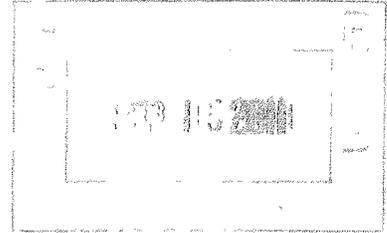


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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 JEFFREY LEALTON COOPER;
TROOPER BRAD LEE MANKINS;
TROOPER ROGER DALE BOONE;
TROOPER STEVEN P. OWENS;
and TROOPER ADAM WILSON SCOTT,
Plaintiffs Below,**



Petitioners,

v.

No. 11-0746

**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, Defendants Below,**

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

The Respondents and Defendants below find the “Procedural History” set forth in the Petitioners’ Statement of the Case to be substantially accurate but also believe that it is unduly argumentative in certain respects, and that it presents information that is not relevant to this appeal regardless of its factual accuracy. The Respondents limit their supplementation and corrections to the matters that they believe to be relevant, as follows:

Petitioners’ Complaint in the lower court alleges that the Petitioners are members, or dependants of members, of the 42nd, 43rd, 44th, and 45th Cadet Classes of the West Virginia State Police (hereinafter “State Police”), who joined the State Police in the belief that they would be enrolled in a benefit and retirement plan known as the West Virginia State Police Death, Disability and Retirement Fund (referred to in the Complaint and through the prior litigation as “Plan A”) that would provide certain established benefits, but that they were actually enrolled in a plan known as the West Virginia State Police Retirement System (referred to in the Complaint as “Plan B” but to the extent that the West Virginia State Police Retirement System has also been named as a party in this matter and is a Respondent, it will be referred to hereinafter as the “SPRS”) (Complaint ¶¶ 1- 35, 47-54).

Petitioners present a substantial amount of information relating to proceedings before the Respondent West Virginia Consolidated Public Retirement Board (hereinafter

“CPRB”) between December 1, 2001, and May 18, 2006.¹ However, Petitioners continue to present matters that were determined in prior proceedings before the Circuit Court of Kanawha County as if they remain in question. More specifically, Petitioners continue to refer to a November 13, 2002, “final decision” attributed to the CPRB. (Petitioners’ Brief at 3-4, 7, 11). Also, although Petitioners correctly note that the Circuit Court of Kanawha County denied Petitioners’ petition for a writ of mandamus seeking an order requiring the CPRB to “comply with the November 13, 2002, decision” (Petitioners’ Brief at 7), Petitioners do not clarify that the circuit court expressly found that the November 13, 2002, vote did not constitute a final decision. (A.R. at 292, Order dated November 17, 2004, C.A. No. 03-MISC-473).

Petitioners correctly state that appeal of the November 17, 2004, order was refused, but Petitioners fail to note that they have continued to refer to the November 13, 2002, vote as a “decision” and that it is referred to as such not only in the Complaint filed in the lower court (A.R. at 412-416, Complaint ¶¶ 72-73, 80-81, 92-94; A.R. at 1558-1562, Amended Complaint ¶¶ 72-73, 80-81, 92-94), but in the brief filed in this appeal. (Petitioners’ Brief at 3-4, 7, 11). This is relevant to the lower court’s dismissal of Respondent Terasa L. Miller (hereinafter “Ms. Miller”) as the Petitioners’ most recent allegations against Ms. Miller are expressly based upon her purported failure to implement the so-called November 13, 2002, “decision” (A.R. at 415-416, Complaint ¶¶ 88-89, 92-94; A.R. at 1558-1562, Amended Complaint ¶¶ 88-89, 92-94). In fact, the

¹ Respondents’ most detailed presentation relating to the nature of relevant prior proceedings and actions was set forth in the CPRB’s Amended Motion filed in the lower court. (A.R. at 1003-1011).

most recent allegations against Ms. Miller are in all relevant respects identical to those asserted in the petition for writ of mandamus filed by the Petitioners in the Circuit Court of Kanawha County in 2003. (A.R. at 175-177, Petition ¶¶ 45-46, 53-55, C.A. No. 03-MISC-473).

In 2003, Petitioners filed a petition for writ of mandamus in the Circuit Court of Kanawha County (A.R. at 168-178, Petition, C.A. No. 03-MISC-473), seeking a ruling that the CPRB had no authority to reconsider its November 13, 2002, vote and that the CPRB's executive officers, including Ms. Miller,² had a nondiscretionary and mandatory duty to implement the CPRB's November 13, 2002, vote to permit the requested transfer of the Petitioners into the retirement system referred to as Plan A. Petitioners also filed a memorandum of law in support of their position (A.R. at 1061-1090, Memorandum of Law, C.A. No. 03-MISC-473). In an order dated November 17, 2004, the circuit court ruled that the CPRB did have the authority to reconsider its November 13, 2002, vote, as that vote had not been reduced to a written final order containing appropriate findings of fact and conclusions of law as required by statute. (A.R. at 1049-1053, Order dated November 17, 2004, C.A. No. 03-MISC-473). Petitioners petitioned for appeal of that order but the petition was refused. (A.R. at 1056-1057, Supreme Court Order dated May 25, 2005, No. 050743).

The proceedings before the CPRB ultimately resulted in the CPRB's adoption of the recommended decisions of the hearing officer (A.R. at 363-394, First Supplemental Recommended Decision of Hearing Officer dated February 17, 2006; A.R. at 689-773,

²In Kanawha County Civil Action No. 03-MISC-473, Ms. Miller was named as Terasa Robertson.

Second Supplemental Recommended Decision of Hearing Officer dated May 8, 2008), which were appealed to the Circuit Court of Kanawha County. The circuit court subsequently entered an order affirming the CPRB's refusal to transfer the Petitioners into Plan A, which order included the following pertinent findings and conclusions:

8.) None of the Petitioners in this case were employed by the WV State Police until 6 months after the effective date of W.V. Code § 15-2A-3(a), which closed enrollment in Plan A. Petitioners were provided with, and signed enrollment forms providing for Plan B benefits. Petitioners are therefore charged with the knowledge of the law as [it] exists in the statute. There is no evidence that the Board made false statements or disseminated any false or misleading information to the Petitioners. The Board cannot now be estopped from carrying out the clear mandates of WV Code § 15-2A-1, et seq., despite any potential misrepresentations by state police officials.

...

12.) In the case at bar, 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. at 866-867, Final Order dated November 20, 2008, C.A. No. 06-AA-55). The Petitioners then petitioned for appeal of the circuit court's final order to this Court, and the petition was refused. (A.R. at 925-926, Corrected Order dated May 13, 2009, No. 090481).

SUMMARY OF ARGUMENT

Petitioners focus solely on proceedings before the CPRB, and fail to consider the effect of the mandamus action that they filed in the Circuit Court of Kanawha County in 2003, Civil Action No. 03-MISC-473, seeking a ruling that the CPRB had no authority to reconsider its November 13, 2002, vote and that the CPRB's executive officers, including Ms. Miller, had a nondiscretionary and mandatory duty to implement the CPRB's November 13, 2002, vote to permit the requested transfer of the Petitioners into the retirement system referred to as Plan A. In that action, in an order dated November 17, 2004, the circuit court ruled that the CPRB did have the authority to reconsider its November 13, 2002, vote, as that vote had not been reduced to a written final order containing appropriate findings of fact and conclusions of law as required by statute. Petitioners have continued to argue that the November 12, 2002, vote of the CPRB constituted the true "final decision" of the CPRB as if this question is still at issue. Pursuant to the doctrine of collateral estoppel, that issue has been determined. The order denying Petitioners' mandamus petition also specifically addressed the allegedly wrongful acts of Ms. Miller. As the only specific allegations relating to the role of Respondent Terasa L. Miller are those relating to her involvement with the reconsideration of the November 12, 2002, vote of the CPRB, there is no basis for a claim against her and she was properly dismissed by the lower court.

The issues and points of law that are raised in the instant action in support of the Petitioners' claims against the CPRB have been raised and argued in prior actions before the CPRB, in circuit court, and in appeals refused by this Court, rendering those circuit court decisions final. The facts now alleged are the same facts that have been

relied upon by the Petitioners in the prior litigation, thus the causes of action are the same. Much of the relief sought by the Petitioners, including Petitioners' transfer into Plan A, a ruling that the CPRB has violated Petitioners' due process rights, and a ruling that the CPRB be compelled to take action to compel funding of the retirement and benefit plans, has been the object of the prior litigation. The Petitioners were parties to the prior litigation, or in privity with the parties, and had a full and fair opportunity to litigate the exact issues, based upon the same facts, in proceedings before the appropriate circuit court. The doctrines of collateral estoppel and *res judicata* therefore apply, and bar further litigation against the CPRB.

To the extent that the Petitioners argue that the CPRB had a duty to inform them as to what benefits they were entitled to receive based upon employment with the State Police and that the CPRB did not so inform them, Petitioners cite no statute or case law that would serve to create such a specific actionable duty on the part of the CPRB. At least implicit in the lower court's ruling is the conclusion that no such actionable duty exists. The final order entered in Kanawha County Civil Action No. 06-AA-55, and relied upon by the lower court in this case, expressly found that: (1) by the time the Petitioner employees were employed by the State Police, W.Va. Code § 15-2A-3, which closed enrollment in Plan A, had been in effect for six months; (2) the Petitioners were provided with, and signed enrollment forms providing for Plan B (SPRS) benefits, and are therefore charged with the knowledge of the applicable statute; and (3) there is no evidence that the CPRB made false statements, disseminated any false or misleading information to the Petitioners, or otherwise made misrepresentations to the Petitioners that induced the Petitioners to join the State Police. Thus, in order to state a claim

against the CPRB, the Petitioners must contend that the CPRB had an actionable duty to independently inform the Petitioners of the terms of their retirement program. The Respondents are aware of no such duty, and, were it to be presumed to exist for the sake of argument, the elements of such a duty would have to be established in detail in order to determine causation under the actual circumstances at issue.

To the extent that Petitioners attempted, at hearing in the lower court, to reserve argument on various motions relating to these Respondents, and particularly to Respondents Terasa L. Miller, the State of West Virginia, PERS, and SPRS, the Petitioners did not make a clear record of that objection. A detailed review of the transcript for the January 20, 2011, hearing could support the argument that Petitioners could have intended to make such an objection, and that such an objection could be implied in statements made on Petitioners' behalf at that hearing. However, Petitioners had an obligation to make a clear objection on the record, at the time of hearing, clearly understood by both the lower court and the parties at the hearing. In this light, the basis for Petitioners' second assignment of error is far less compelling. Further, consideration of the actual substance of the motions filed on behalf of Ms. Miller, the State of West Virginia, the PERS, and the SPRS, the lower court's rulings thereon, and Petitioners' argument relating to the third assignment of error, renders this objection and second assignment of error moot.

Even if it is assumed for the sake of argument that the Petitioners may proceed further in this matter, the relief that Petitioners seek would only be available, if at all, from Respondent CPRB or the State Police, and there is no basis for retaining Respondents Terasa L. Miller, the State of West Virginia, the PERS, and the SPRS, as

parties.³ Were the CPRB to remain as a defendant below, the lower court would have before it the only State representative, other than the State Police, against whom the Petitioners have asserted specific and distinct allegations of wrongdoing. Petitioners have asserted no distinct allegations of negligence or other wrongdoing against the State of West Virginia, the PERS, or the SPRS. As the CPRB is a State agency and is, for the purposes of litigation, the State of West Virginia, there is no basis or reason to name the State of West Virginia as if it is a separate and distinct entity. As the CPRB administers both the PERS and the SPRS, both of which are merely state programs and not agencies⁴, and no allegations of wrongdoing have been made against either retirement system, there is no basis to retain the PERS or the SPRS as parties. As is noted above and elsewhere, the only specific allegations made against Ms. Miller relate to her role as an employee of the CPRB and to an issue that has been litigated and resolved in her favor. There is no reason or legal basis to retain her as a distinct party given the presumed presence of the CPRB. Therefore, even if the CPRB is retained as a party for further proceedings in the lower court, Respondents Terasa L. Miller, State of West Virginia, PERS, and SPRS, were properly dismissed, making Petitioners third Assignment of Error moot.

³ All Respondents, including the State Police, have consistently held the position that the place the Petitioners must seek relief is in the Legislature, as the Respondents were merely executing the law as written and passed by that body, duly signed by the Governor.

⁴ In other words, Petitioner's have sued a set of records, not the people who administer them.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is not appropriate for oral argument under W. Va. R. App. P. 18(a), as the law regarding Petitioners' appeal is based solely around dispositive issues that have been authoritatively decided many times by this Court and are bedrock principles of law in the United States. W.Va. Rule App. Pro. 18(a)(3). Accordingly, this case is well-suited for a memorandum decision. To the extent that oral argument might be deemed necessary by this Court, Argument should be limited to Rule 19 argument, as there are no new or novel issues of law in this case, and as previously stated, this case is appropriate for memorandum decision.

ARGUMENT

A. PETITIONERS' CLAIMS AGAINST THE CPRB AND MS. MILLER ARE BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Respondent Terasa L. Miller

The central inquiry in determining whether the doctrine of collateral estoppel constitutes a bar to a claim is whether a given issue has been actually litigated by the parties in an earlier suit. As this Court has stated:

"[R]es judicata [or claim preclusion] serves to advance several related policy goals-(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end.

Collateral estoppel or issue preclusion "is supported by the same public policy considerations as res judicata." . . . [W]e [have] indicated: "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Asaad v. Res-Care, Inc., 197 W.Va. 684, 687, 478 S.E.2d 357, 360 (1996) (citations omitted)(emphasis added).

The only allegations against Ms. Miller are based upon her purported failure to perform a mandatory statutory duty by immediately reducing the Board's November 13, 2002, vote and decision to a written final order of the Board and acting to implement that decision. This is the exact issue previously raised in Civil Action No. 03-MISC-473, and addressed in the dismissal order as entered in that case. (A.R. at 288-292). Appeal of the dismissal order having been refused by this Court, the order constitutes a final

adjudication on the merits. The Petitioners here were also Petitioners in Civil Action No. 03-MISC-473 or in privity with them, as the prior action was expressly brought in their name and on behalf of similarly situated members of the same State Police classes. Finally, as a review of their petition for writ of mandamus and supporting memorandum shows, the Petitioners had a full and fair opportunity to argue and litigate the exact issues they are attempt to raise in the instant action. (A.R. at 170, 172, 175-177, Petition for Writ of Mandamus ¶¶ 27-28, 34, 45-46, 53-56, C.A. No. 03-MISC-473; A.R. at 1650-1658, 1664-65, Memorandum of Law, C.A. No. 03-MISC-473). As essential elements of the Petitioners' claims against Ms. Miller have already been litigated and determined in Ms. Miller's favor, Petitioners' claims against her are barred by the doctrine of collateral estoppel and were properly dismissed by the lower court on that basis.⁵

In the Complaint, Ms. Miller is identified as the Acting Executive Director of the CPRB (A.R. at 404, Complaint ¶ 36), and it is further alleged that she is required to perform certain mandatory duties as set forth in the applicable statutes and as directed by the CPRB. (A.R. at 404, 415-416, Complaint ¶¶ 37, 88-89, 94). Finally, it is alleged that certain relief was granted to the Petitioners by decision of the CPRB on November 13, 2002 (A.R. at 415, Complaint ¶ 91), that Ms. Miller had a duty to implement that decision (A.R. at 416, Complaint ¶ 94), and that the CPRB had no authority to

⁵ At various times in this litigation, Terasa L. Miller has held the position of Acting Executive Director, in the absence of an Executive Director appointed by the Governor, but her actual post is as the CPRB's current Deputy Executive Director and Chief Operating Officer. (A.R. at 1206, Dep. of Terasa L. Miller). To the extent that the Petitioners attempt to assert claims for equitable relief, Petitioners have provided no explanation as to why the presence of CPRB, as a party, is not sufficient to obtain such relief should it be deemed appropriate.

reconsider its November 13, 2002, decision at a later date, as it did on January 22, 2003. (A.R. at 415, Complaint ¶¶ 92-93). Petitioners thus appear to allege that, although the CPRB clearly chose to reconsider its November 13, 2002, decision, and did so on January 22, 2003, Ms. Miller should have nevertheless implemented the November 13, 2002, decision before the CPRB had an opportunity to reconsider it.

The allegations relevant to Ms. Miller were previously asserted in a Petition for Writ of Mandamus filed in the Circuit Court of Kanawha County, Civil Action No. 03-MISC-473, on or about November 19, 2003. (A.R. at 170, 172, 175-177, Petition for Writ of Mandamus ¶¶ 27-28, 34, 45-46, 53-56, C.A. No. 03-MISC-473).⁶ That action was subsequently dismissed by order dated November 17, 2004. (A.R. at 288-292, Order Granting Defendants' Motion to Dismiss, C.A. No. 03-MISC-473). The Petitioners petitioned for appeal of the dismissal order on April 8, 2005, and the petition for appeal was refused on May 25, 2005. (A.R. at 1056-1057, Supreme Court Order dated May 25, 2005, No. 050743). Thus, the dismissal order entered by the circuit court was a final adjudication.

The dismissal order expressly stated that the CPRB's executive officers had properly exercised executive discretion after the CPRB's November 13, 2002, meeting by not immediately reducing the CPRB's decision to a final administrative order. (A.R. at 289, Order Granting Defendants' Motion to Dismiss, C.A. No. 03-MISC-473). The dismissal order also held that the CPRB had the authority to reconsider a decision until

⁶The Petition filed in Civil Action No. 03-MISC-473 does not refer to Terasa L. Miller, but to Terasa Robertson, Ms. Miller's name at that time. The Petition also expressly identifies other individuals, i.e., Joseph J. Jankowski, Jr., and J. Michael Adkins as acting in their official capacities on behalf of the CPRB.

that decision was incorporated in a written final order. (A.R. at 290-292, Order Granting Defendants' Motion to Dismiss, C.A. No. 03-MISC-473). As the only issues relating to Ms. Miller that are raised in the Complaint are issues that have already been determined in Ms. Miller's favor, the claims against Ms. Miller are barred by the doctrine of collateral estoppel, and therefore, the lower court was correct to dismiss the claims against Ms. Miller.

CPRB

In the course of the proceeding before the CPRB, the Petitioners provided extensive testimony in a series of hearings before the CPRB's Hearing Officer. Although Petitioners have subsequently suggested that these hearings were a "charade" (A.R. at 417, Complaint ¶¶ 99, 102), in terms of discovery, the Petitioners were able to testify as they would have in depositions typically taken in a civil action. As the Hearing Officer accepted the Petitioners' testimony as factually accurate, the Petitioners cannot reasonably complain that the Hearing Officer's fact-finding was inadequate. Nevertheless, Petitioners attempt to do exactly that, contending that the CPRB had previously argued that its procedures were not adequate for the task. (Petitioners' Brief at 27). In the pleading cited by Petitioners, the CPRB was referring to the potential need to resolve factual disputes between the Petitioners and their employer, the State Police, particularly in regard to the Petitioners' claims that the State Police had misled them, and in regard to the accuracy of the Petitioners' testimony that the promise of Plan A retirement benefits was the primary or sole motivating factor for Petitioners' joining the State Police. (A.R. at 1424, 1435). Petitioners fail to note that this purported

procedural inadequacy meant that Petitioners' testimony as to these facts was accepted by the Hearing Officer as true and accurate, as a review of the Hearing Officer's Decisions shows. In practical effect, all potential factual disputes were resolved in Petitioners' favor and they have no basis for complaint on this point as the CPRB's procedure was to their advantage. Rather than actually dispute any factual findings of the CPRB Decisions, Petitioners appear to rely upon them.

The relevant substance of the Petitioners' testimony was summarized in the Hearing Officers recommended decisions, as adopted by the CPRB. (A.R. at 362-394, Final Order and First Supplemental Recommended Decision of Hearing Officer; A.R. at 688-773, Final Order and Second Supplemental Recommended Decision of Hearing Officer). The Petitioners' testimony indicated that the State Police had utilized an inaccurate brochure that did not describe the terms of the SPRS (A.R. at 368-369, 694).⁷ Each of the Petitioner employees did sign an enrollment form with the correct designation, i.e., "West Virginia State Police Retirement System Per 15-2A" when their employment commenced. (A.R. at 370-371, 696).⁸ Various Petitioner employees learned that at least some of the terms of their retirement plan, e.g., the contribution rate, differed from that referred to in recruitment materials while at the State Police Academy, but apparently did not inquire further or were told that the contribution rate was the only change. (A.R. at 375-378, 380-382, 384, 698, 701-704, 707-709, 711,

⁷ In addition, certain discovery was carried out in the action now at issue. A former State Police recruiter, Dale Humphreys, testified that he had prepared the recruitment brochure and continued to use it after it had become inaccurate. (A.R. at 1226-1227).

⁸ In addition, the content of the form was confirmed in the deposition of Respondent Terasa L. Miller, as taken in the action now at issue. (A.R. at 1220-1221, 1224).

715-719, 721-725, 727-732, 734-737, 739-740, 743, 746-747, 749, 752-755). The Decisions included conclusions of law, and noted various legal issues argued by the Petitioners, including detrimental reliance, misrepresentation and promissory estoppel, and equal protection. (A.R. at 385-393, 762-769).

The Decisions were subsequently appealed to the Circuit Court of Kanawha County as Civil Action No. 06-AA-55, where the Petitioners argued detrimental reliance, promissory estoppel, that both the State Police and the CPRB had an obligation to advise the Petitioners of the specific terms of their retirement plan; that the CPRB had statutory authority to transfer the Petitioners into Plan A in order to correct the mistakes that resulted in their enrollment in the SPRS; that enrollment in the SPRS was an impairment of contract obligations and a violation of equal protection and due process rights; that the creation of the SPRS was unconstitutional special legislation; that the CPRB was without jurisdiction and authority to reconsider its November 13, 2002, decision; that Terasa L. Miller had a duty to implement the November 13, 2002, decision; and that the proceedings before the CPRB violated the Petitioners' constitutional rights to due process and equal protection. (A.R. at 844-857, Second Supplemental Petition for Appeal, C.A. No. 06-AA-55). Pursuant to West Virginia Code § 29A-5-4, the circuit court could have reversed, vacated, or modified the CPRB's order if it found the order to be: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority or jurisdiction of the CPRB; 3) made upon unlawful procedure; 4) affected by some other error of law; 5) clearly wrong in view of the evidence; or 6) arbitrary, capricious, or characterized by an abuse of discretion. (W. Va. Code § 29A-5-4(g) (LEXIS through 2011 Regular Sess.)). Thus, the circuit court could

have reversed the CPRB's order based upon virtually any of the Petitioners' arguments had the court deemed them meritorious.

The final order entered in Kanawha County Civil Action No. 06-AA-55, and relied upon by the lower court, expressly found that: (1) by the time the Petitioner employees were employed by the State Police, W.Va. Code § 15-2A-3, which closed enrollment in Plan A, had been in effect for six months; (2) the Petitioners were provided with, and signed enrollment forms providing for Plan B (SPRS) benefits, and are therefore charged with the knowledge of the applicable statute; and (3) there is no evidence that the CPRB made false statements, disseminated any false or misleading information to the Petitioners, or otherwise made misrepresentations to the Petitioners that induced the Petitioners to join the State Police. (A.R. at 866-867, Final Order dated November 20, 2008, C.A. No. 06-AA-55).

In the subsequent petition for appeal to this Court, the Petitioners raised several arguments and issues in support of their contention that the CPRB was required to transfer them to Plan A, including: (1) that the CPRB has both the statutory authority and a duty to transfer the Petitioners to Plan A in order to correct a mistake; (2) that the Petitioners have a property interest in their pension plan and are entitled to Plan A benefits; (3) that the doctrine of promissory estoppel applies and creates a contractual obligation due to Petitioners' reasonable reliance; (4) that the denial of Plan A benefits constitutes a denial of equal protection guaranteed by both the State and federal constitutions; and (5) that the CPRB had a duty to implement the November 13, 2002, vote to transfer the plaintiffs to Plan A through issuance of a written order. (A.R. at 1135-1152, Petition for Appeal of C.A. No. 06-AA-55). In support of these arguments,

Petitioners relied upon and cited case law relating to the following issues: 1) rights of public employees under statutorily-created pension systems as contract rights; 2) detrimental reliance as a basis for the creation of protected contract property rights; 3) the availability of equitable remedies where a mistake has been induced as a result of a party's inequitable conduct; 4) the obligation of the CPRB to take court action where the Legislature fails to act appropriately to correct inadequate funding of retirement plans; and 5) equitable estoppel based upon a representation or concealment of material facts. (A.R. at 1110-1115, Petition for Appeal of C.A. No. 06-AA-55). The petition for appeal of the circuit court's final order was refused. (A.R. at 925-926, Corrected Order dated May 13, 2009, No. 090481). The Complaint filed in the action below asserts claims based upon the following theories of recovery: contract breach, misrepresentation, correction of a mistake as a matter of both statutory authority and equity, violation of due process, the duty of the defendants below to take legal action to enforce the funding requirements of pension funds, and refusal to transfer Petitioners into Plan A despite proof of Petitioners' detrimental reliance. (A.R. at 419-421, Complaint).

Contrary to Petitioners' arguments, the lower court was correct to conclude that the Petitioners' claims are barred by the doctrines of res judicata and collateral estoppel.

Res judicata or claim preclusion "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action."

Beahm v. 7-Eleven, Inc., 223 W.Va. 269, 272, 672 S.E.2d 598, 601-02 (2008) (citations omitted).

“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”

Beahm, 223 W.Va. at 273, 672 S.E.2d at 602 (quoting *Conley v. Spillers*, 171 W.Va. 584, 588, 301 S.E.2d 216, 219 (1983)).

“For a second action to be a second vexation which the law will forbid, the two actions must have (1) substantially the same parties who sue and defend in each case in the same respective character, (2) the same cause of action, and (3) the same object.”

. . .

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, **three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.**

Beahm, 223 W.Va. at 273, 672 S.E.2d at 602 (emphasis added) (citations omitted).

This Court has held that the relitigation of an issue is not precluded where the procedures available in the first court are tailored to the “prompt, inexpensive determination of small claims,” *Asaad*, 197 W.Va. at 687-88, 478 S.E.2d at 360-61, but a bar will be imposed where the first court’s procedures are similar to those found at the circuit court level. Here, Petitioners have essentially complained that the evidentiary hearings employed by the CPRB were lengthy and time-consuming, and the Petitioners’ legal arguments are reviewed and discussed at some length in the CPRB Decisions. The proceeding was not, in fact, prompt and inexpensive.

It is now well established that “the doctrine of res judicata may be applied to quasi-judicial determinations of administrative agencies.”

The standard by which this Court determines the preclusive effect of administrative adjudications is [as follows]:

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 identity of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W.Va. 286, 296, 517 S.E.2d 763, 773

(1999) (citations omitted) (emphasis added).

The third factor which must be present to support a *res judicata* determination is a finding that “the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.”

This Court has explained that with respect to the identity of the two causes of action:

“For purposes of res judicata, ‘a cause of action’ is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief... The test to determine if the ... cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues”

. . .

“An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. **It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata.**”

Accordingly, *res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.

Beahm, 223 W.Va. at 274-275, 672 S.E.2d at 603-04 (emphasis added) (citations omitted).

In arguing that the causes of action are not identical, Petitioners appear to misunderstand the term “cause of action.” As stated in the *Beahm* case, “[f]or purposes of res judicata, ‘a cause of action’ is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief.” *Beahm*, 223 W.Va. at 275, 673 S.E.2d at 604. As noted above, the facts are in Petitioners’ favor, and have been repeatedly relied upon by the Petitioners. Thus, the causes of action have been the same throughout the litigation at issue.

The central inquiry on a plea of res judicata is whether the cause of action in the second suit is the same as the first suit, while the central inquiry in determining whether the doctrine of collateral estoppel constitutes a bar to a claim is whether a given issue has been actually litigated by the parties in an earlier suit. Here, there can be no question that the validity of the CPRB’s Decisions has been litigated in the Circuit Court of Kanawha County, affirmed by the Circuit Court of Kanawha County, and that the Petitioners have petitioned this Court for appeal of these decisions. The issues and points of law that are raised in the instant action in support of the Petitioners’ claims against the CPRB have been raised and argued in prior actions, and in appeals refused by this Court, rendering those circuit court decisions final. The facts now alleged are the same facts that have been relied upon by the Petitioners in the prior litigation. Much of

the relief sought by the Petitioners, including Petitioners' transfer into Plan A, a ruling that the CPRB has violated Petitioners' due process rights, and a ruling that the CPRB be compelled to take action to compel funding of the retirement and benefit plans, has been the object of the prior litigation. The Petitioners were parties to the prior litigation, or in privity with the parties, and had a full and fair opportunity to litigate the exact issues, based upon the same facts, in proceedings before the appropriate circuit court. The doctrines of collateral estoppel and res judicata therefore apply, and bar further litigation against the CPRB.

To the extent that the Petitioners argue that the CPRB had a duty to inform them as to what benefits they were entitled to receive based upon employment with the State Police and that the CPRB did not so inform them, that issue was determined by the circuit court's ruling that the Petitioners were charged with knowledge of the law. Further, Petitioners cite no statute or case law that would serve to create such a specific actionable duty on the part of the CPRB. At least implicit in the lower court's ruling is the conclusion that no such actionable duty exists. To the extent that Petitioners might argue that factual development is necessary, Petitioners have deposed Respondent Terasa L. Miller as the representative of the CPRB, in regard to the nature of the CPRB's communication with public employees. (A.R. at 1206-1224). In order to state a claim against the CPRB, the Petitioners must contend that the CPRB had an actionable duty to independently inform the Petitioners of the terms of their retirement program. The Respondents are aware of no such duty, and, were it to be presumed to exist for the sake of argument, the elements of such a duty would have to be established in detail in order to determine causation under the actual circumstances at issue, i.e., the provision

of inaccurate recruiting information by the State Police. No such details have ever been established by the Petitioners.

B. PETITIONERS' OBJECTIONS TO THE LOWER COURT'S CONSIDERATION OF ALL MOTIONS FILED BY THE RESPONDENTS WERE NOT CLEARLY PRESENTED AT THE TIME OF HEARING AND PETITIONERS' THIRD ASSIGNMENT OF ERROR RENDERS THIS ISSUE MOOT.

To the extent that Petitioners attempted, at hearing in the lower court, to reserve argument on various more recently filed motions relating to these Respondents, and particularly to Respondents Terasa L. Miller, State of West Virginia, PERS, and SPRS, the Petitioners did not make a clear record of that objection. (A.R. at 1476-1483, Transcript of January 20, 2011, hearing). A detailed review of the transcript for the January 20, 2011, hearing could support the argument that Petitioners could have intended to make such an objection, and that such an objection could be implied in statements made on Petitioners' behalf at that hearing. However, Petitioners had an obligation to make a clear objection on the record, at the time of hearing, clearly understood by both the lower court and the parties at the hearing. In this light, the basis for Petitioners' second assignment of error is far less compelling.

Further, consideration of the actual substance of the motions filed on behalf of Ms. Miller, the State of West Virginia, the PERS, and the SPRS, the lower court's rulings thereon, and Petitioners' argument relating to the third assignment of error, renders this objection and the second assignment of error moot. The bases for the lower court's rulings in relation to those Respondents are straightforward and clear and Petitioners have argued against those rulings as their third assignment of error.

- C. DISMISSAL OF THE STATE OF WEST VIRGINIA, SPRS, AND PERS WAS APPROPRIATE AS PETITIONERS' COMPLAINT FAILED TO STATE ANY ALLEGATIONS AGAINST THE SPRS AND PERS AND THE ALLEGATIONS AGAINST THE STATE MERELY DUPLICATED THE ALLEGATIONS ASSERTED AGAINST THE CPRB

PERS and SPRS

In the lower court, the Respondents State of West Virginia, SPRS, and PERS, argued, and the lower court ultimately agreed, that Petitioners' Complaint included, literally, no allegations against the two retirement systems, and that the allegations against the State of West Virginia and the CPRB were the same and did not distinguish the CPRB from the State of West Virginia in any relevant way. Thus, contrary to Petitioners' argument here, although the lower court did conclude that these three Respondents were not necessary parties, that conclusion followed from the lower court's primary ruling that the Complaint was deficient in that it contained no allegations sufficient to state a distinct claim against them. Petitioners now argue, without any significant discussion or explanation, that the two retirement systems were named and must be retained as parties "for the purposes of effecting [equitable] relief" (Petitioners' Brief at 39).⁹

Reference to Petitioners' Complaint shows that the PERS was alleged to have been established pursuant to West Virginia Code §§ 5-10-1 to -55 (A.R. at 405, Complaint ¶ 45), was alleged to be administered by the CPRB pursuant to W. Va. Code

⁹ Petitioners also argue that Respondent Terasa L. Miller was properly named for the same reason, i.e., to effect equitable relief. The reasons justifying Ms. Miller's dismissal are set forth in the argument in response to the first assignment of error, however, it should be noted that there is no apparent need to retain Ms. Miller as a party where the CPRB is already a party, and Petitioners present no explanation as to why the presence of the CPRB as a party is not sufficient should equitable relief be deemed appropriate.

§ 5-10D-1 (A.R. at 406, Complaint ¶ 46), and was further alleged to be “different from other public employee systems” in certain particulars. (A.R. at 407, Complaint ¶ 54). There appears to be no other allegation expressly referring to the PERS set forth elsewhere in the Complaint, and the lower court found that these allegations, taken as a whole, are insufficient to present any cognizable claim of any kind against the PERS. Thus, the Complaint failed to state a claim against the PERS. The lower court also noted that, as the Petitioners have alleged that the CPRB administers the PERS, the CPRB appeared to be the real party in interest,¹⁰ so that no claim against the PERS was necessary regardless of the sufficiency of the allegations against the PERS. The lower court’s approach to the naming of the SPRS as a party was essentially the same.

In the Complaint, the SPRS was alleged to have been established as a retirement plan pursuant to W. Va. Code §§ 15-2A-1 to -22 (A.R. at 410, Complaint ¶ 60), was alleged to be administered by the Board (A.R. at 404, 406, Complaint ¶¶ 39, 46), and was referred to repeatedly throughout the Complaint as “Plan B.” Although review of the Complaint shows that Petitioners alleged that they are enrolled in “Plan B” but contend that they should be transferred to the retirement plan referred to as “Plan A” (A.R. at 406-409, Complaint ¶¶ 47-49, 55-57), there appears to be no allegation set forth in the Complaint against the SPRS as a party defendant. Thus, as was the case with the PERS, the lower court held that the allegations relating to the SPRS were insufficient to state a claim of any kind. As with the PERS, the lower court also noted that, in addition

¹⁰ As the PERS and SPRS appear to be retirement systems or plans that are not self-administering but are administered by the CPRB, the Petitioners have not shown that the PERS and SPRS are entities that can “act” in any relevant way in the absence of the CPRB.

to the absence of allegations sufficient to state a claim against the SPRS, the Petitioners had alleged that the CPRB administers the SPRS, and that it therefore appeared that the CPRB was the real party in interest, and that no claim need be brought against the SPRS regardless of the sufficiency of the allegations against the SPRS. Petitioners' bald statement that the PERS and SPRS are required as parties, so that the lower court may effect equitable relief as may be appropriate, simply ignores and fails to address the lower court's reasoning.

State of West Virginia

In their Complaint, the Petitioners named both the State of West Virginia and certain of its agencies, e.g., the CPRB and the West Virginia State Police as parties. However, the Complaint contains no allegations that clarify or explain what the Petitioners intend by naming the "State of West Virginia" as a distinct party in addition to the State agencies that are also expressly named. This ambiguity is exemplified by allegations that attribute certain characteristics to the State, when those characteristics are equally attributable to a named defendant State agency, e.g., in paragraph 60 of the Complaint (A.R. at 410), the "State of West Virginia" is alleged to administer two retirement plans, when those plans are administered by the CPRB as expressly provided by W. Va. Code § 5-10D-1. Further, with the exception of the cited paragraph, i.e., Complaint ¶ 60, there appears to be no other express reference to the State of West Virginia in the Complaint, either as an actor or as a party independent of the named State agencies.

As the Respondents argued below, the State of West Virginia is capable of acting only through its various agencies and departments.

As a practical consequence of the expansion of government and the proliferation of bodies charged with conducting the State's business, **we have recognized that "proceedings against boards and commissions, created by the Legislature, as agencies of the State, are suits against the state** within the meaning of Article VI, Section 35, of the Constitution of West Virginia, even though the State is not named as a party in such proceedings." *Hamill v. Koontz*, 134 W.Va. 439, 443, 59 S.E.2d 879, 882 (1950); *see also Hesse v. State Soil Conservation Committee*, 153 W.Va. 111, 115, 168 S.E.2d 293, 295 (1969) (constitutional immunity "relates not only to the State of West Virginia but extends to an agency of the state to which it has delegated performance of certain of its duties").

Arnold Agency v. W. Va. Lottery Comm'n, 206 W. Va. 583, 590-91, 526 S.E.2d 814, 821-22 (1999) (emphasis added).

Thus, Respondents contend that it is legally sufficient, and preferable for practical reasons, for the named parties to be limited to the agencies of the State of West Virginia that are alleged to have engaged in actionable conduct. More pointedly, as with the PERS and SPRS, there are simply no allegations in the Complaint that are sufficient to state a claim against the State of West Virginia, if the State of West Virginia is intended to be named as a party that is somehow independent of the CPRB and the West Virginia State Police. The Petitioners fail to address these issues in any significant way, but appear to contend that the State of West Virginia must be named as a party, in addition to the appropriate State agency, when an action is brought against a State agency seeking recovery through the State's insurance policy.

The only allegation necessary to the Petitioners' commencement of an action seeking recovery against a State agency through the State's insurance policy is the allegation that recovery is sought under and up to the limits of the State's liability

insurance coverage.¹¹ See, e.g., *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 169-70, 483 S.E.2d 507, 515-16 (1996). As noted above, this Court has plainly determined that proceedings against State agencies are suits against the State. These Respondents are aware of no case where the State of West Virginia was deemed a necessary party in addition to a State agency where the State's insurance coverage was implicated. As the State of West Virginia acts, at all times, through its agencies, the identification of the State of West Virginia, as if it were a party separate and independent from its agencies is merely confusing, and permits a measure of ambiguity and vagueness that can only serve to hinder a court's deliberations in this matter. Thus, the lower court was correct to dismiss the State of West Virginia.

¹¹ Petitioners only belatedly attempted to comply with this actual requirement in their Amended Complaint. (A.R. at 1565, Amended Complaint ¶ 111).

CONCLUSION

For the foregoing reasons, the Respondents, West Virginia Consolidated Public Retirement Board, the State of West Virginia, the West Virginia State Police Retirement System, the West Virginia Public Employees Retirement System, and Terasa L. Miller respectfully request that the Court affirm the circuit court's order dismissing the claims against them.

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,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0746

DAWN COLLETTE BLAND, et al.,

Petitioners,

v.

STATE OF WEST VIRGINIA, et al.,

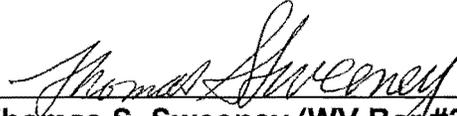
Respondents.

CERTIFICATE OF SERVICE

I, Thomas S. Sweeney, counsel for Defendants 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, acting Executive Director of the West Virginia Consolidated Public Retirement Board, do hereby certify that on this 15th day of September, 2011, I served a true and correct copy of the foregoing **RESPONDENTS MOTION FOR CLARIFICATION** upon counsel of record by hand or by depositing the same in the United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

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