

NO. A07-2034

State of Minnesota
In Court of Appeals

Patricia Ann Langston,

Plaintiff/ Respondent,

vs.

Wilson McShane Corporation, as Administrator
for the Twin Cities Carpenters and Joiners Pension Fund, and
the Twin Cities Carpenters and Joiners Pension Fund,

Defendants/ Appellants.

**REPLY BRIEF OF
DEFENDANTS/APPELLANTS**

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ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER LANGSTON'S CLAIMS

Respondent Patricia A. Langston (“Langston”) admits that, in order to arise under 29 U.S.C. § 1132 (a)(1)(B), an action must be brought to recover benefits due to her **under the terms of the plan**, to enforce rights **under the terms of the plan**, or to clarify rights to future benefits **under the terms of the plan**. 29 U.S.C. § 1132 (a)(1)(B)(Emphasis added) A.Add.44. Respondent’s Brief and Appendix (“Respondent’s Brief”), p. 23. Langston also admits that her Complaint does not identify any provision of the Summary Plan Description (“SPD”) or Plan Document that gives rise to the benefits she seeks or the rights she alleges should be enforced. See Generally Respondent’s Brief.

Indeed, the only potential reference in the Complaint to **the terms of the plan** is contained in paragraph 17, which states: “**By reason of the foregoing**, [Langston] is entitled to judgment against [the Fund] for retroactive and ongoing survivor benefits, plus interest and reasonable attorneys’ fees and costs, **and a declaration that Plaintiff is entitled to benefits under the Plan.**” See Complaint ¶ 17 A.App. 2 (Emphasis added). And “**the foregoing**” in Langston’s Complaint is merely allegations that: (a) “[Langston] seeks a judgment from this Court declaring that the July 2005 Court Order is a QDRO[;]” Id., paragraph 14, and (b) “[the Fund’s] refusal to submit survivor benefits to Plaintiff violates [ERISA].” Id. at ¶ 16.

As a result, following Langston's argument, every exclusively federal Employment Retirement Income Security Act of 1974 ("ERISA") question with tangential beneficiary ramifications could also be a 29 U.S.C. § 1132 (a)(1)(B) action with concurrent state jurisdiction. The argument being that because the outcome of the federal question may mean that Langston is a proper beneficiary, the ramification of that answer may allow a proper benefits application by Langston. And because the processing of that application would require Appellants Wilson McShane Corporation and the Twin Cities Carpenters and Joiners Pension Fund (collectively the "Fund") to apply the terms of the Plan Document to Langston, the terms of the plan are actually being adjudicated. But that analysis was not intended by Congress.

Indeed, Langston incorrectly asserts that her alleged 29 U.S.C. § 1132(a)(1)(B) claim was properly reviewed *de novo* by the district court. Respondent's Brief, p. 14. When the terms of a plan's governing documents give the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan, a district court's standard of review of a plan administrator's denial of benefits challenged under § 1132(a)(1)(B) is abuse-of discretion—not *de novo*. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) and Donaho v. FMC Corp., 74 F.3rd 894, 897 (8th Cir. 1996). Here, the Plan Document upon which Langston purports to base her § 1132(a)(1)(B) claim indeed gives the administrator such discretion. See Plan Document, Section 3.03, A.Add. 144 ("The Trustees shall have full authority to interpret and apply the provisions of this Plan document, the Trust Agreement, and any and all other applicable written documents regarding this Plan.") In law and fact, nothing was alleged

in Langston's Complaint that could possibly implicate an abuse-of-discretion review of the plan administrator's interpretation or application of the terms of the Plan Document as required by § 1132(a)(1)(B).

Furthermore, Langston's argument that Welter v. Welter, 2004 WL 2163149 (Minn. App. 2004) A.Add. 51-53, Hogan v. Raytheon Co., 302 F.3d 854 (8th Cir. 2002), Samaroo v. Samaroo, 193 F.3d 854 (8th Cir. 2002), Hopkins v. AT&T Global Information Solutions Co., 105 F.3d 153 (4th Cir. 1997), Dial v. NFL Player Supplemental Disability Plan, 174 F.3d 606 (5th Cir. 1999) and Rouse v. Daimler Chrysler Corporation UAW, 300 F.3d 711 (6th Cir. 2002) do nothing to support the Fund's jurisdictional argument because none of the cases stand for the proposition that federal courts have exclusive jurisdiction over claims brought pursuant to 29 U.S.C. § 1132(a)(1)(B), is misleading. Respondent's Brief, pp. 23-27. The Fund does not cite these cases for that proposition. Rather, the Fund asserts that these cases support its position that Langston's claim cannot, and does not, arise under 29 U.S.C. § 1132(a)(1)(B) given the face of Langston's Complaint, which plainly alleges one bad act—erroneously determining that her DRO cannot be qualified under ERISA. Accordingly, the state court was without jurisdiction to adjudicate Langston's claim.

In Welter this Court stated that an action challenging a plan administrator's determination as to whether a domestic relations order is qualified does not arise under 29 U.S.C. § 1132(a)(1)(B) and is reviewable only by a federal district court. 2004 WL 2163149 at 3. A.Add.52. Similarly, in Hogan, Samaroo, Hopkins, and Dial the Eighth, Third, Fourth, and Fifth Circuits all held that a plan administrator's determination relating

to whether a DRO is “qualified” is a question of federal law arising under ERISA. Hogan, 302 F.3d at 856; Samaroo, 193 F.3d at 189; Hopkins, 105 F.3d at 155; Dial, 174 F.3d at 611. Where the terms of the plan are not implicated, there can be no allegation in the action that benefits are due **under the terms of the plan**, a request that rights **under the terms of the plan** be enforced, or a request to clarify rights to future benefits **under the terms of the plan** and the action cannot arise under 29 U.S.C. § 1132(a)(1)(B).

Likewise, in Rouse, 300 F.3d 711, the Sixth Circuit held that whether a domestic relations order is qualified is strictly federal in nature because a court’s review is limited to determining whether any obligations are created under ERISA—a federal statute—so the court need not meddle in state domestic relations law or policy in resolving the issue. Id. at 300 F.3d at 716. If an issue is strictly federal in nature, federal courts have exclusive jurisdiction over the matter so the action cannot arise under 29 U.S.C. § 1132(a)(1)(B).

Langston also urges this Court to disregard the legislative history behind the enactment of ERISA because it allegedly contradicts the plain language of § 1132. Respondent’s Brief, pp. 28-29. However, contrary to Langston’s assertion, this legislative history is entirely consistent with § 1132 in that § 1132 prohibits concurrent jurisdiction over ERISA claims unless the action seeks to enforce benefits under the terms of the plan or to recover benefits under the plan. 29 U.S.C. § 1132(a)(1)(B). A.Add.44. The legislative history provides that federal courts are to have exclusive jurisdiction with respect to actions involving a breach of fiduciary duty and with respect to actions to enforce or clarify benefits provided under Title I which includes § 1056.

H.R.Conf.Rep. No. 12280, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5107. The legislative history goes on to provide that state and federal courts are to have concurrent jurisdiction over claims to enforce benefits under the terms of the plan or to recover benefits under the plan which do not involve the application of title I. Id.

Moreover, the legislative history is consistent with the holdings of this Court in Welter and the Eighth, Third, Fourth, Fifth, and Sixth Circuits in Hogan, Samaroo, Hopkins, Dial, and Rouse, such that federal district courts have exclusive jurisdiction over the review of a plan administrator's determination of whether a domestic relations order meets the criteria set forth in 29 U.S.C. § 1056 to be qualified, which is the sole alleged issue in Langston's Complaint.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE FUND'S MOTION TO VACATE DEFAULT JUDGMENT

A. The Fund's Excuse for Failing to Answer was Not Fatal to Its Motion to Vacate Default Judgment Given the Strong Showing on the Other Three Factors

A strong showing on the other three factors to vacate a default judgment under Minn. R. Civ. P. 60.02 regularly outweighs a weak excuse for not timely answering. Riemer v. Zahn, 420 N.W.2d 659, 662 (Minn. App. 1988), Hill v. Tischer, 385 N.W.2d 329, 332 (Minn. App. 1986), Spicer v. Carefree Vacations, Inc., 379 N.W.2d 728, 730 (Minn. App. 1986), Valley View, Inc. v. Schutte, 399 N.W.2d 182, 186 (Minn. App. 1987), and Guillame & Associates, Inc. v. Doe-John Company, 371 N.W.2d 15, 19 (Minn. App. 1985). The Fund has at all times conceded that it had a weak excuse for not

timely answering, but not so weak as to be fatal under the test. Initial Brief and Addendum of Defendants/Appellants (“Appellants’ Brief”) p. 38 In response, Langston does not address the cases cited by the Fund for the proposition that this Court has often found an abuse of discretion in not allowing a case to proceed on the merits where the excuses were worse, or no better than, the instant case. To the extent that Langston argues that the Fund or its counsel’s actions rise above neglect to a level making this one factor dispositive, such an argument is not supported by the record.

The Summons and Complaint were properly served upon the Fund’s agent for the service of legal process, and that agent faxed a copy of both documents to the Fund’s counsel. Affidavit of Laurie Coleman (“Coleman Aff.”) ¶ 13 A.App. 35. Unfortunately, due to an administrative or technical error, the Fund’s counsel did not receive these documents until after the default judgment was entered. Affidavit of David S. Anderson (“Anderson Aff.”) ¶ 3, A.App.36. Moreover, contrary to Langston’s assertion that the Fund failed to explain what it did after it received the Notice of Case Filing, the Fund’s counsel explained that he received a copy of the Notice of Case Filing from Wilson McShane Corporation (“Wilson McShane”), the Fund’s third party administrator, but that he did not believe it pertained to this matter. Rather, he believed it pertained to the family court matter because he had not yet received a denial of Langston’s pending Request for Reconsideration of the family court’s denial of her Motion to Show Cause on the very same issue. Anderson Aff. ¶¶ 2-6 A.App. 36-37.

Moreover, Langston’s attempt to make much of the fact that Laurie Coleman, an employee of Wilson McShane did not provide any testimony about what she did upon

receiving the Notice of Case Filing is misguided. Respondent's Brief, p. 11. The affidavit from the Fund's counsel states that Wilson McShane forwarded the Notice of Case Filing to the Fund's counsel on February 28, 2007, two days after it was filed. Anderson Aff. ¶ 4 A.App. 36-37. Which individual at Wilson McShane physically received the Notice of Case Filing and forwarded it to the Fund's counsel is immaterial.

Langston also asserts that because a draft copy of the Summons and Complaint was faxed to the Fund's counsel in December, 2006, any failure to timely file and Answer cannot be excusable. Respondent's Brief, p. 11. This argument is also immaterial. First, the facsimile cover sheet accompanying the draft Summons and Complaint merely asked if the Fund's counsel was authorized to accept service on behalf of the Fund. Facsimile Cover Sheet ("Fax Cover Sheet"), Ex. H to Affidavit of Thomas F. DeVincke ("DeVincke Aff.") RA 030. The Fund's counsel promptly responded to this facsimile and advised that the firm was not authorized to accept service of the Summons and Complaint—because it was not so authorized—and provided Langston's counsel with the name and address of the Fund's agent for the service of legal process. Letter dated December 21, 2006, Ex. I to DeVincke Aff. RA 032-033. There is no indication from the Fax Cover Sheet that the Summons and Complaint had been filed or would be filed. And second, the facsimile included a copy of Langston's Request for Reconsideration of the denial of her Motion to Show Cause in the family court matter evidencing the fact that the family court action on the very same issue had not yet been concluded. Fax Cover Sheet, Ex. H to DeVincke Aff. RA 030. Given these facts, it was not beyond neglect for the Fund's counsel to mistakenly believe that such papers were

not being contemporaneously filed and related to the family court matter. Moreover, such mistake should not be attributed to the Fund. See Kurak v. Control Data Corp., 410 N.W.2d 34 (Minn.App.1987)(this Court is reluctant to penalize parties for neglect or mistakes of his lawyer and will provide relief of such mistakes when it can be done without substantial prejudice to their adversaries).

Langston cites three cases to argue otherwise. However, these cases are distinguishable from the present case. In Imperial Premium Finance, Inc. v GK Cab Co., 603 N.W.2d 853 (Minn. App. 2000), despite a sworn affidavit of personal service, the defaulting party argued that it did not receive a copy of the summons and complaint. Id. at 857. The court concluded that the defaulting party failed to show by “clear and convincing evidence” that it did not receive the summons and complaint and therefore the failure to respond was chargeable to the party’s own neglect or negligence. Id. at 858. In this case, however, the Fund admits service of the Summons and Complaint and has articulated facts supporting its mistaken belief resulting in the failure to timely file an Answer.

Likewise, in Whipple v. Mahler, 10 N.W.2d 771 (Minn. 1943) the defaulting party cited forgetfulness as his sole excuse to timely file and Answer. Id. at 772. In this case, the Fund does not allege that it forgot to timely file an Answer, rather that it mistakenly believed it did not need to. Moreover, the lengthy dissent in Whipple advocates adoption of the generally accepted rule that courts be “naturally and very properly inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing on the merits. Id. at 776-777.

Finally, in Hovelson v. U.S. Swim & Fitness, Inc., 450 N.W.2d 137 (Minn. App. 1990) the defaulting party claimed its neglect was excusable because it lost the summons and complaint. Id. at 142. However, the district court found that the defaulting party purposefully failed to respond to notices of the suit and the conduct of the defaulting party “boards on intentionally ignoring process” so vacation should not be allowed. Id. In this case, there is no allegation that the Fund failed to respond or intentionally ignored process. Rather, it is undisputed that the Fund promptly responded to Langston’s counsel upon receipt of the draft Summons and Complaint and that the Fund promptly filed the Motion to Vacate upon learning of the entry of the default judgment. Letter dated December 21, 2006, Ex. I to Devincke Aff. RA 032-033 and Memorandum of Law in Support of Motion to Vacate and for Leave to File an Answer A.App. 16-32. Accordingly, under the unique facts of this case, this factor does not outweigh a strong showing on the three other factors.

B. The Fund Presented a Reasonable Defense on the Merits

Langston argues that the Fund’s sole defense in this matter is that Langston is not entitled to benefit payments because the Domestic Relations Order “DRO” was not served on the Fund prior to Gary Langston’s retirement, and as such, the Fund cannot establish a reasonable defense on the merits. Respondent’s Brief, p. 13. Langston misstates the Fund’s defense.

1. Langston Cannot be Considered an Alternate Payee Because the DRO is not Qualified

Langston argues that because the 1993 Judgment and Decree provided that she receive a one-half interest in a portion of Gary Langston's pension, she is entitled to benefits as a "surviving spouse" or "alternate payee." Respondent's Brief, p. 14. But Langston's analysis glosses over a prerequisite to the exclusive federal question of whether she can be recognized as a "surviving spouse" or "alternate payee" by the Fund—the DRO must first be deemed "qualified" by the Fund before she can reach the status of "surviving spouse" or "alternate payee." And as set forth above, that exclusively federal question must be resolved prior to applying the terms of the Plan Document to Langston. Indeed, ERISA and the Fund's governing documents preempt state law—not the other way around. See Administrative Committee of the Wal Mart Stores Inc. Associates' Health and Welfare Plan v. Varco, 338 F.3d 680, 690 (7th Cir. 2003) (where a state law "contradicts the terms of the plan and therefore contravenes ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents," the terms of the plan control and the state law is pre-empted in line with Congress' intent), and Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001) ("ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. We have observed repeatedly that this broadly worded provision is "clearly expansive.")

Pension benefits cannot be assigned or alienated unless it is pursuant to a **qualified** domestic relations order. 29 U.S.C. § 1056 (d) A.Add. 22 (Emphasis added). ERISA specifically prohibits the assignment or alienation of pension benefits pursuant to a domestic relations order that does not meet the requirements to be qualified. 29 U.S.C. § 1056 (d)(3)(a) A.Add. 22. Therefore, if a domestic relations order is not qualified, no interest can be created, assigned or recognized pursuant to that domestic relations order. Id. Here, the Fund correctly determined that the DRO submitted by Langston cannot be deemed qualified because it provides for a type or form of benefit not available under the terms of the plan and requires increased payments, both of which violate ERISA. 29 U.S.C. § 1056(d)(3)(D) A.Add.22.

In addition, as of the date of Gary Langston's death, Langston's DRO had not yet been deemed qualified by the Fund although it certainly could have, had Langston followed the order of the family court and worked with the Fund to cure the defects set forth in the Fund's August 18, 2005 correspondence, or timely filed a court action. Accordingly, Langston could not be considered Gary Langston's surviving spouse pursuant to the terms of the Plan Document. Rather, it was Shelly James ("James"), Gary Langston's legal spouse, who was Gary Langston's surviving spouse as of his death. Coleman Aff. at ¶ 3 A.App. 33. Without a qualified DRO from Langston, and with a proper designation and application from James, the Fund had no choice but to commence payment of the surviving spouse benefits to James. Id. at ¶¶ 6 and 12 A.App. 34-35. It is Langston's own inactivity which led to the predicament she now faces. Accordingly, her cause of action for the surviving spouse benefits, if any, is against either James or Gary

Langston's estate for not following the original Judgment and Decree, not the Fund, which was never notified of the entry of the Judgment and Decree.

2. The Fund Properly Determined that the DRO is not Qualified

Langston argues that the Fund "refuses to honor the QDRO," and the only reason given by the Fund is "that Langston cannot receive benefits because payment had already begun to Gary Langston." Respondent's Brief, p. 15. Langston again misstates the Fund's argument. At no time has the Fund taken the position that Langston is not, or was not, entitled to any of Gary Langston's pension benefits because the DRO was served on the Fund after Gary Langston retired.¹ To the contrary, the Fund argues, and Langston does not refute, that because the DRO ordered benefits to be payable over Langston's lifetime, and given payments and elections already made during her unreasonable inactivity, she sought a form or type of benefit from the Fund that was not available under the terms of the plan. Appellants' Brief pp. 32-33. In other words, the family court simply needed to consider the updated events and correlate the terms of a resulting revised DRO with the terms of the Plan Document. This is true because the benefits in question had already been amortized over Gary Langston's lifetime so they could not be re-amortized over Langston's lifetime. *Id.* Furthermore, at the time of service of the DRO, the DRO required the Fund to pay increased benefits because the survivor benefits had already vested in James, and therefore any surviving spouse benefits paid to

¹ Indeed, as required by ERISA, upon receipt of the DRO, the Fund began withholding \$381.38 per month from Gary Langston's monthly pension benefit which is the amount that would have been payable to Langston if the DRO allowed the benefits to be amortized over Gary Langston's lifetime. Coleman Aff. ¶ 11 A.App. 34-35.

Langston would be in addition to those already paid to James if the DRO was accepted. Id. Because ERISA prohibits DROs that provide for a form or type of benefit not available under the terms of the plan and for increased benefits, the Fund could not deem Langston's DRO as qualified. Id.; see also 29 U.S.C. § 1056(d)(3)(D) A.Add.21-42.

Langston relies on Trustees of the Directors Guild of America-Producer Pension Benefit Plans v. Tice, 234 F.2d 415 (9th Cir. 2000), Hogan v. Raytheon Co., 302 F.3d 854 (8th Cir. 2002), Patton v. Denver Post Corp., 326 F.3d 1148 (10th Cir. 2003), IBM Savings Plan v. Price, 349 F.Supp.2d 854 (D.Vt. 2004), Payne v. GM/UAW Pension Plan, 1996 WL 943424 (E.D.Mich. 1996), Torres v. Torres, 60 P.3rd 798 (Hawaii 2002), and Files v. Exxon Mobil Pension Plan, 428 F.3d 478 (3rd Cir. 2005) to support her argument that a DRO need not be served on a plan administrator prior to the death of the plan participant. Respondent's Brief, p. 15-21. However, in all of these cases, the issue in contention was merely whether a domestic relations order can be deemed qualified after the death of the plan participant, and all of the courts simply reached the conclusion that the timing of the service of the domestic relations order cannot be the basis for determining a domestic relations order is not qualified. Tice, 234 F.2d at 422, Hogan, 302 F.3d at 857, Patton, 326 F.3d at 1150-51, IBM, 349 F.Supp.2d at 860, Payne, 1996 WL 943424 at 8, Torres, 60 P.3rd at 825, and Files, 428 F.3d at 491.

The Fund does not dispute these holdings. Rather, the Fund points-out that Langston's reliance on these cases is misplaced because they address an issue not in contention. Here, the DRO was served upon the Fund prior to Gary Langston's death, and prior to his death, the Fund notified Langston that the DRO could not be deemed

qualified for reasons other than Gary Langston's death. Accordingly, Gary Langston's death was not the basis for the Fund's determination that the DRO was not qualified, as the Fund rendered its opinion prior to his death.

Rather, the Fund determined that, upon proper receipt, the DRO required benefits to be paid in a form not available under the terms of the plan because the DRO ordered the Fund to amortize Langston's benefits over her lifetime, which was no longer an option under the terms of the plan. Indeed, Gary Langston's benefits were already in pay status as a result of his retirement. August 18, 2005 Letter, attached as Ex. D to DeVincke Aff. A.App. 86-87. Furthermore, the Fund determined that the DRO required it to pay increased surviving spouse benefits because at least a portion of these benefits were already vested in, and had been paid, to James. *Id.*

None of the cases cited by Langston involve a situation where the plan administrator rejected a DRO because the amortization or calculation of benefits required by the DRO was not available under the terms of a plan. Furthermore, in the cases cited by Langston, none of the benefits were already in pay status to the plan participant at the time the DRO was served on the plans and, with the exception of Torres², the

² Torres involved a situation where the domestic relations order was served prior to the death of the plan participant, the Fund determined that the domestic relations order was not qualified prior to the participant's death, and the plan participant was remarried at the time the Fund made its determination. Torres, 60 P.3rd at 804-806. However, unlike in the present matter, the Torres plan based its determination that the domestic relations order was not qualified on the fact that the Judgment and Decree did not clearly state whether the former spouse was entitled to surviving spouse benefits, which arguably is not a basis for finding a domestic relations order is not qualified under ERISA. *Id.* at 805. Irrespective of distinguished facts, a single decision from the Supreme Court of Hawaii is insufficient to establish that the Fund did not have a reasonable defense on the

determination that the DRO was not qualified was rendered after the plan participant's death, and all of the plan participants were unmarried at the time of their deaths. Tice, 234 F.2d at 417-418, Hogan, 302 F.3d at 855-856, Patton, 326 F.3d at 1150, IBM, 349 F.Supp.2d at 855-856, Payne, 1996 WL 943424 at 1, Torres, 60 P.3rd at 804-806, and Files, 428 F.3d at 480-482.

In addition to relying on inapposite cases, Langston argues that the cases cited by the Fund in support of its argument that Gary Langston's pension benefits vested in both Gary Langston and James as of the date of Gary Langston's retirement "actually prove Langston's case." Respondent's Brief, p. 19. But Langston is mistaken. First, Langston argues that the Fund's reliance on Rivers v. Central and Southwest Corp., 186 F.3d 681 (5th Cir. 1999) is misplaced because, unlike in Rivers, the Judgment and Decree in this case addresses the division of Gary Langston's pension benefits. Accordingly, the "determinative fact present in Rivers—the ex-spouse's failure to address the pension benefits in the divorce decree—is not present here." Respondent's Brief, p. 20. Langston's argument fails because this fact was neither determinative nor material to the Fifth Circuit's holding that:

Rivers failed to protect her rights in Franklin's pension plan by neglecting to obtain a **qualified** domestic relations order prior to Franklin's retirement date. Consequently, Franklin's pension benefits irrevocably vested in Mrs.

merits, especially in light of the more apposite cases cited by the Fund that support its position, and the fact that on a Motion to Vacate Default Judgment, the Fund need only raise a triable issue which can be established in affidavit. Lysholm v. Karlos, 414 N.W.2d 773, 775 (Minn.App. 1987) and Grunke v. Kloskin, 355 N.W.2d 207, 209 (Minn. 1984)

Franklin on the date of his retirement and Rivers is forever barred from acquiring an interest in Franklin's pension plan.

(Emphasis added) Rivers, 186 F.3d at 683-684. Langston placed herself in an identical situation because she also failed to secure a qualified domestic relations order prior to Gary Langston's retirement. Accordingly, the surviving spouse benefits irrevocably vested in James.

Second, Langston argues that the Fund's reliance on Hopkins, 105 F.3d at 153, is misplaced because the divorce decree did not specifically divide the plan participant's pension benefits, although it did state that the pension benefits were a marital asset. Respondent's Brief, pp. 20-21. Again, this fact was neither determinative nor material to the court's holding. Instead, the Fourth Circuit relied 29 U.S.C. § 1056(d)(3)(B)(i)(I), and held that once the plan participant retires, the domestic relations order seeking surviving spouse benefits relates to benefits payable to a plan beneficiary, *i.e.* the current wife, and not benefits payable with respect to a participant, and as such, the domestic relations order could not be qualified. Id. at 156. The Court further relied on 29 U.S.C. § 1055(c)(2)(A), (7)(A), which prohibits a plan participant from changing his or her surviving spouse annuity designation as well as the manner of distribution of plan benefits after retirement. Id. The court concluded that, at the time of retirement, the participant's current spouse has a vested interest in surviving spouse benefits. Id. at 156-157.

Unlike the majority of the cases cited by Langston, but like this case, and like Rivers and Hopkins, the plan participants were remarried, the plan participants had

retired at the time the domestic relations order was served on the plan, the domestic relations orders ordered the plan participants to name the former spouse as the surviving beneficiary, and the plan participants each named his current spouse as the surviving beneficiary. Rivers, 186 F.3d at 682, and Hopkins, 105 F.3d at 154-155. Inactivity by the former spouse was also a major theme in both Rivers and Hopkins, but were not even at issue in the cases cited by Langston.

Finally, in Rivers, 186 F.3d at 682, the marriage was dissolved in 1972 but the former spouse waited until 1997 to serve a domestic relations order on the Fund. And in Hopkins, 105 F.3d at 154-155, the marriage was dissolved in 1986, but the former spouse waited until 1994 to serve a domestic relations order on the Fund. Similarly, in this case, the Langston marriage was dissolved by Judgment and Decree in 1993, but Langston did not serve a DRO on the Fund until 2005. See Complaint ¶ 5 A.Add. 1, Judgment and Decree, attached as Ex. A to DeVincke Aff. A.App. 68-81, and DRO, attached as Ex. B to DeVincke Aff. A.App.82-84. Accordingly, not only has the Fund presented a valid defense to the merits as required by Minnesota law to proceed past default judgment to proceeding on the merits, but also, the great weight of authority supports the Fund's position that Langston's DRO could not be qualified without modification on dispositive motion on the merits.

C. The District Court Abused its Discretion in Concluding that Vacating the Default Judgment Would "Substantially" Prejudice Langston.

According to Langston, the substantial prejudice to her includes "counting on the withheld benefits payments for years," and the Fund's "constant disregard for Langston."

Id. Accordingly, Langston fails to articulate any prejudice other than delay or bad acts occurring prior to her Complaint; and it is well settled that the mere passage of time and expense implicit in vacating a default judgment and litigating the case on the merits is not substantial prejudice such that the ultimate sanction of default judgment is warranted. Lysholm, 414 N.W.2d at 774. In determining whether there is substantial prejudice warranting the ultimate sanction, the district court must look to the substantial prejudice resulting from the vacation of the default judgment, not from the underlying facts of the case unless the non-moving party gave up some sort of legal right as a result of the default judgment. See Riemer, 420 N.W.2d at 661 (a party seeking to set aside a default judgment must show that no substantial prejudice will **result** to the opposing party)(Emphasis added); see also Imperial Premium Finance, Inc., 603 N.W.2d at 859 (prejudice also results when the nonmoving party gives up a legal right in reliance on the default judgment). But that is not what the district court did.

Despite Langston's attempt to articulate her alleged prejudice as something other than delay, her alleged reliance is just that—delay. Furthermore, this reliance/delay did not arise as a result of the entry of the default judgment, and none of Langston's legal rights have been jeopardized as a result of the default judgment. Accordingly, the only result of vacating the default judgment and litigating this case on the merits is that Langston will lose the advantage of having obtained a default judgment, which is not substantial prejudice.

Langston further states that the Fund owes her duties of a fiduciary because she is a beneficiary and alternate payee. Respondent's Brief, p. 22. But Langston's Complaint

does not allege that any fiduciary duties were breached. And even if that had been plead, Langston does not articulate how the Fund's failure to abide by their fiduciary duties prejudices her after the entry of default.

III. THE FUND'S RULE 60.02(F) ARGUMENT IS PROPERLY BEFORE THE COURT AND HAS MERIT

Langston argues that this Court should not grant the Fund relief under Rule 60.02(f) of the Minnesota Rules of Civil Procedure because this argument was not raised at the trial court level. Respondent's Brief, pp. 29-30. Langston is correct that the Fund did not raise this issue in its Motion to Vacate Default Judgment and for Leave to File an Answer. But the problem of conflicting trial court orders did not arise until the issuance of Judge Hall's Order denying the Motion on August 22, 2007. Accordingly, it could not have been raised at the trial court level. A.App. 131-132. Moreover, the case law cited by Langston is not within the context of a Rule 60.02(f) Motion and this Court is granted broad discretionary power under Rule 60.02(f) to grant relief when "the equities weigh heavily in favor of [the defaulting party] and clearly require relief be granted to avoid an unconscionable result." Wiethoff v. Williams, 413 N.W.2d 533, 536 (Minn.App.1987); see also Newman v. Fjelstad, 137 N.W.2d 181, 186 (Minn. 1965). Given the conflicting orders and their result of requiring the Fund to violate ERISA, the equities weigh heavily in favor of vacating the default judgment and this Court should invoke its discretionary power to do so.

Under the facts of this case, the Fund had no way of knowing that the trial court would convert a Motion to Vacate Default Judgment into a *de facto* Order and

Memorandum for Summary Judgment. Had the Fund believed that it was making a Summary Judgment argument to prevail on the merits, it would have proceeded accordingly. Instead, it justifiably believed that it was providing the trial court with notice of a reasonable defense that would be subject to later proceedings including dispositive motion or trial.

CONCLUSION

Based on the foregoing, the Fund respectfully requests that the Court reverse the trial court's decision that state and federal courts have concurrent jurisdiction over the determination of whether a DRO is qualified, thus rendering the default judgment void. In the alternative, the Fund respectfully requests that the Court reverse the trial court's denial of the Fund's Motion to Vacate Default Judgment and for Leave to File an Answer to allow for proceedings on the merits, and for such other and further relief that the Court deems just and equitable.

Dated: February 19, 2008

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STATE OF MINNESOTA
IN COURT OF APPEALS

Patricia Ann Langston

Court of Appeals No. A07-2034

Plaintiff/Respondent

vs.

Wilson McShane Corporation, as
Administrator for the Twin Cities Carpenters
and Joiners Pension Fund, and the Twin
Cities Carpenters and Joiners Pension Fund,

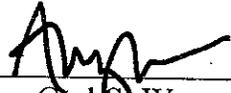
**CERTIFICATION OF
BRIEF LENGTH**

Defendants/Appellants

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this Reply Brief is 5,441 words. This brief was prepared using Microsoft Word for Windows XP Professional.

Dated: February 19, 2008

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