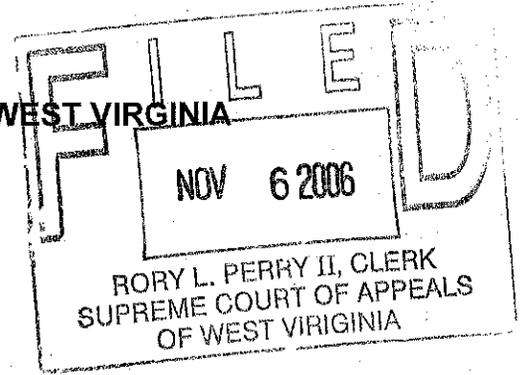


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**ADDA MOTTO; MARIE CAREY;  
DAVID CAREY; KRISTI CAREY;  
and SHARON RUNYON,**

**Plaintiffs,**

**v.**

**NO. 33205**

**CSX TRANSPORTATION, INC.,  
and WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,  
OFFICE OF ABANDONED MINE  
LANDS, AND RECLAMATION, a West  
Virginia government entity,**

**Defendants.**

**BRIEF OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, OFFICE OF ABANDONED MINE LANDS AND RECLAMATION  
REGARDING REVIEW OF CERTIFIED QUESTIONS**

**Anita R. Casey (WVSB # 664)  
Tanya Hunt Handley (WVSB #9070)  
MacCorkle, Lavender, Casey & Sweeney, PLLC  
300 Summers Street, Suite 800  
P. O. Box 3283  
Charleston, West Virginia 25332-3283  
*Counsel for Defendant West Virginia Department of  
Environmental Protection, Office of Abandoned  
Mine Lands and Reclamation***

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## II. NATURE OF PROCEEDING BELOW

The Plaintiffs, Adda Motto, Marie Carey, David Carey, Kristi Carey and Sharon Runyon, originated this action against the Defendants, CSX Transportation, Inc. (hereinafter "CSX"), and the West Virginia Department of Environmental Protection, Office of Abandoned Mine Lands, and Reclamation, (hereinafter "DEP"), in the Circuit Court of Logan County, West Virginia. The case was subsequently transferred to the Circuit Court of Kanawha County, West Virginia, due to the lack of venue in Logan County.<sup>1</sup> The Plaintiffs aver in their Complaint that the Defendants' negligence resulted in flooding that damaged the Plaintiffs' property.

The DEP filed a Motion to Dismiss this action, asserting that the Circuit Court did not have jurisdiction over it, because of the Plaintiffs' failure to comply with the notice requirement of West Virginia Code § 55-17-3, prior to institution of their lawsuit against the state agency. (See DEP's Motion to Dismiss). The statute requires a plaintiff to provide the chief officer of the government agency and the attorney general with written notice of an alleged claim and relief desired at least thirty days prior to instituting litigation. *Id.* It is undisputed that the Plaintiffs, even though their attorney knew of the notice requirement, made no attempt of any kind to comply with the notice provisions of West Virginia Code § 55-17-3. Moreover, the Plaintiffs did not present any reason for their failure to comply with the notice requirement in their response to the DEP's Motion to Dismiss.

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<sup>1</sup>The Defendant CSX attempted to remove this case to the United States District Court for the Southern District of West Virginia, asserting that the DEP had been fraudulently joined as a party in an attempt to thwart federal jurisdiction. The District Court, however, remanded the case back to the Circuit Court of Logan County. The Plaintiffs then filed a motion for change of venue, based on their having improperly filed the action in the Circuit Court of Logan County, rather than the Circuit Court of Kanawha County as required in West Virginia Code § 14-2-2. The Circuit Court of Logan County granted the Plaintiffs' motion for change of venue.

After briefing was complete regarding the Motion to Dismiss, and after having heard oral arguments by the parties, the Circuit Court of Kanawha County decided to certify two questions to this Court. In so doing, the Circuit Court ruled that

as the Plaintiffs have failed to fulfill a statutory prerequisite to bringing this civil action against DEP, the Court would grant the motion to dismiss if the notice provision is jurisdictional but would deny the Motion to Dismiss if the provision were merely procedural and further determine if "good cause" exists to "stay" the notice provisions at this time.

(See Order of Certification entered May 17, 2006.)<sup>2</sup>

The Court heard the petition on October 4, 2006. By Order entered that same day, the Court decided to review the certified questions posed by the Circuit Court of Kanawha County.

### III. STATEMENT OF FACTS

In their Complaint, the Plaintiffs allege that their respective pieces of real property were damaged as a result of flooding, which they contend was caused by the alleged combined negligent acts of the Defendants. The Plaintiffs specifically averred that

[t]he plaintiffs' properties flooded on June 16, 2003, as a result of the culvert referenced above [which was located along Godby Branch Road near Chapmanville, Logan County, West Virginia], and the combined activities and acts of negligence of the defendants', CSX Transportation, Inc. and the DEP, with the result that all plaintiffs have suffered damages to their real and personal properties with several having suffered total destruction of their homes and related belongings. . . .

(See Complaint at ¶ 8.) Even though the flooding allegedly occurred on June 16, 2003, the lawsuit was not filed until June 15, 2005, a day before the expiration of the statute of

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<sup>2</sup>The Court had to correct the May 17, 2006, Order, regarding which party was to file the petition for review of the certified questions. An Amended Order of Certification was entered May 23, 2006. (See Amended Order of Certification entered May 23, 2006.)

limitations provided by the West Virginia Code § 55-2-12.

As previously mentioned supra, the lawsuit was filed without the requisite statutory notice set forth in West Virginia Code §55-17-13. Consequently, the DEP filed a Motion to Dismiss the Complaint. In the Plaintiffs' response to the DEP's Motion to Dismiss, the Plaintiffs offered no explanation for their failure to comply with the notice requirement. Instead, the Plaintiffs argued that "to rigidly require the Plaintiffs to comply with the notice requirement found in *West Virginia Code* § 55-2-12 [sic], effectively shortcuts the Plaintiffs' two year statute of limitations by thirty (30) days. In essence, the notice requirement of § 55-17-3, is counter intuitive to the statute of limitation found in § 55-2-12." (See Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at p. 2.) The Plaintiffs further argued that it would be "improper for th[e] Court to dismiss this claim when such notice requirement can be remedied by merely staying the action for the requisite thirty (30) day period . . . ." (See Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at p. 3.)

The DEP replied to the Plaintiffs' response, specifically noting that the Plaintiffs' counsel has an "apparent habitual failure to follow rules that were pr[e]scribed by the West Virginia Legislature to ensure that State Agencies had ample opportunity and resources to respond to legal action. . . ." (See Reply to Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at pp. 1-2.) It is undisputed that the Plaintiffs' attorney had been involved in at least one other case in which the failure to follow the statutory notice requirement had prompted a motion to dismiss the complaint. (See Exhibit A, attached to Reply to Plaintiffs' Response to Defendant West Virginia Department of Environmental Protections' Motion to Dismiss.)

Because the plaintiffs had prevailed in the other case, the Plaintiffs' attorney apparently believed that there was no longer a need to follow statutory requirements set forth by the Legislature. The DEP also argued that the statute requires that notice be given prior to the action being filed, not after. (See Reply to Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at p.2.)

The Circuit Court, in its Order of Certification, found that the "Plaintiffs have not complied with the requirements of Sections 55-17-1 through -5, particularly by providing written notice or otherwise advising either DEP or the Attorney General that they had a claim against DEP, prior to filing this action." (See Order of Certification entered May 17, 2006.) The Court also found that "it is further undisputed that service of the summons and complaint on DEP was its first notice of Plaintiffs' claim against it and that Plaintiffs failed to provide either DEP or the Attorney General the notice contemplated by Section 55-17-3(a)(1) prior to either filing suit or service on DEP." (See Order of Certification entered May 17, 2006.) Finally, the Circuit Court found that the "Plaintiffs have failed to fulfill a statutory prerequisite to bringing this civil action against DEP. . . ." (See Order of Certification entered May 17, 2006.) Notwithstanding these findings, the Court focused its decision on whether West Virginia Code § 55-17-3 was procedural or jurisdictional. The Circuit Court indicated that if the statutory provision was jurisdictional, it would dismiss the action; however, if the statute was found to be merely procedural, it would deny the motion and determine whether "good cause" existed for the Plaintiffs' failure to comply with the statute so that a stay could be issued in order to allow the Plaintiffs to comply with the notice provision.

#### IV. CERTIFIED QUESTIONS PRESENTED

1. Is there discretion for the Court to waive the mandatory notice provision of West Virginia code Sections 55-17-1 through 5 absent a showing of good cause?

ANSWER: Yes.

2. Does the Circuit Court have discretion to stay proceedings for thirty days to allow time to comply with the provisions of West Virginia Code Sections 55-17-1 through 5 after suit has been filed before notice has been given?

ANSWER: Yes.

#### V. POINTS AND AUTHORITIES

**The Statutory Provisions Set Forth in West Virginia Code §55-17-3 are Mandatory.**

Wheeler v. McPherson, 40 P.3d 632 (Utah 2002).

Georgia Ports Auth. v. Harris, 549 S.E.2d 95 (Ga. 2001).

Article III, Section 35 of the West Virginia Constitution.

University of W. Va. Bd. of Trs. ex rel. W. Va. Univ. v. Graf, 205 W. Va. 118, 516 S.E.2d 741 (1998).

West Virginia Code § 55-17-1 to -5.

West Virginia Code § 55-17-3.

West Virginia Code § 55-17-1.

West Virginia Code § 55-17-5.

Syl. Pt. 1, State v. Wender, 149 S.E.2d 412, 141 S.E.2d 359 (1965), overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W. Va. 538, 328 S.E.2d 144 (1984).

Texas Dept. of Trans. v. Blevins, 101 S.W.3d 170 (Tex. Ct. App. 2003), appeal dismissed, cause remanded, 140 S.W.3d 337 (Tex. 2004).

Pigs Gun Club, Inc. v. Sanpete County, 42 P.3d 379 (Utah 2002).

1 Civ. Actions Against State & Loc. Gov't § 5.5 (Feb. 2006).

J. James Frasier, III, Annotation, Persons or Entities Upon Whom Notice of Injury or Claim Against State or State Agency May or Must be Served, 45 A.L.R. 5<sup>th</sup> 173 (2006).

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Syl. Pt. 1, State v. Boatright, 184 W. Va. 27, 399 S.E.2d 57 (1990).

Syl. Pt. 7, Ex parte Watson, 82 W. Va. 201, 95 S.E.2d 648 (1918).

Mangus v. Ashley, 199 W. Va. 651, 487 S.E.2d 309 (1997).

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Ashby v. City of Fairmont, 216 W. Va. 527, 607 S.E.2d 856 (2004).

State of W. Va. ex rel. W. Va. Regional Jail Auth. v. Henning, No. 33059 (W. Va. filed June 14, 2006) (per curiam order).

**Because the Provisions of West Virginia Code § 55-17-3 are Mandatory, There is no Basis for Allowing a Circuit Court Discretion to Waive the Notice Requirement or to Stay an Action Pending a Party's Compliance with the Notice Requirement.**

West Virginia Code § 55-17-3.

Longwell v. Board of Educ. of County of Marshall, 213 W. Va. 486, 583 S.E.2d 109 (2003).

West Virginia Code §§ 55-17-1 to -5.

**The Plaintiffs Should not be Able to Refile Their Action under the Provisions of West Virginia Code § 55-2-18 (2001).**

West Virginia Code § 55-2-18.

State ex rel. W. Va. Reg'l Jail Auth. v. Henning, No. 33059 (W. Va. filed June 14, 2006) (per curiam order).

West Virginia Code § 46-2-735.

West Virginia Code § 55-2-6.

West Virginia Code § 55-17-3.

Cable v. Hatfield, 202 W. Va. 638, 505 S.E.2d 701 (1998).

State v. Legg, 151 W. Va. 401, 151 S.E.2d 215 (1967).

## VI. DISCUSSION OF LAW

### A. Standard of Review

As the Court most recently opined in Osborne v. United States, 211 W. Va. 667, 567 S.E.2d 677 (2002),

[w]hen this Court is called upon to resolve a certified question, we employ a plenary review. "A de novo standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a federal district or appellate court.' Syl. Pt. 1, Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (1998)." Syl. pt. 2, Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000). Accord Syl. pt. 1, Bower v. Westinghouse Elec. Corp., 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.").

Osborne, 211 W. Va. at 670, 567 S.E.2d at 680. Moreover, it is undisputed that the questions posed by the Circuit Court of Kanawha County, West Virginia, for this Court's determination are questions of law. As the Court stated in Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 559 S.E.2d 713 (2001),

[d]uring our consideration of questions of law, be they presented by certification or otherwise, we employ a de novo standard of review. "To the extent that we are asked to interpret a statute or address a question of law, our review is de novo. State v. Paynter, 206 W. Va. 521, 526, 526 S.E.2d 43, 48 (1999). Accord Syl. pt. 2, Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001) ("Where the issue on 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.' Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415

(1995).”).

Feliciano, 210 W. Va. at 744, 559 S.E.2d at 717.

**B. The Statutory Provisions Set Forth in West Virginia Code §55-17-3 are Mandatory.**

The provisions of West Virginia Code § 55-17-3 are inextricably intertwined with State immunity. This intertwining with sovereign immunity causes the notice provisions to be mandatory. See, e.g., Wheeler v. McPherson, 40 P.3d 632, 635 (Utah 2002) (“Indeed, this standard of strict compliance derives naturally from both basic principles of sovereign immunity and from the text of the Immunity Act itself. As we explained in Hall, ‘where the government grants statutory rights of action against itself, any conditions placed on those rights must be followed precisely.’ ”); Georgia Ports Auth. v. Harris, 549 S.E.2d 95, 99 (Ga. 2001)(“The Legislature enacted the Georgia Tort Claims Act, OCGA § 50-21-20 et seq., in order to balance strict application of the doctrine of sovereign immunity against the need for limited exposure of the State treasury to tort liability. Norris v. Dept. of Transp., 268 Ga. 192, 486 S.E.2d 826 (1997). The GTCA expressly provides that the State shall only be liable within the limitations of the Act, OCGA § 50-21-21(a), which includes the ante litem notice requirements in OCGA § 50-21-26. Norris, supra. Under the version of OCGA § 50-21-26(a)(2) applicable to this case, the requisite written notice could be delivered “‘by certified mail, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services.’”)(footnote omitted).

The State’s immunity from suit is also derived from the provisions of Article VI, Section 35 of the West Virginia Constitution, which provides:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

Id. The Court has explained that “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.” University of W. Va. Bd. of Trs. ex rel. W. Va. Univ. v. Graf, 205 W. Va. 118, 122, 516 S.E.2d 741, 745 (1998) (quoting Mellon-Stuart Co. v. Hall, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)).

The Court has carved out numerous exceptions from the prohibition against suing the State. See Graf, 205 W. Va. at 122-23, 516 S.E.2d at 745-46 (citing cases and exceptions). Notwithstanding the exceptions, sovereign immunity still exists. See id. Because of the significance of sovereign immunity, as well as the impact that permissible lawsuits against the State has on public interests, the Legislature most certainly has the authority to establish time limits relative to the filing of lawsuits as a means of establishing safeguards in order to protect the public interests.

To that end, the West Virginia Legislature, in 2002, enacted West Virginia Code §§ 55-17-1 to -5. Contained within this statutory scheme is West Virginia Code § 55-17-3, which provides, in pertinent part:

(a)(1) **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.

(2) The written notice to the chief officer of the government agency and the attorney general required by subdivision (1) of this subsection is considered to be provided on the date of mailing of the notice by certified mail, return receipt requested. If the written notice is provided to the chief officer of the government agency as required by subdivision (1) of this subsection, any applicable statute of limitations is tolled for thirty days from the date the notice is provided and, if returned by the government agency as evidenced by the return receipt of the certified mail, for thirty days from the date of the returned receipt.

Id. (emphasis added). The purpose for this statute was clearly set forth in West Virginia

Code § 55-17-1, which provides as follows:

[T]here are numerous actions, suits and proceedings filed against state government agencies and officials that may affect public interest. Depending upon the outcome, this type of litigation may have significant consequences that can only be addressed by subsequent legislative action. In these actions, the Legislature is not directly involved as a party. The Legislature is not a proper party to these actions because of an extensive structure of constitutional protections established to safeguard the prerogatives of the legislative branch under our governmental system of checks and balances. Government agencies and their officials require more notice of these actions and time to respond to them and the Legislature requires more timely information regarding these actions, all in order to protect the public interest. The Legislature further finds that protection of the public interest is best served by clarifying that no government agency may be subject to awards of punitive damages in any judicial proceeding.

Id. Finally, the Legislature was unequivocal when it enacted West Virginia Code § 55-17-5, which provides that “[i]t is the express intent of the Legislature that the provisions of this article be liberally construed to effectuate the public policy set forth in section one of this article.” Id.

The Plaintiffs have made no constitutional challenge to this statutory scheme. Moreover, the Court has recognized that “[t]he legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory.” Syl. Pt. 1, State v. Wender, 149 W. Va. 413, 141 S.E.2d 359 (1965), overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W. Va. 538, 328 S.E.2d 144 (1984).

It is axiomatic that the Legislature has set forth an express purpose for this statutory scheme that is within the public interests and that is reasonably related to a legitimate legislative purpose.<sup>3</sup> See id. Other legitimate public interest reasons for enacting such a notice provision were noted by the Supreme Court of Utah in Larson v. Park City Municipal Corp., 955 P.2d 343 (Utah 1998), where the Utah court opined that “the purpose of such

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<sup>3</sup>Other jurisdictions have enacted similar types of notice requirements relating to civil actions against governmental entities and have recognized the significance of strict compliance. Interestingly, some of the relevant statutes in these jurisdictions require not just written notice of the suit at least thirty days prior to filing; but, require written notice of the claim within a set time after the claim arises. See, e.g., Texas Dept. of Trans. v. Blevins, 101 S.W.3d 170, 172 (Tex. Ct. App. 2003), appeal dismissed, cause remanded, 140 S.W.3d 337 (Tex. 2004)(stating that statute requires governmental agency to receive notice of claim “not later than six months after the day that the incident giving rise to the claim occurred”); Pigs Gun Club, Inc. v. Sanpete County, 42 P.3d 379, 382 (Utah 2002)(stating that statute requires written notice of claim within a year after claim arises). “Giving a governmental entity pre-action notice of claim in accordance with statutory provisions is usually considered a mandatory requirement which must be satisfied before a tort action may be maintained.” 1 Civ. Actions Against State & Loc. Gov’t § 5.5 (Feb. 2006)(footnote citing relevant state statutes omitted). Further, “[m]any state legislatures have established notice-of-claim procedures to be followed prior to bringing suit against those public entities. While substantial, rather than strict, compliance with those procedures is the standard more frequently applied by the courts, they usually require service of the claim notice upon the statutorily designated official, employee, or public entity.” J. James Frasier, III, Annotation, Persons or Entities Upon Whom Notice of Injury or Claim Against State or State Agencies may or Must be Served, 45 A.L.R.5th 173 (2006).

notice of claim is to provide the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation. Id. at 345-46. Further, in the instant case, no argument has been made, nor is there any support for, any argument that the statute is either arbitrary or discriminatory. See Wender, 149 W. Va. at 413, 141 S.E.2d at 360.

Consequently,

“[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. Point 1, syllabus, State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al., 148 W.Va. 369 [135 S.E.2d 262 (1964) ].” Syllabus Point 1, State ex rel. Board of Trustees v. City of Bluefield, 153 W.Va. 210, 168 S.E.2d 525 (1969).’ Syl. pt. 3, Central West Virginia Refuse, Inc. v. Public Service Com'n of West Virginia, 190 W.Va. 416, 438 S.E.2d 596 (1993).

Syl. Pt. 2, Keen v. Maxey, 193 W.Va. 423, 456 S.E.2d 550 (1995); see also Syl. Pt. 1, State v. Boatright, 184 W.Va. 27, 399 S.E.2d 57 (1990)(“ ‘Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.’ Syllabus Point 1, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).”).

The clear legislative intent of West Virginia Code § 55-17-3 is that the action must fail if the statutorily-mandated written notice to the “chief officer of the government agency and the attorney general” is not given. Id. at § 55-17-3(a). This intent is plainly gleaned from the statutory provision insofar as the Legislature has tolled any applicable statute of limitations “from the date the notice is provided and, if received by the government agency as evidenced by the return receipt of the certified mail, for thirty days from the date of the returned receipt.” Id. at § 55-17-3(b). If mandatory dismissal of the action was not the

Legislature's intent for a person's failure to comply with the notification provision, then there would have been no need to toll the statute of limitations for thirty days.<sup>4</sup> See id.

Further,

[i]t is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

Syl. pt. 7, Ex parte Watson, 82 W.Va. 201, 95 S.E. 648 (1918); accord Mangus v. Ashley, 199 W.Va. 651, 658, 487 S.E.2d 309, 316 (1997). The use of the word "must" in West Virginia Code § 55-17(a) denotes a "necessity or obligation." The American Heritage Dictionary 560 (4<sup>th</sup> ed. 2001). As the Court stated in Ashby v. City of Fairmont, 216 W. Va. 527, 607 S.E.2d 856 (2004), "[t]ypically, the word 'must' is afforded a mandatory connotation." Id. at 532, 607 S.E.2d at 861.

Recently, the Court agreed that the provisions of West Virginia Code § 55-17-3 are mandatory and that the lower court has no discretion when it comes to dismissing a case for a party's failure to comply with the mandatory notice provisions. In State of W. Va. ex rel. West Virginia Regional Jail Authority v. Henning, No. 33059, (W. Va. filed June 14, 2006)(per curiam order), (copy attached hereto as Exhibit A) the parties acknowledged and the lower court expressly found that the required notice was not given to the government

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<sup>4</sup>The statutory language that tolls the statute of limitations also defeats the Plaintiffs' position argued below that "to rigidly require the Plaintiffs to comply with the notice requirement found in *West Virginia Code* § 55-2-12 [sic], effectively shortcuts the Plaintiffs' two year statute of limitations by thirty (30)." (See Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at p. 2).

agency or the Attorney General in accordance with the mandates of West Virginia Code § 55-17-3 prior to the filing of the lawsuit. Henning Order at 2. The Court also disavowed the lower court's conclusion that "inasmuch as the statute 'does not provide for a remedy, sanction or penalty' for failure to provide the notice, the Authority's motion to dismiss should be denied." Id. Rather, the Court determined that "the Circuit Court's conclusion in that regard would render the provisions of *W. Va. Code*, 55-17-3(a)(1) (2002), of no consequence, **especially in view of the statute's mandatory language to the effect that '[n]otwithstanding any provision of law to the contrary,' the required notice 'must' be given.**" Henning Order at pp. 2-3 (emphasis added).

**C. Because the Provisions of West Virginia Code § 55-17-3 are Mandatory, There is no Basis for Allowing a Circuit Court Discretion to Waive the Notice Requirement or to Stay an Action Pending a Party's Compliance with the Notice Requirement.**

In the present matter, the Plaintiffs argued, and given the phrasing of the certified questions the lower court agreed, that "it would be improper for this Court to dismiss this claim when such notice requirement can be remedied by merely staying the action for the requisite thirty (30) day period. . . ." (See Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at p. 3; see also Order of Certification entered May 17, 2006.) Allowing the lower court discretion either to waive the mandatory requirement or to enter a stay based on a finding of "good cause" so that a plaintiff can have time to comply with the requirement essentially would abrogate the statutory scheme and the Legislature's intent. The Court would have to read into West Virginia Code § 55-17-3(c) words that simply are not there in order to allow a lower court discretion either to waive the mandatory notice requirement or to stay the proceedings

based on a finding of "good cause" for violating the statutory provision.

"[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted. Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citing Bullman v. D & R Lumber Company, 195 W.Va. 129, 464 S.E.2d 771 (1995); Donley v. Bracken, 192 W.Va. 383, 452 S.E.2d 699 (1994)). ([E]mphasis added). See State ex rel. Frazier v. Meadows, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994). Moreover, [a] statute, or an administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten.' Syl. pt. 1, Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989). See Sowa v. Huffman, 191 W.Va. 105, 111, 443 S.E.2d 262, 268 (1994)." Williamson v. Greene, 200 W.Va. 421, 426-27, 490 S.E.2d 23, 28-29 (1997).

Longwell v. Board of Educ. of County of Marshall, 213 W.Va. 486, 491, 583 S.E.2d 109, 114 (2003). Again, the only plausible remedy is dismissal, given the significance of the notice of suit requirement set forth in West Virginia Code § 55-17-3(a) in relation to sovereign immunity and the Legislature's unquestionable right to control the manner and method in which governmental agencies are allowed to be sued.

In this case, there is no basis for allowing the exercise of discretion by the lower court. It is undisputed that the Plaintiffs made no showing that they complied with, or, indeed, made any effort to comply with, the requirements of West Virginia Code §§ 55-17-1 to -5, particularly by providing written notice or in any other manner advising either DEP or the Attorney General that they had a claim against DEP, prior to filing this civil action. Succinctly stated, the Plaintiffs failed to comply with the notice requirement. It is also undisputed that the Plaintiffs failed to offer any evidence of "good cause" for their failure to follow the notice requirement, which would warrant the Circuit Court to stay the proceedings until the Plaintiffs complied with the notice provisions. Finally, it is apparent

from the record below, that the Plaintiffs' attorney knew about the notice requirement and simply chose to ignore it prior to filing suit. (See Reply to Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss at pp. 1-2.)

**D. The Plaintiffs Should not be Able to Refile Their Action under the Provisions of West Virginia Code § 55-2-18 (2001).**

West Virginia Code § 55-2-18 provides:

(a) For a period of one year from the date of an order dismissing an action or reversing a judgment, **a party may refile the action if the initial pleading was timely filed** and: (i) the action was involuntarily dismissed for any reason not based upon the merits of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.

(b) For purposes of subsection (a) of this section, a dismissal not based upon the merits of the action includes, but is not limited to:

(1) A dismissal for failure to post an appropriate bond;

(2) A dismissal for loss or destruction of records in a former action; or

(3) A dismissal for failure to have process timely served, whether or not the party is notified by the court of the pending dismissal.

Id. (emphasis added).

In the case sub judice, neither the Plaintiffs, nor the Circuit Court, ever raised any issue relative to the savings statute, West Virginia Code § 55-2-18, and whether it would operate to extend the statute of limitations for a one-year period. Nevertheless, in Henning, the Court, in directing that the motion to dismiss filed by the West Virginia Regional Jail Authority be granted, further directed that "Frank J. Staud and Shell Equipment Company, Inc. be permitted pursuant to the refiling provisions of *W. Va. Code*, 55-2-18 (2001), to refile their claim against the Authority following compliance with the

notice requirements of *W. Va. Code*, 55-17-3(a)(1)(2002).” Henning Order at 3-4. It appears that this directive was based upon a footnote in the response brief of Frank J. Staud and Shell Equipment Co. opposing the issuance of the writ, wherein the Respondents argued that

[e]ven if the Court were to conclude that the notification requirements set forth in Article 17 are jurisdictional, *W. Va. Code* § 55-2-18 authorizes a one year extension of the statute of limitations following dismissal. As the proper parties are obviously aware of the pending suit and as the notification requirements under Article 17 are not jurisdictional, Staud maintains that dismissal would be futile and unnecessary given the opportunity for re-filing as provided by *W. Va. Code* § 55-2-18.

(See Response Brief of Frank J. Staud and Shell Equipment Company, Inc. in Opposition to Petition for Writ of Prohibition of West Virginia Regional Jail Authority at p. 16 n.17). The Court did not engage in any analysis or reasoning behind the application of the savings statute in the Henning case.

It is important, therefore, to address whether the savings statute would be applicable if this matter were to be dismissed. It is significant to note in the Henning case that the primary allegations appeared to consist of a breach of contract that allegedly occurred on June 20, 2003. (See Memorandum of Law in Support of Petition for Writ of Prohibition With Oral Argument Requested filed in Henning at pp. 1-3; Response Brief of Frank J. Staud and Shell Equipment Company, Inc. in Opposition to Petition for Writ of Prohibition of West Virginia Regional Jail Authority at p. 2; see also Henning Order at p. 1.) The complaint was filed on June 13, 2005. Accordingly, at the time the Court sent this case back to the lower court, on June 14, 2006, the statute of limitations for breach of contract apparently still has not expired. See *W. Va. Code* § 46-2-735 (providing that statute of limitations for contract involving sales is four years); *W. Va. Code* § 55-2-6 (providing for

ten year statute of limitations on written contract and five year statute of limitations of other types of contracts).

In the instant matter, however, the statute of limitations has run as to all the Plaintiffs' claims. The flooding that allegedly caused the Plaintiffs' injuries occurred on June 16, 2003. The Plaintiffs did not file their Complaint until June 15, 2005, a day before the two-year statute of limitations expired. The Court must give some consideration to the application of West Virginia Code § 55-17-3 in relation to West Virginia Code § 55-2-18.

The Court has determined that the notice requirement of West Virginia Code § 55-17-3 is mandatory and that failure to comply with that requirement necessitates dismissal of the action. See Henning Order.

A clear reading of the notice statute indicates that statute of limitations is tolled only when the mandatory written notice provision is given. See W. Va. Code § 55-17-3(a)(2) (providing "[i]f the written notice is provided to the chief officer of the government agency as required by subdivision (1) of this subsection, any applicable statute of limitations is tolled for thirty days from the date the notice is provided and, if returned by the government agency as evidenced by the return receipt of the certified mail, for thirty days from the date of the returned receipt . . . .")(emphasis added). Thus, if a party files a complaint without complying with the written notice provision, the statute of limitations continues to run and is not tolled. In other words, without giving the mandatory notice first, an action against a state agency simply cannot be timely filed. This is the only plausible construction of the statute in light of the savings statute. There would have been no need for the Legislature to include language in West Virginia Code § 55-17-3 tolling the statute

of limitations if it had simply intended the savings statute to govern an action filed without first giving the requisite notice. Rather, the Legislature intended that notice is a necessary prerequisite to filing any action against a governmental agency, and absent such notice the entire action must be forever precluded if the statute of limitations has run before the required notice is given.

Unless the mandatory notice provisions set forth in West Virginia Code § 55-17-3 are followed, an action against a governmental agency cannot be commenced. As the savings statute provides, an action can only be refiled after dismissal if it was timely filed in the first instance. W. Va. Code § 55-2-18(a). In this case, the action was not timely commenced, because even though it was filed a day before the statute of limitations ran, it was filed without the mandatory notice being given first. Accordingly, the statute of limitations was not tolled under 55-17-3(a)(2) and the limitation period expired on June 16, 2005. To conclude that, despite the mandatory nature of the notice requirement, this action could be refiled under the savings statute would render the mandatory notice provisions and the tolling of the statute of limitations set forth in West Virginia Code § 55-17-3(a)(1) and (2) meaningless.

This Court found the saving statute inapplicable under facts analogous to those in this case. For instance, in Cable v. Hatfield, 202 W. Va. 638, 505 S.E.2d 701 (1998), the Court determined that the circuit court clerk properly refused to file a complaint due to the plaintiff's failure to include a completed civil case information statement with the complaint. Id. at 641, 505 S.E.2d at 704. The statute of limitations ran after the complaint, without the completed civil case information, was sent to the circuit clerk's office for filing. The circuit court dismissed the action and the Court upheld that dismissal. The Court determined that

“the remedy provided in W. Va. Code § 55-2-18 is unavailable to . . . [the plaintiff][,]” because the civil action was never timely commenced. 202 W. Va. 646-47, 505 S.E.2d 709-10.

Likewise, the Court has upheld the requirement that a criminal defendant file a notice of intent to file a petition for writ of error with the circuit court’s clerk’s office within sixty days after judgment, notwithstanding a four-month appeal period. In State v. Legg, 151 W. Va. 401, 151 S.E.2d 215 (1967), the Court held that

[t]he provision in Code, 1931, 58-5-4, as amended [currently W. Va. Code § 58-4-4], that in criminal cases no petition for appeal or writ of error shall be presented unless a notice of intent to file such petition, fairly stating the grounds of the petition, shall have been filed with the clerk of the court in which the judgment or order was entered, within sixty days after such judgment or order was entered is **mandatory and jurisdictional**.

Id. at Syl. Pt. 1 (emphasis added). The Court, in Legg, ultimately dismissed the appeal as having been improvidently granted.

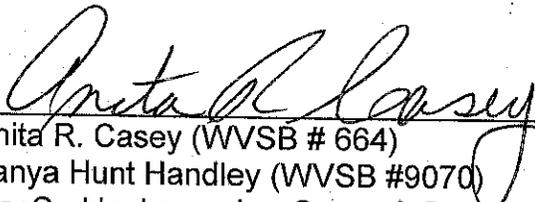
The notice requirement at issue in the instant case is no different than either of the mandatory prerequisites addressed by the Court in Cable and Legg. The imposition of this mandatory notice requirement is certainly within the province of the Legislature and should not be abrogated by the Court by allowing plaintiffs to circumvent the requirement simply by ignoring it, filing the action, and then relying on the savings statute as their saving grace.

#### V. RELIEF PRAYED FOR

Based on the foregoing, the Defendant West Virginia Department of Environmental Protection respectfully requests that the Court uphold the mandatory written notice requirement set forth in West Virginia Code § 55-17-3, which requires that, “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." Id. § 55-17-3(a)(1). If the required notice procedure is not followed, the circuit court must dismiss the action. If the statute of limitations expires prior to the requisite written notice being given, a plaintiff should not be allowed to refile a complaint under the savings statute. Accordingly, the Defendant West Virginia Department of Environmental Protection requests that the Court answer both of the certified questions posed by the Circuit Court of Kanawha County, West Virginia, in the negative.

**WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
OFFICE OF ABANDONED MINE LANDS,  
AND RECLAMATION,  
By Counsel.**



Anita R. Casey (WVSB # 664)  
Tanya Hunt Handley (WVSB #9070)  
MacCorkle, Lavender, Casey & Sweeney, PLLC  
300 Summers Street, Suite 800  
Charleston, WV 25301  
304/344-5600  
304/344-8141

# EXHIBIT A

[Link to PDF file](#)

**This is a per curiam order.**

No. 33059 *State of West Virginia ex rel. West Virginia Regional Jail Authority v. The Honorable John L. Henning, Judge of the Circuit Court of Randolph County, West Virginia; Frank J. Staud; and Shell Equipment Company, Inc.*

Per Curiam:

On a former day, to-wit, June 7, 2006, this original proceeding was submitted to this Court upon the petition of the West Virginia Regional Jail Authority asking this Court to prohibit the respondent, the Honorable John L. Henning, Judge of the Circuit Court of Randolph County, from enforcing an order entered on February 9, 2006, in the underlying action. That action, filed on June 13, 2005, is styled *Frank J. Staud and Shell Equipment Company, Inc., v. West Virginia Regional Jail Authority; Circle M Enterprises, Inc.; and Randall McCauley*, civil action no. 05-C-116 (Randolph County).

In the action, Staud and Shell Equipment alleged, *inter alia*, that the Regional Jail Authority breached a contract to sell them certain stockpiled coal by, instead, transferring the coal to Circle M Enterprises, Inc., and Randall McCauley. Pursuant to the order of February 9, the Circuit Court denied the Authority's motion to dismiss. On March 29, 2006, this Court issued a rule to show cause why relief in prohibition should not be granted. This Court now has before it the petition of the Regional Jail Authority, the responses thereto, all matters of record and the argument of counsel. Upon careful consideration, and as more fully set forth below, this Court concludes that the Regional Jail Authority is entitled to relief in prohibition with regard to the February 9, 2006, order.

In its motion, the Authority, by special appearance, alleged that dismissal was appropriate because Staud and Shell Equipment failed to provide the Authority and the West Virginia Attorney General with the pre-suit notice required by *W.Va. Code*, 55-17-3(a)(1) (2002). That section provides, in part:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of the 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.

As acknowledged by the parties, and as expressly found by the Circuit Court, Staud and Shell Equipment did not provide the required notice to the chief officer of the Regional Jail Authority or to the Attorney General prior to filing the underlying action. Nevertheless, the Circuit Court concluded that, inasmuch as the statute "does not provide for any remedy, sanction or penalty" for failure to provide the notice, the Authority's motion to dismiss should be denied. This Court is of the opinion, however, that the Circuit Court's conclusion in that regard would render the provisions of *W.Va. Code*, 55-17-3(a)(1) (2002), of no consequence, especially in view of the

statute's mandatory language to the effect that "[n]otwithstanding any provision of law to the contrary," the required notice "must" be given. See, *Ashby v. City of Fairmont*, 216 W.Va. 527, 532, 607 S.E.2d 856, 861 (2004) (stating that "[t]ypically, the word 'must' is afforded a mandatory connotation.").

Accordingly, the motion to dismiss should have been granted, and, regardless of whether in denying the motion the Circuit Court was acting without or in excess of its jurisdiction, relief in prohibition is appropriate. See, syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) (indicating that relief in prohibition is appropriate where "the lower tribunal's order is clearly erroneous as a matter of law") and syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) (indicating that relief in prohibition may be granted where "there is a high probability that the trial will be completely reversed if the error is not corrected in advance"). In so holding, this Court does not address the assertion of Circle M Enterprises, Inc., and Randall McCauley that they are also entitled to be dismissed from the action. That assertion is more appropriately before the Circuit Court following the entry of this order.

Upon all of the above, it is ADJUDGED and ORDERED that the writ of prohibition be granted, as moulded. This matter is remanded to the Circuit Court of Randolph County, West Virginia, with directions: (1) that the motion to dismiss filed by the West Virginia Regional Jail Authority be granted, without prejudice, and (2) that Frank J. Staud and Shell Equipment Company, Inc., be permitted pursuant to the refiling provisions of *W.Va. Code*, 55-2-18 (2001), to refile their claim against the Authority following compliance with the notice requirements of *W.Va. Code*, 55-17-3(a)(1) (2002).

It is further ORDERED that service of an attested copy of this order upon the respondent Judge and the other respondents shall have the same force and effect as service of a formal writ.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADDA MOTTO; MARIE CAREY;  
DAVID CAREY; KRISTI CAREY;  
and SHARON RUNYON,

Plaintiffs,

v.

NO. 33205

CSX TRANSPORTATION, INC.,  
and WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,  
OFFICE OF ABANDONED MINE  
LANDS, AND RECLAMATION, a West  
Virginia government entity,

Defendants.

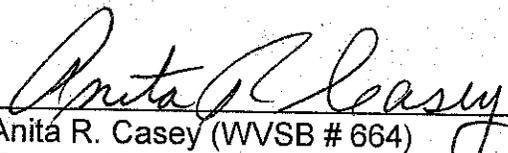
CERTIFICATE OF SERVICE

I, Tanya Hunt Handley, counsel for West Virginia Department of Environmental Protection, office of Abandoned Mine Lands, and Reclamation, do hereby certify that I have on this 6th day of November, 2006, hand delivered this original and nine copies of the "BRIEF OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, OFFICE OF ABANDONED MINE LANDS AND RECLAMATION REGARDING REVIEW OF CERTIFIED QUESTIONS" to the Clerk of the Supreme Court of Appeals of West Virginia. I further hereby certify that I have served a true and exact copy of the foregoing upon all counsel of record herein, by depositing the same in the regular United States Mail, postage prepaid, and addressed as follows:

Letisha R. Bika, Esquire  
Bika Law Office  
114 Monongalia Street  
Charleston, WV 25302  
*Counsel for Plaintiffs*

Bernard E. Layne, III  
Lord, Lord & Layne, PLLC  
405 Capitol street  
Suite 1001  
Charleston, WV 25301  
*Counsel for Plaintiffs*

Andrew Zettle, Esquire  
Cindy D. McCarty, Esquire  
Huddleston Bolen, LLP  
P.O. Box 2185  
Huntington, WV 25701  
*Counsel for CSX Transportation, Inc.*

  
Anita R. Casey (WVSB # 664)  
Tanya Hunt Handley, (W.Va. State Bar #9070)  
MacCorkle, Lavender, Casey & Sweeney, PLLC  
300 Summers Street, Suite 800  
Charleston, WV 25301  
(304) 344-5600