IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0746

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' BRIEF

Marvin W. Masters
West Virginia State Bar No. 2359
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
mwm@themasterslawfirm.com
Counsel for Plaintiffs below, Petitioners

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II. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

This is an appeal of an order entered March 30, 2011, by the Circuit Court of Kanawha County dismissing petitioners' complaint against the State of West Virginia, West Virginia State Police Retirement System (hereinafter "SPRS,") West Virginia Public Retirement Board (hereinafter "CPRB,") West Virginia Public Employees Retirement System (hereinafter "PERS") and Terasa Miller, Executive Director of the CPRB (hereinafter "Miller.) The Court dismissed the West Virginia State Police (hereinafter "WVSP,") as well, which order is subject to a separate appeal before the Supreme Court of Appeals of West Virginia, Appeal No. 11-0747. In petitioners' civil action, they requested monetary damages and equitable relief which is more

specifically explained below. Petitioners' civil action alleges that the CPRB and WVSP agencies of the State of West Virginia misrepresented facts concerning the retirement pension plan and benefits they would receive if they accepted employment with the WVSP. Petitioners' causes of action included claims based on torts, contract, statutory and constitutional rights, remedies and breaches.

Because the respondents CPRB and Miller filed motions to dismiss based upon the affirmative defense of collateral estoppel and later *res judicata* (A.R. 928-1104), and since the trial court dismissed the complaint on the basis that all of petitioners' causes of action against them were barred by application of *res judicata* and/or collateral estoppel (A.R. 1697-1716), procedural history of not only the subject complaint is relevant, but petitioners are compelled to recite the history of the proceedings relied upon by the trial court in dismissing the complaint.

The prior actions can all be summarized, however, as administrative grievances requesting the CPRB to place petitioners into the retirement or pension system under which they were hired. This took from 2001, when the grievance was filed, to 2008, when the CPRB entered the last final order. The other actions were unsuccessful attempts by petitioners from 2002 to 2005 to enforce the CPRB's 2002 decision, which was in their favor (A.R. 1-23), and to prevent the "coerced" decision later made by the CPRB in 2003 (A.R. 24-161). Petitioners appealed the administrative grievance to the Circuit Court and attempted appeal to the Supreme Court of Appeals.

(a) History of Proceedings Prior to Filing Subject Complaint.

The long history of this action began as an administrative appeal filed on December 5, 2001, by West Virginia State Troopers of the 42nd, 43rd, 44th and 45th cadet classes. There were 143 troopers or beneficiaries of estates who were grievants. Due to the length of the

proceedings, the first hearing on the troopers' grievance was not heard until November 13, 2002 -- 11 months later. At this hearing, the West Virginia Consolidated Public Retirement Board (hereinafter "CPRB") found in favor of the West Virginia State Troopers and ordered that they be transferred from Plan B to Plan A[1]. At this hearing, the CPRB hearing examiner told the Board: "[T]here's no question that these folks were misled. . . . There's no question that these people were told wrong." (A.R. 6.) All of the procedures were properly followed leading up to the CPRB's decision. After this decision, however, there was a firestorm by legislators and other state representatives against the members of the CPRB, which were published in the public media. (A.R. 234-235, 243-248 & 258-264.) A bill was introduced in the legislature to hold the Board Members personally liable for the pension fund (A.R. 236-242), and the Board Members were "invited" to a "fiduciary responsibility seminar" on November 12, 2002, to be taught by the Board's law firm. This was scheduled the day before the Board was to meet and decide a reconsideration of its previous decision.

Due to this coercion, the CPRB scheduled a meeting to reconsider its decision for January 22, 2003. The grievants were given no notice of the hearing, but petitioners' counsel heard about it and attended. One Board Member requested that counsel for grievant be permitted to speak (A.R. 30), but the Chairman refused to allow it. (A.R. 31.) When petitioners' counsel attempted to rise and speak he was ruled out of order. (A.R. 56-57.) The proceedings, therefore, took place without notice to the grievants or an opportunity to speak. At this hearing, the Attorney General representative advised the Board that its own procedures required that any

[1] Throughout the proceedings below the parties have referred to West Virginia State Police "Plan A" and "Plan B" as a shorthand way of identifying two separate retirement plans for West Virginia State Troopers. Plan A was established decades ago and was the retirement and disability plan that attracted personnel to the West VirginiaState Police for years. *See* W. Va. Code § 15-2-26 *et seq.* Plan B was adopted by the Legislature in 1994, but was not used for hiring purposes by the West Virginia State Police for the troopers who are petitioners hired in 1994 and 1995. Plan B provided only approximately one-half of the benefits to West Virginia State Troopers. *See* W. Va. Code § 15-2A-1 *et seq.*

appeal of the Board's decision must have been brought within 30 days from their decision and that there was no appeal. Therefore, the November 13, 2002, decision should have been final. During the hearing, members of the Board expressed their objection to the threats and intimidation.

> MR. MCGINLEY: ....I think it's a little reprehensible that we make one vote, albeit an important vote that we voted our conscience and the next thing we know, we're being threatened with personal liability which finance is under and I think that's ... a shame. I think it's a shame that we make one vote for our conscience and a bill's introduced in the Legislature to have us all, all our terms are up April 1st. I think that's a shame.... [I]t borders on despicable,...

(A.R. 40-42.)

> AUDITOR GAINER: Now, the personal liability issue, I will agree. I went through the roof. There's a new hole over in the East Wing where my office is at or West Wing because I detest having those kinds of charges made at me when I know full and well what the law is.... If we're going to take that avenue, then we should hold the whole legislature in contempt for many of their actions and many of their votes. That's a bogus argument and that's an argument that should have never been made and I'm still furious that that was even brought up. That was wrong,...

(A.R. 44-45.)

> MS. HUGHES: ....**[T]here have been many attempts** through newspaper articles, through Legislation that has been introduced **to intimidate individual Board members from exercising their independent authority**....

(A.R. 30, emphases added.)

The Board acknowledges that there was no dispute as to the evidence before them as to whether the troopers were misled.

> AUDITOR GAINER: ....Now, who provided the false information, the erroneous brochures, I've seen some of the information as I'm sure everybody on this Board has. Was there wrong information supplied? Probably there was. I mean, I'm no dummy. I can read and I can look at dates and I can see what gentlemen were provided and these gentlemen, I'm sure, made their decision based on a good faith commitment to the State of West Virginia based on the information provided them,...

(A.R. 54.)

> MS. HUGHES: **At the last hearing prior to voting, I asked what -- is there any dispute that these officers and Troopers were given erroneous information and we were told no. No, there was no dispute.** So individuals that put their life into a promise made to the state that they would receive certain benefits, entered into the academy, took on the duties of a police officer and worked as a police officer for eight, nine years before they even knew or anybody advised them that the plan that they were donating their salary to was the wrong plan and that's not right....

(A.R. 37-38, emphasis added.)

The CPRB members admitted that there were problems with Plan B and that it should be fixed, but the CPRB opted for the Supreme Court of Appeals or the Legislature to fix it. As the Auditor, Glen Gainer, stated:

> AUDITOR GAINER: ....[W]e need either a mandamus from the Supreme Court to make that switch and/or authorization from the legislature to make that switch. It doesn't make any difference to me which avenue it comes from, but I believe those are the two avenues out there, either a mandamus from the court -- you know, in my business as auditor, unfortunately I have to make decisions all the time and I have to deny payments all the time.... **They have the authority to do that. That's why we have a Supreme Court. I think that's where ultimately this case was going to have to be heard....**

(A.R. 55, emphasis added.)

Therefore, the CPRB decided to reverse its earlier decision granting petitioners relief because the CPRB determined it did not have the authority to transfer the troopers.

> AUDITOR GAINER: ....[L]et me say that I support the Troopers and I believe there are deficiencies in Plan B that need to be corrected by the Legislature and I would encourage the Legislature to do that. ... [W]e, as a Board, did not have the authority to transfer those Troopers from Plan B to Plan A and that is what compels me to reconsider this issue, that I do not want to violate the laws that we are all here to uphold and the responsibilities that we're here to uphold and do something no matter how right it may be that we're operating within the legal jurisdiction we have as a Board and that's a concern that I had.

(A.R. 31-32.)

> AUDITOR GAINER: ....**The issue with Plan A and Plan B, there's no question that the disparity between those two plans is like the Grand Canyon and I believe that the State Troopers deserve to know that if they become disabled on the job they're going to be taken care of, their family is going to be taken care of. I think of the widow over in Pocahontas County.** That's a responsibility of the state to do that.

(A.R. 43-44, emphasis added.)

> AUDITOR GAINER: Now, it is my understanding and advice from my counsel that **this Board doesn't have the authority to do that. I've got to follow that. I don't like it because I think the Troopers are – there are equities and disparities between these two plans that need to be addressed.** I don't believe we're the venue to do that. I don't think we can do that as a Board....

(A.R. 45, emphasis added.) The CPRB voted 7-2 in favor of transferring the troopers to Plan A in the November 13, 2002, hearing, and, under threat of personal liability, voted 8-5 against the same motion on January 22, 2003. The CPRB determined, however, in the January 22, 2003, hearing that the "matter be remanded back to the Hearing Officer to conduct individual hearings for **each petitioner**." (Minutes of November 13, 2002, and January 22, 2003, meetings of CPRB.) These hearings for the 143 petitioners took from 2003 to 2008, with the CPRB issuing two "Final Orders" dated May 18, 2006, (A.R. 363-394) and June 3, 2008. (A.R. 689-773.) The Board adopted the recommended decisions. (A.R. 362 & 688.) At the May 17, 2006, hearing before the CPRB, its hearing officer reaffirmed his previous findings. He stated:

> Unfortunately, some of these people while in the process of being recruited were told before this law was passed that, they were told about the features of Plan A. They made their decision to become state troopers based upon what they were told about Plan A.
>
> Everybody, except for one -- everybody relied upon this recruiter's brochure. It doesn't have all of the plan benefits in it, but it has some of the principal benefits. **Everybody relied upon it**, but the law then changed....
>
> ***
>
> There is some evidence that some of the old brochures remained out in the detachments as late as 2001 and they have been distributed to people coming in (inaudible).
>
> This is a real mess, you know, what these folks were being told.

(A.R. 351-360 at 352, emphasis added).

> [T]he evidence has shown that all four classes were misled thus far.
>
> * * *
>
> [The Troopers] didn't learn about it actually what had occurred until as late as 2000.

(A.R. 351-360 at 355.)

Further, Mr. DeBolt acceded that the Board had changed its vote because of politics.

> MR. DEBOLT: At the heart of the matter, I think it was political ... I think there was pressure brought upon this board ...

(A.R. 351-360 at 355-356.) The Hearing Officer's Findings of Fact in his Recommended Decision of February 17, 2006, reiterated his verbal report above. (A.R. 363-370.) After the CPRB reversed itself on January 22, 2003, the petitioners attempted to obtain relief from the West Virginia Supreme Court of Appeals and the Circuit Court of Kanawha County, as follows: Petitioners filed a petition to the West Virginia Supreme Court asking the Supreme Court to stay proceedings before the CPRB on January 17, 2003, which motion was refused by the Supreme Court on January 21, 2003. The petition requested the Supreme Court to order the Board to comply with its November 13, 2002, decision. The Supreme Court declined the petition on March 27, 2003. (A.R. 162.) Petitioners then filed their petition for writ of mandamus requesting the same relief in the Circuit Court of Kanawha County on November 19, 2003. (A.R. 163-287.) The Circuit Court ruled that the CPRB had the authority to reconsider its November 13, 2002, decision and denied petitioners' writ by Order dated November 17, 2004. (A.R.

288-292.) This order was appealed to the West Virginia Supreme Court on March 17, 2005, (A.R. 293-348) and the Supreme Court declined the appeal on May 25, 2005. (A.R. 349-350.) Therefore, the administrative proceeding continued before the CPRB.

On April 19, 2006, petitioners appealed the CPRB Final Orders in the grievance proceedings to the Circuit Court of Kanawha County. The Circuit Court, Judge Kaufman, ordered the following certified question be submitted to the West Virginia Supreme Court on June 8, 2007:

> Can promises by a state agency given to prospective employees on pension benefits bind the Consolidated Retirement Fund to honor the promised benefits if said promises are inconsistent with the statutory pension requirements and statutorily entitled benefits of the fund?
>
> ANSWER: No, as a matter of law.

(A.R. 515-518.) The Supreme Court refused to hear the petition for certified question by Order dated October 24, 2007. (A.R. 658-659.) Thereafter, on November 20, 2008, the Circuit Court of Kanawha County entered its order denying petitioners' appeal. (A.R. 860-869.) Petitioners appealed that decision to the Supreme Court, which declined petitioners' appeal on May 13, 2009.

(b) History of Proceedings Relating to Subject Complaint.

Petitioners filed this action on January 2, 2007, on behalf of themselves and the other troopers in the same or similar circumstances. (A.R. 395-428.) Respondents filed motions to stay this action on the basis that petitioners had not exhausted their administrative remedies since their appeal of the January 22, 2003, CPRB decision had not been finalized. (A.R. 429-503.) The Circuit Court, Judge Stucky, granted the stay on May 21, 2007, (A.R. 512-514), which was not lifted until July 8, 2009. (A.R. 927.)

None of the respondents filed an Answer to the Complaint. The trial court in its order dismissing the complaint, recited its own summary of petitioners' allegations and causes of action as follows:

> 6. Plaintiffs allege various causes of action, including breach of contract (Complaint ¶¶ 110-11, Count I), misrepresentation (Complaint ¶¶ 112-13, Count II), detrimental reliance (Complaint ¶¶ 114-15, Count III), violation of the constitutional right to due process (Complaint ¶¶ 116-17, Count IV), an action to compel the defendants herein to bring an action to compel the Legislature to fully fund the relevant pension plans (Complaint ¶¶ 118-22, Count V), and an unspecified action based upon the Board's refusal to transfer the plaintiffs into Plan A (Complaint ¶¶ 123, 25, Count VI). Plaintiffs also seek to have the instant action treated as a class action (Complaint ¶¶ 126-36, Count VII; Complaint at 31, Prayer ¶ 9).
>
> 7. Plaintiffs request compensatory and punitive damages, and other general relief (Complaint at 30-31, Prayer ¶¶ 1-3,8, 10), that the Court order an accounting of the amounts due the plaintiffs' pension plan and that the Court order the defendants herein to bring an action to enforce full funding should the accounting show that the plan has not been fully funded (Complaint at 30-31, Prayer ¶ 4), that the Court determine that the Board's prior proceedings relating to the plaintiffs' claims were not fair nor adequate and that the Court further rule that it now has jurisdiction over plaintiffs' claims for the purposes of further proceedings (Complaint at 31, Prayer ¶¶ 5-6), and that the Court rule that plaintiffs are entitled to be transferred into Plan (Complaint at 31, Prayer ¶ 7).

(A.R. 1697-1716.)

No defendant filed an answer to the complaint. Defendants CPRB and Miller filed a motion to dismiss. The remaining defendants filed motions to dismiss two months out of time and without leave of the circuit court. In its Final Order, the Circuit Court dismissed the CPRB and Miller, holding that all causes of action in petitioners' complaint against CPRB were barred by *res judicata* or collateral estoppel because of the administrative actions. The action against Miller was dismissed on the basis of collateral estoppel. The State of West Virginia was dismissed because the court held "the State cannot to [sic] be treated as a separate and independent entity, or a separate and independent defendant,..." (A.R. 1697-1716 at ¶ 32.) PERS and SPRS were dismissed because the court claimed there was no cause of action alleged

against those agencies, and the real party in interest was the CPRB since "the defendant Board administers SPRS, pursuant to ... West Virginia Code § 5-10D-1(a),..." and PERS "is alleged to be administered by defendant Board pursuant to West Virginia Code § 5-10D-1...." (A.R. 1697-1716 at ¶¶ 37 & 41.) The Circuit Court dismissed the action against the State Police[2] based upon sovereign immunity, claiming the State's insurance policy excepted this cause of action and also that *res judicata* barred it, and "this Court may not confer retirement benefits for employment where the legislature has not so authorized...." (A.R. 1690-1696 at ¶ 10.)

The respondents CPRB and Miller filed a *W.Va.R.C.P.* 12(b)(6) motion to dismiss on August 3, 2009. (A.R. 928-999.) The WVSP filed its Motion for Summary Judgment on June 1, 2010. (A.R. 1106-1201.) On November 4, 2009, the respondents, State of West Virginia, SPRS, PERS, CPRB, and Miller filed additional 12(b)(6) motions.[3]

These motions were not filed in time pursuant to *W.Va.R.C.P.* 8 and 12 or by *W.Va. Code* §55-17-4(1), and, more importantly, they were filed without leave of court. (A.R. 1482-1483; *see also* A.R. 1524-1540.)

2. STATEMENT OF FACTS

What happened in the recruitment and hiring of the petitioners in the period between 1991 and 1996 is undisputed. The petitioners and the other young men and women in their classes who were recruited by the State of West Virginia to be West Virginia State Troopers were enticed to abandon other career choices in reliance upon this State's promises that they and

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[2] This order is on appeal and subject to a separate briefing. However, the petitioners have moved to consolidate.

[3] (1)Amended Motion to Dismiss of the West Virginia Consolidated Public Retirement Board (A.R. 1000 1018;)
(2)Amended Motion to Dismiss of Defendant Terasa L. Miller (A.R. 1019-1092;)
(3)Motion to Dismiss of the Defendant, State of West Virginia (A.R. 1093-1098;)
(4)Motion to Dismiss of Defendants, West Virginia State Police Retirement System and West Virginia Public Employees Retirement System. (A.R. 1099-1104.)

These four motions are the subject of a notice of appeal now filed with a request for consolidation with his appeal. The petitioners argued that these motions should not have been heard and decided as the Court did.

their families would have the benefit of the State's advertised retirement and disability plan. As explained below, the CPRB and its hearing officer in the first hearing recognized that petitioners were misled and knew that they were entitled to relief.

What began for the petitioners as a bad dream ended in a nightmare. These young men and women fully expected -- once they learned in the period 2000-2001 that they had been placed in a retirement plan they knew nothing about -- that the CPRB or the State would place them in the retirement plan they were promised. Of course, the CPRB did just that on November 13, 2002, when it ordered them to be placed into "Plan A" as provided for in *W.Va. Code* § 15-2-26 *et seq.*

One of petitioners who filed this action include the wife and child of Trooper Douglas Wayne Bland, who was killed in the line of duty. (A.R. 1345.) The widow of Wayne Bland was pregnant at the time of his death, and she and her daughter have lived on half of the benefits Trooper Bland was promised. (A.R. 1345.) Another petitioner is Trooper Robert Joseph Elswick, who was shot in the head in the line of duty, suffering a serious brain injury forcing him to retire disabled. (A.R. 1350.) He and his family will have to live on half of the pension he was supposed to receive.

Trooper Michael Lynch's experiences is instrumental in understanding the recruitment and hiring process. Trooper Lynch grew up in West Virginia, obtained a bachelor's degree from West Virginia University, joined the Air Force and was stationed in southern California. (A.R. 1318.) He decided to either go to law school, pursue a career in law enforcement with the Orange County, Sheriff's Department in California, or with the Federal Bureau of Investigation. (A.R. 1318-1319.) He heard that West Virginia was hiring state troopers so he called them in 1991 and received a brochure in the mail. (A.R. 1319.) He would have been hired by the FBI,

but decided to apply to the West Virginia State Police because of its retirement and disability benefits. Therefore, he sent in his application prior to March 4, 1991. (A.R. 1319.) He received a "conditional offer of employment" from the WVSP on January 11, 1993, long before the passage of Plan B. (A.R. 1319.) He complied with all of the conditions. (A.R. 1320.) While he tested with the 41st Class, which is under Plan A benefits, he was not officially sworn in until September 12, 1994. (A.R. 1321.) It was never explained to him that his retirement/disability benefits were different from any other trooper or different from the brochure he was sent in California. (A.R. 1321.) Had he been told he was under the Plan B benefits, he would not have accepted employment with the WVSP because the retirement plan made the difference. (A.R. 1321-1322.) He would have made $70,000 as a deputy sheriff in California compared to $35,000 as a West Virginia State Trooper. (A.R. 1322.)

The first pamphlet explaining Plan B retirement that Trooper Lynch received was in 2002. (A.R. 1323.) The police trooper manual, which he had received yearly from 1994-2000, always contained Plan A benefits as the only retirement plan. (A.R. 1323.) The respondents claim the petitioners were provided a document describing Plan B. The form only had the words "per 15-2A." (A.R. 1323.) This was meaningless to him. It did not say "W.Va. Code, Chapter 15-2A." It did not advise a new employee of his retirement benefits or that the retirement system was changing. He relied upon the brochure that the State of West Virginia and its agencies provided to him. (A.R. 1323.)

The same is true for Trooper Brad Lee Mankins who is married and had two girls, ages 6 and 3. Trooper Mankins was in the Navy with an opportunity to go to officer candidate school. (A.R. 1370-1379.) Shawn Coleman had an opportunity to join the Ohio State police with $10,000 more salary annually. He was given the brochure and went through application and

testing. He, like several others, was tested with the 1993 Class (41st Class.) (A.R. 1360-1369.) Trooper Coleman is now married with two children, a two-year old daughter and a four-year old son.

The petitioners and members of the 42nd to 45th classes' stories with respect to their recruitment and hiring are essentially the same. While they each came from somewhat different backgrounds, most had college degrees, were young men and women who were on the brink of choosing their life's career. They were impressed and enticed by the State of West Virginia's retirement disability plan for West Virginia State Troopers and they chose the security that the retirement provided for themselves and their families. (A.R. 1317-1406.)

(a) The West Virginia Consolidated Public Retirement Board.

While it is clear what occurred in the recruitment and hiring of the troopers, it is not clear why the CPRB and/or the legislature did not implement the provisions of *W.Va. Code* § 15-2A-1 *et seq*, but they didn't. Why did the CPRB not advise the WVSP and its new hires that beginning in March 1994, all classes were to be in a retirement plan with half the benefits of the previous plan?

Neither these young men and women nor their families were involved in or knew of the turmoil surrounding the troopers' pension benefits in West Virginia in the early 1990s. The West Virginia Supreme Court addressed the constitutionality of the 1994 amendment to *W.Va. Code* § 15-2-26 and § 15-2-27(a)(2) [1994], in its opinion in *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 175 (1994). The Court noted that "[t]he legislature also enacted a new retirement system" referencing "W.Va. Code § 15-2A-1 to 15-2A-19." (*Id.* at 175, f.n. 6.) This case was submitted October 12, 1994, and decided December 15, 1994. The Supreme Court granted a writ, ordering respondents to forbear in implementing the part of the amendment the Court

deemed unconstitutional. (*Id.* at 188.) It is undisputed that there were two retirement plans for troopers in existence in 1994 which continued and have never been repealed and neither refer to the other. *W. Va. Code* § 15-2-26(a) reads:

> "There shall be continued the death, disability and retirement fund heretofore created for the benefits of members of the division of public safety and any dependent of a retired or deceased member thereof."

This article of the code does not limit its applicants to any time period. *W. Va. Code* § 15-2A-1 states in part:

> (a) "...Any West Virginia state trooper employed by the West Virginia state police on or after the effective dates of this article shall be a member of this retirement system and may not qualify for membership in any other retirement system administered by the consolidated public retirement board."

The language of *W.Va. Code* § 15-2A-3(e) is confusing in that it appears to incorporate all troopers "employed on" the effective date as well as those employed afterwards.

Prior to 2001, *W. Va. Code* § 5-10D-1 [1994] provided as follows:

> (a) There is hereby created a consolidated public retirement board to administer all public retirement plans in this state. It shall administer the public employees retirement system established in article 10, chapter five of this code; the teachers retirement system in article seven-a, chapter eighteen of this code; the teachers' defined contribution retirement system created by article seven-b, chapter eighteen of this code; the death, disability and retirement fund of the department of public safety created by article two, chapter fifteen of this code; and the judges' retirement system created under article nine, chapter fifty-one of this code;
>
> (e) The consolidated public retirement board shall have all the powers, duties, responsibilities and liabilities of the public employees retirement system established pursuant to ...the death, disability and retirement fund of the department of public safety created pursuant to article two, chapter fifteen of this code...the consolidated public retirement board may promulgate all rules necessary to effectuate its powers, duties and responsibilities: Provided, That the board may adopt any or all of the rules, previously promulgated, of a retirement system which it administers.

Plan B, *W.Va. Code* § 15-2A-1 *et. seq.* was enacted in 1994. The title of the article is "West Virginia State Police Retirement System Act" and *W. Va. Code* 15-2A-3 is titled "Creation

and administration of West Virginia state police retirement system; leased employees; federal qualification requirements."

Section 15-2A-3(c) provides the following:

> (c) The consolidated public retirement board created pursuant to article ten-d [§§ 5-10D-1 et seq.], chapter five of this code shall administer the West Virginia state police retirement system. The board may sue and be sued, contract and be contracted with and conduct all the business of the system in the name of the West Virginia state police retirement system.

The CPRB never treated the West Virginia troopers as if it were actually administering Plan B. It treated them differently from any other of the many plans it administers. Respondent Miller as a *W.V.R.C.P* 30(b)(7) witness , admitted this, claiming she wasn't aware of this trooper pension issue until 2001.

Petitioners took the deposition of the CPRB by designated agent pursuant to *W.V.R.C.P.* 30(b)(7). (A.R. 1206-1224.) Respondent Miller testified for the CPRB that, as a business practice, they prepare brochures for the employees in their system and send them an annual statement explaining to each member what their benefits are and the employees' status, but they did not do that for the troopers, judges or deputy sheriffs in 1994-1996. (A.R. 1209 & 1211.) The CPRB has no documents, minutes or otherwise, which demonstrates that **any** information was sent to the WVSP administration or to the troopers or recruits until after 2000. (A.R. 1211-1212.)

Respondent Miller did not become aware of the issue with the 1994-1996 recruits until 2001. (A.R. 1215.) "Anytime there are legislative changes, we update our brochures to our members with those changes." (A.R. 1216.) "[W]e try to educate our payroll clerks to where they properly submit contributions and forms. . . ." (A.R. 1217.) She also stated that the State

Police, as well as other agencies, are expected to be able to rely on the accuracy of the Retirement Board in advising the plan benefits for their employees. (A.R. 48.)

The Retirement Board has no information or knowledge that demonstrates that recruits or troopers were told verbally or otherwise about Plan B. (A.R. 1219.) The CPRB's only position is that the reason plaintiffs were not put into Plan A was because *W. Va. Code* § 15-2A-(3) does not permit them to be. (A.R. 1220.) And the only document the State of West Virginia has, which was provided to the troopers, other than the Plan A documents was an enrollment form which states one thing: "per 15-2A." (A.R. 1220.) It doesn't refer to the West Virginia Code, just "per 15-2A." The CPRB intended for the recruits or employee to read and rely on the truth and accuracy of the brochures they received. (A.R. 1213.)

(b) The West Virginia State Police.

Petitioners alleged in their complaint that the CPRB had the responsibility and duty to inform applicants and employees as to the retirement benefits they were to receive based upon employment with the WVSP. (A.R. 395-428 at ¶¶ 40-42.) Also the WVSP had a right to rely on the CPRB to accurately and fully inform its employees of the benefits and qualifications for the same since the CPRB was legislatively granted the sole and exclusive right and duty as a fiduciary to administer the retirement system. (A.R. 395-428 at ¶ 43.)

Prior to the amendments in 1994, *W.Va. Code*, 5-10D-1(a) and (b) granted the CPRB its "powers, duties, responsibilities and liabilities" for the State of West Virginia retirement system including the department of public safety's Plan A. The legislature never added Plan B to the list of retirement plans in *W.Va. Code* § 5-10D-1 until 2001, which is the approximate time the Executive Director of CPRB testified she became aware of petitioners' issues with regard to Plan A and Plan B.

The WVSP's own recruiting coordinator testified that he never knew that there was a new retirement plan with half the benefits of the one described in his brochures. The State Police Recruiting Coordinator, Dale Humphreys, testified that he aggressively recruited young men and women during the period 1994-1999 using the brochures he had always used, which clearly set forth Plan A benefits as being the retirement benefits to which the plaintiffs would be entitled. (A.R. 1225-1235, at 1226-1229.) Mr. Humphreys testified this was utilized up until he retired in 1999. In fact, he stated that the retirement plan was one of the most useful tools he used in selling young people on signing up for the West Virginia State Police. He used it to persuade them to join and that it worked. (A.R. 1226-1229.) Mr. Humphreys also testified he never heard of the other plan or its applicability to the classes he was recruiting. (A.R. 1227.) Further, Plan A benefits were the only benefits described in the State Police law manual commonly referred to as the "bible." The WVSP's recruiting coordinator testified that he was totally unaware and no one told him it had changed. (A.R. 1226-1227.)

Not only did the recruiting coordinator continue to use the Plan A brochure, but the WVSP each year forwarded to each trooper a manual which was referred to as their "bible." This manual, among other things, described the troopers' retirement/disability benefits. The only description was for Plan A benefits. (A.R. 1227.)

III. SUMMARY OF ARGUMENT

The respondents did not file answers to the complaint but filed for a stay which the trial court granted pending resolution of the administrative proceeding. After the stay was lifted, the respondents CPRB and Miller chose to not file an answer, but to assert 12(b(6) affirmative defenses, some out of time, based solely upon res judicata and collateral estoppel.[4] The trial

[4] Petitioners do not waive their objections to the defendants' assertion of defenses out of time.

court granted the motions solely on that basis as to those respondents. The other respondents filed motions claiming basically that they were not proper parties for one reason or the other. The State of West Virginia was dismissed on a motion that requested dismissal or that the complaint limit its responsibility as a part to the acts or conduct of its agents, the CPRB and WVSP. The two retirement systems were dismissed because they were deemed unnecessary parties with the CPRB as the real party in interest. The trial court was clearly wrong in finding that the CPRB's decision on various issues barred any of petitioners' claims including for the following reasons:

1. The CPRB claimed and the Circuit Court of Kanawha County found it did not have authority (jurisdiction) to provide petitioners the relief requested and, therefore its rulings cannot be used as a basis for issue preclusion;

2. The CPRB's procedures did not provide petitioners with a full and fair opportunity to litigate any of their claims because:

   (a) Its procedures are "designed" for economic adjudication of pension issues;

   (b) It does not offer Rules of Civil Procedure or discovery procedures like are in Circuit Court;

   (c) There is no notice and opportunity to appear and present their case to the CPRB;

   (d) The hearing officer decides the case and the CPRB is required to adopt it unless it is clearly wrong and the remaining appeals are basically affected with the same rule except as to issues of law; and

   (e) The CPRB was subjected to coercion and intimidation with regard to petitioner's claims and its succumbed and reversed its decision.

3. The CPRB's procedures and its legislative mandate does not contemplate that it will decide tort causes of action or issues related thereto;

4. This action is against the CPRB and other defendants based on the CPRB's acts and omissions and it essentially decided issues which it claims exonerates it; and

5. The issues are not identical to the issues as presented to the CPRB.

This action was filed against the West Virginia Consolidated Public Retirement Board and its Director, Terasa L. Miller, the West Virginia State Police, as well as the State of West Virginia, the West Virginia State Police Retirement System and the West Virginia Public Employees Retirement System. Respondents admit that plaintiffs in this class action are requesting compensatory damages, as well as various other damages. As this Court is well aware, grievance proceedings before the Retirement Board could only provide plaintiffs with one remedy, which was to be placed in the proper retirement plan. It could not pay plaintiffs damages for being misled into joining or choosing the West Virginia State Police instead of other alternatives. The Retirement Board denied plaintiffs' grievance and appeal because it claimed it did not have the statutory authority to place plaintiffs into "Plan A". This class action claims damages as a result of torts committed by the defendants, which caused them to join in the first place.

The defendant West Virginia State Police contends that plaintiffs seek the same relief in this lawsuit as previous actions brought to address the grievance procedures. Plaintiffs won the administrative grievance proceeding before the West Virginia Consolidated Public Retirement Board (hereinafter "Retirement Board") by an Order of the Retirement Board placing plaintiffs rightfully in Plan A. However, without providing plaintiffs any hearing, the same Retirement Board, after *ex parte* pressures from politicians, changed their votes and denied plaintiffs their retirement under Plan A. Plaintiffs appealed this latter ruling, which ultimately was denied. That appeal, however, was decided on the basis of the underlying record. Had plaintiffs' won, their remedy was a reversal of the Order by the Retirement Board, which would have placed them under Plan A. Not only did plaintiffs not recover compensatory damages, but they could not have recovered damages in that administrative proceeding or on appeal.

There is no issue as to whether or not plaintiffs changed their career choices to join the West Virginia State Police because of the retirement under Plan A. The Retirement Board's hearing examiner, Mr. Jack DeBolt, heard the evidence and, at the hearing on November 13, 2002, reported to the Board:

> [T]here's no question that these folks [troopers] were misled as to what the state of the law is. In the recruiting brochures and in the, I guess what could be considered the State Police Bible, which is a book that contains all matters of information about proposed statutory requirements for the criminal law, as well as the law governing state troopers, the changes reflecting Plan B didn't go in there for a long, long, long time. **There's no question that these people were told wrong.**

(*See* **Exhibit 1**, Transcript of Hearing dated November 13, 2002, at p. 6 (emphasis added).)

One of plaintiffs' claims for relief under the Complaint is for compensatory damages. Plaintiffs were misled into making a career choice that was based on false information. These plaintiffs in choosing to become a West Virginia State Trooper gave up their rights to coverage under workers' compensation and social security. Years later they found out that they had been duped by the Retirement Board and the State Police when they were hired. The Retirement Board had the duty and responsibility to inform the West Virginia State police and plaintiffs of the true retirement benefits the plaintiffs were entitled to if they joined the West Virginia State Police.

In the civil action, petitioners claim that the CPRB and WVSP are State of West Virginia agencies, with somewhat different statutory and/or common law duties. Petitioners contend that respondents provided petitioners with false information during their recruitment and hiring and petitioners were significantly damaged.

In the civil action, the issues are whether the defendants had a duty to provide accurate information and failed in that duty either by providing misleading information, false information

or no information. *Restatement Second, Torts* §551-552; *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 752 (W.Va. 1998;) *Teter v. Old Colony Co.* 190 W.Va. 711, 717, 441 S.E.2d 228 (W. Va. 1994), Folio v. City of Clarsburg, 221 W.Va. 397, 425, 655 S.E.2d 143, 151 (W.Va. 2007.)

The issues related to the other causes of action are not identical either. The trial court found that "virtually every factual allegation and point of law alleged, asserted or argued in the instant action against the Board, has been considered by the Board, or by this Court, either directly or on appeal from the Board.:" (A.R.1711.)

Setting aside for a minute the Board's and the Circuit Court's finding that the Board didn't have jurisdiction of the proceeding in the first place, there were no tort claims, no breach of contract, and no common law equitable claims such as mistake. Also detrimental reliance issues are different because the issue before the Board was whether it had jurisdiction, which it decided in the negative.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for Rule 20 argument since it is a case involving issues of fundamental public importance. Any decision in this case could have significant precedential value in the interpretation of the decisions, statutes and rules at issue in this and other cases, and in defining or clarifying the authority and duty of the Courts where there is a related administrative proceeding.

V. ARGUMENT

1. STANDARD OF REVIEW

In the recent case of *M & J Garage and Towing, Inc. v. West Virginia State Police*, 709 S.E.2d 194, 198 (W.Va. 2010), this Court reiterated that the standard of review for a motion to

dismiss under Rule 12(b)(6), concerning the failure to state a claim is *de novo.* (Citing syl. pt. 2 of *State ex rel. McGraw v. Scott Runyan Pontiac–Buick,* 194 W.Va. 770, 461 S.E.2d 516 (1995): "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.,*" See also, Syl. pt. 1, *Lontz v. Tharp,* 220 W.Va. 282, 647 S.E.2d 718 (2007); Syl. pt. 1, *Rhododendron Furniture & Design v. Marshall,* 214 W.Va. 463, 590 S.E.2d 656 (2003); Syl. pt. 1, *Randolph County Board of Education v. Adams,* 196 W.Va. 9, 467 S.E.2d 150 (1995); and Syl. pt. 3, *Cox v. Amick,* 195 W.Va. 608, 466 S.E.2d 459 (1995).

2. ASSIGNMENTS OF ERROR

A. PETITIONERS' EXHAUSTION OF THEIR ADMINISTRATIVE REMEDIES BEFORE THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IS NOT RES JUDICATA OR COLLATERAL ESTOPPEL AND DOES NOT BAR THEIR CIVIL ACTION AGAINST THE CPRB AND THE DEFENDANTS FOR DAMAGES AND EQUITABLE RELIEF WHERE IN THE ADMINISTRATIVE PROCEEDING THE CPRB CLAIMED AND IT HAS BEEN HELD THAT IT DID NOT HAVE THE AUTHORITY TO GRANT THE RELIEF REQUESTED OR THE RESOURCES TO ADJUDICATE THE ISSUE PRESENTED.

The granting of the respondents' *W.Va.R.C.P.* 12(b)(6) motion to dismiss the complaint in this case was error. The trial court was required to follow the long-held rule that on a 12(b)(6) motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are to be taken as true. The Court should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Owen v. Board of Education,* 140 W.Va. 677, 441 S.E.2d 398 (1994.)

The court dismissed the complaint with regard to the CPRB relying upon res judicata and collateral estoppel and Terasa Miller based upon collateral estoppel. The other respondents were dismissed primarily because they were deemed unnecessary or improper parties based upon the

allegations in the complaint. Petitioners filed their response in opposition to respondents' motions on August 27, 2010. (A.R. 1236-1268.) The trial court heard the motion on January 20, 2011. Petitioners pointed out procedural history of the administrative proceeding, the fact that the CPRB had argued it didn't have the authority or jurisdiction to afford the petitioners the relief they requested and that the procedures before the Board, including its discovery procedures, were inadequate to address the issues now before this Court. (A.R. 1237-1238, 1246-1247.) Also, petitioners pointed out the inadequacy of the hearing process itself, including lack of notice and opportunity to be heard and the undue coercion placed upon the Board. (A.R. 1238.) The petitioners contended that the issues decided by the CPRB are not the issues that are to be decided in this appeal; petitioners were not given a full and fair opportunity to have the issues in the subject case litigated in the administrative proceeding and that there was not a final adjudication in the administrative proceeding. (A.R. 1252-1260.)

In its findings, the trial court held that all causes of action in the subject case were "identical to those previously considered." (A.R. 1710, ¶ 21.) In order to arrive at the conclusion that petitioners' tort causes of action were identical, the court ignored the allegations in petitioners' complaint and relied exclusively on a finding that there was "no evidence that the Board made false statements to petitioners. (A.R. 1711 ¶¶ 24-26.) The trial court ruled that the causes of action asserted in the complaint, including tort causes of action and relief requested, which the CPRB already determined that it had no jurisdiction of and which the Circuit Court agreed, were "identical" to the claims before the CPRB. (A.R. 1710 ¶ 21.) The West Virginia Supreme Court of Appeals has prescribed specific rules which courts should refer to in determining whether previous administrative proceedings may bar a subsequent civil action based upon the doctrine of res judicata or collateral estoppel.

It is more clear that neither res judicata nor collateral estoppel bar this action when analyzed in light of the Surpreme Court's rules where the prior proceeding is an administrative body as explained in *Jones v. Glenville State College*, 189 W.Va.546, 533, 433 S.E.2d 49, 56 (1993):

> [5] "This Court has previously stated in *Liller v. West Virginia Human Rights Commission*, 180 W.Va. 433, 376 S.E.2d 639 (1988) that the doctrine of res judicata only applies when "the decision ... [is] rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court law." *Id.* at 440, 376 S.E.2d at 646. We have also enunciated that the following three factors should be the focus of whether res judicata and collateral estoppel are applicable to a hearing body." (1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body." Syl.Pt. 3, in part, *Mellon-Stuart Co. v. Hall*, 178 W.VA. 291, 359 S.E.2d 124. (1987)." (Emphasis added.)

The Supreme Court stated in *Rowe v. Grapevine Corp.,* 206 W.Va. 703, 710, 527 S.E.2d 814, 821 (1999) that in addition to the above, that [t]he identicality of the issues litigated is a key component to application of administrative res judicata or collaeral estoppel." (Emphasis added.) The Court then stated:

> Differences in the quality or the extensiveness of administrative procedures employed may, however, militate against applying res judicata to administrative rulings, especially where the procedures utilized in the administrative forum were tailored to reaching a prompt, inexpensive determination. (Emphasis added.)

The Court then explained hat for res judicata to apply, there must be a decision on the merits by a court of competent jurisdiction; the same parties or persons in privity in both cases; and the "cause of action" must be "identical" and that "it could have been resolved, had it been presented in the prior action." *Id.* at S.E.2d 122.

It is of course imperative that the final judgment be by a court of competent jurisdiction. *Conley v. Spillers*, Syl. 8; 171 W.Va. 584, 301 S.E.2d 216 (1983.) The Court in Syl. 8 stated that it is:

> "[a] fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim."

The analyzing the equality and adequacy of the procedures utilized in the prior proceeding, the West Virginia Supreme Court has looked at the quality and extensiveness of the administrative body. In *State v. Miller,* 194 W. Va. 3, 10, 459 S.E.2d 114, 121 (1995), this Court stated:

> "In our view, for purposes of issue preclusion, issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings of both suits may be the same."

An important issue is whether the prior procedure has the same or similar discovery tools as the Rules of Civil Procedure. *Vest v. Board of Education of Nicholas County*, 193 W.Va. 222, 227, 455 S.E.2d 781, 786 (1995,) *See also Miller, supra.*

As can be seen below, CPRB's procedures did not provide petitioners with a full and fair opportunity to litigate its matters in dispute. The causes of action certainly were not identical. The legal and factual issues that are required to be applied in the causes of action in the subject case are not identical. The procedures employed by the CPRB were designed for an inexpensive determination of employee questions - not for complex tort and constitutional and contract litigation and were not fair under any circumstances.

1. The CPRB's legal standards and procedures were not substantially similar to those used in a court of law.

The Consolidated Public Retirement Board's (hereinafter "CPRB") procedural rules for petitioners' claims are set forth in the CRPB Legislative Rules § 162-2-7. This rule provides that the Board's own staff made the initial decision, as it did in this case. The petitioner then may appeal that decision to the Board, but the Board does not hear the evidence. The staff refers the case to a "hearing officer" who schedules the hearing. The rules of evidence do not apply at the hearing but the hearing officer may subpoena documents and witnesses "if the information is relevant and reasonable..." "The interest of justice and fair play shall guide proceedings before the hearing officer." The rule requires the Board to retain only a recording of its proceedings. It does not transcribe the recording, "which is the official record of the hearing." Within 60 days, the hearing officer is to submit his report to the Board with final recommendation at the next regularly scheduled meeting. While the applicant is to be noticed of the hearing before the Board, neither the applicant nor his/her attorney may speak to the Board without special consideration and vote by the Board. Therefore, the only thing the applicant can do to be heard by the entity that makes the decision is "propose and submit a final order for consideration by the Board." In arriving at its decision, the Board "shall then make a decision on the findings and recommendation of the hearing officer and accept the recommendation unless the Board finds that the hearing officer has abused his or her discretion...[or] are contrary to law." If the applicant decides to appeal the Board's decision they may request a transcript, "with the cost to be paid by the applicant." (CPRB Legislative Rules § 162-2-8.) The appeal from the Board is subject to the procedures allowed in *W. Va. Code* § 29A-5-4(g). *Smith v. West Virginia Human Rights Com'n.*, 216 W.Va. 2, 602 S.E.2d 445 (2004.) Essentially, questions of law are considered *de novo*, but on questions of fact the circuit court gives the Board's decision deference unless the court finds them to be clearly wrong. *Genesis, Inc. v. Tax Com'r of West*

Virginia, 215 W.Va. 266, 599 S.E.2d 689 (2004.) The West Virginia Supreme Court's review of the circuit court review follows the same limitation as above. *Erps v. West Virginia Human Rights Com'n*, 224 W.Va. 126, 680 S.E.2d 371 (2009.)

Therefore, the legal standards and procedures used by the CPRB to assess the facts are not at all similar to a court. In fact, the CPRB admitted this and argued to the West Virginia Supreme Court in its administrative proceedings that it was not equipped to address petitioner's claims. The CPRB argued to this Court:

> [I]t is virtually impossible to fully investigate or litigate the Petitioners' allegations that they were misled by officials of the West Virginia State Police through the administrative process of the retirement board. . . .
>
> The Board is ill equipped to judge the validity of these claims without extensive discovery not readily available to state agencies. . . . Such factual disputes between the employer and the employee are better left to the province of a jury or a judge. Petitioners currently have a civil class action suit pending against who they allege to be the culpable party, the West Virginia State Police, which encompasses these disputes.
>
> * * *
>
> The Board does not have the authority to alter, amend or modify statutes. The Board does not have the authority or resources to sit in judgment of factual disputes between intervening third parties and their employees.
>
> * * *
>
> If Petitioners believe they were misled or harmed by the actions of other parties, then their avenue of relief, if any, is against the culpable party either through the courts or the legislature. Once again, counsel will remind the Court that Petitioners have a [sic] filed a class action suit against the West Virginia State Police, the party they allege made the misrepresentations, which is currently pending in the circuit court of Kanawha County, West Virginia. (Emphasis added.)

(A.R. 1424, 1435.)

In other words, when petitioners were seeking relief from the CPRB, the Circuit Court of Kanawha County and the Supreme Court of Appeals, the CPRB claimed it didn't have the authority or jurisdiction to provide petitioners' relief, and it didn't have the procedures or means

to litigate the issues presented. They even argue that these issues should be left to a jury and judge and refer the Supreme Court to this very class action in order to avoid review of the CPRB's proceedings.

The importance of the available procedures being identical or substantially similar in both theory and practice before they will bar a subsequent action was discussed in *Vest v. Board of Educ. of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781 (1995); and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

As plainly stated by the Court in *State v. Miller, supra*, Syllabus points 2, 3 and 4:

> 2. *Relitigation of an issue is not precluded when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in two courts.* Where the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims, a compelling reason exists not to apply collateral estoppel.
>
> 3. For purposes of issue preclusion, *issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings of both suits may be the same.*
>
> 4. "For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and *the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel."* Syllabus Point 2, *Vest v. Board of Educ. of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781.

(emphases added).

Petitioners did not have available the discovery procedures available in the subject cause of action. They were not entitled to notice and an opportunity to be heard before the administration board and were denied the same. And here, the CPRB even argued in the administrative proceeding relied upon for issue preclusion, that it didn't have the authority to try

the issues. Yet, the Circuit Court ruled that "the procedure employed in the administrative hearing were substantially similar" to the procedures afforded in circuit courts in West Virginia. (A.R. 1710-1711.)

2. The procedures employed by the CPRB were in fact unfair.

The CPRB cannot deny that its members were subject to coercion and intimidation. Petitioners were not even give notice of the hearing on January 20, 2003, and when plaintiffs' counsel appeared uninvited, he was ruled out of order and told to sit down. After 11 months of litigating the grievance, and being awarded their pension, petitioners were not invited or allowed to participate in its reversal.

Due process requires notice and an opportunity to be heard by a fair, impartial tribunal. "Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." Syl. pt. 2, *State v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960). 16A C.J.S. Constitutional Law § 568e; Southern Railway Co. v. Commonwealth of Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260; Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169; Nulter v. State Road Commission, 119 W.Va. 312, 193 S.E. 549, 194 S.E. 270; 12 Am.Jur., Constitutional Law, § 634; 4 M.J. Constitutional Law § 132." *Id.* at 74, 644. This Court has "repeatedly stressed the importance of an impartial judiciary." *Tennant v. Marion,* 194 W.Va. 97, 107, 459 S.E.2d 374, 384 (1995). *See also State ex rel. Skinner v. Dostert,* 166 W.Va. 743, 750, 278 S.E.2d 624, 630 (1981) (courts have an obligation pursuant to Section 17 of Article 3 of the West Virginia Constitution "to apply the law and decide the case unfettered by any influences alien to the case or the process"); *State ex rel. Shrewsbury v. Poteet,* 157 W.Va. 540, 202 S.E.2d 628 (1974); *State ex rel. Moats v. Janco,* 154 W.Va. 887, 180 S.E.2d 74 (1971). Significantly,

"**judicial judgment must be made free of 'partisan interests, public clamor, or fear of criticism.**' " *Tennant, supra,* at 107, 384, citing *State ex rel. Skinner v. Dostert,* 166 W.Va. at 750, 278 S.E.2d at 630 (emphasis added). See also *United States v. Wade,* 931 F.2d 300, 304 (5th Cir.), *cert. denied,* 502 U.S. 888, 112 S.Ct. 247, 116 L.Ed.2d 202 (1991). Proof of bias or impartiality may invalidate a decision or disqualify a decision maker. 2 Admin. L. & Prac. § 6:10 (3d ed.). See also, 67 C.J.S. Obstructing Justice § 3; 86 C.J.S. Threats § 17. West Virginia Code § 61-5-27.

In its order, the trial court did not describe, refer to, or analyze the issue of whether petitioners received full and fair opportunity to litigate all the issues. (A.R. 1697-1716.) Nowhere in the Court's order does the Court cite to a case nor does it make a finding that the petitioners were afforded with a full and fair opportunity. The Court does not mention the coercion of the CPRB which was pled in the complaint; (A.R. 10-19) or the lack of notice and opportunity to appear and the Board's refusal to allow petitioner's counsel to even speak. (A.R. 20, 22-24.) The trial court does not refer to nor did it discuss the Board's grievance procedures to determine whether the procedures employed by the Board were "tailored to the prompt, inexpensive determination of small claims, a compelling reason not to apply collateral estoppel." The Board does not employ any rules of procedure for discovery or rules of evidence and parties are not entitled to even appear in front of the CPRB.

The trial court quoted in its own order findings by the Circuit Court on the administrative appeal that the CPRB did not have authority or jurisdiction to provide petitioners with the relief. Yet the trial court found that the CPRB heard and decided "[v]irtually every factual allegation and point of law alleged, asserted or argued." (A.R. 1712.) The CPRB argued that it had no power or authority to enroll the petitioners in Plan A, and the Circuit Court on appeal of the

CPRB ordered that "the Board is without any power to supplant its views of fairness and equality in place of the will and intent of the legislature" and the "Court may not confer retirement benefits for employment where the legislature has not so authorized." (A.R. 866) In ruling on the CPRB's subject motion to dismiss, the circuit court quoted the above findings by the Circuit Court that the CPRB had no authority or jurisdiction. (A.R. 1424, 1435.)

The CPRB filed its response to the petitioners' petition to the West Virginia Supreme Court in the administrative appeal and therein reiterated its argument that it was without jurisdiction or authority to provide petitioners with relief. (A.R. 866.)

If the CPRB in the first instance did not have the authority or jurisdiction to grant the relief petitioners were requesting, then their decision with regard to a raft of other findings and conclusions, which it conveniently now asserts and the trial court held was a bar to this civil action against it, is void and a nullity. Where an administrative decision was made without any authority or jurisdiction, it may not be used as a res judicata bar to a subsequent civil action. In *Pritt v. West Virginia Northern Railroad Company*, 132 W. VA. 184, 51 S.E.2d 105, 118 (1948) the defendant railroad asserted that the employees' civil action against it was barred due to res judicata since he had previously asserted a workers' compensation claim for that injury. The Supreme Court stated:

> "...The award of compensation was made without any proof of employment in intrastate activity, and, without such showing, the Compensation Commissioner was without jurisdiction to entertain the claim, and his award was in legal effect a nullity, constituted no bar to a resort by the injured servant to his rights under the Federal Employers' Liability Act, <u>and being an action without jurisdiction could be in no event treated as res judicata of any question relating to an award of compensation</u>." (Emphasis added.)

A decision rendered by an administrative agency that lacks jurisdiction over the parties or the subject matter, or a decision that is beyond the statutory authority of the administrative

agency, is void and can be collaterally attacked in any court, at any time. *Board of Education v. Board of Trustees of the Public Schools Teachers' Pension & Retirement Fund,* 395 Ill.App.3d 735, 739, 334 Ill.Dec. 701, 917 N.E.2d 527 (2009). Furthermore, if a tribunal lacks jurisdiction over the subject matter, the entire decision is void: "Because Mr. Helms filed an untimely notice of appeal with the common pleas court, the court lacked the jurisdiction to consider his appeal. [Internal citation omitted.] Consequently, any judgments, orders, or decisions issued by the common pleas court in Mr. Helms' administrative appeal are void for lack of jurisdiction." *Helms v. Akron Health Department*, 2004 WL 1459344, 3 (Ohio App. 9 Dist. 2004). "A decision by an agency which lacks the statutory power to enter the decision is treated the same as a decision by an agency which lacks personal or subject matter jurisdiction-the decisions are void." *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill.2d 192, 555 N.E.2d 693, 144 Ill.Dec. 334 (1990). "Subject matter jurisdiction goes to competence of a body to resolve a particular dispute. It is a concept that is applicable equally to courts and administrative agencies. Jurisdiction is essential to give validity to the determinations of administrative agencies; without jurisdiction, their acts are void and open to collateral attack." 2 Am. Jur. 2d Administrative Law § 281 [internal citations omitted].

If the CPRB didn't have the authority to grant petitioners relief, then the trial court violated the first rule of issue preclusion that the decision must have been by a court with jurisdiction and or the merits.

3. The issues litigated in the administrative proceedings were not identical to the issues in the subject civil action.

In *Liller v. West Virginia Human Rights Comm'n*, 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988,) the Supreme Court stated: "...identicality of issues litigated is a key component to the application of administrative res judicata or collateral estoppel[.]"

As to the requirement of identicality of issues, a review of the decisions of the West Virginia Supreme Court of Appeals addressing whether issue preclusion should apply to quasi-judicial determinations establishes that the issues previously determined must be the exact and precise issues, i.e., the identical issues, presented in the subsequent civil action. The fact that perhaps a more narrow sub-part of an issue or a broader issue was previously determined will not suffice. See *Garrison v. Herbert J. Thomas Mem. Hosp.*, 190 W.Va. 214, 438 S.E.2d 6, 8-11 (1993;) *State v. Miller,* 194 W. Va. 3, 10, 459 S.E.2d 114, 123-124, f.n. 15 (1995) and *Peters v. Rivers Edge Mining, Inc.,* 224 W.Va. at 178-79, 680 S.E.2d 809-10 distinguishing an issue in arbitration of the "two day rule" with whether it was "pretextual" in the civil action.

The issues in this civil action are obviously not identical either in their legal setting or even in whether they were at issue at all. For example, The trial court hung its finding of issue preclusion and apparently all of the issues against the CPRB on the claim that the CPRB was not guilty of misrepresentation and that that issue was decided in the very case by the CPRB. (A.R. 1711-1712.) This is the danger that the Supreme Court was guarding against in requiring identicality of issues. Petitioners were before the CPRB, not litigating against the CPRB. They didn't attempt to prove that the CPRB intentionally misrepresented anything to them and it was not important to petitioners' claims since there really was only the issue of what they were told not not who told them, so long as it was a state agency.

The finding originally in the appeal order was that "the Petitioners have failed to show that there was any misrepresentation on the part of the Board that induced them to enroll in Plan B." (A.R. 867.) But the trial court expanded this to its own finding that the Circuit Court expressly found that there was no evidence that the Board had made false statements or

disseminated any false or misleading information to the plaintiffs in their recruitment by the State Police." (A.R. 1711.) Then on a motion to dismiss, without mentioning the allegations in the complaint, the Court stated "No new evidence to the contrary has been presented to this Court." (*Id.*) The trial court then claims that the only evidence of wrongdoing is on the WVSP and concludes that petitioners', "without citation to statute or case law assert that they" "had an actionable duty to ensure that the State Police recruiters were providing the plaintiffs with accurate information." (A.R. 1711.) These findings are clearly wrong.

First, petitioners never set out to prove wrongdoing by the CPRB in the administrative hearing. The CPRB was not on trial there, it was the Judge and Jury. Second, contrary to the trial court's statement, there was evidence presented if the trial court had read the record. The Executive Director, 30(b)(7) CPRB witness testified that it had, as it had a statutory duty to do, enrolled the petitioners and used only a form on CPRB stationary that only said per "15-2A." Ms. Miller agreed that "[i]t does not describe the benefits." (A.R. 1306.) The complaint claims that the CPRB had the duty to provide them with accurate information.

But the petitioners' complaint doesn't allege the CPRB falsely set about to provide them false information. Fraud or constructive fraud does not require that petitioners prove that the CPRB intentionally set about to defraud them. It does allege the CPRB had the statutory duty to advise petitioners and failed to advise them.

In summary, petitioners alleged in their complaint that defendants' CPRB and the WVSP are statutory agencies of the State of West Virginia and that CPRB has the statutory duty and responsibility to administer the retirement system of the WVSP and that Executive Director Miller had the statutory duty and responsibility to carry out the responsibility for managing the

CPRB and its mandates in administering the State of West Virginia retirement systems including Plan A and Plan B. (A.R. 36-39, 45-46, 85-89, 404-405 and 414-415.)

Petitioners then alleged that the CPRB and WVSP represented to them and they were promised pension benefits under Plan A both in writing and verbally and that they had given up other careers and jobs in reliance on those representations, relocated their families, took oaths to be West Virginia State Troopers and detrimentally relied upon those representations. (A.R. 396-397.)

Petitioners also complained that the CPRB had the duty to inform them as "applicants and employees" as to their retirement benefits including what they would be entitled to after retirement, etc. (A.R. 405.) Further, plaintiffs complained that the WVSP had a right to rely upon the CPRB to accurately inform its employees of their pension benefits since it was granted by the legislature the "exclusive right and duty to administer retirement rights." (A.R. 405.)

And, petitioners alleged that as a proximate result of "defendants' acts and conduct" they were misled, lost income, they gave up social security, they lost other benefits, suffered annoyance and inconvenience and emotional distress, costs and expenses in attempting to address their rights and remedies and they are members of an improperly funded pension plan. (A.R. 419.) For those defendants who are entitled to sovereign immunity, petitioners seek to recover up to the limits of the state liability policy. (A.R. 419.) Petitioners seek to recover the monetary damages and equitable relief against all defendants, some named only for the purpose of the Court having the parties before it to effect full and complete relief (A.R. 425-426) including requiring the State and its agencies to place petitioners under Plan A. (A.R. 406, 411-412.)

Petitioners claims that they have demonstrated a clear right to the relief they requested and have no other right or remedy of law. (A.R. 421-422.) Petitioners allege causes of action for breach of contract, misrepresentation of or omission of material fact and petitioners relied upon (negligent misrepresentation, constructive fraud or fraud;) mistake, a cause of action based upon a violation of their constitutional rights. (A.R. 420-421.)

In *Peters v. Rivers Edge Mining, Inc., supra,* the West Virginia Supreme Court of Appeals likewise determined that the central issues in an employment arbitration proceeding and a civil action were not identical, explaining: "the arbitration sought to resolve, under the collective bargaining agreement, whether Rivers Edge terminated Mr. Peters because he had violated the 'two-day rule' while the circuit court litigation sought to resolve, under our workers' compensation discrimination statutes, whether Rivers Edge's termination of Mr. Peters based upon his violation of the 'two-day rule' was pretextual." *Id.*, 224 W.Va. at 178-79, 680 S.E.2d at 809-10.

B. WHERE A PARTY HAS MADE KNOWN THAT THEY HAD NO NOTICE OF MOTION AND DEFENSES AND WHERE THEY WERE FILED OUT OF TIME WITHOUT LEAVE OF COURT, THE COURT SHOULD NOT PROCEED WITH DECIDING THE MOTIONS WITHOUT PROVIDING THE OBJECTING PARTY AN OPPORTUNITY TO RESPOND AND ARGUE IN RESPONSE.

Plaintiffs are entitled to relief under W.Va.R.Civ.P. 60(b) from the trial court's March 30, 2011 order, since it ruled upon untimely, improperly filed and unnoticed motions, which the plaintiffs did not have proper notice and opportunity to address.[5] After the filing of the civil complaint on January 2, 2007, a stay was granted. The stay was lifted on July 8, 2009. Therefore,

[5] This particular argument will be addressed in more detail in the plaintiffs recent notice of appeal of the order denying plaintiffs' motion to amend the judgment, filed with this Court on July 29, 2011.

the defendants had thirty, or at the very most 60 days, to file responsive pleadings. The CPRB and Teresa Miller timely filed their original motion to dismiss. The remaining defendants did not file a responsive pleading at all within the thirty or sixty day period. Four months after the say was lifted, the CPRB and Miller then filed an "amended motion to dismiss," without leave of the Court, which included new affirmative defenses for the CPRB and Teresa Miller. At the same time, the first responsive pleadings for the State of West Virginia, PERS, and the West Virginia State police, in the form of Motions to Dismiss, were filed – all approximately two months late. Neither the Amended Motion to Dismiss of the CPRB and Miller, nor the untimely Motions to Dismiss of the remaining defendants were ever properly noticed for hearing. Furthermore, plaintiffs were not aware of their existence prior to the hearing.

As a result, the parties and the Court agreed on the record that those motions would not be dealt with at the January 20, 2001, hearing. (*See* A.R. 39, pp. 1482-1483.) Therefore, plaintiffs did not address the amended motion and late motions to dismiss. However, when defense counsel forwarded its proposed findings of fact and conclusions of law to the Court, they included findings and orders indicating that the Court would be granting the untimely and unnoticed additional motions. The Court signed the order over plaintiffs' objections. As a result, the plaintiffs were denied proper due process and reasonable opportunity to be heard.

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." In addition, "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). The Amended Motion of CPRB/ Miller and untimely motions of the remaining defendants were not properly filed, as they did not have leave of the Court, and were not properly noticed. Importantly, the defendants and the Court agreed to proceed with the hearing without addressing the additional motions of the defendants. Plaintiffs relied upon the defendants' and the Court's agreement that the amended motions would not be argued or ruled upon. Therefore, plaintiffs should be entitled to relief under Rule 60(b)(1) on grounds of mistake, inadvertence, surprise and/or excusable neglect.

C. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO DISMISS OF THE STATE OF WEST VIRGINIA, WEST VIRGINIA STATE POLICE RETIREMENT SYSTEM AND WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM BECAUSE THEY ARE NECESSARY PARTIES AS SET FORTH IN PETITIONERS' COMPLAINT.

(1) The State of West Virginia.

The State of West Virginia, by counsel, argued and the Circuit Court ruled that "[a]s the State acts through its agencies, the State cannot be treated as a separate and independent entity, or a separate and, independent defendant, for the purposes of this action" (A.R. 17) and the Court dismissed it on that basis even though petitioner alleged that the WVTA and CPRB were agencies of the State of West Virginia. (A.R. 9-12, 20-21.)

Further, the State of West Virginia is the named insured on the state's liability policy and any fair reading of the complaint would reveal that the State needs to be a party defendant to this proceeding as two of its agencies acting on its behalf were both alleged to be at fault for misleading the petitioners or alternatively binding the State's retirement funds to Plan A benefits by contractual and/or statutory and/or constitutional means.

(2) Terasa L. Miller.

The respondent argued, by counsel, that the Executive Director of the CPRB should be dismissed because there was only one thing she was alleged to have done improperly was her failure to reduce the November 13, 2002, decision to an order. But that's only one thing alleged. She was the Executive Director of the CPRB and had the duty to carry out direction of the Board but also in her official capacity is a party for purposes of effecting petitioners' requested equitable relief. The same legal standards for dismissing her based on collateral estoppel apply to her the same as the Board discussed above and therefore was error.

(3) PFRS AND SPRS.

These defendants were joined for the purposes of effecting full relief in view of petitioners' request for equitable relief.

The Court rules that "the Board is the real party in interest." Consequently, the Court dismissed these defendants. This is however, premature.

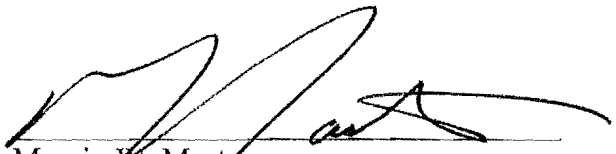
VI. CONCLUSION

The petitioners, therefore, having demonstrated that the trial court was in error, respectfully request this Court to reverse the order dismissing their complaint and remand the same to the Circuit Court of Kanawha County for further proceedings.

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

By Counsel



Marvin W. Masters
West Virginia State Bar No. 2359
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
mwm@themasterslawfirm.com
Counsel for Plaintiffs below, Petitioners
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0746

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;
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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.

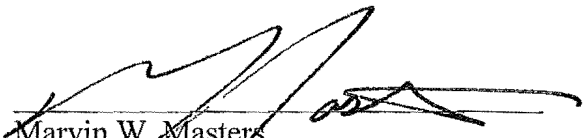
CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Plaintiffs below/Petitioners, do hereby certify that true and accurate copies of the foregoing "Petitioners' Brief" and "Appendix Record" were served upon:

Thomas S. Sweeney
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Post Office Box 3283
Charleston, West Virginia 25332
Counsel for Defendants below/Respondents, State of West Virginia; West Virginia State Police Retirement System; West Virginia Consolidated Public Retirement Board; West Virginia Public Employees Retirement System; and Terasa L. Miller

Wendy E. Greve
Pullin, Fowler & Flanagan, PLLC
901 Quarrier Street
Charleston, West Virginia 25301
Counsel for Defendant below/Respondent, West Virginia State Police

via hand delivery, this 1st day of August, 2011.



Marvin W. Masters
West Virginia State Bar 2359
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
304-342-3106
mwm@themasterslawfirm.com
Counsel for Plaintiffs below, Petitioners
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