

NO. 33354

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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Joseph W. Brown,

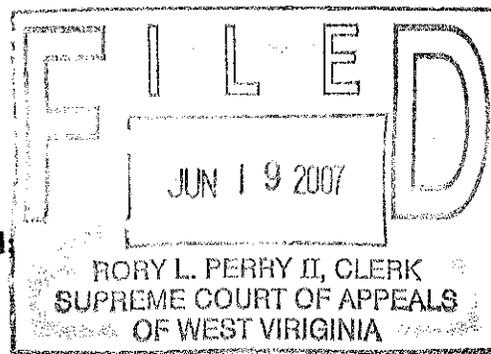
Plaintiff below and Appellant,

v.

Civil Action No.: 05-C-8

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.



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

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REPLY BRIEF OF APPELLANT, JOSEPH BROWN

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

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## REPLY TO STATEMENT OF FACTS

In their Reply [sic] Brief,<sup>1</sup> the Appellees correctly assert that the parties' Final Divorce Order states that Joe Brown's ("Brown") pension was to be divided by a Qualified Domestic Relations Order. However, the Appellees incorrectly refer to a February 29, 2000 Order of the Circuit of Marion County as a Qualified Domestic Relations Order ("QDRO"). The Order to which the Appellees are referring is titled an Order to Divide the Defendant's Retirement Plan ("Order To Divide"). As is explained in the Brief of the Appellant, the QDRO was not entered until April 11, 2001. Therefore, it is the QDRO, not the Order to Divide, that provides guidance on whether the actions of the City were appropriate with regard to the distribution of funds to Bonnie Brown. The QDRO was drafted and entered based on the fact that the City of Fairmont Fireman's Relief Fund Board ("Pension Board") determined that the Order To Divide did not qualify as a Domestic Relations Order.

Nevertheless, the language relied upon by the Appellees in their brief does not in any way support the position that the Order To Divide required the Pension Board to make immediate payment. The language simply states that one-half (½) of Brown's retirement account from the date of employment until the date of the Brown's separation was to be released to Bonnie Brown. However, the Order to Divide does not dictate that the payment to Bonnie Brown be commenced prior to Brown being eligible to receive said payments in accordance with state and federal laws.

Further, although it is agreed upon by the Appellant and Appellees that the facts in this matter are largely undisputed, the Appellees assert a fact in the Appellee Brief that is unsupported by the

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<sup>1</sup> The Appellees refer to their brief as a "Reply" Brief, however the proper term for that brief is "Appellee Brief" according to Rule 10(b) of the West Virginia Rules of Appellate Procedure. Therefore, to alleviate confusion, because the term "Reply" is reserved for Appellant, Appellees' documents previously filed in this appeal will be referred to as "Appellee Brief."

record. On Page 2 of their Brief, the Appellees state that “[t]he amount being provided to Bonnie Brown under the QDRO was significantly less than her one-half interest in the pension plan if she received monthly payments for her vested one-half interest in the plan.” *Appellee Brief at 2*. The Appellees do not offer any reference whatsoever to supporting documentation in the underlying action to support that assertion. In fact, the record reflects that both counsel for Brown and Bonnie Brown in the underlying divorce action had contact with the City of Fairmont (“City”) regarding the amount accrued in Brown’s pension account at the time of separation, one-half (½) of which was allocated to Bonnie Brown in the Final Divorce Order, Order to Divide and the subsequent QDRO. It was the City that provided counsel with the specific amount to be allocated to Bonnie Brown in the QDRO, that amount being \$14,994.95. *See Exhibit A to Petition for Appeal*. The record is void of any evidence of a dispute regarding the amount in Brown’s pension account at the time of the Browns’ separation. The record is also void of any evidence of a dispute regarding the amount of that pension account allocated to Bonnie Brown. In fact, the record reflects that the QDRO containing the dollar amount allocated to Bonnie Brown was drafted by counsel for Bonnie Brown. Therefore, the Appellees’ assertion that Bonnie Brown should have received more money than the amount allocated in the QDRO entered by the circuit court is unsupported by the evidence.

The Appellees accurately quote from the April 11, 2001 QDRO in regard to the method of payment to Bonnie Brown, that being twenty (20) payments of \$746.46 and one payment of \$64.85. However, the Appellees further assert that the QDRO provides that Bonnie Brown would receive payment on or after Brown’s earliest retirement age. The Appellees fail to reference the savings clause of the QDRO, which clearly states that the Order is not intended to “[p]rovide a benefit option not otherwise provided under the terms of the plan.” (Emphasis added).

The majority of the second full paragraph on page 3 of the Appellees' Brief addresses their "beliefs" as to issues surrounding the distribution of the portion of Brown's pension allocated to Bonnie Brown in the Final Divorce Order and subsequent QDRO. These beliefs are not facts that have been substantiated in the record. However, the beliefs are instructive in understanding the thought process of the City in its illegal actions against Brown. First and foremost, the Appellees in their Brief do not articulate the basis for their beliefs. The Pension Board is not mandated to act within its beliefs, it is mandated to act within the law. Secondly, the statement that "[t]he members of the Pension Board . . . believed that payments made to [Bonnie Brown] were inadequate under the terms of the plan" makes it clear that the Pension Board was not acting in a position of trust to its member and employee, Brown, but was acting on behalf of the alternate payee, Bonnie Brown.

#### **POINTS AND AUTHORITIES**

**I. The Fact That Bonnie Brown Was Found To Have A Property Interest In Brown's Retirement Account Does Not Justify The Fact That The Pension Board Breached Its Fiduciary Duties To Brown.**

Stull v. The Firemen's Pension and Relief Fund of the City of Charleston,  
202 W. Va. 440, 504 S.E.2d 903 (1998)

W. Va. Code §§ 8-22-16 through 28

W. Va. Code § 8-22-17

**II. The Allocation To Bonnie Brown Of A Portion Of Brown's Pension Fund Account As Part Of Equitable Distribution In The Parties' Divorce Action Did Not Mandate That The Pension Board Make Immediate Payments Of That Money.**

W. Va Code § 48-1-237(5)

Whiting v. Whiting,  
183 W. Va. 451, 396 S.E.2d 413 (1990)

W. Va. Code § 48-2-32

McGee v. McGee,

214 W. Va. 36, 585 S.E.2d 36, syl. pt. 3 (2003)

Cross v. Cross,

178 W. Va. 563, 363 S.E.2d 449, syl. pt. 5 (1987)

W. Va. Code § 8-22-25

*58 W. Va. Op. Atty Gen. 185*

State ex rel. Fox v. Board of Trustees,

148 W. Va. 369, 135 S.E. 2d 262 (1964)

6 CCH Guide, Standard Federal Tax Reports, Pension, Etc., Plans § 401,  
Paragraph 17,502, page 33,854 (2001)

**III. The Appellees' Reliance on *Staton v. Staton* to Support the Premise That The Pension Board Did Not Breach Its Fiduciary Duty to Brown Is Wholly Misplaced.**

Staton v. Staton,

218 W. Va. 201, 205, 624 S.E.2d 548, 552 (2005)

**IV. Bonnie Brown's Age Is Irrelevant To The Determination Of When Payments Should Have Started To Her As The Alternate Payee.**

W. Va. Code § 8-22-25

Booth v. Sims,

193 W. Va. 323, 456 S.E. 2d 167, syl. pt. 7 (1994)

**V. The Appellees Fail To Assert Any Precedent In Law For The Premise That Bonnie Brown Had A Vested Interest In Brown's Pension Account.**

McGee v. McGee,

214 W. Va. 36, 585 S.E.2d 36 (2003)

Cross v. Cross,

178 W. Va. 563, 363 S.E. 2d 49 (1987)

Booth v. Sims,

193 W. Va. 323, 456 S.E.2d 167 (1995)

Article III § 4 West Virginia Constitution

### **RESPONSE TO APPELLEES' DISCUSSION OF LAW**

In the Appellees' Brief, there are numerous instances wherein the Appellees advance an argument, make an assertion or state a conclusion which is neither supported by any applicable of law or fact. Each such instance will be addressed below.

**I. The Fact That Bonnie Brown Was Found To Have A Property Interest In Brown's Retirement Account Does Not Justify The Fact That The Pension Board Breached Its Fiduciary Duties To Brown.**

The Appellees assert that because Brown's pension account was found to be marital property and thus subject to equitable distribution, the Pension Board acted properly when members of the Board approached Bonnie Brown to discuss Brown's pension account, **without knowledge of Brown.** The Pension Board further asserts that it acted properly when it discussed with Bonnie Brown the fact that they believed she was entitled to more money than was allocated to her by the QDRO prepared by **her** attorney and approved by the Pension Board **before entry by the Court.**

In their Brief, the Appellees state that "[i]n 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." *See Appellee Brief at 6.* The Appellees repeat this assertion when they state that "[o]nly by determining whether or not Mrs. Brown had a property interest in the Petitioners 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." *See Appellee Brief at 8.* The

Appellees also assert that the clandestine meetings with Bonnie Brown were “. . . [a]n effort to see to the proper administration of the fund . . .” and, further, that they “acted throughout the proceedings in good faith in an attempt to properly administer the trust funds.” *See Appellee Brief at 9.*

The Appellees offer no law to support the premise that they owed a fiduciary duty to anyone other than Brown. This Court has held that statutes creating pension and relief funds for municipal employees should be liberally construed in favor of those to be benefitted and that, as fund fiduciaries, Boards of Trustees shall discharge their duties **solely in the interest of employees.** Stull v. The Firemen’s Pension and Relief Fund of the City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998) (emphasis added).

Further, the Appellees offer no supporting law for the premise that the Pension Board did not have an obligation to inform Brown of its position regarding **his** pension benefits prior to making decisions that ultimately adversely affected his property rights in the same. A fireman who is a member of the Fire Department’s Pension and Relief Fund created under W. Va. Code §§ 8-22-16 through 28 has a property interest in such fund that gives rise to “some **procedural due process protection.**” *Id.*, 504 S.E. 2d at 908 (emphasis added). The West Virginia Code states that it is the duty of the Pension Board to “discharge their duties with respect to pension and relief funds solely in the interest of the members and members’ beneficiaries for the exclusive purpose of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the fund.” W. Va. Code § 8-22-17.

The Appellees take the position that the notice that 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." See *Appellee Brief at 9*. (Emphasis added). Yet, the Appellees admit that they "... [b]elieved that payments made to [Bonnie Brown] were inadequate under the terms of the plan." See *Appellee Brief at 3*. The Appellees further admit that "[a] modification of the QDRO was made without notice to Mr. Brown ... " See *Appellee Brief at 9*. The Appellees also admit that at all times relevant to this action, there were no written policies or procedures in place that would give the Pension Board instruction and guidance on how to administer employee's pension accounts.

The entry of the Amended QDRO, after the Pension Board met with Bonnie Brown, is clear evidence that the communication between Bonnie Brown and the Pension Board was other than innocent contact with Bonnie Brown solely to discuss the manner in which she would receive her payments from the fund. Further, correspondence between the Pension Board and Brown clearly indicates that the Board's interpretation of the initial QDRO was that it would negatively impact Brown's pension benefits upon his retirement.

Brown was informed in writing on June 5, 2001 that the Pension Board would begin making payments to Bonnie Brown on June 26, 2001 and, therefore, he was required to make restitution to the Pension Fund for the full amount disbursed to Bonnie Brown. See *Exhibit B to Petition for Appeal*. On June 13, 2001, the Pension Board, through attorney Kevin Sansalone, issued a letter to Charles A. Shields ("Attorney Shields"), attorney for Brown, advising him that

[M]r. Brown's failure to maintain his account in accordance with the memo [from Robert Starns] will adversely affect the amount he is entitled to draw at retirement. I have been advised that his failure to timely replace the payments made to the former Mrs. Brown

will result in a reduction of his benefits of approximately 1.75% for each biweekly payment made to Mrs. Brown.

*See Exhibit C to Petition for Appeal* (emphasis added).

Several months later, by memo dated December 29, 2001, James R. Emerick ("Emerick"), Secretary/Treasurer for the Pension Board, informed Brown that if money taken out of the Pension Fund was not replaced by Brown, a reduction in Brown's benefits would take place upon his retirement from service. Specifically, the December 29, 2001 memo stated:

You did not make a reimbursement payment for September, October, November or December, 2001. Each payment has a value of 1.593% toward your retirement pension. Having missed four payments, your retirement pension will be reduced 6.372%. If you leave the Fire Department on 2/16/04, your 75% maximum date, your pension will be calculated at 68.628%. Missing more payments will further reduce your pension.

*See Exhibit D to Petition for Appeal.*

The aforementioned letters sent to Brown from the Pension Board clearly and unequivocally indicate that the issue of payments to Bonnie Brown was directly related to the property rights of Brown. The Pension Board would like the Court to believe that communications with Bonnie Brown related only to the manner of payment of her \$14,994.95 allocation of Brown's pension account only. However, it is clear that the actions taken by the Pension Board to pay Bonnie Brown prior to Brown's retirement negatively impacted Brown's rights relating to those benefits.

Further evidence of the fact that discussions with Bonnie Brown were about more than the \$14,994.05 allocated to her as part of the parties' divorce settlement and subsequent QDRO, is the fact that the Pension Board approved the amended QDRO, as drafted by an attorney hired by Bonnie Brown, **without notification to Brown**. This amended QDRO allocated additional funds to Bonnie Brown. The QDRO would have awarded Bonnie Brown more than her one-half (1/2) interest in

Brown's Pension Account as of the day of separation. The effect of the QDRO would have been a significant reduction in monies available to Brown upon his retirement, once again affecting his property rights.

Further, the amended QDRO was only submitted after members of the Pension Board approached Bonnie Brown regarding their "belief" that she was entitled to more money. At no time was Brown, the employee and pension holder, advised that the Pension Board believed Bonnie Brown was entitled to more money. At no time was Brown, the employee and pension holder, advised to seek counsel to represent **him** on that matter. And, at no time, did Brown, the employee and pension holder, have any opportunity to be heard on the matter, or even to review the Amended QDRO, prior to submission to the court.

Clearly, the Pension Board did not act in good faith in its handling of Brown's pension account. Nor did the Pension Board attempt to properly administer the trust funds or afford Brown due process of law. The Pension Board willfully violated its fiduciary duties to Brown, which had an adverse effect on the pension benefits owed to him.

**II. The Allocation To Bonnie Brown Of A Portion Of Brown's Pension Fund Account As Part Of Equitable Distribution In The Parties' Divorce Action Did Not Mandate That The Pension Board Make Immediate Payments Of That Money.**

In their Brief, the Appellees state that "[w]here 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." *See Appellee Brief at 8.* The Appellees further assert that "[t]o 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." *See Appellee Brief at 8.* The Appellees offer no

citations to supporting law for this premise. In the instant action, there is no evidence that Brown tried to deprive Bonnie Brown of her share of his pension account.

Brown does not dispute the fact that Bonnie Brown was entitled to her equitable portion of the amount of money in his pension account at the time of the parties' separation. Through counsel, Brown approved a QDRO drafted by counsel for Bonnie Brown that allocated one-half (1/2) of his pension account as of the date of the parties' separation, that amount being \$14,994.95. Brown had every right to continue to work until he decided to retire. His decision to work after he was eligible to retire, had no bearing on the amount of money due to Bonnie Brown from his pension account.

The date of Brown's retirement is irrelevant to the determination of Bonnie Brown's interest in Brown's pension account. With regard to the classification of property as marital or separate, the West Virginia Code defines separate property, *inter alia*, as "[p]roperty acquired by a party during marriage but after the separation of the parties and before ordering [a] . . . divorce." W. Va Code § 48-1-237(5). Therefore, the operative dates are the date of marriage and the date of separation.

Equitable distribution is a three-step process. In Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990), this Court held that "[t]he first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code § 48-2-32."

The allocation of money from one spouse's pension or retirement account as part of the equitable distribution of marital debts and assets does not automatically entitle that spouse to immediate payment. Addressing the division of pension benefits in a divorce action, this Court has stated that

[a] court should look to the following methods of dividing pension rights in this descending order of preference unless peculiar facts and circumstances dictate otherwise: (1) lump sum payment through a cash settlement or offset from other available marital assets; (2) payment over time of the present value of the pension rights at the time of divorce to the non-working spouse; (3) a court order requiring that the non-working spouse share in the benefits on a proportional basis when and if they mature.

McGee v. McGee, 214 W. Va. 36, 585 S.E.2d 36, syl. pt. 3 (2003) [citing Cross v. Cross, 178 W. Va. 563, 363 S.E.2d 449, syl. pt. 5 (1987)].

In the case *sub judice*, the record reflects that counsel for both parties received advice from Kevin Sansalone, the attorney for the City of Fairmont, with regard to the value of Bonnie Brown's one-half ( $\frac{1}{2}$ ) portion of Brown's non-vested pension. See *Exhibit A to Petition for Appeal*. The letter indicated that the Pension Board had determined that Bonnie Brown was entitled to \$14,994.05. *Id.*

The instant action is the exact type of factual scenario in which courts look to methods two or three of Cross, as enunciated above. Brown did not have enough assets to offset the amount of money owed to Bonnie Brown, therefore the judge ordered that a QDRO be entered. Had the QDRO been administered properly, Bonnie Brown would have received her twenty (20) installments of \$746.46 and one (1) payment of \$64.85 allocated in the QDRO when Brown separated his service and, thus, began receiving monthly payments of his own. The payments to Bonnie Brown should not have affected the total amount of Brown's pension account.

In their Brief, the Appellees direct the Court's attention to a Committee Report of the Internal Revenue Code, the same report being cited by the Appellant in his Petition for Appeal. The Committee Report stated that "[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.” See *Appellee Brief at 9* (emphasis added). This report, however, does not state that a QDRO **shall** require a plan to make payments before separation from service – it simply states that it could. In the instant action, the QDRO did not require payments to be made before Brown’s retirement.

West Virginia Code § 8-22-25 states that “[a]ny member of a paid police or fire department who is entitled to a retirement pension hereunder, and who has been in the honorable service of such department for twenty years, may, **upon written application** to the board of trustees, be retired from all service in such department.” The Code further states that the Pension Board “shall authorize the payment of annual retirement pension benefits commencing upon his retirement or upon his attaining the age of fifty years, whichever is later. . . .” W. Va. Code § 8-22-25 (emphasis added).

Before a fireman’s pension fund payments can commence, **the employee’s departmental service must have ended, his name removed from the payroll, and his name entered on the pension roll.** *58 W. Va. Op. Atty Gen. 185* (emphasis added). This transition can only occur when **all** requirements for the determination of eligibility for retirement pension have been met and the employee has ceased employment as a member of a fire department. An employee cannot receive a salary and a retirement pension at the same time. *Id.*

This Court has held that a right to a pension accrues to or vests in a member “**only when all the statutory conditions are performed and all its requirements complied with and satisfied.**” *State ex rel. Fox v. Board of Trustees*, 148 W. Va. 369, 135 S.E. 2d 262 (1964) (emphasis added). Teresa Robertson, Contributions Manager for the State of West Virginia Consolidated Public Retirement Board, notified Plan Administrators in writing that “under current law, no benefits are

payable to an alternate payee until such time as the member is entitled to payment under the plan. . . .” See *Exhibit C to Petition for Appeal at 2*. Furthermore, Internal Revenue Code regulations, addressing guidelines for administration of QDROs as set forth in part in Committee Reports on P.L. 99-514 (Tax Reform Act of 1986), states:

[U]nder present law, a domestic relations order is not a qualified domestic relations order (QDRO) if such order requires a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan. . . .

For example, in the case of a plan which provides for payments of benefits upon separation from service (but not before), the earliest date on which a QDRO can require payments to an alternate payee to begin is the date the participant separates from service.

6 CCH Guide, Standard Federal Tax Reports, Pension, Etc., Plans § 401, Paragraph 17,502, page 33,854 (2001). (Emphasis added).

While it is true that the Internal Revenue Service Code **allows** for payments to an alternate payee before retirement, it does not **mandate** the same. The Appellees totally ignore the underlined section above, which clearly states that if the plan does not allow for payment before separation from service, the QDRO cannot allow for payments before separation from service. Since the West Virginia Code prohibits payments from a fireman’s pension until written application to separate service is made, it is the precise type of plan that to which the IRS Code hypothetical example is referring.

The Pension Board had no written guidelines giving instruction as to how to handle payments to alternate payees. Therefore, the Pension Board acted on their *beliefs* and ignored the law. The Pension Board itself acknowledged, in a memo to Brown, that it is not required to provide any type or form of benefit, or any other option not otherwise provided for under the plan. This

acknowledgment by the Pension Board was based upon advice from Attorney Sansalone in the March 24, 2000 letter, which also advised that the Pension Board take immediate steps to adhere to the IRS Code (requiring procedures for determining a domestic relations order's qualified status).

*See Exhibit C to Petition for Appeal.*

The law is clear that a QDRO, allocating a portion of one spouse's pension to another as part of equitable distribution, does not direct the Pension Board to make payments to the former spouse/alternate payee that would otherwise be prohibited by law. Because Brown had not made application to retire, the acts of the Pension Board were contrary to controlling law and, therefore, the decision of the circuit court should be overturned with instructions upon remand to enter an Order mandating that Brown's pension be reinstated in whole.

**III. The Appellees' Reliance on *Staton v. Staton* to Support the Premise That The Pension Board Did Not Breach Its Fiduciary Duty to Brown Is Wholly Misplaced.**

In support of their position that the communications between Bonnie Brown and the Pension Board were proper, the Appellees state that "[o]nly by determining whether or not Mrs. Brown had a property interest in the Petitioners 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." *See Appellee Brief at 8.* The Appellees go on to state that "[p]ursuant to the ruling of the court in *Staton v. Staton*, (Supra) [sic], it would appear that the West Virginia Supreme Court had decided this issue." *Id.*

The *Staton* case does not in any way deal with the fiduciary duties of a Pension Board. The issue in the *Staton* case was whether Mr. Staton's pension benefits were marital property and, thus, subject to equitable distribution. Mr. Staton was a former City of Beckley Police Officer who had

begun receiving payments from his pension fund prior to his eligibility to retire because he had become disabled with a knee injury. The Staton court stated that “[t]he sole issue for resolution on appeal is whether disability pension benefits are separate or marital property.” Staton v. Staton, 218 W. Va. 201, 205, 624 S.E.2d 548, 552 (2005).

In Staton, the family court classified Mr. Staton's pension as a disability pension and ruled that it was subject to equitable distribution. In ruling on an appeal of the family court's decision, the circuit court held that the family court erred in finding that the pension was a marital asset subject to equitable distribution due to Mr. Staton's disability status. On appeal, Mrs. Staton argued that Mr. Staton's pension was a marital asset subject to equitable distribution. Id., 218 W. Va. at 201, 624 S.E.2d at 548.

The Staton case dealt solely with the equitable distribution of a pension fund that was, at least in part, based upon disability of the employee. The question before the Court was whether the circuit court properly classified the pension fund as separate property of Mr. Staton, by virtue of his disability status. Upon remand, the circuit court was directed to determine the portion of Mr. Staton's retirement which was disability pay and the portion which was straight retirement. The portion of Mr. Staton's pension classified as straight retirement was subject to equitable distribution. In the instant action, no such determination had to be made first, because Brown's retirement was not vested at the time of his separation from Bonnie Brown and, secondly, because Brown was not disabled.

The Staton opinion is void of any reference whatsoever to actions of the Pension Board or to the fiduciary responsibilities of the Pension Board. Therefore, the Appellees' reliance on this opinion to support the premise that the Pension Board acted properly when it communicated with

Bonnie Brown, without knowledge of Brown, about matters directly affecting Brown's retirement, is totally misplaced.

**IV. Bonnie Brown's Age Is Irrelevant To The Determination Of When Payments Should Have Started To Her As The Alternate Payee.**

In their Statement of Facts, the Appellees state that "Mrs. Brown was also fifty years of age at the time payments were made to her by the [Pension Board]." *See Appellee Brief at 4.* Bonnie Brown's age is wholly irrelevant to the determination of when the Pension Board should have properly commenced monthly payments of her one-half (1/2) portion of Brown's retirement account as of the date of separation.

In addressing the date upon which retirement benefits may commence, the West Virginia Code states that:

Any member of a paid police or fire department who is entitled to a retirement pension hereunder, and who has been in the honorable service of such department for twenty years, may, upon written application to the board of trustees, be retired from all service in such department without medical examination or disability. On such retirement the board of trustees shall authorize the payment of annual retirement pension benefits commencing upon his retirement or upon his attaining the age of fifty years, whichever is later. . . ."

W. Va. Code § 8-22-25 (emphasis added).

Further, in Booth v. Sims, 193 W. Va. 323, 456 S.E. 2d 167, syl. pt. 7 (1994), this Court stated that "[i]f a public employee does not meet age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension." (Emphasis added). Clearly then, neither the statutory provisions regarding the commencements of payments from a fire department pension fund, nor the case law regarding the same, make the age of a spouse, former spouse and/or alternate payee, relevant to the determination of when payments may commence.

Consequently, Bonnie Brown's age, at the time of the commencement of payments to her, is irrelevant to the Court's determination of whether the Pension Board violated the law in making payments to her when it did.

**V. The Appellees Fail To Assert Any Precedent In Law For The Premise That Bonnie Brown Had A Vested Interest In Brown's Pension Account.**

The Appellees state that "[t]his Court has addressed the issue of vested interest 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 [sic] (1987) and Booth v. Sims, 193 W. Va. 323, 456 S.E.2d 167 (1995)." However, the Appellees fail to assert the specific points of law from each of those cases that supports their position. In fact, there are none.

The issue in McGee was whether the expert appointed by the Family Law Master correctly valued Mr. McGee's pension for the purposes of equitable distribution in the parties' divorce action. McGee v. McGee, 214 W. Va. 36, 585 S.E.2d 36 (2003). The McGee opinion is void of any reference to Mrs. McGee being "vested" in Mr. McGee's pension. Further, the opinion is void of much reference at all as to the concept of vesting, shy of stating the fact that Mr. McGee's pension plan had vested prior to the parties' separation.

The issue in Cross was whether or not Mr. Cross' "[r]etirement account (or the right to receive future benefits from that account) was marital property ." Cross v. Cross, 178 W. Va. 563, 363 S.E.2d 449 (1987). Since the vast majority of Mr. Cross's retirement account accrued during the marriage it was deemed by the Court to be marital property. Id. As with the McGee case, there was no mention in the Cross case as to Mrs. Cross having a *vested* interest in Mr. Cross' retirement

plan. The issue was solely whether Mrs. Cross was entitled to her equitable portion of the retirement plan as part of the distribution of marital property.

Clearly, with regard to the McGee and Cross cases, the Appellees are confusing the concept of equitable distribution with the concept of vesting. Further, the Appellees reliance on Booth, is also misplaced. Although Booth discusses the issue of vesting, it does not stand for the premise that a spouse or former spouse holds a vested interest in the employee's pension account.

Booth dealt with a mandamus action questioning whether certain amendments to the state public safety pension plan violated the state's obligations of contract under Art. III, § 4 of the West Virginia Constitution. The points of law articulated by this Court in Booth all deal with the employees' rights, not the rights of spouses or ex spouses. Indeed, in Syllabus Point 3, the Booth court held that "[w]hen considering the constitutionality of legislative amendments to pension plans, an employee's eligibility for a pension does not determine whether he or she has vested contract rights . . ." (emphasis added). Booth v. Sims, 193 W. Va. 323, 456 S.E.2d 167(1994). Further, Syllabus Point 4 of Booth states

[U]ntil a public employee meets the relevant age and service requirements for collection of a pension, he or she may not receive a pension, and the existence of constitutionally protected reliance interests in pension benefit and contribution schedules do not in any way alter the existing procedure for reimbursing pension contributions into the plan upon a public employee's voluntary or involuntary separation from state employment. (emphasis added).

Id. at Syl. Pt. 4.

The Booth Court did address vesting, but only as it applied to the employee pension holder, stating 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.” Id. at syl. pt. 5. Since Bonnie Brown was not employed by the City of Fairmont, the points of law articulated in Booth are simply inapplicable to the instant action.

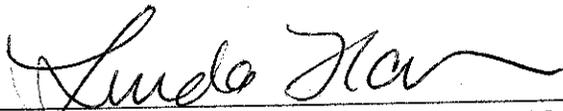
As with their reliance on Staton, the Appellees were misguided once again when they relied upon the McGee, Cross and Booth cases to assert the premise that Bonnie Brown had a vested interest in Brown’s pension plan. The record is void of any evidence that Bonnie Brown was employed by the City of Fairmont Fire Department and, therefore, she did not have a vested interest in the City of Fairmont Fireman’s Pension Relief Fund.

### CONCLUSION

The Appellees state that they acted on their **beliefs** when handling the Brown QDRO. The Appellees do not advance any law to support their actions – because none exists. The law is clear that no benefit should have been paid to Bonnie Brown until Brown separated from his service with the City of Fairmont Fire Department. Since Brown had not separated at the time that payments were made to Bonnie Brown, said payments were contrary to the law. Further, contact with Bonnie Brown, especially contact that recommended actions to the detriment of Brown, are a clear violation of the Pension Board’s fiduciary duties to Brown. For all these reasons, this Honorable Court should remand this matter to the circuit court with instructions to enter an Order consistent with controlling law in the State, reinstating Brown’s pension fund in full, and conducting a proceeding on the merits of the remaining issues in the underlying Complaint.

Dated this 19<sup>th</sup> day of June, 2007

**APPELLANT, JOSEPH W. BROWN**  
**By Counsel**



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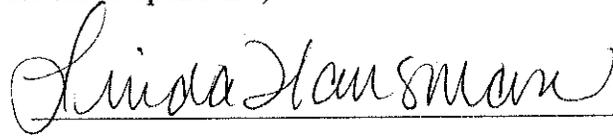
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CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of June, 2007, I served the foregoing **Reply Brief of**

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