No. 33205 – *Adda Motto, Marie Carey, David Carey, Kristi Carey, and Sharon Runyon v. CSX Transportation, Inc. and West Virginia Department of Environmental Protection, Office of Mine Lands and Reclamation, a West Virginia government entity*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring, in part, and dissenting, in part:

This case comes to us in the form of two certified questions arising in a civil action pending in the Circuit Court of Kanawha County.

In view of the decision of this Court to require the dismissal of the underlying action for failure of the Petitioners below to comply fully with West Virginia Code §55-17-3(a) (2002) (Supp. 2006), I concur in the further judgment of this Court permitting the underlying suit to be refiled after the expiration of the statute of limitations under the provisions of the savings statute, West Virginia Code §55-2-18 (2001) (Supp. 2006).

However, I vigorously dissent from the new point of law, stated in syllabus point three of the majority opinion, holding that the pre-suit notice to state officials required by West Virginia Code §55-17-3(a) is *jurisdictional*.

As explained in the majority opinion, the constitutional principles I maintain are pivotal to a decision in this case were not addressed because the parties did not raise a

constitutional challenge to the statute. While the general rule is that courts do not pass upon the constitutionality of a statute in such instances, the long-recognized exception to that rule is when "a decision upon that very point is necessary to the determination of the case." Syl. Pt. 1, *Edgell v. Conaway*, 24 W. Va. 747 (1884). This Court explained in *State v. Harrison*, 130 W. Va. 246, 43 S.E.2d 214 (1947), that "[t]his widely recognized principle is based upon the attitude of deference of the judiciary for the legislative department of the government." *Id*. at 249, 43 S.E.2d at 216. I can think of no more decisive reason to invoke the exception than when the legislative enactment being considered oversteps constitutionally defined bounds to the powers of the legislative branch.

The majority suggests that without a constitutional challenge by the parties, the only alternative remedy is, in effect, judicial repeal of the notice statute through recognition of discretion of the courts to waive the pre-suit notice provisions. While it is not entirely clear, that conclusion appears to rest on the determination that the notice requirements are jurisdictional in nature. I maintain that the better approach is to fashion a remedy for the absence of timely pre-suit notice that, in comity, recognizes and accommodates in most cases the desire of the Legislature to have notice of litigation given to its officers and to other affected state agencies before the state's interests are adversely affected by the litigation. In most instances, such an accommodation can be achieved by simply staying further action in the case (including suspending response times) until notice

is given for the required period of time. However, in cases seeking to bar or postpone some projected state action alleged to pose imminent or irreparable harm to the complaining parties, there may be a legitimate need for swift, if temporary, immediate action without the required notice to state officials. To hold, as the majority does, that the statute under consideration constitutes a *jurisdictional* bar to all relief until the required notices are given and the stipulated times have elapsed is unwise and unnecessary.

A similar accommodation involving a pre-suit notice provision governing medical malpractice actions was crafted by this Court in *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005). The resolution fashioned in *Hinchman* reflected a wise balance of the prerogatives of the legislative and judicial branches of government without either declaring the notice provisions jurisdictional or refusing to accommodate the legislative will. In so doing, the right to citizens' access to the courts was expressly preserved. *Id*. Syl. Pt. 2, 217 W. Va. at 379, 618 S.E.2d at 388. The statutory pre-suit notice requirements examined in *Hinchman* were intended to resolve a legislatively defined problem of crisis dimension involving medical malpractice lawsuits. The legislative design was intended to curtail the number lawsuits considered frivolous in order to ease a perceived economic crisis and to instill or renew public confidence in the skills and quality of medical services in the state. I note first that the statute in *Hinchman* dealt with suits grounded in the common law, over which the Legislature retains constitutional powers to enact statutory amendment, not

extraordinary remedies. Moreover I note that in the statute under consideration here, the Legislature was not dealing with a perceived economic or social crisis as in *Hinchman,* but with the convenience of the state government in responding to litigation initiated by citizens seeking some kind of relief from the actions of that state government.

It is also worth noting a distinction between our Court system and that of the federal government. Federal courts' jurisdiction, with only a few exceptions, is derived from acts of Congress. The jurisdiction of our state courts comes from the state constitution directly, without Legislative enactment except in those cases in which the Legislature chooses to enlarge, rather than restrict, that jurisdiction. The wisdom of those who drafted our state constitution in choosing to secure to our people the aid of the courts directly, rather than by the grace of the Legislature, ought to be respected. The opinion of this Court from which I here dissent fails to give full respect to that highly meaningful distinction.

The impact of the majority opinion is even more inappropriate in cases seeking extraordinary remedies. The jurisdiction of this Court and of the circuit courts to entertain suits seeking extraordinary remedies such as mandamus derives from Article VIII of the Constitution of this State *and is not subject to restriction by the Legislature*. While this Court has permitted the Legislature to set certain pre-conditions to the filing of suits seeking common-law damages for alleged malpractice by health care providers, treating the type of

pre-conditions presently at issue as *jurisdictional* in cases seeking relief by way of one or another extraordinary remedy has potential for mischief that need not be chanced.

The course chosen by the majority operates to close the courthouse doors to citizens seeking prompt redress against the government despite the express constitutional guarantee that "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, *shall* have remedy by due course of law. . . ." W.Va. Const. art. III,§ 17 (emphasis supplied). I firmly believe that this Court, giving due respect to our republican form of government, should never sanction a remedy that sets government above the people rather than as servant of the people. Indeed, this Court has historically respected and adhered to this tenet. *See* Syl. Pt. 2, *Ralston v. Town of Weston*, 46 W.Va. 544, 33 S.E. 326 (1899) ("The statute of limitations runs against the state and municipal corporations, as against individuals in similar cases."); Syl. Pt. 3, *City of Wheeling v. Campbell*, 12 W.Va. 36 (1877) ("The statute of limitations . . . runs against a municipal corporation, the same as against a natural person."), *overruled on other grounds.*

Finally, we have reviewed the wealth of authority on which the majority bases its decision to find the pre-suit notice provision at issue to be a jurisdictional matter. In my estimation, the extensive discussion in the majority opinion regarding treatment by other jurisdictions of pre-suit notice statutes without comparatively examining those states'

constitutional mandates and authority with ours has led to a questionable, if not faulty, conclusion.

Accordingly, I concur in that portion of the majority opinion allowing refiling of suit by application of the savings statute, I respectfully dissent from the remainder of the opinion, based upon my firmly rooted convictions.