

2011-02-25

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0747

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)

WEST VIRGINIA STATE POLICE,

Defendant below, Respondent.

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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I. ASSIGNMENTS OF ERROR

- A. WHERE THERE IS LIABILITY INSURANCE COVERAGE FOR WRONGFUL ACTS OF AN AGENT OR AGENCY OF THE STATE, SOVEREIGN IMMUNITY IS NOT A BAR TO THE CIVIL ACTION.**
- B. COLLATERAL ESTOPPEL DOES NOT BAR AN ACTION WHERE THE DEFENDANT WAS NOT A PARTY TO AN ADMINISTRATIVE APPEAL AND THERE WAS NO FINDING IN SAID ACTION WHICH IS DETERMINATIVE OF THE MERITS OF PLAINTIFFS' SUBSEQUENT CAUSE OF ACTION.**

II. STATEMENT OF THE CASE

a. Procedural History of the Case

Petitioners filed this action on January 2, 2007, against the West Virginia State Police (hereinafter "WVSP") and others on behalf of themselves and the other troopers in the same or similar circumstances. (A.R. 395-428.) Petitioners', in their Complaint, alleged causes of action for damages based upon causes of action for negligence, misrepresentation, fraud and violation of their constitutional rights. They requested monetary damages, as well as equitable relief, against all defendants based on the claim that the WVSP was acting as an agency of the State and of the other defendants in making the misrepresentations complained of in petitioners' complaint. (A.R. 395-428.) Petitioners specifically alleged that the WVSP owed a duty them to provide "accurate information about retirement benefits, disability retirement benefits and death benefits ...", particularly if they were going to provide the information at all. (A.R. 395-428 at ¶ 44.) They alleged that they were recruited by the WVSP to work as State Troopers "with written and/or verbal assurances and promises that they would receive benefits provided for as described in Plan A...". (A.R. 395-428 at ¶ 48.) They also alleged that they "detrimentally relied upon the written and/or verbal representations and/or omissions of defendants and their predecessors in choosing their careers and foregoing other education, professions, jobs, careers

and compensation based on promises of a better pension, disability and death benefits for them and their families.” (A.R. 395-428 at ¶ 51.) They alleged that the WVSP was negligent in their hiring by providing them false information. (A.R. 395-428.) They prayed for compensatory damages from the WVSP for their misrepresentations and omissions. (A.R. 424.) Further, the WVSP was acting as an agent of the State of West Virginia and therefore the State and other Defendants are liable for their acts and omissions.

The WVSP filed a motion for summary judgment on June 1, 2010 based upon sovereign immunity and collateral estoppel. (A.R. 1106-1201.) On April 1, 2011, the circuit court dismissed the action against the WVSP based upon sovereign immunity, claiming the State’s insurance policy excepted this cause of action, and also that collateral estoppel barred it, and finding that the court could not confer retirement benefits for employment where the legislature has not so authorized. (A.R. 1690-1696 at ¶ 7-9.) With regard to sovereign immunity, the court held that sovereign immunity barred petitioners’ action because the court found that “retirement benefits” were excepted from the WVSP’s insurance coverage. (A.R. 1690-1696 at ¶ 8.) The Court made no other findings regarding the exclusionary language. (A.R. 1690-1696.) With regard to collateral estoppel, the court found that Plaintiff’s claims have already been litigated between the same parties on the same issues and adjudicated to a final decision in Kanawha County, Civil Action Number 06-AA-55. 1." (A.R. 1690-1696 at ¶ 9.)

Prior to the filing of this case, administrative grievances and appeals were instituted by petitioners requesting the Consolidated Public Retirement Board to place petitioners into the retirement or pension system under which they were hired. The WVSP was not a party to these grievances or appeals. (A.R. 290-292, 361-394, 688-773, 860-869). The circuit court, in dismissing the petitioners’ Complaint, relied upon the findings of the Kanawha County Circuit

Court in the administrative appeal to dismiss petitioners' action. (A.R. 1690-1696 at ¶ 9.) The allegations pleaded in petitioners' civil Complaint, that were related to the duty the CPRB owed the WVSP and the duties the WVSP owed petitioners, were not adjudicated in any prior proceedings. (A.R. 290-292, 361-394, 688-773, 860-869). The claim against the WVSP does not depend upon whether the Board or the court can transfer the plaintiffs to Plan A benefits. The decision not to transfer actually reinforces plaintiffs' claims against the WVSP. And there is no question but that the WVSP recruited these young men and women by telling them verbally and in writing that they were going to receive Plan A benefits.

The earlier proceedings involved the issue of whether the petitioners should be placed into the retirement or pension system under which they were hired. Petitioners reference Appeal No. 11-0746, filed contemporaneously with this Appeal, for a complete history of the administrative grievances and appeals. However, a complete recitation of the history of the proceedings is not necessary for purposes of the issues in this Appeal. What is important for purposes of this Appeal is the fact that none of the orders in the prior proceedings addressed the issues pleaded in petitioners' Complaint relating to the duties the WVSP owed petitioners. (A.R. 290-292, 361-394, 688-773, 860-869).

Equally important is the fact that the Consolidated Public Retirement Board in these prior proceedings argued to this Court the following:

[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.

(A.R. 1424, 1435.)

Petitioners now appeal the circuit court's order on the basis that their claims are not barred by sovereign immunity or collateral estoppel.

b. Statement of the 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 their families would have the benefit of the State's advertised retirement and disability plan.

One of petitioners who filed this action includes 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.

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, and 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.)

Another petitioner is Trooper Michael Lynch. 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. (A.R. 1319.) He complied with all of the conditions. (A.R. 1320.) Trooper Lynch then undertook testing with the 41st Class. (A.R. 1320.) On September 23, 1993, he received a letter advising him that he had advanced to the second phase of testing and to report to the oral interview. (A.R. 1321.) He received a letter from the WVSP on January 6, 1994, advising him that he was to take the physical exam at Marshall University. It stated, "report to the State Police Academy Tuesday, January 11th of '94." (A.R. 1320.) While he tested with the 41st Class, 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 would not have accepted employment with the WVSP. 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 say “please call and inquire,” “read the Code,” and it did not advise a new employee 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 stories are different with the petitioners, but the promises are the same. The troopers, while young, choosing a career with many and varied opportunities chose the West Virginia State Police over other jobs and careers, not for the salary but for the benefits.¹

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

¹ Petitioners refer the Court to the statement of facts in Appeal No, 11-0746 for additional details on other petitioners that were recruited.

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 State Police Recruiting Coordinator testified that he was totally unaware that the law had changed to reduce benefits for the recruits and he never told them that. Mr. Humphreys stated:

A. Yes, sir. The West Virginia State Police has been around since 1919. We are the fourth oldest, I believe, in the country.

We have prestige across the country. We have a very good reputation amongst the best law enforcement departments in the country.

We have an academy that is probably the only one, I believe it is the only one still that offers a two-year Associate's Degree.

When you graduate, it is all paid for. You are paid while you are attending. You will be the same -- actually, you are the same as going to Marshall University.

Upon graduation from the State Police Academy, you are awarded an Associate's Degree in criminal justice, and our retirement plan at that time was as good or better than most any department in the country.

We were offered 5.5 percent of the total earnings that you accumulated while you were in the department paid out on a monthly basis.

Q. In your recruiting, did you find that the retirement plan that the West Virginia State Police had was beneficial to the state in terms of attracting qualified personnel to the State Police?

A. I feel if I hadn't have had the retirement program that I did and the academy with the Associate's Degree, those two factors was the selling points that I used all through my recruitment.

When you laid this out, you could just see the expressions on their faces, this is interesting, I am interested in this, I don't have to pay for my college, I get paid while I go, and I am going to retire with an excellent retirement after 20 years or 25 years. If I hadn't have had those tools, I wouldn't have got the standard of troopers that I did.

Q. The brochure that you have there that describes the retirement plan of the West Virginia State Police, when did you stop using that brochure in recruiting candidates to the West Virginia State Police?

- A. I never did stop using this.
- Q. So that would include recruiting individuals in 1994, 1995 and 1996?
- A. Yes, sir.
- Q. And even 1997?
- A. Yes, sir. I don't remember any other brochure. This was the last one that I wrote. This is the last one I remember ever using.
- Q. Were you ever informed by the Consolidated Public Retirement System or by anyone else in state government that the retirement benefits for candidates to the West Virginia State Police Academy were any different than what is in Exhibit 1?
- A. No, I was never informed. I was never given any information. I really don't know why, but I had to find this out on my own at a much later date, but I was never given any notification to stop using this, that there was a new plan, other than what I had picked up on my own much later.

(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.) Plan B was not even a footnote. Petitioners alleged that the "State Police" owed them a duty to provide them with accurate information as to their retirement and pension benefits. (A.R. 395-428 at ¶¶ 44.) Obviously, this conduct by the WVSP was negligent and misrepresented the benefits to petitioners.

III. SUMMARY OF ARGUMENT

The WVSP filed a motion for summary judgment in the circuit court below claiming that petitioners' claims were barred by sovereign immunity and collateral estoppel. The WVSP has liability insurance coverage for wrongful acts such as negligence and misrepresentation. The

exclusionary language in the insurance policy does not exclude coverage for misrepresentations. Inasmuch as the WVSP has insurance coverage for petitioners' claims and the petitioners are seeking monetary damages covered by the insurance policy the WVSP cannot assert the defense of sovereign immunity.

The WVSP also asserts that the issues in this case have been previously adjudicated in their favor in prior administrative proceedings. The present claims involve petitioners' allegations that the CPRB and the WVSP 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. The WVSP, acting for the State of West Virginia, made written and verbal assurances and promises that they would receive benefits provided for as described in Plan A and the petitioners detrimentally relied upon the representations and/or omissions of defendants and their predecessors in choosing their careers and foregoing other education, professions, jobs, careers and compensation based on promises of a better pension, disability and death benefits for them and their families. If the WVSP undertook any responsibility to inform them then the WVSP had a duty to provide correct information. The WVSP was not a party to any of the prior proceedings. Further, the only real underlying determination made in the prior administrative proceedings was the determination by the Consolidated Public Retirement Board and the court that the CPRB did not have the statutory authority to place petitioners in the retirement or pension plan under which they were hired. The CPRB did not adjudicate whether the WVSP or the other defendants were negligent or made misrepresentations and had no jurisdiction to award or deny the plaintiffs tort damages for these causes of action. Additionally, the Consolidated Retirement Board did not, and could not, provide petitioners with a full and fair opportunity to

adjudicate the claims set forth above. Therefore, there was no final adjudication of petitioners' claims against the WVSP in the other actions.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this case because: the parties have not waived oral argument; the appeal is meritorious; the dispositive issues have not been authoritatively decided; and petitioners believe the Court's decisional process would be significantly aided by oral argument. Because this case involves assignments of error in the application of settled law relating to insurance policy construction and the doctrine of collateral estoppel, it should be set for Rule 19 argument. Inasmuch as this is a Rule 19 argument, a memorandum decision in this particular appeal is generally appropriate.

V. ARGUMENT

1. STANDARD OF REVIEW

This Court's standard of review concerning summary judgment is well settled. Upon appeal, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court is guided by Rule 56 of the West Virginia Rules of Civil Procedure, which provides that summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). This Court has also made clear that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). *Accord* Syl. pt. 2, *Jackson v. Putnam County Bd. of Educ.*, 221 W.Va. 170, 653 S.E.2d 632 (2007); Syl. pt. 1,

Mueller v. American Elec. Power Energy Servs., Inc., 214 W.Va. 390, 589 S.E.2d 532 (2003).

2. ASSIGNMENTS OF ERROR

A. WHERE THERE IS LIABILITY INSURANCE COVERAGE FOR WRONGFUL ACTS OF AN AGENT OR AGENCY OF THE STATE, SOVEREIGN IMMUNITY IS NOT A BAR TO THE CIVIL ACTION.

Sovereign immunity is not a bar to this action because there is liability insurance coverage for the misrepresentations and omissions of the WVSP. The circuit court ruled that in a civil action for damages where the claimed damages include employee benefits, the insurance policy of the State does not provide coverage. Defendants and the circuit court relied upon an exclusion to the policy to deny coverage for the petitioners' claims. (A.R. 1690-1696.)

The WVSP's insurance policy, effective July 1, 2001, includes "Coverage E," entitled, "Wrongful Act Liability Insurance," which insures "for a loss arising from any 'Wrongful Act' of the 'Insured' . . ." and the "Company" agrees to pay "all sums that the 'Named Insured' may be required . . . to pay . . . arising from any 'Wrongful Act.' " (A.R. 1451.)

"Wrongful Act" is defined to include:

any actual or alleged act, breach of duty, neglect, error, misstatement, misleading statement or omission by the "insured(s)" in the performance of their duties for the "Named Insured", individually or collectively, or any matter claimed against them solely by reason of their being or having been "insured(s)".

(A.R. 1453.)

Endorsement #17 to the policy extends this coverage, without any exclusion for "wages, salaries and benefits", for the period July 1, 1977 to July 1, 1995. (A.R. 1455.) Endorsement #17 states as follows:

Section I – Coverages, Coverage E. Wrongful Act Liability Insurance is amended to add the following:

This insurance shall cover loss arising from any claim made against the “Named Insured”, the estates, heirs, legal representative or assigns of deceased persons who were “insureds” at the time of the “Wrongful Act” upon which such claims are based for “Wrongful Acts” that were committed in the “policy territory” during the period July 1, 1977 to July 1, 1995 for State of West Virginia agencies, so long as the claim made against the “insured” for loss arising from any “Wrongful Act” of the “insured” or of any other person whose actions the “insured” is legally responsible was never reported to the “Named Insured’s” prior carrier(s) and the Board of Risk and Insurance Management of the State of West Virginia had no knowledge of the claim during the pendency of your claims made policy(ies).

While there are exclusions to this endorsement, they do not address, in any way, exclusions for claims attributable to wages, salaries or benefits. (A.R. 1455.)

As defined in the policy in Coverage E, (4)(B), “loss” broadly includes but is not limited “damages, judgments, settlements and costs.” (A.R. 1454.)

In *Pittsburg Elevator v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983), this Court held that “[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.”

In *Wehner v. Weinstein*, 216 W.Va. 309, 607 S.E.2d 415 (2004), this Court set forth certain well-established principles of insurance policy construction:

This Court has consistently held that “ ‘[l]anguage in an insurance policy should be given its plain, ordinary meaning.’ Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (1986).’ Syllabus Point 2, *Russell v. State Automobile Mutual Insurance Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992).” Syl. Pt. 2, *Tanner*, 211 W.Va. at 162, 563 S.E.2d at 827. In syllabus point three of *Tanner*, this Court also explained:

“ ‘Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.’ Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).” Syllabus Point 1, *Russell v. State Automobile Mutual Insurance Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992).

The Court in *Wehner, supra*, further explained:

The problem of ambiguity in a contract of insurance has been extensively addressed by this Court, and ambiguity has been defined as follows: “Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.” *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216,221, 517 S.E.2d 313, 318 (1999).

Wehner, at 315, 421.

Where an ambiguity exists, this Court has explained that certain rules of construction will be implemented. First, “any ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured.” *Id.*, at 315, 421. See also, *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988). This Court has also stated that it is well-settled law “that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.” *Wehner*, at 315, 421. See also, Syl. Pt. 2, *State v. Janicki*, 188 W.Va. 100, 422 S.E.2d 822 (1992); Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). Where a provision of an insurance policy is ambiguous, it is construed against the drafter, especially when dealing with exceptions and words of limitation. *West Virginia Ins. Co. v. Lambert*, 193 W.Va. 681, 458 S.E.2d 774 (1995). Therefore, “[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.” *Jenkins v. State Farm Mutual Automobile Ins. Co.*, 219 W.Va. 190, 632 S.E.2d 346 (2006), citing Syl. Pt. 7, *Russell v. Bush & Burchett, Inc.*, 210 W.Va. 699, 559 S.E.2d 36 (2001). Further, “[w]hen the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted.” Syl. Pt. 2, *Farmers Mutual Insurance Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002).

Another matter to be considered in examining the applicability of an insurance exclusion is whether an insured had a reasonable expectation of coverage under the insurance policy. This Court has adopted the doctrine of reasonable expectations. “An insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean.” *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33, 35-36 (1986); see *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Hensley v. Erie Insurance Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981); *Thompson v. State Automobile Insurance Co.*, 12 W.Va. 551, 554, 11 S.E.2d 849, 850 (1940). “With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” Syl. Pt. 8, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

In *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, *supra*, this Court explained:

Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted. *Linden Motor Freight Co. v. Travelers Insurance Co.*, 40 N.J. 511, 193 A.2d 217 (1963); see Keeton, 83 Harv.L.Rev. at 976. An exclusion in a general business liability policy should not be so construed as to “strip the insured of protection against risks incurred in the normal operation of his business,” especially when the insurer was aware of the nature of the insured’s normal operations when the policy was sold. *Chemtec Midwest Services, Inc. v. Insurance Company of North America*, 279 F.Supp. 539 (W.D. Wis. 1968); see *Boswell*, 38 N.J.Super. 599, 610, 120 A.2d 250, 255.

Where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. *Gerhardt v. Continental Insurance Co.*, 48 N.J. 291, 225 A.2d 328 (1966).

Id. at 742, 496. Thus, where “[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and

clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured. Syl. Pt. 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, *supra*.

First, this policy provides coverage for “wrongful acts” which include breaches of duty, neglect, error, misstatements, misleading statements and omissions. It also plainly and clearly provides coverage, without exclusion, for any wrongful act, retroactively from July 1, 1977 to July 1, 1995. Many of the Defendants' wrongful acts occurred in 1993 to July 1995. During this period is when the WVSP recruiters distributed brochures and recruited the petitioners. It is a portion of the of the period when the WVSP handed out manuals with Plan A as the only retirement. Also, it is when petitioners were verbally told they would receive Plan A benefits. The classes included were years 1994-1996. Unquestionably, there is liability coverage for these acts, without exclusion, and the circuit court therefore erred in ruling that the State’s insurance policy did not provide coverage for these acts.

The exclusion relied upon by the Court was Exclusion E(2)(I). This exclusion is only applicable from July 2, 2005 and states that it applies “[t]o any claim(s) made against the ‘insured’ for damages attributable to wages, salaries and benefits.” (A.R. 1453.) However, the exclusion is vague and ambiguous. It was obviously intended to apply to claims such as wage and hour violations and claims against the state for reclassification, administrative wage and hour claims, but not ‘wrongful acts.’ (A.R. 1447-1449.) This is because the tort action defines the coverage. In other words, coverage goes to what the wrongful act or liability is. Coverage is not typically determined by the consequences of the action. In this case, misrepresentation, fraud and negligence are the causes of action to which one is required to look in order to define

coverage. Petitioners' claims are that they would not have accepted employment with the WVSP if they had been told they would receive Plan B benefits.

“Wages, salaries and benefits” are not defined in the policy. However, it is clear that these words are nouns. They are not acts. “Wages, salaries and benefits” did not cause Plaintiffs’ claims. Defendants’ acts - their misstatements, misleading statements, and omissions - caused Plaintiffs’ claims.

What is clear is that when a claim involves a "Wrongful Act," the policy provides coverage for whatever resulted from the wrongful act. (A.R. 1447-1449.) Therefore the coverage is determined by the act and not by the consequences of the act. (A.R. 1447-1449.) In this case the petitioners’ losses were a result of the torts of misrepresentation, fraud and negligence. (A.R. 1447-1449.) These acts are covered under the policy. (A.R. 1447-1449.)

The exclusion is at least subject to more than one interpretation and is therefore ambiguous. It also conflicts with the insuring provision of the policy which clearly insures the plaintiffs’ allegations of acts of defendants since it insures against misrepresentations so long as they are not “intentional” and found to be so by “final adjudication.” Further, the “loss” insured against includes broad language such as “damages,” “judgments,” “settlements,” and “costs.” Damages for misrepresentation include loss of income and benefits. Thus, the exclusion must be construed strictly against the insurance company and liberally in favor of the insured, and the interpretation that will sustain the claim and cover the loss must be adopted.

Additionally, the doctrine of reasonable expectations should be considered here. First, the exclusion was ambiguous and unclear. Also, the policy was obviously obtained to protect the State against losses from “wrongful acts” occurring in the normal operation of its business. The insurer was aware of the nature of the State’s normal operations when the policy was sold. The

State sought protection against risks from “wrongful acts”. This ambiguous policy provision, if interpreted in favor of the insurance company, would largely nullify that protection. For example, “wrongful act” includes any breach of duty or any neglect or any misrepresentation. Any breach, neglect or misrepresentation could result in a plaintiff losing income and benefits. This would leave the State, and the beneficiaries of the policy, without the coverage for which it contracted. Thus, the application of this exclusion should be severely restricted and Plaintiffs’ claims should be covered. Therefore, the circuit court erred in finding that Plaintiffs’ action is barred by sovereign immunity.

Furthermore, *Eggleston v. W.Va. Dept. of Highways*, 189 W.Va. 230, 429 S.E.2d 636 (1993) and *Shaffer v. Stanley*, 215 W.Va. 58, 593 S.E.2d 629 (2003), foreclose any argument that Plaintiffs’ claims are not covered by this insurance policy. Syllabus point 1 of *Eggleston v. W.Va. Dept. of Highways*, *supra*, holds:

W.Va. Code, 29-12-5(a) (1986), provides an exception for the State’s constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy ‘shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.’

In *Shaffer v. Stanley*, *supra*, the Bureau for Child Support Enforcement (“BSCE”) wrongfully collected child support in excess of what was owed by Mr. Stanley and he filed suit against the DHHR and BSCE to recover the overpayment. The BSCE denied liability for the repayment based upon constitutional immunity. The Court, relying upon *Parkulo v. West Virginia Board of Probation*, 199 W.Va. 161, 483 S.E.2d 507 (1996), reasoned that the State Board of Risk and Insurance Management is authorized pursuant to W.Va. Code § 29-12-5(a) to purchase insurance providing coverage of all State “property, activities and responsibilities.” *Shaffer*, at 68, 639. The Court, relying upon Syllabus point 2 of *Pittsburg Elevator*, *supra*,

reasoned that “[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.” The Court then, relying upon Syllabus point 1 of *Eggleston, supra*, concluded: “that the Board of Risk and Insurance Management had a statutory duty to purchase or contract for insurance to provide coverage for all of the DHHR’s activities and responsibilities. Further, the DHHR has a responsibility to refund an obligor money collected in excess of what is owed by the obligor. Due to Mr. Stanley’s successful assertion of the statute of limitation on the execution of judgments, it has been determined that the DHHR collected from Mr. Stanley in excess of what he owed. Therefore, Mr. Stanley is entitled to a refund of his overpayment of child support arrearages under and up to the limits of the State’s liability insurance coverage for loss on account of the DHHR’s activities and responsibilities.” *Shaffer*, at 68, 639.

In a footnote to its conclusion, the Court stated “[d]ue to the fact that the Board of Risk and Insurance Management had a statutory duty under W.Va. Code § 29-12-5(a), as stated in *Eggleston*, to purchase or contract for insurance for all of the DHHR’s responsibilities, this Court wishes to make clear that the absence of any such coverage may not be used by the DHHR to deprive the appellee of a refund of his overpayment.” *Id.* at fn. 14.

The Court’s discussion of the reason for constitutional immunity in *Pittsburg Elevator* indicates that the original intention of constitutional provisions granting sovereign immunity were meant only to prevent bondholders of a state from sacking the public treasury. *Pittsburg Elevator*, at 748, 680. The Court discussed the concept that “[t]here is no creature of the State above the law and irresponsible”, expressed in *Tomkins v. Kanawha Board*, 19 W.Va. 257 (1881). *Id.* at 750, 682. The Court also discussed the Bill of Rights found in Article III of the

West Virginia Constitution, the constitutional provisions that protect these rights, and the irreconcilability of these provisions and sovereign immunity. *Id.* Relying upon *Coal & Coke Ry Co. v. Conley*, 67 W.Va. 129, 67 S.E.613 (1910) and *Poindexter v. Greenhow*, 114 U.S. 270, 290, 5 S.Ct. 903, 914, 29 L.Ed. 185 (1885), the Court distinguishes the “State” and the “government of the State” as follows:

Once the distinction between the State as an ‘ideal person, intangible, invisible, immutable,’ and the government of a State as an agent accountable for its wrongful acts is recognized, the asserted irreconcilability of the freedoms guaranteed by article III and the bar to suit contained in article VI, section 35 loses all validity. Indeed, as the Court in *Poindexter* observed: ‘[The] immunity from suit, secured to the States, is undoubtedly a part of the Constitutional, of equal authority with every other, *but no greater, and to be construed and applied in harmony with all the provisions of that instrument.*”

Pittsburg Elevator, at 751-752, 683-684 (emphasis in original).

The Court then considers the decisions that have carved exceptions from the prohibition against suing the “State” and concludes:

Our constitution clearly contemplates that every person who is damaged in his person, property, or reputation shall have recourse to the courts to seek the redress of his injuries. *See* W.Va. Const. art. III, §§ 9, 10, 17. *See generally* *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781, 786 (1981). The fact that the wrongdoer is an instrumentality of state government should not eviscerate these constitutional rights, inasmuch as the Bill of Rights contained in article III is designed to protect people from government. Moreover, one's constitutional right to access to the courts should not depend upon whether one seeks recourse for injuries attributable to a governmental agency by way of a cause of action sounding in tort, or by way of a mandamus to compel compensation for the damaging of private property. *Compare* *Mahone v. State Road Comm'n*, 99 W.Va. 397, 129 S.E. 320 (1925), *with* *State ex rel. Phoenix Insurance Co. v. Ritchie*, *supra*. It is anomalous, indeed, that our constitution protects property which is damaged, for example, through the negligence of the State Road Commission in the course of constructing a roadway, *see State ex rel. Phoenix Insurance Co. v. Ritchie*, *supra*, but would not protect the life and limbs of a person negligently run down by a truck driven by an employee of the State Road Commission during construction of the same roadway. *See* Syllabus Point 1, *Mahone v. State Road Comm'n*, *supra*. (“The state road commission of West Virginia is a direct governmental agency of the state, and as such is not subject to an action for tort.”) Undeniably, problems of equal protection are present in such a situation.

With regard to the effect of the State's procurement of liability insurance upon the constitutional bar to suit, the Court ultimately concludes that where suits seek recovery against the State's liability insurance coverage, "the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable." *Id.* at 756, 668-689. *See also*, W.Va. Code §29-12-5; *Goodwin v. County Comm'n of Webster County*, 171 W.Va. 130, 298 S.E.2d 103, 105 (1982)("Where liability insurance is present, the reasons for immunity completely disappear.")

Accordingly, the Defendants here should be prohibited from asserting an absence of coverage to deprive the Plaintiffs of the damages to which they are entitled as a result of the Defendants' wrongful acts. The Board of Risk and Insurance Management had a statutory duty to purchase or contract for insurance to cover the duties and responsibilities of the WVSP. The WVSP had a duty to deal with the Plaintiffs' in a lawful manner and to refrain from wrongful acts against the Plaintiffs. Thus, while there is coverage for plaintiffs' claims, even the absence of any coverage here may not be used to deprive the Plaintiffs of the damages to which they are entitled. Moreover, to hold otherwise would allow the State to ignore its statutory duty to purchase or contract for insurance. The State could simply shirk its responsibility, neglect to procure the proper insurance, and then claim immunity. This would render West Virginia Code 29-12-1 *et seq.* meaningless and would also allow the State to eviscerate the constitutional rights guaranteed to our citizens to protect them from the government.

In conclusion, that WVSP has liability insurance coverage for the wrongful acts complained of by the Plaintiffs and the circuit court erred in finding that sovereign immunity bars Plaintiffs' action.

B. COLLATERAL ESTOPPEL DOES NOT BAR AN ACTION WHERE THE DEFENDANT WAS NOT A PARTY TO AN ADMINISTRATIVE APPEAL AND THERE WAS NO FINDING IN SAID ACTION WHICH IS DETERMINATIVE

**OF THE MERITS OF PLAINTIFFS' SUBSEQUENT
CAUSE OF ACTION.**

The issues actually decided in the prior administrative grievance and appeal certainly are not the same issues as the those in the present case against the WVSP. Petitioners were not given a full and fair opportunity to have the issues raised in the instant case resolved in the administrative grievance and appeal. Further, there was not a final adjudication on the merits in the prior administrative grievance and appeal of the issues sought to be litigated in the present civil action.

The WVSP argued and the court below found that plaintiffs' claims have already been litigated "between the same parties on the same issues and adjudicated to a final decision in Kanawha County, Civil Action Number 06-AA-55 and then dismissed the Complaint against the WVSP based upon collateral estoppel.

The circuit court plainly erred in applying the doctrine of collateral estoppel to this case. First, contrary to the WVSP's argument and the circuit court's finding, the WVSP was not a party to the prior administrative grievances or appeals. Second, the issues decided in the prior administrative grievance and appeal are not the same issues as those in the present case. In this civil action Plaintiffs' seek damages for the wrongful acts of the WVSP and against the other defendants in part based upon the acts of the WVSP. The CPRB did not adjudicate whether the WVSP was negligent or made misrepresentations and had no jurisdiction to award the plaintiff tort damages for these causes of action. Therefore, plaintiffs were not given a full and fair opportunity to have the issues raised in the instant case resolved in the administrative grievance and appeal. Finally, there was not a final adjudication in the prior administrative grievance and appeal of the issues sought to be litigated in the present civil action.

This Court held in the Syllabus of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995):

1. 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*.

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 identity 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).

Similarly, this Court has stated:

An assessment of three factors is ordinarily made in determining whether res judicata and collateral estoppel may be applied 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 doctrine is consistent with the express or implied policy in the legislation which created the body.

Syl. Pt. 3, *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987) (emphasis added).

See also Syl. Pt. 8, *Conley v. Spiller*, 171 W.Va. 584, 302 S.E.2d 216 (1983) (“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.”);

Mellon-Stuart Co. v. Hall, 178 W.Va. at 299, 359 S.E.2d at 132 (“The central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit.”).

a. Identity of Issues

The issues present in this case are not identical to the issues previously decided in the administrative grievance and appeal. As to the requirement of identity of issues, a review of the decisions of the West Virginia Supreme Court of Appeals addressing whether collateral estoppel 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.

In *Garrison v. Herbert J. Thomas Mem. Hosp.*, 190 W.Va. 214, 438 S.E.2d 6 (1993), the Court was presented with the issue of whether collateral estoppel would bar the plaintiff, Richard L. Garrison, M.D., from asserting that an agent of the local defendant hospital (“Thomas Hospital”) at which he had previously held privileges had reported false and misleading information to a Wyoming hospital (“Memorial Hospital”) at which he had applied for privileges due to the fact that the doctor had earlier failed in a suit in which he challenged the Wyoming hospital's denial of his application for privileges. The doctor had stated in his application for privileges that he had never previously had any privileges suspended. Memorial Hospital, in verifying the information contained in his application, contacted Thomas Hospital. Dr. Hogshead, the Medical Director of Thomas Hospital, responded to the inquiry indicating that Dr. Garrison's obstetrical privileges had been suspended.² Accordingly, Memorial Hospital denied

² Dr. Garrison's obstetrical privileges had been suspended. He argued, however, in his West Virginia suit that following his suspension he met with an agent of Thomas Hospital in part to discuss a lawsuit he was intending to

Dr. Garrison's request for privileges on the basis that he had concealed material facts in his application. *Id.* at 8-11.

Dr. Garrison unsuccessfully brought a suit in Wyoming challenging the hospital's denial of his application. He then brought suit in West Virginia against Thomas Hospital asserting in part that they had breached a contract entered into by the parties and tortiously interfered with his business relations. Thomas Hospital argued that he was collaterally estopped from arguing that Dr. Hogshead had provided false and misleading information because the Supreme Court of Wyoming had concluded that Dr. Hogshead's statements were true. The West Virginia Supreme Court of Appeals concluded that collateral estoppel could not be applied because the issues presented in the two suits were not identical. *Id.*

The Court stated:

The primary issue in [the case appealed to the Supreme Court of Wyoming] was whether the decision of Memorial Hospital's Board of Trustees to deny Dr. Garrison's application for appointment to the medical staff was arbitrary, capricious or without foundation in fact. The court determined that the trustee's decision was not arbitrary or capricious because there was "*substantial evidence that Dr. Garrison's application for medical staff privileges contained significant misstatements or omissions.*" *Garrison [v. Board of Trustees of Memorial Hospital]*, 795 P.2d 190, 194 (Wyo. 1990)]. The court believed that Dr. Garrison concealed material facts from the trustees. *Id.*

* * *

The issue before the Wyoming Supreme Court was not whether Dr. Hogshead knowingly gave false information to Memorial Hospital about Dr. Garrison. The court instead based its review upon whether the action of the trustees in denying Dr. Garrison's application was arbitrary or capricious. Therefore, we do not believe that Thomas Hospital can assert collateral estoppel in this action.

file against it. During this discussion, he alleged that Thomas Hospital agreed that if he did not file such a suit it would reinstate his obstetrical privileges; expunge any record of his suspension; and not report the suspension to any entity inquiring about it. Based upon this agreement, he then resigned from the medical staff of Thomas Hospital. *Id.* at 9.

Garrison v. Herbert J. Thomas Mem. Hosp., 438 S.E.2d at 10-11 n. 5 (emphases added). The Court was able to conclude that the issues presented were not identical and that collateral estoppel should not apply despite that (1) Dr. Hogshead's letter was the substantial evidence upon which Memorial Hospital relied in denying Dr. Garrison's application on the basis that he had concealed material facts in his application, and (2) Dr. Garrison would not be guilty of having concealed such material facts if indeed Dr. Hogshead's contentions were false and misleading.

Similarly, in *Miller, supra*, in addition to finding that the procedures available were not identical or substantially similar, the Court also concluded that the issue presented before it was not identical to that previously determined in the administrative proceeding. As noted above, Miller, a licensed practical nurse, who had been terminated from her job on the basis that she had committed patient abuse, had been found by a preponderance of the evidence before the State Employee Grievance Board to have not committed any patient abuse. The Court concluded that collateral estoppel did not act as a bar, however, to a subsequent criminal prosecution for battery.

The Court noted that the State Employee Grievance Board did not have any authority or jurisdiction to determine criminal matters. Moreover, in comparing the issues that were presented, the Court refused to define the relevant issue at the administrative hearing as being whether the defendant had committed any patient abuse. Rather, the Court defined the relevant issues in a broader fashion stating, "we recognize the issue of whether an individual was terminated wrongfully for patient abuse is not the same issue as whether an individual committed a criminal act of battery." *Miller*, 459 S.E.2d at 123. The Court then noted that a claimant who has filed a grievance for wrongful termination may raise additional factors which would not be relevant to a criminal prosecution, including that proper termination procedures were not

followed, that the claimant was in reality terminated for other discriminatory reasons, or that the sanction of termination imposed was harsher than those sanctions received by other employees similarly situated.³ *Id.*

However, the Court admitted that any such matters in Miller's grievance proceeding was dicta since it was found that she had not committed any patient abuse.⁴ In essence, the dispositive issue in both the grievance proceeding and the criminal case was whether Miller had improperly struck the patient. The Court explained the apparent inconsistency as follows:

By distinguishing these issues, we do not mean to suggest that battery may not be considered a form of patient abuse. We merely are stating *there are differences between a grievance and a criminal proceeding that merit an independent review of the facts and issues*. Thus, although the ALJ did not find patient abuse at the grievance proceeding, it did not foreclose the criminal proceeding on the issue of battery.

Id. at 124 n. 15.

More recently, 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

³ Again, ironically, the Court used differences concerning the grievance procedure--that were this time clearly favorable to Miller--to prevent the successful claimant from having collateral estoppel used as a bar to the subsequent criminal suit.

⁴ Had the ALJ concluded that Miller was guilty of committing patient abuse but that she was improperly terminated because the appropriate procedures were not followed or because the employer had actually terminated her due to another motive which was impermissibly discriminatory, then obviously her success in the wrongful termination proceeding should not bar her subsequent criminal trial for battery. However, the ALJ concluded that Miller's termination was wrongful because she had not committed any patient abuse. Any additional reasons given for the ALJ's finding of wrongful termination were merely dicta.

S.E.2d at 809-10.

The issues actually decided in the prior administrative grievance and appeal here are not the same issues as those in the present case. In this case the Plaintiffs allege that the WVSP owed a duty to the Plaintiffs "to provide them with accurate information about retirement benefits, disability retirement benefits and death benefits ...". Plaintiffs also allege that they were recruited by the WVSP to work as State Troopers "with written and/or verbal assurances and promises that they would receive benefits provided for as described in Plan A...". Plaintiffs allege that they "detrimentally relied upon the written and/or verbal representations and/or omissions of defendants and their predecessors in choosing their careers and foregoing other education, professions, jobs, careers and compensation based on promises of a better pension, disability and death benefits for them and their families. Plaintiffs seek compensatory damages from the WVSP for their misrepresentations and omissions. As can be observed from the circuit court's findings set forth above, the administrative grievance and appeal involved a different issue—the issue of whether the CPRB had authority to place the Plaintiffs into the retirement or pension system under which they were hired. The issue regarding whether the CPRB had authority to place the Plaintiffs into the retirement or pension system under which they were hired is neither identical nor similar to the issue of whether Plaintiffs are entitled to damages caused by the misrepresentations and omissions of the WVSP. This position is supported by the facts and law set forth in the cases above. Accordingly, the circuit court erred in ruling that Plaintiffs' claims are barred by collateral estoppel.

b. Full and Fair Opportunity to Litigate

Plaintiffs were not given a full and fair opportunity to have the issues raised in the instant case resolved in the administrative grievance or appeal. The importance of the available

procedures being identical or substantially similar in both theory and practice before the doctrine of collateral estoppel may be utilized is demonstrated in several decisions of the West Virginia Supreme Court of Appeals, including *Vest v. Board of Educ. of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781 (1995); *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

In *Vest*, the Court was faced with the issue of whether a female substitute teacher was collaterally estopped from filing a claim under the West Virginia Human Rights Act alleging that she had been discriminated against and terminated on the basis of sex and pregnancy due to the fact that she had earlier lost a grievance she had filed with the Grievance Board which was essentially based upon the same facts and circumstances. The Court held in pertinent part:

The procedures employed by the Grievance Board are not substantially similar to those employed by either a court of law or the Human Rights Commission (Commission), and the differences are of profound significance. Thus, even if a grievance hearing examiner concludes that an employer's adverse action to a grievant was not "discriminatory," but was job related, that determination is not binding on a court or the Commission deciding a claim under the Human Rights Act--regardless of whether the grievant alleged or adduced evidence of discriminatory motive or disparate impact at the grievance hearing and regardless of whether the Grievance Board made a determination about such issues.

As noted above, the Legislature designed the grievance process to be simple and expeditious. Consequently, the process is streamlined and lacks many of the adversarial accouterments found in judicial and Commission's proceedings. In the vast majority of grievances, for example, the grievant is not represented by a lawyer. Moreover, and more importantly, the grievance process does not provide for any of the discovery mechanisms available under the Rules of Civil Procedure and the Commission's procedural rules. Finally, in stark contrast to the Human Rights Act, the grievance statute does not provide for the right to an independent investigation of each grievance filed before the Board, does not make available at public expense representation by a lawyer for cases that proceed to a hearing before an administrative law judge, and does not give employees the option of skipping the administrative process and pursuing their claims *de novo* in circuit court where jury trials and the full array of legal and equitable remedies are obtainable.

Id. at 786.

In *Miller*, the Court was faced with the issue of whether the State could be collaterally

estopped from prosecuting a licensed practical nurse for committing a battery on a mentally retarded patient since the nurse had previously successfully challenged her termination for patient abuse before the State Grievance Board. During the proceedings before the State Grievance Board, the nurse was found to have not committed any patient abuse. The State was represented in this proceeding by the Attorney General's Office. In light of the ruling that she did not commit any patient abuse, which was based on a preponderance of the evidence, the nurse argued that collateral estoppel should bar the subsequent criminal prosecution, particularly since any finding of guilt against her for committing a battery would have to be proven beyond a reasonable doubt.

The Court, relying in part on its earlier holding in *Vest*, disagreed noting in part that the procedures which had been available before the State Grievance Board were not substantially similar to those which are available in a criminal prosecution.

. . . [W]e find the purpose of the grievance procedure under W.Va.Code, 29-6A-1, *et seq.*, is "to provide a procedure for the *equitable and consistent resolution of employment grievances*[" W.Va.Code, 29-6A-1 (1988). (Emphasis added). . . . Simply stated, the purpose of the Grievance Board is to fairly and efficiently resolve employment problems

* * *

. . . The procedure employed at a grievance proceeding is obviously much different than that employed at a criminal trial. For instance, a criminal trial is governed by the Rules of Criminal Procedure, while a grievance proceeding is not. In addition, parties in a criminal proceeding are afforded a wide variety of rules and statutory protections. For example, reciprocal discovery is provided under Rule 16 of the West Virginia Rules of Criminal Procedure. Likewise, the West Virginia Rules of Evidence are strictly applied in criminal proceedings. Moreover, under the Sixth Amendment to the United States Constitution, a criminal defendant may invoke his rights to a speedy and public trial before an impartial jury; "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence." *See also* W.Va. Const. art. 3, § 14.

Although the purpose of the grievance procedure is to provide for an

“equitable” resolution of an employment problem, the grievance procedure simply does not provide a grievant with the same level of protection afforded a criminal defendant. Nor do we find merit to the defendant's argument that because she was not found guilty of patient abuse under the lower preponderance of the evidence standard, she could not be convicted of battery beyond a reasonable doubt. As previously mentioned, the Grievance Board has no authority to resolve a criminal matter, and the procedures employed and protections afforded at each proceeding are significantly different. In fact, the salutary purposes of an informal grievance procedure would be frustrated if collateral estoppel were applied so as to subsequently limit a full and fair consideration of the issue in a criminal case.

Miller, 459 S.E.2d at 122-23 (footnotes omitted).

Accordingly, the Court set forth, in part, the following syllabus points:

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 identity 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).

The procedures employed in a grievance are not substantially similar to those employed by a court of law, and the differences are "of profound significance." The Legislature designed the grievance process to be simple and expeditious. Consequently, "the process is streamlined and lacks many of the adversarial accouterments found in judicial proceedings", including discovery mechanisms. Therefore a compelling reason exists for a court to refuse to apply the

doctrine of collateral estoppel.

Furthermore, in the administrative grievance and appeal here, the CPRB consistently and successfully argued that it did not have the authority, discovery procedures or resources necessary for litigating the issues raised by plaintiffs—unlike those available in this Court for purposes of handling the present civil action.

On Appeal before this Court, the CPRB argued the following:

[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.

It is evident from the case law set forth above and the CPRB's own admissions that the Plaintiffs were not given—and the CPRB could not give—a full and fair opportunity to litigate the issues raised in the instant case. The circuit court therefore erred in finding that Plaintiffs action is barred by collateral estoppel.

c. Final Adjudication on the Merits .

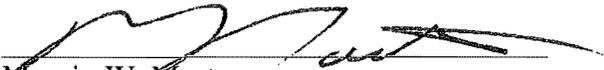
There was not a final adjudication on the merits in the prior administrative grievance and appeal of the issues sought to be litigated in the present civil action. According to Syllabus point 1 of *State v. Miller, supra*, collateral estoppel will not bar a claim if there is not “a final adjudication on the merits of the prior action.” The issue present in this case was not adjudicated in the administrative grievance or appeal. Neither the CPRB, nor the circuit court that heard the administrative appeal, made any findings or rulings denying Plaintiffs entitlement to compensatory damages for the misrepresentations and omissions of the WVSP. Moreover, the CPRB admittedly did not have the authority, discovery procedures or resources necessary for litigating the issues raised by the Plaintiffs. Thus, there was no adjudication of the issues present in this case. Accordingly, the circuit court erred in ruling that Plaintiffs' claims are collaterally estopped.

VI. CONCLUSION

Inasmuch as the trial court erred by granting summary judgment, this Honorable Court should reverse the trial court's order granting the WVSP's motion for summary judgment and remand the case for trial on the merits.

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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F:\April\WVSP Draft.doc

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0747

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, wife and
infant daughter of Douglas Wayne Bland;
TROOPER ROBERT JOSEPH ELSWICK;
TROOPER MICHAEL DAVID LYNCH;
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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)

WEST VIRGINIA STATE POLICE,

Defendant below, Respondent.

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:

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

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

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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