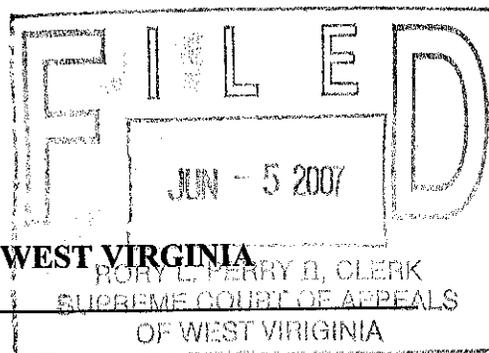


NO. 33354



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

JOSEPH W. BROWN,

Plaintiff below and Appellant,

v.

Civil Action No.: 05-C-9

**THE CITY OF FAIRMONT, WEST VIRGINIA;
NICK L. FANTASIA, individually and as Mayor,
City of Fairmont, West Virginia, and Chairperson,
Board of Trustees City of Fairmont Fireman's
Pension and Relief Fund; JAMES EMERICK,
individually and as Secretary/Treasurer,
Board of Trustees, City of Fairmont Pension and Relief Fund;
ROBERT STARN, individually and as Past Secretary/Treasurer,
City of Fairmont Fireman's Pension and Relief Fund;
RICHARD BOWERS, individually and as Member,
City of Fairmont Fireman's Pension and Relief Fund;
BRUCE McDANIEL, individually and as City Manager,
City of Fairmont; and RICHARD STARN, individually
and as Fire Chief, City of Fairmont Fireman's Pension
and Relief Fund; and EILEEN LAYMAN, individually and
as Finance Director, City of Fairmont, West Virginia,**

Defendants below and Appellees.

**FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE FRED L. FOX, II, JUDGE**

REPLY BRIEF OF APPELLEES

**TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

Counsel for the Appellees

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INTRODUCTORY STATEMENT

A summary judgment was awarded to the Defendants below and Appellees herein by the Circuit Court of Marion County, West Virginia, on the basis that Mrs. Brown had a vested interest in Mr. Brown's retirement plan once he attained the age of fifty and had twenty years of service, that after her interest vested proper payments were made by the City of Fairmont Fireman's Pension and Relief Fund under the Qualified Domestic Relations Order ("QDRO") entered in the divorce proceeding, that communications about her interest by pension fund members were proper, that no genuine issue of material fact exists and the matter could be resolved as a matter of law.

STATEMENT OF THE FACTS

Appellant and Appellees agree that the facts relied upon by the Circuit Court in issue in its ruling are largely undisputed. Mr. Brown's pension fund was not fully vested as of the date the parties separated as he had not reached the required age of fifty. He was born on August 14, 1949. He was fully vested in his pension plan as of the date of the Divorce Decree on September 20, 1999, in that he had attained the age of fifty at that time and had in more than twenty years of service. The Final Divorce Decree provided that "the Plaintiff's pension shall be divided by Qualified Domestic Relations Order which shall be prepared by the Defendant's counsel." Both Mr. and Mrs. Brown were represented by counsel.

The QDRO to divide Mr. Brown's retirement plan was entered on February 29, 2000.

That Order provided that

"WHEREUPON, after a review of the file and consideration made upon the following findings of fact this Court does ORDER:

1. That the City of Fairmont release one half or 50% from the Plaintiff's Retirement Plan account, from the date of his employment through the date of separation (July 12, 1998) currently maintained by Mr. Brown, social security number: 235-74-9002, his address is 726 Mt. Vernon Heights, Fairmont, WV 26554 to Bonnie Brown, Social Security number: 233-80-4864, her address is Rt. 2, Box 219B, Fairmont, WV 26554."

This Order was approved by counsel for both Mr. and Mrs. Brown. At the time of the entry of said Order, Mr. Brown was fully vested in his pension plan and could have received payment under his pension plan if he had elected to retire at that time. Mr. Brown had met the minimum requirements of fifty years of age and twenty years of service. The amount being provided to Bonnie Brown under the QDRO was significantly less than her one-half interest in the pension

plan if she had received monthly payments for her vested one-half interest in the plan. Mrs. Brown was also fifty years of age at the time payments were made to her by the City of Fairmont Fireman's Pension and Relief Fund. A QDRO entered on April 11, 2001, provided:

"...the Alternate Payee shall receive 20 payments of \$746.46 and one payment for \$64.85 for a total of \$14,994.05"

The Order further provided that Mrs. Brown could commence receiving payment on or after the participant's earliest retirement age. This Order was sent to Mr. Brown after it was entered. Mrs. Brown elected to receive monthly payments and they were made by the City of Fairmont Fireman's Pension and Relief Fund to her.

The Order entered on February 29, 2000, distributes fifty percent of the Plaintiff's retirement plan account from the date of his employment through the date of separation, July 12, 1998. At the time of the entry of said Order, the members of the City of Fairmont Fireman's Pension and Relief Fund believed Mrs. Brown had a vested interest in the fund and was entitled to make a claim for her share of the retirement benefits. The members of the Pension Board believed that Mrs. Brown had acquired a vested interest in one-half of the retirement plan upon her husband obtaining age fifty and serving twenty years and believed that payments being made to her were inadequate under the terms of the plan.

Appellant brought suit against the Appellees, part of whom are members of the City of Fairmont Pension and Relief Fund, alleging among other things that they inappropriately disclosed his financial information to his former wife. The Circuit Court found that Mrs. Brown did, in fact, have a vested interest in the pension plan upon her husband reaching the age of fifty and having twenty years of service and that communicating with her was appropriate and the distributions made

to Mrs. Brown were proper under the QDRO.

DISCUSSION OF LAW

In this action the Court reached certain conclusions of law. With regard to whether and when a Motion for Summary Judgment should be granted, Appellant does not take issue with Conclusions 1 through 4 that follow:

"1. "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." W. Va. R. Civ. P. 56(b). Rule 56 of the West Virginia Rules of Civil Procedure also states:

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that moving party is entitled to a judgment as a matter of law . . .

W. Va. R. Civ. P. 56(c) (2003).

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 1, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. "Rule 56 . . . is 'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

4. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, Williams v. Precision

Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). Additionally, while the facts and evidence are to be considered in the light most favorable to the nonmoving party, "the nonmoving party must nonetheless offer some concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor." Id. at 59-60.

Appellees concur that there is very little dispute with regard to the facts and so the issue before the Court is truly a matter of law as applied to the facts of this particular case. The Appellant relies upon West Virginia Code, Chapter 8, Article 22, Section 25(a). The Appellant takes the position that since Mr. Brown was not retired at the time of his divorce, under that section of the Code, even though he had attained the age of fifty and had more than twenty years of service, payment could not be made from his pension plan until he was retired. At the time payment to Mrs. Brown was made, Mr. Brown was not retired. In order to answer the questions of notice and improper communications alleged in the Complaint, the Court was required to determine whether or not Mrs. Brown had a vested interest in her husband's retirement plan.

At the time of the Divorce Decree, Mr. Brown was fifty years of age and had more than twenty years of service. Appellees rely, in part, upon the case of Staton v. Staton, 218 W. Va. 201, 624 S.E.2d 548 (2005), in which the Court ruled that "the date on which Mr. Staton actually retires is not relevant in the determination of retirement benefits subject to equitable distribution."

The Appellant complains that the Circuit Court erred in finding that Mrs. Brown had a vested interest in the pension account of Mr. Brown. In State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, 148 W. Va. 369, 373, 135 S.E.2d 262, 264 (1964) (emphasis added) (citing State ex rel. Frye v. Bachrach, 175 Ohio State 419, 195 N.E.2d 803), this Court addressed the issues of vested interest. See also Booth v. Sims, 193 W. Va.

323, 456 S.E.2d 167 (1995) (stating in Syllabus Point 5 that "[i]n public employee pension cases, what often concerns the court is not the technical concept of 'vesting,' but rather the conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system." Syllabus Point 7 additionally states that "[b]y meeting certain eligibility requirements, a public employee acquires a *right* to payment under a pension plan. For any employee not yet eligible for payment, this is a mere expectancy; if the public employee does not meet the age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension. But substantial employee participation in the system *does* create an employee's reliance interest in pension benefits.") (emphasis original).

The Court correctly concluded that vesting is more of a protection of property rights because of substantial, detrimental reliance upon the existing pension system. Mr. Brown made contributions into that system during his years of marriage with Mrs. Brown. Both of them would have detrimentally relied upon those funds being available upon Mr. Brown attaining age fifty and having twenty years of service.

26 U.S.C. §414(p)(4)(B) defines earliest retirement age as it applies to this case as participants obtaining age fifty or the earliest date on which the participant could begin receiving benefits whichever is later. That definition is not tied into when the participant begins receiving benefits but the age of fifty and when the participant could begin receiving benefits. Where a spouse is eligible for retirement and the only condition to the payment of benefits is his application for them, the benefits should be divided as part of equitable distribution. To rule otherwise would mean that one spouse could be deprived of any share in retirement benefits by the decision of the other spouse

to delay retirement. In the case at hand, Mr. Brown was eligible for retirement, he had completed more than twenty years of service and he had attained 50 years of age.

26 U.S.C. §414(p)(4)(A) provides that payment could be made to an alternate payee under a Qualified Domestic Relations Order. That section specifically provides for payment when the participant is not separated from service provided that the participant has attained the earliest retirement age which would be, in this case, age fifty and twenty years of service.

Since Mr. Brown attained age fifty on August 14, 1999, and had twenty years of service, distribution to Mrs. Brown after that date was proper. Only by determining whether or not Mrs. Brown had a property interest in the Petitioner's retirement benefits for the purpose of equitable distribution can the Court determine whether or not she had a vested interest that would authorize the members of the pension board to communicate with her. Pursuant to the ruling of the court in Staton v. Staton, (Supra.), it would appear that the West Virginia Supreme Court had decided this issue. Mrs. Brown had a property interest in the pension plan of her husband even though he had not retired. This Court has addressed the issue of vested interests in pensions in the cases of McGee v. McGee, 214 W. Va. 36, 585 S.E.2d 36 (2003), Cross v. Cross, 178 W. Va. 563, 363 S.E.2d 499 (1987) and Booth v. Sims, 193 W. Va. 323, 456 S.E.2d 167 (1995).

The manner in which distribution was made to Mrs. Brown was resolved by the Family Law Master and set forth in the QDRO entered in this action. The lower court did not have to look to the footnote of Staton to resolve this matter because, as the Appellant points out, the amount of payment to be made was resolved by the parties who were represented by counsel.

Appellant relies upon Committee Reports of the Internal Revenue Code Regulations addressing guidelines for the administration of QDROs as set forth in part in Committee Report on

T.L. 99-514 (Tax Reform Act of 1996) and underlines certain portions of that report that the Appellant believes would support his position. However, the Appellees direct the Court's attention to the following language in the Report relied upon by Appellant:

"A QDRO could also require a plan to begin payments to an alternate payee when the participant attains age 50, even if the participant has not been separated from service."

6 CCH Guide, Standard Federal Tax Reports, Pension, etc., Plans-Section 401, paragraph 17,512, page 33,854 (2001).

The Appellees complied with the QDRO entered by the lower court. The Appellees, in an effort to see to the proper administration of the fund, contacted Mrs. Brown who they believed had a vested interest in the pension fund concerning payments to be made to her and acted throughout the proceedings in good faith in an attempt to properly administer the trust funds. The parties in the domestic relations matter were represented by counsel throughout the proceedings.

The lack of notice to Mr. Brown appears to be a major issue with Appellant. The notice Mr. Brown wanted deals with the pension funds of Mrs. Brown after her interest was vested. No notice was required to be given to Mr. Brown about the Board's dealings with Mrs. Brown on her vested interest. A modification of the QDRO was made without notice to Mr. Brown by the Family Law Master and that modification was set aside and is a moot issue on this appeal.

RELIEF PRAYED FOR

For the foregoing reasons the Respondents respectfully pray that the Appellant's
Appeal be denied.

Brandy D. Bell

Boyd L. Warner (WV State Bar ID # 3932)
Brandy D. Bell (WV State Bar ID #9633)
Counsel for Appellees
(Except Richard Bowers)

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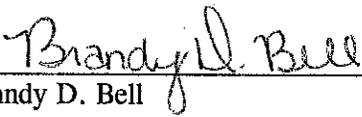
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and as Fire Chief, City of Fairmont Fireman's Pension
and Relief Fund; and EILEEN LAYMAN, individually and
as Finance Director, City of Fairmont, West Virginia,

Defendants below and Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2007, I served the foregoing
"Reply Brief of Appellees" upon counsel for the Appellant, Joseph W. Brown, by depositing a true
copy thereof in the United States mail, postage prepaid, in a sealed envelope addressed as follows:

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