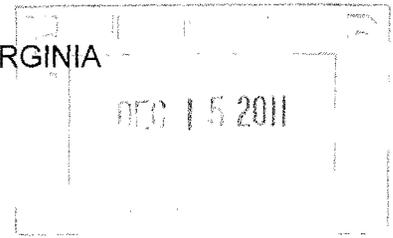


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1146



DAWN COLETTE BLAND and AUTUMN
NICOLE BLAND, Wife and Infant Daughter
of Douglas Wayne Bland, et al.

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; TERESA 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,

Respondents.

Respondent, West Virginia State Police's Brief

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STATEMENT OF THE CASE

Petitioners are or were members of the West Virginia State Police 42nd - 45th Cadet Classes or their beneficiaries. The petitioner members were employed no earlier than September 11, 1994. The petitioners all are members or beneficiaries of a retirement plan for West Virginia State Troopers referred to as Plan B. W.Va. § 15-2A-1, et seq. Plan B went into effect on March 12, 1994 and, by statute, requires that all persons employed after its effective date be enrolled in it and not its predecessor plan known as Plan A. W.Va. § 15-2A-3(a) and W.Va. § 15-2-26.

Petitioners have sought judicial revision of their membership in Plan B by seeking a declaration that they are entitled to Plan A benefits and membership in Plan A. The basis for their claim that they are entitled to Plan A benefits is that they allege that they were advised of Plan A benefits during recruitment and that they became West Virginia State troopers because they believed that they would receive Plan A benefits. Petitioners have sought this relief before the Consolidated Retirement Board, the Circuit Court of Kanawha County, and the West Virginia Supreme Court of Appeals.

The petitioners' administrative appeal in which they sought enrollment in Plan A was filed on or about December 5, 2001 was resolved by final order from the circuit court which found against petitioners. During the pendency of that action petitioners filed suit in the instant underlying action. This suit was also dismissed and it is that dismissal the petitioners' appeal.¹

¹ Petitioners have a companion appeal of the decision dismissing the remaining defendants in the civil action appealed herein at *Bland et al. v. 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, W.Va. S. Ct. Appeal No. 11-0746*. Those respondents have filed a response to the instant appeal and this

The trial court had originally stayed the action against the West Virginia State Police (hereinafter referred to as WVSP) while the petitioners' administrative action was pending as "[w]hich benefit plan plaintiffs [were] entitled to be [in was] the subject of an administrative action that [was] under appeal to the Circuit Court of Kanawha County in Administrative Appeal No. 06-AA-55 before the Honorable Judge Tod Kaufman. See AR 870, Petition for Appeal. The stay was lifted after the Circuit Court of Kanawha County, Judge Kaufman, ruled that petitioners were not members of retirement Plan A but were rather members of retirement Plan B. See State ex. Rel. Trooper Michael Lynch et al v. Joseph Jankowski, Jr., Kanawha County Civil Action 06-AA-55 (Kaufman); See A.R. 860, Final Order.

In both actions petitioners' alleged that the CPRB breached a duty to inform petitioners, applicants and employees, of their retirement benefits they would eligible for and that the WVSP had a right to rely on the CPRB to accurately and fully inform WVSP employees of their benefits and the WVSP had a duty to its recruits and employees to provide them with accurate information about benefits if it provided them with any information at all. The basis for this claim appears to be that the WVSP recruitment brochures were old brochures setting forth minimal information regarding Plan A and the CPRB did not disseminate new brochures setting forth information regarding Plan B. The administrative appellate court entered an Order of Certification certifying the question to the Supreme Court of whether or not the Board can be bound by promises of a state agency given to prospective employees regarding pension benefits. The court answered the question "No, as a matter of law." The Supreme

respondent adopts and incorporates their statement of facts and law and arguments in opposition herein as well.

Court refused the certified question.

The administrative appellate court then entered a Final Order dismissing the petitioners' claims. The final determination included a conclusion of law that as to these petitioners "[n]one of the Petitioners in this case were employed by the WV State Police until 6 months after the effective date of West Virginia Code 15-2A-3(a), which closed enrollment in Plan A. Petitioners were provided with, and signed enrollment forms providing for Plan B benefits. Petitioners are therefore charged with the knowledge of the law is [sic] exists in the statute." See A.R. at 886, Final Order Kanawha County Civil Action No. 06-AA-55; Petition for Appeal Denied, W.V.S.Ct., 090481, A.R. at 925-926.

Despite the Final Order in which the petitioners were found to be members of Plan B petitioners sought to collaterally attack that determination in the instant underlying action. The facts alleged are the same in this action as the facts alleged in the administrative action.

Petitioners represented that what happened in the recruitment process is not disputed. Petitioners' Brief at 4. It is disputed. However, it is not dispositive. As noted in the administrative appellate court's ruling, the court presumed there were misrepresentations made during the recruitment process. Petitioners' factual recitations in large part have no relevance to the issues in the instant appeal and appear to have been presented for the sole purpose of an attempt to sway this court with sympathy towards the beneficiaries of the WVSP retirement system who receive different benefits from other beneficiaries of the WVSP retirement system.

SUMMARY OF ARGUMENT

The facts alleged by petitioners and the arguments that petitioners have made have been the same throughout every action. Petitioners have consistently argued that the basis for their claim that they are entitled to Plan A benefits is because there was an oral misrepresentation made prior to hiring that they would receive Plan A benefits. While petitioners have posed alternative legal theories to support their argument that they are entitled to Plan A benefits the factual basis and support for each theory has remained the same.

The WVSP has no statutory authority to determine what benefits its members receive nor can it confer retirement benefits on any of its members. Syl. Pt. 4, McDaniel v. WV Division of Labor, 214 W.Va. 719, 519 S.E.2d 277 (2003); Cain v. PERS, 197 W.Va. 514, 476 S.E.2d 185 (1996). There has been a final adjudication on the issue of whether or not petitioners can be placed in Plan A. The administrative appellate court ruled that they cannot. Petitioners are collaterally estopped from relitigating this issue merely because they have come up with different theories of recovery.

Even if collateral estoppel was not applicable respondent has never had the statutory authority to place petitioners in Plan A or to confer Plan A benefits upon them. That is the bailiwick of the legislature. Petitioners current machinations are merely an effort to create a state treasury in an state agency's insurance policy. The WVSP is properly immune from petitioners' claims to obtain their "damages" through it. The damages petitioners seek are Plan A benefits. Any attempted argument that retirement or wage related damages are not sought because petitioners' complaint's prayer for

relief seeks "compensatory damages" does not lift the immunity conferred.² As such a claim is not even actionable petitioners argument was insufficient to overcome summary judgment.

At best petitioners allege a cause of action which accrued on or before December 1, 2001 when they were indisputably aware that they were not in Plan A (by virtue of the fact that that is when they filed their petition with the Board). The statute of limitations on petitioners' putative claims would have expired in 2003, more than three years prior to the filing of the underlying civil action. Petitioners could not meet their burden in overcoming respondents properly supported motion for summary judgment as the issues raised did not create a genuine issue of material fact. West Virginia R.Civ.Pro. 56(c), Jividen v. Law, 461 S.E.2d 451 (W. Va. 1995). "Genuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever preferrations catch a litigant's fancy. A 'dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" (Citation omitted) Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd., 474 S.E.2d 872, 878 (W. Va. 1996),

STATEMENT RE ORAL ARGUMENT

Oral argument is not needed or appropriate as the laws raised in petitioner's appeal have been definitively if not exhaustively addressed in prior case law issued by this Court. W.V.R.App.Pro. 18. If this Court determines oral argument to be

² Petitioners' claim that the damages sought are for loss of opportunity as *but for* the promise of Plan A benefits they would have taken another job elsewhere is and was insufficient to overcome summary judgment as it does not create an entirely new class of damages but merely sets the damages at the difference in value of Plan A and Plan B retirement benefits which is not a covered element of a claim but is rather a claim for which the WVSP is immune.

necessary, respondent suggests it be limited to argument pursuant to W.V.R.App.Pro. 19.

ARGUMENT

A. STANDARD OF REVIEW

Respondent does not contest the standard of review concerning summary judgment contained in Petitioners' brief. However, petitioner has failed to set forth the standard of review with respect to the application of collateral estoppel. The trial court's application of the doctrine of collateral estoppel is reviewed under an abuse of discretion standard and is not a *de novo* review. Syl. pt. 7 of Conley v. Spillers.

"We follow the rule stated in Parklane Hosiery Co. v. Shore, 439 U.S. at 331, 58 L. Ed. 2d at 562, 99 S. Ct. at 651 (1979), that the trial court should have a rather broad discretion in determining when it should be applied: 'We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.'" Conley v. Spillers, 171 W. Va. 584, 592-593, 301 S.E.2d 216 (W. Va. 1983).

Respondent also adds the following standard with respect to the burden of the party opposing summary judgment. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the

West Virginia Rules of Civil Procedure." Syl. Pt. 3, Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (W. Va. 1995). "Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Id. at Syl. Pt. 5.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL AGAINST PETITIONER

Petitioner has asserted that "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 action." Respondent suggests that petitioners' appeal fails as they have failed to set forth any facts or law which would support an argument that the trial court abused its discretion in the application of collateral estoppel. Petitioners claim that collateral estoppel is inapplicable because: the WVSP was not a party to the prior case or appeals; the issues decided were not the same issues as the present case; petitioners did not receive a full and fair opportunity to adjudicate whether or not the WVSP was negligent or made misrepresentations; and 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.

Petitioners are correct that the WVSP was not a party to the prior action but are incorrect that that fact operates as a bar to the application of collateral estoppel.

“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 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.” Syl. Pt. 1 State ex rel. Federal Kemper Ins. Co. v. Zakaib 506 S.E.2d 350, (W.Va.,1998) citing Syl. Pt. 1, State v. Miller, 459 S.E.2d 114 (W.Va. 1995) (emphasis added).

This Court has noted that “[c]ollateral 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.” Conley v. Spillers, 171 W. Va. 584, 589, 459 S.E.2d 114 (W. Va. 1983). “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 proceeding, 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 judicata.” Syl. pt. 2, Conley v. Spillers. *Citations omitted*.

The issues are identical in every action and proceeding petitioners have brought. In every action they allege that during recruitment they were advised that they would receive Plan A benefits. In every action petitioners have alleged detrimental reliance on pre-hire recruitment statements. In fact, it was petitioners who noted in their brief that the claims that there were statements made in the recruitment process that they relied upon prior to hiring were un rebutted. Application of the resulting ruling can hardly be said to violate

petitioners' due process rights. The trial court properly ruled that collateral estoppel applied with respect to the ruling that "[n]one of the Petitioners in this case were employed by the West Virginia State Police until 6 months after the effective date of W.V. Code § 15-2A-3(a), which closed enrollment in Plan A. Petitioners were provided with, and signed enrollment forms providing for Plan B benefits. Petitioners are therefore charged with the knowledge of the law is [sic] exists in the statute." A.R. 860.

There is no requirement that the West Virginia State Police have been a named party to the underlying administrative action in order for collateral estoppel to apply to bind petitioners' with the rulings made by the court in the administrative action. Although "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard . . . [t]he due process problem does not arise where a stranger to the judgment seeks to enforce it against a party to the judgment since the party has already had his day in court in the suit where the prior judgment was rendered. Conley v. Spillers, 171 W. Va. 584, 590 (W. Va. 1983), *citations omitted*.

Petitioners argument that collateral estoppel does not apply because there was not "an adjudication of whether the WVSP was negligent or made misrepresentations" fails to illustrate how there was an abuse of discretion in the application of collateral estoppel in this case. Petitioners do not set forth any facts which support their claim that the issues in the prior proceeding are not identical to the instant proceeding. Rather, petitioners argue that they have *added* issues in the second proceeding which were not raised in the first when they made claims that the WVSP had a duty to provide plaintiffs with "accurate information about retirement benefits, disability retirement benefits and death benefits . . ."

and that they were recruited based upon representations that Plan A benefits were available and finally that they detrimentally relied upon those representations. See Petition at p. 27. Adding an issue, particularly issues which are not material, does not establish that the court abused its discretion in the application of collateral estoppel.

Collateral estoppel was applied to prevent the relitigation if whether or not the court had the authority to place petitioners in Plan A, whether or not a state agency had the authority to place petitioners in Plan A, and whether or not petitioners were charged with knowing that they were enrolled in Plan B when they executed the enrollment forms. "Genuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever preferrations catch a litigant's fancy. A 'dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" (Citation omitted) Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd., 474 S.E.2d 872, 878 (W. Va. 1996), Jividen v. Law, 461 S.E.2d 451 (W. Va. 1995). Petitioners claims that they raised a negligence argument almost ten years after the allegedly negligent misrepresentations and at least six years after any applicable statute of limitations would have run does not support an argument that the trial court erred in granting respondent summary judgment or was plainly wrong in applying collateral estoppel.

Petitioners do not dispute that the misrepresentations they allege were negligently made during the recruitment process were made, at the latest, in 1996. If this is a case, as petitioners represent, with issues which were never raised before the filing of the civil action appealed from, then petitioners' claims would additionally fail as a matter of law as they were filed well outside any applicable statute of limitations. Petitioners were made aware of the fact that they were enrolled in Plan B at the time they were hired and

endorsed their enrollment papers following which contributions were automatically deducted from their paychecks in amounts consistent with Plan B contributions and *inconsistent* with Plan A contributions. See A.R. at p. 168. Petitioners were certainly aware that they were members of Plan B at the time they presented their claim to the CPRB wherein they requested they be moved to Plan A as those were benefits which were promised to them by the State during recruitment. A.R. at p. 298. That was in 2001. *Id.* The civil action which petitioners claim was the first time they filed suit against the WVSP for such alleged negligent misrepresentations was January 2, 2007, almost six years later. A.R. 395-428.

Petitioners cite to a number of cases for the proposition that collateral estoppel is not applicable where the issues are not identical. Respondents note that this proposition is actually a misstatement as all of the issues need not be identical rather only the ones to which collateral estoppel is being applied. Nevertheless, the cases relied upon are not analogous to the facts of the instant case. For instance, petitioners rely upon Garrison v. Herbert J. Thomas Mem. Hosp., 190 W.Va. 214, 438 S.E.2d 6 (1994). In Garrison the court found that where the issue in the first case was whether a hiring decision was arbitrary, capricious or without foundation of fact and the other was whether an individual knowingly gave false information presented different issues. Petitioners also cite to State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995) and Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009). In Miller, the court found that a prosecutor was not barred from maintaining a criminal action against a defendant for battery where the defendant's termination from employment arising under the same facts as the battery charge had been reversed by an employee grievance board which found that she did not

engage in patient abuse. Collateral estoppel did not apply to the issue of battery in a criminal proceeding where the original issue was one of patient abuse presented to a grievance board which had no authority to resolve criminal matters and whose procedures were so wholly different in quality and extensiveness than those of a state criminal prosecution. In Peters there had been an arbitration where Rivers Edge claimed that it terminated Peters, an employee, for violating the “two day rule” which provided the employer could terminate an employee for being off of work for two consecutive days without consent and without a doctors order. On the other hand, the subsequent civil action addressed whether or not the employer's defense of the “two day rule” was pretextual. Therefore, the court found that the issues were in fact different and Peters was not collaterally estopped from arguing pretext.

Here the issue is whether petitioners can be placed in Plan A or receive Plan A benefits. The issue was fully litigated and the answer was no.³ Petitioners claim that they were not given a full and fair opportunity to have the issues raised in the instant case resolved in the administrative grievance of appeal is belied by the appellate record in this case. In fact the support for this argument petitioners present is a statement made by the CPRB during a hearing in the administrative proceeding that it did not have the means to conduct discovery to *contradict* petitioners claims with respect to whether they were misled. If there was any unfairness it was not the petitioners who suffered. This is further supported by the court's ruling that presumed that the petitioners were misinformed prior to enrollment.

³ Note that this issue was decided with the assumption that they were misled to believe they were entitled to Plan A benefits or uninformed as to the true nature of their benefits prior to hiring.

Finally, petitioners argue that there was not a final adjudication because they did not have a full and fair opportunity to adjudicate “compensatory damages.” This claim is made irrelevant by the determination that upon hire they were charged with knowing the law at the time. Therefore what occurred *prior* to hire was not relevant and cannot now be dispositive. Petitioners do not provide this court with any law on any of their theories of recovery to illustrate how their alleged inducement would be actionable. If this is a negligence action as alleged in petitioners’ brief the statute of limitations would bar it.

C. DAMAGES IN THE FORM OF WAGES AND BENEFITS ARE NOT RECOVERABLE AGAINST THE WEST VIRGINIA STATE POLICE

Our Constitution, Article 6, § 35, provides: “The State of West Virginia shall never be made a defendant in any court of law or equity.’ There is no specific exception to this inhibition. Such a provision is ordinarily construed to be ‘absolute and unqualified.’” Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 172 W.Va. 743, 752-753, 310 S.E.2d 675, 685 (W.Va.,1983). However, our court has allowed a variety of actions against the State or its officers holding that these forms of action fall outside the bounds of the constitutional prohibition against suing the State. For example, an injunction to restrain or require a state officer to perform a ministerial duty is not prohibited, Chesapeake & Ohio Railway Co. v. Miller, 19 W.Va. 408 (1882), *aff’d*, 114 U.S. 176, 5 S.Ct. 813, 29 L.Ed. 121 (1885); State ex rel. W.H. Wheeler & Co. v. Shawkey, 80 W.Va. 638, 93 S.E. 759 (1917); Fidelity & Deposit Co. v. Shaid, 103 W.Va. 432, 137 S.E. 878 (1927); State ex rel. Printing-Litho, Inc. v. Wilson, 147 W.Va. 415, 128 S.E.2d 449 (1962); suits against officers, acting, or threatening to act, under allegedly unconstitutional statutes, have been held not to be suits against the State,

Blue Jacket Consolidated Copper Co. v. Scherr, 50 W.Va. 533, 40 S.E. 514 (1901);
Coal & Coke Railway Co. v. Conley, *supra*; Hamill v. Koontz, 134 W.Va. 439, 59 S.E.2d
879 (1950); *see also* Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979); Ables v.
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139 W.Va. 92, 79 S.E.2d 277 (1953); suits for declaratory judgment have been held not
to be suits against the State, Douglass v. Koontz, 137 W.Va. 345, 71 S.E.2d 319
(1952); Farley v. Graney, 146 W.Va. 22, 119 S.E.2d 833 (1960); mandamus has been
permitted to require the state road commission to institute proper condemnation
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Simpson, 118 W.Va. 440, 190 S.E. 680 (1937); Riggs v. Commissioner, 120 W.Va.
298, 197 S.E. 813 (1938); Childers v. Road Commissioner, 124 W.Va. 233, 19 S.E.2d
611 (1942); Newman v. Bailey, 124 W.Va. 705, 22 S.E.2d 280 (1942); Doss v. City of
Mullens, 133 W.Va. 351, 56 S.E.2d 97 (1949); Taylor v. Baltimore & Ohio Railroad Co.,
138 W.Va. 313, 75 S.E.2d 858 (1953); State ex rel. French v. State Road Commission,
147 W.Va. 619, 129 S.E.2d 831 (1963); State ex rel. Rhodes v. West Virginia
Department of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972); liability arising from
the performance of proprietary functions is not immunized, Ward v. County Court, 141
W.Va. 730, 93 S.E.2d 44 (1956); Whitney v. Ralph Myers Contracting Corp., 146 W.Va.
130, 118 S.E.2d 622 (1961); Kondos v. Board of Regents, 318 F.Supp. 394

(S.D.W.Va.1970), *aff'd*, 441 F.2d 1172 (4th Cir.1971); quasi-public corporations which have no taxing power or dependency upon the State for their financial support have been held not to be afforded any immunity, Hope Natural Gas Co. v. West Virginia Turnpike Commission, 143 W.Va. 913, 105 S.E.2d 630 (1958); Christo v. Dotson, 151 W.Va. 696, 155 S.E.2d 571 (1967); State ex rel. C & D Equipment Co. v. Gainer, 154 W.Va. 83, 174 S.E.2d 729 (1970); and, finally, mandamus may be employed to compel state officers, who have acted arbitrarily, capriciously, or outside the law, to perform their lawful duties. State ex rel. Ritchie v. Triplett, 160 W.Va. 599, 236 S.E.2d 474 (1977). Pittsburgh Elevator, 172 W.Va. 743, 753-754, 310 S.E.2d 675, 685 - 686 (W.Va. 1983).

Petitioners claims did not meet any of those exceptions. The court in Pittsburgh Elevator expanded the exceptions to the immunity of the state. "A suit seeking recovery against the State's insurance carrier is outside the bounds of the constitutional bar to suit contained in W.Va. Const. Art. VI, § 35." Pittsburgh Elevator Co, 172 W.Va. 743, 756, 310 S.E.2d 675, 688 (W.Va., 1983). The relief sought herein is *specifically excepted* from the insurance available.

The West Virginia State Police Policy Exclusions include the following:

Exclusions

This insurance does not apply to:

1. Any claim(s) made against the "insured" for damages attributable to wages, salaries and benefits.

As the relief sought is for an employment benefit, namely that petitioners be placed under retirement Plan A as opposed to Plan B there is clearly no "available

insurance” and suit cannot be maintained. While the court has held that “pensions are a lawful debt of the State” the proper remedy for any failure to pay a pension is a mandamus action against the state treasurer and auditor neither of whom are parties to this action. Further, “the funding of any pension program is the legislature's problem-not the state employees' problem-and once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests.” Even if petitioners established a lawful debt of the State, their remedy is a mandamus action against the Treasurer and the Auditor and not the West Virginia State Police. Gribben v. Kirk 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995) citing Syl. Pt. 14, Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1995).

Petitioners argument that their claims are not barred as they are for “wrongful act” does not alter the true nature of the damages claimed in this case. Furthermore any wrongful act claim would be barred by the statue of limitations. See *infra*. The trial court correctly ruled that the petitioners’ claims for retirement benefits which indisputably this claim is for are barred by sovereign immunity. The presence of insurance in this case does not lift the immunity as there is no insurance for retirement benefits. A.R. at 1454.

The claims presented by petitioners are the very sort of claim which the policy behind sovereign immunity sought to prevent; namely to prevent the diversion of State monies from legislatively appropriated purposes. Mellon-Stuart Co. v W.Va. Bd. Of Regents, 178 W.Va. 291, 296, 359 S.E.2d 124, 129 (1987). “Thus, where monetary relief is sought against the State treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit.” *Id.* citations omitted.

Petitioners argue that the dismissal of their claim by the circuit court was improper because they have stated a cause of action against the WVSP for which it is not immune because they allege a "wrongful act" and there is coverage under the WVSP policy for a "wrongful act." Wordsmithing does not alter the true nature of their claim. Petitioners seek to be placed in Plan A. Titling that claim one for "compensatory damages" does not lift the WVSP' immunity from suits for retirement benefits. What damages do petitioners seek in their action? Petitioners' companion appeal and their prayer for relief in the instant complaint makes plain that they seek a transfer to Plan A. A.R. at 1135-1152. There could not be any other damages.

CONCLUSION

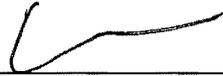
The issue has never been whether or not petitioners are deserving of a more fruitful benefit plan. Respondent posits that all West Virginia State Troopers and their beneficiaries should receive the best benefit plans that the legislature is able to confer upon them. Respondent is not statutorily authorized to confer benefits on anyone or to dictate the amount of those benefits.

As to the issues in this appeal, petitioners are members of Plan B. No further cause of action exists. The appeals for improved benefits for all law enforcement officers belong before a different branch of government than the instant one.

For all the foregoing reasons, respondent respectfully requests that this Court deny petitioners appeal and dismiss this matter with prejudice.

WEST VIRGINIA STATE POLICE,

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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; et al.

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; TERESA 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,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendant, West Virginia State Police,
does hereby certify on this 15th day of December, 2011, that a true copy of the foregoing
"Respondent, West Virginia State Police's Brief" was served upon opposing counsel
by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and
addressed as follows:

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