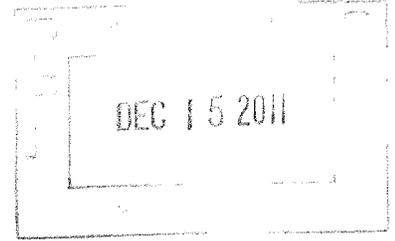


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 Below,



Petitioners,

v.

No. 11-1146

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, Defendants Below,

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

The Respondents and Defendants below find the "Procedural History" set forth in the Petitioners' Statement of the Case to be substantially accurate but wish to emphasize that the merits of the motions at issue in this appeal are at issue in Appeal No. 11-0746, while this appeal focuses solely on the Rule 60 Motion. The Respondents limit their supplementation and corrections to the matters that they believe to be relevant, as follows:

Petitioners' Statement of Facts notes that the Respondents did not obtain leave of the lower court in order to file the motions at issue, but emphasizes this fact in an argumentative manner, as the necessity for leave under the circumstances is at issue and is the subject of argument. Petitioners' references to certain relevant notices of hearing are factually accurate but again present argument that is essentially repeated in the argument section of Petitioners' brief.

In addition, it should be noted that the Respondents filed the motions at issue on⁹ or about November 5, 2009. (A.R at 1842-1843, docket sheets for Kanawha County C.A. No. 07-C-2 at lines 51 - 55). Subsequently, Petitioners moved to file an Amended Complaint on August 25, 2010. (A.R at 1843, docket sheet at lines 85 - 86). That motion was subsequently granted and Amended Complaint was filed on or about March 8, 2011. (A.R. at 1541- 1575; A.R at 1843, docket sheet at line 106). The Respondents filed a response to the Amended Complaint renewing their previously filed motions, by reference, on March 22, 2011. This filing was appropriate and timely in accordance with the West Virginia Rules of Civil Procedure. (A.R. at 1685-1689; A.R at 1843, docket sheet at line 108).

SUMMARY OF ARGUMENT

Petitioners' basic contention is that the court below, due to procedural defects, improperly granted certain motions to dismiss filed on behalf of the Respondents. These motions include amended motions filed, respectively, on behalf of the CPRB and Terasa L. Miller, as well as a motion filed on behalf of the State of West Virginia, and a single motion filed on behalf of both the PERS and the SPRS. When Petitioners subsequently filed a Rule 60 motion, the lower court declined to amend its order of dismissal, denied Petitioners' Rule 60 motion, and ordered the dismissal to stand as originally entered. As noted by the Petitioners, the dismissal order, as originally entered, is already the subject of a separate appeal, No. 11-0746, before this Court. Thus, the substantive law and the arguments relevant to the substance of the motions at issue are more properly before the Court in that prior appeal.

Petitioners argue that a binding agreement between the parties was entered into at a hearing on January 20, 2011, by which the parties purportedly agreed to continue the hearing as to the motions at issue, and that the lower court subsequently failed to enforce the terms of that agreement, but instead entered a dismissal order based, at least in part, on consideration of the motions at issue. To the extent that Petitioners attempted, at hearing in the lower court, to establish the terms of such an agreement or stipulation, postponing or reserving both written and oral argument on the motions at issue, the Petitioners did not make a clear record of the terms of that purported agreement. Neither the other parties, nor apparently, the Court, understood there to be an agreement which the Petitioners now claim to have existed. As the proposed terms were not clearly established at hearing, there was no enforceable agreement.

If no agreement is found to have been established at hearing, Petitioners argue, in the alternative, that the motions at issue should not have been included in the dismissal order as they were not properly noticed for hearing and Petitioners had no opportunity to respond to the motions. Whether the notices of hearing provided sufficient and adequate notice is for the Court's determination upon review of the notices and the relevant circumstances. Unfortunately for Petitioners, the record clearly demonstrates they were afforded the opportunity to argue the motions, both orally and in writing on several occasions. However, in practical effect, although couched in terms of the appeal of a separate order denying a Rule 60 motion, the instant appeal actually seeks reversal of portions of the same dismissal order that is at issue, on the merits and in its entirety, in Appeal No. 11-0746. As the substance of the motions and dismissal order at issue are before the Court elsewhere, the dismissal order cannot be reversed merely on the basis of a purported procedural defect. Where the Court can not only choose to consider the merits of the motions at issue, but will be issuing a decision on the merits in a prior appeal that is already pending before the Court, the issue of procedural defect is moot.

To the extent that Petitioners argue that the motions at issue could not be filed or considered by the lower court as they were filed without leave and outside the time allowed, Petitioners rely upon the application of procedural rules that are not relevant, and that cannot be properly applied to the motions at issue or the Respondents, under the circumstances at issue. Even if Petitioners are correct in this, the response to the Amended Complaint cured whatever complaint they might have had in this regard.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this appeal is unnecessary as it concerns an issue of procedural defect, in relation to the denial of a Rule 60 motion, in a case where the order that was the subject of the Rule 60 motion is already before the Court in the previously filed Appeal No. 11-0746. As a decision as to substantive issues in that prior appeal could render the procedural issue, and the disposition of the Rule 60 motion, moot, and as the relevant facts are adequately presented in the briefs and on the record, the decisional process would not be significantly aided by oral argument. Under these circumstances, a memorandum decision would appear to be appropriate.

ARGUMENT

- A. THE TERMS OF THE AGREEMENT AS ARGUED FOR BY PETITIONERS WERE NOT CLEARLY PRESENTED AT THE TIME OF HEARING AND WERE THUS NEVER SUFFICIENTLY CLEAR TO FORM THE BASIS FOR AN AGREEMENT.

To the extent that Petitioners attempted, at hearing in the lower court, to establish the terms of an agreement or stipulation postponing or reserving both written and oral argument on certain more recently filed motions relating to these Respondents, and particularly to Respondents Terasa L. Miller, State of West Virginia, PERS, and SPRS, the Petitioners did not make a clear record of the terms of that purported agreement. (A.R. at 1476-1483, Transcript of January 20, 2011, hearing). A detailed review of the transcript for the January 20, 2011, hearing could support the argument that Petitioners intended to at least make an objection of some kind, as Petitioners' counsel states that he is not prepared to address the motions at issue and further indicates that he does not

believe he received copies of the motions or of notices of hearing. However, Petitioners had an obligation to make the terms of the proposed agreement or stipulation clear on the record, in a manner whereby the terms would be clearly understood by both the lower court and the parties at the hearing. Petitioners did not fulfill that obligation.

Based upon the case law cited in support of their position, Petitioners contend that the statements of the trial court and of counsel for the parties, made in open court at the January 20 motion hearing, show that an agreement or stipulation was entered into by the parties. However, the language actually cited, and quoted, by Petitioners is far more ambiguous and equivocal than that typically used by the parties to a binding stipulation or agreement. The language at issue was not sufficient, as a matter of law, to create such an agreement.

In practical effect, Petitioners contend that they obtained an agreement that the hearing of certain potentially dispositive motions would be continued and that the Petitioners would have the opportunity, at an unspecified future time, to brief and argue against those motions that were subject to the continuance. Certainly, had Petitioners clearly identified the motions at issue to the trial court, or requested that opposing counsel identify the motions for the benefit of the court, at the outset of the hearing, and had then clearly requested that the hearing of the identified motions be continued, there would be little to argue or to consider. But that is not what actually occurred. To the contrary, the terms "continue" and "continuance" are nowhere to be found in the hearing excerpt cited by the Petitioners.

Further, as Petitioners' counsel himself suggested at the hearing, opposing counsel, i.e. the Respondents' counsel, had already argued the motions to which

Petitioners were then referring.¹ Petitioners' counsel did state he did not have copies of the motions at issue, and that he was thus not prepared to address them at the hearing.

But the language that would presumably constitute the purported agreement is ambiguous at best.

Edited in order to emphasize that language, the statements of Petitioners' counsel that would serve to create an agreement read as follows:

Your Honor, Mr. Sweeney...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.

...

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

(A.R. at 1482-1483).

It must be recalled that, in the context of the January 20 hearing, the motions at issue had just been argued moments before by the Respondents (movants below). Thus, whether properly served or noticed or not, they have already been "brought on" for hearing. In other words, Petitioner's counsel consented, in the statements claimed to constitute the agreement, to the Respondents having argued their motions to the court at the same hearing. With this in mind, it becomes easy to understand how both the

¹Petitioners' counsel suggested that this was the case when he stated, at hearing, in reference to opposing counsel's just-completed oral argument, that "I don't know if he meant to argue them just now or what, but he and I discussed them." Review of the hearing transcript shows that these motions were argued, just as Petitioners' counsel suggested, as Ms. Miller, the State of West Virginia, the PERS, and the SPRS are expressly mentioned, however briefly. (A.R. at 1481-1482).

other counsel, and the court, understood the purported agreement to have a completely different meaning than the one argued by the Petitioners before this Court.

It is equally reasonable to consider that Petitioners' counsel may be stating to the court that he informed the movants' counsel, prior to the hearing, that he had no objection to the motions being brought on for hearing. Recently, in *Crawford v. Snyder*, No. 101579, 2011 W. Va. LEXIS 317, at 13-14 (W. Va. Nov. 16, 2011), this Court noted that the circuit court, in the context of a trial, did not abuse its discretion in limiting the testimony of a witness as it was not clearly informed, by counsel, that the witness would be unable to return and thus unavailable to testify in the future. This Court required that counsel clearly inform the trial court of such matters, and that failure to do so resulted in the Court's rulings on the matter being upheld by this Court. The question here is similar, in that the terms of the purported agreement, as stated by Petitioners' counsel at hearing, simply did not carry the same meaning to the court as they can now be made to appear here through focused argument. It must be remembered that the trial court was presented with three separate opportunities to interpret the purported agreement in the manner which Petitioners now suggest, and that on each occasion, the court ruled against the Petitioners.²

Admittedly, a detailed review of the hearing transcript, informed by knowledge of civil procedure, could lead to the conclusion that an agreement of the sort now argued by Petitioners was created, but if so, the agreement's terms would be the result of

² These opportunities were first when the Respondents submitted their proposed Order from the January 20 hearing, again when the Petitioners filed an objection to the proposed order, and a third time at the hearing on the motion filed under Rule 60.

construction and not a matter of applying clear terms arising from an offer and acceptance.

It should be emphasized that the single clearly stated term of any purported agreement was that Petitioners had no objection to the motions at issue being brought on for hearing. Thus, any agreement described by Petitioners is found to have been created, the one absolute term contained therein was that Petitioners agreed that the motions at issue would be brought on for hearing and consideration, on the merits, by the lower court. As the motions had, in fact, just been brought on for hearing, the Petitioners waived, in this term, any argument they might have had that the motions were not properly considered by the court.

- B. IF PETITIONERS CANNOT RESPOND SUCCESSFULLY, AS A MATTER OF SUBSTANTIVE LAW, TO THE RESPONDENTS' ARGUMENTS IN THE CONTEXT OF APPEAL 11-0746, THE ISSUE OF PROCEDURAL DEFECT IS RENDERED MOOT, AND THE ORDER AT ISSUE SHOULD NOT BE REVERSED.

Petitioners' second assignment of error need not be considered if an agreement is found to have been created, and it thus proposes an alternate basis for relief. Petitioners argue proper notice must be given, claiming the language in the notices was not sufficient to give adequate notice under the circumstances. It should be noted that the purpose of the notice requirements is to afford all parties the opportunity to be heard. Petitioners do not refer to any case where, as here, the aggrieved parties had already filed an appeal of the lower court's substantive rulings and are in the process of being heard on the substantive issues that they contend they could not argue below.

Here, consideration of the actual substance of the motions filed on behalf of the Respondents, including Ms. Miller, the State of West Virginia, the PERS, and the SPRS, the lower court's rulings thereon, and Petitioners' arguments in opposition to the motions at issue are before the Court in Appeal No. 11-0746. As noted in more detail by the Respondents in the context of Appeal No. 11-0746, there is no basis for retaining Respondents Terasa L. Miller, the State of West Virginia, the PERS, and the SPRS, as parties, and the reasons may be simply and clearly stated. Petitioners have asserted no distinct allegations of negligence or other wrongdoing against the State of West Virginia, the PERS, or the SPRS, that either serve to distinguish these entities from the CPRB, or are sufficient to state a claim. Petitioners' allegations against Ms. Miller merely duplicate allegations that were asserted in prior actions against her that were decided in her favor.

As the CPRB is a State agency and is, for the purposes of litigation, the State of West Virginia, there is no basis or reason to name the State of West Virginia as if it is a separate and distinct entity.³ As the CPRB administers both the PERS and the SPRS, and no allegations of wrongdoing have been made against either retirement system, assuming the systems have the capacity to act in some relevant way in the absence of the CPRB, there is no basis to retain the PERS or the SPRS as parties. The only specific allegations made against Ms. Miller relate to her role as an employee of the CPRB and to an issue that has already been litigated and resolved in her favor. There is no reason or legal basis to retain her as a distinct party. Thus, the bases for several of the motions at issue are relatively simple and easily stated, and it poses no obvious

³ This is in addition to the clear Constitutional prohibition on naming the State of West Virginia as a Defendant. West Virginia Constitution, Article VI, Section 35.

hardship to require the Petitioners to address the substance of these issues in Appeal No. 11-0746. If Petitioners cannot provide adequate reasons for naming these parties in the course of their prior appeal, No. 11-0746, where they are most certainly being heard on the issues, there is no point to requiring that their dismissal be reversed on procedural grounds alone.

It is not the purpose and function of this Court in a review of a denial of a 60(b) motion to rule upon the substance of the appellant's assertion.

...

Conversely, **where a claim is absolutely without merit, neither a reviewing court nor a trial court should engage in a fruitless venture to vacate a judgment by reason of procedural defects merely to reconfront a substantive rule which mandates a denial of the movant's underlying claim.** Suffice it to say that we find sufficient merit in appellant's claim to consider the validity of his motion.

Toler v. Shelton, 157 W. Va. 778, 786, 204 S.E.2d 85, 90 (1974) (emphasis added). As the Petitioners have cited *Toler*, it is appropriate to note that the actual procedure at issue there is not similar to the procedures at issue here.

Toler, in suffering a dismissal with prejudice without notice, has been denied a substantial right. By a proper motion, seasonably made, this denial was brought to the attention of the trial court, which chose in a terse order, unsupported by findings of fact, to overrule and deny the motion for relief. This, also, was tantamount to a denial of the appellant's right to due process.

Toler, 157 W. Va. at 787, 204 S.E.2d at 90 (citation omitted). Here, unlike *Toler*, the Court is not only in a position to note the substantive merit, if any, of Petitioners' arguments but has already been called upon to consider the merits and to rule upon them in a prior appeal.

As noted by the Respondents in the context of Appeal No. 11-0746, the State of West Virginia, SPRS, and PERS, argued, and the lower court ultimately agreed, that Petitioners' Complaint included, literally, no allegations against the two retirement systems, and that the allegations against the State of West Virginia and the CPRB were the same and did not distinguish the CPRB from the State of West Virginia in any relevant way. The allegations asserted against Terasa L. Miller were based upon her purported failure to perform a mandatory statutory duty. But that exact issue, arising from the same alleged facts, was previously raised in Kanawha County Civil Action No. 03-MISC-473, and addressed in the dismissal order as entered in that case. As the Petitioners have conceded the issue of collateral estoppel argument in Appeal No. 11-0746, reversal of the lower court's order here, based on a procedural defect, is a "fruitless venture."

To the extent that Petitioners argue that the motions designated as amended motions could not be properly filed as the Respondents failed to obtain leave to amend their pleadings, Petitioners fail to note that the motions at issue do not constitute pleadings as defined by Rule 7. W. Va. R. Civ. P. 7. Nor are motions the subject of Rule 8. W. Va. R. Civ. P. 8. Petitioners cite no case law that dictates that leave must be sought to amend a previously filed motion. Petitioners' reference to affirmative defenses is irrelevant as the motions at issue are neither pleadings pursuant to Rule 8, nor are the issues presented in them limited to affirmative defenses. Where a plaintiff fails to state a claim, no defense, affirmative or otherwise, is necessary, as there is no cognizable claim to defend against.

To the extent that Petitioners argue that at least some of the Respondents should be held to have been in default, but admit that, pursuant to W. Va. Code § 55-17-4, no default judgment can be entered against a government agency unless that agency clearly intends to fail to appear or defend, Petitioners fail to indicate what purpose a default could possibly serve in the absence of a default judgment. Default is an interim step to a default judgment. Further, here, no default was ever entered against any Respondent, pursuant to the terms of Rule 55(a), prior to the Respondents' filing of the motions at issue.⁴

Although Petitioners cite to *Cales v. National Union Fire Ins. Co.*, 212 W.Va. 223, 569 S.E.2d 479 (2002), in order to establish that there is a distinction between a default and a default judgment, Petitioners fail to note that this distinction is generally honored in the breach, as parties and courts appear to routinely refer solely to default judgments. See, e.g., *Diehl v. Liller*, 208 W. Va. 518, 519, 541 S.E.2d 608, 609 (2000) (default judgment may be entered "when a party . . . has failed to plead or otherwise defend[.]"); *Hartwell v. Marquez*, 201 W. Va. 433, 435-36, 498 S.E.2d 1, 3-4 (1997) ("Counsel also moved for default judgment on the issue of liability[.]"); *State ex rel. McGraw v. Combs Servs.*, 206 W. Va. 512, 516, 526 S.E.2d 34, 38 (1999) ("[T]he circuit court entered default judgment . . . upon the defendants' failure to answer the . . . complaint."). In light of the apparent tendency to ignore default as an interim step, it is at least reasonable to

⁴ It should be noted that, although Petitioners argue that the motions at issue were never properly served upon them, and that the motions at issue were never properly noticed for hearing, they do not argue that the motions were never filed with the lower court. Reference to the lower court's docket sheet shows that the motions were filed prior to Petitioners' motion for entry of default. No default was ever entered.

conclude that W. Va. Code § 55-17-4 did the same, particularly as default is effectively pointless where no default judgment can be entered. Thus, default is also rendered a nullity by § 55-17-4 as it is procedurally meaningless, even as an interim step.

By the Petitioners' reasoning, pursuant to W. Va. Code § 55-17-4, a government agency that does intend to appear and defend would nevertheless be required to move the court for leave to do so, even if no default had been entered. As the plain practical effect of the statute is to allow such an agency to defend if it intends to do so, Petitioners would require an extra, purely formalistic, and genuinely meaningless procedure before the agency could proceed with its defense. Given that the Petitioners have been litigating these matters against various State agencies over the course of year without seeking a default, they cannot, in good faith, contend that they had any reason to believe that any of the Respondents "clearly intend[ed] to fail to appear, plead or otherwise defend in the action" below.

Petitioners also do not provide any reason why they did not seek a default prior to having the case dismissed over a year later. It is the responsibility of a party who believes there is a default to ask the court to enter such an order. W.Va. Rule Civ. Pro. 55. The Petitioners did not do so until after the Court had already dismissed their case. They appear to have sat upon their rights and made no effort to request anything from the court at the appropriate time.

Finally, it is important to note the effect of the Amended Complaint. The entry of the Amended Complaint effectively once again allowed all parties to make an appropriate response pursuant to W.Va. Rule Civ. Pro. 12. Respondents did precisely that, re-alleging and incorporating by reference their previously filed motions to dismiss,

including the amended motions and the motions relating to the State of West Virginia and PERS and the SPRS. The Respondents filed their response in a timely manner. Thus, even if, somehow, the Petitioners are correct that there was a technical default without entry of such by the court, this issue was cured by the filing of the Amended Complaint and the response thereto, ending the question of default in this case.

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CONCLUSION

For the foregoing reasons, the Respondents, West Virginia Consolidated Public Retirement Board, the State of West Virginia, the West Virginia State Police Retirement System, the West Virginia Public Employees Retirement System, and Terasa L. Miller respectfully request that the Court affirm the circuit court's order denying Petitioners' Rule 60 motion.

STATE OF WEST VIRGINIA, WEST
VIRGINIA STATE POLICE
RETIREMENT SYSTEM, WEST
VIRGINIA, CONSOLIDATED PUBLIC
RETIREMENT BOARD, WEST
VIRGINIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM, and
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Petitioners,

v.

STATE OF WEST VIRGINIA, et al.,

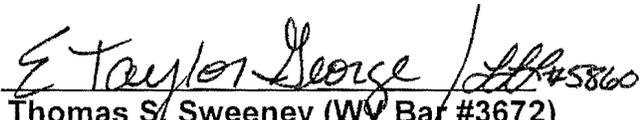
Respondents.

CERTIFICATE OF SERVICE

I, Thomas S. Sweeney, do hereby certify that on this 15th day of December, 2011, I served a true and correct copy of the foregoing **RESPONDENTS' BRIEF** upon counsel of record by hand or by depositing the same in the United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

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