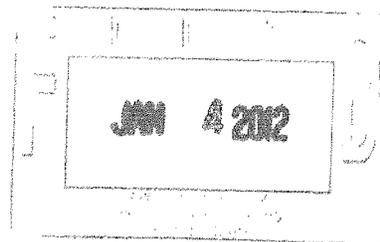


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO. 11-1146

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' REPLY TO RESPONSE BRIEF OF WEST VIRGINIA STATE POLICE**

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TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>II.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
	<b>A. PROCEDURAL HISTORY.....</b>	<b>1</b>
	<b>B. STATEMENT OF FACTS.....</b>	<b>1</b>
<b>III.</b>	<b>ARGUMENT.....</b>	<b>2</b>
	<b>A. RESPONDENT WEST VIRGINIA STATE POLICE FAILED TO RESPOND TO PETITIONERS' ASSIGNMENTS OF ERROR AND THEREFORE THE COURT SHOULD ASSUME THAT THE RESPONDENT AGREES WITH THE PETITIONERS' ASSIGNMENTS OF ERROR.....</b>	<b>2</b>
	<b>B. THE CIRCUIT COURT ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL TO DISMISS PETITIONERS CLAIMS.....</b>	<b>3</b>
	<b>C. DAMAGES FOR MISREPRESENTATION ARE RECOVERABLE AGAINST RESPONDENT.....</b>	<b>7</b>
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>8</b>

## TABLE OF AUTHORITIES

### **CASES:**

<i>Abdair v. Dellinger</i> , 227 W.Va. 388, 709 S.E.2d 743 (2011).....	4
<i>Conley v. Spiller</i> , 171 W.Va. 584, 301 S.E.2d 216 (1983).....	4
<i>Dunning v. Barlow &amp; Wisler, Inc.</i> , 148 W.Va. 206, 133 S.E.2d 784 (1963).....	5
<i>Garrison v. Herbert J. Thomas Memorial Hosp.</i> , 190 W.Va. 214, 438S.E.2d 6 (1993).....	4
<i>Holloman v. Nationwide Mut. Ins. Co.</i> , 217 W.Va. 269, 276, 617 S.E.2d 816, 823 (2005) .....	4
<i>Investors Loan Corp. v. Long</i> , 152 W.Va. 673, 166 S.E.2d 113 (1969).....	5
<i>Miller v. Lambert</i> , 196 W.Va. 24, 467 S.E.2d 165 (1995) .....	5
<i>Peters v. Rivers Edge Mining</i> , 224 W.Va. 160, 680 S.E.2d 791 (2009).....	4
<i>Pittsburg Elevator v. West Virginia Board of Regents</i> , 172 W.Va. 743, 310 S.E.2d 675 (1983) .....	7
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	4, 5
<i>Vest v. Board of Educ. of the County of Nicholas</i> , 193 W.Va. 222, 455 S.E.2d 781 (1995) .....	5
<i>Webb v. Webb</i> , 171 W.Va. 614, 301 S.E.2d 570 (1983).....	6

### **AUTHORITIES:**

American Jurisprudence, <i>Equity</i> , 27A § 15 .....	6
W.Va. Rule of Appellate Procedure 10.....	2
W. Va. Rule of Civil Procedure 8 .....	5

## **I. ASSIGNMENT OF ERROR**

**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**

### **A. PROCEDURAL HISTORY**

Petitioners reference Appeal Nos. 11-0746 and 11-0747 for a complete procedural history of this case. However, a complete recitation of the history of the proceedings is not necessary for purposes of the issues in this Appeal. This appeal is limited to the denial of Petitioners' *W.Va.R.C.P.* 60(b) motion seeking relief from orders entered dismissing Petitioners' claims against the West Virginia State Police, the 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 Consolidated Public Retirement Board. Petitioners, by this Reply, specifically respond to "Respondent, West Virginia State Police's Brief."

### **B. STATEMENT OF FACTS**

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. For whatever reason, the West Virginia State Police's response brief addresses the substantive issues raised in Appeal No. 11-0747 and appears to be an improper attempted surreply to Petitioner's brief in that Appeal.

### **III. ARGUMENT**

#### **A. RESPONDENT WEST VIRGINIA STATE POLICE FAILED TO RESPOND TO PETITIONERS' ASSIGNMENTS OF ERROR AND THEREFORE THE COURT SHOULD ASSUME THAT THE RESPONDENT AGREES WITH THE PETITIONERS' ASSIGNMENTS OF ERROR**

The Respondent, West Virginia State Police ("WVSP"), filed a response to Petitioners' Appeal brief on December 15, 2011; however, the brief does not address Petitioners' Rule 60(b) assignments of error which are at issue in this particular appeal. The WVSP brief addresses the substantive issues in Appeal No. 11-0747 and appears to be an improper attempted surreply to the Petitioners' reply in that Appeal which is also currently pending before this Court.

Rule 10(d) of the West Virginia Rules of Appellate Procedure states in pertinent part: "Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." Rule 10(j) of the West Virginia Rules of Appellate Procedure states: "The failure to file a brief in accordance with this rule may result in the Supreme Court refusing to consider the case, denying oral argument to the derelict party, dismissing the case from the docket, or imposing such other sanctions as the Court may deem appropriate." Further, neither Rule 10 of the West Virginia Rules of Appellate Procedure nor any of the other Rules of Appellate Procedure permit the filing of a surreply to an appeal brief. While Rule 10(h) does allow for the filing of a supplemental brief, a supplemental brief may only be filed when the Court, on its own motion or upon a motion of a party, "directs that supplemental briefs be filed addressing a particular issue or circumstance."

Respondent's brief in no way addresses the Petitioners' assignments of error. Respondent has failed to respond to Petitioners' assignments of error and this Court has not provided leave or

directed that Respondent is excepted from Rule 10's mandates. Accordingly, if this Court assumes that the Respondent agrees with the Petitioners' view of the issues here, then the Court should find that the trial court erred by failing to grant the Plaintiffs relief from the March 31, 2011 order, the trial court's June 29, 2011 order denying Plaintiffs' Rule 60(b) Motion should be set aside and reversed, the Plaintiffs' Motion for Relief from Judgment should be granted for good cause shown, and this case should be remanded for further proceedings with proper notice and proper procedural due process, including whether Plaintiffs are entitled to default. Additionally, because Respondent has failed to file a brief in accordance with Rule 10, Petitioners respectfully move this Court to strike Respondent's brief as being unresponsive to this appeal; to deny oral argument; and, accordingly, grant Petitioner's requested relief.<sup>1</sup>

Alternatively, if the Court denies Petitioner's motion to strike the Respondent's Brief, Petitioners reply to Respondent's brief by incorporating, verbatim as if fully set forth herein, the arguments set forth in Petitioners' Brief in this Appeal and those set forth in Petitioner's Brief and Reply Brief in Appeal No. 11-0747. Also, if Petitioner's motion to strike is denied, there are a few points raised by the WVSP in its Brief that Petitioners must clarify for the Court. Petitioner's clarification of these points is set forth below in sections "B" and "C".

**B. THE CIRCUIT COURT ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL TO DISMISS PETITIONERS' CLAIMS**

The Respondent argued below that the Petitioners' claims had already been litigated between the same parties on the same issues and adjudicated to a final decision. In making its decision to dismiss Plaintiffs' claims, the circuit court found that the Plaintiffs' claims had already been litigated "*between the same parties* on the same issues and adjudicated to a final decision in Kanawha County, Civil Action No. 06-AA-55." Contrary to the Respondent's

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<sup>1</sup> Petitioners have filed contemporaneously herewith "Petitioners' Motion to Strike Respondent West Virginia State Police's Reply Brief."

arguments and the court's finding, the Respondent was not a party to the prior administrative grievances or appeals. This is a matter of record and Respondent admits this fact. The circuit court incorrectly found that the Respondent was a party to those grievances and appeals. Further, Respondent, a stranger to the prior action, should not have been permitted to unfairly assert collateral estoppel since the Petitioners could not have adjudicated their claims against the Respondents in the prior action. Syl. pt. 6, *Conley v. Spiller*, 171 W.Va. 584, 301 S.E.2d 216 (1983); Syl. pt. 3, *Abdair v. Dellinger*, 227 W.Va. 388, 709 S.E.2d 743 (2011)..

Moreover, the court also plainly erred in applying the doctrine of collateral estoppel to Plaintiffs' claims because the issues decided in the prior administrative grievance and appeal are not the exact, precise, or identical issues that are present in this case. *Garrison v. Herbert J. Thomas Mem. Hosp.*, 190 W.Va. 214, 438 S.E.2d 6 (1993); *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); *Peters v. Rivers Edge Mining*, 224 W.Va. 160, 680 S.E.2d 791 (2009). 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. *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 276, 617 S.E.2d 816, 823 (2005). A cause of action for misrepresentation and resulting compensatory damages does not present the same issue as an administrative grievance regarding the proper placement in a retirement system. While Respondent argues that Petitioners used the same allegations in each case, the same factual allegations can support more than one issue or cause of action.

Further, the Petitioners were not given a full and fair opportunity have the issue raised in the instant case resolved in the administrative grievance or appeal. The procedures and standards employed in administrative matters are much different than that employed in the courts. The differences in procedures employed in a grievance hearing verses the procedures employed in a

court of law are "of profound significance" and the Consolidated Retirement Board admitted this fact on Appeal before this Court when it argued that the administrative process had no discovery mechanisms to investigate or litigate Plaintiffs' allegations of misrepresentation and that the Plaintiffs should pursue their relief for misrepresentation through their civil action rather than the administrative process. *See 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).

Finally, 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. 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.

Respondent raises two additional issues in its brief. First, Respondent improperly raises a statute of limitations defense that was neither plead nor argued below. Respondent failed to affirmatively plead its statute of limitations defense below which is required by Rule 8 of the West Virginia Rules of Civil Procedure and it cannot remedy that deficiency on appeal. *W.Va.R.Civ.P. 8*; *Miller v. Lambert*, 196 W.Va. 24, 467 S.E.2d 165 (1995); *Investors Loan Corp. v. Long*, 152 W.Va. 673, 166 S.E.2d 113 (1969); *Dunning v. Barlow & Wisler, Inc.*, 148 W.Va. 206, 133 S.E.2d 784 (1963). Nonetheless, Respondent's argument on this issue is without merit inasmuch as the prior administrative action was filed against the CPRB in 2001 and Petitioners had to exhaust their administrative remedies before filing this action. In fact, when this action was filed Respondent moved for and the circuit court granted a stay of this action until after the administrative proceedings were concluded. Petitioners' causes of action did not accrue until after the administrative remedies were exhausted and Petitioners would not have had a cause of action had the CPRB placed the Petitioners into the Plan A retirement system.

Second, Respondent argues that the Petitioners are charged with the knowledge of the law as it existed in the retirement statute. Petitioners submit that they are entitled to the relief they seek because (1) if petitioners' mistake was one of fact, it was clearly a material fact which would entitled them to relief; (2) if the mistake was a mixed one of law and fact, they would also be entitled to such relief; (3) if the mistake was one of law, it did not relate to general law but rather to the petitioners' own private legal rights, and is therefore treated as one of fact, and they are entitled to relief; (4) if the mistake was one as to the general law, then petitioners were clearly induced by fraud or other inequitable conduct on the part of the respondents, and are entitled to relief; or (5) if the WVSP would attempt to argue that it actually believed that the Petitioners were entitled to Plan A benefits and that it was not guilty of fraud or other inequitable conduct, then the mistake would be a mutual mistake of law (and/or fact), and the Petitioners would be entitled to relief. Because the statute at issue merely sets forth the factual terms of a contract rather than a true proclamation of law, the Petitioners' mistake is one of fact and a remedy exists for a party who has suffered a mistake of fact. *Webb v. Webb*, 171 W.Va. 614, 301 S.E.2d 570 (1983). Even if Petitioners' ignorance or mistake was one of law or a mixed one of law and fact, the Respondent fails to recognize or admit that numerous relevant exceptions exist to the rule that ignorance of the law is no excuse. These exceptions include: where the mistake is induced or accompanied by inequitable conduct of the other party; where there is fraud or undue influence, or inequitable conduct; where there is a need to prevent injustice; where a mistake of fact is the result of a mistake of law and justice and equity require it; and where there is wrongful conduct by a nonmistaken party inducing prejudicial reliance to do so. 27A Am.Jur.2d *Equity* § 15.

### **C. DAMAGES FOR MISREPRESENTATION ARE RECOVERABLE AGAINST RESPONDENT**

“Suits 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 *Pittsburg Elevator v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983). Petitioners here are seeking to recover damages caused by Respondent's misrepresentations. The State's liability insurance policy covers the Respondent's misrepresentations or "wrongful acts". Thus, Petitioners' claims are not barred by sovereign immunity and the circuit court erred in dismissing Petitioners' claims.

The WVSP's insurance policy, effective July 1, 2001, includes coverage for “Wrongful Acts”. Coverage applies “for a loss arising from any ‘Wrongful Act’ of the insured and the insurance company agrees to pay “all sums that the ‘Named Insured’ may be required . . . to pay . . . arising from any ‘Wrongful Act.’ ” “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)”.

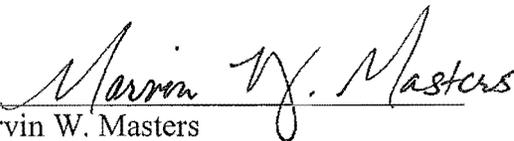
Endorsement #17 to the policy extends this coverage, without any exclusion for “wages, salaries and benefits”, for the period July 1, 1977 to July 1, 1995. While there are exclusions to this endorsement, they do not address, in any way, exclusions for claims attributable to wages, salaries or benefits. A significant part of Respondent's wrongful acts and misrepresentations occurred during the time this coverage was in effect and there is no question that the coverage for wrongful acts under this policy applies without exclusion. Moreover, Respondent neither addresses nor denies this fact in its brief.

Further, Respondent can point to no exclusion for wages, salaries or benefits prior to July 2, 2005. The exclusion relied upon by the Respondent and the circuit court was Exclusion E(2)(I). This exclusion is only applicable from July 2, 2005, forward.

#### **IV. CONCLUSION**

Inasmuch as the trial court erred by failing to grant the Petitioners relief from the March 31, 2011 order, and since Respondent WVSP has failed to respond to or deny Petitioners' arguments set forth in their assignments of error, the Petitioners 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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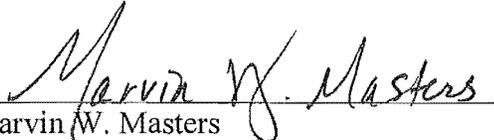
**CERTIFICATE OF SERVICE**

I, Marvin W. Masters, counsel for Plaintiffs below/Petitioners, do hereby certify that true and accurate copies of the foregoing **“Petitioners' Reply to Response Brief of West Virginia State Police”** were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 4th day of January, 2012.

  
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