

11-1146

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DAWN COLETTE BLAND and  
AUTUMN NICOLE BLAND, Wife and  
Infant Daughter of Douglas Wayne Bland;  
TROOPER ROBERT JOSEPH ELSWICK;  
TROOPER MICHAEL DAVID LYNCH;  
TROOPER TIMOTHY LANE BRAGG;  
TROOPER CHRISTOPHER LEE CASTO;  
TROOPER JEFFREY LEALTON COOPER;  
TROOPER BRAD LEE MANKINS;  
TROOPER ROGER DALE BOONE;  
TROOPER STEVEN P. OWENS;  
and TROOPER ADAM WILSON SCOTT,

Plaintiffs,

v.

Civil Action Number 07-C-2  
Honorable James C. Stucky

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

Defendants.

**ORDER DENYING PLAINTIFFS'  
MOTION TO AMEND JUDGMENT AND FOR DEFAULT**

On June 13, 2011, came the parties, by their respective counsel, for hearing on the previously filed to be heard on the Plaintiffs' Motion to Amend the Court's Order Regarding Motions by the Defendants, West Virginia Consolidated Public Retirement

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CATHY C. STUCKY  
KANAWHA COUNTY CIRCUIT COURT

Board, Terasa L. Miller, State of West Virginia, West Virginia State Police Retirement System, and West Virginia Public Employees Retirement System, to Dismiss the Action, and for Default.

At hearing, the Plaintiffs argued to the Court that their counsel did not believe they had been properly served with the amended motions to dismiss and certain of the various motions to dismiss filed on behalf of the Defendants, the 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 (hereinafter collectively referred to as the "Board Defendants"), however Plaintiffs' counsel conceded that there was no way for Plaintiffs to prove that they had not been properly served. Plaintiffs also argued that the hearing notices relating to the Board Defendants' respective motions were ambiguous and did not give adequate notice of the motions to be argued at the January 20, 2011, hearing, as the notices did not expressly identify, by their respective titles, the various motions filed on behalf of the Board Defendants. Plaintiffs contended that it was not readily apparent that separate and independent motions were to be argued, as they were inaccurately and misleadingly referred to in the notices either as a single motion, or collectively as motions for summary judgment. Plaintiffs also argued that the amended motions of the West Virginia Consolidated Public Retirement Board (the "Board") and Terasa L. Miller, as well as the motions to dismiss filed on behalf of the remaining Board Defendants, were untimely filed, and that their filing was thus itself improper in the absence of this Court's express grant of leave to do so, upon motion by the Board Defendants. Plaintiffs further argued that an agreement had been made between counsel for the

Plaintiffs and counsel for the Board Defendants, to the effect that the Board Defendants would not argue or advance any motions at the January 20, 2011, hearing of this matter, other than the motions to dismiss based upon the issue of collateral estoppel.

Plaintiffs' counsel expressly conceded that arguments based upon the issue of collateral estoppel were presented in motions that were properly filed, served, and noticed for hearing, and that this Court had thus properly ruled, insofar as procedure is concerned, upon the issue of collateral estoppel. However, Plaintiffs argued that those portions of the order at issue that do not relate to the issue of collateral estoppel should be set aside, pursuant to Rule 60 of the Rules of Civil Procedure, on the grounds that the relevant notices of hearing were insufficient to serve as adequate notice, that the hearing of certain of the motions and amended motions thus constituted surprise, and that the circumstances relating to the hearing of the Board Defendants' motions were otherwise sufficient to justify the relief sought by the Plaintiffs.

Counsel for the Board Defendants responded by arguing to the Court that the Plaintiffs' concession that the Court could properly order dismissal on grounds of collateral estoppel was a sufficient basis to deny Plaintiffs' Motion, as collateral estoppel applied to all claims asserted by the Plaintiffs against the Board Defendants. In this regard, the Board Defendants further argued that Plaintiffs' claims relied upon the same issues throughout the course of all prior proceedings, regardless of forum, thus justifying dismissal on grounds of collateral estoppel.

~~To the extent that Plaintiffs argued in their motion that a default had occurred,~~ the Board Defendants responded that the provisions of Chapter 55 of the West Virginia Code precluded a default judgment against any of the Board Defendants. Finally,

counsel for the Board Defendants stated that he did not knowingly agree to defer argument on all but one of the Board Defendants' various motions to dismiss and amended motions at hearing on January 20, 2011, and argued that the representations of counsel at the January 20 hearing, as recorded in the hearing transcript, were not sufficiently clear and unambiguous as to show that the parties had, in fact, come to such an agreement.

WHEREUPON, after review of the file in this matter and consideration of the Plaintiffs' Motion, along with the responses and associated briefs and memoranda, and having heard the arguments of counsel, this Court does hereby **ORDER** that the Plaintiffs' Motion to Amend the Court's Order Regarding Motions by the Defendants, West Virginia Consolidated Public Retirement Board, Terasa L. Miller, State of West Virginia, West Virginia State Police Retirement System, and West Virginia Public Employees Retirement System, to Dismiss the Action, and for Default be **DENIED**.

The Court notes and preserves the objections of the Plaintiffs to this Order.

The Clerk is directed to provide a certified copy of this Order to all counsel of record.

It is so **ORDERED**.

Enter this Order this 29 day of June, 2011.

James C. Stucky  
James C. Stucky  
Judge, Thirteenth Judicial Circuit

Prepared by:

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This Order was submitted pursuant to West Virginia Trial Court Rule 24.01(c).

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29  
DAY OF June, 2011  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
Th. D. Vucella