STATE OF MICHIGAN
SUPREME COURT

RICHARD WILLIAM DORKO,
Plaintiff-Appellant,
v

SHERRY SUE DORKO,
Defendant-Appellee.

Supreme Court
Case No. 156557

Court of Appeals
Case No. 333880

Circuit Court
Case No. 2004-5765-DM

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PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

A. Michigan Court Rules Applicable To Waiver Of Defenses In Pleadings Do Not Apply To Motions To Set Aside Time-Barred Orders.

Appellee has argued that Appellant waived his statute-of-limitations argument because he did not raise the issue in his first responsive pleading.

The Michigan Court Rules provide that grounds for summary disposition based on a statute of limitations and affirmative defenses based on a statute of limitations are waived unless asserted in the parties' first responsive pleading. MCR 2.116(D)(2); MCR 2.111(F)(3)(a). However, these court rules relate to newly-commenced cases, initial pleadings, and summary-disposition motions relating to those pleadings. Further, the court rules specifically define pleadings as only a complaint; cross-claim; counterclaim; third-party complaint; an answer to a complaint, cross-claim, counterclaim, or third-party complaint; and a reply to an answer. MCR 2.110(A).

The Michigan Court Rules concerning initial pleadings, affirmative defenses, and summary-disposition motions simply do not apply to motions concerning the property-division terms of a divorce judgment.

B. Federal Law Concerning ERISA-Qualified Pension Plans Does Not Preempt Michigan Law Concerning Entry Of A QDRO.

Appellee has asserted that federal law under the Employee Retirement Income Security Act (ERISA) preempts Michigan's statute of limitations concerning the entry of Appellee's Qualified Domestic Relations Order (QDRO).

However, ERISA specifically exempts QDROs from preemption: "Subsection (a) [preemption] shall not apply to qualified domestic relations orders." 29 USC 1144(b)(7). It

is very clear that Appellee is endeavoring to enter a QDRO and that Appellant is resisting that effort. Federal preemption simply does not apply to this appeal.

In reliance on *Metro Life Ins Co v Mulligan*, 210 F Supp 2d 894 (ED Mich, 2002), Appellee has argued that where a judgment of divorce does not qualify as a QDRO, federal preemption will still apply. In *Metro Life Ins Co v Mulligan*, a party endeavored to enforce the terms of a judgment of divorce against the terms of an ERISA qualified pension plan. The court determined that federal law preempted the terms of the judgment of divorce because the judgment of divorce failed to meet the definition of a QDRO; thus, the QDRO exception to federal preemption did not apply. Further, *Metro Life Ins Co v Mulligan*, is a case brought in federal court involving federal application of a state-court QDRO.

In this appeal, however, a party is not endeavoring to enforce the application of a QDRO in federal court. Rather, a party is endeavoring to enter a QDRO in state court. And, ERISA preemption does not apply to the entry of QDROs in state courts. 29 USC 1144(b)(7).

In reliance on *Gendreau v Gendreau*, 122 F3d 815 (9th Cir, 1997), Appellee has argued that her interest in Appellant's pension funds did not accrue until she sought to enter her QDRO because she has no enforceable interest in the pension funds until the QDRO is entered. In *Gendreau*, a party sought to discharge a division of his pension funds to his ex-wife as a debt in federal bankruptcy-court. The court in *Gendreau* determined that the ex-wife's interest in her husband's pension funds was established under state law at the time of the divorce decree. In other words, her property interest in the pension funds accrued at the time the divorce decree entered.

In this appeal in state court, Appellee acquired her interest in Appellant's pension funds at the time the Judgment of Divorce entered and not at the time Appellee sought to enter the QDRO. Thus, Appellee's property interest in Appellant's pension fund accrued upon entry of the Judgment of Divorce.

Appellee's reliance on federal preemption of ERISA, if it has any value at all, would have value in federal litigation concerning the application of a QDRO that had already entered in state court. Such litigation concerning the application of a QDRO that has entered in state court will occur in federal courts under federal preemption of ERISA. However, where the entry of a QDRO in the first instance is considered, the litigation is appropriately in the state courts where federal preemption of ERISA does not apply.

C. Appellee's Interest In Appellant's Pension Funds Accrued Upon Entry Of The Judgment of Divorce.

In reliance on *Rybinski v Rybinski*, 333 Mich 592; 53 NW2d 386 (1952) and *Torakis v Torakis*, 194 Mich App 201; 486 NW2d107 (1992); Appellee has asserted that her interest in Appellant's pension funds did not accrue until the payments became due; in other words, when Appellant received his pension payments.

However, the courts in *Rybinski* and *Torakis* were considering the statute of limitations as it is applied to support payments and not as it is applied to division of property. It is important to note that Michigan's legislature enacted a specific statute concerning the statute of limitations as it is applied to support payments:

> For an action to enforce a support order that is enforceable under the support and parenting time enforcement act . . . the period of limitations is 10 years from the date that the last support payment is due under the support order regardless of whether or not the last payment is made.

MCL 600.5809(4). Thus, where the legislature has stated a specific scheme for the accrual of support payments that differs from property division, it is clear that the legislature intended for the accrual scheme to apply to only the exception stated, support payments, and not to the division of property.

Division of Appellant's pension funds in this appeal is division of property and is not division of support payments; thus, the holdings in *Rybinski* and *Torakis* and the statutory accrual scheme for support payments do not apply in this appeal.

Essentially, at the time the Judgment of Divorce was entered, Appellee's interest in Appellant's pension funds was a present interest in receiving a future benefit. In other words, the Judgment of Divorce conveyed to Appellee an interest that had accrued to her and was part of the divisible marital estate.

D. A QDRO Is Part Of The Judgment And Subject To Time Limitations.

Appellee has asserted that the holding in *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012), that a QDRO is part of the judgment of divorce and subject to time limitations, isn't applicable. Appellee further asserts that she is not endeavoring to enforce the Judgment of Divorce.

Where the judgment of divorce directs entry of a QDRO consistent with the obligation to conclusively decide the parties' rights in a pension, the QDRO is considered part of the judgment of divorce and is not a completely separate order. *Neville*, 467. Based on this holding, the *Neville* court barred a parties' effort to amend an earlier-entered QDRO for failure to pursue the effort within the time limits for amendment of judgments.

Likewise, Appellee's effort in this appeal to enter a QDRO after the 10-year statute of limitations for enforcement of the Judgment of Divorce has expired should be barred for failure to comply with the time limitations for enforcement of judgments.

Further, Appellee's right to enter a QDRO derives entirely from the terms of the Judgment of Divorce and nowhere else. Absent the Judgment of Divorce, Appellee would have absolutely no interest in Appellant's pension funds. Thus, it is clear that Appellee is endeavoring to enforce the terms of the Judgment of Divorce.

Respectfully submitted:

Dated: November 16, 2017

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