

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OCT 31 2011

DOCKET NO. 11-1146

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, wife and
infant daughter of Douglas Wayne Bland;
TROOPER ROBERT JOSEPH ELSWICK;
TROOPER MICHAEL DAVID LYNCH;
TROOPER TIMOTHY LANE BRAGG;
TROOPER CHRISTOPHER LEE CASTO;
TROOPER SHAWN MICHAEL COLEMAN;
TROOPER JEFFREY LEALTON COOPER;
TROOPER BRAD LEE MANKINS;
TROOPER CHRISTOPHER ADAM PARSONS;
TROOPER ROGER DALE BOONE;
TROOPER STEVEN P. OWENS;
and TROOPER ADAM WILSON SCOTT,
and all others similarly situated,

Plaintiffs below, Petitioners,

v.

(Civil Action No. 07-C-02)
(Kanawha County Circuit Court)

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

Defendants below, Respondents.

PETITIONERS' BRIEF

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I. ASSIGNMENT OF ERROR

A. WHEN THE PARTIES AND THE COURT AGREE NOT TO ADDRESS MOTIONS TO DISMISS, WHICH WERE FILED OUT OF TIME BY DEFENDANTS, THUS RENDERING THEM A NULLITY, AND WHICH WERE IMPROPERLY NOTICED AND WHICH OPPOSING COUNSEL WERE NOT AWARE OF AT THE HEARING, THE TRIAL COURT SHOULD NOT HAVE ENTERED AN ORDER OFFERED BY DEFENSE COUNSEL GRANTING THOSE SAME MOTIONS.

II. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

This civil action was filed on January 2, 2007, by petitioners after a long and involved history of pursuing relief through administrative proceedings before the West Virginia Consolidated Public Retirement Board, appeals therefrom, and petitioning for extraordinary relief. This appeal is limited to the denial of petitioners' *W.Va.R.C.P.* 60(b) motion seeking relief from an order entered dismissing all of plaintiffs' claims against State of West Virginia, West Virginia State Police Retirement System, West Virginia Public Retirement Board, West Virginia Public Employees Retirement System and Terasa Miller, Executive Director of the CPRB (collectively referred to herein as "CPRB defendants"). Petitioners also contended that they were entitled to default. The order dismissing the CPRB defendants was entered on March 30, 2011, and is subject to a separate appeal, Appeal No. 11-0746. The procedural history of the entire case is set out in detail in the Petitioners' Brief in that appeal. The trial court also dismissed the claims against the West Virginia State Police by separate order entered on March 30, 2011, which is subject to Appeal No. 11-0747.

2. STATEMENT OF FACTS

This is a civil action filed in the Circuit Court of Kanawha County on January 2, 2007, by employees of the West Virginia State Police who were recruited by being promised verbally and

in writing that their disability and retirement benefits would be under “Plan A.”¹ After they accepted employment on that agreement and promise in 1994-1996, they were provided written information with the same representation of what their benefits were. Not until approximately the year 2000, four to six years later, after they performed substantial work in reliance on the promises made, did they learn that they were enrolled in “Plan B” and that their benefits would be deemed half of what they were promised.

Petitioners filed this action against the West Virginia State Police (hereinafter “WVSP”), the West Virginia Consolidated Public Retirement Board (hereinafter “CPRB”), the State of West Virginia (hereinafter “State”), the West Virginia State Police Retirement System (hereinafter “SPRS”), the West Virginia Public Employees Retirement System (hereinafter “PERS”) and Terasa L. Miller, then Executive Director of the CPRB (“hereinafter “Miller”), 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 negligence, misrepresentation, fraud, breach of contract, and violation of their constitutional rights. (A.R. 395-428.)

After the filing of the Complaint on January 2, 2007, a stay was granted. The stay was lifted on July 8, 2009. Therefore, the defendants had 30, or at the very most 60, days to file responsive pleadings. None of the respondents filed an Answer to the Complaint. The CPRB and Miller timely filed their original *W. Va. R.C.P.* 12(b)(6) Motion to Dismiss on August 3, 2009. (A.R. 928-999.) The remaining defendants did not file a responsive pleading at all within the 30- or 60-day period. Instead, the remaining defendants filed motions to dismiss two months out of time and without leave of the circuit court. Specifically, the WVSP filed its Motion for

¹ “Plan A” is provided for under *W. Va. Code* § 15-2-26, *et seq.* and is at least two times the benefits of “Plan B” provided for by *W. Va. Code* § 15-2A-1, *et seq.*

Summary Judgment, its first responsive pleading, on June 1, 2010. (A.R. 1106-1201.) On November 4, 2009, the respondents, State of West Virginia, SPRS, PERS, CPRB, and Miller filed additional 12(b)(6) motions including:

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

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

About a year after the filing of the out of time motions, the respondent CPRB filed a “Notice of Hearing” to be held on August 30, 2010. The notice said:

PLEASE TAKE NOTICE that the undersigned will bring on for hearing its previously filed Motion to Dismiss, before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, West Virginia, at 11:00 a.m. on 30 August 2010. You are invited to attend to protect your interests. (Emphasis added.) (A.R. 1202-1205.)

Note that the notice indicates one motion, not motions. That hearing was continued to January 20, 2011. But, importantly, plaintiffs had already filed their brief in response to the original motion to dismiss based on the CPRB’s notice in August 2010. In responding to the notice and the motion filed, petitioners’ counsel was not aware of any motions other than the *one* original

motion to dismiss and filed their opposition brief only addressing that one motion based exclusively on collateral estoppel.

Defendants then filed another Notice of Hearing to be held on January 20, 2011, which, of course, did take place. That notice stated:

PLEASE TAKE NOTICE that the undersigned will bring on for hearing the Motions for Summary Judgment previously filed by the defendants herein, before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, West Virginia, at 9 a.m. on January 20, 2011. You are invited to attend to protect your interests. (Emphasis added.) (A.R. 1457-1460.)

Of course, the only defendant that had filed a motion for summary judgment was the West Virginia State Police, and it was scheduled for hearing on the same date, January 20, 2011.

Based upon the notices, the plaintiffs prepared for the only CPRB motion they were aware of -- the August 3, 2009 original motion to dismiss -- and the WVSP's motion for summary judgment. None of the other motions were ever properly noticed. Petitioners' counsel learned for the first time of the existence of other motions (i.e. the untimely November 4, 2009 motions to dismiss of defendants, State of West Virginia, West Virginia State Police Retirement System and West Virginia Public Employees Retirement System), at the hearing.

The CPRB defendants filed their amended motions about a year before the original hearing date in August 2010. The amended motions have a proper certificate of service and petitioners do not contend that defendants did not place the motions in the mail. Petitioners' counsel, however, did not see them or have them in the file for this case. Because of the passage of time from filing of the motion to the date of the hearing, petitioners' counsel has no way to determine why the motions never reached counsel or his file and were not in his possession. Nevertheless, they were not, and petitioners' counsel did not know of their existence until

January 20, 2011, the day of the hearing when defense counsel mentioned the motions to the court.

At hearing, petitioners objected to the court hearing the November 4, 2009 motions and asked that they be considered at a later date. The court and the defendants' counsel agreed to this. (A.R. 1482-1483.) However, the CPRB defendants submitted their proposed order with findings that demonstrated they were renegeing on their agreement at the January 20, 2011 hearing to only submit the CPRB's motion to dismiss and not the "amended" motions and other of the untimely motions of the defendants. (A.R. 1697-1716.) Thus, even though plaintiffs' counsel, defendants' counsel and the court agreed that only the motions plaintiffs' counsel were aware of would be dealt with at the hearing, and plaintiffs relied on that agreement in good faith, defendants' counsel submitted a proposed order to the court which included rulings on the other motions. Plaintiffs filed objections to the proposed order. (A.R. 1524-1527.) By order dated March 30, 2011, the court signed the defendants' proposed order granting all of the defendants' motions, including the ones that everyone agreed would not be considered, over the plaintiffs' objections. (A.R. 1697-1716.) Plaintiffs filed a timely notice of appeal of that order, pending under docket number 11-0746.

Thereafter, petitioners moved the trial court to amend the order pursuant to *W.Va. Rule of Civil Procedure*, Rule 60(b). (A.R. 1717-1724.) Plaintiffs argued that (1) the four defense motions filed on November 4, 2009, were filed out of time without leave of court and, therefore, were a nullity; (2) that the defendants were in default as to those claims they had not answered or filed in accordance with *W.Va. Rule of Civil Procedure* 12(b)(6) or within the time required by statute; and (3) that defendants had agreed the additional filed motions were not properly noticed, would not be taken up at the hearing, and that plaintiffs were denied due process.

Plaintiffs requested that the court grant relief from its order to reflect rulings only on motions properly filed before the court and properly noticed and which were agreed to proceed upon. The court denied plaintiffs' motion by order dated June 29, 2011. (A.R. 1837-1841.) Due to the fact that the trial court heard and denied plaintiffs' motion to amend, alter or set aside the March 30, 2011 final order after the Notice of Appeal in 11-0746 was filed, petitioners have filed this separate notice of appeal of the June 29, 2011 order denying plaintiffs' Rule 60(b) motion to amend. This appeal, specifically, deals with the Court's failure to grant a Rule 60(b) motion to set aside, alter or amend a judgment due to default of defendants and/ or due to mistake, inadvertence, surprise, or excusable neglect.

III. SUMMARY OF ARGUMENT

Petitioners are entitled to relief under *W.Va.R.C.P.* 60(b) from the trial court's March 30, 2011, order since the November 4, 2009 "amended" motion to dismiss of defendants CPRB and Miller, and the November 4, 2009 motions to dismiss of defendants, State of West Virginia, West Virginia State Police Retirement System and West Virginia Public Employees Retirement System, were neither properly nor timely filed and were not properly noticed. They were a nullity as being late filed without leave of court. In addition, the parties and the trial court agreed they would not be dealt with at the January 20, 2011 hearing. In granting those motions, the court violated an agreed stipulation by the parties that was approved by the court at hearing. As a result, the petitioners were denied proper due process and reasonable opportunity to be heard. Therefore, the June 29, 2011 order denying petitioners' 60(b) motion should be reversed and petitioners granted the relief requested, including striking of defenses and default.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this case because (1) the parties have not waived oral argument; (2) the appeal is meritorious; (3) the dispositive issues have not been authoritatively decided; and (4) 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 notice and other rules of civil procedure, 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

Typically, “[a] motion to vacate a judgment made pursuant to Rule 60(b), W.Va.R.C.P., is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” Syl. pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). Accord Syl. pt. 1, *Nancy Darlene M. v. James Lee M.*, 195 W.Va. 153, 464 S.E.2d 795 (1995); Syl. pt. 1, *Jackson Gen. Hosp. v. Davis*, 195 W.Va. 74, 464 S.E.2d 593 (1995). However, this Court explained the standard of review concerning a *W.Va.R.C.P.* 60(b) motion when there is also a Rule 12(b) dismissal is de novo under the circumstance here:

The appeal herein involves review of two related but distinct lower court orders. The first order consists of a dismissal of a claim resulting from the grant of a motion for judgment on the pleadings in accord with Rule 12(c). “Appellate review of a circuit court’s order granting a motion for judgment on the pleadings is de novo.” Syl. Pt. 1, *Copley v. Mingo County Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995). The second order entails the denial of a Rule 60(b) motion to reconsider the dismissal. We recently observed in *Westmoreland v. Vaidya*, 222 W.Va. 205, 664 S.E.2d 90 (2008), that although our review of a lower court’s denial of a Rule 60(b) motion is generally limited and deferential, where the Rule 60(b) motion challenges the trial court’s earlier dismissal of a case

our review focuses on the substantive standard of review applicable to the dismissal when the appeal period has not expired on the dismissal order. *Id.* at 209, 664 S.E.2d at 94. Here the lower court's May 14, 2007, order expressly notes that the appeal period for both orders began with the issuance of the May 14 order. Consequently, since the controlling issue on appeal is dismissal of the Joneses' claim resulting from a judgment on the pleadings, we proceed to review of the matter de novo. Syl. Pt. 1, *Copley*.

Choice Lands, LLC v. Tassen, 224 W.Va. 285, 289, 685 S.E.2d 679, 683 (2008).

2. ASSIGNMENTS OF ERROR

A. **WHEN THE PARTIES AND THE COURT AGREE NOT TO ADDRESS MOTIONS TO DISMISS, WHICH WERE FILED OUT OF TIME BY DEFENDANTS, THUS RENDERING THEM A NULLITY, AND WHICH WERE IMPROPERLY NOTICED AND WHICH OPPOSING COUNSEL WERE NOT AWARE OF AT THE HEARING, THE TRIAL COURT SHOULD NOT HAVE ENTERED AN ORDER OFFERED BY DEFENSE COUNSEL GRANTING THOSE SAME MOTIONS.**

(1) **THERE WAS AN AGREEMENT TO DELAY PROCEEDING ON THE "AMENDED MOTIONS."**

There was an explicit agreement between plaintiffs' counsel and counsel for the CPRB defendants that only one CPRB motion to dismiss -- the August 3, 2009 "motion to dismiss" -- would be heard on January 20, 2011. Plaintiffs' counsel also clearly understood that the court ruled that this procedure was acceptable. The following is from the transcript of the hearing on June 20, 2011:

MR. MASTERS: Your Honor, Mr. Sweeney brought these -- he has some motions here. I don't know if he meant to argue them just now or what, but he and I discussed them. I don't have a copy of those.

They, to my knowledge, were not noticed, or they certainly were not briefed that I was aware of, and I'm here on the motion that I thought I was appearing on, which is the motion to dismiss, based on summary judgment, which is in front of you and both -- all parties briefed. That's the **one** I'm here on.

And I told him that those -- if they have any relevance, I have no objection to bringing them on, **I [sic] just not prepared to address them this morning.**

THE COURT: **All right.**

MR. MASTERS: Is there an objection to that?

MR. SWEENEY: **No**, I just had one – you mentioned that our – **the only one that you’re addressing is the Consolidated Public Retirement Board’s Motion for Summary Judgment – it’s a Motion to Dismiss.** Just a point of technicality.

THE COURT: **Okay.**

MR. MASTERS: All right. Well, maybe it’s the State Police’s Motion for Summary Judgment. All right.

MR. SWEENEY: Yes, sir.

(A.R. 1482-1483, emphases added.) Any reasonable person would believe that this meant it was okay with the Court. If it were not okay, then plaintiffs’ counsel would have objected and insisted on some investigation as to why plaintiffs’ counsel did not know about the motions and also moved the court to reschedule the hearing. If the trial court denied those remedies, plaintiffs would have orally argued the points the best he could.

Also, plaintiffs wanted to assure that defendants’ counsel agreed. Therefore, plaintiffs’ counsel asked: “Is there an objection to that?” Mr. Sweeney, defense counsel, stated as follows: “**No**, . . . the only one that you’re addressing is the Consolidated Public Retirement Board’s Motion for Summary Judgment – it’s a Motion to Dismiss. Just a point of technicality.” (Emphasis added.) The Court again acknowledged that it was “**Okay.**” (Emphasis added.) Plaintiffs’ counsel then said, “All right.” Therefore, the November 4, 2009 motions were not addressed by plaintiffs’ counsel at hearing in reliance upon the representations of defendants’ counsel and the statements of the court at hearing.

CPRB defendants’ counsel never again disputed the above or mentioned it again. However, when defense counsel forwarded its proposed findings of fact and conclusions of law to the trial court, it included findings and orders indicating that the court would be granting the August 3, 2009 Motion to Dismiss and the November 4, 2009 Amended Motions to Dismiss of

the CPRB and Miller, along with the November 4, 2009 Motions to Dismiss of the State of West Virginia, PERS and SPRS. (A.R. 1697-1716.) Therefore, the CPRB reneged on its agreement at the January 20, 2011 hearing to only submit *its* motion to dismiss and not the November 4, 2009 motions. As soon as plaintiffs' counsel realized the CPRB was renegeing on its agreement, plaintiffs' counsel filed an objection to that part of the CPRB's proposed order not incorporated into its original motion to dismiss. However, the trial court signed the order over the plaintiffs' objections and denied their *W.V.R.C.P.* 60(b) motion to alter or amend that judgment. (A.R. 1697-1716.)

It is material to the case against the CPRB that the trial court decided as it did because the court granted the motion to dismiss of the CPRB on the grounds asserted in the late-filed amended motions to dismiss, grounds to which the plaintiffs never had a reasonable opportunity to respond. In addition, the trial court dismissed the remaining defendants, the State of West Virginia, PERS and SPRS, without the plaintiffs having had any opportunity to address the motions to dismiss of those defendants.

Plaintiffs further argued to defendants and the trial court in their objections to the proposed order that it would be a waste of judicial time to have the West Virginia Supreme Court of Appeals considering an Order, which includes findings and conclusions and dismissal of defendants from this case on motions that plaintiffs' counsel was not aware of prior to the hearing and which were subject to the various procedural issues identified herein. Plaintiffs' arguments fell on deaf ears.

In *Lawyer Disciplinary Bd. v. Cavendish*, 226 W.Va. 327, 335, 700 S.E.2d 779, 786 (2010), this Court held that “[s]tipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding...” *citing* Syllabus Point 1, *Butler v. Transfer Corp.*

147 W.Va. 402, 408 128 S.E.2d 32, 37 (1962) (holding the same rule would of course apply to pre-trial stipulations). The *Cavendish* court further held that “A stipulation is a judicial admission. As such, it is binding in every sense. . . .” *Id.* at 335, 779. “A stipulation between parties made in open court constitutes not only an agreement between the parties but between the parties and the court, and the court is bound to enforce the agreement for the benefit of the party interested and for the protection of the court’s own dignity.” CJS Stipulations, § 11 *citing Webster v. Webster*, 216 Cal. 485, 14 P.2d 522 (1932).

The agreement not to proceed on the November 4, 2009 motions of which plaintiffs’ counsel was unaware prior to hearing is binding upon the defendants and the court. Therefore, the court committed an error of law in entering an order that effectively nullified and violated the stipulation.

What *should* have occurred here is what was agreed to at the hearing on January 20, 2011. The CPRB’s original motion to dismiss and the WVSP’s motion for summary judgment should have been decided and then the other November 4, 2009 motions, including the CPRB and Miller’s “amended” motions and the motions to dismiss of the State of West Virginia, PERS and SPRS, should have been re-served and/or properly noticed for hearing at a later date.

First and foremost, the trial court in this case granted defendants’ motions to dismiss on defenses that could not be brought before it because they were a nullity having not been pled and filed within the time provided by the West Virginia Rules of Civil Procedure and by West Virginia statute. In addition, plaintiffs’ counsel was not aware of motions filed out of time, was not prepared to address them, and the notice did not sufficiently describe the motions to be heard. Further, when plaintiffs briefed this motion for the August 2010 hearing, the notice called for a “motion,” not “motions.” The August hearing was continued at the last minute because of

defense counsel's illness. Therefore, plaintiffs did not file further briefs in opposition to the defendants' motion. The hearing was "continued" from August 2010 to January 20, 2011. Defendants did file a new notice of hearing, but it referred only to motions for summary judgment, which only the WVSP had filed. Therefore, the trial court should never have taken up the motions which were a nullity and not properly noticed.

This case falls under the factors set forth in Rule 60(b)(1). Rule 60(b)(1) of the *West Virginia Rules of Civil Procedure* states that on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, excusable neglect, or unavoidable cause. The West Virginia Supreme Court of Appeals acknowledged in *Kelly v. Belcher*, 155 W.Va. 757, 773, 187 S.E.2d 617, 626 (1972), that subdivision (b) of Rule 60 "should be liberally construed to accomplish justice." Importantly, the defendants and the court agreed to proceed with the hearing without addressing the additional motions of the defendants. Plaintiffs relied upon the defendants' and the court's agreement that the amended motions would not be argued or ruled upon. Therefore, plaintiffs should be entitled to relief under Rule 60(b)(1) on grounds of mistake, inadvertence, surprise and/or excusable neglect.

It has been held that Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 60(b)(1)(3d Ed. 2011 Supp)(citations omitted). In addition, in *Zirkle v. Zirkle*, 208 W.Va. 374, 540 S.E.2d 591 (2000), the West Virginia Supreme Court of Appeals held that Rule

60(b)(1) could be used to correct a legal mistake. *See also Wooten v. Wooten*, 203 W.Va. 686, 510 S.E.2d 760 (1998); Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 60(b)(1)(3d Ed. 2011 Supp) further explains:

It has been noted that “[t]he requirements for a claim of ‘surprise’ under Rule 60(b)(1) are unclear and ill-defined.” *Denny v. Zimmer US, Inc.*, 2006 WL 2167270 (M.D.Tenn. 2006). The few cases that have explicitly applied this factor “do not engage in any analysis of ‘surprise,’ but simply apply the ordinary meaning of the word to their facts.” *Bituminous Cas. Corp. v. Garcia*, 223 F.R.D. 308 (N.D.Tex. 2004). *See Jones v. United States*, 225 F.3d 507 (8th Cir. 2001); *Williams v. New York City Dept. of Corr.*, 219 F.R.D.78 (S.D.N.Y. 2003); *ACEquip Ltd. v. Am. Eng’g Corp.*, 218 F.R.D. 364 (D.Conn. 2003). **This ground for relief is usually cited by parties when they have allegedly not been notified of a judgment or pleading.** *See Thompson v. American Home Assur. Co.*, 95 F.3d 429 (6th Cir. 1996); *Cory v. Aztec Steel Building, Inc.*, 2005 WL 1993454 (D.Kan. 2005); *McLindon v. Russell*, 2000 WL 1221816 (S.D.Ohio 2000) [Emphasis added].

Excusable neglect encompasses situations in which the failure to comply with a filing deadline is attributable to negligence. *See State ex rel. Bess v. Berger*, 203 W.Va. 662, 510 S.E.2d 496 (1998)(per curiam). In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the United States Supreme Court found that “at least for purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” 507 U.S. at 394, 113 S.Ct. at 1497, 123 L.Ed.2d at 89. The Court explained that the determination of excusable neglect “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission,” 507 U.S. at 395, 113 S.Ct. at 1498, 123 L.Ed.2d at 89 (footnote omitted).

In addition, the failure to grant a Rule 60(b) motion can implicate issues of procedural due process. This Court held in *State ex rel. Dept. Health & Human Res. v. Schwab*, 206 W.Va.

551, 526 S.E.2d 327 (1999), where there was some uncertainty about whether the plaintiffs had obtained proper service on the defendant and when the plaintiffs' counsel advised the law master that he and the defendant had agreed to a continuance, there was some question as to whether defendant's procedural due process rights were violated when the law master entered judgment for the plaintiff and the Court held that the default judgment was to be set aside.

Alternatively, the court should have also granted relief to plaintiffs pursuant to Rule 60(b)(6) of the *West Virginia Rules of Civil Procedure*. Rule 60(b)(6) provides that upon motion and such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for any other reason that is not contained in the provisions of Rule 60(b), and which justifies relief from the operation of the judgment. The circuit court below committed an error of law in signing the order and in failing to grant plaintiffs' Rule 60(b) motion for relief from judgment or order where the trial court had dismissed plaintiffs' complaint based on defenses not properly asserted.

(2) THE CPRB'S NOTICES OF HEARING ON MOTIONS WERE INADEQUATE.

The CPRB and Miller filed and served their initial Motion to Dismiss on August 3, 2009. They filed Amended Motions to Dismiss on November 4, 2009. The CPRB then filed a "Notice of Hearing" to be held on August 30, 2010, approximately a year later and after the amended motions to dismiss were filed. The notice says:

PLEASE TAKE NOTICE that the undersigned will bring on for hearing its previously filed Motion to Dismiss, before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, West Virginia, at 11:00 a.m. on 30 August 2010. You are invited to attend to protect your interests. (Emphasis added.) (A.R. 1202-1205.)

Keep in mind it filed its "Amended Motions" on November 4, 2009. The question is why did the CPRB file a notice for only one original "Motion to Dismiss?" The notice was for a motion –

not motions. Certainly it did not alert plaintiffs' counsel that the CPRB, Miller, and the other state defendants had *all* filed motions, amended or otherwise. Certainly nothing in the Notice of Hearing alerted plaintiffs' counsel.

After plaintiffs filed their brief in response to the original motion to dismiss, the August 30, 2010 hearing was continued to January 20, 2011, based on the CPRB's notice. Defendants then filed another Notice of Hearing to be held on January 20, 2011, which, of course, did take place. That notice stated:

PLEASE TAKE NOTICE that the undersigned will bring on for hearing the Motions for Summary Judgment previously filed by the defendants herein, before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, West Virginia, at 9 a.m. on January 20, 2011. You are invited to attend to protect your interests. (Emphasis added.) (A.R. 1457-1460.)

The only defendant that ever filed a motion for summary judgment was the West Virginia State Police, and it was scheduled for hearing on the same date, January 20, 2011. Obviously, this likewise did not alert plaintiffs' counsel that there were other motions to dismiss, including "amended" motions to dismiss filed by the CPRB and Miller.

None of the November 4, 2009 motions of the CPRB and Miller, the State of West Virginia, PERS or SPRS were properly noticed. The first notice alone clearly noticed CPRB's first motion to dismiss but did not mention any other. The second notice referred to them as motions for summary judgment previously filed by the defendants, which would only include the WVSP since there was no summary judgment motion ever filed by CPRB, Miller, State of West Virginia, PERS or SPRS. Based upon the notices, the plaintiffs prepared for the only CPRB motion they were aware of -- the August 3, 2009 motion to dismiss -- and the WVSP's motion for summary judgment.

West Virginia Rule of Civil Procedure 5(a) requires “every written motion” and “every written notice” to be served upon each of the parties to an action. “Notice of a hearing date enables a party to be heard ... lack of notice of a hearing date may be reason to open or vacate a judgment.” Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 5(a)(3d Ed. 2011). Pursuant to *West Virginia Rule of Civil Procedure* 6(d), a written motion and written *notice of hearing* on the motion must be served according to the time lines in Rule 6. Here, they were not. The Supreme Court’s decision in *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997), pointed out that the purpose of the notice requirement of Rule 6(d) is to prevent a party from being prejudicially surprised by a motion. Because adequate notice was not provided, plaintiffs were denied proper notice and opportunity to be heard, which is a violation of procedural due process.

In fact, in *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974), this Court held that when a judgment of dismissal was entered against a party without the notice required by *W.Va. R.C.P* 6, the refusal of the trial court to vacate the dismissal order pursuant to a timely motion under Rule 60(b) constitutes an abuse of discretion, warranting a reversal and remand of the case.

The plaintiffs were entitled to proper notice of all of the defendants’ motions prior to hearing. Since they were not provided proper notice, the court below abused its discretion in refusing to vacate the order granting those motions.

In addition, plaintiffs were not required to file responses to motions filed out of time and plaintiffs are entitled to default. Pursuant to Rule 12(a)(1) of the *West Virginia Rules of Civil Procedure*, defendants had 30 days to respond to plaintiffs’ complaint. However, statutory law enumerated at *West Virginia Code* § 55-17-4(1) provides that a government agency shall be

allowed 60 days to serve an answer to a complaint. Rule 12(a)(3) of the *West Virginia Rules of Civil Procedure* provides that a motion to dismiss under Rule 12(b) postpones the necessity of pleading until the motion is disposed of, and, if successful, no answer would be necessary. Pursuant to Rule 8(c) of the *West Virginia Rules of Civil Procedure*, “in pleading to a preceding pleading, a party shall set forth affirmatively estoppel, res judicata, and any other matter constituting an avoidance or affirmative defense.” The failure to assert an affirmative defense results in a waiver of that defense. *Old Line Life Ins. Co. of America v. Garcia*, 418 F.3d 546 (6th Cir. 2005). CPRB and Miller’s Amended Motion to Dismiss with new defenses was filed four months after the stay was lifted without any motion to alter or amend the original responsive pleading. The remaining defendants, the State of West Virginia, PERS, and SPRS, filed no answer at all during the required time period. Therefore, the November 4, 2009 motions were not filed in time pursuant to *W.Va.R.C.P.* 8 and 12 or by *W. Va. Code* §55-17-4(1), and, more importantly, they were filed without leave of court.

West Virginia Rule of Civil Procedure 55(a) provides that when there is a failure to plead or otherwise defend a case as provided by the Rules of Civil Procedure, default is appropriate. Rule 55 distinguishes “default” and “default judgments.” This distinction was explained by Chief Justice Davis in *Cales v. National Fire & Ins. Co.*, 212 W.Va. 223, 569 S.E.2d 479 (2002). The Supreme Court held that “[a] default related to the issue of liability and a default judgment occurs after damages have been ascertained.” While under *West Virginia Code* § 55-17-4(2) a “judgment by default” may not be entered against a government agency, unless certain circumstances are met, this provision does not apply to entry of “default.” Thus, entry of default may be awarded against a state agency and should have been granted in this case against the

State of West Virginia, PERS and SPRS for their failure to timely file an answer or motion to dismiss.

VI. CONCLUSION

Inasmuch as the trial court erred by failing to grant the plaintiffs relief from the March 31, 2011 order, the plaintiffs respectfully request that the June 29, 2011 order denying plaintiffs' Rule 60(b) Motion for Relief from Judgment be reversed, the plaintiffs' Motion for Relief from Judgment be granted for good cause shown, and that the March 31, 2011 order be set aside and this case remanded for further proceedings with proper notice and proper procedural due process, including whether plaintiffs are entitled to default.

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

NO. 11-1146

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

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

Defendants below, Respondents.

CERTIFICATE OF SERVICE

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

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 31st day of October, 2011.



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