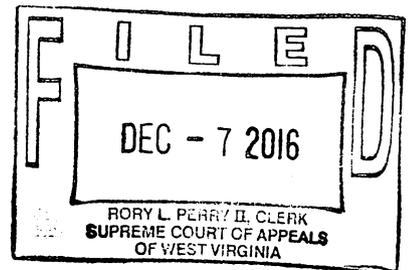


IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA



CASE NO. 16-0735

EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs Below, Petitioners,

vs.

Upon Certified Question
From the Circuit Court of Calhoun County
Hon. Thomas C. Evans III, Judge
Civil Action No. 12-C-14

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

Defendant Below, Respondent.

PETITIONERS' REPLY BRIEF
UPON CERTIFIED QUESTION

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**PETITIONERS' REPLY BRIEF
UPON CERTIFIED QUESTION**

Come now petitioners Edward E. Harris and Sandra L. Harris, by counsel, Orton A. Jones, Esquire, and respectfully file Petitioners' Reply Brief upon Certified Question in reply to the matters set out in Respondent's Brief Upon Certified Question.

Petitioners believe that the Specific Points Arising from Certified Question and the Statement of the Case, both contained in their Brief filed herein October 14, 2016, adequately set out the facts of this case upon which the Certified Question arose. In its Order entered March 7, 2016, the Circuit Court of Calhoun County denied Respondent's Motion to Dismiss the Complaint, holding 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 made an identical finding with regard to retirement PEIA coverage in its said Order. (Appendix 373).

In said Order of March 7, 2016, the Circuit Court concluded that the action was timely filed and that the statute of limitations began to run when Petitioner Edward L. Harris retired on December 31, 2010.

In its Order entered August 1, 2016, the Circuit Court granted Respondent's Motion to Certify Statute of Limitations Question to the Supreme Court of Appeals or, in the Alternative, to Reconsider. In this 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)

ARGUMENT

Respondent Calhoun County Commission begins its argument with the following assertion:

West Virginia case precedent previously made clear that a contract is breached when the breach occurs and the plaintiff becomes aware of the breach. See *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 749, 466 S.E.2d 810, 817 (1995) (per curiam). Never has this Court held that the statute of limitations on a contract action begins to run when a plaintiff incurs consequential damages. That established judicial practice should continue in this matter.

(Respondent's Brief 6)

The *McKenzie* case is the only West Virginia case cited by Respondent for this proposition. This case is inapplicable to the present issue and Respondent's assertion is wrong on several levels.

First, the *McKenzie* case did not involve a pension question or any other question in which the right to sue had not yet occurred. *McKenzie* dealt with violations of a coal lease by the lessee. They all occurred more than ten years before the lessors filed suit. The trial court and this Court held that the right to sue accrued when the violations occurred. The lessors (plaintiffs) alleged that they had declared a forfeiture of the lease within ten years and that was when the cause of action accrued. The trial court and this Court held that the ongoing existence of the lease did not prevent plaintiffs from suing for damages, and that plaintiffs' attempt to declare a forfeiture was ineffective anyway.

The Court in *McKenzie* said: "The statute of limitations does not begin to run when a party to the contract declares a forfeiture." 195 W.Va. at 749.

Significantly, the *McKenzie* opinion seems to expressly distinguish its holding from pension cases. A passage of the *McKenzie* opinion, Petitioners submit, should take that case out of consideration regarding the issue here before the Court. That passage is as follows:

The McKenzies allege that these claims only "accrued" when Island

Creek began “holding over” on December 12, 1974. Thus the McKenzies argue that their complaint is timely because it was filed within ten years of the date on which they allege the lease terminated. In support of their argument, the only authority they cite is *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), an ERISA case in which the Court of Appeals held that forfeiture of pension rights did not occur upon an employee’s misconduct or discharge but occurred when a pension committee declared the forfeiture by denying the employee’s pension claim. However, the appeals court’s decision was based on an interpretation of the vested pension rights under ERISA §203(a), 29 U.S.C. §1053(a). *Given the specific question of Winer v. Edison Bros. Stores Pension Plan concerning the vesting of pension rights, we find that the ERISA case has little persuasive value in determining when a coal lease is forfeited.*

195 W.Va. at 749 (italics supplied).

Thus, even in the *McKenzie* opinion itself, the Court recognized that unaccrued pension rights are or may be different from the great majority of contract claims.

In the above-quoted opening paragraph of the Calhoun County Commission’s Brief (Respondent’s Brief 6), Respondent asserted that “[n]ever has this Court held that the statute of limitations on a contract action begins to run when a plaintiff incurs consequential damages.

The issue before this Court is not about consequential damages. This case is about the right to sue and when it accrues.

The statute upon which this issue is grounded is West Virginia Code Chapter 55, Article 2, Section 6 [Thomson-West 2002], which provides, in pertinent part:

Every action to recover money . . . or on any other contract . . . shall be brought within the following number of years *next after the right to bring the same shall have accrued*, that is to say: . . .

W.Va. Code §55-2-6. (italics supplied)

The fact is, the West Virginia Court has a long history of cases in which the plaintiff’s right

to sue occurs long after the event or breach, by well over ten years, and in which the statute of limitations is not a bar to the suit.

Respondent has overlooked the case of *Clark v. Gruber*, 74 W.Va. 533, 82 S.E.338 (1914), discussed on pages 12 and 13 of Petitioners' Brief, which involved a claim for boarding and nursing care in 1904 and 1905, filed after the decedent's death, in or after 1910, more than five years after the services claimed for had accrued. This 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.

This 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.

Certainly Edward Harris's services were not completed and the contemplated event of his retirement had not happened until December 31, 2010.

Another West Virginia case cited by Petitioners and not addressed by Respondent is *Wren v. Wehn*, 122 W.Va. 625, 12 S.E.2d 809 (1942), which was a suit relating to an agency contract. This Court held, in the sole Syllabus Point, as follows:

In the absence of arrangement to the contrary, the date of 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 *Stafford v. Bishop*, 98 W.Va. 625, 127 S.E. 501 (1925), this Court held, in its First Syllabus Point, as follows:

When an attorney engages to perform certain services for a client during an indefinite period, the statute of limitations is inoperative thereon until his employment is terminated.

This was a lawsuit filed in 1923 for services rendered in 1907 in the probate of a will and for certain further services rendered from 1907 through the next 16 years to the estate. Certain other items not expressly within that representation, occurring in 1907, 1915 and 1916, were held to be time-barred. The services rendered in 1907 in the probate process were held to be timely and enforceable.

This Court also held as follows:

The plaintiff should be allowed a reasonable compensation for his services to the estate and the executor during the 16 years preceding this action, in so far as he supervised the paying out and division of money, directed the deposit of money and investments, and assisted the defendant in his other duties as executor. His compensation should be limited strictly to services in these respects.

127 S.E. at 504.

The evidence on this point was held to be inadequate and on that point the judgment was reversed and a new trial was ordered.

This Court in *Stafford* quoted with approval at 127 S.E. at 504, from *Koen v. Koen*, 86 W.Va. 502, 103 S.E. 322 (1920), as follows:

“Where an agency or trusteeship has currency, or involves numerous acts or a course of business involving many transactions, the statute of limitations begins to run, not from the date of each transaction, but from the termination of such agency.”

Koen v. Koen, 86 W.Va. 502, 103 S.E. 322

Thus, it has long been the law in this state that the right to bring the action having accrued and the act constituting the breach having occurred are not synonymous terms. Although the two often occur simultaneously, they are not the same.

Clearly, the right to bring a civil action against one's employer for an act or omission that will diminish the employee's future retirement benefits *if and when* the employee *thereafter* lives long enough, does not quit, get laid off or get fired from his or her employment and successfully retires therefrom, accrues when he or she fully performs his or her side of the bargain, and retires.

Respondent asserts, in the third paragraph of its Argument that "[t]he courts in majority of other states have followed the common law just as closely as West Virginia." (Respondent's Brief 6.) Respondent then proceeds to discuss a number of reported cases from other states. None of these cases support Respondent's position in the case before this Court.

The first such case cited by Respondent is *Cavanaugh v. City of Omaha*, 590 N.W.2d 541 (Neb. 1998), quoting ". . . a cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of . . . any actual injury occasioned to him or her. *Cavanaugh* at 544."

The Nebraska court also said, in its Syllabus Point No. 1 and at 580 N.W.2d at 544, the following:

The point at which a statute of limitations commences to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run *when the aggrieved party has the right to institute and maintain suit*. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action.

(emphasis supplied)

The *Cavanaugh* case was not a pension case or a case in which plaintiff had to perform future services to qualify for a certain benefit. In that case, the city of Omaha erred in improperly posting a police promotion test. The city then delayed the test while it made a proper posting. At the test date in the defective posting, plaintiff was eligible by years served for the lieutenant position and a certain

other sergeant was not. By the time of the later posting, the other sergeant had become eligible. Both took the test. As a result, the other sergeant had the higher score and got the position. Plaintiff sued the city.

The Nebraska court held that the cause of action arose when the city posted the defective notice, not when plaintiff later took the test and the sergeant who had been ineligible at the time the first (and cancelled) test was improperly posted the successful applicant. There was nothing to prevent plaintiff from suing at the time the first test date was cancelled for a mistake committed by the city. Plaintiff did not need to fulfill some future requirement (such as retiring) before he could sue.

Respondent Calhoun County Commission next cites *Howarth v. First Nat'l Bank of Anchorage*, 540 P.2d 486, 490-491 (Alaska 1975), for the proposition that “[a] cause of action for breach of contract accrues as soon as the promissor fails to do the thing contracted for, and the statute of limitations begins to run at such time” (Respondent’s Brief 6-7).

More space is required to reflect and report what the Alaska court actually said and held relating to any point relevant to the present case. The *Howarth* case involved a suit by the seller of improved real estate against a bank that had agreed to protect and preserve his security interest in the property upon his relinquishing to be cancelled his insurance policies on the property. The bank agreed to do so on August 22, 1961. Plaintiff’s policies were cancelled. The bank assured plaintiff that there was presently adequate insurance. As it happened, there was not.

On September 10, 1961, the real property sustained severe fire damage. Several days later, plaintiff learned that no replacement insurance had been obtained. On September 11, 1967, plaintiff filed that suit and the bank filed a motion for summary judgment, based on, *inter alia*, the six-year statute of limitations. The Supreme Court of Alaska reversed the trial court’s summary judgment and

ruled for plaintiff, in language that strongly supports the position here of Petitioner Edward Harris.

The court stated as follows:

The statute of limitations begins to run in contract causes of action from the time the right of action accrues. This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as consequences of the breach. *A contract action actually accrues or arises when there is an existing right to sue for breach of the contract.*

Ordinarily, a cause of action for breach of contract accrues as soon as the promisor fails to do the thing contracted for, and the statute of limitations begins to run at such time. It is not material that the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action.

However, if Howarth can prove that the bank had a contractual duty “to preserve and protect” his property, including a duty to maintain fire insurance, then the statute of limitations will not bar recovery. The bank could have fulfilled its duty either by acting as the insurer of the property or by contracting with an insurance company. In either case, appellant’s property would have been protected. *Thus, breach would not occur until Howarth’s property suffered fire damage and additionally the bank refused to compensate appellant.*

Since the fire occurred on September 10, 1961, Howarth would not have sought compensation from the insurance companies or the bank until some time shortly after that date. Howarth commenced the present action on September 11, 1967. Thus, the six-year statute of limitations applicable to contract actions does not bar relief.

540 P.2d at 490-491. (emphasis supplied.)

Respondent next cites *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254 (Del. Superior Ct. 1966), for the general proposition that the statute in contract actions runs at the time of the resulting injury. (Respondent’s Brief 7). *Nardo* was an action filed against the builder for a roof job installed in 1957 for dampness that began in 1959 and rafter sag in 1960 or 1961. The suit was filed in 1967

and was barred by a three-year statute of limitations. There is no resemblance whatever to the case here before this Court.

Next cited by Respondent is *Roberts v. Richard & Sons., Inc.*, 304 A.2d 364 (N.H. 1973), cited for the proposition that a breach of contract action accrues when the breach occurs, whether any damage then occurred or not. (Respondent's Brief 7). The *Roberts* case deals with the discovery rule. The suit sought damages for the cost of remedying defects in a garage and showroom erected by the defendant. The building was completed in November 1963. The suit was brought in February 1970. The statute of limitations was six years. Plaintiff argued that the defects were not discovered by him until May 1964. The court held that the breach occurred at completion of the building, and observed the following:

The factual situation here is not as persuasive as in the tort actions involving malpractice since on the basis of the plaintiff's allegations his ignorance of his cause of action for a few months left him over five years to bring his action.

504 A.2d at 366.

In any event, Petitioners submit that nothing about the *Roberts* case is instructive on the present issue.

Respondent next cites *River Community Bank, N.A. v. Bank of N.C.*, 215 U.S. Dist. LEXIS 121034 (W.D. Va. Sept. 11, 2015), for the proposition that a claim for breach of contract accrues and the statute of limitations begins to run at the time of the breach and plaintiffs can recover nominal damages. (Respondent's Brief 7).

In the *River Community Bank* case, which was between two banks, plaintiff and defendant's predecessor entered into a loan purchase agreement (LPA) with plaintiff purchasing part of the loan

obligation. Defendant's predecessor warranted that the loan documents were valid. The LPA was signed on August 6, 2009. The borrower's signatures were proven to have been forged and the borrower filed bankruptcy in 2011. The suit was filed in March 2014. The Virginia federal court held that the North Carolina three-year statute of limitations applied and that the cause of action arose and the breach was completed under the warranties when the LPA was signed in 2009 and the action was time-barred.

The Virginia federal district court cited and quoted from several North Carolina cases. One was *Penley v. Penley*, 332 S.E.2d 51 (N.C.1985) in which case the North Carolina court said:

In general, an action for breach of contract must be brought within three years *from the time of the accrual of the cause of action*. A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. The statute begins to run on the date the promise is broken. A new promise to pay fixes a new date from which the statute runs. *In no event can a statute of limitation begin to run until plaintiff is entitled to institute action.*

332 S.E.2d at 62. (Internal citations omitted.) LEXIS at *10. (emphasis supplied.)

Another case cited in *River Community Bank v. Bank of North Carolina, supra*, was *Thurston Motor Lines, Inc., v. General Motors Corp.*, 128 S.E.2d 413 (N.C. 1962). The quotation from the *Thurston* case that was abbreviated in *River Community Bank* is set out here in full as follows:

It is a firmly established rule *that with certain exceptions, such as in the cases of covenants and indemnity contracts*, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action. It is sufficient if nominal damages are recoverable for the breach or for the wrong, and it is unimportant that the actual or substantial damage is not discovered or does not occur until later.

128 S.E.2d at 415. LEXIS at *11. (emphasis supplied.) Thus, in *Thurston* the North Carolina court recognized that there were exceptions to its "firmly established rule."

The *Thurston Motor Lines* case also said:

In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute a suit arises, . . .

128 S.E.2d at 415. (Internal citations of C.J.S. and Am.Jur. omitted.) LEXIS at *11

Respondent next quotes from the New York Court of Appeals case of *Ely-Cruikshank Co., v. Bank of Montreal*, 615 N.E.2d 985, 987 (N.Y. 1993), as saying: “Since nominal damages are always available in breach of contract actions, all of the elements necessary to maintain a lawsuit and obtain relief in court [are] present at the time of the alleged breach [.]”

This is not quite what the New York court said. Following is the cited language of the New York court with the differences from Respondent’s quotation as set out above in italics:

Since nominal damages are always in breach of contract actions, all of the elements necessary to maintain a lawsuit and obtain relief in court *were* present at the time of the alleged breach *in this case*.

615 N.E.2d at 987. (Internal citations and quotation marks omitted). (emphasis supplied)

This difference in quotations is significant in this connection: The case of *Bauer v. Roman Catholic Diocese of Albany*, 457 N.Y.S.2d 1003 (N.Y.S.Ct. App. Div. 1982), is a case involving retirement benefits in an appellate court of the same state, and had an entirely difference result.

In the *Bauer* case, under a memorandum of understanding, plaintiff worked for defendant from 1958 to 1966. He then worked for Albany Medical College until January 9, 1970, when he rejoined defendant and the parties entered into an agreement whereby plaintiff would receive, at age 65, retirement benefits equal to the benefit he would have received from Albany Medical College in addition to the regular retirement from defendant. Plaintiff began working for defendant January 15, 1970. This agreement was reduced to writing and signed on November 9, 1970. On October 4, 1973,

plaintiff requested that defendant implement an investment fund for the payment of the promised benefits. This was never done. Plaintiff left defendant's employ on April 1, 1978.

The trial court on February 4, 1982, denied defendant's motion for summary judgment and to dismiss the complaint as barred by the six-year statute of limitations. The appellate court affirmed that order and held as follows:

The agreement to pay retirement benefits designates the parties, identifies and describes the subject matter of the agreement and appears to state the essential or material terms of the contract. Whether all the material elements of the agreement are in fact contained therein must await disposition of that issue in a plenary trial. In the present posture of the case, however, the agreement is sufficient to survive a summary motion to dismiss. *Plaintiff has six years in which to sue for breach of contract. The breach occurred either on April 1, 1978 when plaintiff's employment ceased or on the subsequent date when plaintiff became entitled to receive his retirement benefits, either of which is well within the prescribed Statute of Limitations.*

457 N.Y.S.2d at 1004. (emphasis supplied.)

The last foreign state case cited by Respondent in support of its position is *Medical Jet S.A. v. Signature Flight Support Palm Beach, Inc.*, 941 So.2d 576 (Fla. App. 2006), (Respondent's Brief 8), in which the cause of action accrued when defendant performed an aircraft inspection without proper certification, not when plaintiff's aircraft was later grounded. The Florida District Court of Appeal held that a cause of action accrues at the time of the breach, not from the time when consequential damages result or become ascertained.

The court in *Medical Jet* did say, however: "*This is not one of those exceptional cases where the general rule does not apply.*" 941 So.2d at 578. (emphasis supplied.)

Respondent also quotes from 18 Richard A. Lord, *Williston on Contracts* (3d ed. 1978) to the effect that the statute of limitations "runs from the time of the breach, although no damage occurs

until later.” (Respondent’s Brief 6).

Professor Lord also has something to say in his Fourth Edition of *Williston on Contracts* (2004) that is more pertinent to the case at hand, including the following:

[T]he general view is that, although in an entire contract for continuous indeterminate services there is a stated or customary time of periodic payments, the statute [of limitations] is not put into operation from such periodic dates but only from termination of the employment.

31 Richard A. Lord, *Williston on Contracts* §79.25 (4th ed. 2004).

Respondent cites the United States Supreme Court opinion in *Order of Railway Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944), and quotes the first portion of the penultimate paragraph of the opinion. Omitting the remainder of that paragraph and the whole of the next (and last) paragraph is to miss the entire thrust of that opinion. That omitted language, preceded by the last sentence quoted by Respondent, is as follows:

The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. *Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued.*

Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed. We find no basis for applying a state statute of limitations to cut off the right of the Adjustment Board to consider the claims or to absolve the courts from the duty to enforce an award.

321 U.S. at 349. (italics supplied.)

The Supreme Court reversed the Circuit Court of Appeals in this case, holding as follows:

We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier’s efforts

to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law.

The Circuit Court of Appeals held the claims barred by the state six-year statute of limitations applicable in the forum. *it is true that the enforcement of the award results in entering judgment in 1942 on claims that began to accrue in 1930 and some of which ceased to accrue over six years before the suit in the District Court was commenced.* It is also true that some of these have accrued in large amounts.

321 U.S. at 347. (emphasis supplied.)

The Supreme Court thus held that the claim was timely filed.

Respondent cites the West Virginia case of *Flanigan v. West Virginia Public Employees Retirement System*, 176 W.Va. 330, 342 S.E.2d 414 (1986), for the proposition that the suit was not dismissed as unripe, “demonstrating that a PERS participant need not be retired and eligible to receive retirement benefits in order for a claim for failure to timely enroll an employee to accrue.” (Respondent’s Brief 12.)

The *Flanigan* case stands for no such proposition and demonstrates nothing of the kind urged by Respondent.

Flanigan was a mandamus proceeding originating in this Court. Flanigan was a county magistrate seeking to join the PERS and transfer service credit from the Teachers Retirement System to PERS. The case had no similarity with the case here under consideration. No limitation of actions issue arose.

This Court did have some things to say in *Flanigan*, however, that would be well to keep in mind in the present case:

In approaching a resolution of this matter, it is noted that under West Virginia code §5-10-3a (1979 Replacement vol.) we are directed to give substantial weight to the remedial nature of the PERS Act by the

legislative ordination to construe its provision liberally in favor of its intended beneficiaries.

342 S.E. 2d at 419

Another such item is:

Pursuant to the PERS Act, every participating public employer carries out statutory duties as an agent for PERS, such as making withholdings from salaries, transmitting funds, and providing relevant employee information and records. Under West Virginia Code §5-10-29(c) (1979 Replacement Vol.), every employing agency is authorized to, and by practical necessity must, make the determination of eligibility in order to carry out their duty to deduct from each payroll employee contributions due PERS.

342 S.E. 2d at 420

Petitioners cited *Lipscomb v. Tucker County Commission*, 197 W.Va. 84, 475 S.E.2d 84 (1996), in their opening Brief for the proposition that “[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.” (Petitioners’ Brief 13-14). *Lipscomb* was clearly not a retirement case.

Respondent urges as a distinguishing feature that the county commission in *Lipscomb* had a duty to make payments to Ms. Lipscomb, whereas “the Respondent in the present case never had a duty to make retirement payments to Mr. Harris.” (Respondent’s Brief 11-12). Petitioners view that statement as a non sequitur. Of course, the Calhoun County Commission had no duty to *make* retirement payments *to Mr. Harris*, but the County Commission *did* have a duty to *withhold* retirement contributions *from* his paycheck and *send* them to *PERS and* a duty to *send* to PERS the County Commission’s *own funds* as the employer’s contribution to Mr. Harris’s retirement, *and* the County Commission *did* have a duty (that it undertook for *all* of its employees) to *make* payments from its *own funds* to PEIA for Mr. Harris’s insurance premiums, all of which Respondent *failed* to

do, all of which *diminished* the *retirement benefits* that Mr. Harris *finally earned* and was entitled to *upon his retirement*, when, under W.Va. Code §55-2-6, his right to bring the action had accrued, when, under *Lipscomb*, all of the elements of a cause of action entitling him to recover in fact came to exist.

Further, the County Commission *did* have a duty to *make* PEIA premium payments for Mr. Harri's *health* insurance in 1987 and early 1988 that *failed* to make, resulting in his loss of benefit in retirement from his accrued sick leave by preventing him from being grandfathered in to the pre-July 1988 eligible benefit. Thanks to the County Commission's failure in 1987 and pre-July 1988, the HARRISES' PEIA health insurance stops on December 31, 2016, in the current month, and would not have if Respondent had fulfilled its assumed obligation to Mr. Harris in 1987 and pre-July 1988.

Significantly, Respondent does not address in any manner the West Virginia case of *Booth v. Sims*, 193 W.Va. 223, 456 S.E.2d 167 (1994), discussed on page 18 of Petitioners' Opening Brief. While the *Booth* case does not address statutes of limitations as such, it does clearly and succinctly define the nature of a public employee's relationship with the retirement system.

As the *Booth* opinion sets out (193 W.Va. at 337), a public employee acquires a *right* to payment under a pension plan *by meeting certain eligibility requirements*. Among the essential requirements are age and service over many years. If the public employee does not meet these requirements, he or she *is not entitled to a pension*. For any employee not yet eligible for payment, his right to payment is a *mere expectancy*. After some indeterminate number of years he or she acquires a "reliance interest" in benefits; that is, the State Legislature cannot reduce the benefits he or she has been working toward to the exclusion of other employment. Yet, he or she is not eligible for any benefits even then, until he or she fulfills the requirements.

It is ludicrous to suggest, much less advocate as Respondent does, that Eddie Harris, with less than two years service, had a duty back in 1989 either to sue his employer for mishandling a retirement expectancy that might never reach fruition, or else forget about it.

In its zeal to avoid doing justice and fair dealing with its faithful long-time servant who gave many years of his energetic once-young life to the always-kept-clean offices, hallways, bathrooms, courtroom and environs of their courthouse, Respondent Calhoun County Commission strives to deny him even his day in court, evading its responsibility to him for having served him poorly, and has the chutzpah to suggest (Respondent's Brief 15) that their old janitor "h[e]ld off" on filing a suit "until some real money accrues."

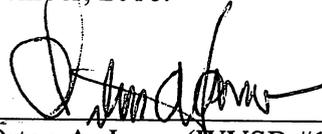
Petitioners submit that Edward Harris is entitled to his day in court, a day that only became available when his right to bring this action accrued, when he retired and became entitled to all the benefits of retirement he had worked for and finally earned upon his retirement, including the benefits Respondent lost for him by its serious omissions.

To say, as Respondent does (Respondent's Brief 15), that "[a]ssent by this Court to Petitioners' argument would reward bad actors and those who knowingly sleep on their rights" is to miss completely the issue of this case as posed in the Certified Question.

CONCLUSION

WHEREFORE, for all the reasons stated herein and in Petitioners' Initial Brief, Petitioners Edward and Sandra Harris respectfully pray that the Honorable Supreme Court of Appeals of West Virginia enter an Order affirming the ruling and Order of the Circuit Court of Calhoun County of March 7, 2016, and answering the Certified Question with a strong and reasoned NO.

Respectfully submitted this 7th day of December, 2016.



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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

CASE NO. 16-0735

EDWARD E. HARRIS and
SANDRA L. HARRIS,

Plaintiffs Below, Petitioners,

vs.

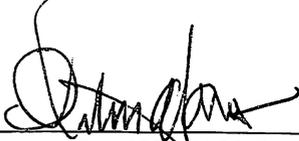
THE COUNTY COMMISSION OF CALHOUN
COUNTY, a governmental corporation in and for
Calhoun County, West Virginia,

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’ Reply Brief Upon Certified Question”** on the following by depositing same into the United States Mail, First Class, postage pre-paid this 7th day of December, 2016, addressed to the following:

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