A]ny decree made by a court lacking [subject matter] jurisdiction is void.' *State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005)'); *Cruikshank*, 138 W. Va. at 734, 77 S.E.2d at 604 ('Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void. . . .'); *Preissler*, 163 W. Va. at 719, 260 S.E.2d at 280, syl. Pt. 1 ('Where there is no showing on the record that any party has properly instituted proceedings in a court of record, the court cannot exercise jurisdiction over the matter and any purported order or judgment entered is void and its enforcement may be restrained by prohibition.'); Syllabus, *Perkins v. Hall*, 123 W. Va. 707, 711, 17 S.E.2d 795, 799 (1941) ('the proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act.') (internal citation omitted)).

Id. As this Court noted in *State ex rel. TermNet Merchant Services, Inc.*, "[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." 217 W. Va. at 700 619 S.E.2d at 213 (citations

omitted). Likewise, "a determination that the trial court lacked in personam jurisdiction will render the default judgment at issue void and unenforceable. . . .; *see also Smith v. Smith*, 140 W. Va. 298, 302–03, 83 S.E.2d 923, 925–26 (1954) (recognizing necessity of personal jurisdiction for judgments founded upon personal liability)." *Leslie Equip. Co. v. Wood Resources, L.L.C.*, 224 W. Va. 530, 533, 687 S.E.2d 109, 112 (2009). In short, jurisdiction, both subject matter and personal, must exist for an order of a court to be valid.

B. THE RESPONDENT JUDGE EXCEEDED HER JURISDICTION IN MAINTAINING THIS CASE AS DENISE FAILED TO PROVIDE THE REQUIRED PRE-SUIT NOTICE OF HER SUIT AGAINST DHHR NURSE MANAGER FRANCES STUMP IN COMPLIANCE WITH THE STATUTE.

The Respondent Judge erroneously determined that only those "elected or appointed public office holder[s]" are entitled to statutory pre-suit notice and, therefore, even though Frances Stump was named by Denise as a defendant in this case because Stump "was employed as a supervisor for DHHR," and Denise allegedly reported sexual harassment to her, Ms. Stump "is merely a public employee . . . [and] Plaintiff was not required to provide notice of her claims against Defendant Stump". [Appx. 0298-0299]. As this Court noted in *Motto*, "[t]o accept the circuit court's opinion that it has discretion to waive this mandatory notice would require us, in effect, to judicially repeal W. Va. Code § 55-17-3(a)." 220 W.Va. at 419, 647 S.E.2d at 855.

"Without question, the statute was enacted expressly to create additional notice and opportunity for the Legislature to deal with claims against 'government agencies,' as defined in the statute." *Magee v. Racing Corp. of West Virginia*, No. 17-0008, 2017 WL 4993455 at*4 (W.Va. Nov. 1, 2017) (unpublished). It is also without question that the Respondent Judge exceeded her jurisdiction and, thereby, contrary to the West Virginia Legislature's intent, deprived the State of West Virginia of the benefits provided by the pre-suit notice statute.

The West Virginia Code provides as follows:

> Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency[2], 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. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.

W. VA. CODE § 55-17-3(a)(1). Compliance with the pre-suit notification provisions set forth in West Virginia Code section 55-17-3(a)(1) is a mandatory, jurisdictional pre-requisite for filing an action against a government agency, and failure to provide notice in compliance with the statute is grounds for dismissal. *Motto v. CSX Transp. Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007); *See also State ex rel. Dale v. Stucky*, 232 W.Va. 299, 752 S.E.2d 330, n. 5 (2013). As noted earlier, this Court has repeatedly held that " ' '[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.'" *Id.* at 335 (citations omitted).

The Code defines "government agency", the term used in the pre-suit notice statute, to include public officials named in their official capacity. *See* W. VA. CODE § 55-17-2(2) (" 'Government agency' means a Constitutional officer or ***other public official named as a defendant*** or respondent ***in his or her official capacity***, or a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued") (emphasis added). In this case, the pre-suit notice

[2] There is no dispute that Denise did not provide thirty (30) days' notice before instituting action against Ms. Stump. Denise sent her purported notice on October 21, 2019. [JA0081]. ***The very next day***, she filed her Complaint naming Ms. Stump as a defendant. [*Id.*; JA0024-0033].

provision also applies specifically to Ms. Stump because Denise sued her in her official capacity. *Id.* As commentators have noted:

> If a plaintiff fails to advance allegations other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity and is treated as a claim against the defendant in one's official capacity.

63C AM. JUR. 2D PUBLIC OFFICERS AND EMPLOYEES §385 (2020). In the instant case, Denise expressly alleges that "[a]t all relevant times herein, Ms. Stump worked as a supervisor/agent of DHHR," [Am. Compl. ¶ 6, Appx. 0012], and all specific factual allegations against Ms. Stump relate to actions she took within the scope of her official duties in that employment. [*Id.* at ¶ 22, 25, Appx. 0014-0015]. Therefore, Ms. Stump has been sued in her official capacity for the purposes of the pre-suit notice provisions of *W. Va. Code* §§ 55-17-1, *et seq.*

Ms. Stump is also a "public official" as that term is used in the relevant statute. Indeed, this issue was recently resolved by Judge Chambers in *Hoback v. Cox*, No. 3:19-CV-460, 2020 WL 2367011 (S.D. W.Va. May 11, 2020). In *Hoback*, the Plaintiff, a Registered Nurse at Mildred Mitchell-Bateman Hospital, brought suit against, among others, DHHR and Sherrie Cox, a nurse manager at a hospital run by DHHR. Using the very same statutory definition at issue here, the Court found that punitive damages could not be recovered against Ms. Cox in her official capacity as the relevant statute prohibited punitive damages from being awarded against a "government agency" and defined a "government agency," such as DHHR, to include a "public official in her official capacity." In short, Judge Chambers effectively determined that a nurse manager at a hospital that was run by DHHR was a "public official" under the exact same statutory provisions at issue here. The situation at issue herein – whether *W. Va. Code* § 55-17-1, *et seq.* encompasses Ms. Stump as a "public official" -- is virtually identical to that in *Hoback*.

Similarly, in *Harvey v. Cline*, Judge Copenhaver proceeded from an assumption that guards at a West Virginia regional jail were "public officials" for the purposes of the pre-suit notice provision of *W. Va. Code* §55-17-1 had they been sued in their official capacities. No. 15-14091, 2016 WL 1562950 (S.D. W.Va. April 18, 2016) (Finding the statute of limitations not tolled by the pre-suit notice because the § 1983 claim was against the guards in their individual capacities). Additionally, "public officials" are afforded qualified immunity from suit. *See, e.g., State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992). Indeed, in *Clark v. Dunn*, this Court held that "a conservation officer employed by the Department of Natural Resources" was a "public officer and official" entitled to that immunity. 195 W.Va. 272, 278, 465 S.E.2d 374, 380 (1995); *see also Dixon v. Ogden Newspapers, Inc.*, 187 W.Va. 120, 416 S.E.2d 237, n. 3 (1992) (Noting that for purposes of defamation police and other law enforcement officers are public officials) (footnotes omitted).

Simply stated, it is absurd for Denise to allege that Frances Stump should be a defendant in this case because Ms. Stump acted as "a supervisor/agent of DHHR"[3] to whom she complained about alleged sexual harassment,[4] and whose alleged actions/inactions she seeks to impute liability to DHHR, yet simultaneously argue that Ms. Stump is not a public official sued in her official capacity, deserving of pre-suit notice. Denise's failure to provide the requisite notice to Ms. Stump is a jurisdictional defect which required the Respondent Judge to dismiss this case.

VI. CONCLUSION

Pursuant to *Rule of Appellate Procedure* 16(j), Petitioner respectfully requests that this Court issue a rule to show cause prohibiting the Respondent Judge from allowing this case to proceed against DHHR, given that she has no jurisdiction.

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[3] Am. Complaint at ¶ 6, Appx. 0012.
[4] Am. Complaint at ¶ 22, Appx. 0014.

Respectfully submitted this 9th day of October, 2020.

STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

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VERIFICATION

I, Jan L. Fox, Esq., being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Jan L. Fox, Esq.

Taken, subscribed, and sworn to before me this 9th day of October, 2020.

My Commission expires: August 1, 2021.

Notary Public

Official Seal
Notary Public, State of West Virginia
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My Commission Expires August 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2020, I caused to be served a true and correct copy of the "***Verified Petition for Writ of Prohibition***" and ***"Appendix Record"*** by depositing the same in the United States Mail, postage prepaid, upon the Respondents and their counsel of record as follows:

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