

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PATRICIA JONES,

Plaintiff/Petitioner,

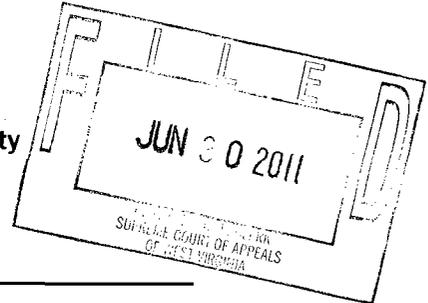
vs.

No. 101327

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD and
JUDY VANNOY AKERS,

Defendants/Respondents.

From the Circuit Court of Kanawha County
The Honorable Todd J. Kaufman
Civil Action No. 10-C-746



**RESPONSE ON BEHALF OF RESPONDENT JUDY VANNOY AKERS
TO AMENDED PETITION FOR APPEAL**

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I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

On April 21, 2010, Patricia Jones filed a Petition for Writ of Mandamus and a Complaint for Injunction and Damages in the Circuit Court of Kanawha County naming the West Virginia Consolidated Public Retirement Board (hereinafter referred to as the "Board") and Judy Vannoy Akers, the surviving widow of Danny Akers. Prior thereto Petitioner Patricia Jones had filed a Complaint requesting a temporary and permanent injunction against Judy Akers individually and as Administrator of the Estate of Danny Akers in the Circuit Court of Mercer County, Civil Action No. 10-C-66-OA. Subsequently, the Sheriff of Mercer County was appointed Administrator of the Estate of Danny Akers. This Complaint requested the same relief as requested in the Kanawha County Circuit Court Complaint. Surviving widow Judy Akers, by special appearance, filed a Motion to Dismiss the Complaint in the Circuit Court of Kanawha County. This motion was never directly ruled upon by the Circuit Court of Kanawha County and the Order dismissing the Complaint filed June 11, 2010, did not specifically mention Judy Akers' Motion to Dismiss for failure to state a claim and lack of jurisdiction.

II. PRELIMINARY STATEMENT

Since the Petitioner's request for relief is beyond mere reversal of the dismissal of her Complaint in the Kanawha County Circuit Court but also a determination by this Court as to the appropriateness of the Board's conduct in rejecting both the June 4, 2009, DRO and the posthumous DRO, Judy Akers then, to give this Honorable Court the complete picture, must establish what went on in the initial Complaint for a temporary and permanent injunction which was denied in Mercer County Circuit Court, along with the Board's conduct preretirement and post Danny Akers' death.

III. STATEMENT OF FACTS

The Petitioner was married to Danny Akers for many years and they had two children and grandchildren at the time Ms. Jones decided to end her marriage with Mr. Akers and sued him for

divorce in 2006, and it wasn't until June, 2008, that this contested divorce ended and a Final Order entered in June, 2008. The Mercer County Family Court's Final Order was extraordinarily complicated and convoluted in that it attempted to address all kinds of contingencies as to Mr. Akers' employment and retirement possibilities. The Family Court order gave the Petitioner 100% of her retirement IRA and *one-half* of his retirement benefits, in addition to surviving spouse as to benefits as to retirement plans. Danny Akers was ordered to pay the \$800 a month house payment as long as Ms. Jones resided in the same and thereafter ordered to pay \$250 per month alimony. The Petitioner was to prepare a Qualified Domestic Relations Order pursuant to the Final Order entered on June 30, 2008.

Upon the Petitioner's remarriage in April, 2009 (when she became Mrs. Jones), Danny Akers, by new counsel, moved to modify the terms of the Final Order. The hearing on this Petition to Modify was held in front of Judge Mary Ellen Griffith on June 4, 2009. At that hearing, Judge Griffith granted Danny Akers some relief as to alimony (the petitioner had remarried) and the house payment (since the Petitioner had vacated the marital residence), but denied any relief in regard to the Domestic Relations Order pertaining to retirement benefits. On that date the Judge entered a Domestic Relations Order as the same pertained to Danny Akers' retirement benefits and further ordered Danny Akers to execute an election granting 100% of his preretirement benefits hereinafter referred to as "preretirement death benefits". This document, (attached as Exhibit "1"), was executed by Danny Akers in the Courthouse in Mercer County, witnessed by present counsel, the Petitioner and her present counsel, and tendered to Petitioner and her counsel contemporaneously with its execution on June 4, 2009, as the Judge instructed. Respondent Judy Akers does not know what Petitioner did with the original executed document after the Petitioner received the same, but finds the vicious and defamatory allegations against her husband to be most disturbing.

Judy Akers, a friend, then caregiver for over a year, and later fiancé, became the wife of Danny Akers in September, 2009. Danny Akers died on December 16, 2009, of complications from chronic renal disease. Mrs. Akers, on January 19, 2010, received a letter from the Retirement Board acknowledging her husband's death and her right to receive a surviving spouse monthly annuity. (See attached Exhibits "2a", "2b", "2c", Letter and instructions). On January 21, 2010, widow Judy Akers filed the application for surviving spouse benefits with the Board. (See attached Exhibits "3a", "3b", "3c", "3d", "3e", "3f"). On January 27, 2010, the Board again wrote Mrs. Akers and advised her that they couldn't calculate the benefit until Mr. Akers' disability application was reviewed. (See attached Exhibit 4).

Thereafter, Petitioner Patricia Jones sued Judy Akers individually and Judy Akers, as the Administratrix of the Estate of Danny Akers, in the Circuit Court of Mercer County. (See previously submitted Mercer County Complaint, Exhibit # "2" in Respondent's Motion to Dismiss). Along with other requests for relief, Petitioner demanded a preliminary injunction. Thereafter, on February 25, 2010, Judge Omar Aboulhosn of the Circuit Court of Mercer County did issue a temporary injunction. The Court had noted that the plaintiff may be entitled to a portion of any retroactive disability award given the language in the divorce Order entered on June 30, 2009, but the Court felt there were insignificant funds that could be awarded to warrant the imposition of an injunction regarding those disability funds. The Court further noted that if there was a net award of retroactive disability benefits, those may be an asset of the Estate of Danny Akers and may be subjected to claims of the Plaintiff and perhaps others. In the Court's conclusion, Judge Aboulhosn ruled that,

"It should grant the plaintiff's request for a temporary injunction regarding the retirement assets, but deny the temporary injunction as to the disability benefits." (See previously submitted Motion to Dismiss).

On March 29, 2010, the parties came before the Circuit Court of Mercer County for a

hearing on Plaintiff's Motion for a Permanent Injunction. At that time, West Virginia Consolidated Public Retirement Board's Executive Director, Ann Lambright, testified concerning her rejection of the Domestic Relations Order prepared by the Petitioner and entered by Family Court Judge Mary Ellen Griffith and her reasons thereto. Additionally, Danny Akers' election of preretirement benefits to Petitioner executed June 4, 2009, was entered into evidence. (See Exhibit "1"). Judge Aboulhosn, on July 16, 2010, made the following findings,

"1. That the West Virginia Public Consolidated Retirement Board rejected the Qualified Domestic Relations Order issued involving the Plaintiff and the decedent, Danny K. Akers.

2. That the decedent, Danny K. Akers, was not retired at the time of his death and was not disabled at the time of his death.

3. That the West Virginia Public Consolidated Retirement Board has awarded the decedent a posthumous disability award that will be paid to the defendant as a surviving spouse pursuant to State statute."

Thereafter, the Court dissolved the previous preliminary injunction and refused a permanent injunction as to disability benefits. (See previously submitted Exhibit "4" in Respondent's Motion to Dismiss). This Order was never appealed, and the Petitioner's claim against Judy Akers for unjust enrichment remains.

On May 10, 2010, Sheriff Don Meadows of Mercer County was appointed as Administrator of the Estate of Danny Akers. (See previously submitted Exhibit "5" in Respondent's Motion to Dismiss).

In December, 2010, the Sheriff of Mercer County and Patricia Jones, by counsel, signed off on another DRO which, in March of 2011, was rejected by the Board.

On the 20th day of April, 2011, for the first time, the Petitioner admits that Mr. Akers elected a preretirement death benefit to Mrs. Jones. Her admission is made after 18 months of litigation in three different tribunals wherein the Petitioner continuously and intentionally failed to acknowledge the election executed by Danny Akers.

IV. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

- A. THE KANAWHA COUNTY CIRCUIT COURT'S DISMISSAL WAS PROPER AS TO JUDY AKERS.**
- 1. JUDY AKERS' RIGHTS TO PRERETIREMENT BENEFITS VESTED ON THE DATE HER HUSBAND DIED.**
 - 2. THE JUNE 4, 2009 QDRO WAS PROPERLY REJECTED BY THE BOARD.**
 - 3. THE BOARD PROPERLY REJECTED THE POSTHUMOUS QDRO.**
- B. THE MERCER COUNTY CIRCUIT COURT'S RULING ON JULY 19, 2010, IS *RES JUDICATA* AS TO THE PETITIONER'S CLAIMS AGAINST JUDY AKERS.**
- C. PETITIONER JONES SHOULD BE DENIED EQUITY UNDER THE DOCTRINE OF UNCLEAR HANDS.**

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VI. SUMMARY OF ARGUMENT

Danny Akers was thrown out of the marital home in June, 2006; divorced in June, 2008; and remarried in September, 2009. He was an active employee and participant of the Plan who had not retired, nor could he have retired, at the time of his death on December 16, 2009.

On the date of his death, his preretirement benefits vested in his surviving spouse, Judy Akers, pursuant to West Virginia Code §5-10-27(b)(1). After the death of Danny Akers, the Board contacted Judy Akers and sent her the necessary application and other forms for surviving spouse preretirement death benefits pursuant to the aforesaid statute. Judy Akers completed the surviving spouse application and sent it to the Board in February, 2010. The Board, however, ignored the mandatory language of West Virginia Code §5-10-27(b)(1), ignored the vesting of preretirement death benefits in the surviving spouse, and posthumously awarded Mr. Akers' disability retirement benefits to Judy Akers pursuant to West Virginia Code §5-10-25 in late March, 2010. The Board, by this act, created the present controversy.

In the March 29, 2009 hearing, wherein Executive Director Ann Lambright testified pursuant to a subpoena issued by Mrs. Jones, Mrs. Jones knew that her appropriately rejected QDRO was fatally flawed because it, in violation of state and federal law, attempted to snatch all of Danny Akers' preretirement death benefits. Mrs. Jones knew that, by statute, marriage trumps and voided any and all preretirement elections made by the active participant, Danny Akers.

It is the conduct and actions of Patricia Jones and the Board that is in issue here and not the marriage of Judy Akers and the preretirement death of her husband, Danny Akers.

VII. DISCUSSION OF LAW

A. THE KANAWHA COUNTY CIRCUIT COURT'S DISMISSAL WAS PROPER AS TO JUDY AKERS.

During the pendency of the Mercer County action as noted above, the Petitioner filed an action in the Circuit Court of Kanawha County. There were no allegations contained with Petitioner's Complaint alleging that Judy Vannoy Akers had any duty owed to Petitioner nor did she

breach any such duty owed to the Petitioner. In fact, only Paragraph 3 which stated that the Petitioner and Defendant Judy Akers are citizens and residents of the State of West Virginia; Paragraph 13 which stated that Danny Akers married Judy Akers; and Paragraph 15 wherein the Petitioner acknowledged that the surviving spouse, Judy Akers, was to receive the posthumously awarded disability retirement benefits in the form of an annuity pursuant to West Virginia Code §5-10-27; and Paragraph 19 which stated that Respondent/defendant Judy Akers is named herein as a party to enable her to respond and otherwise protect her interests in the outcome of this litigation if she desires. These allegations assert no cause of action against Judy Akers.

Judy Akers filed a 12(b) motion to dismiss alerting Judge Kaufman that she was subject to a previously filed action in Mercer County; that Danny Akers had executed and tendered joint and survivor death benefits to Mrs. Jones as required by the Final Order; and that Judy Akers had been awarded statutorily granted preretirement death benefit annuity.

After Danny Akers executed the joint and survivor annuity option A, (Exhibit "1"), and tendered the same to the Petitioner and her current counsel on June 4, 2009, Danny Akers made no changes and did not execute any other annuity options. The only thing Danny Akers did was to marry Respondent Judy Vannoy Akers in September, 2009. Judy Vannoy Akers was the surviving widow of Danny K. Akers, who died of chronic renal disease resulting in failure on December 16, 2009. (See attached Death Certificate, Exhibit "3f").

1. JUDY AKERS' RIGHTS TO PRERETIREMENT BENEFITS VESTED ON THE DATE HER HUSBAND DIED.

The Plan that the Board administers in West Virginia requires that a participant be 55 years of age to qualify for retirement benefits, if he has 30 years of service. Mr. Akers never reached 55 prior to his death. When Danny Akers passed away on December 16, 2009, he was married to Judy Vannoy Akers. He was not retired as he was not old enough and he had not been granted a disability retirement.

West Virginia Code §5-10-27 (entitled Preretirement Death Benefit Annuities) provides in Section (b)(1) for a member's surviving spouse if said member has 10 or more years of service and is entitled to a deferred annuity. §5-10-27(b)(1) states as follows,

"In the event any member who has ten or more years of credited service, or any former member with ten or more years of credited service and who is entitled to a deferred annuity, pursuant to section twenty-one of this article: Dies; and leaves a surviving spouse, the surviving spouse shall immediately receive an annuity computed in the same manner in all respects as if the member had: (A) Retired the day preceding the date of his or her death, notwithstanding that he or she might not have attained age sixty or sixty-two years, as the case may be; (B) elected option A provided in section twenty-four of this article; and (C) nominated his or her surviving spouse as beneficiary." (Emphasis added).

The aforesaid section is mandatory when a member with 10 or more years of service (Danny Akers had 30), who is entitled to a deferred annuity, dies and leaves a surviving spouse.

Wherein this section states,

"The surviving spouse shall immediately receive an annuity computed in the same manner in all respects as if the member had: (A) Retired the day preceding his or her death, notwithstanding that he or she might not have attained age sixty or sixty-two years, as the case may be; (B) elected option A provided in section twenty-four of this article; and © nominated his or her surviving spouse as beneficiary."

The above operative words are "The surviving spouse shall immediately receive an annuity". Danny Akers did nothing after he executed the June, 2009 election and signed the unqualified DR0, but remarry and die. The Board is incorrect when it argues that Danny Akers did not have sufficient years of service, as he had 30 years. Danny Akers did not violate, as the Petitioner argues, West Virginia Code §5-10-24 because he did not execute any preretirement election options after the Court ordered his execution of the election dated June 4, 2009. Danny Akers cannot be held responsible for the scrivener's error in the election form by Patricia Jones and her counsel, nor their loss of the same. The prohibitions upon remarriage election requiring affidavits concerning QDR0s do not apply because the statute's language pertains only to the retirant. As

found by Judge Aboulhosn, Danny Akers had never retired nor been declared disability retirement prior to his death. Under West Virginia Code §5-10-2(23) a retirant means any member who has commenced an annuity payable by a retirement system. This did not happen.

Alienation of employee pension benefits is prohibited by both ERISA and West Virginia state law. Both federal and state law protects surviving spouses in situations where a vested participant who dies before the annuity starting date and who has a surviving spouse, by providing that such spouse shall receive the preretirement surviving spouse benefits. See 29 U.S.C. 1055(a)(1) and West Virginia Code §5-10-27(b)(1).

2. THE BOARD PROPERLY REJECTED THE JUNE 4, 2009 DRO

In July, 2009, the Board rejected the June, 2009 DRO due to its fatal inconsistencies. The Board found that the DRO granted Mrs. Jones 50% of the marital property portion of Mr. Akers' retirement benefits, but would grant Mrs. Jones 100% of post-separation retirement benefits if Danny died after he retired. The Board also found that this DRO was attempting to alienate Mr. Akers' preretirement benefits election as prohibited by West Virginia Code Rule §162-1-6.2.

The then Executive Director of the Board, Ann Lambright, testified pursuant to Mrs. Jones' subpoena, on March 29, 2009, in the Mercer County Circuit Court proceedings and confirmed that a QDRO cannot require a non-retired participant to name a particular beneficiary nor can it require a participant to choose benefit options preretirement.

The Board is correct in its denial of the June 4, 2009, DRO because, as it found, 1) a QDRO cannot speak to preretirement benefit elections; 2) a QDRO cannot provide for benefits beyond 50% of the accrued benefits during the marriage prior to separation; 3) the QDRO cannot force a participant preretirement to elect a beneficiary for preretirement benefits nor choose the annuity option prior to retirement.

During the March 29, 2009 hearing, Executive Director Lambright went on to testify that the past practices of the Board, and including her past experiences with Mrs. Jones' present counsel,

was that the Board approved QDROs pre-execution by the Family Law Judge and thereafter received their approved QDRO signed by the Judge. Ms. Lambright testified there was no draft QDRO and there was no pre-approval in this case. Mrs. Lambright testified that in her experience pre-retirement direction as contained in the elections are normally and usually sent and attached to the proposed QDRO. But, in this instance, there was no proposed QDRO and there was no election attached. Ms. Lambright also testified that in a pre-retirement situation, if the participant remarries and who has not retired, the election forms don't matter. As Executive Director Ann Lambright testified, and Judge Aboulhoshn found, Danny Akers died as a active member of the Department of Highways and that he didn't die as a retiree. Therefore, the QDROs rejected meant nothing in this case since Danny Akers died preretirement until the Board granted a posthumous disability retirement. Respondent Akers' position that she, as surviving widow, vested in her husband's preretirement death benefits as surviving spouse pursuant to West Virginia law, §5-10-27(b)(1). The Board notified Mrs. Akers of her statutory rights and sent her the paperwork for completion of her surviving spouse annuity application. As there was no QDRO in effect, Mrs. Jones cannot alienate the preretirement benefits of the actual surviving spouse. Under both federal and West Virginia law, a QDRO is the only way to alienate preretirement benefits. Since there was not a QDRO entered prior to Danny Akers' death, it cannot supersede, then, the rights of a surviving spouse. In the case of Selvey v. Long, 696 A.2d 102 (NJ Appellate Division 1997), the Court held a property settlement agreement entitling the decedent's first wife to 50% of her husband's state pension benefits where the husband remarried and the issue before the court was whether the second wife was required to share her widow's benefits with the first wife. The New Jersey court determined that the second wife alone was entitled to the widow's benefits which they deemed to be her property under the state retirement statute. Id. at 157-158.

Executive Director Ann Lambright testified that Danny Akers' pre-death disability application converted Judy Akers' surviving spouse annuity benefits under §5-10-27(b)(1) to a

disability benefit. Ms. Lambright stated that it doesn't change the dollars awarded, but what it does is change the tax benefits. Ms. Lambright confirmed that the surviving spouse receives exactly what she would have received under a preretirement death benefit, but she has to pay less taxes on the same.

The Board's unilateral preretirement decision to ignore West Virginia Code §5-10-27(b)(1) mandatory surviving spouse benefits does not entitle Mrs. Jones to a claim against Judy Akers.

Danny Akers was married to Judy Akers at the time of his death on December 16, 2009. On that date, Judy Akers' rights to the preretirement death benefit annuity vested by statute, West Virginia Code §5-10-27(b)(1). Mrs. Akers was contacted by the Board and sent the paperwork to apply for the preretirement death annuity. (See Exhibits "2a", "2b", "2c"). The Board estimated the monthly benefit at \$1,841.86. The Board then, on its own, ignored the application for preretirement death benefits and determined that since Danny Akers had submitted, prior to his death, an application for disability retirement, they would grant posthumously disability retirement benefits to the surviving spouse, Mrs. Akers, thereby creating this current controversy. This decision by the Board inured to its benefit because it reduced the benefits payable by the Plan by approximately \$300 a month. The issue of whether the Board was negligent in denying the fatally flawed June 4, 2009 DRO or the posthumously presented amended QDRO in December, 2010, is confined to the obligations and responsibilities due Mrs. Jones from the Board. This should not impact Judy Akers' statutorily vested right to surviving spouse benefits. If the Board was negligent in these denials, then the Board must pay damages and the law, then, should not act to eliminate Mrs. Akers' rights as granted by statute. As a result, the Kanawha Circuit Court's dismissal of Judy Akers was clearly appropriate.

3. THE BOARD PROPERLY REJECTED THE POSTHUMOUS DRO

The majority of courts have held that a QDRO entered after the participant's death does not supersede the rights of a surviving spouse. See Samaroo v. Samaroo, 193 F.3d 185, at 187 (3rd

Circuit, 1999). See also Davenport, 146 F. Supp. at 780 (2000 W.L. 1898846).

In the case of Selvey v. Long, 696 A.2d 102 (NJ Appellate Division 1997), a property settlement agreement entitled the decedent's first wife to 50% of her husband's state pension benefits, as in the case at bar. A valid QDRO was not entered into, the husband remarried, and the issue before the court was whether the second wife was required to share her widow benefits with the first wife. In the absence of a valid QDRO entered prior to death, the New Jersey court determined that the second wife alone was entitled to widow benefits which the court deemed to be her property under the state retirement statute. Long, Id. at 157-58).

In the case of Stahl v. Exxon Corp., 212 F.Supp 2d 657 (S.D. Texas 2002), the Court addressed a retirement plan similar to West Virginia's plan. The minimum retirement age was 55 (as in the West Virginia retirement plan). The Plan provided that when an employee dies prior to receiving any benefits, the surviving spouse will receive an annuity of 50% of the benefits earmarked for the employee. A DRO was presented to the plan administrator but rejected because it did not specify the proper distribution scheme. Thereafter, the participant remarried.

The decedent plan participant's former wife sued the employer alleging she was entitled to one-half of the proceeds under the surviving spouse annuity. The Stahl Court ruled,

"Accordingly, this court cannot enforce the fourth domestic relations order entered after Andrew's death, where the effect would be to divest Jacqueline (new wife) of her statutorily mandated interest in SSA benefits." Stahl, Id., at 667.

The Stahl court went on to find that although the last proposed QDRO was drafted correctly,

"...it is without legal effect because it was not in place prior to Andrew's death, when Jacqueline's right to surviving spouse benefits matured and vested under the Plan." Stahl, Id., at 667.

As the Third Circuit held in the case of Samaroo v. Samaroo, 193 F.2d 185 (3rd Cir. 1999),

"The majority of cases hold that a surviving spouse annuity vests on the date of the participant's death and a proposed QDRO entered posthumously is not enforceable. Id. at 187. See also Davenport, 146 F. Supp. at 780; 2000 W.L. 1898846.

The laws of West Virginia, which are similar to the federal laws, allow a QDRO to speak only as to retirement benefits. The anti-alienation sections of both federal and West Virginia law only allow a QDRO to speak. Since Mr. Akers never retired nor was granted disability benefits prior to his death, the QDRO proposed on June 4, 2009, nor the amended QDRO proposed in December, 2010, cannot speak to preretirement beneficiaries of Danny Akers. As Executive Director Ann Lambright testified, beneficiaries are for preretirement benefits. QDROs do not deal with preretirement benefits of the plan participant, only ex-spouses.

The fact of the matter remains that the courts have been consistent in finding that surviving spouse benefits vest on the date of the participant's death as to preretirement benefits and that a QDRO only speaks to retirement benefits and not preretirement benefits. In the Samaroo case, *Ibid.*, no benefits were paid to anybody because of the ex-wife's failure to get a DRO qualified that referenced survivor benefits. In regard to a fairness or equitable argument, the Third Circuit said,

“The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture . . . but rather the part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan.”

In the Samaroo case, the former spouse of a plan participant, who, unlike this case, had not remarried and who (like this case) had not yet retired, sought to amend the divorce decree *nunc pro tunc* after the participant's death to provide for an award of preretirement survivorship annuity. The Third Circuit in that case relied on similar reasoning, as did the Fourth Circuit in Hopkins, and concluded that a Domestic Relations Order entered after the death of a participant is not an enforceable QDRO. The Third Circuit also upheld the District Court's ruling that the ex-wife's entitlement to a survivorship annuity was to be determined as of the date of the death of the participant.

As the Board points out, to comply with either the proposed QDRO in 2009 or the amended QDRO in 2010, would require the Board to pay more than the Plan provides and, further, more than

the DRO provided for her share. Accordingly, Respondent Judy Akers, widow, asserts that her right to preretirement death benefits vested on the date her husband died, December 16, 2009. See Hopkins v. AT&T Global Information Solutions Company, 105 F.3d 153 (4th Cir. 1997).

In the case of Ross v. Ross, 705 A.2d 784 (Ct. App. Div. 1998), the Court ruled in absence of a valid QDRO entered prior to the participant's death, a former spouse was not entitled to proceeds of the participant's pension plans which were payable to the participant's current surviving spouse. The Court noted that survivor benefits from a pension plan automatically pass to the current surviving spouse upon the participant's death. Id. at page 792. The Ross Court opined as follows,

“... where a surviving spouse has not waived her right to benefits and a QDRO does not exist, ERISA prevents a participant from naming a beneficiary other than a surviving spouse. In that case, a participant will be unable to alienate any of his or her pension plans, even by distribution in a property settlement agreement.” Ross at 793.

The Board cited numerous cases that supports its position that a QDRO cannot make the Board pay more than the Plan provided.

The West Virginia legislature has codified and has chosen to limit the amount of a participant's interest that can be awarded by a QDRO. West Virginia has chosen to leave a Plan participant with control over the portions of his or her benefits attributable to service before marriage and, of course, after separation. A DRO should never be qualified that disenfranchises the surviving widow.

B. THE MERCER COUNTY CIRCUIT COURT'S RULING ON JULY 19, 2010, IS RES JUDICATA AS TO THE PETITIONER'S CLAIMS AGAINST JUDY AKERS.

Judge Aboulhoshn conducted a hearing on March 29, 2010, on Mrs. Jones' claim for a permanent injunction. The Board's executive director, Ann Lambright, subpoenaed by Mrs. Jones, testified concerning her rejection of the proposed DRO prepared by the Petitioner and entered by the Family Law Judge. Additionally, Danny Akers' election of preretirement benefits to the Petitioner executed on June 4, 2009, was entered into evidence. Judge Aboulhoshn found that,

“Decedent Danny K. Akers was not retired at the time of his death and was not disabled at the time of his death. “

After denying Mrs. Jones’ claim for a permanent injunction against Mrs. Akers for receiving her statutory benefits, he found that the Board had awarded Danny Akers a posthumous disability award that would be paid to Judy Akers as his surviving spouse, pursuant to state statute. This ruling was never appealed. This ruling provided that Judy Akers could continue to receive benefits from the Board and did not have to pay them over to Mrs. Jones.

Res judicata requires substantially the same parties who sue and defend in each case in the same respective character. (See Porter v. McPherson, 479 S.E.2d 668, at 676 (W.Va. 1996). Mrs. Jones sued Mrs. Akers in Mercer County asking for a permanent injunction and other equitable trust remedies to compel Mrs. Akers to transfer to Mrs. Jones all the benefits which were being paid to Mrs. Akers by the Board. Mrs. Jones pled the same allegations and intentionally omitted the election of preretirement benefits signed by Mr. Akers in the Kanawha County case and requested the same relief. The only difference is that in the Kanawha County case Mrs. Jones sued the Board. Thus, the issue as to benefits received by Mrs. Akers from the Board has been decided and has never been appealed. See Blake v. Charleston Area Medical Center, 498 S.E.2d 41 (W.Va. 1997). At the March 29, 2010 hearing, Mrs. Jones subpoenaed Executive Director Ann Lambright to testify concerning her reasons for rejecting the DRO. If the Board was negligent in denying the DRO, that is a matter that should be decided between the Board and Mrs. Jones. Absent a valid QDRO prior to the death of Danny Akers, Mrs. Akers surviving spouse benefits were vested by West Virginia statute §5-10-27(b)(1). It is the Board’s own conduct, whether negligent or not, to reduce the benefits payable to Mrs. Akers by posthumously granting a disability retirement application rather than granting the mandatory surviving spouse benefits, which continued to fuel this controversy.

C. PETITIONER JONES SHOULD BE DENIED EQUITY UNDER THE DOCTRINE OF UNCLEAN HANDS.

Mrs. Jones’ initial misconduct was her attempts to force the Board to recognize a QDRO

that would have paid more than what the DRO granted her. She was entitled to 50% of Danny Akers' retirement benefits during the marriage up to the date of separation. The QDRO presented would have given Mrs. Jones more than 3 years worth of retirement benefits that occurred post separation.

Her second act of misconduct was her failure to exercise due diligence in following up with the Board's rejection of her QDRO for over 7 months. It was two months after Danny Akers died that she came forward and demanded all of the survivor benefits.

The third act of misconduct was when Mrs. Jones commenced her lawsuit against Judy Akers in the Mercer County action and failed to apprise the Mercer County Court that Danny Akers had in fact executed and delivered a preretirement death annuity election on June 4, 2009, as required by the Family Law Judge.

Mrs. Jones' next act of misconduct was to mislead the Kanawha County Court and omit that Danny Akers had in fact complied with the designation of Mrs. Jones for his preretirement benefits.

She continued this misrepresentation when she filed her original Petition in this Court and declared that members and participants like Mr. Akers could change the election of benefits and nomination of beneficiary without the former innocent spouse ever knowing, which Mrs. Jones said had actually happened to her. See Petitioner's Brief, page 12. The fact of the matter is that Mr. Akers did nothing but get remarried. He never submitted any election after the June 4, 2009, election that he gave to Mrs. Jones.

She continued her misrepresentation when Mrs. Jones intentionally once again omitted the June 4, 2009, election by referencing a May 7, 2009 election to Judy Vannoy Akers and Mr. Akers' grandson and omitting the tendered preretirement election form that was done on June 4, 2009.

The Petitioner continued this course of misconduct when she accused decedent Danny Akers of contempt as follows,

“Obviously once Mr. Akers died, it was not possible for the Court to

adjudge him in contempt and sanction him. Individuals like him die and believe that he or she accomplished a task of defeating his or her former spouse's claim to retirement assets that the former spouse did not earn and therefore did not deserve." See Petitioner's Amended Petition, Pg. 12.

Petitioner continued her deceptive manipulation of the facts when she argued as follows,

"To underscore the misconduct of Mr. Akers . . . it was discovered that contrary to the Final Order of Divorce on May 7, 2009, Mr. Akers without Mrs. Akers, changed his beneficiary for his retirement benefits. See Jones Amended Petition for Appeal, Pg. 5.

. . . This change was not only contrary to the express provisions of the Final Order but not correcting the change also violated subparagraph 7(f) of the QDRO entered on June 4, 2009. It was not known to Mrs. Akers, until after the death of Mr. Akers, that Mr. Akers was contempt of two separate orders, both the Final Order of Divorce and the QDRO." See Jones Amended Petition, Pgs. 5-6.

It must be remembered that there was no hearing on the QDRO until June 4, 2009, when it was finally presented to the Family Law Court for the first time. After the tendering of the June 4, 2009 preretirement benefit election, Mrs. Jones knew, for a fact, prior to the death of Mr. Akers, that he was not in contempt of two separate orders because she was present and observed the execution of the preretirement death benefit form and received the original of the same and checked the election that she wanted and put in that she was entitled to 100% of it. Petitioner Jones continues to defame decedent Danny Akers when she accuses him of perjury, knowing full well that Danny Akers had executed the preretirement death benefit form on June 4, 2009, and she had received the same when she argues,

"What happens if the member or retirant commits perjury and then dies? What is the remedy for the innocent former spouse given that the penalty of perjury is no threat to a deceased member or a deceased retirant?" See Petitioner's Reply Brief, Pg. 5.

Mrs. Jones goes on to argue that it is inconceivable that a member could escape the jurisdiction of the Family Court and seriously impair, or eliminate, the only significant income producing asset available for his former innocent spouse. The Petitioner's conduct throughout this

litigation has ignored the compliance of Danny Akers at the June 4, 2009 hearing, in her claim for equity. From the Final Order submitted to this Court in this case, it is clear that most people, including Danny Akers, wouldn't understand that he also gave up his share of his retirement that he earned and that he disinherited his children and grandchildren and disenfranchised any future spouse prior to the hearing on June 4, 2009. Finally, for the first time, the Petitioner admits that Danny Akers signed the preretirement election form and tendered the same to her, but now in her request for equity, she blames Danny Akers for her failure to check the right box and complete the right section. She was the scrivener of this document who, on her own or with advice of her present lawyer, checked whatever box she wanted and filled out whatever portion she wanted. However, she continues to argue that Danny Akers is in contempt for her own negligence in not checking the right box. See Petitioner's Response to Motion to Dismiss, Pg. 3.

By her conduct, Petitioner Jones has unclean hands and is therefore not entitled to the consideration of equity. Although the Domestic Relations Order provided that she would receive her share of Danny Akers' retirement, that has never been the goal of her various lawsuits and/or allegations. Her goal is to take it all.

Mrs. Jones was the drafter of the QDRO and she knew or should have known that it would not be accepted because it was fatally inconsistent. Mrs. Jones had the obligation of due diligence to follow up on the QDRO after she submitted the same to the Board. Upon the receipt of the executed preretirement form, she had the obligation to present it to the Board and to check whatever benefit box she wanted. It was Mrs. Jones' misconduct for waiting 7 months to even ask about her submitted QDRO and it was Mrs. Jones' misconduct if she checked the wrong box and it was Mrs. Jones' misconduct if the preretirement election form mysteriously disappeared from her possession.

This Court has applied in numerous cases the doctrine of unclean hands as the same pertains to conduct within divorce cases. This Court has opined,

“Their hand may be unclean, but it is the duty of the court of equity to permit them to clean them when it can do so and not permit such uncleanliness to continue as a stench in the nostrils of the people.” Gardner v. Gardner, 110 S.E.2d 495 (W.Va. 1959).

This Court has further gone on to hold that,

“Equity never helps those who engage in fraudulent transactions, but leaves them where it finds them.” Providence v. Providence, 473 S.E.2d 894 (W.Va. 1996).

The Petitioner’s misconduct was in fact, both now and then, connected with this particular domestic relations order and the fatally flawed QDRO that she is now seeking to enforce. Her allegations within the record in her Complaint filed in the Kanawha County Circuit Court against Judy Akers and the Board intentionally omitted the existence of the preretirement benefit document executed and tendered on June 4, 2009. She has continued throughout to deny the existence of this document and has continued to paint the decedent in a light most vile in her pleadings filed with this Court. When finally accepting that she could not deny the fact that the preretirement election benefit executed on June 4, 2009, she blamed the decedent for her failure to fill out the actual preretirement benefit she wanted. This Court has held,

“Whenever and if it is made to appear to the Court that by reason of fraudulent or other unconscionable conduct, the plaintiff has lost his right to invoke a court of equity, the Court will, on motion of a party or on its own motion, wash its hands of the whole. Wheeling Dollar Savings & Trust co. v. Hoffman, 35 F.2d 84, 86 (W.Va. 1995) quoting State v. Altizer Coal Land Co., 128 S.E.2d 286 (W.Va. 1924).

Patricia Jones should be denied her claim of equity to all of Danny Akers’ portion of his benefits.

VII. CONCLUSION

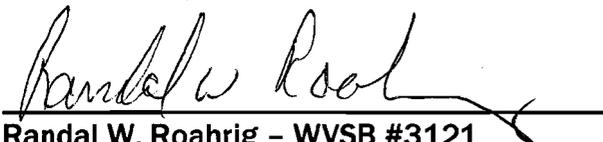
As the Board so eloquently pointed out in its brief filed in April, 2011, the Board cannot accept a QDRO that gives an ex-spouse more than 50% of the member’s total benefits. See West Virginia Code Rule 162-1-6.2.1 (2005). The DRO in the instant case was limited to 50% of Danny Akers’ retirement benefits accrued during the marriage. The DROs proposed, and properly rejected

by the Board, would have given Mrs. Jones all of Danny Akers' 50% share accrued pre-separation to her. Thus, if the Board had accepted the June, 2009 DRO and treated Mrs. Jones as the surviving spouse, she would be receiving 100% of Mr. Akers' total accrued benefits, including those accrued post-separation. This would have been in direct contradiction of the Final Order and the proposed DRO awarding Mrs. Jones only 50% of Danny Akers' retirement benefits. The acceptance of the proposed June, 2009 QDRO and the posthumous QDRO requiring Mrs. Jones to be treated as a surviving spouse eliminates, in clear violation of the law, Danny Akers' ability to leave his 50% share of his retirement benefits to other beneficiaries. Recognition of Mrs. Jones as surviving spouse would also violate the preretirement death benefits of Danny Akers' actual spouse on the date of his death under West Virginia Code §5-10-27(b)(1). A DRO cannot act to violate a state statute established to protect the rights of the actual spouse of the plan participant. The unilateral decision of the Board to ignore the requirements of West Virginia Code §5-10-27 which vested in Judy Akers on the date of her husband's death surviving spouse benefits and to after Danny Akers' death to award a posthumous disability retirement cannot divest Judy Akers of her rights as surviving spouse.

WHEREFORE, Judy Vannoy Akers respectfully requests that this Court confirm the dismissal of Judy Akers from the Kanawha County Circuit Court action.

JUDY VANNOY AKERS, RESPONDENT

By Counsel



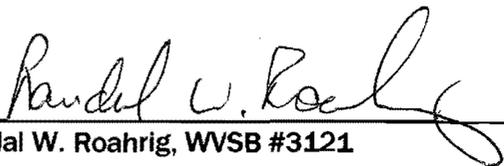
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CERTIFICATE OF SERVICE

I, Randal W. Roahrig, counsel for Respondent Judy Vannoy Akers, do hereby certify that I have mailed copies of the foregoing **RESPONSE ON BEHALF OF RESPONDENT JUDY VANNOY AKERS TO AMENDED PETITION FOR APPEAL** upon counsel of record, by United States Mail, postpaid, as follows, on this the 29th day of June, 2011:

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EXHIBITS

ON

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CLERK'S OFFICE