

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-308

ICA EFiled: Jan 03 2024  
10:05AM EST  
Transaction ID 71726505

**DONDI STEMPLER,**

Applicant below, Petitioner,

v.

**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,**

Respondent.

---

*Appeal from the West Virginia Consolidated Public Retirement Board*

---

**PETITIONER'S REPLY BRIEF**

Lonnie C. Simmons (W.Va.I.D. No. 3406)

**DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC**

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

[lonnie.simmons@dbdlawfirm.com](mailto:lonnie.simmons@dbdlawfirm.com)

*Counsel for Petitioner Dondi Stemple*

## TABLE OF CONTENTS

I.	Introduction .....	1
II.	Reply to statement of facts .....	3
III.	Reply to arguments .....	4
IV.	Conclusion .....	9

## TABLE OF AUTHORITIES

### ***West Virginia cases:***

<i>Aetna Casualty &amp; Surety Co. v. Pitrolo</i> , 176 W.Va. 190, 342 S.E.2d 156 (1986) . . . . .	10
<i>Bennett v. Adkins</i> , 194 W.Va. 372, 460 S.E.2d 507 (1995) . . . . .	10
<i>Cathe A. v. Doddridge County Board of Education</i> , 200 W.Va. 521, 490 S.E.2d 340 (1996) . . . . .	10
<i>Dadisman v. Moore</i> , 181 W. Va. 779, 384 S.E.2d 816 (1988) . . . . .	6
<i>Phillip Leon M. v. Greenbrier Board of Education</i> , 199 W.Va. 400, 484 S.E.2d 909 (1996) . . . . .	10
<i>Security National Bank &amp; Trust Co. v. Willim</i> , 153 W.Va. 299, 168 S.E.2d 555 (1969) . . . . .	10
<i>State ex rel. Deputy Sheriffs' Association, Inc. v. Sims</i> , 204 W.Va. 442, 513 S.E.2d 669 (1998) . . . . .	6
<i>Trozzi v. Board of Review West Virginia Bureau of Employment Programs</i> , 214 W.Va. 604, 591 S.E.2d 162 (2003) . . . . .	10
<i>West Virginia Education Ass'n v. Consolidated Public Retirement Board</i> , 194 W.Va. 501, 460 S.E.2d 747 (1995) . . . . .	10
<i>West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.</i> , 234 W.Va. 469, 766 S.E.2d 416 (2014) . . . . .	5

### ***Miscellaneous:***

file:///C:/Users/lcs/Downloads/5.pdf . . . . .	7
<a href="https://portal.ct.gov/-/media/TRB/Content/ActiveInactive/AI_WDRWLAPP.pdf">https://portal.ct.gov/-/media/TRB/Content/ActiveInactive/AI_WDRWLAPP.pdf</a> . . . . .	7
<a href="https://sra.maryland.gov/sites/main/files/file-attachments/form_5.pdf?1696960791">https://sra.maryland.gov/sites/main/files/file-attachments/form_5.pdf?1696960791</a> . . . . .	7

<a href="https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/customer-service/retirement-plan-single-withdrawal-form-payment-form.pdf">https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/customer-service/retirement-plan-single-withdrawal-form-payment-form.pdf</a> . . . . .	7
<a href="https://www.johnhancock.com/content/dam/onejohnhancock/pdfs/annuities-forms/Withdrawal_Request_Qualified_Form.pdf">https://www.johnhancock.com/content/dam/onejohnhancock/pdfs/annuities-forms/Withdrawal_Request_Qualified_Form.pdf</a> . . . . .	7
<a href="https://www.kpers.org/forms/kwithdrawalbooklet.pdf">https://www.kpers.org/forms/kwithdrawalbooklet.pdf</a> . . . . .	7
<a href="https://www.lampers.org/sites/default/files/fileattachments/general/page/1631/separation_from_service_withdrawal_form_02.18.2020.pdf">https://www.lampers.org/sites/default/files/fileattachments/general/page/1631/separation_from_service_withdrawal_form_02.18.2020.pdf</a> . . . . .	8
<a href="https://www.nhrs.org/docs/default-source/members-forms/refund-application.pdf?sfvrsn=f4653bb4_22">https://www.nhrs.org/docs/default-source/members-forms/refund-application.pdf?sfvrsn=f4653bb4_22</a> . . . . .	7
<a href="https://www.persi.idaho.gov/docs/forms/RS108_with_Special_Tax_Notice.pdf">https://www.persi.idaho.gov/docs/forms/RS108_with_Special_Tax_Notice.pdf</a> . . . . .	7
<a href="https://www.taltys.com/blog/the-importance-of-having-your-documents-notarized/">https://www.taltys.com/blog/the-importance-of-having-your-documents-notarized/</a> . . . . .	8

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-308

**DONDI STEMPLER,**

Applicant below, Petitioner,

v.

**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,**

Respondent.

---

*Appeal from the West Virginia Consolidated Public Retirement Board*

---

**PETITIONER’S REPLY BRIEF**

**I. Introduction**

*To the Honorable Judges of the*

*Intermediate Court of Appeals of West Virginia:*

Respondent West Virginia Consolidated Public Retirement Board does not dispute that under the law, it legally owed and owes Petitioner Dondi Stemple as well as the other participants in the various State public employee retirement systems the highest fiduciary duty to maintain, manage, invest, and care for the retirement contributions to which it has been entrusted. However, in its brief, Respondent shirks its highest fiduciary duty in this case where Petitioner’s now deceased ex-husband was able to use the unnotarized withdrawal form created by Respondent to make significant withdrawals from Petitioner’s retirement account, without her knowledge or permission. Thus, Petitioner’s retirement benefits were gutted by Respondent authorizing the Auditor to cut checks

removing money from Petitioner's contributions based simply on unnotarized withdrawal documents. The end result of Respondent's carelessness is the retirement benefits that Petitioner anticipated would help her meet her living expenses after she ended her long and distinguished public school teaching career were reduced without her knowledge.

Respondent asserts two main theories in an effort to explain away its lack of diligence in protecting Petitioner's retirement contributions. First, Respondent asserts Petitioner has failed to prove that Respondent violated any fiduciary duty owed to her. Respondent's underlying theory apparently is that although it owes the highest fiduciary duty to all State employees participating in a State retirement system, unless the Legislature has a specific statute on point, then no fiduciary duty was violated. Under Respondent's rationale, any anonymous person simply could telephone Respondent and ask to withdraw all of the money in some State employee's retirement account because there is no specific statute precluding such telephonic withdrawals. The absurdity of this suggestion demonstrates the fallacy of Respondent's attempt to limit the scope of its fiduciary duties only to whatever specific statutes provide. As the Court will see, both the Legislature and the West Virginia Supreme Court have made it clear that Respondent's fiduciary duty encompasses many different specific acts that are not spelled out in detail by statute, but which are part of Respondent's obligations to protect the retirement contributions to which it has been entrusted.

Second, despite the large amount of money withdrawn from her retirement account without her knowledge or permission, Respondent argues Petitioner failed to prove that she was harmed in any way. Petitioner respectfully submits Respondent's arguments are meritless and ignore how obviously Respondent violated its obligations owed to Petitioner. Furthermore, if this Court endorses Respondent's failure to carry out its fiduciary duties owed to Petitioner, then this Court will

be establishing a dangerous precedent opening the door for other unsuspecting State employees to having their own retirement contributions withdrawn based upon an unnotarized withdrawal form. Petitioner respectfully submits this Court should use this case to instruct Respondent that State employees participating in the various State retirement systems have the right to rely on Respondent to ensure that any withdrawal of retirement funds actually was authorized by the employee. The most obvious solution, which has been adopted by most other state retirement systems, is to require the withdrawal form to be notarized.

## **II. Reply to statement of facts**

Respondent blames Petitioner for failing to present in evidence the relevant bank records, income tax returns, and divorce documents, which may have provided more details on how and when her deceased ex-husband stole this money. Regardless of whether he deposited the money into some unknown bank account or otherwise managed somehow to hide his criminal actions from Petitioner, there is no dispute that the root cause is the failure of Respondent to require a notarized signature on the retirement withdrawal form.

Petitioner believes her husband had a separate bank account from hers, based upon some information developed during her divorce. (AR 69). Her husband handled all of the finances. (AR 70). During her divorce, Petitioner also learned her husband had maxed out ten credit cards and two lines of credit that were in her name. (AR 78-79). As a result of these debts, Petitioner had to file for bankruptcy in 2013. (AR 79).

In preparing for her hearing, Petitioner actually did make an effort to obtain some of the records highlighted by Respondent. When she tried to gather records, she learned that the bank records did not go back far enough. (AR 79-80). Petitioner has no bank records from the relevant

time. (AR 92). She also attempted to obtain their tax records, but she did not have her husband's Social Security Number, which was required. (AR 80-81).

Petitioner is not sure whether the forged checks were deposited in their joint account or in some other separate account. (AR 91-92). When Petitioner returned to employment in 2016, she did not make any inquiry about her prior retirement contributions. (AR 106). Thankfully, for the years she worked as a teacher in Virginia, Petitioner's retirement contributions had not been withdrawn. Petitioner was told to withdraw retirement funds in Virginia requires the person to go through many hoops. (AR 82-83).

While it would have been nice for Petitioner to have discovered sooner that her deceased ex-husband had signed her name to an unnotarized retirement funds withdrawal form, the timing of this discovery does not alleviate the highest fiduciary obligation owed by Respondent to Petitioner. Furthermore, discovering this missing money earlier would not make any legal difference because it was Respondent's failure to exercise the highest fiduciary duty owed to Petitioner that created the problem in the first place.

### **III. Reply to arguments**

Respondent acknowledges that prior to Respondent coming into existence in 1991, the Teachers Retirement Board required a notarized signature to withdraw funds from a retirement account. Respondent offers no explanation for dropping the notarization requirement that existed, at least with respect to the Teachers Retirement Board, prior to Respondent being created by the Legislature, other than to assert that it has never been "required" by statute to have such signatures on retirement withdrawal forms notarized. (**RESPONDENT'S BRIEF** at 4). The suggestion is Respondent only does what a statute tells it to do when, in fact, the highest fiduciary duty



Respondent owes to State employee participants in the various retirement programs requires it to do much more.

It would be impossible for the Legislature to micromanage every decision, investment, communication, decision, or even every line required on Respondent's various forms. Rather than following such an approach, the Legislature accomplished its purposes by delegating to Respondent the highest fiduciary duty to protect the funds and assets of its retirees, as noted in Syllabus Point 3 of *West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.*, 234 W.Va. 469, 766 S.E.2d 416 (2014):

“The fiduciary duty of the Consolidated Public Retirement Board established by *W.Va.Code*, 5–10D–1 [1998] and its members, with respect to the public employee pension funds and assets entrusted to the Board, includes the affirmative duty to monitor and evaluate the effect of legislative actions that may affect such funds and assets, and to take all necessary actions including initiating court proceedings if necessary to protect the fiscal and actuarial solvency of such funds and assets.” Syl. Pt. 2, *State ex rel. Deputy Sheriff's Ass'n v. Sims*, 204 W.Va. 442, 513 S.E.2d 669 (1998).

In this decision, the West Virginia Supreme Court held that consistent with its fiduciary duties, Respondent had standing to file a declaratory judgment action to resolve disputes arising from investment-related contracts involving public retirement funds irrespective of whether Respondent was an actual party to the contract. “As we acknowledged in *Sims*, the Board has a responsibility as “financial prognosticator and micromanager” to “use the court system to protect the rights of the beneficiaries of the funds held in trust by the Board.” *Id.* at 448, 513 S.E.2d at 675 (internal citation omitted).” Thus, Respondent is the entity that micromanages the funds entrusted with it, not the Legislature.

In *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988), the West Virginia Supreme Court recognized the constitutional and contractual right State public employees are owed in connection with their retirement plans and, as a result, such already accrued retirement benefits cannot be reduced. These constitutional and contractual obligations owed by Respondent were recognized based upon a review of the applicable statutes and constitutional provisions, as opposed to being based upon a specific statute.

Finally, in *State ex rel. Deputy Sheriffs' Association, Inc. v. Sims*, 204 W.Va. 442, 513 S.E.2d 669 (1998), the West Virginia Supreme Court held in Syllabus Point 4 that based upon the fiduciary duty it owes, Respondent has “the affirmative duty to monitor and evaluate the effect of legislative actions that may affect such funds and assets, and to take all necessary actions including initiating court proceedings if necessary to protect the fiscal and actuarial solvency of such funds and assets.” Thus, this is another example where the broad fiduciary duty owed by Respondent was found by the West Virginia Supreme Court to require Respondent to take certain actions, even in the absence of a specific statute.

In an effort to excuse its failure to take any action to protect the moneys contributed by Petitioner into her retirement account, Respondent states that it only has three employees to handle and process 2,500 requests for refunds per year in all ten different retirement plans it manages. **(RESPONDENT’S BRIEF at 4)**. So, in light of the high volume of retirement benefit withdrawals combined with inadequate staffing, Respondent’s solution simply is to do nothing and to have its three employees blindly process these unnotarized retirement benefit withdrawal forms, without imposing any restrictions or protections to prevent fraud.

Respondent's poor staffing actually is an even stronger reason why Respondent should require notarized signatures on retirement benefit withdrawal forms. The notarization provides at least some additional protection against a person making a fraudulent withdrawal without the State employee's knowledge or consent.

In **PETITIONER'S APPEAL BRIEF**, Petitioner listed California, Minnesota, Missouri, Nebraska, Oregon, South Carolina, Tennessee, Texas, Utah, and Washington as states requiring notarized signatures on their State retirement withdrawal forms. In its brief, Respondent did not make any comment about why these other states require a notarized signature on a retirement benefits withdrawal form. In addition to these states, Petitioner also notes that the following states also require a notarized withdrawal form: Connecticut<sup>1</sup>, Idaho<sup>2</sup>, Kansas<sup>3</sup>, Maryland<sup>4</sup>, New Hampshire<sup>5</sup>, and North Carolina<sup>6</sup>. Other general retirement and investment entities require a notarized signature for withdrawal, including Fidelity Investments<sup>7</sup>, John Hancock<sup>8</sup>, and Municipal

---

<sup>1</sup>[https://portal.ct.gov/-/media/TRB/Content/ActiveInactive/AI\\_WDRWLAPP.pdf](https://portal.ct.gov/-/media/TRB/Content/ActiveInactive/AI_WDRWLAPP.pdf).

<sup>2</sup>[https://www.persi.idaho.gov/docs/forms/RS108\\_with\\_Special\\_Tax\\_Notice.pdf](https://www.persi.idaho.gov/docs/forms/RS108_with_Special_Tax_Notice.pdf).

<sup>3</sup><https://www.kpers.org/forms/kwithdrawalbooklet.pdf>.

<sup>4</sup>[https://sra.maryland.gov/sites/main/files/file-attachments/form\\_5.pdf?1696960791](https://sra.maryland.gov/sites/main/files/file-attachments/form_5.pdf?1696960791).

<sup>5</sup> [https://www.nhrs.org/docs/default-source/members-forms/refund-application.pdf?sfvrsn=f4653bb4\\_22](https://www.nhrs.org/docs/default-source/members-forms/refund-application.pdf?sfvrsn=f4653bb4_22).

<sup>6</sup><file:///C:/Users/lcs/Downloads/5.pdf>.

<sup>7</sup>[https://www.fidelity.com/bin-public/060\\_www\\_fidelity\\_com/documents/customer-service/retirement-plan-single-withdrawal-form-payment-form.pdf](https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/customer-service/retirement-plan-single-withdrawal-form-payment-form.pdf).

<sup>8</sup>[https://www.johnhancock.com/content/dam/onejohnhancock/pdfs/annuities-forms/Withdrawal\\_Request\\_Qualified\\_Form.pdf](https://www.johnhancock.com/content/dam/onejohnhancock/pdfs/annuities-forms/Withdrawal_Request_Qualified_Form.pdf).

Police Employees Retirement System<sup>9</sup>. All of these States and companies require the signature on a person's retirement withdrawal form to be notarized in an effort to help prevent the type of fraud that occurred in the present case.

There are many reasons to have a document notarized, whether it's required by law or not. Here's why this system has been in place for centuries:

Deter fraud and forgery: In a world where scammers take advantage of any victim who comes along, having a trustworthy notary to verify a signer's identity adds an extra layer of protection when implementing crucial documents.

Provide legal protection: Having your documents notarized can help prevent contract disputes and litigation.

Elevate the credibility of the document: Many documents are not legally binding until they have been notarized. Even though this doesn't apply to all documents, a notarization is still beneficial because a notary's stamp and signature increase the document's inherent value and authenticity.

Avoid the need for a witness to appear in court: Under the law of evidence, a notarized document is considered self-authenticating. This means it may be submitted as evidence in a trial without additional proof that it is what it appears to be. Therefore, a notarization prevents the witness from having to be present, saving a great deal of time and money in the process.<sup>10</sup>

The only rationale offered by Respondent as to why retirement withdrawal forms in this State do not require notarization of the beneficiary's signature is from the testimony of Terasa Miller, Respondent's Deputy Director and Chief Operating Officer, who explained there is no statute

---

<sup>9</sup>[https://www.lampers.org/sites/default/files/fileattachments/general/page/1631/separation\\_from\\_service\\_withdrawal\\_form\\_02.18.2020.pdf](https://www.lampers.org/sites/default/files/fileattachments/general/page/1631/separation_from_service_withdrawal_form_02.18.2020.pdf).

<sup>10</sup><https://www.taltys.com/blog/the-importance-of-having-your-documents-notarized/>.

requiring notarization and also commented that notaries sometimes cost money and would be an inconvenience for State employees. (AR 122, 145). Petitioner respectfully submits that such a minor inconvenience or even minimal cost suffered by a participant in a West Virginia public employee retirement system is far outweighed by the potential losses suffered by such participants if the money is removed through fraud. As a result of the income tax penalties associated with the early withdrawal of retirement funds combined with the negative impact the removal of such funds will have on the public employee's retirement in the future, requiring some inconvenience, such as notarization, should be required. The fact that Respondent chooses not to take any action to help ensure that no other public employee suffers the same fate as Respondent is shocking and a dereliction of the highest fiduciary duty Respondent owes.

#### **IV. Conclusion**

Through this appeal, Petitioner Dondi Stemple respectfully seeks a reversal of Respondent's final order, asks for a remedy that actuarially would place Petitioner in the position she should have been had the \$16,437.62 not been withdrawn from her retirement account without her consent, signature, approval, or knowledge. All of Petitioner's service credits should be reinstated and Respondent should be held responsible for paying whatever financial contributions are required. Counsel for Petitioner is unable to make this very sophisticated calculation and would rely upon the actuaries employed by Respondent to come up with the appropriate figures. Finally, Petitioner seeks

to recover the attorneys' fees incurred during the course of this proceeding<sup>11</sup> as well as any additional relief the Court deems to be appropriate under these facts.

**DONDI STEMPLE**, Applicant below, Petitioner,

–By Counsel–

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va.I.D. No. 3406)

**DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC**

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

[Lonnie.simmons@dbdlawfirm.com](mailto:Lonnie.simmons@dbdlawfirm.com)

---

<sup>11</sup>*West Virginia Education Ass'n v. Consolidated Public Retirement Board*, 194 W.Va. 501, 460 S.E.2d 747 (1995); *Phillip Leon M. v. Greenbrier Board of Education*, 199 W.Va. 400, 484 S.E.2d 909 (1996); *Cathe A. v. Doddridge County Board of Education*, 200 W.Va. 521, 490 S.E.2d 340 (1996); *Trozzi v. Board of Review West Virginia Bureau of Employment Programs*, 214 W.Va. 604, 591 S.E.2d 162 (2003); *Bennett v. Adkins*, 194 W.Va. 372, 460 S.E.2d 507 (1995); *see also Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986); *Security National Bank & Trust Co. v. Willim*, 153 W.Va. 299, 168 S.E.2d 555 (1969).

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-308

**DONDI STEMPLER,**

Applicant below, Petitioner,

v.

**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,**

Respondent.

---

*Appeal from the West Virginia Consolidated Public Retirement Board*

---

**CERTIFICATE OF SERVICE**

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S REPLY BRIEF** was served electronically on counsel of record on December 3, 2023, using the File and Serve Xpress system.

/s/ Lonnie C. Simmons

---

Lonnie C. Simmons (W.Va.I.D. No. 3406)