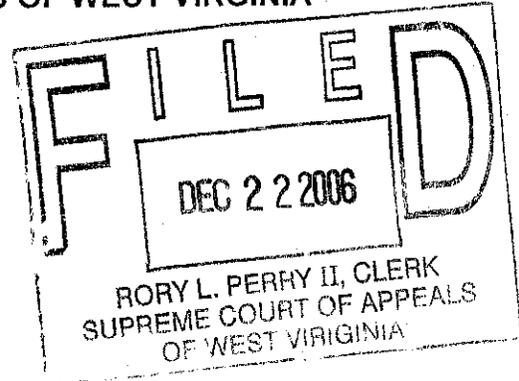


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**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.

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

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Mine Lands and Reclamation***

The Defendant, The West Virginia Department of Environmental Protection, Office of Abandoned Mine Lands and Reclamation ("DEP"), by counsel Anita R. Casey, Tanya Hunt Handley, and the law firm of MacCorkle, Lavender, Casey & Sweeney, PLLC, in reply to the response filed by the Plaintiffs, Adda Motto, Marie Carey, David Carey, Kristi Carey, and Sharon Runyon, as permitted by West Virginia Rules of Appellate Procedure 10 and 13, states the following:

I. ARGUMENT

A. **There is no Basis for a Thirty-Day Stay to Afford the Plaintiffs Time to Comply With the Mandatory Statutory Notice Requirement.**

In making their arguments as to why a stay should be issued, the Plaintiffs offer no opposition to the fact that they failed to comply, in any way, with the mandatory statutory notice requirement at issue, despite their attorney being fully aware of the notice requirement. Yet, the Plaintiffs have gone to great lengths to support their position that a thirty day stay "meet[s] the requirements of the notice provisions." (See Plaintiffs Response at p. 2). The problem with the Plaintiffs' argument is that it simply is not supported by the statutory scheme. See W. Va. Code §§ 55-7-1 to -5. To overcome the lack of statutory support for their position, the Plaintiffs create their own purpose for the statute and ignore the purpose set forth by the Legislature in West Virginia Code § 55-17-1. In creating their "purpose" for the statute, the Plaintiffs posit that because the "judgment sought in this case is for insurance benefits . . . [a]ny judgment recovered will come from insurance assets, and not a legislative allocation of State funds. Accordingly, WV Code § 55-17-1, et. seq. is not applicable to the case at bar." (See Plaintiffs' Response to Defendant's Brief ("Plaintiffs' Response") at p. 3).

Let there be no mistake that the Legislature expressly set forth the following purpose for enacting West Virginia Code §§ 55-17-1 to -5:

(a) The Legislature finds that there are numerous actions, suits and proceedings filed against state government agencies and officials that may affect the 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.

W. Va. Code § 55-17-1.

Noticeably absent from both West Virginia Code § 55-17-1, as well as West Virginia Code § 55-17-3, is any language that even remotely suggests that notice is not required to be given when a judgment is sought that is covered by insurance. Moreover, there is no construction of these two statutory provisions that supports the Plaintiffs' argument that if a claim results in a judgment that is covered by insurance, then West Virginia Code §§ 55-17-1 to -5 is inapplicable. Specifically, West Virginia Code § 55-17-3 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). Had the Legislature deemed that notice was unnecessary in cases involving judgments that are covered by insurance, it would have said so.

Further, the Plaintiffs misapprehend how the insurance policy covering government agencies operates. The Plaintiffs maintain that judgments covered by insurance do not implicate "a legislative allocation of State funds." (See Plaintiffs' Response at p. 3). Justice Burnside, joined by Justice Maynard, in their dissenting opinion to Johnson v. C.J. Mahan Constr. Co., 210 W. Va. 438, 557 S.E.2d 845 (2001), however, explained some of the nuances of the BRIM policy, which undisputedly dispels the Plaintiffs' notion that public funds are not implicated.

The BRIM policy is a state-funded self insurance arrangement which constitutes a limited waiver of sovereign immunity.

The legislature authorized the purchase of liability insurance providing coverage of State "property, activities, and responsibilities," to provide compensation for claims that otherwise would have been barred by sovereign immunity. West Virginia Constitution, Article VI, § 35 W.Va.Code § 29-12-5. Parkulo v. West Virginia Bd. of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1997) See also, Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983).

The Legislature created The State Board of Insurance [Risk and Insurance Management] (BRIM) to supervise the state's liability insurance plans. W.Va Code 29-12-1, et seq. Pursuant to this responsibility, BRIM

established the equivalent of a self insurance program administered by, but not funded by, a private insurance company, American International Group (AIG). The "premium" in the BRIM arrangement is a fund set aside by the State from which the claims are paid. The determination of which claims should be paid and which denied is governed by the "policy," which, like an ordinary insurance policy, states coverages and exclusions from coverage. Since public funds, rather than ordinary insurance, pay the claims, this system constitutes the legislative waiver of a degree of sovereign immunity as to those claims covered by the program, but only to such claims. To the extent that certain categories of claims are not covered by the BRIM policy, immunity has not been waived.

Johnson, 210 W. Va. at 443, 557 S.E.2d at 850 (Burnside, Justice, dissenting). Thus, "public funds, rather than ordinary insurance, pay the claims," even if the claim, or as the Plaintiffs maintain the "judgment" is covered by insurance. Consequently, the provisions of West Virginia Code §§ 55-17-1 to -5 are just as applicable to the instant case as to any other involving a claim against a government agency. The reason that the availability of insurance does not make the provisions inapplicable is clear. The statutory notice requirement was promulgated by the Legislature because of the importance of sovereign immunity, which the Plaintiffs fail to take into account, as well as the impact that permissible lawsuits against the State have on public interests. Certainly, the Legislature has the authority to establish time limits relative to the filing of lawsuits as a means of establishing safeguards to protect the public interests.

The Plaintiffs, relying on the Court's decisions in Hinchman v. Gillette, 217 W. Va. 378, 618 S.E.2d 387 (2005), and Roy v. D'Amato, 218 W. Va. 692, 629 S.E.2d 751 (2006), further argue that "[w]ith regard to the thirty (30) day notice provision in malpractice claims, this Court ruled that the notice provision should be liberally construed to promote the ends of justice." (See Plaintiffs' Response at p. 3). The Plaintiffs, however, again fail to take into account the differences between the statutory pre-suit notice of claim and screening

certificate of merit requirement enacted as part of the Medical Professional Liability Act ("MPLA") and the notice requirement enacted as part of the statutory scheme concerning suits brought against governmental agencies. The differences between the two statutes are significant.

First, the Court has found that

the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts.

Syl. Pt. 2, Hinchman, 217 W. Va. at 379, 618 S.E.2d at 387. Unlike the pre-suit notice of claim requirement found in the MPLA, which was crafted as a tort reform measure intended to weed out frivolous lawsuits, the notice of claim requirement that must be complied with prior to bringing a lawsuit against a government agency is inextricably intertwined with sovereign immunity. As expressed in West Virginia Code § 55-17-1, the purpose of the notice requirement was the recognition by the Legislature that actions against government agencies "may affect public interest" and "have significant consequences that only can be addressed by subsequent legislative action." Id. "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 purpose behind these two distinct notice requirements is but one reason why the notice requirement contained in West Virginia Code § 55-17-1 is not comparable with the pre-suit notice of claim and certificate of merit requirement found in the MPLA.

The two notice provisions are further distinguishable because while the Court found in Hinchman that “[t]he requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizen’s access to the courts[,]” the same cannot be said for the notice requirement contained in West Virginia Code § 55-17-3. Syl. Pt. 2, in part, Hinchman, 217 W. Va. at 379, 618 S.E.2d at 388. West Virginia Code § 55-17-3 provides that

[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.

Id. (Emphasis added). It is unequivocal that, according to this statutory provision, if the notice is not provided, the statute of limitations is not tolled. If the statute of limitations is not tolled, a claim is lost and that is the intent of this statutory provision. That this is the legislative intent is further found in 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 liberal construction is intended to ensure that the Legislature and the government agencies and officers receive the notice that the statute mandates. The claim or action is not suppose to go forward if the statute of limitations expires before the requisite notice is given. Id. at § 55-17-3 and § 55-17-5. The only potential similarity between the pre-suit notice requirements is that the Court has upheld the “notice of intent to sue” requirement of the MPLA, just as the Court has upheld the notice requirement of West Virginia Code § 55-17-3(a)(1) in State of West Virginia ex rel. West Virginia Regional Jail Authority v. Henning, No. 33059 (W. Va. filed June 14, 2006) (per curiam order). Again, however,

unlike Hinchman, the Court upheld the notice provisions of West Virginia Code § 55-17-3 without placing any exceptions to prevent dismissal where the notice was provided but lacked insufficient information. Specifically, the Court found that **“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).

Because of these differences, the Plaintiffs’ reliance upon the Court’s decisions relative to the pre-suit notice of claim and screening certificate of merit found in the MPLA is misguided. 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. See id. Therefore, there is no basis for allowing the exercise of discretion by the lower court to impose a thirty-day stay in order for the Plaintiffs to comply with the statute that they have ignored.

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

The Plaintiffs argue that if a dismissal is appropriate due to their failure to comply with the mandatory notice requirement, "a dismissal under this rule would merely result in the Plaintiffs refileing their claims under W. Va. Code § 55-2-18." (See Plaintiffs' Response at pp. 4-5). In support of this argument, the Plaintiffs posit that the dismissal of their action was "without prejudice" and, therefore, "our savings statute, W. Va. Code § 55-2-18, may be utilized to permit the re-filing [sic] of the action if it were involuntarily dismissed for failure to comply with the mandates of W. Va. Code § 55-17-3, because such dismissal would not be a dismissal on the merits." (See Plaintiffs' Response at p. 6).

The Plaintiffs' argument does not take into account that there has been no dismissal order entered by the Circuit Court in this matter. The only Order entered by the Circuit Court is the Order of Certification. Further, if the Circuit Court were to dismiss the action because this Court determines that the notice provision is mandatory, then the Circuit Court would have no choice but to dismiss the action with prejudice, because the statute of limitations has expired. (See Order of Certification entered May 17, 2006)(previously attached as Exhibit A to the DEP's Brief).

Additionally, in support of the Plaintiffs' argument as to why the savings statute should apply, the Plaintiffs misrepresent to the Court the Defendant DEP's position regarding the filing of the Plaintiffs' Complaint. The Plaintiffs maintain that "the defendant concedes that the plaintiffs' complaint was timely filed in stating that the complaint was filed 'a day before the two-year statute of limitations expired.'" The Defendant DEP stated the following in its brief, "[e]ven 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 limitations provided by the West Virginia Code § 55-2-12." (Defendant DEP's Brief at pp. 2-3). No where in this statement is there any concession by the Defendant DEP that "the plaintiffs' complaint was timely filed." This statement was nothing more than a factual recitation regarding the filing of the Plaintiffs' Complaint relative to the statute of limitations. The Defendant DEP's position is that the Plaintiffs' complaint was not timely filed, because the Plaintiffs failed to comply with the mandatory notice requirement of West Virginia Code § 55-17-3.

The Plaintiffs also attempt to lead this Court to believe that

the applicable statute of limitations as to the West Virginia Department of Environmental Protection did not begin to run until June 6, 2005, when co-counsel Letisha R. Bika, discovered through a letter she received from Michael Richardson, Emergency Program Manager, which outlined, at least in part, that a portion of the flooding was 'mining related.'"

(See Plaintiffs' Response at p. 6 n.1). This is the first time that the Plaintiffs have ever even suggested that the statute of limitations did not begin to run until June 6, 2005. A review of the Plaintiffs' Response to Defendant West Virginia Department of Environmental Protection's Motion to Dismiss that was served on March 21, 2006, indicates that the Plaintiffs only argued that "[t]he Complaint in this case was filed in the Circuit Court of Logan County on June 15, 2005, two years from the date of occurrence of the subject incident." (See Plaintiffs' Response to Defendant DEP's Motion to Dismiss at p. 2). The Plaintiffs were right in stating that their suggestion that the statute of limitations as to the Defendant DEP did not begin to run until June 6, 2005, "is not germane to these proceedings." (See Plaintiffs' Response at p. 6, n.1). It is clearly "not germane" and it is a blatant attempt to mislead the Court regarding the applicable statute of limitations.

In the instant matter, 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; however, because the requisite notice was never given, the Plaintiffs Complaint was not timely filed. 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) If a party, such as the Plaintiffs in the case sub judice, 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 government 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.

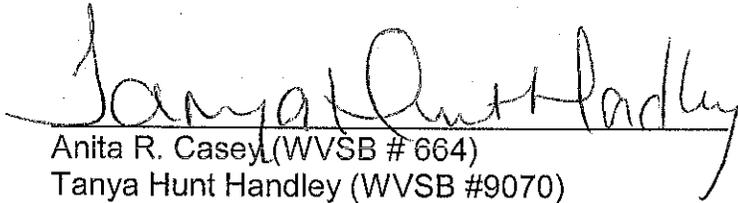
Unless the mandatory notice provisions set forth in West Virginia Code § 55-17-3 are followed, an action against a governmental agency cannot be commenced. As the

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.

II. CONCLUSION

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.



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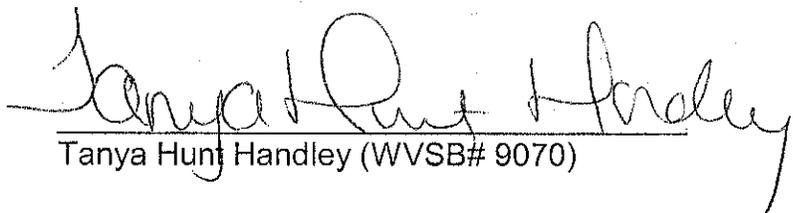
CERTIFICATE OF SERVICE

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 December 22, 2006, I caused the original and nine copies of the "**REPLY 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:

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