

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-

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

v.

HON. TERA L. SALANGO, Judge of the Circuit
Court of Kanawha County, and SIERRA FEAZELL,
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Under West Virginia Code § 55-17-3(e), does the ninety (90) day period for a party to initiate a lawsuit after serving pre-suit notice begin to run immediately after the party has served the pre-suit notice or thirty (30) days thereafter?

2. Did the Circuit Court err as a matter of law where it found that Respondent Feazell filed her Complaint more than ninety (90) days after she served upon Petitioner the pre-suit notice required under West Virginia Code § 55-17-3 and refused to dismiss Respondent Feazell's Complaint for lack of subject matter jurisdiction?

3. Whether the Respondent Judge is improperly exercising jurisdiction over DHHR in contravention of *Motto v. CSX Transp. Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007).

II. STATEMENT OF THE CASE

A. INTRODUCTION.

This case comes before the Court as the result of an effort on the part of Respondent Sierra Feazell ("Respondent Feazell") to avoid the mandatory and jurisdictional pre-suit notice requirements contained *W. Va. Code* §§ 55-17-1, *et seq.* Although the Legislature has found the jurisdictional requirements of *W. Va. Code* § 55-17-3 to be essential "in order to protect the public interest[.]" Respondent Feazell deems complying with that process to be the "one of the worst, frivolous, and largest waste of judicial resources" that she has witnessed. [APPX_0070]. Respondent Feazell cannot fail to follow the law and then expect the law to be warped to excuse her failures. The Circuit Court does not have subject matter jurisdiction over this action because Respondent Feazell failed to serve pre-suit notice upon the West Virginia Department of Health and Human Resources ("Petitioner" or "DHHR"), a governmental agency, in compliance with West Virginia Code § 55-17-3. Specifically, she initiated her lawsuit more than 90 days after

serving the pre-suit notice; thus, the notice was “expired” under West Virginia Code 55-17-3(e). Thus, dismissal of the Complaint is essential, and the Circuit Court erred in denying Petitioner’s Motion to Dismiss for lack of subject matter jurisdiction.

B. FACTS AND PROCEDURAL HISTORY.

Respondent was an employee of DHHR.¹ [APPX_0034 at ¶ 6]. DHHR “is a division of the State of West Virginia.” [Id. at ¶ 2]. Respondent Feazell initially filed suit against DHHR on or about June 22, 2023 under Civil Action Number 23-C-493. After jurisdictional insufficiencies were identified by Motion to Dismiss, Respondent Feazell filed an “Order of Rule 41(a) Dismissal Without Prejudice”. [APPX_0008]. In the voluntary dismissal, Respondent Feazell agreed to “DISMISS *this matter*”. [Id.] (emphasis added). Accordingly, the entire suit, Civil Action Number 23-C-493, was dismissed. [Id.].

On or about **August 16, 2023**, Respondent Feazell sent the required statutory pre-suit notice to file *another* action against DHHR. [APPX_0010 to 0013]. Respondent Feazell subsequently filed her *second* civil action, the instant matter (23-C-1070), on or about **December 7, 2023**, well after the pre-suit notice expired. [APPX_0013 to 0028]. By statute, suit must be filed within *ninety (90) days* of service of the pre-suit notice. W.VA. CODE § 55-17-3(e). Ninety (90) days from August 16 is **November 14**². Respondent Feazell’s suit, filed *one hundred thirteen (113) days* after service of the pre-suit notice, was accordingly almost one (1) full month late. Indeed, Respondent Feazell’s counsel even acknowledged in a December 19, 2023 email that the

¹ Effective January 1, 2024, the DHHR was abolished and replaced by three new Cabinet-level departments. W. VA. CODE § 5F-2-1a (2023). The reorganization has no effect on this issue, however. The applicable successor agency here would be the Department of Human Services (“DoHS”).

² <https://www.timeanddate.com/date/dateadded.html?m1=08&d1=16&y1=2023&type=add&ay=&am=&aw=&ad=90&rec=>.

time gap between serving the pre-suit notice and filing the Complaint was “more than the 90 days required by statute, meaning the notice was stale.” [APPX_0029].³

One day after suit was filed, Respondent Feazell filed a Notice of Filing Amended Complaint. Respondent’s “Notice of Filing Amended Complaint” indicates that it is to “remove[] a party”. [APPX_0030 to 0046]. However, no party was removed. Indeed, the Amended Complaint speaks in terms of Defendants (plural), although only DHHR is named as a Defendant in Civil Action No. 23-C-1070. Not only was Respondent’s pre-suit notice defective, but also service of the Amended Complaint was defective. The Amended Complaint was served on the Attorney General, [APPX_0046], not on the Chief Officer of DHHR (the Cabinet Secretary) or the Secretary of State as is required by *W.Va. R. Civ. P.* 4(6)(D) and *W. Va. Code* § 56-3-13(d). *Accord* Syl. Pt. 2, *White v. Berryman*, 187 W.Va 323, 418 S.E.2d 917 (1992).⁴

Pursuant to Rules 12(b)(1) and 12(b)(5) of the West Virginia Rules of Civil Procedure, Petitioner filed a Motion to Dismiss the Complaint against it on January 8, 2024. [APPX_0047 to 0069]. In its accompanying Memorandum of Law, Petitioner made clear that the pre-suit notice Respondent Feazell served upon it on **August 16, 2023** expired ninety (90) days later on **November 14, 2023** pursuant to *W. Va. Code* § 55-17-3(e), well before she actually filed her Complaint on **December 7, 2023**. [*Id.*]. Accordingly, Respondent Feazell’s failure to comply with the mandatory pre-suit notice requirements to State agencies pursuant to West Virginia Code § 55-17-3, deprived the Circuit Court of subject matter jurisdiction over the action, and, consequently, that dismissal of the Complaint was essential. [*Id.*].

³ Petitioner should not be surprised at the filing of this Petition. [APPX_0029] (“If the Judge would for some reason not rule in your favor, I see a Writ being filed.”).

⁴ The deficient service would be an appropriate alternative ground for dismissal. Respondent Feazell did not address this argument below and has therefore waived it. [APPX_0110 to 0111].

Respondent Feazell filed a Response in opposition to the Motion to Dismiss, [APPX_0070 to 0100], asserting (contrary to her counsel’s previous e-mail) that it was “clear that the Legislature fully intended for Plaintiffs to have ninety (90) days from the effective date of the pre-suit notice to file their Complaint.” [*Id.* at APPX_0075]. From that specious proclamation, Respondent Feazell further asserted that, since a plaintiff may not file suit for thirty (30) days after service of the pre-suit notice under *W. Va. Code* § 55-17-3(a)(1), the ninety (90) day period under *W. Va. Code* § 55-17-3(e) to file an action relating to the pre-suit notice “cannot begin until the expiration of the thirty (30) day pre-suit notice in order to ensure that the Legislature’s intent to give Plaintiffs ninety (90) days to file is given full effect.” *Id.*

In all, the effect of Respondent Feazell’s position is that she believes that a plaintiff has ***one hundred twenty (120) days*** after service of pre-suit notice to institute an action against a governmental agency under *W. Va. Code* § 55-17-3(e) – not ninety (90) days as prescribed by the plain language of that statute – and that her pre-suit notice on **August 16, 2023** had therefore not expired when she filed her Complaint one hundred thirteen (113) days later on **December 7, 2023**. Petitioner subsequently filed a Reply, wherein it maintained that the ninety (90) day period to institute suit after service of pre-suit notice begins to run at the time the pre-suit notice is served, and, consequently, Respondent Feazell’s pre-suit notice on August 16 had expired when her Complaint was filed ***one hundred thirteen (113) days*** later on December 7. [APPX_0101 to 0114]. The parties also filed respective proposed orders. [APPX_0115 to 0125 (Petitioner’s)]; [APPX_0126 to 0133 (Respondent Feazell’s)]. Petitioner further filed objections to Respondent Feazell’s proposed order pursuant to *Tr. Ct. Rule* 24.01. [APPX_0134 to 0140]. A hearing was held on April 24, 2024, wherein the Respondent Judge heard oral argument and took the matter under advisement.

On April 30, 2024, the Respondent Judge denied Petitioner’s Motion to Dismiss for lack of subject matter jurisdiction. [APPX_0001 to 0007]. In an Order slightly modified from Respondent Feazell’s proposed order, Circuit Court found that, pursuant to *W. Va. Code* § 55-17-3(a)(1), “one files the pre-suit notice and then may not file suit for thirty (30) days... So, the ninety (90) day limited period for filing cannot begin until the expiration of the thirty (30) day pre-suit notice to ensure that the Legislature’s intent to give Plaintiffs ninety (90) days to file is given full effect.” [*Id.* at p. 5]. The Circuit Court reasoned that “[Petitioner’s] argument would defeat the Legislature’s intent and only give litigants sixty (60) days to file, rather than ninety (90).” *Id.* The Circuit Court concluded that “[Respondent Feazell’s] deadline would be December 14, 2023[,]” that Respondent’s filing of the Complaint on December 7, 2023 was timely, and that it consequently had subject matter jurisdiction over the action. *Id.* In short, the effect of the Respondent Judge’s rule is that plaintiffs have 120 days to file their lawsuit rather than the 90 prescribed by the plain language of statute; a clear error.

The Circuit Court’s decision to deny Petitioner’s Motion to Dismiss and exercise subject matter jurisdiction over this case is erroneous as a matter of law, and thus, Petitioner files the instant Writ of Prohibition to prevent the Circuit Court from erroneously exercising jurisdiction over this action.

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). As this Court has noted, 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).

Under *W. Va. Code* § 55-17-3(e), the ninety (90) day period for individuals to initiate a lawsuit after serving pre-suit notice begins to run immediately after the pre-suit notice is served. Consequently, the pre-suit notice that Respondent Feazell served upon Petitioner on **August 16, 2023** expired before she filed her Complaint on **December 7, 2023**, one hundred thirteen (113) days after service of that pre-suit notice. Furthermore, Respondent Feazell did not serve a new pre-suit notice upon Petitioner in accordance with *W. Va. Code* § 55-17-3(e) before filing her Complaint. This Court has made it clear that compliance with the notice provisions contained in *W. Va. Code* § 55-17-3 is required for the circuit court to have subject matter jurisdiction over this action. Thus, due to Respondent Feazell's failure to file her Complaint within ninety (90) days after serving pre-suit notice upon Petitioner, the circuit court lacks subject matter jurisdiction over this action.

Furthermore, the circuit court erred as a matter of law where it denied Petitioner's Motion to Dismiss Respondent's Complaint for lack of subject-matter jurisdiction based on its erroneous analysis of *W. Va Code* § 55-17-3(e). The circuit court incorrectly determined that the ninety (90) day period under *W. Va. Code* § 55-17-3(e) for a party to file suit after serving pre-suit notice begins to run thirty (30) days *after* service of the pre-suit notice (a total of **120 days** from service of the pre-suit notice). From this, the Circuit Court erroneously concluded that Respondent Feazell's August 16, 2023 notice had not expired when her Complaint was filed on December 7,

2023, and that Respondent had complied with the jurisdictional requirements of *W. Va. Code* § 55-17-3(e). Consequently, the circuit court determined that it had subject matter jurisdiction over this action and denied Petitioner’s motion to dismiss for lack of the same. The circuit court’s denial of Petitioner’s motion to dismiss for lack of subject matter jurisdiction based on its erroneous analysis of *W. Va. Code* § 55-17-3(e) is a clear error of law, and a writ of prohibition is essential to prevent the Circuit Court from exercising jurisdiction that it does not have.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves errors in exercising subject matter jurisdiction and narrow issues of law, oral argument under *W. Va. R. App. P.* 19 is appropriate in this case. Alternatively, to the extent that this case involves issues of fundamental public importance, oral argument may be appropriate under *W. Va. R. App. P.* 20. There is public interest in this matter because if the Circuit Judge is permitted to compel Petitioner’s further participation in this case, the State and its taxpayers will incur prohibitive and unnecessary expenditures of costs and resources. Petitioner submits that the ten (10) minutes of argument afforded under *W. Va. R. App. P.* 19(e) is sufficient.

V. ARGUMENT

A. THE AWARD OF A WRIT OF PROHIBITION IS APPROPRIATE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

1. The Standards for a Writ of Prohibition

“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *W. VA. CODE* § 53-1-1.⁵ When a petition raises

⁵ See also Syl. Pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (purpose of writ of prohibition is “to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers”).

a jurisdictional challenge, “[this Court] must determine... whether it is jurisdictional in the sense of requiring a decision upon facts or a decision upon a pure question of law.” *State ex rel. Charleston Area Medical Center, Inc. v. Thompson*, 248 W. Va. 352, 357, 888 S.E.2d 852, 857 (2023) (internal quotations omitted). If the challenge “rests upon the determination of a question of law, prohibition will lie if the trial court has exceeded its jurisdiction or usurped a jurisdiction in law that does not exist.” *Id.* When a case presents a question of law, this Court applies a *de novo* standard of review in determining whether the circuit court exceeded its jurisdiction. *Id.*

Here, an award of a writ of prohibition is entirely appropriate because the trial court does not have subject matter jurisdiction over this action due to Respondent Feazell’s failure to serve pre-suit notice upon Petitioner in accordance with the requirements of *W. Va. Code* § 55-17-3. This Court has long held that “**compliance with the pre-suit notification provisions set forth in W. Va. Code § 55-17-3(a) (2002) is a jurisdictional pre-requisite for filing an action against a State agency[,]**” and that “**failure to comply with statutory notice mandates deprives the circuit court of jurisdiction[.]**” *Motto v. CSX Transp. Inc.*, 220 W.Va. 412, 419, 647 S.E.2d 848, 855 (2007) (emphasis added). “**Dismissal is required for failure to comply with the notice provisions contained within W. Va. Code § 55-17-3 due to a lack of jurisdiction...**” *Id.* (emphasis added).

Thus, by denying Petitioner’s Motion to Dismiss for lack of subject matter jurisdiction and exercising jurisdiction over this case despite Respondent’s failure to comply with the unambiguous statutory notice mandates contained in *W. Va. Code* § 55-17-3, the Circuit Court has usurped a jurisdiction in law that does not exist. Furthermore, the challenge rests purely upon a determination of a narrow and specific question of law – that is, whether the ninety (90) day period under West Virginia Code § 55-17-3(e) for a party to initiate a lawsuit after serving pre-suit notice begins to

run immediately after the pre-suit notice is served or thirty (30) days thereafter. No determinations of fact must be made to resolve the jurisdictional challenge. Consequently, a writ of prohibition is appropriate in this case.

2. This Court’s Application of the Prohibition Standards in Similar Cases

This Court has issued writs of prohibitions in other cases involving issues of lack of subject matter jurisdiction, including issues stemming from failures to properly serve pre-suit notices.⁶

B. THE TRIAL COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION BECAUSE RESPONDENT FEAZELL’S PRE-SUIT NOTICE WAS UNTIMELY UNDER W. VA. CODE. § 55-17-3.

“Jurisdiction is made up of two elements—jurisdiction of the subject matter and jurisdiction of the person.” *Sidney C. Smith Corp. v. Dailey*, 136 W. Va. 380, 386, 67 S.E.2d 523, 526 (1951). Without question, subject matter jurisdiction “must exist as a matter of law for the court to act[,]” and any decree made by a court lacking [subject-matter] jurisdiction is void.” *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003); *State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005).

1. Rules of Statutory Interpretation

“The primary object in construing to statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 2, *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (2003). When courts interpret a statutory provision, they are “bound to apply, and not construe, the enactment’s plain language.” *Taylor*, 214 W. Va. at 329, 589 S.E.2d at 59. This Court has held

⁶ See, e.g., *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 835 S.E.2d 579 (W. Va. 2019) (granting writ of prohibition for lack of subject matter jurisdiction stemming from failure to comply with pre-suit notice requirements); *Thompson*, 248 W. Va. at 357, 888 S.E.2d at 857 (granting writ of prohibition for lack of subject matter jurisdiction stemming from failure to comply with pre-suit notice requirements); *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 246 W. Va. 184, 866 S.E.2d 350 (2021) (granting writ of prohibition for lack of subject matter jurisdiction stemming failure to comply with pre-suit notice requirements.); *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 588 S.E.2d 217 (2003) (granting writ of prohibition for lack of subject matter jurisdiction).

that “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951); *see also Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 397 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). “A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Pratt & Whitney Engine Services v. Steager*, 239 W. Va. 833, 838, 806 S.E.2d 757, 762 (2017) (citation omitted).

2. The Requirements of West Virginia Code §§ 55-17-1, *et seq.*

W. Va. Code §§ 55-17-1, *et seq.*, sets forth procedures that must be followed in civil actions filed against State government agencies and their officials in order for a court to have subject matter jurisdiction over such actions. The term “government agency” is defined to include “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.” *W. Va. Code* § 55-17-2(2). There can be no dispute that the pre-suit notice provisions codified in *W. Va. Code* §§ 55-17-1, *et seq.*, apply to DHHR.

Regarding the pre-suit notice requirement, the 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, 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) (emphasis added). Thus, a party must serve pre-suit notice upon the DHHR at least thirty days prior to instituting an action against it. *Id.* Furthermore, the Code provides that:

If 90 days elapse after service of notice required by subsection (a) of this section has been effected and action has not been instituted, then the notice shall be considered to have expired, and before an action may be instituted, the complaining party or parties must provide new notice as required by subsection (a) of this section which shall be accompanied by a second or subsequent notice fee of \$250 to the attorney general and by a second or subsequent notice fee of \$250 to the chief officer of the governmental agency: *Provided*, That no further tolling of any applicable statute of limitations shall occur during any second or subsequent notice.

W. VA CODE § 55-17-3(e) (emphasis added). Accordingly, by a plain reading of the Code, a pre-suit notice expires ***ninety (90) days after service of the same.*** If an action is not instituted within that period, and in such situations, a complaining party must provide a new notice before an action may be instituted. Importantly, 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 state agency[.]” and “failure to comply with statutory notice mandates deprives the circuit court of jurisdiction[.]” *Motto*, 220 W.Va. at 419, 647 S.E.2d at 855.

3. Respondent Feazell’s pre-suit notice was untimely under West Virginia Code § 55-17-3.

As mentioned previously, Respondent Feazell mailed her pre-suit notice on **August 16, 2023**. Pursuant to *W. Va. Code* § 55-17-3(e), her notice was valid for ninety (90) days thereafter – until **November 14, 2023**. Respondent did not file her Complaint initiating the instant matter until **December 7, 2023**, one hundred thirteen (113) days after serving her pre-suit notice, and therefore well after the pre-suit notice had expired. Thus, it is clear that Respondent Feazell filed her suit in noncompliance with *W. Va. Code* § 55-17-3, and, consequently, the circuit court does not have subject matter jurisdiction over this action.

Respondent Feazell’s argument that the ninety (90) day period for individuals to file suit after serving pre-suit notice under *W. Va. Code* § 55-17-3(e) begins to run thirty (30) days after service of the pre-suit notice because “the Legislature fully intended for Plaintiffs to have ninety (90) days from the effective date of the pre-suit notice to file their Complaint” is unfounded and contrary to the plain reading of *W. Va Code* § 55-17-3(e). [APPX_0075]. Respondent Feazell appears to claim that because *W. Va Code* § 55-17-3(e) provides that pre-suit notices expire ninety (90) days after “service of notice required by subsection (a) of this section has been effected[.]” the Legislature did not intend for the ninety (90) day period to begin to run until thirty (30) days after service of the pre-suit notice because that is when the notice period ends and the party may file suit. Respondent Feazell’s argument is nothing more than a distortion of plain English. The effect is to artificially extend the deadline to one hundred twenty (**120**) **days**, a notion found nowhere in the plain wording of the statute. Respondent’s counsel did not even believe his own argument had merit as of December 19, 2023, evidenced by his email wherein he stated that the August 16, 2023 notice was served “**more than the 90 days required by statute, meaning the notice was stale.**” [APPX_0029] (emphasis added).

The statute states that the ninety (90) day period begins to run “after service of the notice required by subsection (a) has been effected[.]” *W. Va. Code* § 55-17-2 does not define the term “effected.” According to the Oxford English Dictionary, “effected” means “to bring about (an event, a result); [or] to accomplish (an intention, a desire).”⁷ “Completed” and “effected” are synonyms.⁸ Thus, by the plain meaning of the Legislature’s words, *W. Va. Code* § 55-17-2(e) provides that the ninety (90) day period for plaintiffs to file suit after serving pre-suit notice begins to run “after service of the notice required by subsection (a) is [brought about, accomplished, or completed.]” Although not specific to the pre-suit notice requirements contained *W. Va. Code* § 55-17-3, Rule 5 of the *W. Va. Rules of Civil Procedure* (“Service and filing of pleadings and other papers”) provides that “[s]ervice by mail is complete upon mailing.” *W. VA. R. CIV. P. 5(b)*. Thus, according to plain English and analogy to similar language in the Rules of Civil Procedure, service of pre-suit notice is completed – or, in other words, effected – upon mailing the pre-suit notice. Consequently, it is clear that the ninety (90) day period for individuals to file suit after serving pre-suit notice under *W. Va. Code* § 55-17-3(e) starts immediately upon mailing of the pre-suit notice.

If the Legislature intended for the ninety (90) day period to begin to run thirty (30) days after service of the pre-suit notice and for “Plaintiffs to have ninety (90) days from the effective date of the pre-suit notice to file their Complaint[.]”, as Respondent Feazell claims, then the Legislature simply would have drafted the statute in such a way. [APPX_0075]. For example, *W. Va. Code* § 55-17-3(e) could have stated that “if 120 days elapse after service of notice required by subsection (a) of this section has been effected and action has not been instituted, then the notice shall be considered to have expired,” or stated “if 90 days elapse after the conclusion of the 30-day period of notice required by subsection (a) of this section and action has not been instituted,

⁷ <https://www.oed.com/search/dictionary/?scope=Entries&q=effected>

⁸ <https://www.thesaurus.com/browse/effected>

then the notice shall be considered to have expired.” Yet, the Legislature did not draft the statute in such a way, rather, it clearly stated in *W. Va. Code* § 55-17-3(e) that if “90 days elapse *after service of notice... has been effected* and action has not been instituted, then the notice shall be considered to have expired[.]” (emphasis added). Given that the Legislature has clearly and unambiguously provided that pre-suit notices expire *ninety (90) days after their service*, Respondent Feazell should not be permitted to warp law merely because it suits her position in this matter.⁹ The Legislature’s intent, and more concretely, its words, must be enforced.

In sum, Respondent failed to file her Complaint initiating this action within ninety (90) days after serving pre-suit notice in accordance with *W. Va. Code* § 55-17-3(e). Accordingly, the Circuit Court does not have subject matter jurisdiction over this action, and dismissal is essential.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE PETITIONER’S MOTION TO DISMISS UNDER RULES 12(B)(1) AND 12(B)(5).

1. A circuit court lacking subject matter jurisdiction must dismiss the action.

“It is well established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte* by th[e] Court.” *State ex rel. Universal Underwriters Insurance Co. v. Wilson*, 239 W.Va. 338, 801 S.E.2d 216, 223 (2017). Moreover, “[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.” *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005). Importantly, neither Petitioner nor the Circuit Court can waive subject matter jurisdiction. *Thornsbury*, 214 W. Va. at 233, 588 S.E.2d at 222 (“[s]ubject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act.”); *see also, Motto*, 220 W.Va. at 419, 647 S.E.2d at 855 (“To accept the circuit court’s

⁹ Respondent Feazell may argue that the language of the statute is ambiguous. It would be noteworthy that this Court has found a previous version of this statute to be “plain and unambiguous.” *Motto*, 220 W.Va at 418, 647 S.E.2d 854.

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).”).

Accordingly, “[w]henver 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.” Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr.*, 158 W.Va. 492, 211 S.E.2d 705 (1975). Dismissal is mandatory when the court lacks subject-matter jurisdiction over the controversy alleged in the complaint. See W. Va. R. Civ. P. 12(h)(3) (“[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.”). This Court has not hesitated to require mandatory compliance with the pre-suit notice statute in order to obtain subject matter jurisdiction. See *Gomez v. State Athletic Comm’n*, 2016 WL 5348350 (W.Va. Sep. 23, 2016); *Melissa C. v. West Virginia Dept. of Health and Human Resources*, 2016 WL 2970887 (W.Va. May 12, 2016); *Motto v. CSX Transp. Inc.*, 220 W.Va. 412, 647 S.E.2d 848 (2007). Indeed, Circuit Courts routinely dismiss suits accordingly. See, e.g., *Toler v. Jackie Withrow Hosp.*, 2016 WL 11509105 (Raleigh Co. Aug. 17, 2016); *Ellison v. Ray*, 2008 WL 5506584 (Kanawha Co. May 16, 2008); *Stock v. Rutherford*, 2008 WL 5506582 (Kanawha Co. March 10, 2008); *Yoak v. Marshall Univ. Bd. of Gov.*, 2006 WL 6659054 (Kanawha Co. July 12, 2006) (finding other basis for dismissal, also); *Bissett v. Marion Co. Dept. of Health*, 2005 WL 5533033 (Mon. Co. May 6, 2005); *Johnson v. Rudloff*, 2005 WL 5533033 (Kanawha Co. March 2, 2004); *Field v. Mallory*, 2003 WL 25564623 (Mon. Co. Feb. 25, 2003).

2. The Circuit Court of Kanawha County lacks subject matter jurisdiction over this action.

In the instant matter, the circuit court erred as a matter of law when it determined that the ninety (90) day period under *W. Va. Code* § 55-17-3(e) for a party to file suit after serving pre-suit

notice begins to run thirty (30) days after service of the pre-suit notice. As explained above, a plain reading of *W. Va. Code* § 55-17-3(e) and Rule 5 of the *W. Va. Rules of Civil Procedure* compel the conclusion that the Legislature **intended and drafted** that statute in such a way that the ninety (90) day period for a party to file suit after serving pre-suit notice begins to run immediately after the pre-suit notice is mailed – not 30 days thereafter. *W. VA. CODE* § 55-17-3(e) (“If 90 days elapse ***after service of notice*** required by subsection (a) of this section has been effected and action has not been instituted, then the notice shall be considered to have expired”); *W. VA. R. CIV. P.* 5(b) (“Service by mail is complete upon mailing.”).

Petitioner correctly asserted in its motion that the circuit court lacked subject matter jurisdiction over this action because Respondent Feazell failed to comply with the pre-suit notice requirements contained in *W. Va. Code* § 55-17-3, which are a mandatory “**jurisdictional prerequisite for filing an action against a State agency[,]**” such as Petitioner. *Motto*, 220 W.Va. at 419, 647 S.E.2d at 855 (emphasis added). Specifically, Petitioner asserted, *inter alia*, that Respondent Feazell failed to initiate suit within ninety (90) days after serving pre-suit notice and then filed her Complaint without serving a new pre-suit notice as required by *W. Va. Code* § 55-17-3. The relevant facts were not disputed; neither party refutes that Respondent mailed her pre-suit notice on **August 16, 2023** and subsequently filed suit on **December 7, 2023** (113 days later) without serving a new pre-suit notice.

The circuit court’s error of determining that the ninety (90) day period under *W. Va. Code* § 55-17-3(e) for a party to file suit after serving pre-suit notice begins to run thirty (30) days after service of the pre-suit notice led the circuit court to erroneously conclude that Respondent Feazell’s August 16, 2023 pre-suit notice had not yet expired when Respondent Feazell filed her Complaint on December 7, 2023, and that it had subject matter jurisdiction over this action. The circuit court’s

denial of Petitioner's motion to dismiss for lack of subject matter jurisdiction based on its erroneous analysis of *W. Va. Code* § 55-17-3(e) is a clear error of law. A writ of prohibition is essential in this case to prevent the Circuit Court from exercising jurisdiction where it has none.

VI. CONCLUSION

The Respondent Judge was clearly in error by ruling that Respondent Feazell's lawsuit, filed *113* days after service of her pre-suit notice, was timely despite the clear and unambiguous jurisdictional pre-requisite that Respondent Feazell must have done so within *90 days*. Accordingly, the Petitioner, the West Virginia Department of Health and Human Resources, respectfully requests that this Court issue a rule to show cause pursuant to *W. Va. R. App. P.* 16(j) prohibiting the circuit court from allowing this case to proceed against DHHR, given that it has no jurisdiction.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

By Counsel,

/s/ Mark C. Dean

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VERIFICATION

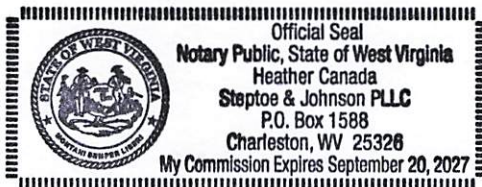
I, Mark C. Dean, being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information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




Mark C. Dean

Taken, subscribed, and sworn to before me this 4th day of June 2024.

My Commission expires: September 20, 2027.





Notary Public

CERTIFICATE OF SERVICE

I, Mark C. Dean, do hereby certify that I have filed this “VERIFIED PETITION FOR WRIT OF PROHIBITION” with the Clerk via the File & Serve Express system on July 12, 2024, and also deposited a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Hon. Tera L. Salango, Judge
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