

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 11-1146

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, wife and
infant daughter of Douglas Wayne Bland;
TROOPER ROBERT JOSEPH ELSWICK;
TROOPER MICHAEL DAVID LYNCH;
TROOPER TIMOTHY LANE BRAGG;
TROOPER CHRISTOPHER LEE CASTO;
TROOPER SHAWN MICHAEL COLEMAN;
TROOPER JEFFREY LEALTON COOPER;
TROOPER BRAD LEE MANKINS;
TROOPER CHRISTOPHER ADAM PARSONS;
TROOPER ROGER DALE BOONE;
TROOPER STEVEN P. OWENS;
and TROOPER ADAM WILSON SCOTT,
and all others similarly situated,



Plaintiffs below, Petitioners,

v.

(Civil Action No. 07-C-02)
(Kanawha County Circuit Court)

STATE OF WEST VIRGINIA;
WEST VIRGINIA STATE POLICE
RETIREMENT SYSTEM; WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a West Virginia state agency and
public corporate body; WEST VIRGINIA
PUBLIC EMPLOYEES RETIREMENT SYSTEM,
a West Virginia state agency and public
corporate body; TERASA L. MILLER, Acting
Executive Director of West Virginia Consolidated Public
Retirement Board; and WEST VIRGINIA STATE POLICE,
a West Virginia state agency and public corporate body,

Defendants below, Respondents.

**PETITIONERS' REPLY TO RESPONSE BRIEF OF
STATE OF WEST VIRGINIA, WEST VIRGINIA CONSOLIDATED RETIREMENT
BOARD, WEST VIRGINIA STATE POLICE RETIREMENT SYSTEM, WEST
VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, AND TERASA MILLER**

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I. INTRODUCTION

This is the reply of the Petitioners to the briefs of the Respondents, the State of West Virginia (hereinafter, “the State”), the West Virginia Consolidated Retirement Board (hereinafter, “CPRB”), the West Virginia State Police Retirement System (hereinafter, “SPRS”), the West Virginia Public Employees Retirement System (hereinafter “PERS”), and Terasa Miller (hereinafter “Miller”).¹ In their response brief, the Respondents do not deny:

1. That there was an agreement at hearing not to hear the motions on the subject date;
2. That the motions at issue were never properly noticed; and
3. That the motions at issue were filed out of time.

Petitioners are entitled to relief from the order at issue under West Virginia Rule of Civil Procedure 60(b) as set out in Petitioners’ Brief filed of record herein.

II. ARGUMENT

A. THE PARTIES AND THE COURT AGREED NOT TO HEAR THE MOTIONS AT ISSUE AT HEARING. RESPONDENTS’ EXPLANATION DOES NOT CHANGE THE PLAIN MEANING OF THE STIPULATION.

As explained in the petition for appeal, the Plaintiffs below were not aware that the Defendants, SPRS, PERS, and the State filed motions to dismiss out of time and without leave of the Court. The Plaintiffs below were further not aware that Defendants, CPRB and Miller, filed amended motions to dismiss out of time and without leave of the Court. The Plaintiffs were not aware that these motions were to be heard at the hearing scheduled on January 20, 2011, because Petitioners were unaware of their existence and these motions were not properly noticed.

¹ The Petitioners were served with a response brief titled “Respondents’ Brief,” on December 15, 2011, filed by E. Taylor George and Thomas S. Sweeney. Counsel listed on the signature page that said brief was being filed on behalf of Defendants, CPRB, the State, Miller, SPRS, and PERS. The West Virginia State Police (hereinafter WVSP) is also a Respondent in this appeal. It filed a separate response brief on December 15, 2011; however, that brief did not in substance address the Rule 60(b) issue, which is the issue in this particular appeal. Instead, the WVSP brief appears to address the substantive issues of the appeal in an attempt to surreply to the Petitioners’ reply to the substantive appeal. Petitioners are filing a separate brief in reply to the brief of the West Virginia State Police.

Therefore, when Plaintiffs' counsel arrived at hearing, an agreement was reached not to hear these motions. Specifically, Plaintiffs below reasonably understood that the Defendants and the court agreed to proceed with the hearing without addressing the four additional motions of the Defendants, and Plaintiffs below relied upon the Defendants' and the court's agreement that the motions at issue would not be argued or ruled upon. However, Respondents claim the following exchange on the record did not make clear the agreement among the parties and the court:

MR. MASTERS: Your Honor, Mr. Sweeney brought these – he has some motions here. I don't know if he meant to argue them just now or what, but he and I discussed them. I don't have a copy of those.

They, to my knowledge, were not noticed, or they certainly were not briefed that I was aware of, and I'm here on the motion that I thought I was appearing on, which is the motion to dismiss, based on summary judgment, which is in front of you and both – all parties briefed. That's the **one** I'm here on.

And I told him that those – if they have any relevance, I have no objection to bringing them on, I [sic] **just not prepared to address them this morning**.

THE COURT: **All right.**

MR. MASTERS: Is there an objection to that?

MR. SWEENEY: **No**, I just had one – you mentioned that our – **the only one that you're addressing is the Consolidated Public Retirement Board's Motion for Summary Judgment – it's a Motion to Dismiss**. Just a point of technicality.

THE COURT: **Okay.**

MR. MASTERS: All right. Well, maybe it's the State Police's Motion for Summary Judgment. All right.

MR. SWEENEY: Yes, sir.

(A.R. 1482-1483, emphases added.)

The Respondents argue that no agreement was made. Respondents claim that a different meaning should be attributed to the conversation, and stated in their brief, "It is equally reasonable to consider that Petitioners' counsel may be stating to the court that he informed the

movants' counsel, prior to the hearing, that he had no objection to the motions being brought for hearing." *See* Respondents brief at p.7.

Respondents wish this Court to believe that Petitioners agreed for the court below to hear and decide all four of the new motions at issue, without the Petitioners ever seeing them, responding to them, or arguing them. Note that Respondents do not expressly say that this interpretation was, in fact, the Respondents' understanding of the agreement on that day in court. Instead, they simply suggest this could be "considered" an interpretation. If the Plaintiffs below were simply consenting to going forward with the motions and waiving any argument on the motions at issue, as argued by the Respondents, the Plaintiffs would not have said that they are not prepared to address them *today*. If the parties were agreeing to hear all four motions, Respondents' attorney would not have said "**the only one that you're addressing is the Consolidated Public Retirement Board's Motion for Summary Judgment – it's a Motion to Dismiss.**"

In *Lawyer Disciplinary Bd. v. Cavendish*, 226 W.Va. 327, 335, 700 S.E.2d 779, 786 (2010), this Court held that "[s]tipulations **or agreements** made in open court by the parties in the trial of a case and acted upon are binding...." *citing* Syllabus Point 1, *Butler v. Transfer Corp.* 147 W.Va. 402, 408, 128 S.E.2d 32, 37 (1962) (holding the same rule would of course apply to pre-trial stipulations) [Emphasis added]. The *Cavendish* court further held that "A stipulation is a judicial admission. As such, it is binding in every sense...." *Id.* at 335, 779. "A stipulation between parties made in open court constitutes not only an agreement between the parties but between the parties and the court, and the court is bound to enforce the agreement for the benefit of the party interested and for the protection of the court's own dignity." CJS Stipulations, § 11 *citing Webster v. Webster*, 216 Cal. 485, 14 P.2d 522 (1932). Since there was

an agreement upon which the Petitioners relied, and the Respondents and the court below reneged upon that agreement, the Plaintiffs are entitled to relief pursuant to Rule 60(b)(1).

B. RESPONDENTS ESSENTIALLY ADMIT THERE WAS, AT THE VERY LEAST, A MATERIAL MISTAKE REGARDING THE AGREEMENT AT HEARING NOT TO HEAR THE MOTIONS AT ISSUE IN THIS APPEAL.

Rule 60(b)(1) of the *West Virginia Rules of Civil Procedure* states that on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, excusable neglect, or unavoidable cause. The West Virginia Supreme Court of Appeals acknowledged in *Kelly v. Belcher*, 155 W.Va. 757, 773, 187 S.E.2d 617, 626 (1972), that subdivision (b) of Rule 60 "should be liberally construed to accomplish justice."

Even if you assume Respondents' interpretation, it amounts to an admission by the Respondents that there was an agreement and, at the very least, that Plaintiffs below were operating under a mistaken understanding of the agreement.² Respondents argue that the terms of the agreement were not specific enough. However, even if the agreement terms were not specific enough such that the parties and the court were confused as to its meaning, as argued by the Respondents, such a mistake is precisely what justifies relief from an order. Therefore, Petitioners were entitled to relief under Rule 60(b)(1) on grounds of mistake, inadvertence, surprise and/or excusable neglect.

² From Respondents' brief: "Admittedly, a detailed review of the hearing transcript, informed by the knowledge of civil procedure, could lead to the conclusion that an agreement of the sort now argued by Petitioners was created, but if so, the agreement's terms would be the result of construction and not a matter of applying the clear terms from an offer and acceptance." Respondent's brief at pp. 7-8.

C. RESPONDENTS ESSENTIALLY ADMIT THAT THE MOTIONS AT ISSUE WERE NOT PROPERLY NOTICED. THIS ALONE JUSTIFIES A REVERSAL OF THE COURT’S ORDER PURUSANT TO WEST VIRGINIA RULE OF CIVIL PROCEDURE 60(b).

In their brief, Respondents do not argue that the motions at issue were properly noticed. “Notice of a hearing date enables a party to be heard ... lack of notice of a hearing date may be reason to open or vacate a judgment.” Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 5(a)(3d Ed. 2011). Pursuant to *West Virginia Rule of Civil Procedure* 6(d), a written motion and written *notice of hearing* on the motion must be served according to the time lines in Rule 6. Here, they were not. The Supreme Court’s decision in *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997), pointed out that the purpose of the notice requirement of Rule 6(d) is to prevent a party from being prejudicially *surprised* by a motion.

In fact, in *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974), this Court held that when a judgment of dismissal was entered against a party without the notice required by *W.Va. R.C.P* 6, the refusal of the trial court to vacate the dismissal order pursuant to a timely motion under Rule 60(b) constitutes an abuse of discretion, warranting a reversal and remand of the case. Adequate notice was not provided; therefore, Petitioners were denied proper notice and opportunity to be heard. This is a violation of procedural due process. These errors alone warrant a reversal under Rule 60(b).

The Respondents argue that their errors do not matter because the substantive order that should not have been entered to begin with is on appeal before this Court.³ In other words, the Respondents argue that because the Petitioners were required to timely file a notice of appeal of

³ From Respondents’ brief: “As the substance of the motions and dismissal order at issue are before the Court elsewhere, the dismissal order cannot be reversed merely on the basis of a purported procedural defect.” Respondents’ brief at p. 3.

the substantive order in 30 days under the new appellate rules,⁴ that the Petitioners have waived all rights to obtain a reversal on grounds of procedural error that occurred before and after the notice of appeal was required to be filed.⁵ Respondents also argue that there is no harm to their error because the Petitioners can argue their motions for the first time on appeal to this Court. In essence, Respondents ask this Court to find that there is no need for procedural due process in the trial court and no right to Rule 60(b) relief.

The eternal infinite term length of this litigation certainly begs for advancement toward a just finality with which Petitioners can agree; however, the trial court entered Respondents' proposed order dismissing Petitioners' complaint upon a preliminary finding that Petitioners neither opposed the motions nor filed opposition to the motions. With this preamble to the order, the clear message is that the trial court considered Petitioners' non-action as relevant to its decision.

In addition to the obvious constitutional and civil procedure violations implicated by the Respondents' argument, it is also legally inaccurate. The appellate standard of review is often different than the standard a Plaintiff must meet before the trial court. Even with a de novo appellate standard, it precludes the party from submitting affidavit, deposition or evidence in opposition to the motion and forces the party on appeal to rely only upon the documents submitted solely by the moving party. In this case, for example, Petitioners were not given an opportunity to argue that the motions were themselves a nullity, having not been timely filed.

⁴ Effective December 2010.

⁵ Respondents argue that Petitioners do not cite any case law on this issue to show that procedural arguments are not waived when a party appeals the substantive order. There is a reason for this. Under the old rules, a party had four months to appeal a decision. By that time, Rule 60(b) or other post trial motions were typically decided. That is not the case with the new 30-day notice of appeal requirement, and there is no case law under the new rule to cite.

D. THE RESPONDENTS ADMIT THAT THE MOTIONS AT ISSUE WERE FILED OUT OF TIME. THEREFORE, THE RESPONDENTS WERE IN DEFAULT AND THE COURT CANNOT ENTER AN ORDER ON MOTIONS THAT WERE A NULLITY BECAUSE OF THAT DEFAULT.

Respondents do not argue that the motions to dismiss of PERS, SPRS and the State in response to Petitioners' complaint were timely filed.⁶ Respondents do not argue that the motion for summary judgment filed by the WVSP, as their only responsive pleading, was timely filed. *West Virginia Rule of Civil Procedure 55(a)* specifies that, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." The motions of the WVSP, PERS, SPRS and the State are a nullity and they are "technically in default." Respondents brief at p. 14. Importantly, if the defaulting Respondents had filed a motion to set aside default, for example, as leave to file their first responsive pleading out of time, and properly noticed it for hearing, at least the Petitioners would have known about their existence. If the Respondents had sought leave of the court to file their amended response to Plaintiffs' complaint, the Plaintiffs would have known about their existence. Instead, the Respondents skipped this step. As a result of failing to file a motion for relief from default, or for any leave of the court, and failure to notice the motions at issue, the Petitioners were surprised to say the least when they appeared at the hearing.

Respondents argue that the out of time motions to dismiss of SPRS, PERS and the State, the out of time motion for summary judgment of WVSP, and the amended motions of CPRB and Miller did not require leave of the court because those motions are not pleadings. Pursuant to

⁶ The State, SPRS, PERS and WVSP were required to file a response to Plaintiffs' complaint, at the latest, on or before September 7, 1999. SPRS, the State, and PERS did not file a responsive pleading until November 4, 2009. (A.R. 1093-1104.) WVSP did not file a responsive pleading until June 1, 2010. (A.R. 1106-1201.) They did so without leave of the court below. Defendants CPRB and Miller filed amended motions to dismiss on November 4, 2009, without leave of the court below. (A.R. 1000-1092.)

Rule 12(a)(1) of the *West Virginia Rules of Civil Procedure*, Defendants had 30 days to respond to Plaintiffs' complaint. However, statutory law enumerated at *West Virginia Code* § 55-17-4(1) provides that a government agency shall be allowed 60 days to serve an answer to a complaint. Rule 12(a)(3) of the *West Virginia Rules of Civil Procedure* provides that a motion to dismiss under Rule 12(b) postpones the necessity of pleading until the motion is disposed of, and, if successful, no answer would be necessary. Pursuant to Rule 8(c) of the *West Virginia Rules of Civil Procedure*, "in pleading to a preceding pleading, a party shall set forth affirmatively estoppel, res judicata, and any other matter constituting an avoidance or affirmative defense." The failure to assert an affirmative defense results in a waiver of that defense. *Old Line Life Ins. Co. of America v. Garcia*, 418 F.3d 546 (6th Cir. 2005). Rule 55(a) specifies that, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." As the WVSP, PERS, SPRS, and the State were in default, they were required to move the court for leave to file a late affirmative defense to remove the default if they wished to base a motion to dismiss on it.

Respondents claim that because the Petitioners filed for and obtained proper leave of the court to amend their complaint in March of 2011, their default was cured because they responded to the amended complaint. However, Petitioners' motion was filed on August 25, 2010, and leave was not granted until after the argument before the Court on Respondents' motions to dismiss. Therefore, filing a motion to amend does not cure the failure to file affirmative defenses to the original complaint.⁷ The court then dismissed the complaint on March 30, 2011.

Respondents also argue that default should not be found against the State because you cannot obtain a default judgment against the State and that default is useless as against the State.

⁷ The WVSP never responded to the amended complaint.

However, *West Virginia Rule of Civil Procedure 55* distinguishes “default” and “default judgments.” This distinction was explained by Chief Justice Davis in *Cales v. National Fire & Ins. Co.*, 212 W.Va. 223, 569 S.E.2d 479 (2002). The Supreme Court held that “[a] default related to the issue of liability and a default judgment occurs after damages have been ascertained.” While under *West Virginia Code* § 55-17-4(2) a “judgment by default” may not be entered against a government agency, unless certain circumstances are met, this provision does not apply to entry of “default.” Therefore, the State or its agency can be subject to an order of default. Again, it would have made a difference here because, if Respondents had filed a motion for leave to file out of time or a motion for relief of default, the Petitioners would have known about the late pleadings.

Respondents further argue that, since the Petitioners never sought an order of default prior to the order granting Respondents’ out of time motions, they are relieved of their default. However, Rule 55(a) specifies that, “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and the fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.” While a motion by the Petitioner is required for a default judgment under Rule 55(b), no such motion by Petitioners is required under 55(a) to obtain a default, as it is automatic when the Respondent fails to comply with the rules. The Respondents’ actions and, in this case, failure to timely act, created the default. As the Respondents were in default by their failure to timely act, it was the Respondents’ burden to seek leave of the court to cure it, not the Petitioners’ burden to have the court memorialize their default under the language of Rule 55(a).

E. THE PETITIONERS ARE ENTITLED TO DUE PROCESS.

The failure to grant a Rule 60(b) motion can implicate issues of procedural due process. *State ex rel. Dept. Health & Human Res. v. Schwab*, 206 W.Va. 551, 526 S.E.2d 327 (1999). In their summary of argument, Respondents represent that the record “clearly demonstrates Petitioners were afforded the opportunity to argue the motions at issue both orally and in writing, on several occasions.” *See* Respondents’ brief at p. 3. Respondents do not cite anything in the “clear record” demonstrating these multiple opportunities. There was only one hearing on the substantive motions and that occurred on January 20, 2011, where the agreement not to hear the motions was made.

Respondents argue that all of their compounded error is excused and any reversal for those errors is pointless because they believe the Petitioners’ substantive appeals are “absolutely without merit.”⁸ Respectfully, many opposing parties believe that other parties’ arguments are meritless. One party’s opinion of the strength of the opposing party’s argument is not the benchmark to determine whether the opposing party is entitled to reasonable notice and fair opportunity to be heard. That right is guaranteed by our state constitution. Because the Petitioners were denied that right, there was a mistake of law and the Petitioners are entitled to relief from the order under Rule 60(b). Here, the problem is amplified in that the trial court made a finding that Petitioners did not oppose the motions and demonstrated no valid reason for so finding.

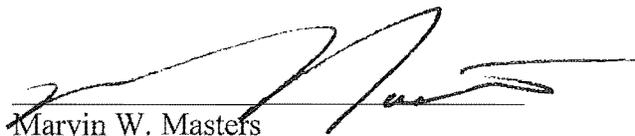
⁸ Respondents spend a portion of their brief arguing the substantive merits of the appeal. Petitioners disagree that their substantive appeal was absolutely without merit and refer the Court to their brief on the substantive appeal to address this issue. Respondents further argue, at p. 11, that the Petitioners have conceded the issue of collateral estoppel with regard to defendant Miller. Petitioners deny wholeheartedly that they ever conceded collateral estoppel with respect to any of Defendants.

III. CONCLUSION

Inasmuch as the trial court erred by failing to grant the Plaintiffs relief from the March 31, 2011 order, the Plaintiffs respectfully request that the June 29, 2011 order denying Plaintiffs' Rule 60(b) Motion for Relief from Judgment be reversed, the Plaintiffs' Motion for Relief from Judgment be granted for good cause shown, and that the March 31, 2011 order be set aside and this case remanded for further proceedings with proper notice and proper procedural due process, including whether Plaintiffs are entitled to default.

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, Wife and
Infant Daughter of Douglas Wayne Bland;
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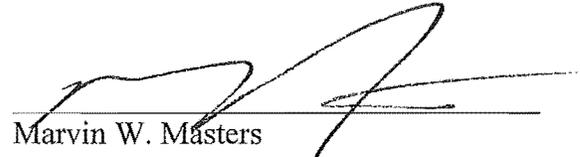
CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Plaintiffs below/Petitioners, do hereby certify that true and accurate copies of the foregoing **“Petitioners’ Reply to Response Brief of State of West Virginia, West Virginia Consolidated Retirement Board, West Virginia State Police Retirement System, West Virginia Public Employees Retirement System, and Terasa Miller”** were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 22nd day of December, 2011.



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