IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Edward E. Harris and Sandra L. Harris,
Plaintiffs below, Petitioners

vs.

The County Commission of Calhoun County
Defendant below, Respondent

Case No. 16-0735

RESPONDENT'S BRIEF
UPON CERTIFIED QUESTION

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RESPONDENT'S BRIEF UPON CERTIFIED QUESTION

COMES NOW the Respondent, The County Commission of Calhoun County (the "Respondent" or the "Commission"), by counsel, Karen H. Miller, Joseph L. Amos, Jr., and Adam K. Strider, of Miller & Amos, Attorneys at Law, and, pursuant to the Rules of Appellate Procedure, respectfully submits "Respondent's Brief upon Certified Question."

I. 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?

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.

II. Statement of the Case

Petitioner Edward E. Harris ("Mr. Harris") began employment with Respondent as a courthouse custodian in August of 1987. Joint Appendix ("J.A.") at 20. Most of the exact terms and conditions of his initial employment are either not known or not recalled, as such employment began approximately thirty (30) years ago. The Petitioners claim that, according to an employee handbook which was allegedly in effect at the time, the Respondent was to enroll Mr. Harris in Public Employee's Insurance Agency ("PEIA") and Public Employees Retirement System ("PERS") benefits at the outset of his employment. J.A. at 6-8. This alleged employee handbook has not been produced, nor has any other document or testimony stating that the Respondent agreed to automatically enroll every employee in these benefits at the onset of their

employment. No document or testimony has been produced evidencing that Mr. Harris wished or requested to be enrolled in PEIA or PERS benefits at the beginning of his employment.

At all relevant times, Mr. Harris' paychecks contained abbreviations signifying which deductions were made from the gross paycheck amount. See, e.g., J.A. at 73. In August 1988, the abbreviation "Ret." began to appear on Mr. Harris' paychecks, along with an accompanying deduction of approximately Nine Dollars and forty-five cents ($9.45) per paycheck. See, e.g., J.A. at 115. PERS records show the year 1989 as his first year of credited service. J.A. at 238. The reason for this discrepancy is not known, nor is the identity of the party responsible. In any case, the Petitioners do not allege that any irregularity in the handling of Mr. Harris' PERS membership occurred at any point after January 1989.

PEIA records show that Mr. Harris was first enrolled in PEIA insurance coverage in August 1988. J.A. at 254; see also Supplemental Appendix ("S.A.") at 1. Enrollment forms, dated August 8, 1988 and signed by Mr. Harris, have been recovered. *Id.* These enrollment forms, which bear Mr. Harris's signature, list Mr. Harris's first date of employment as "August 5, 1988," giving him clear notice of the fact that he was not enrolled in PEIA in 1987. *Id.* At this stage in discovery, it is not known why Mr. Harris was not enrolled in PEIA from August of 1987 through August of 1988. For reasons which are still unclear, Mr. Harris also filled out a PEIA enrollment form in 1991. J.A. at 277. In 1996, the Respondent began to allow employees to receive the cost of their insurance premium as additional cash compensation in lieu of insurance coverage. Electing to take advantage of this option, Mr. Harris withdrew his PEIA membership on July 13, 1996. J.A. at 237. He re-enrolled in coverage on May 7, 1997. J.A. at 236. PEIA did not consider this break in coverage to alter his date of first enrollment.

A change occurred in the PEIA retirement structure effective in July 1, 1988. Retirees

who were continually enrolled since before that date were permitted to exchange three (3) days of accrued annual and/or sick leave for one (1) month of the entire premium of continued PEIA coverage for themselves and their dependents into retirement. See W. Va. Code § 5-16-13(d). For those retirees whose first date of continuous enrollment was after that date, the retirement benefit is less advantageous; they may exchange three (3) days of accrued annual and/or sick leave for half of the monthly premium. See W. Va. Code § 5-16-13(e). In essence, had Mr. Harris enrolled in PEIA coverage on the first day he was employed, his retirement benefits through PEIA would be more generous. This, however, is only the case if he was in fact eligible to participate in PEIA benefits in 1987, which is in dispute.

Over the course of Mr. Harris' employment, he had repeated correspondence with PERS, putting him on notice that he had not received credit for 1987 or 1988 as years of service. First, PERS mails annual paper statements to its members. See, e.g., J.A. at 276. These statements detail for which years the member's account has been credited. Mr. Harris would have received one (1) of these statements annually, which would have put him on notice that PERS had not credited his account for the years 1987 or 1988. While not all of these annual statements have been produced, the statements from 1999 and 2008 were in the Petitioners' possession. J.A. at 239-240, 276. Mr. Harris also expressly requested that PERS provide him a statement of his account in 2000. J.A. at 293.

After Mr. Harris retired on December 31, 2010, he began receiving PERS and PEIA retirement benefits, with which the Petitioners were unsatisfied. J.A. at 7-11. Rather than attempt to reconcile the issue with PEIA and PERS, the Petitioners brought the instant suit against the Respondent on April 27, 2012. J.A. at 5-12. This suit was filed almost twenty-four (24) years after any alleged breach of contract by the Respondent ended (1989).

Over three (3) years after the Complaint and Petition (the "Complaint") was filed in the Circuit Court case below, the Petitioners moved to amend their Complaint. J.A. at 38-52. The Respondent opposed this amendment on the grounds of futility, undue delay and undue prejudice, and also moved to dismiss the underlying Complaint, based on the running of the statute of limitations. J.A. at 53-66. After extensive briefing on both motions by both parties, the Court denied "Defendant's Motion to Dismiss," and held the Petitioners' "Motion for Leave to File Amended Complaint and Petition" in abeyance. J.A. at 373-378. Thereafter, on motion by the Respondent, the Circuit Court certified the question of the running of the statute of limitations to this Court. J.A. at 379-380, 397-406.

III. Summary of the Argument

The Respondent has moved to dismiss the Complaint, based on the running of any potentially applicable statute of limitations. The Petitioners have alleged that Mr. Harris began employment with the Respondent on August 3, 1987. They have further alleged that the Respondent had a contractual duty to enroll Mr. Harris in PEIA and PERS benefits at the inception of Mr. Harris' employment, but did not do so until later. Additionally, the Petitioners have alleged that the Respondent failed to enroll Mr. Harris in PERS, or failed to remit contributions to PERS on his behalf, beginning in 1988, at the latest. PEIA records indicate that Mr. Harris was enrolled in PEIA coverage beginning in August of 1988.

The Respondent contends that the statute of limitations for any claim against it for failure to make any of the performances alleged by the Petitioners, began to run when the breach occurred and when the breach became known to the Petitioners. That position is the settled contract law of West Virginia. The controversy in this case largely implicates what the Respondent's "performance" was and when it was due.

It is important to note that the Respondent is not a state entity; it is a unit of county government which participates in PERS and PEIA on a voluntary basis. As a non-state participating employer, the Respondent has no duty and no power to calculate participants' benefits, manage their accounts or pay retirement benefits. The Respondent's performance begins and ends with enrolling the participating employee in these programs and remitting the payments to PERS and PEIA.

In the case of PERS benefits, the Petitioners have no standing allegation that the Respondent failed to enroll Mr. Harris in PERS benefits, or that it failed to remit contributions to PERS at any point after the year 1988. That is when the alleged breach ended. As for PEIA, records indicate that Mr. Harris was enrolled in PEIA in August 1988. That is when the alleged breach ended. The Respondent does not pay retirement benefits. Therefore, the payment of retirement benefits to Mr. Harris following his retirement is not the role of the Respondent and cannot be considered to be its responsibility. Irrespective of the agreement which may have existed between Mr. Harris and PEIA or PERS, his alleged agreements with the Respondent were to be performed while he was still employed.

Accordingly, this Court should hold that the statute of limitations in a suit against an employer for an alleged failure to enroll an employee in retirement benefits, managed and paid by a separate entity, begins to run when the breach occurs and becomes known, in conformity with established West Virginia precedent.

IV. Statement Regarding Oral Argument and Decision

As an apparent matter of first impression before the Court, this matter has been appropriately designated for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

V. Argument

A. The statute of limitations regarding an alleged breach of contract for failure of an employer to timely enroll an employee in retirement benefits, should begin to run when the duty arises, the contract is breached and the aggrieved party knows of the breach.

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.

The position taken by West Virginia courts, that the statute of limitations in a contract action is triggered at the time of the breach or when the breach becomes known to the non-breaching party, is echoed across the nation's jurisprudence. The common law rule, as articulated in Williston on Contracts, pursuant to the defining authoritative treatise on contract law, states that the statute of limitations **"runs from the time of the breach, although no damage occurs until later."** (Emphasis added) 18 Richard A. Lord, Williston on Contracts § 2921A (3d ed. 1978).

The courts in the majority of other states have followed the common law just as closely as West Virginia. The Supreme Court of Nebraska stated the rule with particular clarity, referring to it as the "Occurrence Rule." In *Cavanaugh v. City of Omaha,* 590 N.W.2d 541 (Neb. 1998), the court articulated that **". . . 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."** (Emphasis added). *Cavanaugh* at 544.

This rule is also followed by the courts of several other states, including, but not limited to, Alaska, see *Howarth v. First Nat'l Bank of Anchorage,* 540 P.2d 486, 490-491 (Alaska 1975)

("[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."); Delaware, see *Nardo v. Guido De Ascanis & Sons, Inc.*, 254 A.2d 254, 256 (Del.Sup.Ct. 1966) (contrasting the running of a statute of limitations in a breach of contract action, which runs at the occurrence of the breach, with that of a negligence action, which runs at the time of the injury resulting from the defendant's negligence.); and New Hampshire. See *Robert v. Richard & Sons,* 304 A.2d 364, 366 (N. H. 1973) (holding that "[a]n action for breach of contract unlike a tort action accrues when the breach occurs whether any damage then occurred or not.").

Another incarnation of the same principle appears in the jurisprudence of North Carolina. This rule addresses damages, but acknowledges that every unexcused nonperformance of a bargained-for obligation is damage in and of itself. Therefore, a claim for breach of contract accrues and the statute of limitations begins to run, at the time of the breach because "a plaintiff is entitled to initiate an action for breach of contract at the time of the breach, and at that point may recover nominal damages." *River Community Bank, N.A. v. Bank of N.C.,* Case No.: 4:14-cv-00048, 2015 U.S. Dist. LEXIS 80031 (W. D. Va., June 19, 2015) (Applying North Carolina law). In *River Community Bank*, the plaintiff acquired an interest in a pre-existing loan from the defendant's predecessor entity by merger. See *id.* at *2-*3. It was later discovered that certain documents securing the loan were forged by the borrower. See *id.* The court therein held that the plaintiff's claim arose when the defendant transferred its interest in a loan secured by forged documents, not upon the plaintiff sustaining consequential damages. See *id.* at *13-*14. The court reasoned that "such further damage is only aggravation of the original injury," not the

original injury itself, which was incurred upon the breach. *Id.* Therefore, the court held that the plaintiff filed suit outside of North Carolina's three (3) year statute of limitations for breach of a written contract. See *id.* at *20-*21.

This variation on the Occurrence Rule is also followed, in notable part, by the courts of New York, see *Ely-Cruikshank Co. v. Bank of Montreal*, 615 N.E.2d 985, 987 (N.Y. 1993) ("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[.]") (Internal citations omitted) and Florida. In the Florida appellate court case *Med. Jet, S.A. v. Signature Flight Support,* 941 So. 2d 576 (Fla. 4th DCA 2006), Med. Jet sued Signature Flight Support ("Signature") in August of 2003 for failure to have the proper certifications when they performed an inspection on Med. Jet's airplane in April of 1998. See *id.* at 577. Because the airplane at issue had not been inspected by a properly certified inspector, the airplane was grounded by the government in May 1999, depriving Med. Jet of its use for some time. See *id.* The Florida court held that the statute of limitations began to run in April 1998, when Signature performed the inspection without proper certifications. See *id.* This placed the filing of the suit outside the applicable five (5) year statute of limitations. At that time, Signature had failed to do that which they were contractually bound to do, which entitled Med. Jet to sue for nominal damages at that time. See *id.* at 578. Therefore, the cause of action had accrued. The cause of action did not wait for the airplane to be grounded, the source of the consequential damages resulting from Signature's breach, which occurred after the statue of limitations period. See *id.*

Under the principle articulated above, the primary items up for contention in this case are: (1) What was the performance due by the Respondent?; (2) When did its duty to perform arise and when was this duty allegedly breached?; and (3) When did the Petitioners have

knowledge of this breach? In this case, the duty the Petitioners claim the Respondent violated was to enroll Mr. Harris in PERS and PEIA benefits at the beginning of his employment, and to deduct and make appropriate contributions to those agencies on his behalf. J.A. at 6-7.

According to the Complaint, that duty arose at the time Mr. Harris began employment with the Respondent. J.A. at 6. They have also alleged that the Respondent had a duty to deduct appropriate PERS contributions from Mr. Harris' paychecks and send those contributions, along with the matching employer contributions, to PERS on his behalf. *Id.* The Petitioners have conceded that on January 1, 1989, at the latest (though there is a dispute of fact as to the exact date of his enrollment), the Respondent enrolled Mr. Harris in PERS benefits and made the appropriate contributions to PERS on his behalf with every paycheck. J.A. at 7. There is no allegation that the Respondent breached these alleged duties regarding PERS benefits at any point after January 1, 1989.

With respect to the corresponding claims involving PEIA benefits, records from PEIA show that Mr. Harris has been continually enrolled since August 1988. There is no standing allegation in this case that the Respondent failed to enroll Mr. Harris in PEIA benefits at any point after that date.

The primary error present in "Petitioners' Brief Upon Certified Question" is the conflation of the alleged duties of two (2) different entities as one in the same. The Petitioners have stated that Mr. Harris had no right to receive payment from his retirement until after his retirement vested and after he actually retired. J.A. at 322. This is true, but it has no bearing on when the statute of limitations begins to run in the instant matter. The Petitioners have never alleged that the Respondent had a duty to maintain Mr. Harris' PERS and PEIA accounts, calculate or otherwise determine his benefits, or pay those benefits upon his retirement. In short,

the **employee receives their benefit at retirement, but the employer's performance was due long before that upon the issuance of each paycheck.**

In fact, the management of the employee benefits themselves and the provision of benefits after retirement is the exclusive statutory duty of PERS and PEIA. See W. Va. Code § 5-16-13; see also W. Va. Code § 5-10-1 *et seq.* After the enrollment of a new employee is complete, and the appropriate contributions to PERS and PEIA leave the Respondent's hands, the Respondent's role in that employee's public employee benefits has ended. The employer has nothing to do with this stage. The employer's performance ended and was either performed or breached when the duty to enroll and contribute became due.

In that way, the Petitioners' allegations herein are allegorical to those in *Med. Jet.* The *Med. Jet* defendant allegedly failed to perform a bargained-for task (inspecting the airplane while having the proper certifications), which resulted in a government entity taking an action that damaged the plaintiff (grounding the airplane). See *Med. Jet* at 577. Similarly, the Petitioners have alleged that the Respondent failed to perform its allegedly bargained-for task (timely enrolling Mr. Harris in PERS and PEIA benefits), which, according to the Petitioners' allegations, caused the relevant government entities to apply Mr. Harris' retirement benefits in a less favorable way. In both cases, the defendant's alleged breach occurs, and the cause of action accrues, when the defendant's allegedly bargained-for performance is not performed as agreed, not when the government entity takes the resulting damaging action. See *id.* at 578 ("[A] cause of action for breach of contract accrues at the time of the breach, not from the time when consequential damages result or become ascertained.") (Internal citations omitted.).

B. The case law cited by the Petitioners is easily differentiated from the issues in this case.

The Petitioners have identified several cases, mostly from other states, which they allege to be pertinent to the instant matter. In fact, all of these cases contain key facts which easily differentiate them from the instant matter.

In the sole West Virginia case identified by the Petitioner, *Lipscomb v. Tucker County Commission*, 197 W. Va. 84, 475 S.E.2d 84 (1996) (Albright, J.), the plaintiff sought seniority pay credit for certain years she spent as an employee of a predecessor county agency. See *Lipscomb*, 197 W. Va. at 86. The plaintiff was hired by the Tucker County Ambulance Authority in 1989. See *id.* Subsequently, in 1990, the Ambulance Authority enacted a seniority pay structure, whereby employees received increased pay based on years of service. See *id.* at 86-87. The plaintiff filed suit in 1995, claiming that her years as an employee of Tucker County EMS should have been credited as additional seniority pay. See *id.* at 87. The Court held that the suit was timely filed under the five (5) year statute of limitations applicable to claims under the West Virginia Wage Payment Collection Act, because the statute of limitations ran from the date the seniority pay structure came into effect in 1990, not her date of hire in 1989. See *id.* at 90. The Court reasoned that the plaintiff's claim could not have accrued in 1989, when the employer did not yet have a duty to calculate or pay seniority pay, as the seniority pay scheme did not yet exist. See *id.*

The Petitioners' attempts to analogize their claims to those of Ms. Lipscomb are flawed in material ways. Unlike the present case, the employer's duty in Lipscomb was to calculate and make a payment. See *id.* Therefore, Ms. Lipscomb's claim accrued when that duty arose and was breached in 1990. See *id.* The fact that Ms. Lipscomb was, at that point, entitled to **receive** payments is irrelevant; rather, what is key is that the employer was at that time required to **make**

payments. See *id.* However, the Respondent in the present case **never had a duty to make retirement payments to Mr. Harris**. As discussed earlier, the Respondent's alleged duty was to enroll Mr. Harris in PERS and PEIA, and to make the appropriate payments to those agencies when they came due. That duty was allegedly breached in 1987 and 1988, and, therefore, the Petitioners' alleged cause of action also arose at that time.

A more applicable West Virginia case is *Flanigan v. West Virginia Public Employees Retirement System*, 176 W. Va. 330, 342 S.E.2d 414 (1986) (McGraw, J.). Like the Petitioners, Magistrate Flanigan claimed that he was entitled to be enrolled in PERS at a particular point, and was entitled to have amounts deducted from his paycheck and contributed to PERS on his behalf. See *Flanigan*, 176 W. Va. at 333. In that case, the plaintiff alleged that he had been informed, in error, by his employer that, because he was at that time receiving payments from the Teachers Retirement System, he was ineligible to participate in PERS. See *id.* at 332-333. The remedy ordered by the Court was for PERS to allow the plaintiff to enroll in PERS, and for his account to be credited as if he had been enrolled from the date he first became employed by the court system. See *id.* at 337-338. What is key from this case is that Magistrate Flanigan was still employed when he brought his suit. See *id.* at 332. 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.** The same should hold true of the Petitioner's claims with respect to PEIA benefits.

Another case on which the Petitioners wrongfully rely, *Steelman, et al. v. Oklahoma Police Pension & Retirement System*, 128 P.3d 1090 (Okla. Ct. App. 2005), in fact, reinforces the tenets of the Respondent's argument. In *Steelman*, the suit brought by the retiring police officers was against the retirement system, not against the officers' employers. Therein, the

plaintiff sought a correction of insufficient retirement payments which were the result of the retirement system's failure to properly account for pre-employment military service. See *id.* at 1094. While the *Steelman* court found that one (1) of the plaintiffs' claims did not accrue until retirement, this was because **the calculation and making of correct retirement payments was the retirement system's bargained-for performance, and the time the retirement system was obligated to perform was upon his retirement.** See *id.* at 1096-1097. The retirement system had not breached its duty until it failed to make the correct payments at the time it agreed to make them. This is not the case for the Respondent, because **it was never the Respondent's duty to make retirement payments to the Petitioners**.

The misconception harbored by the Petitioners can be properly analogized to a relationship with an escrow agent. Assume that a father, son and escrow agent enter into an agreement. Under the terms of this agreement, if the son graduates from college, the father will deposit One Million Dollars ($1,000,000) with the escrow agent. The escrow agent will then oversee the investment of that money for twenty (20) years, and pay the principal and earnings to the son after the expiration of that time period. The son graduates from college as agreed, but the father only transfers Five Hundred Thousand dollars ($500,000) to the escrow agent. The son's claim arises when the son discovers that the father has transferred an insufficient sum to the escrow agent, not when the escrow agent pays the resulting insufficient sum to the son. This is because the payment from the escrow agent to the son is the escrow agent's duty, not the father's. The father's bargained-for performance was to engage the escrow agent's services, and pay the correct sum to the escrow agent, and, as such, his breach occurred when he failed to do that, not when the son received an insufficient amount of money from the escrow twenty (20) years later.

C. Equity and the ongoing integrity of the statute of limitations require that the Petitioners' claims be held untimely.

The interests of equity support upholding the integrity of the statute of limitations in this instance. The existence of the statute of limitations serves: "(a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims." Ochoa, Tyler T., and the Hon. Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation,* 28 Pac. L. J. 453, 460 (1997). Furthermore, it promotes the resolution of disputes at a time when pertinent evidence and testimony is still readily available.

> "[S]tatutes of limitation... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. 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." *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349 (1944).

This case is the poster child for the type of claims discussed by the U.S. Supreme Court in *Railroad Telegraphers.* The Petitioners had all the requisite information to see this situation coming a mile away. However, rather than seek a remedy with PERS and PEIA, or even the Respondent in the late 1980's and early 1990's when they became aware of the problem, the Petitioners watched the case snowball without action until Mr. Harris' retirement. They were aware of all facts giving rise to their claim during the late 1990's, at the very latest. The fact that this case was brought so long after the fact is not the result of new evidence or latent facts coming to light; it is the result of the Petitioners sitting on their hands for decades rather than diligently defending their entitlements and seeking clearly available remedies.

Due to the Petitioners' delay, the most crucial witness to this case, the County Clerk at the time Mr. Harris began his employment, and the person who would have actually handled Mr. Harris's PEIA and PERS enrollment papers at the county level, is deceased. Most of the other potential fact witnesses' memories have faded with time and age. We are left with rumor, supposition and sparse, thirty (30) year old records to sort out what actually occurred. Of course, whether, and exactly when, the Petitioners had notice of the alleged breaches is a question of fact which is not the subject of this certified question. However, in the interests of equity, the Respondent respectfully requests this Honorable Court preserve the integrity of the statute of limitations by holding this claim to the standard of the Occurrence Rule: that the Petitioners' claim accrued when the alleged breaches occurred, and when the Petitioners became aware, or reasonably should have been aware, of those alleged breaches.

In fact, holding otherwise would create a perverse incentive against filing timely suits. Holding that the statute of limitations in such situations as the case at present does not accrue until consequential damages are incurred incentivizes benefit program participants and their attorneys to hold off on rectifying the situation until some real money accrues. Because it is retirement benefits which are at issue, there is no urgent need to enforce their rights at the time of the breach, absent a meaningful statute of limitations. Rather, it would be in the claimant's financial interest to wait and sue after they retire, collecting the benefits in a lump sum after retirement. By doing so, they are permitted to enjoy the benefits of the funds that would otherwise have been deducted from their paychecks as their contribution to the benefits programs, completely free from consequences. Assent by this Court to the Petitioners' argument would reward bad actors and those who knowingly sleep on their rights.

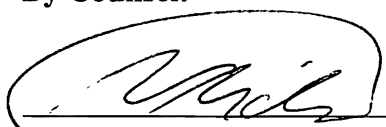
VI. Conclusion

WHEREFORE, for the reasons stated herein, Respondent, The County Commission of Calhoun County, respectfully prays that this Honorable Court enter an Order resolving this certified question in the affirmative, reversing the answer to the certified question supplied by the Circuit Court of Calhoun County.

Dated this 17th day of November, 2016.

THE COUNTY COMMISSION OF CALHOUN COUNTY

By Counsel:



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CERTIFICATE OF SERVICE

I, Adam K. Strider, counsel for Respondent The County Commission of Calhoun County, do hereby certify that I have served the foregoing "Respondent's Brief Upon Certified Question," upon counsel of record, by mailing a true and exact copy thereof to the following:

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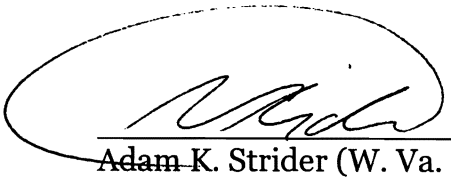
Counsel for Petitioners

Dated this 17th day of November, 2016



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