

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' REPLY BRIEF

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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.

I. ARGUMENT

A. 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).

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 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. The trial court 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 the CPRB had no jurisdiction to award the Plaintiffs 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 has held:

"Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. We have made this summary of the doctrine of collateral estoppel:

But where the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters which were actually litigated in the former proceedings, as distinguished from those matters that might or could have been litigated therein, and arises by way of estoppel rather than by way of strict *res adjudicata*. *Lane v. Williams*, 150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965).

Syllabus Point 2, *Conley v. Spillers*, 171, W.Va. 584, 301 S.E.2d 216 (1983); Syllabus Point 2, *Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743 (2011).

This Court has held:

"Whether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues presented in the present case are the same as presented in the earlier case; whether the controlling facts or legal principals have changed substantially since the earlier case; and whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair." Syllabus Point 6, *Conley v. Spillers*, 171, W.Va. 584, 301 S.E.2d 216 (1983).

Syllabus Point 3, *Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743 (2011).

This Court has also held:

"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 a 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." Syllabus Point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syllabus Point 4, *Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743 (2011).

In *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 276, 617 S.E.2d 816, 823 (2005), this Court pointed out that according to *Miller* the doctrine of collateral estoppel

mandates that the facts, the legal standards, and the procedures be identical and that the party against which the doctrine is asserted has had a full and fair opportunity to litigate the issue. In other words "[t]he central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit. *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 177, 680 S.E.2d 791, 808 (2009), *See also Stillwell v. City of Wheeling*, 210 W.Va. 599, 558 S.E.2d 598 (2001); *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987).

The pivotal and only real issue decided in the prior administrative grievance and appeal was whether the CPRB had the authority to place the Plaintiffs into the retirement system or pension system under which they were hired. Here, Plaintiffs are alleging that the WVSP owed a duty to them to provide "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.

While the facts alleged by the Plaintiffs to support their causes of action may be the same, the issues are not. When the *Miller* criteria are applied to this case, it is evident that collateral estoppel does not bar the instant action. 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. The issue here is not, as Respondent suggests, "whether Petitioners can be placed in Plan A or receive Plan A benefits."

Further ". . . 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 through the factual settings of both suits may be the same." *Neiswonger v. Hennessey*, 215 W.Va. 749, 753, 601 S.E.2d 69, 73 (2004) citing *State v. Miller*, 194 W.Va. at 10, 459 S.E.2d at 121. The CPRB did not adjudicate whether the WVSP or the other defendants were negligent or made misrepresentations, and it 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.

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." *Vest v. Board of Educ. of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 781 (1995). The grievance process is designed to be simple and expeditious. *Id.* Consequently, "the process is streamlined and lacks many of the adversarial accouterments found in judicial proceedings", including discovery mechanisms. *Id.* Therefore a compelling reason exists for a court to refuse to apply the doctrine of collateral estoppel.

In fact, the Consolidated Public Retirement Board, in these prior proceedings argued to this Court:

[I]t is virtually impossible to fully investigate or litigate the Petitioners' allegations that they were misled by officials of the West Virginia State Police through the administrative process of the retirement board. . . .

The Board is ill equipped to judge the validity of these claims without extensive discovery not readily available to state agencies. . . . Such factual

disputes between the employer and the employee are better left to the province of a jury or a judge. Petitioners currently have a civil class action suit pending against who they allege to be the culpable party, the West Virginia State Police, which encompasses these disputes.

* * *

The Board does not have the authority to alter, amend or modify statutes. The Board does not have the authority or resources to sit in judgment of factual disputes between intervening third parties and their employees.

* * *

If Petitioners believe they were misled or harmed by the actions of other parties, then their avenue of relief, if any, is against the culpable party either through the courts or the legislature. Once again, counsel will remind the Court that Petitioners have a [sic] filed a class action suit against the West Virginia State Police, the party they allege made the misrepresentations, which is currently pending in the circuit court of Kanawha County, West Virginia.

(A.R. 1424, 1435.)

The CPRB's own admissions establish that its standards and procedures did not afford Plaintiffs a full and fair opportunity to litigate their claims. Further, since the WVSP was not a party to the prior action, the Plaintiffs' could not have adjudicated their causes of actions against the WVSP in the prior action. Neither the CPRB nor the trial court in the prior proceedings made any finding or rulings denying Plaintiffs' entitlement to compensatory damages for the misrepresentations and omissions of the WVSP. Thus, the WVSP did not meet the *Miller* criteria and the trial court erred in applying the doctrine of collateral estoppel against the Petitioners.

Additionally, "whether a stranger to a first action can assert collateral estoppel in a second action depends on several general inquiries: "whether issues presented in present case are the same as presented in earlier case; whether controlling facts or legal principals have changed substantially since earlier case; and whether there are special circumstances that would warrant conclusion that enforcement of judgment would be unfair." Syllabus Point 6,

Conley v. Spillers, 171, W.Va. 584, 301 S.E.2d 216 (1983); Syllabus Point 3, *Abadir v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743 (2011).

The WVSP, as a stranger to the first action, should not have been permitted to assert collateral estoppel here because as set forth above, the issues presented here are not the same issues decided in the prior proceedings and Petitioners were denied the opportunity to fully and *fairly* litigate their specific claims against the WVSP. Thus, the trial court erred in permitting the WVSP to assert the doctrine of collateral estoppel against the plaintiffs.

Finally, a review of *Garrison v. Herbert J. Thomas Memorial Hospital*, 190 W.Va. 214, 438 S.E.2d 6 (1994); *Peters v. Rivers Edge Mining, Inc.*, 224 W.Va. 160, 177, 680 S.E.2d 791, 808 (2009); and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), which address whether collateral estoppel should apply to quasi-judicial determination establishes that issues previously determined must be the exact and precise issues, i.e., identical issues, presented in the subsequent civil action. These cases support the position that if a more narrow sub-part of an issue or a broader issue was previously determined, that will not suffice to justify the application of the doctrine of collateral estoppel. They further support the position that procedural differences in administrative proceeding and courts of law prohibit the application of the doctrine of collateral estoppel. *Abadir v. Dellinger, supra*, also supports the position above. In *Abadir*, this Court held that the appellate court's ruling in an earlier action in which an employee sought to enforce a settlement agreement with an employer relating to the employee's discrimination claim, that the employer's attorney had apparent authority to enter into a settlement agreement on behalf of the employer, did not actually litigate, for purposes of collateral estoppel, the issue of whether the attorney had actual authority to settle the discrimination claim.

Finally, Respondent, in its response, improperly raises a statute of limitations defense. Respondent failed to plead statute of limitations as a defense in the trial court below, thereby making it improper to now assert this affirmative defense on appeal. Rule 8 (c) of the West Virginia Rules of Civil Procedure requires that the defense of statute of limitations be plead affirmatively. Rule 8 (c) provides:

Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, *arbitration and award*, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Further, where a statute of limitations defense is insufficiently presented by a defendant in the trial court, the defendant cannot remedy that deficiency on appeal. See *Miller v. Lambert*, 196 W.Va. 24, 467 S.E.2d 165 (1995). See also *Investors Loan Corporation v. Long*, 152 W.Va. 673, 166 S.E.2d 113 (1969) (Rule 8 (c) affirmative defense will not be considered when raised for the first time on appeal); *Dunning v. Barlow & Wisler, Inc.*, 148 W.Va. 206, 133 S.E.2d 784 (1963) (affirmative defense not asserted in an answer or determined at trial level will not be considered on appeal). Respondent never specifically asserted a statute of limitations defense in its motion to dismiss, its motion for summary judgment, or any other pleading, and it should therefore be precluded from now raising it on appeal.¹

¹ Nonetheless, Respondent's argument on this issue is without merit inasmuch as the prior administrative action was filed against the CPRB in 2001 and Plaintiffs had to exhaust their administrative remedies before filing this action. In fact, when this action was filed both the WVSP and the CPRB moved for a stay of this action and the circuit court granted the stay until after the administrative proceedings were concluded. Plaintiffs' causes of action did not accrue until after their administrative remedies were exhausted, and Plaintiffs would not even have had causes of action if the CPRB would have placed the Plaintiffs into the Plan A retirement system. Therefore, even if the Respondent is not precluded from asserting a statute of limitations defense, its argument is nonetheless without merit.

C. 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.

Respondent misconstrues Petitioners' argument and the pivotal issue here. Petitioners, in the instant action, are not as Respondent claims seeking to "be placed under retirement Plan A as opposed to Plan B." Petitioners are not seeking pension benefits. Petitioners are seeking damages caused as a result of the WVSP's misrepresentations, fraud and negligence. Petitioners are not seeking recovery from state funds, but are seeking recovery under and up to the limits of the State's liability insurance coverage. "[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." *Pittsburg Elevator v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983).

The relief Petitioners seek is not excepted from the WVSP's insurance policy. 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 *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 “ “[I]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. Jaricki*, 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 Mut. Auto. 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.*, 122 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.

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 evident 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.

The doctrine of reasonable expectations should also be considered here as set forth in Petitioner's Brief. Furthermore, as previously set forth in Petitioners' brief, *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. Petitioners note that Respondent's have failed to address these issues in their reply and Petitioners assume that Respondent agrees with Petitioners' view of these issues.

Respondent's argument on the statute of limitations here is also improper for the reasons set forth in section "B" above. Further, the Petitioners here are not seeking money from the State Treasury or any other state funds. Thus, *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987), is not applicable in this respect. The Petitioners are seeking compensatory damages as a result of the wrongful acts of the WVSP and these wrongful acts are covered by the WVSP's

insurance policy. Thus, the trial court erred in finding that sovereign immunity bars Plaintiffs' action.

II. CONCLUSION

The issue in this case is not whether Petitioners should be placed in Plan A or Plan B. The issue is whether Petitioners are entitled to compensatory damages as a result of the WVSP's misrepresentations and omissions. Further, the WVSP is not immune from the Petitioners' claims because there is insurance coverage for the misrepresentations and omissions of the WVSP. Therefore, inasmuch as the trial court erred by granting summary judgment, Petitioners respectfully request this Honorable Court to reverse the trial court's order granting the WVSP's motion for summary judgment and to remand this 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

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0747

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, wife and
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TROOPER ROBERT JOSEPH ELSWICK;
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TROOPER STEVEN P. OWENS;
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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' Reply Brief" were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 3rd day of October, 2011.



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