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 Abandoned Mine Lands and Reclamation, a West Virginia government entity*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

This opinion holds that compliance with the notice provisions of *W.Va. Code*, 55-17-3(a) [2002] is a jurisdictional prerequisite. In other words, if a plaintiff doesn't give notice at least thirty days before filing a lawsuit against a state agency to the Attorney General and the "chief officer of the government agency" – so that the Speaker of the House and the President of the Senate may "forthwith" learn of the threatened litigation – then the courts of this state have no jurisdiction to hear the lawsuit.

I dissent from such a ridiculous holding. First and foremost, I dissent because the statute is plainly unconstitutional, violating every notion of separation of the powers constitutionally vested in each branch of government. Second, the cases cited as support for the opinion simply don't support the opinion – in fact, the cases suggest the exact opposite result. And not just a few of the cases. *All of them.*

I.
W.Va. Code, 55-17-3(a) is unconstitutional

I concede that the constitutionality of the statute was not challenged before this Court, but on remand I see nothing to stop the circuit court from refusing to apply the statute on constitutional grounds.

W.Va. Code, 55-17-3(a) is a flagrant violation of all notions of separation of powers. The Legislature cannot constitutionally pass a law that deprives the courts of jurisdiction over certain kinds of cases. Yet the majority's opinion suggests that the law may reach just that result.

The *West Virginia Constitution* states that "[t]he judicial power of the State shall be vested solely . . . in the circuit courts,"[1] and states that circuit courts

> shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increased by the legislature[.]

Id., Art. VIII, § 6. The *Constitution* gives the Legislature only one opportunity to tinker with the civil case jurisdiction of the circuit court, and that is to increase the "amount in controversy" requirement. *Expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies when reading this section of the *Constitution*. The *Constitution* doesn't give the Legislature the power to limit a circuit court's civil case jurisdiction by imposing pre-suit notice requirements. *W.Va. Code*, 55-17-3(a) therefore violates section 6 of Article VIII of our *Constitution*, because the statute attempts to limit the civil case jurisdiction of the circuit courts.

The statute also violates section 1 of Article VIII of our *Constitution*, because it makes pre-suit notice to members of the Executive and the Legislative branches a prerequisite to filing a lawsuit against the State. This section of the *Constitution* places all

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[1]*West Virginia Constitution*, Art. VIII, § 1.

judicial power in the courts – yet the statute seizes for the Executive and the Legislative branches a measure of authority over the operation of the Judiciary.

The members of the majority – as they have done in the past – continue to abdicate the judicial power of the courts to the Executive and Legislative branches. Piece by piece, bit by bit, the Legislature has gnawed away at the Court's constitutional duties, responsibilities and powers. The courts were designed by the Founding Fathers – of our Nation and our State – to be a check and a balance against the powers of the Executive and Legislative branches. I dissent because the majority opinion gives the green light to the Legislature to continue passing laws that minimize the Judiciary's role in government, and that limit the people's ability to access the courts to receive justice.

II.
The Majority Opinion Mis-Cites Authority

As its primary authority, the majority opinion "look[s] to how other jurisdictions, both federal and state, have dealt with the failure to follow statutory pre-suit procedures applicable to actions against governmental entities for guidance." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 12). The opinion lists "a number" of state and federal courts that have *interpreted* pre-suit notice statutes, and have found that compliance with pre-suit notice of claim provisions is "a jurisdictional prerequisite." The opinion implies that these other courts read various vague statutes – statutes like *W.Va. Code*, 55-17-3(a) – and interpreted a jurisdictional component into the statute. Then the opinion relies upon these

"above cited authorities from federal and state jurisdictions" to "find" in *W.Va. Code*, 55-17-3(a) "the provision of statutory notice to be jurisdictional in nature." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 15).

So why do I have a problem with this tried-and-true system of opinion writing? The reason those other state courts (and the federal courts) found their particular notice statutes to be jurisdictional is obvious: unlike West Virginia, those states' statutes *explicitly make pre-suit notice jurisdictional.* The majority opinion does not make this clear, and never points out that West Virginia's statute is totally different from all those other statutes.

In fact, none of the cases from federal and other state jurisdictions quoted by the majority opinion ever "interprets" a statute. The majority opinion quotes cases from state courts in Colorado, Connecticut, Georgia, Indiana, Kansas, Maine, Mississippi, Utah, Virginia, Wyoming, as well as district and federal circuit courts of the United States, as examples of courts consistently recognizing that the filing of pre-suit notice in an action against a governmental entity is a jurisdictional prerequisite.[2] The cases interpret nothing,

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[2]The statutes behind the cases quoted by the opinion say the following (with emphasis added):

Colorado: "Compliance with the provisions of this section shall be a *jurisdictional prerequisite* to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action." *C.R.S.A.*, § 24-10-109 (1) [1992].

Connecticut: "*No action for any such injury shall be maintained* . . . unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation." *C.G.S.A.*, § 13a-149 [1986].

Georgia: "No action against the state under this article shall be commenced and the

(continued...)

but rather apply clear statutory language making pre-suit notification a jurisdictional prerequisite.

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[2](...continued)
courts shall have *no jurisdiction* thereof unless and until a written notice of claim has been timely presented to the state as provided in this subsection." *Ga. Code. Ann*, § 50-21-26(a)(3) [2000].

Indiana: "[A] claim against the state is *barred* unless notice is filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs." *Indiana Code*, § 34-13-3-6 [1998].

Kansas: "All claims against a municipality must be presented in writing with a full account of the items, and *no claim shall be allowed* except in accordance with the provisions of this section. . . . *No person may initiate an action* against a municipality unless the claim has been denied in whole or part." *Kan. Stat. Ann.*, § 12-105b [2004].

Maine: "*No claim or action shall be commenced* against a governmental entity or employee in the Superior Court unless the foregoing notice provisions are substantially complied with." 14 *M.R.S.A* § 8107(4) [2001].

Mississippi: "*After all procedures within a governmental entity have been exhausted*, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim[.]" *Miss. Code Ann.*, § 11-46-11(1) [2002].

Utah: "A claim against a governmental entity . . . *is barred* unless notice of claim is filed . . . within one year after the claim arises." *Utah Code Ann.* § 63-30d-402 [2004].

Virginia: "Every claim cognizable against the Commonwealth . . . shall be *forever barred* unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim[.]" *Va. Stat.* § 8.01-195.6 [2007].

Wyoming: "No action shall be brought under this act against a governmental entity unless the claim upon which the action is based is presented to the entity as an itemized statement in writing[.]" *Wyo. Stat. Ann.*, § 1-39-113 [1997]. The *Wyoming Constitution*, Article 16, § 7 also requires notice: "No money shall be paid out of the state treasury . . . and *no bills, claims, accounts or demands against the state . . .shall be . . . allowed* or paid until a full itemized statement in writing, certified to under penalty of perjury, shall be filed with the officer or officers whose duty it may be to audit the same."

United States: "*An action shall not be instituted* upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency[.]" 28 U.S.C.A. § 2675(a) [1966].

The language of the statutes relied upon in the majority opinion simply is not found in West Virginia's statute. *W.Va. Code*, 55-17-3(a) is vastly different from all of the state and federal statutes relied upon by the majority opinion, and says absolutely nothing about pre-suit notification being jurisdictional. The majority opinion didn't "find" notice to be a jurisdictional prerequisite; the majority wrote it into the statute on a whim.

Furthermore, the opinion says that while some courts find their state's pre-suit notice statutes are not jurisdictional, those "other courts deem such non-compliance with statutory requirements to be a bar or defense to suit." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 14). In reality, those courts said something directly opposite. Those courts actually do appear to interpret a vague state law, but they interpret their statutes to mean that plaintiffs can still proceed with their lawsuit even without giving pre-suit notice. For example, Minnesota held in *Naylor v. Minnesota Daily*, 342 NW.2d 632, 634 (Minn. 1984) that the state notice statute was not a jurisdictional bar to suit. The Minnesota court found that if a plaintiff fails to give notice, a jury "could consider the effect of the failure to receive notice in determining liability or damages. But the case may not be dismissed." Similarly, the court in *University of Texas Southwestern Medical Center v. Loutzenhiser*, 140 S.W.2d 351 (Tex. 2004) said that "the failure to give notice of a claim . . . does not deprive a court of subject matter jurisdiction over an action on the claim."

I would have written the majority opinion to hold that *W.Va. Code*, 55-17-3(a) is *not* a jurisdictional bar to suit, and that the failure to give pre-suit notice does not deprive a court of subject matter jurisdiction. However, notice by the plaintiff to the various state

agencies / actors – presuming such a notice requirement isn't flagrantly unconstitutional – should be compelled before the case proceeds further, and the failure to give pre-suit notice can be considered by a jury in determining liability or damages.

I therefore respectfully dissent.