

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

**HONORABLE MARK T. BOONSTRA, HONORABLE AMY RONAYNE KRAUSE,
HONORABLE BROCK A. SWARTZLE**

**RICHARD WILLIAM DORKO,
Plaintiff-Appellant,**

v

**SHERRY SUE DORKO,
Defendant-Appellee.**

SC No. 156557

COA No. 333880

KALAMAZOO CC No. 2004-5765-DM

Plaintiff-Appellant's Application for Leave to Appeal Supplemental Brief

ORAL ARGUMENT REQUESTED

Respectfully submitted:

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QUESTIONS PRESENTED

- I. Has Plaintiff-Appellant Waived Any Statute-Of-Limitations Defense?
- II. Did The Michigan Court Of Appeals Decide *Joughin v Joughin*, 320 Mich App 380; 906 NW2d 829 (2017) Correctly?
- III. When Does A Claim For Retirement Benefits Under A Judgment Of Divorce Accrue?

STATEMENT OF THE FACTS

On August 3, 2005, the trial court entered a Judgment of Divorce concerning these parties. 4a. The Judgment of Divorce awards Defendant-Appellee one-half of the marital portion of Plaintiff-Appellant's pension and retirement benefits via directive to prepare a Qualified Domestic Relations Order (QDRO). 9a-10a. Specifically, the Judgment of Divorce states:

Qualified Domestic Relations Order: Defendant is awarded ½ of the marital interest of Plaintiff's retirement plan via QDRO through employment with General Motors. She shall share in any early retirement subsidy under the Plan in proportion to her award. She shall be entitled to cost-of-living and other post-retirement increases in proportion to her award. She shall be allowed to elect to receive benefits under the Plan as soon as the Plan permits. To the extent necessary to protect her interest in the event of Plaintiff's death, she shall be designated surviving spouse.

9a-10a.

On July 1, 2014, 8 years and 11 months after the Judgment of Divorce entered, Plaintiff-Appellant retired. 147a. At the time of Plaintiff-Appellant's retirement, Defendant-Appellee had not entered a QDRO to receive her portion of Plaintiff-Appellant's pension and retirement benefits. 13a. Under the pension plan, Plaintiff-Appellant had no other choice than to elect the pension and retirement benefits available to him upon retirement because Defendant-Appellee had not entered her QDRO. 146a. Therefore, Plaintiff-Appellant was receiving his full pension and retirement benefits. 146a.

On August 3, 2015, the 10-year period from the entry of the Judgment of Divorce expired without Defendant-Appellee undertaking any effort to renew the Judgment. 2a.

On August 11, 2015, 10 years and 8 days after the Judgment of Divorce entered, 1 year and 35 days after Plaintiff-Appellant retired, and 8 days after the Judgment of Divorce expired; Defendant-Appellee filed her first proposed QDRO under the seven-day rule. 13a.

Plaintiff-Appellant, as an unrepresented party, did not object to the entry of the first QDRO; and on August 19, 2015, the trial court entered the first QDRO. 14a. However; the plan administrator rejected the first QDRO as unqualified, and Defendant-Appellee sought to enter a second, amended QDRO. 20a.

Plaintiff-Appellant, as an unrepresented party, objected to the entry of the second, amended QDRO under the seven-day rule. 25a. In his initial Objection, Plaintiff-Appellant did not raise the statute-of-limitations. 25a. Plaintiff-Appellant, as an unrepresented party, attended the motion hearing on his Objection to entry of the second, amended QDRO under the seven-day rule (27a), and the trial court scheduled the Objection for an evidentiary hearing concerning the terms of the second, amended QDRO. 39a.

Prior to the evidentiary hearing, Plaintiff-Appellant retained counsel. Asserting the 10-year statute of limitations for the enforcement of a judgment of divorce, Plaintiff-Appellant filed an Amended Objection (44a) challenging the entry of the second, amended QDRO. 46a. Plaintiff-Appellant also filed a Motion asserting the 10-year statute of limitations and seeking to set aside the first QDRO that had already entered and to deny entry of the second, amended QDRO. 48a.

On May 16, 2016, the trial court stated on the record its decision to deny Plaintiff-Appellant's Motion concerning the statute of limitations (111a) and directed Defendant-Appellee to submit an Amended QDRO (116a), which was entered on June 24, 2016. 136a.

After entry of the Amended QDRO, the plan administrator approved the Amended QDRO, and Defendant-Appellee began receiving her one-half of the marital portion of Plaintiff-Appellant's pension and retirement benefits.

On June 27, 2016, the trial court entered the Order denying Plaintiff-Appellant's effort to set aside and deny entry of the QDROs. 140a. The trial court also denied Plaintiff-Appellant's motion for a stay pending appeal. 129a.

On July 11, 2016, Defendant-Appellee filed a Motion in the trial court seeking to recover from Plaintiff-Appellant her portion of the pension and retirement benefits from the time that Plaintiff-Appellant retired to the effective date of her approved QDRO. 142a.

On July 15, 2016, Plaintiff-Appellant filed his Application for Leave to Appeal, and Plaintiff-Appellant's appeal commenced in the Michigan Court of Appeals. 151a, 154a.

Plaintiff-Appellant filed a Response to Defendant-Appellee's Motion seeking pre-QDRO pension and retirement benefits in the trial court (145a); however, on October 5, 2016, the Michigan Court of Appeals granted Plaintiff-Appellant's Application for Leave to Appeal. 209a. Therefore, Defendant-Appellee's effort to recover money damages from Plaintiff-Appellant for her portion of the pre-QDRO pension and retirement benefits has stalled in the trial court pending this appeal.

On July 11, 2017, after all the briefs were filed and 28 days before oral argument in the Michigan Court of Appeals (153a), a different panel of the Michigan Court of Appeals in *Joughin v Joughin*, 320 Mich App 380; 906 NW2d 829 (2017), held that Michigan has no statute-of-limitations period for the entry of a qualified domestic relations order concerning the division of retirement benefits in a divorce case. 269a. The Opinion is not unanimous, and the Honorable Kathleen Jansen authored a Dissenting Opinion. 274a.

While the Opinion in *Joughin* directly relates to the issues in this case, the *Joughin* case and this case were not consolidated for appeal, and Plaintiff-Appellant did not know that

the *Joughin* matter was pending while his appeal was pending in the Michigan Court of Appeals.

Because the *Joughin* Opinion was released for publication just 28 days before Plaintiff-Appellant's oral argument in the Court of Appeals (153a), the Michigan Court of Appeals panel in this case was bound by the holding in the prior Opinion in the *Joughin* case. 282a.

ARGUMENT

I. Has Plaintiff-Appellant Waived Any Statute-Of-Limitations Defense?

Plaintiff-Appellant has not waived his statute-of-limitations defense.

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 a party's first responsive pleading. MCR 2.116(D)(2); MCR 2.111(F)(3)(a).

Under the Michigan Court Rules, pleadings are limited and defined differently than objections and motions. Specifically, pleadings are defined and strictly construed 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 limit the waiver of statute-of-limitations defenses to circumstances where pleadings are filed. No Michigan Court Rule or law provides that statute-of-limitations defenses cannot be asserted in an amended objection or a post-judgment motion.

Applying the precedent to the case at bar, Plaintiff-Appellant did not waive his statute-of-limitations defense when he filed his Amended Objection to entry of a second,

amended QDRO under the seven-day rule and his Motion to set aside and deny entry of the QDROs because his prior filing of an Objection was not a first pleading; therefore, it is not waived under the Michigan Court Rules that provide waiver if not asserted in a first responsive pleading.

II. Did The Michigan Court Of Appeals Decide *Joughin v Joughin*, 320 Mich App 380; 906 NW2d 829 (2017) Correctly?

The Michigan Court of Appeals decided incorrectly that Michigan has no statute of limitations for the entry of a QDRO concerning the division of pension and retirement benefits in a divorce case.

The Michigan Court of Appeals very recently held that Michigan's statute of limitations does not time-bar the entry of a QDRO. *Joughin*. The majority in *Joughin* agreed that actions to enforce property division under the provisions of divorce judgments are subject to the 10-year statute-of-limitations period that runs from entry of the judgment. MCL 600.5809(3); *Peabody v DiMeglio*, 306 Mich App 397; 856 NW2d 245 (2014). However, the majority distinguished the entry of a QDRO from efforts to enforce property division reasoning that QDRO entry is merely a ministerial task undertaken in conjunction with a judgment of divorce; thus, when a party complies with a directive in a judgment of divorce to enter a QDRO, the party is only supplying information and is not endeavoring to enforce the property-division terms of a judgment of divorce. *Joughin*.

However, the Dissenting Opinion reasons that the majority has circumvented the statute of limitations by proclaiming the entry of a QDRO a mere ministerial task and not an effort to enforce the property-division terms of a judgment of divorce. Thus, by extension, other ministerial tasks undertaken in conjunction with the property-division terms of a divorce judgment are no longer time-barred either. *Joughin*, Dissenting Opinion. For

instance, other tasks undertaken to enforce the property-division terms of a judgment of divorce might include the entry of a deed, the transfer of title in a vehicle, and the closing of banking and credit-card accounts. All of these tasks are directed by and are attendant with the property-division terms of a judgment of divorce, and the statute of limitations would time-bar the undertaking of all of these tasks. However, each of these other tasks are now at risk of being labeled ministerial in nature such that the statute of limitations would no longer apply to these undertakings. So, if faced with a statute-of-limitations challenge to any effort to enforce the property-division terms of a judgment, litigators only need to show that the undertaking is a mere ministerial task, and the statute of limitations can be circumvented.

The Dissenting Opinion also argues that the majority disregards the purpose of a statute of limitations: to encourage prompt recovery, provide security against stale demands, and remedy the problems associated with delay. *Joughin*, Dissenting Opinion; citing *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

While not raised in the *Joughin* Dissenting Opinion, the *Joughin* court also should have considered the legislative intent concerning the statute-of-limitations period for division of pension and retirement benefits.

The primary goal of judicial interpretation of statutes is to discern the intent of the Legislature, and the Legislature's intent is revealed by examining the specific language of the statute. *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002). If the statutory language is clear, the court presumes that the Legislature intended the meaning it has plainly expressed, and the statute will be enforced as written. *Federated Publications, Inc*. Every word or phrase of a statute will be given its plain and ordinary meaning. *Federated Publications, Inc*. When interpreting a statute and determining the

Legislature's intent in drafting a statute, we must first look to the actual language of the statute and as far as possible give effect to the plain meaning of every phrase, clause, and word in the statute. *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010).

Michigan's Legislature has clearly stated the 10-year statute-of-limitations period for enforcement of the property-division terms of divorce judgments. MCL 600.5809(3). In the very next section of the statute, the Legislature also stated a different, separate, and distinct limitations period for support payments. MCL 600.5809(4). If the Legislature had intended a different, separate, and distinct limitations period for division of pension and retirement benefits, or ministerial tasks, the Legislature could have stated so. Because the Legislature sets forth a different, separate, and distinct limitations period for support payments, and chose not to set forth a different, separate, and distinct limitations period for division of pension or retirement benefits, the Legislature has clearly intended that division of pension and retirement benefits fall within the general 10-year statute of limitations.

III. When Does A Claim For Retirement Benefits Under A Judgment Of Divorce Accrue?

A claim for pension and retirement benefits accrues upon entry of a judgment of divorce.

As pointed out in the *Joughin* Dissenting Opinion, it is important to distinguish between (a) the present right to claim an interest in pension and retirement benefits that will be paid in the future, and (b) the future payment of pension and retirement benefits where the right to receive the benefits has been previously established.

The right of a party to receive a division of property in a divorce case accrues upon entry of the judgment of divorce. MCL 600.5809(3); *Peabody v DiMeglio*, 306 Mich App 397; 856 NW2d 245 (2014).

Michigan statutes direct that a divorce judgment determine all vested and unvested rights of the parties to any pension, annuity, or retirement benefit. Specifically, the statute provides:

- (4) Each judgment of divorce or judgment of separate maintenance shall determine all rights, including any contingent rights, of the husband and wife in and to all of the following:
- (a) Any vested pension, annuity, or retirement benefits.
 - (b) Any accumulated contributions in any pension, annuity, or retirement system.
 - (c) In accordance with section 18 of 1846 RS 84, MCL 552.18, any unvested pension, annuity, or retirement benefits.

MCL 552.101(4).

Pension and retirement benefits accrue at the time that the parties earn the benefits, and Michigan statute directs that retirement benefits accrued during the marriage are divisible in a divorce. MCL 552.18. Specifically, the statute states that the following retirement benefits are includable in the marital estate:

- (1) Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit **accrued** by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.
- (2) Any rights or contingent rights in and to unvested pension, annuity, or retirement benefits payable to or on behalf of a party on account of service credit **accrued** by the party during marriage may be considered part of the marital estate subject to award by the court under this chapter where just and equitable.

...

MCL 552.18 (emphasis added).

Thus, Michigan trial courts in a divorce cases are directed to divide between the parties pension and retirement benefits that accrued during the marriage.

Conversely, Michigan courts are generally prohibited from dividing pension and retirement benefits that accrued either before the marriage or after the judgment of divorce is entered because those benefits have not accrued during the marriage.

Therefore, as the *Joughin* majority asserts, if pension and retirement benefits only accrue when the payments commence, then Michigan trial courts are not vested in the power to divide pension and retirement benefits that will be paid in the future at all.

This is not the case, and property rights accrue when the right to receive the property is created upon entry of the judgment of divorce and not when the property is actually provided to the party.

Essentially, when a trial court in a divorce divides the accrued pension and retirement benefits in a judgment of divorce, the judgment of divorce provides the parties with their present rights to receive pension and retirement benefits that will be paid in the future. Thus, upon entry of the judgment of divorce, the parties' rights to claim an interest in the pension and retirement benefits accrue even though the actual payment of, or satisfaction of the present interest in, the pension and retirement benefits will be paid at some time in the future. In this respect, the entry of a QDRO is an effort to enforce a property interest that the party seeking QDRO entry already has by virtue of entry of the judgment of divorce. Stated differently, without the existence of a judgment of divorce, no party has the authority to enter a QDRO. So, the power to enter the QDRO with the trial court and present that QDRO to a plan administrator for approval is entirely derived from the terms of the judgment of divorce. Thus, the very right to enter the QDRO is created when the trial court enters a judgment that directs the entry of a QDRO. The property rights, or the right to claim an interest in pension and retirement benefits, accrues when the judgment of divorce is entered and not when the payments commence in the future.

CONCLUSION

Michigan family-law practitioners, courts, and litigants deserve a clear and concise statute-of-limitations period for the entry of QDROs, and the applicable statutes and case law prior to the Michigan Court of Appeals' holding in *Joughin* provide that clarity.

The result of the holding and the reasoning in *Joughin* will be convoluted, delayed litigation involving retirement benefits years or decades after the judgment of divorce is entered, and, as in this case, years after a litigant has already retired. The litigation necessary to unravel the parties' property-rights and interests in retirement benefits years or decades after the entry of the judgment of divorce greatly impacts the parties who are required to pay attorney fees that are much higher because a party has delayed. Indeed, Defendant-Appellee has already commenced an action to recover pension and retirement benefits from Plaintiff-Appellant that Plaintiff-Appellant received during his pre-QDRO period of retirement.

Respectfully submitted:

Dated: July 28, 2018


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