INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Aug 14 2024
10:49AM EDT
Transaction ID 74039583

ICA EFiled: Jul 16 2024
11:47AM EDT
Transaction ID 73676322

Brian Cunningham, in his capacity as Director of the Public Employees Insurance Agency and Mark D. Scott, Geoff S. Christian, Amanda D. Meadows, Jared Robertson, Damita Johnson, Jason Myers, Michael Cook, William Milam, and Michael T. Smith, in their capacities as Members of the Public Employees Insurance Agency Finance Board,
Respondents Below, Petitioners

v.) No. 23-ICA-127

Air Evac EMS, Inc.,
Petitioner Below, Respondent

and

Air Evac EMS, Inc.,
Petitioner Below, Petitioner

v.) No. 23-ICA-135

Brian Cunningham, in his capacity as Director of the Public Employees Insurance Agency and Mark D. Scott, Geoff S. Christian, Amanda D. Meadows, Jared Robertson, Damita Johnson, Jason Myers, Michael Cook, William Milam, and Michael T. Smith, in their capacities as Members of the Public Employees Insurance Agency Finance Board,
Respondents Below, Respondents

MANDATE

On July 16, 2024, the Intermediate Court of Appeals of West Virginia made and entered the following order, in vacation:

Pursuant to Rule 26 of the Rules of Appellate Procedure, the opinion previously issued in the above-captioned cases is now final and is certified to the Circuit Court of Kanawha

County (Case No. 19-AA-169) and to the parties. The decision of the Circuit Court of Kanawha County is reversed, and this matter is remanded to the Circuit Court of Kanawha County for further proceedings consistent with the opinion. It is ordered that the parties are to each bear their own costs. The Clerk is directed to remove this action from the docket of this Court.

Judge Daniel W. Greear, not participating.

Judge Robert E. Ryan, sitting by temporary assignment.

A True Copy

Attest: /s/ Ashley N. Deem
Chief Deputy Clerk of Court

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Aug 14 2024
10:49AM EDT
Transaction ID 74039588

ICA EFiled: Jun 13 2024
03:49PM EDT
Transaction ID 73368142

Spring 2024 Term

FILED
June 13, 2024
released at 3:00 p.m.
ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

Nos. 23-ICA-127 & 23-ICA-135

BRIAN CUNNINGHAM, in his capacity as Director of the Public Employees Insurance Agency and MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, and MICHAEL T. SMITH, in their capacities as Members of the Public Employees Insurance Agency Finance Board,
Respondents Below, Petitioners

v.) No. 23-ICA-127

AIR EVAC EMS, INC.,
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AND

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v.) No. 23-ICA-135

BRIAN CUNNINGHAM, in his capacity as Director of the Public Employees Insurance Agency and MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, and MICHAEL T. SMITH, in their capacities as Members of the Public Employees Insurance Agency Finance Board,
Respondents Below, Respondents

Appeal from the Circuit Court of Kanawha County
Honorable Carrie L. Webster, Judge
Civil Action No. 19-AA-169

REVERSED AND REMANDED

Submitted: February 6, 2024
Filed: June 13, 2024

Michael R. Williams, Esq.
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JUDGE LORENSEN delivered the Opinion of the Court.

CHIEF JUDGE SCARR dissents and reserves the right to file a separate opinion.

JUDGE GREEAR voluntarily recused.

JUDGE ROBERT E. RYAN sitting by temporary assignment.

LORENSEN, JUDGE:

This consolidated matter arises from Air Evac EMS, Inc.'s ("Air Evac") attempts to collect additional payment for providing air ambulance transports to individuals insured by the West Virginia Public Employees Insurance Agency ("PEIA")[1] over three years.[2] Both parties appeal the December 16, 2022, order of the Circuit Court of Kanawha County, which held that: (1) PEIA is not entitled to sovereign immunity against Air Evac's claims; (2) the payment dispute between Air Evac and PEIA was subject to the Administrative Procedures Act ("APA") and Contested Case Rules ("CCR"); (3) pursuant to the CCR, Air Evac is entitled to a contested hearing on the merits of its demand for additional payments from PEIA; and (4) on remand, PEIA and Air Evac were ordered to negotiate a fair price before pursuing further administrative proceedings, concluding it was improper to set reimbursement at either the Medicare Rural Rate or Air Evac's "full billed" charges.

On review, we hold that the circuit court erred in concluding that sovereign immunity did not bar Air Evac's claim for damages against PEIA. Therefore, we reverse the circuit court's December 16, 2022, Final Order Granting, in Part and Denying, in Part

[1] Since the filing of this consolidated appeal, Brian Cunningham was appointed as Director of the Public Employees Insurance Agency. Accordingly, by order dated February 1, 2024, this Court made the necessary substitution of parties pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure.

[2] The transports at issue occurred between June 9, 2016, and June 4, 2019.

Air Evac EMS, Inc.'s Petition for Appeal and remand this matter to be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action follows extensive federal litigation that resulted in PEIA's air ambulance reimbursement rate caps being found to be preempted by federal law.[3] As relevant context, we provide a brief overview of the federal litigation. On June 9, 2016, Air Evac initiated an action in the United States District Court for the Southern District of West Virginia, seeking a declaratory judgment that PEIA's reimbursement rate caps[4] were preempted by the federal Airline Deregulation Act ("ADA"). *See Cheatham II*, 2017 WL 4765966, at *1, 10. The rate cap provisions limited PEIA's reimbursement rates for air ambulance providers to either the Medicare Rural Rate or the annual cost of an air ambulance provider's membership program—both being rates below Air Evac's "full-billed" charges. *See id.* at *1. At summary judgment, the district court found that the ADA preempted the provisions, and enjoined PEIA from enforcing the reimbursement caps. *Id.*

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[3] *See Air Evac EMS, Inc. v. Cheatham* (*Cheatham I*), 260 F. Supp. 3d 628, 633 (S.D.W. Va. 2017); *Air Evac EMS, Inc. v. Cheatham* (*Cheatham II*), No. 2:16-cv-05224, 2017 WL 4765966, at *1 (S.D.W. Va. Oct. 20, 2017), *aff'd*, 910 F.3d 751 (4th Cir. 2018); *Air Evac EMS, Inc. v. Cheatham* (*Cheatham III*), 910 F.3d 751, 759 (4th Cir. 2018); *see also* W. Va. Code §§ 5-16-8a(a)–(b) (2016) (amended 2019), 5-16-5(c)(1) (2007) (amended 2023).

[4] *See* W. Va. Code §§ 5-16-8a(a)–(b) (2016) (amended 2019), 5-16-5(c)(1) (2007) (amended 2023).

During PEIA's appeal of the district court's decision, Air Evac sent written demands to PEIA, asserting that, in light of the injunction, PEIA was now obligated to pay its "full billed" charges for air transports it had provided since initiating the federal litigation. PEIA refused, arguing that it was not mandated to "unquestionably pay whatever amount Air Evac unilaterally establishes as its charge" and maintaining that it had discretion to negotiate. Instead, PEIA offered to pay a portion of Air Evac's billed charges at the Medicare Rural Rate, which Air Evac accepted, considering it partial compensation.[5]

Before the United States Court of Appeals for the Fourth Circuit, the district court's decision was affirmed in full, and the Fourth Circuit agreed that PEIA's rate capping provisions were preempted by the ADA. *See Cheatham III*, 910 F.3d 751, 755. Once the Fourth Circuit had issued its ruling, a second exchange of demands and refusals began. Over the summer of 2019, the parties continued to dispute whether PEIA had an obligation to further compensate Air Evac. Eventually, the parties reached an impasse, and on October 24, 2019, Air Evac demanded a contested case hearing before the PEIA Board regarding the disputed charges. In response, on November 13, 2019, PEIA declined to schedule a hearing, asserting that Air Evac's demand was exempt from APA procedures, and therefore not subject to the CCR.[6]

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[5] PEIA paid $754,988.00 of Air Evac's $4,773,034.00 "full billed" charges.

[6] *See* W. Va. Code R. §§ 151-1-1 *et seq*.

Construing PEIA's response as a summary denial, on December 13, 2019, Air Evac appealed PEIA's decision to the Circuit Court of Kanawha County. There, Air Evac sought a declaration that it was entitled to a contested hearing under the APA, and further, sought the circuit court to order PEIA to pay the remaining balance of $4,018,046 for the 115 transports it provided to PEIA members between June 9, 2016, and June 4, 2019. In support, Air Evac claimed that, in light of the federal injunction modifying the reimbursement statutes,[7] severability principles now mandated PEIA to pay Air Evac's "full billed" charges. Further, Air Evac contended that PEIA's refusal to budge from the Medicare Rural Rate—the same rate PEIA would have previously paid under the now-enjoined rate caps—amounted to ignoring the federal injunction.

In response, PEIA, citing its own regulations, maintained that the APA was inapplicable because this matter constituted a provider payment dispute, and as such, it was exempt from APA procedures.[8] Further, addressing severability, PEIA contended that the remaining statutory language would not amount to a mandate for PEIA to pay whatever price Air Evac demanded. PEIA also raised an issue of its own challenging the circuit court's jurisdiction by invoking sovereign immunity as a defense.

[7] *See Cheatham III*, 910 F.3d 751, 759; *see also* W. Va. Code §§ 5-16-8a(a)–(b) (2016) (amended 2019), 5-16-5(c)(1) (2007) (amended 2023).

[8] *See* W. Va. Code R. §§ 151-1-1 *et seq*.

On December 16, 2022, the circuit court issued its Final Order Granting, in Part and Denying, in Part Air Evac EMS, Inc.'s Petition for Appeal. The circuit court concluded that PEIA was not entitled to sovereign immunity, as Air Evac was seeking recovery from legislatively appropriated funds. Specifically, the funds sought were, in part, appropriated to PEIA for the purpose of satisfying payments like the medical transports at issue, placing Air Evac's claim within an exception to PEIA's sovereign immunity. Further, the circuit court determined that this matter was subject to APA procedures and PEIA's Contested Case Rules. Regarding the disputed payments, the circuit court reasoned that PEIA's decision to reimburse Air Evac at the Medicare Rural Rate failed to comply with the Fourth Circuit's mandate in *Cheatham III*; however, the circuit court also rejected Air Evac's assertions that it was entitled to payment of its "fully billed" charges. Instead, the circuit court ordered the parties to engage in good faith negotiations regarding the disputed charges, and if no resolution materialized, for further proceedings pursuant to the APA and CCR.[9] It is from this order both parties appeal.

[9] The circuit court also rejected PEIA's contention that, pursuant to its authority under West Virginia Code § 5-16-3(c) (2013), it had retroactively lifted the ban on balance-billing for the transports in question, which would permit Air Evac to recover any unpaid balance from PEIA members.

II. STANDARD OF REVIEW

When reviewing a question of sovereign immunity, our standard of review[10] is as follows:

> [The Supreme Court of Appeals of West Virginia] has held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Further, "[a]s jurisdictional issues are questions of law, our review is de novo."

Holley v. Feagley, 242 W. Va. 240, 242, 834 S.E.2d 536, 538 (2019) (footnotes omitted) (first quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); and then quoting *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 343, 801 S.E.2d 216, 221 (2017)).

III. DISCUSSION

At the outset, we address our jurisdiction. Our jurisdiction stems from the circuit court's denial of PEIA's sovereign immunity defense. We consider the circuit court's order to be an appealable order on the issue of sovereign immunity:

> "[A] circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Likewise, when the issue relates to sovereign immunity, it is well-settled that "the denial of a substantial

[10] The parties dispute whether this matter is properly subject to judicial review as a contested case pursuant to the Administrative Procedures Act. In such cases, a specific statutory standard of review is to be applied. *See* W. Va. Code § 29A-5-4(g) (2021). However, because we dispose of this case on sovereign immunity grounds, we decline to apply the standards of review applicable to the other assignments of error raised by the parties.

> claim of absolute immunity is an order appealable before final judgment[.]"

W. Virginia Lottery v. A-1 Amusement, Inc., 240 W. Va. 89, 94, 807 S.E.2d 760, 765 (2017) (second alteration in original) (first quoting *W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015); and then quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)).[11] With our jurisdiction to review the circuit court's order established, we proceed to consider the principles of our sovereign immunity jurisprudence.

A. Sovereign Immunity

The State's sovereign immunity against suit is enshrined within Article VI, § 35 ("Section 35") of the West Virginia Constitution, which provides that: "The state of West Virginia shall never be made defendant in any court of law or equity . . . ." Accordingly, if applicable, sovereign immunity deprives a court of jurisdiction to hear the

[11] *See* W. Va. Code § 51-11-4(b)(1) (granting the Intermediate Court of Appeals jurisdiction over "[f]inal judgments or orders of a circuit court in all civil cases . . . entered after June 30, 2022 . . .").

case.[12] This immunity is "facially absolute[,]"[13] unwaivable,[14] and extends to agencies of the State.[15] The underlying purpose of sovereign immunity is "designed to protect the public purse"[16] from the "diversion of state money from legislatively appropriated purposes to the payment of court awards[.]"[17]

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[12] *See* W. Va. Const. art. VI, § 35; *Arnold Agency v. W. Virginia Lottery Comm'n*, 206 W. Va. 583, 593, 526 S.E.2d 814, 824 (1999); *Skaff v. Pridemore*, 200 W. Va. 700, 704–05, 490 S.E.2d 787, 791–92 (1997) (per curiam); *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 167, 483 S.E.2d 507, 513 (1996).

[13] *Davari v. W. Virginia Univ. Bd. of Governors*, 245 W. Va. 95, 99, 857 S.E.2d 435, 439 (2021); *see also Gribben v. Kirk*, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995) (citations omitted) ("the constitutional grounding of the State's immunity is not judicially revocable"); *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987) ("This constitutional grant of immunity is absolute and, as we have consistently held, cannot be waived by the legislature or any other instrumentality of the State.").

[14] *See Univ. of W. Virginia Bd. of Trustees ex rel. W. Virginia Univ. v. Graf*, 205 W. Va. 118, 121, 516 S.E.2d 741, 744 (1998); *Skaff v. Pridemore*, 200 W. Va. 700, 705–06, 490 S.E.2d 787, 792–93 (1997) (per curiam) ("[I]t is clear that 'the constitutional immunity of the State of West Virginia from suit by Article VI, Section 35 of the Constitution of this State can not be waived by the Legislature or any other instrumentality of the State.'") (quoting *Morgantown v. Ducker*, 153 W. Va. 121, 130, 168 S.E.2d 298, 303 (1969)).

[15] *See* Syl. Pt. 7, *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003) (quoting Syl. Pt. 2, *Stewart v. State Road Comm'n*, 117 W. Va. 352, 185 S.E. 567 (1936)); *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 168, 483 S.E.2d 507, 514 (1996)).

[16] *Pittsburgh Elevator Co. v. W. Virginia Bd. of Regents*, 172 W. Va. 743, 756, 310 S.E.2d 675, 689 (1983).

[17] *Kerns v. Bucklew*, 178 W. Va. 68, 72, 357 S.E.2d 750, 754 (1987); *see also Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987).

Nevertheless, West Virginia law has recognized exceptions to this immunity.[18] In applying these exceptions, specific focus is placed on the nature of the relief

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[18] In *Univ. of W. Virginia Bd. of Trustees ex rel. W. Virginia Univ. v. Graf*, 205 W. Va. 118, 122–23, 516 S.E.2d 741, 745–46 (1998), the Supreme Court of Appeals of West Virginia highlighted many such exceptions:

> These exceptions include injunctions to restrain or require State officers to perform ministerial duties, *C & O R'y Co. v. Miller, Auditor,* 19 W.Va. 408 (1882), *aff'd,* 114 U.S. 176, 5 S.Ct. 813, 29 L.Ed. 121 (1885); suits against State officers acting or threatening to act, under allegedly unconstitutional statutes, *Blue Jacket Consol. Copper. v. Scherr,* 50 W.Va. 533, 40 S.E. 514 (1901); recognition of a moral obligation by the State, *State ex rel. Davis Trust Co. v. Sims,* 130 W.Va. 623, 46 S.E.2d 90 (1947); counterclaims growing out of transactions wherein the State institutes actions at law against a citizen, *State v. Ruthbell Coal Co.,* 133 W.Va. 319, 56 S.E.2d 549 (1949); suits for declaratory judgment, *Douglass v. Koontz,* 137 W.Va. 345, 71 S.E.2d 319 (1952); mandamus relief to require the State Road Commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes, *Stewart v. State Road Commission of West Virginia,* 117 W.Va. 352, 185 S.E. 567 (1936); suits alleging liability arising from the State's performance of proprietary functions, *Ward v. County Court of Raleigh County,* 141 W.Va. 730, 93 S.E.2d 44 (1956); suits against quasi-public corporations which have no taxing power or dependency upon the State for financial support, *Hope Natural Gas v. West Virginia Turn. Com'n,* 143 W.Va. 913, 105 S.E.2d 630 (1958); mandamus relief to compel State officers, who have acted arbitrarily, capriciously or outside the law, to perform their lawful duties, *State ex rel. Ritchie v. Triplett,* 160 W.Va. 599, 236 S.E.2d 474 (1977); suits in which constitutional immunity is superseded by federal law, *Kerns v. Bucklew,* 178 W.Va. 68, 357 S.E.2d 750 (1987); suits that seek recovery under and up to the limits of the State's liability insurance coverage, *Pittsburgh Elevator v. W.Va. Bd. of Regents,* 172 W.Va. 743, 310 S.E.2d 675 (1983); and suits by state employees seeking an award of back wages which is

sought. Accordingly, "where monetary relief is sought against the State treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit." *Davari v. W. Virginia Univ. Bd. of Governors*, 245 W. Va. 95, 102, 857 S.E.2d 435, 442 (2021) (citing *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)). Further, a distinction is drawn between requests for prospective and retroactive relief. "'[T]he sovereign immunity doctrine is implicated when retroactive money relief against the State is sought, but does not operate to bar an award which is prospective in nature.'" *Univ. of W. Virginia Bd. of Trustees ex rel. W. Virginia Univ. v. Graf*, 205 W. Va. 118, 121, 516 S.E.2d 741, 744 (1998) (quoting *Skaff v. Pridemore*, 200 W. Va. 700, 706, 490 S.E.2d 787, 793 (1997) (per curiam)).

Mindful of these principles, we consider the parties' arguments regarding the application of sovereign immunity to this matter.

B. Application of Law

In No. 23-ICA-127, PEIA argues that the circuit court erred in declining to recognize its sovereign immunity. PEIA contends that the circuit court's reliance on *Mellon-Stuart Co. v. Hall*[19] creates a new, unrecognized, general "legislative appropriation" exception to sovereign immunity. Further, the circuit court violated a

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prospective in nature, *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (1995).

[19] 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987).

second sovereign immunity principle by not recognizing that Air Evac impermissibly seeks retroactive monetary relief—payment for its past transports—from the State in an administrative action and associated lawsuit filed in circuit court in late 2019. Conversely, Air Evac maintains that sovereign immunity is inapplicable for three reasons: (1) PEIA is not named as a "defendant" in this action within the meaning of Section 35 to trigger immunity; (2) pursuant to the circuit court's reading of *Mellon-Stuart*, Air Evac only seeks recovery from funds that have been legislatively appropriated for the purpose of compensating health care providers for their services; and (3) even if sovereign immunity is otherwise applicable, Air Evac's demand falls within the prospective relief exception to immunity because it only requests payment for transports made after the filing of the federal *Cheatham* litigation.[20]

[20] Simultaneously, in No. 23-ICA-135, Air Evac asserts a cross-assignment of error, arguing that, instead of ordering the parties to negotiate a mutually agreed reimbursement rate and undergo further administrative proceedings, the circuit court should have determined that it was entitled to reimbursement of its "full billed" charges.

While we recognize the other assignments of error raised in this consolidated appeal, because sovereign immunity presents a jurisdictional bar to the underlying claim, we decline to consider further issues. *See* W. Va. Const. art. VI, § 35; *Arnold Agency v. W. Virginia Lottery Comm'n*, 206 W. Va. 583, 593, 526 S.E.2d 814, 824 (1999); *Skaff v. Pridemore*, 200 W. Va. 700, 704–05, 490 S.E.2d 787, 791–92 (1997) (per curiam); *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 167, 483 S.E.2d 507, 513 (1996). "As the circuit court's lack of jurisdiction over this matter is dispositive, we need not address . . . [the] remaining assignments of error." *Holley v. Feagley*, 242 W. Va. 240, 245, 834 S.E.2d 536, 541 (2019).

We must first consider if this matter triggers Section 35 immunity.[21] Air Evac does not dispute that PEIA, as a state agency, constitutes "the State" for the purposes of sovereign immunity; instead, it argues that PEIA is not a "defendant" within the meaning of Section 35.[22] We find this argument unpersuasive.

We begin by acknowledging that certain suits do not trigger the sovereign immunity of the State:

> [C]ourts will entertain actions against State officials through the common law writs of mandamus, prohibition, and habeas corpus or through the courts' equitable powers to issue injunctions. In such cases, the "State" is not a defendant; rather, a State official is sued (usually in his or her official capacity) to require performance of a nondiscretionary duty of constitutional or statutory origin or to cease engaging in a course of conduct that violates some constitutional or statutory duty.

Gribben v. Kirk, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995). Ultimately, the core consideration is whether the true party in interest is the State:

> The Supreme Court of the United States has discussed that "when the action is in essence one for recovery of money from

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[21] *See* W. Va. Const. art. VI, § 35 ("The state of West Virginia shall never be made defendant in any court of law or equity . . . .").

[22] It appears that this argument was not raised before the circuit court. Normally, we would decline to consider a new argument raised for the first time on appeal; however, as this argument pertains to an unwaivable jurisdictional issue, we will consider it. *See Argus Energy, LLC v. Marenko*, 248 W. Va. 98, 104, 887 S.E.2d 223, 229 (2023) ("In cases dealing with . . . jurisdiction, the rule against raising a new issue or argument [on appeal]—premised as it is on principles of waiver—does not apply . . ."); *Lewis v. Municipality of Masontown*, 241 W. Va. 166, 170, 820 S.E.2d 612, 616 (2018).

> the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." In that same vein, the Supreme Court of the United States has determined that when a claim seeks recovery of funds from the state treasury as retroactive relief, the state retains sovereign immunity unless some other exception applies.

W. Virginia Lottery v. A-1 Amusement, Inc., 240 W. Va. 89, 103–04, 807 S.E.2d 760, 774–75 (2017) (footnotes omitted) (citations omitted). Here, we observe that the named defending parties are PEIA's director and members of its Finance Board, sued in their official capacities. It follows then, that "when the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Id.* at 103, 807 S.E.2d at 774 (2017).

Air Evac seeks to distinguish this matter from a typical claim for money damages. It highlights that, under its severability theory, PEIA's obligation to pay its "full billed" charges arises from the simple operation of PEIA's reimbursement statutes, less the language preempted by federal law.[23] We also recognize that Air Evac did not seek money damages alone—it also sought recognition that the APA and CCR controlled its dispute with PEIA. However, at bottom, Air Evac cannot escape nor deny what it seeks—a directive requiring the State to pay Air Evac the money it contends it is owed. Air Evac concedes this point in its prayer for relief before the circuit court:

> Accordingly, Air Evac respectfully requests that this Court expeditiously affirm the validity the contested case hearing

[23] *See Cheatham III*, 910 F.3d 751, 759; *see also* W. Va. Code §§ 5-16-8a(a)–(b) (2016) (amended 2019), 5-16-5(c)(1) (2007) (amended 2023).

> procedures of W. Va. Code R. § 151-1-3, et seq., and . . . grant a final order: (1) ordering that, under West Virginia law, Air Evac is entitled to payment of its billed charges on the disputed transports; and (2) ordering that, under West Virginia law, Respondents must promptly issue full payment on these transports.[24]

Air Evac concedes the same in its briefing before this Court:

> For the foregoing reasons, this Court should reverse the Circuit Court's decision that Air Evac is not entitled to full payment for air ambulance transports from June 9, 2016, to June 4, 2019, and remand with instructions to order PEIA to fully reimburse Air Evac for these charges.[25]

As the Supreme Court of Appeals of West Virginia has explained: "Our cases reflect a desire to ensure the proper performance of official duties, and *so long as compliance with a judicial decree does not require the expenditure of money*, no potential for conflict with Section 35 is triggered." *W. Virginia Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 102, 807 S.E.2d 760, 773 (2017) (emphasis added) (quoting *Gribben v. Kirk*, 195 W. Va. 488, 494, 466 S.E.2d 147, 153 (1995)). Accordingly, we conclude that Air Evac's claim seeks money recovery from a State defendant. As result, Section 35 immunity is triggered.[26]

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[24] No. 23-ICA-127, A.R. 20 (Petition for Appeal).

[25] No. 23-ICA-135, Pet'r's. Br. 23.

[26] As to any distinction between PEIA's posture as a "defendant" or "respondent" in this matter, we find it immaterial.

We note, in passing, that as a component of this argument, Air Evac asserts that judicial review of administrative matters does not implicate sovereign immunity at all. According to Air Evac, three cases stand for that proposition. *See Curry v. W. Virginia Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637 (2015); *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Virginia*, 224 W. Va. 591, 687 S.E.2d 374 (2009) (per curiam);

We move on to consider whether any recognized exception to sovereign immunity is applicable. First, we address whether Air Evac seeks prospective or retroactive relief. "The crucial date for drawing a line between prospective and retroactive relief should be the initiation of the relevant . . . action and not the date of judgment." Syl. Pt. 1, *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (citation omitted). Further, "where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief." *Id.* at Syl. Pt. 2 (citation omitted).

Maupin v. Sidiropolis, 215 W. Va. 492, 493, 600 S.E.2d 204, 205 (2004) (per curiam). Air Evac highlights that each case is an administrative matter involving a payment dispute with the State. Air Evac reasons that because the Supreme Court of Appeals of West Virginia heard these matters, sovereign immunity is no obstacle here. However, none of these cases ever addressed the applicability of sovereign immunity, let alone proclaimed administrative matters categorically exempt from sovereign immunity. Air Evac asks this Court for a profound holding based upon little authority. Here, we find *Kanawha County Public Library Board v. Board of Education of County of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013) instructive:

> While this Court has noted its authority to *sua sponte* determine jurisdictional issues, including standing, it does not follow that an issue neither asserted by the parties nor addressed in this Court's opinions is binding upon it. This Court, like many others including the United States Supreme Court, adheres to the well-settled premise that "the exercise of jurisdiction in a case is not precedent for the existence of jurisdiction."

Acknowledging the constitutional gravity of sovereign immunity, we decline to hold what the Supreme Court of Appeals of West Virginia has not.

The parties dispute whether October 24, 2019—the date Air Evac initiated its request for a contested hearing regarding its payment demand—draws the line for prospective relief. From our review of the record, this demand is the first time that Air Evac formally sought payment as relief.[27] In *Skaff v. Pridemore*, 200 W. Va. 700, 705-6, 490 S.E.2d 787, 792-3 (1997) (per curiam), the Supreme Court of Appeals of West Virginia addressed the line-drawing challenges inherent to the prospective relief exception to sovereign immunity, which we find instructive:

> Although this is not a mandamus action but rather an appeal from an order of the circuit court, the principles upon which *Gribben* was based are the same . . . Applying the *Gribben* standard to these circumstances, we believe that the initiation of the appellees' Level IV grievance board complaint on August 16, 1991 is the crucial date, and conclude that pay awarded from that date is prospective and not barred by sovereign immunity. . . . [Accordingly,] the circuit court erred in making the award retroactive to October 16, 1989, inasmuch as the commencement date of the award should be August 16, 1991.

Id. 200 W. Va. at 703, 490 S.E.2d at 790 (discussing *Gribben v. Kirk*, 195 W. Va. 488, 490, 466 S.E.2d 147, 149 (1995)). In *Skaff*, rather than considering the original grievance as the point of "initiation," the Supreme Court of Appeals of West Virginia considered *the filing that produced the original decision appealed from*—in that case a Level IV grievance board complaint—to denote the "initiation of the relevant action." *Id.* Turning to the case at hand, the matter on appeal before this Court originated from Air Evac's October 24, 2019, demand letter. The transports Air Evac seeks payment for occurred between June 9,

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[27] *See* No. 23-ICA-127, A.R. 68 (Demand for Contested Hearing); 147–48 (*Cheatham* Complaint).

2016, and June 4, 2019. Because all transports predate the initiation of this matter, we conclude the relief sought is retroactive, not prospective; therefore, this exception to sovereign immunity does not apply.

Air Evac's final argument supports the circuit court's order, seeking to offer a separate exception to sovereign immunity. Relying on *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987), the circuit court found that the monetary relief sought by Air Evac stemmed from legislatively appropriated funds which, by virtue of being assigned to PEIA by the Legislature, were purposefully intended to be disbursed to providers like Air Evac for their charges. Referencing various cases,[28] the circuit court reasoned that:

> Sovereign immunity is inapplicable where the Legislature itself creates a program, appoints an agency to administer it, and requires the agency to make payment out of funds appropriated for that purpose. Seeking payment under such a scheme, as Air Evac has done here, simply does not implicate "the policy which underlies sovereign immunity," which "is to prevent the diversion of State monies from legislatively appropriated purposes." *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296 (1987).[29]

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[28] In reaching this conclusion, the circuit court relied on three cases. *See Curry v. W. Virginia Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637 (2015); *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W Virginia*, 224 W. Va. 591, 687 S.E.2d 374 (2009) (per curiam); *Maupin v. Sidiropolis*, 215 W. Va. 492, 493, 600 S.E.2d 204, 205 (2004) (per curiam). Similarly to Air Evac's argument addressed above, we find the circuit court misapprehended the value of these cases in concluding that an exception to sovereign immunity was applicable here. For a discussion of these cases, *see supra* note 26.

[29] No. 23-ICA-127, A.R. 604 (Order).

The core principle from *Mellon-Stuart* underpinning the circuit court's reasoning is an often cited one:

> Broadly stated, the policy which underlies sovereign immunity is to prevent the diversion of State monies from legislatively appropriated purposes. Thus, where monetary relief is sought against the State treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit.

Id. at 296, 359 S.E.2d at 129. The circuit court misapplies *Mellon-Stuart*. There, plaintiffs sought compensation from a state agency for completed construction work and initiated a proceeding before the court of claims.[30] *See id*. at 295–96, 359 S.E.2d at 128–29. The court of claims issued a decision recommending plaintiffs be awarded their requested payment; however, the Legislature declined to appropriate any money to compensate those claims. *Id*. Before the Supreme Court of Appeals of West Virginia, plaintiffs requested that the agency be forced to pay its recommended claims from the agency's budget. *Id*. The Court rejected this argument, declining to carve out a new exception in this context. Instead, the Court returned to the *Pittsburgh Elevator* exception[31] as the only possible avenue for plaintiff's recovery, reaffirming the general prohibition barring any monetary recovery that would directly draw from State funds.

> Our central holding in *Pittsburgh Elevator* was that an action putatively against a State agency, which seeks recovery only from the agency's liability insurance, is not barred by sovereign

[30] The Court of Claims has been renamed the West Virginia Legislative Claims Commission. *See* W. Va. Code § 14-2-4 (2017).

[31] *Pittsburgh Elevator Co. v. W. Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983) (claims within the State's insurance coverage and limits are not barred by sovereign immunity).

> immunity . . . consistent with the policy underlying sovereign immunity, since the availability of insurance proceeds assures that *any damages recovered would not be paid out of State coffers*.

Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987) (emphasis added).

The factual context of *Mellon-Stuart* informs our understanding of "legislative appropriation." There, while plaintiffs received a favorable recommendation from the court of claims, the Legislature declined to make a specific appropriation to authorize compensation to the vendor; had the Legislature acted to approve the vendor's claim, sovereign immunity would have fallen away.[32] In light of the Legislature's rejection of a specific appropriation through the court of claims process, plaintiffs attempted an end-run around the need for legislative approval. Instead, relying on the court of claims' recommendation, plaintiffs aimed to reach directly into the agency's budget, requesting monetary relief. As above, this triggers the underlying rationale for sovereign immunity to bar such claims—the "diversion of state money from legislatively appropriated purposes to the payment of court awards."[33]

[32] *See State ex rel. McLaughlin v. W. Va. Ct. of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001) (noting that only the Legislature can authorize the payment of Commission claims that are otherwise subject to our state's sovereign immunity).

[33] *Kerns v. Bucklew*, 178 W. Va. 68, 72, 357 S.E.2d 750, 754 (1987); *see also Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987).

It follows then, that the "legislative appropriation" discussed in *Mellon-Stuart* is akin to a legislative award of a specific sum to a specific entity, directly enacted by the Legislature. Therefore, returning to the case at hand, we conclude that the Legislature's general act of assigning basic budget appropriations to a state insurance agency that has been delegated with discretionary powers in administering those funds, does not amount to a "legislative appropriation" of the kind entertained in *Mellon-Stuart* which could pierce the State's sovereign immunity against claims for monetary relief.

Ultimately, we fail to identify the foundation for the circuit court's cited exception to PEIA's sovereign immunity. In *Mellon-Stuart*, arguments to expand the recognized exceptions to sovereign immunity were rejected; and in doing so, the Supreme Court of Appeals of West Virginia respected the broad grant of immunity afforded to the State by the West Virginia Constitution. We do the same.

IV. CONCLUSION

For the above reasons, we conclude that the circuit court erred in refusing to recognize PEIA's sovereign immunity. Accordingly, we reverse the circuit court's December 16, 2022, Final Order Granting, in Part and Denying, in Part Air Evac EMS, Inc.'s Petition for Appeal and remand this matter to be dismissed with prejudice.

Reversed and Remanded.

ICA EFiled: Jul 03 2024
04:07PM EDT
Transaction ID 73553894

No. 23-ICA-127 – *Brian Cunningham, in his capacity as Director of the Public Employees Insurance Agency and Mark D. Scott, Geoff S. Christian, Amanda D. Meadows, Jared Robertson, Damita Johnson, Jason Myers, Michael Cook, William Milam, and Michael T. Smith, in their capacities as Members of the Public Employees Insurance Agency Finance Board v. Air Evac EMS, Inc.*,

FILED
July 3, 2024
released at 3:00 p.m.
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

and

No. 23-ICA-135 – *Air Evac EMS, Inc., v. Brian Cunningham, in his capacity as Director of the Public Employees Insurance Agency and Mark D. Scott, Geoff S. Christian, Amanda D. Meadows, Jared Robertson, Damita Johnson, Jason Myers, Michael Cook, William Milam, and Michael T. Smith, in their capacities as Members of the Public Employees Insurance Agency Finance Board*

SCARR, C.J., dissenting:

I respectfully dissent from the majority's decision to reverse the circuit court's December 16, 2022, Final Order Granting, in Part and Denying, in Part Air Evac EMS, Inc.'s Petition for Appeal. This case stems from the aftereffects of extensive federal litigation, in which the Fourth Circuit Court of Appeals held that the federal Airline Deregulation Act ("ADA") preempted state statutes which capped the Public Employees Insurance Agency ("PEIA")'s reimbursement rates for air ambulance providers to either the Medicare Rural Rate or the annual cost of an air ambulance provider's membership program, while making "balance-billing" (wherein a provider bills the insured for the remaining balance after being partially reimbursed by an insurer) a criminal offense. *See Air Evac EMS, Inc. v. Cheatham* (*Cheatham I*), 260 F. Supp. 3d 628, 633 (S.D.W. Va. 2017); *Air Evac EMS, Inc. v. Cheatham* (*Cheatham II*), No. 2:16-cv-05224, 2017 WL

4765966, at *1 (S.D.W. Va. Oct. 20, 2017), *aff'd*, 910 F.3d 751 (4th Cir. 2018); *Air Evac EMS, Inc. v. Cheatham* (*Cheatham III*), 910 F.3d 751, 759 (4th Cir. 2018).

Air Evac EMS, Inc. ("Air Evac") is an air ambulance provider who operates in West Virginia, and was the party who sought the injunction of the rate-capping statutes in the *Cheatham* litigation. PEIA is an insurance company created by the State of West Virginia for its employees as an alternative to using a private insurance company. By virtue of operating in West Virginia, Air Evac was legally required to do business with PEIA by providing its services to PEIA's insureds. *See* W. Va. Code R. § 64-48-4.15 (2022). As was noted by the district court, "Air Evac must accept patients without regard to insurance coverage or ability to pay." *Cheatham I*, 260 F. Supp. 3d at 633. Indeed, "West Virginia law forbids Air Evac from refusing service to any patient, regardless of insured status. In fact, because Air Evac is most often called upon to provide transportation in medical emergencies, the air ambulance provider does not know a patient's insured status until after the emergency transport has concluded." *Cheatham II*, 2017 WL 4765966, at *1 (citations omitted). After the federal district court enjoined enforcement of the rate-capping statutes on October 20, 2017, PEIA continued to pay Air Evac the Medicare Rural Rate, which is the same amount as it had paid under the enjoined statutes.

After *Cheatham III*, Air Evac sought additional reimbursement beyond the Medicare Rural Rate for the services it provided during the *Cheatham* litigation, which it had accepted as partial payment. Specifically, Air Evac sought the remaining balance of

$4,018,046 for the 115 transports it had provided to PEIA members between June 9, 2016, the initiation of the *Cheatham* litigation, and the June 4, 2019, amending of West Virginia Code § 5-16-8a to allow air ambulance service providers to balance bill insureds. PEIA has consistently refused to pay Air Evac anything more than what it owed under the enjoined rate-capping statutes. As a result, Air Evac has only received $754,988.00 of the $4,773,034.00 "full billed" charges. PEIA even refuses Air Evac's demand to hold a hearing regarding the disputed charges, contending that the matter is not a "contested case." This refusal to hold a hearing caused Air Evac to file its December 13, 2019, Petition for Appeal in the circuit court, seeking a court order compelling PEIA to hold an administrative hearing pursuant to their own Rules of Procedure for Contested Case Hearings and Declaratory Rulings ("contested case rules"). *See* W. Va. Code R. § 151-3-4 (1987). With constitutional rights hanging in the balance, the majority now orders the dismissal of Air Evac's claim, on the grounds that PEIA, an insurance company created to ensure compensation of healthcare services provided to our state employees, has sovereign immunity against the claims of health care providers who were forced to provide services for its insureds. Although the purpose of sovereign immunity is to protect the public purse, the desire to protect the government goes too far here. The majority fails to properly appreciate and adequately consider the unique circumstances at play. By allowing this overly broad construction of our sovereign immunity doctrine, the majority has enabled PEIA to essentially nullify the result of the *Cheatham* cases. In doing so, the majority improperly places the state's sovereign right to immunity from suit above our people's fundamental due process rights.

The basis of our sovereign immunity is found within Article VI, § 35 of the West Virginia Constitution, which provides that: "The state of West Virginia shall never be made defendant in any court of law or equity . . . ." W. VA. CONST. art. VI, § 35. As correctly noted by the majority, sovereign immunity confers a great deal of protection from suit upon the state and its agencies. *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987) ("This constitutional grant of immunity is absolute and, as we have consistently held, cannot be waived by the legislature or any other instrumentality of the State."). The primary purpose of sovereign immunity is to prevent the diversion of state monies from legislatively appropriated purposes. Thus, our rule is that generally, when monetary relief is sought against the state treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit. *Id.*

However, our courts have a long history of wisely tempering the harsh language of Article VI, § 35 so that the State of West Virginia's right to be free from suit does not displace the fundamental rights of its citizens. *See Tompkins v. Kanawha Bd.*, 19 W. Va. 257, 264 (1881) ("There is no creature of the State above the law and irresponsible. If this were so, the corporation might deny to certain individuals all benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued."). Less than two decades after West Virginia's formation, the *Tompkins* Court noted the inherent problems that an overly rigid application of sovereign immunity would create when it held that the doctrine was inapplicable to a state-owned corporation, stating that to hold otherwise would create "a legalized despot trespassing upon the rights of the citizens, who would be powerless to protect themselves." *Id.* at 263.

"The concept that '[t]here is no creature of the State above the law and irresponsible' expressed in *Tompkins* finds its foundation in article III of the West Virginia Constitution, commonly known as our 'Bill of Rights.'" *Pittsburgh Elevator Co. v. W. Virginia Bd. of Regents*, 172 W. Va. 743, 750, 310 S.E.2d 675, 682 (1983). There are several due process rights enumerated in the West Virginia Constitution's Bill of Rights ("WVCBR") that are at odds with a broad construction of our sovereign immunity doctrine. *See id*. Indeed, "[t]he philosophical basis of our pluralistic society is crippled when the government's power is found to be so absolute that it cannot be made to answer for the wrongs committed in its name." *G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents,* 177 W. Va. 539, 541, 355 S.E.2d 32, 34 (1987). Section 9 of article III of the West Virginia Constitution provides that:

> Private property shall not be taken or damaged for public use, without just compensation ... and when private property shall be taken, or damaged for public use ... the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; *Provided,* That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

Section 10 of article III provides that: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers[;]" and § 17 of article III provides: "The 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; and justice shall be administered without sale, denial or delay." *Id.* art. III, §§ 10, 17. These state due process rights explicitly guaranteeing the right to compensation, including a right to have such compensation ascertained by a jury in matters involving a public taking, plainly conflict with a doctrine that provides unwavering immunity to the state. Our state constitution clearly contemplates that every person who suffers damages shall have recourse through the courts to seek redress, and "[t]he fact that the wrongdoer is an instrumentality of state government should not eviscerate these constitutional rights, inasmuch as the Bill of Rights contained in article III is designed to protect people from government." *Pittsburgh Elevator Co.*, 172 W. Va. at 754, 310 S.E.2d at 686. In addition to conflicting with our state constitution's due process rights, a broad view of our sovereign immunity doctrine also sits uneasily with the federal constitution's due process rights, that no person shall be deprived of their property without due process of law, and that no property shall be taken for public use without just compensation. *See G.M. McCrossin, Inc.*, 177 W. Va. at 542, 355 S.E.2d at 35; U.S. CONST. amend. XIV, § 1. The people's due process rights are most fundamental to our very conception of government, *see* Rodney L. Mott, *Due Process of Law* 589 (2d. ed. 1973), and plainly conflict with a doctrine holding that no recovery can be had against the state nor its agents for any potential wrongdoing.

"Whenever possible, apparently conflicting portions of a constitution will be read so as to reconcile and harmonize them. We have, however, recognized that, if it is necessary to maintain the rights of a citizen under article III, those rights will be treated as an exception to the inhibition on suing the state government." *G.M. McCrossin, Inc.*, 177

W. Va. at 542, 355 S.E.2d at 35 (citations omitted). Accordingly, our courts have wisely tempered Article VI, § 35's apparent bar by carving out several exceptions to the otherwise harsh sovereign immunity doctrine. *See id.* at 542-43, 355 S.E.2d at 35-36. For example, constitutional concerns motivated the allowance of an aggrieved person to achieve, through a writ of mandamus, a similar result to a suit for damages against the state. *See State ex rel. Henson v. W. Virginia Dep't of Transp., Div. of Highways*, 203 W. Va. 229, 232, 506 S.E.2d 825, 828 (1998); *State ex rel. Rhodes v. W. Virginia Dep't of Highways*, 155 W. Va. 735, 738, 187 S.E.2d 218, 220 (1972); Syl. Pts. 1-2, *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W. Va. 306, 175 S.E.2d 428 (1970).[1] In addition to such equitable causes of action, our precedent also allows suits for damages when the state is acting as a proprietor, *Ward v. Cnty. Ct. of Raleigh Cnty.*, 141 W. Va. 730, 739-40, 93 S.E.2d 44, 49 (1956); when an agency is acting as a quasi-public corporation, *Hope Nat. Gas Co. v. W. Va. Tpk. Comm'n*, 143 W. Va. 913, 930, 105 S.E.2d 630, 639-40 (1958); and when the state has a "moral obligation" to pay damages. Syl., *State ex rel. Davis Tr. Co. v. Sims*, 130 W. Va. 623, 46 S.E.2d 90 (1947). It is noteworthy that when analyzing whether a governmental entity can be sued as a quasi-public corporation, the court pays significant attention to the source of funds when determining whether the suit for damages is truly against the public purse. *See Hope Nat. Gas Co.*, 143 W. Va. at 929-30, 105 S.E.2d at 639-40. Another sovereign immunity exception that makes manifestly clear the importance of the public purse is the

[1] Sovereign immunity does not typically bar equitable actions against state officers or agents, as they are not against the state itself, and as such suits do not directly seek monetary damages, they do not typically implicate the public purse. *See Pittsburgh Elevator Co.*, 172 W. Va. at 753-54, 310 S.E.2d at 685-86.

allowance of suits for damages against the state up to the limit of any liability insurance coverage it may have. Syl. Pt. 2, *Pittsburgh Elevator Co.*, 172 W. Va. 743, 310 S.E.2d 675. A survey of those numerous exceptions to our sovereign immunity doctrine reveals two major throughlines: whether the suit would result in a recovery of damages from the public purse, and the danger of sovereign immunity obviating the people's constitutional due process rights.

Applying these principles to the case at hand, it is evident that there are unique circumstances at play here that attenuate the dangers to the public purse and accentuate the danger of obviating Air Evac's due process rights by applying sovereign immunity's bar to its claims. Before this litigation, Air Evac had prevailed in the federal *Cheatham* litigation and was attempting to negotiate with PEIA for the remaining balance of the partial payments made at the rate-capped reimbursement rate for services provided to PEIA members from June 9, 2016, to June 4, 2019. Although the federal district court enjoined enforcement of the rate-capping statutes on October 20, 2017, PEIA continued to only pay the same Medicare Rural Rate as prescribed by the rate-capping statutes. As Air Evac was legally required to continue to provide its services to PEIA insureds both during and after the *Cheatham* litigation, it had no choice but to accept the PEIA's partial payments. *See* W. Va. Code R. § 64-48-4.15. Then, as Air Evac attempted to exercise its due process rights to an administrative hearing, it was met with a rigid refusal to even hold a hearing regarding whether PEIA owed any additional payment. These actions caused Air Evac to file its Petition for Appeal in the circuit court, seeking an order mandating that

PEIA hold a hearing regarding the matter pursuant to PEIA's contested case rules. *See* W. Va. Code R. § 151-3-4.

Regarding the danger that Air Evac's claims may pose to the public purse, there are attenuating factors that mitigate any such danger. It must be noted that Air Evac is only seeking full reimbursement for a period of limited duration, so there is no risk of an indeterminate amount of future payments depleting the state's coffers. In addition, the nature of the funds at issue and for what they would be awarded must be considered. PEIA is an insurance company created by the State of West Virginia to serve as an insurance provider for its employees. *See* W. Va. Code § 5-16-1 (2024). In this capacity, PEIA receives premiums from its insureds, and these premiums make up the great majority of its revenue; state appropriations have been well under ten percent of PEIA's yearly revenue since 2014.[2]

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[2] *See* Ernst & Young LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2023 AND 2022 WITH REPORT OF INDEPENDENT AUDITORS 17 (2023), https://peia.wv.gov/Forms-Downloads/Documents/financial_reports/independent%20auditors%20reports/peia/PEIA_Basic_Financial_Statements_Required%20Supplementary_Information_Other_Financial_Information_Fiscal_Years_2022-2023.pdf; Ernst & Young LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2022 AND 2021 WITH REPORT OF INDEPENDENT AUDITORS 15 (2022), https://peia.wv.gov/financial_reports/Documents/2208-4088006_West%20Virginia%20Public%20Employees%20Insurance%20Agency_22-21_FINAL.pdf; Ernst & Young LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2021 AND 2020 WITH REPORT OF INDEPENDENT AUDITORS 12 (2021),

Considering the small percentage of PEIA revenue coming from the state, it must be noted that such funds are appropriated for the purpose of paying for PEIA's expenses. Predictably enough, PEIA's revenue is mostly spent on paying for the claims of its insureds, and this type of expenditure is exactly what was intended by the legislature. Indeed, the entire *raison d'etre* of an insurance provider is to use the pooled premiums to

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https://peia.wv.gov/financial_reports/Documents/WVPEIA%20FS%2021-20_Final.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2020 AND 2019 11 (2020), https://peia.wv.gov/financial_reports/Documents/PEIA%20Financial%20Statements%20 6.30.20.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2019 AND 2018 11 (2019), https://peia.wv.gov/financial_reports/Documents/PEIA%20Financial%20Statements%20 6.30.19.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2018 AND 2017 11 (2018), https://peia.wv.gov/financial_reports/Documents/PEIA%20FS%206.30.18-final.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2017AND 2016 11 (2017), https://peia.wv.gov/Forms-Downloads/Documents/financial_reports/PEIA%20FS%206.30.17.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2016 AND 2015 11 (2016), https://peia.wv.gov/financial_reports/Documents/PEIA%20FS%206.30.16.pdf; Dixon Hughes Goodman LLP, WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY: FINANCIAL STATEMENTS, REQUIRED SUPPLEMENTARY INFORMATION, AND OTHER SUPPLEMENTARY INFORMATION YEARS ENDED JUNE 30, 2015 AND 2014 11 (2015), https://peia.wv.gov/Forms-Downloads/Documents/financial_reports/independent%20auditors%20reports/peia/Financial-Statements-Fiscal-Years-2014-2015.pdf.

pay those covered expenses too great for any one of its insureds to bear. The majority's usage of sovereign immunity is misapplied here; that doctrine is meant to protect state monies from being *diverted* from their legislatively appropriated purposes, not to prevent the spending of any state monies whatsoever. *See Mellon-Stuart Co.*, 178 W. Va. at 296, 359 S.E.2d at 129.

Our law explicitly recognizes the uniquely attenuated implications of state monies spent on insurance. *See* Syl. Pt. 2, *Pittsburgh Elevator Co.*, 172 W. Va. 743, 310 S.E.2d 675. Even if the majority wishes to turn a blind eye to *Pittsburgh Elevator Co.*, it is currently our law and binding precedent. For my part, when considering the integrity of the public purse, I see the state monies spent on a liability insurance policy as analogous to PEIA revenue —mostly raised from state employee premiums— spent paying claims of an insured's health insurance policy. Thus, I believe that our precedent in *Pittsburgh Elevator Co.* and the unique circumstances at play here nullify any traditional dangers to the public purse that might be presented by litigation against state agencies.

PEIA's continued obstinance has trammeled upon Air Evac's due process rights. By paying Air Evac as if the statutory rate caps had not been enjoined, and then by refusing to follow the Fourth Circuit's instructions to negotiate for the reimbursement rates it desires to pay Air Evac as a normal market participant would, PEIA is essentially acting as if the *Cheatham* litigation had not occurred. *See Cheatham III*, 910 F.3d 751, 769 (4th Cir. 2018). Crucially, Air Evac was literally compelled by law to provide these services to

PEIA insureds, and practically forced to accept a fractional payment rate that was preempted by federal law. All the while, Air Evac was forbidden to make up the difference by balance-billing. Outside of the Legislative Claims Commission ("LCC"), our state courts are the sole forum wherein Air Evac can seek recovery of the approximately $4,000,000 balance left over from PEIA's enjoined reimbursement rate. Although relief can be sought in the LCC, the actual payment of an award from the LCC is at the discretion of the Legislature, requiring an actual budgetary appropriation of funds. Because of the discretionary nature of an LCC award payment, our state courts are the only forum which can afford a binding recovery, or at a minimum, compel PEIA to hold a hearing regarding the disputed payments. The majority's overly broad view of sovereign immunity has stripped that forum of its jurisdiction.

Our precedent barring similar claims on sovereign immunity grounds were predicated upon the claimant being a knowledgeable and willing market participant who voluntarily chose to contract with a state agency, knowing that any disputes would go before the LCC. *See* Syl. Pt. 2, *G.M. McCrossin, Inc.*, 177 W. Va. 539, 355 S.E.2d 32; *Mellon-Stuart Co.*, 178 W. Va. at 296-97, 359 S.E.2d at 129-30. However, Air Evac's provision of services to PEIA insureds were not the result of a voluntary business decision to do business with the state, and to accept the associated risks. Air Evac's inability to choose is the crux of the issue here, as it goes directly against the eponymous purpose of the ADA, deregulation. When Congress passed the ADA, it included the preemption clause specifically to ensure that the states did not merely replace federal aviation regulations with their own. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992). Congress clearly desired to replace the previously highly regulated American aviation sector with one maximally reliant on competitive market forces that would foster efficiency, innovation, and low prices. *Id.* at 378. Here, the mandatory compulsion to do business with PEIA while fixing reimbursement and prohibiting balance-billing eliminated any hope of free-market negotiation and competition. In direct contradiction of the ADA, Air Evac was essentially made "an offer they couldn't refuse." The Fourth Circuit's command that PEIA negotiate and act as a market participant sought to realize the goals of the ADA, as anything less contravenes the ADA's broad sweep. *See Cheatham III*, 910 F.3d at 762.[3]

Air Evac's legal compulsion to provide its services to PEIA insureds, and thus do business with the agency, makes its situation more akin to a taking, implicating its due process rights under both the federal and state constitutions. *See* U.S. CONST. amend. XIV, § 1; W. VA. CONST. art. III, §§ 9, 10, 17. Air Evac has a due process property interest in reimbursement for the services at issue. Although this Court's precedent has in the past found that a medical service provider did not have a due process property interest in

[3] Given the wide-reaching preemption of states acting with the force of law in a way that has a "significant effect" upon an air ambulance company's prices, it is probable that PEIA's post-*Cheatham* refusal to negotiate with Air Evac itself violated the ADA. *See Cheatham III*, 910 F.3d at 767. This is because the four-million-dollar shortfall caused by PEIA's recalcitrance likely had a prohibited "significant effect" upon Air Evac's bottom line, and thus its prices.

reimbursement for services provided, that decision was made because the payments were the subject of a health care fraud investigation. *Burgess v. W. Virginia Dep't of Hum. Servs.*, No. 23-ICA-11, 2024 WL 2952975, at *11 (W. Va. Ct. App. June 12, 2024). Outside of that unique context, federal courts have long recognized a medical services provider's due process property interest in reimbursement for already-provided services, akin to the payments at issue here. *See Pressley Ridge Sch., Inc. v. Stottlemyer*, 947 F. Supp. 929, 940 (S.D.W. Va. 1996). Thus, the majority's decision that our state courts do not have jurisdiction to hear this case based on sovereign immunity is violative of Air Evac's state and federal due process rights.[4]

In earlier cases when faced with the apparent irreconcilability of Article VI sovereign immunity with other constitutional provisions, our courts have found ways to ensure that those wronged by the state government had a remedy. *See G.M. McCrossin, Inc.*, 177 W. Va. at 542, 355 S.E.2d at 35. Air Evac's case is precisely the type of case that should be construed as a mandamus action to satisfy its due process rights by ensuring that they have some remedy for the alleged state wrongdoing. As described above, the remedy Air Evac seeks is an order compelling PEIA to follow the procedures laid out by its own statutory contested case rules:

> Any party who demands a hearing to have determined any constitutional rights, legal rights, duties interests or privileges

[4] Although the majority would likely still allow Air Evac to have the LCC as an avenue to seek recovery for the disputed payments, fundamentally because of the discretionary nature of the payment of an LCC award, I do not believe that such a forum satisfies Air Evac's due process rights.

> of specific parties as required by law shall specify in writing the grounds relied upon as a basis for the relief requested….When the executive secretary is presented with a demand for a hearing, the executive secretary shall conduct a hearing or cause a hearing to be conducted within forty-five (45) days of receipt of such written demand, unless postponed to a later date pursuant to these rules.

W. Va. Code R. §§ 151-3-4.1, 151-3-4.2. Our precedent has held that sovereign immunity is no bar to mandamus actions to compel a state officer, who has acted arbitrarily, capriciously, or outside the law, to perform his lawful duties. Syl. Pt. 1, *State ex rel. Ritchie v. Triplett*, 160 W. Va. 599, 236 S.E.2d 474 (1977). Here, Air Evac is attempting to compel the state officers who administer PEIA to perform their lawfully required duty to hold a contested case hearing pursuant to West Virginia Code of Regulations §§ 151-3-4.1, 151-3-4.2, neatly echoing the kind of mandamus actions not barred by our sovereign immunity doctrine.

"Mandamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard." Syl. Pt. 2, *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995). Sovereign immunity bars retroactive monetary relief but does not bar an award which is prospective in nature. *Skaff v. Pridemore,* 200 W. Va. 700, 706, 490 S.E.2d 787, 793 (1997). Concerning whether Air Evac's claims should be considered retroactive or prospective, were they to be considered a mandamus action, I believe the majority to be incorrect in concluding that October 19, 2019, the date Air Evac initiated its request for a contested hearing, draws the line for prospective relief. The majority correctly notes our rule that "[t]he crucial date for drawing a line between prospective and retroactive relief should be the initiation of the relevant mandamus action and not the date of judgment." Syl. Pt. 3, *Gribben*, 195 W. Va. 488, 466 S.E.2d 147. However, drawing the line demarcating prospective from retrospective relief is a practical, equity-focused exercise, tied to the particulars of each case. *See Black v. State Consol. Pub. Ret. Bd.*, 202 W. Va. 511, 522, 505 S.E.2d 430, 441 (1998) (noting that the prospective relief demarcation line was drawn at the initiation of the mandamus action simply to avoid limiting relief based on an indeterminate litigation timeline). In *Black*, the court set the prospective relief demarcation line at the appellant's first request for an administrative appeal hearing on the equitable basis that "administrative agencies cannot with impunity contravene their own policies and rules … without the availability of a remedy to, as much as possible, make the innocent party whole." *Id.* at 522, 505 S.E.2d at 441. Similarly, I believe that administrative agencies should not with impunity contravene a federal injunction without the availability of a remedy.

In demarcating prospective relief at the onset of this litigation, the majority fails to consider the practical effects of the bifurcated nature of this litigation. Air Evac could not have possibly initiated any type of relevant action to demarcate its relief as prospective until the federal courts had already held the rate capping statutory scheme to be preempted by the ADA. Before the federal preemption in the *Cheatham* litigation, what would Air Evac's cause of action be? Such an action would most likely have been soundly trounced at the pleading stage. *See* W. Va. R. Civ. P. 12(b)(6). In such a case, filing the federal action to have the rate caps enjoined should be considered the "relevant mandamus action." This result would better accord with the equitable purposes underpinning *Black*'s reasoning, that a remedy should be available when an administrative agency blatantly contravenes a federal injunction.

Since the *Cheatham* litigation, Air Evac has troublingly become something of a white whale to the State of West Virginia's Ahab, as the state has made repeated efforts to regulate Air Evac despite the ADA's broad preemption.[5] Mere months after the *Cheatham* litigation ended, the West Virginia Offices of the Insurance Commissioner ("OIC") sought to bring Air Evac under its regulatory control by considering its membership program an unauthorized insurance plan. *Air Evac EMS, Inc. v. Dodrill*, 523 F. Supp. 3d 859, 863-64, 870 (S.D.W. Va. 2021), *aff'd sub nom. Air Evac EMS, Inc. v.*

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[5] PEIA's efforts have been an attempt to use sovereign power to place its serious financial concerns onto the back of Air Evac instead of addressing them like a normal market participant. Healthcare's recently skyrocketing costs are no secret, and PEIA is no exception to this issue. *See* Sean O'Leary, *What is the Plan for the $376 Million PEIA Shortfall?*, W. VA. CTR. BUDGET & POL'Y. (Dec. 21, 2022), https://wvpolicy.org/what-is-the-plan-for-the-376-million-peia-shortfall/. Like any insurance company facing financial hardship, PEIA has cut costs; its premiums and state appropriations have increased as coverage has decreased. *See* Steven Allen Adams, *West Virginia PEIA board approves plan changes due to legislation*, WVNEWS (Mar. 30, 2023), https://www.wvnews.com/news/wvnews/west-virginia-peia-board-approves-plan-changes-due-to-legislation/article_637ca72c-cf42-11ed-aef2-a3e40da15360.html#:~:text=The%20Public%20Employees%20Insurance%20Agency%20Finance%20Board%20met,for%20out-of-state%20medical%20care%20for%20non-contiguous%20out-of-state%20counties; Phil Kabler, *PEIA: Benefit cuts of $40 million needed next year*, CHARLESTON-GAZETTE MAIL (Oct. 27, 2017), https://www.wvgazettemail.com/news/politics/peia-benefit-cuts-of-40-million-needed-next-year/article_9f9a3162-a773-57b5-b08a-8ce732f75a00.html. One can view PEIA's efforts to regulate Air Evac and as one among its many cost-cutting measures, but one only available to an insurance company wielding the state's coercive power.

McVey, 37 F.4th 89 (4th Cir. 2022) ("*Dodrill I*"). After the OIC's regulatory effort was enjoined, the Legislature statutorily designated Air Evac as an insurance provider. *Air Evac EMS., Inc. v. Dodrill*, 548 F. Supp. 3d 580, 585-87 (S.D.W. Va. 2021) ("*Dodrill II*"). Unsurprisingly, the district court found the *Dodrill II* legislation to be preempted by the ADA. *Id.* at 595. Apparently undeterred by the result of *Dodrill II*, the Legislature enacted another law attempting to regulate Air Evac as an insurance company. *Air Evac EMS, Inc. v. McVey*, No. 2:21-cv-00105, 2024 WL 1287634, at *2 (S.D.W. Va. Mar. 26, 2024). The state's efforts are concerningly targeted at Air Evac, as *Dodrill I* reveals that the OIC told one of Air Evac's competitors that he was looking for ways he could "shut down" Air Evac's membership program, and the legislation in *McVey* would have solely affected Air Evac. *See Id.*; *Dodrill I*, 523 F. Supp. 3d at 869. The state's attempts to regulate Air Evac show a disregard for the ADA and free market principles, as it seems that the state has committed its coercive power and resources to pushing Air Evac out of the air ambulance market.

From Air Evac's perspective, PEIA has essentially nullified the results of the *Cheatham* litigation. PEIA ignored the federal injunction against its rate caps when it refused to pay anything more, foisting a preempted lower reimbursement rate upon a health care provider who was forced to do business with the agency. Even after the *Cheatham* litigation, PEIA ignored the Fourth Circuit's instructions to act as a normal market participant by refusing to entertain any negotiations with Air Evac regarding the disputed payments. Now, by ruling that Air Evac's claims are barred by Article VI, § 35's sovereign immunity, the majority would place PEIA outside of any meaningful possibility of review, giving this Court's blessing to PEIA's efforts to pretend that the *Cheatham* litigation had never occurred. In doing so, the majority has ignored the crucial facts that make this case uniquely threatening to Air Evac's due process rights and benign to the public purse, and failed to follow our wise history of allowing for relief to be found in such unique situations.

For the foregoing reasons, I believe that this Court should affirm and remand the circuit court's December 16, 2022, Final Order Granting, in Part and Denying, in Part Air Evac EMS, Inc.'s Petition for Appeal to the circuit court for further proceedings consistent with this opinion. Accordingly, I respectfully dissent.