| | |
|---|---|
| **COURT OF APPEALS, STATE OF COLORADO**<br>Court Address: 101 W. Colfax Ave. # 800, Denver, CO 80202 | |
| **Appeal From The District Court, Denver County, Colorado**<br>2010 CV 9848 *Lawless* (Consolidated Appeal)<br>2011 CV 3733 *Hogan*<br>2010 CV 9874 *Mills*<br>Trial Court Judge: Honorable William W. Hood III | |
| ***Plaintiffs-Appellants***<br><br>TRACEY LAWLESS, ROBERT HOGAN, TERRILYNN MILLS,<br>v.<br><br>***Defendants-Appellees***<br><br>STANDARD INSURANCE COMPANY; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION BOARD OF TRUSTEES, CAROLE WRIGHT, MARYANN MOTZA, and RICK LARSON, in their Official Capacity only | ▲ COURT USE ONLY ▲<br><br>**Court of Appeals Case No. 2012CA567** |


**Attorneys for Defendant-Appellee, Standard Insurance Company**

Clinton P. Swift, #7127
SWIFT & BRAMER, LLP
1230 West Ash, Suite C
Windsor, Colorado
P 970-460-0266
swiftp@swiftbramerlaw.com

Warren von Schleicher, #11PHV3096
SMITH | VON SCHLEICHER + ASSOCIATES
180 N. LaSalle St., Suite 3130
Chicago, Illinois 60601
P 312-541-0300
warren.vonschleicher@svs-law.com


# ANSWER BRIEF OF STANDARD INSURANCE COMPANY

## CERTIFICATE OF COMPLIANCE

The Answer Brief of Standard Insurance Company complies with all the requirements of C.A.R. 28 and 32. The Answer Brief complies with C.A.R. 28(g) because it contains 9,239 words and 778 lines of text, including footnotes. The Answer Brief complies with C.A.R. 32 because it is prepared using Roman style Garamond Premier Pro 14 point size including footnotes.

The Answer Brief complies with C.A.R. 28(k) because it contains under separate heading (i) a concise statement of the applicable standard of appellate review with citation to authority; and (ii) a citation to the precise location in the record where the issue was preserved or whether Appellee agrees with Appellants' statements concerning the standard of review and preservation for appeal, and if not, why not.

September 18, 2012
Attorney for Defendant-Appellee, Standard Insurance Company

*/s/ Clinton P. Swift*
Clinton P. Swift, #7127
SWIFT & BRAMER, LLP
1230 West Ash, Suite C
Windsor, Colorado
P 970-460-0266
F 970-237-4838
swiftp@swiftbramerlaw.com

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

## STATUTES AND REGULATIONS

## ISSUES PRESENTED FOR REVIEW

Whether the district court correctly held that PERA Rule 7.45 does not violate C.R.S. §24-51-701 *et seq.* (the "PERA Statute" or "Statute") and therefore is not *ultra vires* or unconstitutional, where administrative rules are presumed valid unless proven to be invalid beyond a reasonable doubt.

Whether the district court correctly held that the Group Short-Term Disability Insurance Policy purchased by PERA from Standard Insurance Company, with an effective date of January 1, 1999, complies with PERA's Rules, including Rule 7.45(E), and is not subject to judicial reformation retroactive to 1999.

## STATEMENT OF THE CASE

### Nature of the Case

The Colorado General Assembly created the Public Employees' Retirement Association ("PERA") as an instrument of the State of Colorado responsible for providing welfare and pension programs to Colorado public employees. C.R.S. §24-51-201; *Tepley v. Pub. Emp. Ret. Ass'n*, 955 P.2d 573, 580 (Colo. Ct. App. 1997). The General Assembly charged PERA with the duty to design (by promulgating rules) and provide (by procuring an insurance policy) a short-term disability program. The General

Assembly directed PERA to purchase a short-term disability insurance policy that "shall conform" to PERA's rules. C.R.S. §§24-51-702, 24-51-703.

In November 1998, PERA promulgated rules that provide income replacement benefits to public employees whose disability prevents them from working in their assigned jobs and in any other occupation, calculated at 60% of predisability earnings for a maximum period of 22 months. PERA's rules, specifically Rule 7.45(E), provide no benefit to employees who are able to work in another occupation. PERA determined that public employees who are able to work in other State jobs or other jobs for another employer should not be entitled to stay at home and collect disability benefits. PERA submitted its rules to the Attorney General of Colorado in compliance with the Administrative Procedures Act, C.R.S. §24-4-103. The Attorney General found no legal deficiency in the form or substance of PERA's rules.

With the Attorney General's imprimatur, PERA purchased a Group Short Term Disability Insurance Policy ("Group STD Policy") that conforms precisely to PERA's rules as directed by C.R.S. §24-51-703. PERA purchased the Group STD Policy, with an effective date of January 1, 1999, from Standard Insurance Company ("Standard").

Tracey Lawless ("Lawless"), Terrilynn Mills ("Mills"), and Robert Hogan ("Hogan") (collectively "Plaintiffs"), while unable to work in their assigned jobs, are fully able to work in other jobs earning 75% or more of their prior income. Under PERA's rules and the Group STD Policy, which must "conform" to PERA's rules, Plaintiffs are not entitled to a short-term disability benefit.

Plaintiffs, in the First, Second, and Third Claims of their respective Complaints, contend that Rule 7.45(E) is inconsistent with C.R.S. §24-51-702. Lawless asserted her claims both individually and as representative of a putative class reaching back to January 1, 1999.[1] Plaintiffs seek a declaration that Rule 7.45(E) is *ultra vires* and unconstitutional. But they impermissibly seek to hold Standard financially responsible for a State entity's alleged constitutional violations.

Plaintiffs want the Court to rewrite PERA Rule 7.45 by striking Rule 7.45(E), then judicially reform the Group STD Policy to conform to the judicially rewritten Rule, and then order Standard to pay monthly income replacement benefits to them (and the

[1] Lawless's Motion to Certify Class Action is held in abeyance pending this appeal. (Order Certifying Final Judgment, *Lawless* CD pg. 1320). References to "*Lawless* CD," "*Mills* CD," and "*Hogan* CD" are to corresponding page of the record on appeal submitted by Plaintiffs in CD format to the Court of Appeals.

putative class) for 22 months under the judicially rewritten Group STD Policy retroactive to January 1, 1999.

The district court held that PERA Rule 7.45(E) comports with the PERA Statute and is not *ultra vires* or unconstitutional. The General Assembly granted PERA substantial discretion to design and implement a short-term disability program. The General Assembly delegated legislative power to PERA to define "disability," to determine whether to provide monetary or non-monetary benefits, and to decide when benefits terminate. The General Assembly never mandated payment of *monetary* benefits to public employees who cannot perform their assigned jobs but are fully capable of performing other jobs. PERA properly exercised its legislative discretion by creating a short-term disability program that assists public employees until they are able to return to work in their State jobs, in other State jobs, or in other jobs for different employers. PERA's rules, including Rule 7.45(E), are completely consistent with the PERA Statute and the General Assembly's intent.

But whether the district court's decision on the validity of Rule 7.45(E) is upheld or overturned on appeal, the district court's grant of summary judgment for Standard must stand. Plaintiffs' dispute properly lies with PERA and the State of Colorado, not with

Standard. As a private entity, Standard cannot be liable for the alleged *ultra vires* acts or constitutional violations of PERA. The separation of powers doctrine precludes the Court from rewriting PERA's rules, which is fundamentally a legislative function, and foisting the judicially rewritten rules on Standard as retroactive contract terms. Colorado's prohibition on retrospective legislation also bars the retroactive application of newly rewritten rules on Standard. And the Takings Clause of Colorado's Constitution prohibits Plaintiffs, PERA, and the State from ordering Standard to pay damages in the form of income replacement benefits to Plaintiffs (and the putative class) under a purported "judicially reformed" Group STD Policy. The State, either directly or through judicial decree, cannot seize Standard's assets to pay damages caused by PERA's *ultra vires* acts and constitutional violations, in order to preserve the public treasury.

However the Court may rule on the validity and constitutionality of Rule 7.45(E), Plaintiffs' claim for declaratory judgment and reformation of contract against Standard fails, and the district court's grant of summary judgment in favor of Standard must stand.

## Course of the Proceedings in the District Court

Tracey Lawless filed her initial Complaint on December 21, 2010, and her Third Amended Complaint on April 27, 2010. (3rd Am. Compl., *Lawless* CD pgs. 146-164).

Terrilynn Mills filed her initial Complaint on December 22, 2010, and her Third Amended Complaint on April 27, 2010. (3rd Am. Compl., *Mills* CD pgs. 159-174). Robert Hogan filed his Complaint on May 20, 2011. (Compl., *Hogan* CD pgs. 1-15). Plaintiffs assert claims for Injunctive and Declaratory Relief against PERA and Standard (First Claim), Reformation of Insurance Contract against PERA and Standard (Second Claim), and Civil Rights Violations under 42 U.S.C. §1983 against PERA and PERA's Board members (Third Claim). (3rd Am. Compl., *Lawless* CD pgs. 153-156; 3rd Am. Compl., *Mills* CD pgs. 164-167; Compl., *Hogan* CD pgs. 6-9). Plaintiffs also asserted claims against Standard for breach of contract, bad faith breach of insurance contract, and violation of the Colorado Consumer Fraud Act, but these claims remain pending and are not part of this appeal.[2]

Standard filed a Motion for Summary Judgment on all claims in Plaintiffs' Complaint. (Standard's Mot. for Summ. J., *Lawless* CD pgs. 694-712, *Mills* CD pgs. 651-669; Stipulation to Incorporate Mot. for Summ. J., *Hogan* CD pgs. 316-318). PERA filed a Motion for Partial Summary Judgment, and Plaintiffs filed a Motion for

[2] For ease of reference, "Complaint" refers collectively to the Third Amended Complaint in the *Lawless* and *Mills* cases and to the Complaint in the *Hogan* case.

Partial Summary Judgment. (PERA's Mot. for Partial Summ. J., *Lawless* CD pgs. 487-513, *Mills* CD pgs. 435-461; Stipulation to Incorporate Mot. for Summ. J., *Hogan* CD pgs. 316-318; Pls.' Mot. for Partial Summ. J., *Lawless* CD pgs. 631-650, *Mills* CD pgs. 462-481; Stipulation to Incorporate Mot. for Summ. J., *Hogan* CD pgs. 316-318). On September 20, 2011, the parties filed a Stipulation and Joint Motion to Consolidate the *Lawless*, *Mills*, and *Hogan* cases for ruling on the parties' motions for summary judgment. (Stipulation and Joint Mot., *Lawless* CD pgs. 1145-1147). On October 4, 2011, the district court consolidated the cases into the *Lawless* case for purposes of summary judgment. (Order, *Lawless* CD pg. 1316).

## Disposition of the District Court

On January 4, 2012, the district court entered summary judgment in favor of PERA and Standard on Plaintiffs' claims for declaratory judgment and reformation of the Group STD Policy in the First and Second Claims of the Complaint. The district court also granted summary judgment for PERA and PERA's individual board members on Plaintiffs' claim for civil rights violations under 42 U.S.C. §1983 in the Third Claim of the Complaint. (Court Order, *Lawless* CD pgs. 1190-1196).

The district court acknowledged that administrative regulations are presumed valid and will not be set aside unless proven to be invalid "beyond a reasonable doubt." (Court Order, *Lawless* CD pg. 1192) (quoting *Pigg v. State Dept. of Highways*, 746 P.2d 961, 967 (Colo. 1987)). The district court stated, "Courts should accord deference to the interpretation of a statute by the agency charged with enforcing it, so long as a rule or regulation does not regulate beyond the scope of authority granted by the legislature." (Court Order, *Lawless* CD pg. 1192) (citing *Pigg*, 746 P.2d at 967). Moreover, "[w]hen a legislature has reenacted or amended a statute, a failure to repeal the agency's interpretation is persuasive evidence that the administrative interpretation was intended by the legislature." (Court Order, *Lawless* CD pg. 1192) (quoting *Hewlett-Packard Co. v. State Dept. of Revenue*, 749 P.2d 400, 406 (Colo. 1988)).

The district court stated that the PERA Statute "provide[s] a basic framework, but leave[s] the details of the STD program to PERA, including: defining disability; allowing PERA to provide income replacement, or rehabilitation services, or retraining services when someone is disabled; and determining when benefits should terminate under the short-term disability plan." (Court Order, *Lawless* CD pg. 1194) (citing C.R.S. §24-51-703).

In providing a framework to guide PERA in designing a short-term disability program, C.R.S. §24-51-702(1) states in part that a member who is unable to perform the essential functions of her job "shall be provided with reasonable income replacement, *or* rehabilitation or retaining services, *or* a combination thereof, under a program provided by the disability program administration for a period specified in the rules adopted by the [PERA] board." (Court Order, *Lawless* CD pg. 1194) (emphasis added). The General Assembly "used the term 'or,' giving PERA the option to provide one or more of these methods, but not necessarily all." (Court Order, *Lawless* CD pg. 1194). Therefore, the district court held that C.R.S. §24-51-702(1) does not require that PERA automatically provide monetary income replacement benefits to qualifying members. (Court Order, *Lawless* CD pg. 1194). The district court stated that the PERA Statute is "less clear" whether PERA automatically must provide at least one type of benefit to qualifying members. (Court Order, *Lawless* CD pg. 1194).

The district court concluded that C.R.S. §24-51-702(1) could be interpreted to require that a qualifying member "receive some benefits for at least a brief period of time," or "it could be read to give PERA broad discretion to decide when, how, and for how long—including for no time at all—someone should receive STD benefits." (Court

Order, *Lawless* CD pg. 1194). The district court found C.R.S. §24-51-702(1) ambiguous because it supports more than one reasonable interpretation, including PERA's interpretation as reflected in Rule 7.45. (Court Order, *Lawless* CD pg. 1194).

The district court determined that the General Assembly intended to give PERA broad discretion in devising a short-term disability program. The district court found that Rule 7.45(E) is a reasonable interpretation of the Statute and is consistent with legislative intent. (Court Order, *Lawless* CD pg. 1194). The legislature's goal, as evidenced by the PERA Statute and its legislative history, was to create the short-term disability program as a temporary bridge to return to the workforce. "[B]ecause the goal is to assist PERA members in returning to the workforce, and because PERA was given broad discretion in not only determining who is disabled, but also how long benefits should last, and when they should terminate, it is also reasonable to interpret the statute the way PERA did in Rule 7.45 E." (Court Order, *Lawless* CD pg. 1194).

PERA promulgated Rule 7.45(E) in 1998, and it has been in effect for 14 years. The district court underscored that in 2009, the General Assembly modified §701 of the Statute (C.R.S. §24-51-701) and "could also have modified section 702 or 703 to require something different, if it disapproved of PERA's interpretation of the statute." (Court

Order, *Lawless* CD pgs. 1194-1195). "The legislature's decision not to modify these sections is further evidence that PERA's interpretation is reasonable and consistent with legislative intent." (Court Order, *Lawless* CD pg. 1195) (citing *Hewlett-Packard Co.*, 749 P.2d at 406).

The district court held that Rule 7.45(E) is consistent with the PERA Statute and consistent with the PERA Statute's legislative history. "[A]n agency's interpretation is presumed valid and should only be invalidated, if it is inconsistent with the clear language of the statue or the legislative intent. I do not find 7.45.E to be inconsistent with the clear language of the statute or the legislative intent." (Court Order, *Lawless* CD pg. 1195). The district court held that Rule 7.45(E) is valid and the Group STD Policy is valid and cannot be reformed.

The district court entered judgment for PERA and Standard on Plaintiffs' claims for declaratory judgment and reformation of the Group STD Policy, alleged in the First and Second Claims for Relief, and for PERA and PERA's individual Board members on Plaintiffs' claims for civil rights violations under 42 U.S.C. §1983, alleged in the Third Claim for Relief. (Court Order, *Lawless* CD pg. 1196).

## STATEMENT OF FACTS RELEVANT TO THE ISSUES ON APPEAL

Prior to 1999, Colorado's disability welfare program paid public employees who were permanently disabled from their assigned jobs the equivalent of their salary through retirement age. The old program created perverse incentives by financially encouraging public employees to remain out of the workforce and collect full salary from the State, even though they were fully capable of working in another job.

The General Assembly took corrective action by passing the PERA Statute effective January 1, 1999. The General Assembly delegated legislative authority to PERA in order to design and provide two disability programs for Colorado public employees: a short-term disability program and a disability retirement program. Section 702(1) charges PERA with the duty *to provide* these programs, and §702(1)(a) describes the general structure of the short-term disability program that PERA is responsible for providing:

> (1) *The association shall provide* for two types of disability programs for disabilities incurred on or before termination of employment:
>
> (a) Short-term disability. A member who is found by the disability program administrator to be mentally or physically incapacitated from performance of the essential functions of the member's job with reasonable accommodation as required by federal law, but who is not totally and permanently incapacitated from regular and substantial gainful employment, shall be provided with reasonable income replacement, or rehabilitation or retraining services, or a

> combination thereof, under a program provided by the disability program administrator for a period specified in the rules adopted by the board. The cost of the program shall be funded by the association.

C.R.S. §24-51-702(1)(a) (emphasis added).

The General Assembly directed PERA to purchase a short-term disability insurance policy that "shall conform to the rules adopted by the board." C.R.S. §24-51-703.

Section 703 states:

> The association shall contract with a disability program administrator to determine disability, to provide short-term disability insurance coverage, and to administer the short-term disability program. A contract shall conform to rules adopted by the board, which rules shall include but not be limited to standards relating to the determination of disability; the independent review, by a qualified panel, of determinations made by the disability program administrator and challenged by the applicant; requirements for medical or psychological examinations; the adjustment or termination of payments based on the mental or physical condition of the program participant; the change of status of a program participant from short-term disability to disability retirement or from disability retirement to short-term disability based on the mental or physical condition, education, training, and experience of the program participant; and the monitoring of the disability program administrator's performance by the association.

Fulfilling its legislatively delegated duties, and mindful of the abuses of the pre-1999 disability program, PERA promulgated Rules 7.40 through 7.65. PERA Rule 7.45(E) provides:

> The applicant is not disabled for this purpose if the applicant is medically able to perform any job, based on the applicant's existing education, training, and experience, that earns at least 75 percent of the applicant's predisability earnings from PERA-covered employment as defined in Rule 7.50(B)(1), whether or not the applicant does so.

(Rule 7.45(E), Exhibit A to PERA's Mot. for Partial Summ. J., *Lawless* CD pg. 517). Rule 7.45(E) ensures that public employees use short-term disability as a temporary bridge until they are able to return to work, and that employees who are fully capable of working in another State job, or in another job for a different employer, cannot choose instead to stay home and collect disability from the State.

PERA designed the State's short-term disability program to provide public employees who satisfy all the criteria of Rule 7.45 "certain income replacement and reasonable rehabilitation." (Rule 7.50(B), Exhibit A to PERA's Mot. for Partial Summ. J., *Lawless* CD pg. 517). PERA promulgated Rule 7.50(B)(1), stating that the "maximum amount of monthly income replacement shall be 60 percent of the applicant's predisability earnings from PERA-covered employment," and Rule 7.60, establishing the "maximum payment period" of 22 months. (Rules 7.50(B)(1) and 7.60, Exhibit A to PERA's Mot. for Partial Summ. J., *Lawless* CD pgs. 517-518).

PERA submitted its Rules to the Attorney General for approval in compliance with the Administrative Procedures Act, C.R.S. §24-4-103. The Attorney General found no constitutional deficiency or legal error in the form or substance of PERA's Rules:

> The above-referenced rules [including Rule 7.45] were submitted to this office on November 23, 1998, as required by §24-4-103, C.R.S. (1997). This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

(Opinion of Attorney General, Exhibit A to Standard's Mem. in Support of its Mot. to Dismiss 3rd Am. Compl., *Lawless* CD pg. 246).

After the Rules received the Attorney General's stamp of approval, PERA purchased a Group STD Policy from Standard that conforms precisely to PERA's Rules, as specifically directed by C.R.S. §24-51-703.[3] PERA also contracted with Standard to

---

[3] Consistent with PERA's Rules, the Group STD Policy provides that a Member is Disabled if as a result of a medical condition, the Member is:

1. Mentally or physically incapacitated from performance of the Essential Functions of the Member's Own Job with reasonable accommodation as required by federal law; and
2. Unable to earn at least 75% of his or her Predisability Earnings in any other job the Member is able to perform, based on education, training and experience, regardless of whether the Member is working in that or another job.

(Group STD Policy pg. 3, Exhibit A to Standard's Mem. in Support of its Mot. for Summ. J., *Lawless* CD pg. 720).

provide services under an Administrative Services Agreement ("ASA") with an effective date of January 1, 1999. (ASA, Exhibit B to Standard's Mem. in Support of its Mot. for Summ. J., *Lawless* CD pg. 733).

PERA's duties and responsibilities are governed by the PERA Statute, which is specifically directed at and delegates legislative authority to PERA. But Standard's obligations are contractual in nature and governed by the Group STD Policy and the ASA. The ASA states that "Standard will administer and be financially responsible for payment of claims under the short term disability program, *in accordance with the terms of the Group STD Policy* (# 633387-A) issued by Standard to Plan Sponsor." (ASA pg. 1, Exhibit B to Standard's Mem. in Support of its Mot. for Summ. J., *Lawless* CD pg. 733) (emphasis added). The ASA provides that Standard acts in the capacity of an "independent contractor." (ASA pg. 2 "Scope of Authority," Exhibit B to Standard's Mem. in Support of its Mot. for Summ. J., *Lawless* CD pg. 734). The ASA confirms that Standard's payment obligations are contractual in nature, namely, to administer and pay claims "in accordance with the terms of the Group STD Policy." (ASA pg. 1, Exhibit B to Standard's Mem. in Support of its Mot. for Summ. J., *Lawless* CD pg. 733).

Plaintiffs Tracey Lawless, Terrilynn Mills, and Robert Hogan claimed to be disabled as defined by the Group STD Policy. After evaluating the medical and vocational evidence and consulting highly qualified physicians, Standard determined that based on their education, training, experience, and functional capacities, Plaintiffs are fully able to work in numerous jobs that pay more than 75% if their prior earnings. Under the Group STD Policy's terms—which statutorily must "conform" to PERA's Rules—Plaintiffs do not qualify for income replacement payments, because they are able to work in other jobs and earn substantial income.

## SUMMARY OF THE ARGUMENT

The General Assembly created PERA as an instrument of the State responsible for providing welfare and pension programs to Colorado public employees. C.R.S. §24-51-201. The General Assembly charged PERA with the duty to design and provide a short-term disability program, to enact rules governing that program, and to purchase a short-term disability insurance policy that conforms to PERA's rules. C.R.S. §§24-51-702, 24-51-703 (the short-term disability insurance policy "shall conform to rules adopted by the board"). On November 20, 1998, PERA promulgated Rule 7.40 through Rule 7.65 establishing the State's short-term disability program, and obtained legislative approval

for its rules as required by the Administrative Procedures Act, C.R.S. §24-4-103. PERA submitted its rules to Colorado's Attorney General, who found no constitutional or legal deficiency. With the Attorney General's official stamp of approval, PERA purchased a Group STD Policy from Standard that conforms precisely to PERA's rules.

The crux of Plaintiffs' lawsuit is that PERA Rule 7.45 is *ultra vires* and unconstitutional. Plaintiffs assert that Rule 7.45 establishes a more restrictive definition of short-term disability than prescribed by the General Assembly in C.R.S. §24-51-702. By adopting Rule 7.45 and procuring a Group STD Policy that *by statute* must "conform" to PERA's rules, PERA allegedly deprived its members of property in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs seek a declaration that PERA's Rule 7.45 is *ultra vires* and unconstitutional. But they want to hold Standard financially liable for PERA's constitutional violation.

Standard, however, is an independent contractor whose legal obligations are determined by the contractual terms of the Group STD Policy. The General Assembly charged PERA—not Standard—with the authority and duty to design and provide a short-term disability program. In fact, the General Assembly specified that the short-term disability insurance policy must conform to PERA's rules. C.R.S. §24-51-703.

Nothing in the PERA Statute requires that Standard guarantee the constitutionality of PERA's rules, second-guess the State's legislative safeguards, police the Attorney General's approval of PERA's rules, and bear financial responsibility if PERA's rules are subsequently found by a court to be *ultra vires*. The district court correctly held that PERA's Rule 7.45 is consistent with the PERA Statute and the General Assembly's legislative intent. But if the Court determines that PERA's Rule 7.45 is *ultra vires* and violates the Fourteenth Amendment, then Plaintiffs must look to the State for a remedy.

Plaintiffs attempt to transform PERA's constitutional liability into Standard's contractual liability through the conduit of "reformation of contract." Plaintiff Tracey Lawless brought her Due Process and contract reformation claims individually and as the representative of a putative class that includes Terrilynn Mills and Robert Hogan. They want the Court to rewrite PERA's rules by striking Rule 7.45(E), then judicially reform the Group STD Policy to conform to the judicially rewritten Rule, and then order Standard to pay under a judicially reformed Policy retroactive to January 1, 1999.

Plaintiffs cannot make it past the first step toward contract reformation. The promulgation of rules is a legislative function, not a judicial function. Plaintiffs' entreaty for the Court to redesign the State's disability program by judicially rewriting PERA's

rules, and to implement that program retrospective to January 1, 1999 by judicial *force majeure* under the guise of contract reformation, runs afoul of the separation of powers. Plaintiffs' request for judicial reformation of PERA's rules and judicial reformation of the Group STD Policy is a remedy the Court is not empowered to deliver. If PERA's rules are valid and enforceable, as Colorado's Attorney General and the district court declared, then the decision of the district court should be upheld. But if PERA's rules are *ultra vires*, the judicial task is to strike down the rules, not to judicially redesign Colorado's disability welfare program. Under either scenario, whether the district court's determination of the validity of PERA's rules is upheld or overturned, Plaintiffs cannot assert any claims against Standard based on a purported "reformed" insurance policy, and the district court's grant of summary judgment in favor of Standard must stand.

## ARGUMENT

### I. Appellate Standard of Review

Standard disagrees with Plaintiffs' statement of the standard of review on appeal as incomplete. On appeal, the court reviews the grant of summary judgment *de novo*. *West*

*Elk Ranch, LLC v. United States*, 65 P.3d 479, 481 (Colo. 2002). Statutory interpretation presents an issue of law. *Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009).

Courts should accord deference to an interpretation of a statute by the state agency responsible for enforcing the statute. *Pigg*, 746 P.2d at 967. "Administrative regulations are presumed valid and will be set aside only when the party who challenges them establishes their invalidity beyond a reasonable doubt." *Id.* Courts should not invalidate an agency's statutory interpretation unless it is "inconsistent with the clear language of the statute or the legislative intent." *Miller v. Indus. Claim Appeals Office of State of Colorado*, 985 P.2d 94, 96 (Colo. Ct. App. 1999). "When a legislature has reenacted or amended a statute, a failure to repeal the agency's interpretation is persuasive evidence that the administrative interpretation was intended by the legislature." *Hewlett-Packard Co.*, 749 P.2d at 406.

## II. Preservation for Appeal

Standard agrees with the statements concerning preservation for appeal in Plaintiffs' Amended Opening Brief.

## III. Standard Cannot be Legally Liable for the Alleged *Ultra Vires* Acts and Constitutional Violations of PERA.

Since January 1, 1999, PERA has provided public employees with the short-term disability program established by PERA's rules, under a Group STD Policy that conforms precisely to PERA's rules. Balancing public policy interests and State budgetary constraints, PERA enacted rules that provide for payment of income replacement benefits, calculated at 60% of predisability earnings for a maximum period of 22 months, to public employees who are unable to perform their assigned jobs and cannot work in any other job. PERA, acting as the General Assembly's legislative proxy, specifically chose to provide no benefit—whether income replacement, retraining, or rehabilitation services—to public employees who are able to work in another job that pays at least 75% of their prior earnings. PERA's rules, including Rule 7.45(E), reflect public policy and economic choices that rectified the abuses of the pre-1999 program, by discouraging employees who are able to work in another gainful job from choosing instead to remain at home and collect monthly disability payments.

As the district court held, the PERA Statute gives PERA significant flexibility in designing the State's short-term disability program. The PERA Statute does not mandate

payment of income replacement benefits to disabled public employees. The Statute does not mandate a 22-month maximum benefit period. And the Statute does not mandate that public employees who are unable to work in their assigned jobs yet are fully able to work and earn substantial income in another job (but who choose not to) must receive precisely the same benefit as employees who cannot work at all. Plaintiffs' claim that they are statutorily entitled to receive income replacement benefits for maximum period of 22 months has no foundation in the language of the PERA Statute. PERA's short-term disability program does not conflict with any provision of the PERA Statute. As the district court held, no clear conflict exists between the Statute and PERA's rules. See *Miller*, 985 P.2d at 96 (Courts cannot invalidate an agency's statutory interpretation unless the agency's interpretation conflicts with the clear language of the statute).

But if PERA exceeded its statutory charter and enacted rules that deprived Plaintiffs of property in violation of the Due Process Clause, PERA's constitutional liability cannot be passed to Standard, which is precisely what Plaintiffs seek to accomplish. They seek a declaration that Rule 7.45(E) is *ultra vires* and unconstitutional. But they want Standard to bear financial responsibility for redressing PERA's constitutional violations.

The Due Process Clause of the Fourteenth Amendment forecloses Plaintiffs from holding Standard financially liable for the alleged *ultra vires* acts and constitutional violations of PERA. The Fourteenth Amendment applies only to acts of the State.[4] PERA is an instrument of the State of Colorado, but Standard is a private entity and a corporate citizen of Oregon. Standard never assumed the role of a state sovereign when it issued the Group STD Policy to PERA. The Court has acknowledged that Standard, as the insurer of PERA's short-term disability program, is not a public entity. *Moran v. Standard Ins. Co.*, 187 P.3d 1162, 1166 (Colo. Ct. App. 2008) ("Standard's status as a private corporation, even one that has entered a contract with a public entity, precludes its treatment as a public entity under the CGIA [Colorado's General Immunity Act].").

Only instruments of the state are liable for unconstitutional deprivations of property. Standard, as a private entity, is not an instrument of the State and cannot be liable for damages caused by PERA's promulgation of Rule 7.45. See *Rendall-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (The Fourteenth Amendment "applies to acts of the states, not to

---

[4] The Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend. XIV, §1.

acts of private persons or entities."); *Paige v. Coyner*, 614 F.3d 273, 278 (6th Cir. 2010) ("[T]he Fourteenth Amendment prohibits only states (as opposed to private entities) from depriving individuals of due process.").

Plaintiffs try to characterize their claims for payment of income replacement benefits as contractual in nature. But their claims actually are for damages sustained from PERA's alleged deprivation of property in violation of the Due Process Clause. Their damages might be *measured* by the value of the benefit PERA allegedly should have provided in its rules. But the measure of damages does not transform Plaintiffs' Due Process claim against an instrument of the State into a contractual right to recover benefits from a private entity such as Standard.

The Statute does not transform Standard into a guarantor of PERA's governmental responsibilities. If the General Assembly is to impose statutory duties on private entities that contract with the State, and sanction civil liability for failing to fulfill those statutory duties, then the legislature's intent must be stated "loud and clear" in the text of the statute. *Quintano v. Indus. Comm'n*, 495 P.2d 1137, 1139 (Colo. 1972). "This is not a subject in which we should attempt to infer such a legislative intent." *Id.* See also *Crossgrove v. Wal-Mart Stores, Inc.*, 280 P.3d 29, 34 (Colo. Ct. App. 2010), aff'd, 276

P.3d 562 (Colo. 2012) ("[S]tatutes in derogation of the common law must be strictly construed....") (quoting *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1076 (Colo. 1992)).

Nothing in the PERA Statute requires that Standard guarantee the constitutionality of PERA's rules, police the Attorney General's approval of PERA's rules, and bear financial responsibility if PERA's rules are subsequently found by a court to be *ultra vires*. Nor is it desirable to foist legislative oversight responsibilities on Standard, an independent contractor and corporate citizen of Oregon, and impose civil liability on Standard for the alleged *ultra vires* acts of a Colorado State instrumentality. That would be tantamount to a judicial declaration of "no confidence" in the Administrative Procedures Act and the State's legislative process.

Standard's obligations are governed by the terms of the Group STD Policy, and there is no dispute that Standard has fully complied with the Group STD Policy's terms. Standard has no statutory or contractual obligation to recompense public employees in the event PERA enacts rules that are *ultra vires* and unconstitutional. If PERA exceeded its rulemaking authority by enacting Rule 7.45, then the safeguards embodied in the

Administrative Procedures Act failed the citizens of Colorado. Plaintiffs must look solely to PERA and the State of Colorado for a remedy.

## IV. The Separation of Powers Doctrine Precludes Judicial Reformation of the Group STD Policy.

Plaintiffs try to metamorphose PERA's *constitutional* liability into Standard's *contractual* liability through the conduit of "reformation of contract." They posture their claim as a simple action to reform the Group STD Policy to incorporate "statutorily mandated coverage." (Am. Opening Br. pg. 32).

Plaintiffs' simple reformation theory is not so simple. In fact, it's unprecedented. By statute, the Group STD Policy must conform to PERA's rules. C.R.S. §24-51-703. Plaintiffs want the Court to rewrite the Group STD Policy to conform to non-existent rules that Plaintiffs contend PERA *should have adopted*. They want the Court to reform PERA's Rule 7.45, then reform the Group STD Policy to conform to the judicially rewritten Rule, and then order Standard to specifically perform under the reformed Policy retroactive to January 1, 1999.

Plaintiffs' elaborate remedy of judicially rewriting PERA's rules and conforming the Group STD Policy to reflect the judicially rewritten rules is not reformation of contract

at all. It is an entreaty for the Court to redesign Colorado's disability benefit program, which is a legislative function that the Court must abjure.

### A. The PERA Statute is Not an Insurance Statute and does Not Impose Mandatory Coverage Terms on Private Insurers.

Plaintiffs portray their reformation claim as a straightforward action to reform an insurance policy "to provide statutorily mandated coverage." (Am. Opening Br. pgs. 32-33). They analogize their reformation claim to an action to reform an automobile insurance policy to comply with Colorado's now repealed Auto Accident Reparations Act ("CAARA"), C.R.S. §10-4-701 *et seq*. (Am. Opening Br. pgs. 32-33).

CAARA was a comprehensive statutory regime enacted explicitly for the purpose of regulating auto insurers. CAARA was specifically directed at insurance companies: "[A]n insurer authorized to transact or transacting business in this state may not exclude the minimum coverages required by operation of [this statute] in any contract of liability insurance for injury, wherever issued, covering ownership, maintenance, or use of a motor vehicle while it is in this state." C.R.S. §10-4-711 (2002). CAARA delineated extensive "Required Coverage" terms for inclusion in every "complying policy." C.R.S. §10-4-706 (2002). CAARA implemented a dispute resolution system (all insurers "shall be deemed

to have agreed" to mandatory arbitration), compliance reporting requirements (insurers must file a certification affirming that their policies comport with the statutory definition of a "complying policy"), and a mechanism to police insurer compliance (through the insurance commissioner). C.R.S. §§10-4-703, 704, 717 (2002).

The PERA Statute is not a statutory regime regulating private insurance companies. The PERA Statute applies to only a single purchaser—the State of Colorado, through its proxy PERA. The Statute does not impose duties on private insurance companies or regulate insurer conduct. In fact, the PERA Statute is not directed at private insurers at all; it is directed solely and exclusively at PERA. The PERA Statute is an expression of the General Assembly's spending power, not its police power.

As the district court acknowledged, the Statute establishes a general framework for Colorado's short-term disability program, and calls upon PERA to exercise its rulemaking authority to design and assemble the specific components of that program. The Statute manifests the General Assembly's delegation of legislative authority to PERA to design (by enacting rules) and implement (by purchasing an insurance policy) a short-term disability program. But the Statute does not mandate that private insurers provide specific benefits that the Court can simply "enforce" by judicial decree. To infer duties

and civil remedies that are not contained in the statute's terms "is tantamount to judicial legislation." *Golden Animal Hosp. v. Horton*, 897 P.2d 833, 836 (Colo. 1995). See also *Burns v. City Council of City & County of Denver*, 759 P.2d 748, 749 (Colo. Ct. App. 1988) ("Courts will not interpret a statute or an ordinance to mean that which it does not express.").

Because the PERA Statute does not impose a statutory duty upon Standard to provide specific benefits, Plaintiffs cannot use the PERA Statute as the touchstone for rewriting the Group STD Policy's terms. The PERA statute does not give Plaintiffs legal authority to compel Standard to provide a type of coverage that Standard never contracted to assume and that Standard is not statutorily required to provide. "A court may not make a contract for the parties and then order it to be specifically performed." *Ballow v. Phico Ins. Co.*, 878 P.2d 672, 680 (Colo. 1994).

In seeking reformation, Plaintiffs ask for a remedy that the Statute does not provide and that the Court is not empowered to deliver. They want the Court to rewrite PERA's rules to provide an income replacement benefit that they think PERA *should have chosen* to give to public employees like them, who are fully able to work in another

occupation, and then incorporate the rewritten rules into the Group STD Policy as retroactive contract terms.

Plaintiffs' reformation claim, therefore, is not a simple claim to reform an insurance policy to conform to statutory minimum coverage requirements. It is a request for the Court, under the guise of reformation, to assume PERA's legislative rulemaking authority, make discretionary public policy decisions about what benefits the State should offer to PERA members who are fully able to work in other jobs, and seize Standard's financial assets so the State can pay those judicially legislated benefits retroactive to January 1, 1999.

### B. Judicial Reformation is Barred by the Separation of Powers Doctrine.

The separation of powers imposes limitations on the exercise of power that the branches of government may not transgress. The separation of powers is founded on mutual respect of each of the three branches for the constitutional prerogatives and powers of the other branches. Article III of the Colorado Constitution directs that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. art. 3.

The judiciary holds a particularly solemn position, because courts possess the authority to strike rules and directives of the other branches that violate the Constitution. That authority does not license courts to substantively change or "fix" those rules and directives. Adherence to the separation of powers maintains the public's confidence in a restrained judiciary. "This doctrine ensures that the judiciary will not 'under the pretense of deciding a case,' preempt an executive agency from exercising powers properly within its own sphere." *Colo. State Dept. of Health v. Geriatrics, Inc.*, 699 P.2d 952, 959 (Colo. 1985) (quoting *People v. Montgomery*, 669 P.2d 1387, 1389 (Colo. 1983)). "The separation of powers doctrine imposes upon the judiciary a proscription against interfering with the executive or legislative branches...." *Id.* (quoting *Pena v. Dist. Court of the Second Judicial Dist.*, 681 P.2d 953, 956 (Colo. 1984)).

Judicial reformation of PERA's rules would encroach on a core legislative function. Rule-making is a function specifically granted to PERA by the General Assembly. Courts may find a state agency's rules to be *ultra vires* and strike them as void, but courts are not authorized to legislate from the bench and rewrite the rules. See *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) ("[W]hat judges deem a 'correction' or 'fix' is

from another perspective a deliberate interference with the legislative power to choose what makes for a good rule.").

The judiciary's assumption of legislative powers is strictly verboten by the separation of powers:

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." This allows both of our branches to adhere to our respected, and respective, constitutional roles.

*Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (concurring opinion)).

By delegating rulemaking authority to PERA, the General Assembly entrusted PERA to perform the legislative task of balancing public policy interests and State budgetary constraints. "Rulemaking is a derivative of lawmaking," and thus "rulemaking is a legislative function." *Whiley v. Scott*, 79 So.3d 702, 710 (Fla. 2011). "The Legislature delegates rulemaking authority to state agencies because they usually have expertise in a particular area for which they are charged with oversight." *Id.* PERA's rulemaking authority entails discretionary policy choices, which is a core legislative function.

If PERA made choices in designing the State's disability program that exceeded its delegated authority, the judicial task is to strike down the rules. The Court cannot seize PERA's legislative powers, circumvent the Administrative Procedures Act, and decide what disability benefit choices would best serve Colorado's public interests, as Plaintiffs request.

The separation of powers precludes the judiciary from assuming legislative powers and making discretionary choices about benefit program design. In *Malone v. Bureau of Indian Affairs*, 38 F.3d 433 (9th Cir. 1991), the Ninth Circuit held that the Bureau of Indian Affairs adopted eligibility criteria for educational grants that exceeded the Bureau's statutory authority. The Ninth Circuit invalidated the Bureau's rules. The Ninth Circuit further held that the district court violated the separation of powers by judicially promulgating new rules, which is a legislative power consigned to the Bureau. "[A]fter invalidating §40.1, we lacked the authority to dictate the precise standard that the BIA should adopt under the proper statutory authority." *Id.* at 437. "[T]here can be no question that the promulgation of eligibility criteria for a program established under the Act is a matter consigned to the agency in the first instance." *Id.* at 439. The Ninth Circuit explained:

> [B]y sending its statute to the relevant agency for implementation, [Congress] has delegated to that agency the function of choosing between implicit statutory options. The duty of the court in this circumstance is to keep the agency within the bounds of its delegated authority.... Thus, the judicial role may often be, as one commentator has put it, to "specify what the statute cannot mean, and some of what it must mean, but not all that it does mean."

*Id.* at 437 (citations omitted).

Plaintiffs argue that PERA already exercised its legislative prerogative by choosing to provide income replacement benefits calculated at 60% of predisability earnings for 22 months. (Am. Opening Br. pgs. 25-26). According to Plaintiffs, the Court need only cross-out Rule 7.45(E)—a minor editorial adjustment—so Plaintiffs can qualify for the same bountiful income replacement benefits. Excising a portion of a rule is no different than rewriting the rule. By excising subsection (E), the Court would be making a discretionary decision to provide income replacement benefits to public employees like Plaintiffs who are fully able to work in other jobs that provide a gainful income, which is a benefit PERA *specifically chose not to provide* to that group of employees. See *McCulloch Gas Processing Corp. v. Dept. of Energy*, 650 F.2d 1216, 1230 (Tem. Emer. Ct. App. 1981) ("[T]he district court erred in excising specific language from the regulations and in effect rewriting the regulations."); *Danly Mach. Corp. v. United States*, 492 F.2d 30, 33

(7th Cir. 1974) ("If, as it claims, the regulation was arbitrary and a misapplication of statutory authority, our only power as judges would be to prohibit the Secretary from applying the regulation.... We as a court have no power to give, or to direct the Secretary to give, an enlarged bounty to classes of persons not heretofore covered by any regulation.").

The judiciary's function ends when an unconstitutional rule is laid bare. "Authorities applying a separation of powers analysis instruct that courts should not interfere with the exercise of power by other branches of government except to enforce ministerial acts requiring no discretion." *E. Mo. Coal. of Police v. City of Univ. City*, No. ED 95564, -- S.W.3d --, 2011 WL 1661075, at *4 (Mo. Ct. App. May 3, 2011) (court refused to interfere with city employee matters when the legislature delegated that authority to the city manager); *York v. Civil Serv. Comm'n*, 689 N.W.2d 533, 541 (Mich. Ct. App. 2004) (rejecting the plaintiff's request for the court to rewrite a state agency's employee classification rules to place plaintiff in a higher paying job classification: "This would not only infringe on the CSC's 'absolute,' plenary,' and constitutionally mandated authority to classify its employees, but it would also violate the separation of powers doctrine.").

If the Court finds the PERA Statute requires that some benefit must be provided to public employees even though they are able to work in another occupation, then PERA must exercise its legislative responsibilities and determine what benefit to provide. PERA has innumerable benefit choices, income replacement benefits being only one possible option. PERA might choose to provide retraining or rehabilitation services to employees who are able to work in other gainful jobs. PERA might choose to provide lesser income replacement benefits for a shorter duration for employees who can work in other gainful jobs (maybe 35% of predisability earnings rather than 60%, for 6 months rather than 22 months). PERA might choose to provide the same income replacement benefit to all public employees, but shorten the benefit period, or diminish the benefit calculation formula, to ensure that the program does not become too costly. These are quintessentially legislative choices shaped by public policy, from which the Court must abstain. "'It is not up to the court to make policy or to weigh policy.' Such action must be left to the General Assembly." *Estate of Keenan v. Colo. State Bank & Trust*, 252 P.3d 539, 546 (Colo. Ct. App. 2011) (quoting *Town of Telluride v. Lot Thirty–Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000); citing *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000)) (internal citation omitted).

If PERA exceeded its statutory charter by adopting Rule 7.45 and purchasing an insurance policy that conforms to Rule 7.45, the judicial remedy is to declare Rule 7.45 unconstitutional and the Group Policy void. Voiding the Policy is not a remedy Plaintiffs seek or desire, but it is the remedy the law provides. When a public entity enters a contract that exceeds its statutory authority, the contract is void. "Any contract which will disable a public or quasi-public corporation from performing the duty which it has undertaken, or has been imposed upon it, for public weal ... is void." *Colburn v. Bd. of Comm'rs of El Paso County*, 61 P. 241, 243 (Colo. Ct. App. 1900). See *Black v. First Fed. Sav. & Loan Ass'n of Fargo, N.D., F.A.*, 830 P.2d 1103, 1109 (Colo. Ct. App. 1992) ("[I]f a special district's contract is beyond the scope of its constitutional or statutory powers, the contract is *ultra vires* and, consequently, void."); *Normandy Estates Metro. Recreation Dist. v. Normandy Estates Ltd.*, 534 P.2d 805, 807 (Colo. Ct. App. 1975), modified in part on other grounds, 553 P.2d 386 (Colo. 1976) ("We recognize that a contract with the District is void if the District fails to comply with statutory requirements governing such a contract."). See also *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515, 519 (Colo. Ct. App. 1998) ("Contracts executed by municipal corporations are

void when there is a failure to comply with the mandatory provisions of the applicable statutes or charters.").

Plaintiffs' request that the Court judicially rewrite PERA's rules and then judicially reform the Group STD Policy circumvents the safeguards of the Administrative Procedures Act and is inimical to the Colorado Constitution's separation of powers.

### C. Reformation Violates Colorado's Prohibition on Retrospective Legislation and the Colorado Constitution's Takings Clause.

Plaintiffs' request for judicial reformation of PERA's rules and the Group STD Policy not only transgresses the separation of powers, but also violates Colorado's constitutional prohibition on retrospective legislation. "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Colo. Const. art. 2, §11. Courts apply Colorado's proscription against any law "retrospective in its operation" to prohibit any act "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *McClenahan v. Metro. Life Ins. Co.*, 621 F.Supp.2d 1135, 1142 (D. Colo. 2009)

(quoting *Cont'l Title Co. v. Dist. Court*, 645 P.2d 1310, 1314 (Colo. 1982); *Moore v. Chalmers-Galloway Live Stock Co.*, 10 P.2d 950, 952 (Colo. 1932)) (parenthetical omitted).

Retrospective laws are unjust because they violate fundamental principles of fairness. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). But that's precisely what Plaintiffs endeavor to accomplish through reformation of the Group STD Policy. Plaintiffs (individually as representatives of a putative class) seek to create new duties and financial obligations to pay monetary benefits that are not contained in the Group STD Policy and that are not mandated by the PERA Statute or PERA's rules, and foist them on Standard retroactive to January 1, 1999. The legislature cannot pass a law retroactive to January 1, 1999 that would require Standard to pay greater benefits than Standard contracted to provide. Plaintiffs cannot use the Court to accomplish the same result under the guise of retroactive reformation. See *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) ("Retroactivity is generally disfavored in the law, in

accordance with 'fundamental notions of justice' that have been recognized throughout history.") (internal citations and quotations omitted).

Retrospective "reformation" of the Group STD Policy to January 1, 1999 also violates the Takings Clause of the Colorado Constitution. (Colo. Const. art. 2, §15, "Private property shall not be taken or damaged, for public or private use, without just compensation."). The remedy that Plaintiffs call "reformation" entails judicially rewriting PERA's rules to provide expanded monetary benefits to public employees in violation of the separation of powers, and imposing the judicially rewritten rules on Standard as retroactive contract terms. The proposed judicially rewritten law (Rule 7.45 *sans* subsection (E)), incorporated into a judicially "retroactively reformed" Group Policy, would impose new obligations on Standard to pay income replacement benefits to public employees who are not entitled to receive a monetary benefit under the current PERA disability regime, retroactive to January 1, 1999.

In the district court, Plaintiffs and PERA both advocated reformation of the Group STD Policy in the event the district court were to strike Rule 7.45(E) and order PERA to pay benefits to Plaintiffs and the putative class. (Pls.' Resp. in Opp'n to Standard's Mot. to Dismiss, *Lawless* CD pg. 267-272; Pls.' Mot. for Partial Summ. J., *Lawless* CD pgs.

647-648; PERA's Resp. to Standard's Mot. for Summ. J., *Lawless* CD pgs. 898-890). By advocating retroactive reformation as a cognizable remedy, PERA endeavors to shift liability for its alleged *ultra vires* acts and constitutional violations onto Standard, and thereby preserve the coffers of the State. PERA's approval of retroactive reformation highlights why this remedy conflicts with the Takings Clause of the Constitution, which bars the state from taking private property for public use without just compensation.

If a state violates the Due Process Clause of the Fourteenth Amendment, the state cannot seize private property to obtain the funds to pay for its violation. Plaintiffs and PERA cannot use the judicial system to achieve the same objective. "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2601 (2010). Yet that is precisely the remedy Plaintiffs (with PERA's complicity) ask this Court to sanction. Plaintiffs and PERA propose to obtain by judicial fiat the private property of Standard for public use, to compensate Colorado employees for PERA's constitutional violations, without just compensation to Standard. The Takings Clause "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The State's

appropriation of Standard's funds would amount to an unconstitutional taking of private property, in violation of the Takings Clause. See *E. Enters.*, 524 U.S. at 537 (holding that the State's enforcement of an act to require coal operators to pay more money into a retirement fund retroactively to 1966 is an unconstitutional taking of private property in violation of the Takings Clause).

Plaintiffs argued before the district court that a governmental taking of property for the public good assumes the legitimacy of the governmental action. Plaintiffs asserted that after the State seizes Standard's property to pay income replacement benefits to Plaintiffs and the putative class, Standard can sue PERA for just compensation. (Pls.' Resp. in Opp'n to Standard's Mot. to Dismiss, *Lawless* CD pgs. 263-265). Plaintiffs' "so sue me" solution for governmental seizures would make every seizure lawful. Plaintiffs ignore the cardinal purpose the Takings Clause serves in the Bill of Rights and Colorado's Constitution, which is to stand as a shield against the abuse of government authority. The State's appropriation of Standard's funds is not for the public good. The appropriation aims to take Standard's funds to pay damages caused by PERA's alleged Due Process violations, to preserve the State's treasury. That is not a legitimate exercise of

governmental authority for the public good. It is an arbitrary exercise of governmental authority for the financial benefit of the State.

## CONCLUSION

The PERA Statute authorizes PERA to design a program that offers any number of benefit options, but does not mandate the payment of income replacement benefits. Nor does the PERA Statute mandate that employees who are unable to perform their assigned jobs but are fully capable of working in another occupation must receive the same benefit package as employees who cannot work at all. The PERA Statute provides PERA with a menu of options, not mandatory coverage terms. If PERA Rule 7.45 is valid and enforceable, then Plaintiffs have no claims against PERA or Standard for declaratory judgment and reformation, and the district court's decision should be upheld. But if PERA's rules are *ultra vires*, the judicial task is to strike down the rules and void the Group STD Policy, and not to judicially redesign Colorado's disability welfare program under the guise of reformation of contract. Plaintiffs cannot pursue a claim against Standard for payment of income replacement benefits under a purported "reformed" group insurance policy. However the Court decides the constitutionality of Rule 7.45(E), the district court's entry of summary judgment for Standard must stand.

Attorney for Defendant-Appellee, Standard Insurance Company

*/s/ Clinton P. Swift*
Clinton P. Swift, #7127
Swift & Bramer, LLP
1230 West Ash, Suite C
Windsor, Colorado
P 970-460-0266
F 970-237-4838
swiftp@swiftbramerlaw.com

## CERTIFICATE OF MAILING

I certify that a true and correct copy of this Answer Brief on a CD was sent on September 18, 2012 by overnight delivery (FedEx) to the Court of Appeals, State of Colorado, 101 W. Colfax Ave #800, Denver, CO 80202. I further certify that on September 18, 2012, I deposited this Answer Brief in the United States first class mail, postage fully prepaid, addressed as follows:

*Attorneys for Plaintiffs-Appellants*:
Shawn E. McDermott
Heather L. Petitmermet
Law Office of Shawn E. McDermott, LLC
2300 15th Street, Suite 200
Denver, CO 80202

*Attorneys for Defendants-Appellants Colorado Public Employees' Retirement Association, Colorado Public Employees Retirement Association Board of Trustees, Carole Wright, Maryann Motza, and Rick Larson, in their official capacity only*:

Gary M. Kramer
Berenbaum Weinshenk P.C.
370 17th Street, Suite 4800
Denver, CO 80202

Gregory W. Smith
Adam L. Franklin
1301 Pennsylvania Ave.
Denver, CO 80203-2386

*Attorneys for Defendant-Appellee Standard Insurance Company*:
Warren von Schleicher
Smith | von Schleicher + Associates
180 N. LaSalle St., Suite 3130
Chicago, IL 60601

Attorney for Defendant-Appellee, Standard Insurance Company

*/s/ Clinton P. Swift*
Clinton P. Swift, #7127
SWIFT & BRAMER, LLP
1230 West Ash, Suite C
Windsor, Colorado
P 970-460-0266
F 970-237-4838
swiftp@swiftbramerlaw.com