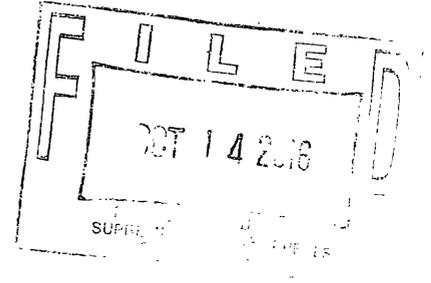


IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA



16-0735

EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs Below, Petitioners,

vs.

CIVIL ACTION NO. 12-C-14
Hon. Thomas C. Evans III
Circuit Judge

THE COUNTY COMMISSION OF CALHOUN
COUNTY, a governmental corporation in and for
Calhoun County, West Virginia,

Defendant Below, Respondent.

PETITIONERS' BRIEF UPON CERTIFIED QUESTION

Respectfully submitted by:
Counsel for Petitioners,

Orton A. Jones (WVSB #1924)
HEDGES, JONES, WHITTIER & EDGES
216 Market Street, Suite 201
P.O. Box 7
Spencer, WV 25276
Phone: 304-927-3790
Facsimile: 304-927-6050
ortonjoneshjwh@yahoo.com

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**PETITIONERS' BRIEF
UPON CERTIFIED QUESTION**

Come now Petitioners, Edward E. Harris and Sandra L. Harris, by counsel, Orton A. Jones, Esquire, pursuant to the West Virginia Rules of Appellate Procedure, and respectfully file Petitioners' Brief Upon Certified Question.

**SPECIFIC POINTS ARISING FROM
CERTIFIED QUESTION**

1. Petitioners Edward E. Harris and his wife Sandra L. Harris filed their civil action against Respondent The County Commission of Calhoun County, on April 27, 2012, about sixteen (16) months after Mr. Harris retired on December 31, 2010, as an employee of Respondent. Mr. Harris's employment had begun August 3, 1987.

2. Petitioners alleged in their Complaint that Mr. Harris's retirement benefits had been improperly diminished by reason of certain failures on the part of Respondent to enroll him in the retirement and insurance plans when said Petitioner began his employment with Respondent and for almost a year and a half thereafter.

3. Respondent Calhoun County Commission filed a Motion to Dismiss the Complaint under Rule 12(b)(6), Rules of Civil Procedure, on the ground that Petitioner's Complaint was time-barred by the statute of limitations because the statute of limitations began to run when the Commission's breach of Mr. Harris's employment contract occurred in 1987 and 1988, and he failed to file his suit within five (5) years (by December 31, 1993), or within ten years by (December 31, 1998) under West Virginia Code §55-2-6. The parties filed exhibits with their Briefs and Respondent's Motion could be considered under Rule 56, Rules of Civil Procedure, but was always referred to as a motion to dismiss.

4. Arguments were heard and the Circuit Court announced its ruling from the bench on December 10, 2015. (Appendix 338) The Circuit Court of Calhoun County entered an Order March 7, 2016, in which it denied Respondent's Motion to Dismiss and made findings that "a breach of contract action for failure to timely enroll an employee in PERS in violation of a duty to timely enroll said employee in PERS . . . accrues when all the elements of a cause of action accrue to the Plaintiff upon retirement from a participating employer, rather than when the failure to enroll the employee in PEIA and/or PERS occurs, or when the Plaintiff became aware of such failure; plaintiff had no right to retire in 1989 or earlier and only a required period of future employment could earn any such right." The Circuit Court made an identical finding with regard to retirement PEIA coverage. (Appendix 373)

5. In denying Respondent's Motion to Dismiss in its Order entered March 7, 2016, the Circuit Court concluded that the action was timely filed and the statute of limitations began to run when Petitioner retired on December 31, 2010.

6. On February 29, 2016, Respondent County Commission filed its Motion to Certify Statute of Limitations Question to the Supreme Court of Appeals or, in the Alternative, to Reconsider. (Appendix 344)

7. On August 1, 2016, the Circuit Court granted said Motion to Certify and entered an order certifying the question of when the statute of limitations accrued in the instant matter to the West Virginia Supreme Court of Appeals. In said order, the Circuit Court said: "Neither the parties nor the Court have identified a Syllabus Point authoritatively resolving the specific question at issue." (Appendix 397)

CERTIFIED QUESTION

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?

The Circuit Court of Calhoun County answered this question: No.

STATEMENT OF THE CASE

This case is before this Court upon a Certified Question posed by the Circuit Court of Calhoun County by Order entered August 1, 2016, after the Circuit Court had, by Order entered March 7, 2016, denied the Motion of defendant County Commission of Calhoun County to Dismiss the action as time-barred by reason of the statute of limitations.

The West Virginia Supreme Court of Appeals, by Order entered August 3, 2016, assigned Docket No. 16-0735 to this case, suspended briefing and directed the Clerk of said Circuit Court to forward certain specific items from the lower court record to the Clerk of the Supreme Court of Appeals.

The West Virginia Supreme Court of Appeals, by Order entered September 14, 2016, (1) adopted the opinion that this matter be scheduled for oral argument on a date to be determined, (2) directed that the Clerk will, at a later date, issue a Notice of Argument pursuant to Rule 20 (b) of the Rules of Appellate Procedure, (3) directed that the Appendix, to contain all items the parties intend to be included therein, be filed on or before October 17, 2016, and (4) established a briefing schedule.

The Appendix and a copy thereof were filed by Petitioners with the Clerk of the Supreme Court of Appeals on October 7, 2016.

This case, Civil Action No. 12-C-14, was filed in the Circuit Court of Calhoun County on April 27, 2012, by Edward E. Harris and Sandra L. Harris, Plaintiffs below and Petitioners herein, against the County Commission of Calhoun County, Defendant below and Respondent herein, for certain relief for Petitioners' losses resulting from breaches of Respondent's wrongful and unlawful acts and omissions contrary to its duties and obligations to Petitioners under the West Virginia Public Employee Retirement System (PERS) and the West Virginia Public Employees Insurance Agency (PEIA statutes as hereinafter set out.

In their Complaint, Eddie and Sandra Harris sought the following relief:

1. That the number of annual and sick leave days of plaintiff Edward E. Harris that are already applied upon said plaintiff's single health insurance coverage be adjusted by defendant to constitute family coverage for both plaintiffs from the date following the date of retirement, January 1, 2011, to the date of this Court's Order requiring same and apply such further accrued leave days thereto as necessary to comprise three days leave time for each month of family coverage;
2. That upon Order of this Court, the remaining days of accrued leave be applied thereafter to family health insurance coverage for plaintiffs at three leave days for each month of family health insurance coverage so long as accrued leave days remain for this purpose;
3. That defendant be Ordered to pay such amounts from its treasury as may be required by PEIA and/or the Public Employees Retirement Board for payment for said coverage;
4. That defendant be Ordered to reimburse and pay to plaintiffs all sums which have been deducted from plaintiff Edward E. Harris's retirement pay for the family insurance coverage of plaintiff Sandra L. Harris to the time of said Order and in accordance with the directives of said Court, and that plaintiffs have judgment against defendant therefor;
5. That plaintiffs have judgment against defendant for the said sum of \$442.09 that was paid by plaintiffs to PEIA for said first month coverage for Sandra L. Harris to avoid defaulting and losing said plaintiff's coverage;

6. That defendant be Ordered to cause the adjustment of years and months of plaintiff Edward E. Harris's employment to be corrected to reflect his true years of service for retirement pay purposes or, that judgment be entered for plaintiffs against defendant for the difference between what he receives in retirement pay and what he should receive with the said one year and five months service being credited;
7. That plaintiffs may have pre-judgment interest at the legal rate upon all sums Ordered by this Court to be paid or reimbursed to plaintiffs by defendant;
8. That plaintiffs may have a reasonable attorney fee and the costs of this action; and
9. That plaintiffs may have such further and general relief as the nature of the cause may require. (Appendix 8)

Respondent filed its Motion to Dismiss the Complaint as being barred by the statute of limitations on August 12, 2015. Briefs were filed by both parties and the motion was argued on December 19, 2015. The Circuit Court denied the motion by announcement that day and by Order entered March 7, 2016. Upon motion by Respondent made February 29, 2016, the Circuit Court entered an Order on August 1, 2016, certifying the question to the Supreme Court of Appeals.

The Plaintiffs'/Petitioners' losses and damages, and this civil action, arose from the following events.

Plaintiff Edward E. Harris became employed by the County Commission of Calhoun County and began his employment as a full-time janitor of the Calhoun County courthouse on August 3, 1987, and retired from this position on December 31, 2010. The terms of his employment included health insurance and retirement benefits from the outset. Two actions – or inactions – of the County Commission wrongfully and adversely affected Eddie Harris's retirement pay and his retirement health insurance benefits. These omissions or mistakes occurred at the very beginning of his career of working for the County Commission.

First, the County Commission and its Clerk wholly failed to enroll Eddie in the Public Employees Retirement System (PERS), although they had a duty to do so and told him so and he thought they had. They did not withhold his retirement contributions (about \$9.45 each semi-monthly paycheck) until the first of August 1988. (Appendix 241-250)

At that time, August 1988, the Commission began withholding his retirement contributions from his paychecks, but still did not send them in to PERS and did not send in any employer contributions either. It is not known what the Commission did with the employee contributions it withheld. Apparently they stayed in the county treasury; he never saw them again. (Appendix 241-250; 73-148)

Finally, beginning in January, 1989, the Respondent County Commission began sending in to PERS both the current employee and employer contributions. As a result, PERS they put Eddie on their rolls as of that month. When Eddie retired, his years of service computations for his amount of retired pay began as of January 1, 1989. He receives no credit for service between August 3, 1987, and December 31, 1988, inclusive. (Appendix 238)

Second, the County Commission and its Clerk wholly failed to enroll Eddie in the Public Employees Insurance Agency (PEIA), although, again, they had a duty to do so and so informed him, and he thought they had done so. At the time Eddie began his employment and for a considerable time before and after that date, the Calhoun County Commission paid the full premium to PEIA for all of its employees. The Commission paid the full premium in lieu of a pay raise. Eddie was told that he and his wife were covered and he was confident that they were. As it happened, neither Eddie nor his wife Sandra got sick or otherwise needed to use their PEIA coverage during that time. (Appendix 232-235)

The County Commission and Clerk finally enrolled Eddie in PEIA after July 1988. His membership continued to and through his retirement except a period between July 13,1996, and May 7, 1997. Eddie's family finances were dire and he elected to change his status to no coverage so his premium contribution (by that time employee contributions to PEIA premiums had been resumed by the Commission) would be added to his paycheck until he straightened out his financial situation. He was reinstated May 7,1997, and remained in the system thereafter. (Appendix 236-237)

At the time Eddie's employment commenced, August 3,1987, West Virginia Code §5-16-13, part of the Public Employees Insurance Act, provided, *inter alia*, as follows:

“ . . . when a participating employee voluntarily retires as provided by law, that employee's accrued annual leave and sick leave, if any, shall be credited toward an extension of the insurance coverage provided by this article, according to the following formulae: The insurance coverage for a retired employee shall continue *one additional month for every two days of annual leave or sick leave, or both*, which the employee had accrued as of the effective date of his or her retirement. *For a retired employee, his or her spouse and dependents, the insurance coverage shall continue one additional month for every three days of annual leave or sick leave, or both*, which the employee had accrued as of the effective date of his or her retirement.” (emphasis supplied).

In 1988, the West Virginia Legislature amended this section to reduce the benefit of using accrued sick leave to apply to PEIA premiums to the following:

“ . . . when the participating employee voluntarily retires as provided by law, *that employee's annual leave or sick leave, if any, shall be credited toward one half of the premium cost of the insurance provided by this article, for periods and scope of coverage determined according to the following formulae: (1) One additional month of single retiree coverage for every two days of annual leave or sick leave, or both*, which the employee had accrued as of the effective date of his or her retirement; *or (2) one additional month of coverage*

for a retiree, his or her spouse and dependents for every three days of annual leave or sick leave, or both, which the employee had accrued as of the effective date of his or retirement. The remaining premium costs shall be borne by the retired employee if he or she elects the coverage . . . For purposes of this subsection, an employee shall not be considered a new employee after returning from extended authorized leave on or after July 1, 1988. (emphasis supplied).

In amending the statute to reduce this benefit by half to employees, the Legislature “grandfathered in” all employees who “elected to participate in the plan before July 1, 1988.” Eddie did so elect and thought he was in the plan. He should have been in the plan. The County Commission undertook to have all of its employees in the plan and undertook to pay all their premiums. In Eddie’s case, they failed to do so.

At the time of Eddie’s retirement December 31, 2010, he was not provided with the benefit in applying sick leave days to PEIA family coverage for himself and his wife that he would have received had the Commission and Clerk properly enrolled him in PEIA when he began his employment on August 3, 1987. Instead, his sick leave is applied to one-half of the monthly premiums, not the entire premiums, because the Commission did not enroll him in PEIA until after June, 1988.

The County Commission in this case responded to this failure on its part by asserting a “WV PEIA Document” dated July 1, 2010, which states:

For eligible employees *continuously* covered by the PEIA since before July 1, 1988, 2 days of sick or annual leave may be converted into the full premium for one month’s single coverage and three days’ sick or annual leave may be converted into one month’s family coverage; . . .”
(emphasis supplied) (Appendix 178)

However, that “continuous” requirement appears only in documents promulgated by PEIA itself and is not contained in the statute. There is no statutory requirement than an employee be continuously covered in order to have the “grandfather” protection.

Plaintiffs Eddie and Sandra Harris filed this civil action on April 27, 2012, less than a year and a half after Eddie retired on December 31, 2010. By the nature of the case, plaintiffs depended heavily upon discovery for much of the information and records relevant to the case. In about July, 2014, the deductions from Eddie’s retirement check to pay his life insurance premiums stopped and the coverage was in jeopardy. Also, information received in discovery by that time had indicated a need for amending the Complaint in several particulars, in addition to adding the new cause of action. The new insurance problem was remedied by the entry of an agreed court order and the new cause of action was mooted. The other amendments to the Complaint to conform to discovery are not yet adopted, as the motion to amend the Complaint is held in abeyance pending resolution of defendant’s Motion to Dismiss that was filed with defendant’s opposition to plaintiffs’ Motion to Amend. (Appendix 377)

Thereafter, defendant County Commission filed additional payroll records as late supplemental discovery responses and, shortly thereafter, defendant exhibited much of said records with its Motion to Dismiss Complaint. (Appendix 73-141) Several of these late-filed records that had earlier appeared to be non-existent revealed facts that were helpful to plaintiffs and should also be added to an Amended Complaint, but discussed in briefs and exhibits that are in the Appendix. Some of these items are set out above in this relating of the facts, items that were unknown by and unrevealed to plaintiffs, even when they filed their Motion to Amend Complaint. Discovery is not yet complete. All further discovery is suspended by Order pending resolution of

the statute of limitations question, except that plaintiffs have leave to depose Eddie Harris to preserve his testimony because of his serious medical condition.

Defendant's Motion to Dismiss has been the subject of extensive briefing by both parties. On March 7, 2016, the Circuit Court entered an Order denying defendant's Motion to Dismiss the civil action, ruling that this case was timely instituted within the period of the statute of limitations. On August 1, 2016, the Circuit Court entered an Order Certifying the Statute of Limitations question to the West Virginia Supreme Court of Appeals.

In the Circuit Court's Order of March 7, 2016, denying defendant's Motion to Dismiss, the Court found, as to both the PERS and PEIA enrollment issues, "that a breach of contract action for failure to timely enroll an employee in PERS [and PEIA] in violation of a duty to timely enroll said employee in PERS [and PEIA] . . . accrues when all of the elements of a cause of action accrue to the plaintiff upon retirement from a participating employer, rather than when the failure to enroll the employee in PEIA and/or PERS occurs or when the plaintiff becomes aware of such failure. Plaintiff had no right to retire in 1989 or earlier and only a required period of future employment could earn any such right." The Circuit Court then held that the statute of limitations began to run when Mr. Harris retired in December 2010, and that this case, that was filed in April, 2012, was timely filed. (Appendix 373-378)

Petitioners Edward and Sandra Harris ask the Court to affirm the Circuit Court's Order denying Respondent's Motion to Dismiss the Complaint by answering the Certified Question: No.

SUMMARY OF ARGUMENT

Defendant's Motion to Dismiss is based solely on the proposition that plaintiffs' cause of

action is barred by the applicable statute of limitations which, being based on contract, is either ten (10) years or five (5) years.

Plaintiff Edward E. Harris retired as an employee of defendant County Commission of Calhoun County on December 31, 2010. Five years from that date would be December 31, 2015. Ten years from that date would be December 31, 2020. Neither deadline had yet occurred when Petitioners filed their civil action on April 27, 2012.

Respondent argues that the statute of limitations began to run in 1988. (See Defendant's said Motion - Appendix at 53-66). In other words, Eddie needed to file his lawsuit against his employer, the County Commission, sometime within the next five or ten years after January 1, 1988, while he was still employed by the Commission.

Aside from the interesting scenario Respondent would require: that is, Eddie Harris could either sue his employer early on or forget it, there are legal reasons why Mr. Harris could not do so. To begin with, he had no cause of action in 1988. He had no present retirement right. He had to work a requisite number of years and/or obtain a certain age in order to be eligible for retirement. If he had quit or been laid off or died at any time after 1988 without actually retiring, there would be no retirement benefits or benefits of any kind thereafter, period. Only by performing his employment duties over the years and finally attaining retirement did he have any right at all to reap the rewards vouchsafed to him by the County Commission's duties to him as an employee who had fully served a career for the County Commission and, only then, under the rules and obligations in which he served, is he entitled to the full credit and computation under which he earned his retirement.

The County Commission, on the other hand, could have corrected the matter at any time, including after Eddie's retirement which, for no meritorious reason, Respondent did not do and still has not done. If for any reason Eddie Harris had not continued in his employment with Respondent and had at some point resigned, died or been terminated, he would not have retired at all and no cause of action relating to his retirement entitlement or the effect of his PEIA enrollment or his retirement benefits would ever have arisen. He had no cause of action until he actually retired.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue before the Court upon the Certified Question involves a precise question without exact precedent in this State, although closely-related principles have been enunciated by this Court. As a matter of first impression, this matter has appropriately been designated for oral argument pursuant to Rule 20, Rules of Appellate Procedure.

ARGUMENT

The Circuit Court was eminently correct in ruling that a breach of contract action for failure to timely enroll an employee in PERS or PEIA in violation of a duty to timely enroll said employee accrues when all the elements of a cause of action accrue to the plaintiff upon retirement, and the statute of limitations begins to run at the time of retirement.

While the West Virginia Supreme Court of Appeal has not previously examined the present issue presented by the Circuit Court's Certified Question, it has defined analogous issues in a number of cases.

In *Clark v. Gruber*, 74 W.Va. 533, 82 S.E. 338 (1914), plaintiff provided boarding and nursing care for decedent and his wife in 1904 and early 1905, to be paid from decedent's estate on his death, as evidenced by an agreement and a will decedent executed that provided payment

for these services. After his wife's death, decedent remarried in 1906 and made a new will omitting the provisions for plaintiff. Decedent died in 1910, when his later will was probated. The plaintiff then sued the estate for this 1904 and 1905 nursing care and board. The estate raised the issue of statute of limitations. The court held, in Syllabus Point 3, as follows:

If, in such cases, the evidence shows such implied contract to be for a continuous service, and not to be paid for until completed or until some future event, the statute of limitations will not begin to run, except from the time of such completion, or the happening of the event contemplated.

The court held that neither party contemplated payment before the decedent's death, "and certainly not until the services were completed or relationship between them had ceased." 82 S.E. at 340.

In *Wren v Wehn*, 122 W.Va. 625, 12 S.E.2d 809, (1941), a suit upon an agency contract, the court held in the sole Syllabus Point:

In the absence of arrangement to the contrary, the date of the termination of an agency fixes the time when the right to compensation for services rendered thereunder accrues, and the statute of limitations on any suit or action to recover the same runs from that date.

In *Lipscomb v. Tucker County Commission*, 197 W.Va. 84, 475 S.E.2d 84 (1996), a suit to recover county years-of-service salary benefits that had been denied plaintiff, on appeal from a dismissal on grounds of statute of limitations, in reversing the trial court's dismissal, the court stated:

Appellant argues that her civil suit was filed within the five-year statute of limitations provided by W.Va. Code §55-26-6 for claims under oral or implied contracts, because her cause of action did not accrue until February 28, 1990, the date when the Wage and Hour Review Board adopted the month wage scale that provided for a years-of-service adjustment. We agree with appellant. Prior to February 20, 1990, appellant had no expectation of longevity pay, no means to measure or calculate it, and certainly no right to compel the County Commission to pay such an adjustment before it became a part of the employment contract. A statute of

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

197 W.Va. at 90.

In *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343 (1971), a case involving a defense of statute of limitations where there had been an anticipatory breach, the court held, in Syllabus Points 1 and 2, as follows:

1. The general rule in cases of anticipatory breach of contract is that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue any of three remedies: he may treat the contract as rescinded and recover on quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing.
2. When an action is brought after the time fixed by an executory contract for the beginning of performance by a party who has committed an anticipatory breach, the period of limitations runs not from the time of such breach but from the time fixed for performance by the defaulting party.

The case of *Annon v. Lucas*, *supra*, was quoted from with approval by Judge Stamp in *LaPosta Oldsmobile, Inc., v. General Motors Corp.*, 426 F. Supp.2d 346, 353 (N.D. W.Va. 2006).

This opinion also said: “In West Virginia, a right of action upon a contract accrues when the agreement is to be performed or when payment becomes due.”

The West Virginia position on the principle here involved seems clear. Although Petitioners’ counsel has not found and Respondent has not cited, a West Virginia case directly on point, an Oklahoma case is quite close and is, it is submitted, quite persuasive. In *Steelman v.*

Oklahoma Police Pension & Retirement System, 128 P.3d 1090 (Okla. Civ. App. 2005), three retired police officers brought an action against the state police retirement system to further enhance their retirement benefits based upon their pre-employment military service. The appellate court held that two of the officers' breach of contract claims were barred by an agreement to accept certain agreed payments, but the third officer, McKenzie, was to have the enhanced retirement benefits as required in that case by statute.

The court quoted the Oklahoma Supreme Court as having held that "the contract between the state and its employees [comes] into existence at the point of eligibility . . ." and that "the retirement pension benefits provided to firefighters and police officers under our state statutory schemes become absolute at the time those benefits become payable to those eligible . . . [citation omitted]" 128 P.3d at 1096.

In differentiating between McKenzie and the other officers (who had signed certain agreements), the court held as follows:

In the present case, OPPRS notified McKenzie in 1994 of how it would calculate his personal military service credits. We note that, unlike Steelman, McKenzie did not sign binding documents accepting OPPRS calculations. But, in 1994, McKenzie was not receiving nor was he eligible to receive pension benefits. Thus, OPPRS notification dealt with McKenzie's future potential benefits whereas the *Kinzy* notification dealt with retroactive benefits for retirees and those eligible for pension payments.

* * *

We do not find the events in 1994 to have triggered the statute of limitations for a breach of contract cause of action by McKenzie.

128 P.3d at 1097.

In *Towson University v. Conte*, 862 A.2d 94 (Md. 2004), the director of an institute of the

university sued the university for wrongful discharge and breach of contract. On the issue of statute of limitations, the Maryland court held as follows:

With respect to Conte's alleged failure to comply with the one-year limitations period provided in §12-202 for bringing a breach of contract action against the State, it would appear that his action was, in fact, timely. His contract and employment were formally and effectively terminated on January 26, 1999, and his action was filed on January 24, 2000. Whether Dr. Conte could have sued for injunctive relief prior to January 26, 1999, to preclude Towson University from terminating his contract or for an anticipatory breach of contract – an issue that is not before us – his cause of action for the actual breach did not and could not arise until the contract was, in fact, terminated.

862 A.2d at 957.

Another statute of limitations case is *Garrigan v. Village of Malverne*, 874 N.Y.S.2d 503 (A.D. 2 Dept. N.Y. 2009), in which a retired police officer's cause of action for breach of contract based on an agreement which provided that the officer would receive payment for unused vacation, sick, and terminal leave upon termination from employment, was held not to have accrued upon the officer's appointment to chief of police, where the record did not support a determination that the appointment was a termination from employment within the meaning of the contract. The unused vacation and sick leave pay were earned between 1957 and 1973, when he was appointed chief. He retired in 2001. His request for this sum was denied and he filed his suit in 2002. His suit was held to be timely.

In the Circuit Court of Calhoun County, in support of its Motion to Dismiss, Respondent cited *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 749, 466 S.E.2d 810 (1995) (per curiam), for the proposition that "the statute of limitations begins to run when the breach of the contract occurs or when the act breaching the contract becomes known." In other words, apparently

Mr. Harris should have filed his lawsuit back in 1988, just after his employment began. Defendant's *McKenzie* case was about a coal lease for which lessors sought a forfeiture and damages based on breaches occurring more than ten years before. There was nothing about the existence of the lease that prevented the plaintiffs/lessors from suing the defendants/lessees when the breach occurred and caused Plaintiffs immediate damages. The "forfeiture" of the lease was declared by plaintiffs themselves at such time as they chose and had no effect on plaintiffs' earlier immediate right to sue. The case had nothing to do with retirement or with entitlements that had not accrued until retirement took place.

In the Federal case of *Thomas v. Branch Banking & Trust Co.*, 443 F.Supp. 2d 806 (N.D. W.Va. 2006), after discussing the *McKenzie* case (cited by the defendant bank), Judge Keeley ruled as follows:

BB&T argues that Thomas's contract claims could not have accrued any later because BB&T's only duty under the 1995 transfer agreement was to allow Mr. Thomas to transfer his residual ownership interest in the shares of the stock to his wife. Thus BB&T reasons that the breach of contract claims could have accrued only if and when BB&T refused to allow the ownership transfer in 1995.

BB&T's argument on this issue, however, contains at least one fatal flaw. In her complaint, Thomas does not aver that one Valley/BB&T breached an obligation to allow the stock transfer from her husband to go forward. Rather, she alleges that One Valley entered into a security contract with her and her husband in which she would receive, upon satisfaction of the two secured loans, some of the shares that Mr. Thomas had originally pledged as collateral to the bank. (Complaint ¶ 22). Thomas further alleges that BB&T did not convey 4076 of those share to her after the loans were fully paid off in February, 2003. (Compl. ¶ 20).

Taking those factual allegations as true, as this Court must at this stage of the litigation, it is clear that BB&T's obligation to convey the share certificates did not become due for performance until February, 2003. Consequently, Thomas's breach of contract claims did not

accrue until BB&T allegedly failed to convey the certificates at that time. As Thomas filed her suit in March, 2006, her breach of contract claims are not barred by the ten-year limitation period for actions on written contracts contained in §55-2-6.

443 F. Supp. 2d at 809-10.

The West Virginia case of *Booth v. Sims*, 193 W.Va. 223, 456 S.E.2d 167 (1994), addresses another, albeit highly relevant, aspect of this situation. The *Booth* case was a mandamus proceeding in the Supreme Court of Appeals relating to actions of the Public Employees Retirement Board under newly-passed legislation to reduce benefits for retirees, and tested the constitutionality of the legislation. Significant to the present question is Syllabus Point No. 21 of the *Booth* case which reads as follows: “Although the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee’s pension property rights once it establishes the system unless the employee acquiesces in the change to the pension plan *or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.*” (emphasis supplied).

In the body of the opinion in *Booth v. Sims*, the Court said as follows:

“By 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 this same participation *does* create an employee’s reliance interest in pension benefits. Consequently, an employee’s membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and has substantially relied to his or her detriment.” (emphasis in original.)

193 W.Va. at 337.

It should be abundantly clear that by meeting certain eligibility requirements, Eddie Harris as a public employee acquired a right to expect a certain level of payment under the PERS Pension Plan but, because he was an employee not yet eligible for payment, this was a mere expectancy. He had yet to meet the age and service requirements for benefits and, had he never done so, he would have not received a pension at all. Eddie did in fact thereafter meet the age and service requirements for benefits. He retired. His pension was made less than it should have been by the actions of the County Commission during a time when Eddie Harris was working toward a pension but his right was then nothing more than a “mere expectancy” in the words of the Supreme Court of Appeals in *Booth v Sims*.

Eddie filed this action early in the second year following his retirement. With his retirement, his years of service and his saving up of sick and vacation leave days (a practice intentionally encouraged by the feature of applying accumulated sick and personal leave days to post-retirement PEIA premiums) finally reached fruition. He was now entitled to the full, agreed benefit of his retirement that he had worked toward since 1987. The County Commission’s insistence that he should have sued them during his first twelve years of employment or else forget about it is ludicrous and simply wrong.

The order of the Circuit Court of Calhoun County of March 7, 2016, finding that the statute of limitations began to run only at the time of retirement, and should be upheld.

CONCLUSION

WHEREFORE, based upon the foregoing matters, Petitioners Edward and Sandra Harris respectfully pray that the Supreme Court of Appeals of West Virginia enter an Order affirming said

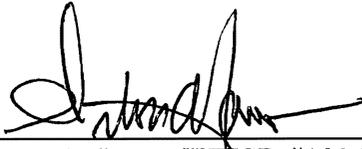
Order of March 7, 2016, and answering the Certified Question as the Circuit Court did, with a resounding No.

Respectfully submitted, this 14th day of October, 2016.

EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs Below, Petitioners,

By Counsel.



Orton A. Jones (WVSB #1924)
HEDGES, JONES, WHITTIER & HEDGES
Attorneys at Law
P. O. Box 7
Spencer, West Virginia 25276
Telephone: 304-927-3790
Facsimile: 304-927-6050
Counsel for Plaintiffs

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

16-0735

EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs Below, Petitioners,

vs.

CIVIL ACTION NO. 12-C-14
Hon. Thomas C. Evans III
Circuit Judge

THE COUNTY COMMISSION OF CALHOUN
COUNTY, a governmental corporation in and for
Calhoun County, West Virginia,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Orton A. Jones, Esquire, counsel for Petitioners, Edward E. Harris and Sandra L. Harris, certify that I have served the foregoing **“Petitioners’ Brief Upon Certified Question”** on the following by depositing same into the United States Mail, First Class, postage pre-paid this 13th day of October, 2017, addressed to the following:

Adam K. Strider, Esq.
Joseph L. Amos, Jr., Esq.
Attorneys at Law
The Miller Building
2 Hale Street
Charleston, West Virginia 25301
304-343-7915 - Fax
Counsel for Defendant, Below Respondent



Orton A. Jones (WVSB #1924)
HEDGES, JONES, WHITTIER & HEDGES
Attorneys at Law
P. O. Box 7
Spencer, West Virginia 25276
ortonjoneshjwh@yahoo.com