

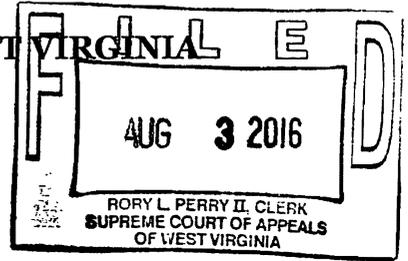
NO. 288
THIS 1st DAY OF August 2016
PAGE 518

IN THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA

FILED
CIRCUIT COURT
CALHOUN CO., WV

2016 AUG -1 AM 10:50

SHEILA GARRETSON
CIRCUIT CLERK



EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs,

vs.

Civil Action No. 12-C-14
(Judge Thomas C. Evans, III)

THE COUNTY COMMISSION OF
CALHOUN COUNTY,
a Governmental Corporation in and for
Calhoun County, West Virginia,

Defendant.

**ORDER CERTIFYING QUESTION TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

This certified question stems from a claim by Plaintiffs, Edward E. Harris (“Mr. Harris”) and Sandra L. Harris (“Ms. Harris”) (hereinafter collectively referred to as the “Plaintiffs”), by counsel, Orton A. Jones, of Hedges, Jones, Whittier & Hedges, Attorneys at Law, against Defendant, The County Commission of Calhoun County (the “Defendant”), by counsel, Joseph L. Amos, Jr. and Karen H. Miller, of Miller & Amos, Attorneys at Law, for breach of contract, (i.e., an alleged Employee Handbook policy). Plaintiffs claim that said Employee Handbook policy obligated the Defendant to enroll Mr. Harris in the Public Employee Retirement System (“PERS”) and to make paycheck deductions and contributions to PERS on Mr. Harris’ behalf. Plaintiffs similarly allege that another Employee Handbook policy obligated the Defendant to enroll Mr. Harris in insurance coverage through the Public Employees Insurance Agency (“PEIA”) at the time of his hiring.

On December 10, 2015, the Circuit Court denied “Defendant’s Motion to Dismiss or, in the Alternative, for Summary Judgment,” wherein Defendant sought dismissal of the case because the statute of limitations had run on Plaintiffs’ claims. Upon Motion by the Defendant, this Court hereby certifies the question of what event or events trigger the running of the statute of limitations in this or similar circumstances, to the West Virginia Supreme Court of Appeals (the “Supreme Court”).

I. Findings of Undisputed Fact

1. The Plaintiffs became employed by the Defendant as Janitors at the Calhoun County Courthouse on or about August 3, 1987.
2. At some point thereafter, Mrs. Harris left employment with the Defendant. However, Mr. Harris continued to be employed as a Janitor until his retirement on December 31, 2010.
3. When Mr. Harris began working as a Janitor, he was issued weekly paychecks by the Defendant.
4. Defendant is a non-state participating agency in PEIA and PERS.
5. As a non-state PERS participating agency, Defendant could deduct amounts from each of Mr. Harris’ paychecks and contribute that amount, along with Defendant’s employer contribution, to PERS on behalf of Mr. Harris.
6. As a non-state PEIA participating agency, Defendant could deduct amounts from each of Mr. Harris’ paychecks and contribute that amount, along with Defendant’s employer contribution, to PEIA on behalf of Mr. Harris during his employment with Defendant.

7. The Plaintiffs allege that Defendant did not deduct Mr. Harris' retirement contributions from his paycheck for approximately the first year and five months of his employment. It is undisputed that the paychecks issued to Mr. Harris by the Defendant did not display a deduction for retirement from his date of hire in 1987 through August 1988. The amounts Plaintiffs allege should have been paid to PERS on Mr. Harris' behalf were instead paid to Mr. Harris in his weekly paycheck.
8. In August 1988, an entry for "RET.," symbolizing "Retirement," began to appear on Mr. Harris' paychecks.
9. The Plaintiffs allege that Defendant did not immediately enroll Mr. Harris in PEIA coverage on August 3, 1987, which would have "grandfathered" him into a more generous healthcare plan upon his retirement. It is undisputed that in August 1988, Mr. Harris signed a completed PEIA enrollment form. PEIA records indicate this as the date of Mr. Harris' continuous enrollment.
10. Mr. Harris had numerous written exchanges with PERS and PEIA during his employment with the Defendant, including the following:
 - a. On January 14, 1991, Mr. Harris filled out a second PEIA enrollment form.
 - b. On July 9, 1996, Mr. Harris submitted a letter requesting that he be withdrawn from PEIA coverage. The letter was labeled "Approved" by PEIA on July 13, 1996. This letter was accompanied by a completed PEIA "Policyholder Termination of Coverage Form,"

submitted on July 10, 1996, with an effective termination date of July 31, 1996.

- c. On May 7, 1997, Mr. Harris re-enrolled in PEIA family coverage and basic life insurance, with an effective date of July 1, 1997. On August 14, 1998, Mr. Harris enrolled in Provident Life and Accident Insurance Company's additional life insurance policy.
 - d. On August 5, 1998, Mr. Harris enrolled in optional life insurance and dependent life insurance.
 - e. On December 31, 1999, PERS sent Mr. Harris a statement detailing his PERS account credit. The earliest year of credit listed on this statement is 1989. The statement did not show credit for the years 1987 or 1988. It is the standard practice of PERS to send these statements annually to their members.
 - f. On January 20, 2000, Mr. Harris sent a fax to PERS requesting a statement of his retirement earnings to that date.
11. Mr. Harris retired from the Defendant on December 31, 2010, and began receiving retirement benefits.

II. Procedural History

12. On April 27, 2012, Plaintiffs filed the instant law suit in the Circuit Court of Calhoun County, West Virginia, alleging breach of contract for violation of an alleged Employee Handbook policy. Specifically, Plaintiffs claim that this alleged policy obligated Defendant to enroll Mr. Harris in PERS and PEIA on his first day of employment. Plaintiffs claim that Defendant's alleged failure to timely enroll Mr. Harris in PERS resulted in him

receiving a lower retirement check. Plaintiffs also claim that Defendant's alleged failure to timely enroll Mr. Harris in PEIA coverage resulted in him being precluded from exchanging accrued vacation and sick leave for his entire PEIA premium after retirement, due to a change in the West Virginia statute which took effect in July 1988.

13. Essentially, Plaintiffs' Complaint seeks damages allegedly resulting from Mr. Harris not being enrolled in PERS from his hire date until 1989, and not being enrolled in PEIA from his hire date until August 1988.
14. On May 4, 2012, Defendant filed its "Answer to Complaint."
15. On June 2, 2015, Plaintiffs filed their "Motion for Leave to File Amended Complaint and Petition" ("Motion to Amend"), seeking to add a third breach of contract claim alleging that Defendant caused Mr. Harris' Optional Life Insurance Coverage to be terminated.
16. On August 11, 2015, Defendant filed a "Response in Opposition to Plaintiffs' Motion for Leave to File Amended Complaint and Petition and Motion to Dismiss the Underlying Complaint" ("Motion to Dismiss"). In pertinent part, Defendant alleged that the statute of limitations had run regarding Plaintiffs' breach of contract claims regarding PERS and PEIA enrollment.
17. On December 10, 2015, a hearing was held in the Circuit Court of Calhoun County, West Virginia. The Court denied Defendant's Motion to Dismiss, finding that the statute of limitations in a breach of contract action did not accrue until Mr. Harris was damaged. This damage would be the receipt

of reduced retirement benefits. Plaintiff's Motion to Amend was held in abeyance.

18. On February 26, 2016, the Defendant filed a "Motion to Certify Question to the West Virginia Supreme Court of Appeals" ("Motion to Certify"). The question is what event triggers the running of the statute of limitations in a breach of contract action.
19. At a hearing on March 7, 2016, the Court granted Defendant's Motion to Certify. The Court further stayed litigation and discovery, with the exception that the Plaintiffs may take a videotaped evidentiary deposition of Mr. Harris. Should the Plaintiffs elect to do so, the Defendant will be permitted to take the discovery deposition of Mr. Harris prior to the taking of his evidentiary deposition.
20. Should the Supreme Court hold that the statute of limitations began to run when the breaches occurred and were discovered by the Plaintiffs, this action would be dismissed in its entirety as untimely.

III. Legal Standard

"Any question of law . . . may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back."¹

III. Pertinent Points of Law

¹ W. Va. Code 58-5-2.

West Virginia recognizes a ten (10) year statute of limitations for breach of a written contract.² A breach of an oral contract is accompanied by a five year statute of limitations.³ However, the statute and accompanying case law are silent as to exactly what event triggers the running of the statute of limitations in such cases.

The parties have produced case law that they claim supports their argument as to when the statute of limitations begins to run in a contract action. Neither the parties nor the Court have identified a Syllabus Point authoritatively resolving the specific question at issue. The parties have produced dicta that they claim supports their argument. The Plaintiffs have drawn the Court's attention to the following dicta:

A statute of limitations begins to run no sooner than the date all of the elements of a cause of action entitling a party to recover in fact exist.⁴

Meanwhile, the Defendant has claimed that the following dicta supports its position:

We have consistently held that the statute of limitations begins to run when the breach of the contract occurs or when the act breaching the contract becomes known. The statute of limitations does not begin to run when a party to the contract declares a forfeiture. Such an expansion of the statute of limitations as urged by the McKenzies is not within the plain language of the statute which allows ten years for an action to be brought 'after the right to bring the same shall have accrued.' Neither is such expansion consistent with the spirit or the purpose of setting barriers to stale claims that could have been the subject of more timely litigation."⁵

IV. Question Presented

CERTIFIED QUESTION:

² W. Va. Code 55-2-6.

³ *Id.*

⁴ *Lipscomb v. Tucker County Commission*, 197 W. Va. 84, 90 (1996).

⁵ *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 749 (1995).

Does the statute of limitations in an alleged breach of contract action against an employer for failure to timely enroll an employee in retirement benefits begin to run when the act breaching the contract occurs and the employee knows of the breach?

CIRCUIT COURT ANSWER:

No. The statute of limitations begins to run when the employee is subsequently damaged at retirement through the receipt of less advantageous retirement benefits than they would have received, had they been timely enrolled.

VI. Procedure After Certification

Following the entry of this Order, and receipt thereof by the Supreme Court of Appeals, this matter shall proceed in accordance with Rule 17(a) of the West Virginia Rules of Appellate Procedure.

VII. Conclusion

Accordingly, pursuant to the provisions of W. Va. Code 58-5-2, Defendant's "Motion to Certify Question to the West Virginia Supreme Court of Appeals" is hereby **GRANTED**. The question of when the statute of limitations accrued in the instant matter is hereby certified to the Supreme Court.

Pursuant to the granting of Defendant's "Motion to Certify Question to the West Virginia Supreme Court of Appeals," this matter, including discovery, is hereby **STAYED**, pending the answer to this Certified Question, except that the Plaintiffs may elect to take Mr. Harris' videotaped evidentiary deposition. Should the Plaintiffs so elect, the Defendant shall be permitted to take the discovery deposition of Mr. Harris prior to the taking of his videotaped evidentiary deposition.

The Parties are hereby **ORDERED** to convene and generate a Joint Appendix to the Supreme Court for consideration of this case, which shall be compliant with format, page numbering, and general requirements in Rule 7. The Joint Appendix shall be filed with Defendant's Brief to the Supreme Court.

The Court hereby notes the objections and exceptions of the parties to any adverse rulings herein.

The Circuit Clerk is hereby directed to enter this Order and forward copies to all counsel of record. The Circuit Clerk is further directed to transmit a copy of this Order, along with a copy of the docket sheet in this matter, to the Clerk of the West Virginia Supreme Court of Appeals.

ENTERED: July 29, 2016



Thomas C. Evans, III, Circuit Judge
Fifth Judicial Circuit
State of West Virginia

EDWARD E. HARRIS

VS. COUNTY COMMISSION OF CALHOUN

LINE DATE ACTION

1 04/27/12 CASE FILED
2 04/27/12 COMPLAINT AND PETITION FILED AND SUMMONS ISSUED.
3 04/27/12 EX A- HEALTH BENEFITS AND BASIC LIFE INSURANCE ENROLLMENT FORM;
4 EX B- CONSOLIDATED PUBLIC RETIREMENT BOARD; EX C- 1987 WEST
5 VIRGINIA INSTRUCTIONS FOR FORM I.T. 104 EMPLOYEE'S WITHOLDING
6 EXEMPTION CERTIFICATE; EX D- PEIA INSURANCE STATEMENT; EX E-
7 PEIA DELINQUENCY NOTICE; EX F- EMPLOYEE'S HANDBOOK; EX G1- RE-
8 TIREMENT BENEFIT ESTIMATE; EX G2- PEIA SHEET; EX H- PUBLIC
9 EMPLOYEES RETIREMENT SYSTEM FILED.
10 05/25/12 ANSWER TO COMPLAINT FILED.
11 06/22/12 CERTIFICATE OF SERVICE FILED.
12 07/24/12 PLAINTIFFS' FIRST RESPONSE TO DEFENDANT'S FIRST SET OF INTER-
13 ROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS FILED.
14 09/20/12 PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUC
15 TION OF DOCUMENTS FILED.
16 10/12/12 PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR
17 PRODUCTION OF DOCUMENTS FILED.
18 10/22/12 CERTIFICATE OF SERVICE DEFENDANTS RESPONSE TO PLAINTIFFS FIRST
19 SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS
20 UPON COUNSEL OF RECORD FILED.
21 02/04/13 CERTIFICATE OF SERVICE FILED.
22 07/19/13 PLAINTIFF'S RESONSE TO DEFENDANT'S SECOND SET OF INTERROGATORIES
23 AND REQUEST FOR PRODUCTION OF DOCUMENTS FILED.
24 08/09/13 CERTIFICATE OF SERVICE FILED.
25 08/21/13 PLAINTIFFS' RESPONSE TO DEFENDANTS FIRST REQUEST FOR ADMISSIONS
26 FILED.
27 06/16/14 NOTICE TO TAKE DEPOSITIONS ON JULY 23, 2014 AT 10:00 AM FILED.
28 12/04/14 LETTER FROM ORTON JONES TO ROBERT A. HOGUE FILED.
29 12/17/14 MOTION FILED.
30 12/17/14 NOTICE OF HEARING FOR JANUARY 6, 2015 1T 11:30 AM FILED.
31 01/06/15 AMENDED NOTICE OF HEARING FILED. HEARING NOW SET FOR JANUARY 9,
32 2015 AT 10:30 AM IN ROANE COUNTY.
33 01/15/15 CERTIFICATE OF SERVICE FILED
34 01/26/15 AGREED ORDER ENTERED (CIV 28 PG 180)
35 06/04/15 MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND PETITION FILED.
36 PLAINTIFF EX A - AMENDED COMPLAINT.
37 07/01/15 NOTICE OF HEARING FOR AUGUST 10, 2015 AT 10:30 AM FILED.
38 07/06/15 CERTIFICATE OF SERVICE FILED.
39 07/06/15 CERTIFICATE OF SERVICE FILED.
40 07/13/15 AMENDED NOTICE OF HEARING FILED. HEARING SET FOR SEPTEMBER 3, 20
41 15 AT 10:30 AM.
42 07/27/15 PLAINTIFFS' ANSWERS TO DEFENDANT CALHOUN COUNTY COMMISSION'S
43 FIFTH SET OF DISCOVERY TO PLAINTIFF EDWARD H HARRIS FILED.
44 08/12/15 DEFENDENT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' "MOTION FOR
45 LEAVE TO FILE AMENDED COMPLAINT AND PETITION: AND MOTION TO
46 DISMISS THE UNDERLYING COMPLAINT; EXHIBIT #1 PLAINTIFF'S
47 ANSWERS TO DEFENDANT CALHOUN COUNTY COMMISSION'S FIFTH SET OF
48 DISCOVERY TO PLAINTIFF EDWARD H HARRIS; EXB#2 FINANCIAL PAPERS;
49 EXB #3 PEIA NON-STATE AGENCY ENROLLMENT FORM; EXB #4 LETTER FROM
50 EDWARD HARRIS DTD 7/9/96. FILED.

EDWARD E. HARRIS

VS. COUNTY COMMISSION OF CALHOUN

LINE	DATE	ACTION
51	08/21/15	PLAINTIFF'S ANSWERS TO DEFENDANT'S MOTION TO DISMISS COMPLAINT
52		FILED.
53	08/21/15	PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFFS'
54		MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT FILED.
55	09/01/15	DEFENDANT'S REPLY TO "PLAINTIFFS' ANSWERS TO DEFENDANT'S MOTION
56		TO DISMISS COMPLAINT" FILED.
57	09/08/15	PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY TO PLAINTIFFS' ANSWER
58		TO DEFENDANT'S MOTION TO DISMISS COMPLAINT FILED.
59	09/14/15	DEFENDANT'S FINAL ARGUMENTS BRIEF REGARDING PLAINTIFFS' MOTION
60		FOR LEAVE TO FILE AMENDED COMPLAINT AND PETITION FILED.
61	09/21/15	PLAINTIFFS' REPLY TO DEFENDANT'S FINAL ARGUMENT BRIEF REGARDING
62		PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT FILED.
63	09/21/15	ORDER ENTERED. THE DEFENDANT WILL FILE A FINAL ARGUMENT BRIEF
64		ON PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT AND PETITION AND
65		THE PLAINTIFFS WILL FILE A FINAL ARGUMENT BRIEF WITHIN 15 DAYS
66		OF THIS HEARING. HEARING SET FOR NOVEMBER 30, 2015 AT 1:00 PM.
67		(CIV 28 PG 286)
68	11/19/15	ORDER ENTERED THAT ANY FURTHER FILINGS OF MEMORANDA OR EXHIBITS
69		ON BEHALF OF PLAINTIFFS SHALL BE FILED HEREIN ON OR BEFORE
70		NOVEMBER 23, 2015 AND THAT ANY MEMORANDA OR EXHIBITS IN RESPONSE
71		TO THE DEFENDANT SHALL BE FILED ON OR BEFORE DECEMBER 4, 2015.
72		THIS MATTER IS CONTINUED UNTIL DECEMBER 10, 2015 AT 2:00 PM.(CIV
73		33 PG 334)
74	11/25/15	PLAINTIFF'S FINAL BRIEF AND RESPONSE TO DEFENDANT'S MOTION TO
75		DISMISS COMPLAINT FILED.
76	12/04/15	CERTIFICATE OF SERVICE FILED.
77	12/07/15	DEFENDANT'S FINAL ARGUMENTS BRIEF REGARDING DEFENDANT'S MOTION
78		TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT FILED.
79	12/07/15	ADDENDUM TO PLAINTIFF'S FINAL BRIEF AND RESPONSE FILED.
80	12/17/15	ADDENDUM TO PLAINTIFFS' FINAL BRIEF AND RESPONSE FILED.
81	12/29/15	NOTICE OF ORDER FILED.
82	02/16/16	NOTICE OF HEARING FOR MARCH 7, 2016 AT 10:30 AM FILED.
83	02/16/16	MOTION FILED.
84	02/19/16	TRANSCRIPT OF DECEMBER 10, 2015 FILED.
85	02/29/16	MOTION TO CERTIFY STATUTE OF LIMITATIONS QUESTION TO THE WEST
86		VIRGINIA SUPREME COURT OF APPEALS OR, IN THE ALTERNATIVE, TO
87		RECONSIDER FILED.
88	03/07/16	PLAINTIFF'S RESPONSE TO MOTION OF DEFENDANT TO CERTIFY STATUTE
89		OF LIMITATIONS QUESTION FILED.
90	03/07/16	MOTION FOR ENTRY OF APPROPRIATE ORDER FILED.
91	03/07/16	MOTION TO CERTIFY STATUTE OF LIMITATIONS QUESTION TO THE WEST
92		VIRGINIA SUPREME COURT OF APPEALS OR, IN THE ALTERNATIVE, TO
93		RECONSIDER FILED.
94	03/07/16	ORDER ENTERED DENYING THE DEFENDANT'S MOTION TO DISMISS THE
95		"COMPLAINT AND PETITION". THE PARTIES SHALL JOINTLY CONTACT THE
96		COURT'S STAFF TO CONDUCT A SCHEDULING CONFERENCE.(CIV 28 PG 399)
97	03/21/16	ORDER ENTERED THAT THIS CASE IS STAYED EXCEPT FOR COUNSEL TO
98		TAKE DEPOSITION OF PLAINTIFF EDWARD HARRIS (CIV 28 PG 421)
99	03/28/16	PROPOSED ORDER BY ORTON JONES FILED.
100	08/01/16	ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF APPEALS OF

