

NO. A07-2034

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State of Minnesota  
In Court of Appeals

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Patricia Langston,

*Respondent,*

v.

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

*Appellants.*

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RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## Statement of the Issues

1. Did the district court abuse its discretion in denying the Appellants' motion to vacate the April 18, 2007, default judgment?

The district court held that Appellants were not entitled to relief from the default judgment because Appellants could not establish excusable neglect for their failure to answer nor could Appellants establish any meritorious defense to Langston's claim for benefits.

Authority: Minn. R. Civ. P. 60.02(a).  
*Hinz v. Northland Milk & Ice Cream Co.*, 53 N.W.2d 454 (Minn. 1952).

2. Did the district court have concurrent jurisdiction with the courts of the United States over Patricia Langston's claim for benefits?

The district court held that it had concurrent jurisdiction with the courts of the United States over Patricia Langston's claim for benefits.

Authority: 29 U.S.C. § 1132 (e).  
29 U.S.C. § 1132 (a)(1)(B).

## I.

### Statement of the Case

This is an appeal from an order and judgment of the Anoka County District Court, the Honorable Sharon L. Hall presiding, denying Appellants' motion to vacate a default judgment. This lawsuit arises from Appellants' failure to honor a qualified domestic relations order served on them in July 2005. Respondent Patricia Langston initiated this lawsuit seeking retirement benefits that she ostensibly obtained fourteen years ago when she divorced her husband. Appellants failed to appear or defend Langston's claims and, on April 18, 2007, this Court entered a default judgment in favor of Langston.

Thereafter, Appellants filed a motion to vacate the default judgment. Appellants brought their motion to vacate pursuant to both Minn.R.Civ.P. 60.02(a) and 60.02(d). The district court rejected both of Appellants' arguments and denied their motion to vacate. Appellants now appeal.

Appellants properly raise only two arguments in support of their appeal, and both should be rejected. First, Appellants claim they are entitled to relief pursuant to Minn.R.Civ.P. 60.02(a). This Court should reject this argument because Appellants have failed to demonstrate excusable neglect, a meritorious defense, and lack of prejudice to Langston.

Second, Appellants claim that the district court lacked subject matter jurisdiction over Langston's claim and that, therefore, the April 18<sup>th</sup> default judgment is void. This Court

should reject Appellants' jurisdictional challenge because the relevant statute, 29 U.S.C. §1132, and case law expressly provide that Langston, as a plan beneficiary, may seek an adjudication of her entitlement to benefits in state court. For these reasons, this Court should affirm the district court in all respects.

## II.

### Facts

Patricia and Gary Langston were married on September 5, 1964. Gary Langston was a carpenter and a participant in the Twin Cities Carpenters and Joiners Pension Fund (the "Plan"). The Plan is administered by Wilson-McShane Corporation (the "Administrator").

In 1992, Patricia Langston initiated a Dissolution Proceeding. The Langstons' marriage was dissolved by a Judgment and Decree of this Court dated August 3, 1993. DeVincke Aff., Exhibit A, (A. 68). The Judgment and Decree provides:

Petitioner shall be awarded a one-half interest in the marital share of all future pension payments received by Respondent. This shall include one-half of all payments made to Respondent pursuant to a plan that Respondent is currently participating in, even if Respondent is not currently fully vested in said plan.

The marital share of all pension payments shall be a fraction, the numerator of which is the number of years that Respondent worked for the employer providing the pension benefit during the parties' marriage and the denominator of which shall be the total number of years that Respondent works for the employer providing the pension benefit.

By way of example, but not limitation, if Respondent works for an employer for 7 years prior to entry of the Judgment and

Decree herein, the Respondent works for the same employer for a total of 20 years (13 years after the dissolution) the martial share of each pension payment would be 7/20th's. Petitioner would be entitled to one-half of 7/20th's of each pension payment.

This Judgment and Decree shall order all of Respondent's employers which have a pension plan in which Respondent has an interest to withhold payment of any lump sum distributions or early withdrawals to the extent of Petitioner's interest herein.

In the event Respondent's pension plan or plans allow Respondent to elect survivor benefits, Respondent shall be required to elect said survivor benefits and Petitioner shall be named as the survivor beneficiary.

*Id.* In 2001, it appears Gary Langston remarried. From 1993 through July 2005, it appears that Patricia Langston, as a result of her prior counsel's neglect, failed to procure a Qualified Domestic Relations Order ("QDRO") to enforce her entitlement to a portion of the martial share of Gary Langston's retirement benefits.

On July 1, 2005, the district court issued a QDRO. DeVincke Aff., Exhibit B, (A. 82) The QDRO was entered by the Clerk of the Court on July 19, 2005. *Id.* The QDRO identifies Patricia Langston as the alternate payee of those retirement benefits guaranteed to her by the 1993 Judgment and Decree. *Id.*, Paragraphs D and E. On or about August 9, 2005, Langston's counsel served the QDRO on the Administrator. DeVincke Aff., Exhibit C, (A. 85).

By letter dated August 18, 2005, the Administrator rejected the QDRO and informed Langston that she was not entitled to the survivor benefits because "benefits to the Participant

are already in pay status due to Mr. Langston's retirement. In addition, he remarried prior to retirement and elected to receive his accrued benefits in the form of a joint and survivor annuity, with death benefits payable to his current spouse." DeVincke Aff., Exhibit D, (A. 86). The Administrator has taken the position that Langston is entitled to receive benefit payments for September and October 2005 only upon the submission of a QDRO so stating.<sup>1</sup>

Gary Langston retired in 2004 and died on October 19, 2005. DeVincke Aff., Exhibit E, (A. 88). Appellants informed Langston that they would only approve a revised QDRO that would limit her to two months of benefit payments. DeVincke Aff. Exhibit F, (A. 89). It is Appellants' position that Langston's counsel did not act in a sufficiently timely manner so as to preserve her right to survivor benefit payments. *Id.*

Langston then moved the district court for an order requiring Appellants to honor the QDRO. That motion was filed in the 1993 Dissolution Proceeding. In response to Langston's motion, appellant Wilson-McShane Corporation argued that it had not been served with the motion papers because Appellants' counsel was not counsel for Wilson-McShane Corporation. DeVincke Aff. Exhibit G, "Responsive Memorandum in Opposition to Petitioner's Motion To Enforce the Court's July 1, 2005 Domestic Relations Order", p. 5. Appellants argued that the QDRO was not enforceable. Appellants, however, never

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<sup>1</sup> Aside from the dispute regarding what interest Langston has as a "surviving spouse," Appellants have approved all other provisions of the 2005 QDRO.

suggested that the district court lacked subject matter jurisdiction over Langston's claim for benefit payments. *Id.*

Langston's motion to enforce the QDRO in the context of the Dissolution Proceeding was denied by the district court, the Honorable Nancy Logering presiding, by order dated August 9, 2006. On December 12, 2006, Langston's counsel faxed the August 9<sup>th</sup> order as well as the summons and complaint for this lawsuit to Appellants' counsel. DeVincke Aff. Exhibit H, (R.A. 30) Apparently, Appellants' counsel had not received the August 9<sup>th</sup> Order. In response, Appellants' counsel informed Langston's counsel that it had reviewed the summons and complaint, and to ". . . please be advised that our firm serves neither as the legal representative nor the agent for service of process for Wilson-McShane." DeVincke Aff., Exhibit I, (R.A. 32) Appellants' counsel did indicate it represented the Plan, but refused to accept service of process on behalf of the Plan. *Id.*

On December 27, 2006, the district court refused Langston's request for reconsideration. (A. 39). The district court's denial was because Appellants were not a party to the marital dissolution action. *Id.* On January 5, 2007, Langston served a summons and complaint in this action on Appellants as instructed by Appellants' counsel. (A. 13). Appellants never answered or defended themselves from Langston's lawsuit. *Id.* On April 18, 2007, approximately eighty-three (83) days after the time to respond to Langston's complaint expired, the district court entered a default judgment in favor of Langston. (A. 15).

At hearing, Langston's counsel informed the district court that notice of the default judgment hearing had not been provided to the non-responsive Appellants. DeVincke Aff., ¶ 12,(A. 66). Further, Langston's counsel expressly referred to Judge Logering's prior ruling denying Langston's motion to enforce the QDRO for lack of personal jurisdiction over Appellants. ("Without reaching the substance of the complaint, the Court found there was no jurisdiction over the plan in the context of the marital dissolution action, . . . .") (A. 7); ("I think that's how Judge Logering felt. When the jurisdictional issue came up . . . .") (A. 10).<sup>2</sup>

Appellants moved the district court pursuant to Minn.R.Civ.P. 60.02(a) and (d) to vacate the default judgment. (A. 17). At that time, Appellants raised only two arguments in support of their motion. *Id.* First, that this Court must vacate the default judgment pursuant to Minn.R.Civ.P. 60.02(d) because the district court lacked subject matter jurisdiction over Langston's claim for benefit payments. Second, that the district court should vacate the default judgment because Appellants made a sufficient showing under the four-pronged analysis required by Minn.R.Civ.P. 60.02 (a).

On August 22, 2007, the district court issued a 25 page order and memorandum denying Appellants' motion. (A. 131). The district court did, however, modify the existing

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<sup>2</sup> Appellants make the bizarre assertion that "Notably absent from Langston's motion papers and the colloquy between Langston's counsel and Judge Walker Jasper was any discussion relating to the previous determination by Judge Logering, a Judge from the same Court as Judge Walker Jasper, that the Court lacked [personal] jurisdiction over the Fund to grant the relief requested by Langston . . . ." Appellants' Brief, p. 12.

judgment by finding that Langston's entitlement to benefits would run from April 18, 2007 - the date of the default judgment. *Id.*

The district court found that both the Employee Retirement Income Security Act ("ERISA") and case law make clear that the district court had subject matter jurisdiction over Langston's claim for benefit payments. Further, district court found that Appellants' lacked any good reason for its failure to answer, lacked a meritorious defense to Langston's claims and that vacating the judgment would unfairly prejudice Langston.<sup>3</sup>

On October 22, 2007, Appellants filed a notice of appeal from the district court judgment. (A. 156). This Court should affirm the district court in all respects because state courts have concurrent jurisdiction with the courts of the United States over a beneficiary's claim for ERISA controlled benefit payments. Further, the district court did not abuse its discretion in denying Appellants' motion to vacate the default judgment entered on April 18, 2007 because Appellants were unable to establish that the failure to answer was caused by excusable neglect or that Appellants had a meritorious defense to Langston's claim for benefit payments.

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<sup>3</sup> Langston concedes that Appellants acted diligently upon receiving notice of the default judgment and that factor weighed in favor of granting the requested relief.

### III.

#### Argument and Authorities

##### A. Standards of Review

There are two issues for this Court's review - the district court's denial of Appellants' motion to vacate, and the district court's determination of jurisdiction. This Court will affirm a district court's denial of a motion to vacate a default judgment absent an abuse of discretion. *Foerster v. Folland*, 498 N.W.2d 459, 460 (Minn. 1993).

This Court reviews questions of subject matter jurisdiction *de novo*. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002);

##### B. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion To Vacate The Default Judgment.

To demonstrate a right to relief under Rule 60.02(a), Appellants must show (1) that they had a reasonable excuse for failure or neglect to answer; (2) that they acted with due diligence after receiving notice of his default, (3) that no substantial prejudice results to the plaintiff from vacation of the judgment; and (4) that they had a reasonable defense on the merits. *Hinz v. Northland Milk & Ice Cream Co.*, 53 N.W.2d 454 (Minn. 1952); *Coller v. Guardian Angels Roman Catholic Church of Chaska*, 294 N.W.2d 712, 715 (Minn. 1980).

Case law provides that the moving party bears the burden of proving all four of the elements, including lack of prejudice; that a strong showing on the other factors may offset relative weakness on one factor; and that default judgments are to be "liberally" reopened to

promote resolution of cases on the merits. *Imperial Premium Finance, Inc. v. GK Cab Co., Inc.*, 603 N.W.2d 853 (Minn. App. 2000). Despite the liberality of the standard, trial courts "should not grant relief so freely as to encourage loose practice...." *Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn.App. 1987), quoting *Hinz*, 53 N.W.2d at 456-57.

A party may not be relieved from a default unless that party makes a strong showing on at least three of the four factors considered by the court. *See Imperial Premium Finance*, 603 N.W.2d at 859 (trial court abused its discretion in vacating default judgment where defendant satisfied only two factors); *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142 (Minn. App. 1990), review denied (Minn. March 16, 1990) (vacation affirmed where defendant made a reasonable but not strong showing of a defense on the merits, no showing of a reasonable excuse for failure to answer, and a weakened showing of the due diligence and prejudice factors); and *Wiethoff*, 413 N.W.2d at 536 (defendant not entitled to vacation under Rule 60.02(a) when defendant made a weak showing on two of four factors).

The district court properly analyzed each prong of this four-pronged test and determined that Appellants failed to demonstrate a reasonable excuse for failing to answer or that they had a meritorious defense on the merits. The district court further found that Langston would be prejudiced were her benefits denied any longer in light of her clear entitlement to benefits. Given the record evidence, the district court's findings in this regard do not constitute an abuse of discretion and, accordingly, this Court should affirm.

i. **Appellants' Failure To Answer Was Not Attributable To Excusable Neglect.**

Appellants are unable to establish that the failure to answer was attributable to excusable neglect. Appellants state only that they faxed the summons and complaint to their lawyer and that it was either ignored, lost or simply not understood. Defs'. Memo., pp. 6; 12-13, (A. 21, 27-8). Appellants offered no documentary evidence that the facsimile was actually sent.

Further, Appellants offer no excuse at all as to what they did when they received the notice of case filing. These documents clearly set forth the identity of the parties. These parties are markedly distinct from those in the 1993 marital dissolution action. A comparison of the case captions does not support Appellants' claim of confusion. Moreover, Appellants' counsel was already in possession of the summons and complaint because Langston's counsel sent it to them on December 12<sup>th</sup> - one hundred and six (106) days before this Court entered default judgment against Appellants.

Appellants' counsel testifies he was unaware that the notice of case filing pertained to this matter. Again, the document itself includes "Twin Cities Carpenters and Joiners Pension Fund" as a named party. This entity was never a party to the 1993 martial dissolution action. Moreover, the case file number "CX-07-1888" indicates a 2007 filing.

Further, the document's title: "Notice of Case Filing," indicates that a new civil action has been filed with the district court. A Notice of Case Filing would not be mailed out by the Court Administrator on a 14-year-old civil action. It is also telling that Laurie

Coleman, the sole source of testimony provided by Appellants, provides no testimony regarding the Notice of Case Filing. This is problematic because Wilson-McShane would have received the Notice of Case Filing directly from the district court two months before hearing on Plaintiff's motion for default judgment. Yet, the district court was provided only with Appellants' counsel's testimony that he "was not aware it [Notice of Case Filing] pertained to this matter." Anderson Aff., ¶ 4, (A. 36-37).

Under Minnesota case law, and on the facts presented, Appellants were unable to excuse their neglect in failing to answer Langston's complaint. As set forth, Appellants' failure to answer or otherwise defend was at least partly, if not completely, the fault of Appellants themselves. In *Imperial Premium*, this Court held that the trial court abused its discretion by finding excusable neglect when the defendant's failure to answer was "chargeable to [the defendant's] own neglect or negligence." *Imperial Premium*, 603 N.W.2d at 857-8. "Neglect of the party itself which leads to entry of a default judgment is inexcusable, and such neglect is a proper ground for refusing to reopen a judgment." *Id.*

In *Whipple v. Mahler*, 10 N.W.2d 771 (Minn. 1943), the Supreme Court of Minnesota refused to permit defaulting litigants to reopen a default judgment where they blamed the delay on confusion resulting from an office move, during which the summons and complaint were lost or forgotten. *Id.* at 774-5. In *Hovelson v. U.S. Swimm & Fitness, Inc.*, 450 N.W.2d 137 (Minn. App. 1990), this Court held that simply misplacing a summons and complaint is

not excusable neglect. The *Hovelson* Court held that “the negligence was caused by [the defendant’s] own acts and is therefore not to be excused.” *Id.* at 142.

Accordingly, the district court did not abuse its discretion in finding that Appellants’ admitted failure to articulate a reasonable excuse for their failure to answer or otherwise defend Langston’s lawsuit weighed in favor of denying Appellants’ motion to vacate.

ii. **Appellants Lack A Meritorious Defense Because Langston Is Entitled To The Benefits Awarded By The District Court.**

As the defaulted parties, Appellants bore the burden of establishing a showing of facts which will, if established, constitute a good defense to Langston’s claim. *Grady v. Maurice L. Rothschild & Co.*, 176 N.W. 153, 154 (Minn. 1920). Here, the entire defense put forth is that Langston is not entitled to benefit payments because the QDRO was not served on the Plan prior to Gary Langston’s retirement. See Appellants’ Affidavit of Merits ¶2(g) (R.A. 24-26). As set forth below, this defense is woefully inadequate and flatly at odds with both the controlling statutory, regulatory and interpretive case law.

Accordingly, this Court should affirm the district court’s denial of Appellants’ motion because the Judgment and Decree of 1993 and the Court Order of July 2005 entitle Langston to the benefit payments she has now been awarded. Further, the Plan Administrator has not articulated any proper reason for refusing to honor the QDRO.

**a. Langston Is Entitled To Receive Retirement Benefits As An Alternate Payee "Surviving Spouse".**

In 1984, the United States Congress amended ERISA by enacting the Retirement Equity Act ("REA"). The REA amendments specifically permit the assignment of retirement benefits to alternate payees that obtain QDROs. A former spouse can replace the current spouse as a beneficiary of the plan if the former spouse obtains a QDRO, recognizing the former spouse as an alternate payee. 29 U.S.C.A. § 1056(d)(3)(A). The district court properly reviewed Appellants' rejection of the 20005 QDRO *de novo*. See *Samaroo v. Samaroo*, 193 F.3d 185 (3<sup>rd</sup> Cir. 1999).

The Judgment and Decree of 1993 provided that Langston receive a one-half interest in a certain portion of Gary Langston's retirement benefits. The QDRO served by Langston's counsel on the Administrator accurately reflects this entitlement and complies with the requirements of ERISA. Accordingly, Langston is entitled to receive retirement benefits as a "surviving spouse" or alternate payee.

The term "QDRO" means a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan. A QDRO may not:

1. require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
2. require the plan to provide increased benefits (determined on the basis of actuarial value), and

3. require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

In this case, the July, 2005, QDRO does not run afoul of ERISA's requirements. Indeed, Appellants never contended that the QDRO violates ERISA. Instead, Appellants claimed that because Langston failed to serve the QDRO prior to Gary Langston's retirement, she is divested of any interest in those benefit payments.

Further, ERISA specifically identifies former spouses as appropriate alternate payees. "The term 'alternate payee' means any spouse, *former spouse*, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. 26 U.S.C. § 414(p)(8) (Emphasis added).

Accordingly, Patricia Langston is an appropriate alternate payee, and the QDRO of July 2005 comports with the statutory requirements of ERISA.

**b. Appellants Improperly Refused To Recognize The Qualified Domestic Relations Order.**

Appellants have refused to honor the QDRO. The only reason given by Appellants is that Langston cannot receive benefits because payment had already begun to Gary Langston. There is no basis for this denial of benefits. On the contrary, the relevant regulations and case law both mandate that Langston is entitled to the benefits that she obtained in the 1993 judgment and decree.

In 2007, the Department of Labor promulgated 29 C.F.R. § 2530.206. That regulation specifically provides that “. . . a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued.” 29 C.F.R. § 2530.206, ( c)(1). The examples provided as part of the regulation make clear that a domestic relations order issued after death, divorce and annuity starting date may all be qualified. Accordingly, the Appellants’ denial of benefits to Langston based on the late service of the August 2005 order is without merit.

Further, the United States Court of Appeals for the Ninth Circuit addressed a scenario similar to Langston’s in *Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.2d 415 (9<sup>th</sup> Cir. 2000).

In *Tise*, the 9<sup>th</sup> Circuit explained:

Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before the plan participant's benefits become payable on account of his retirement or death. Several features of the statute's language and structure confirm that ERISA erects no such requirement.

First, for all the detail of the QDRO requirements, ERISA nowhere specifies that a QDRO must be in hand before benefits become payable.

Second and more significantly, the statute specifically provides for situations in which no valid QDRO issues until after benefits become payable. Once the pension plan is on notice that a domestic relations order has issued that may be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO and therefore creates

obligations for the pension plan. 29 U.S.C. § 1056(d)(3)(G)(II).

While the plan is making this determination, it must segregate the benefits that would be due to the alternate payee under the terms of the DRO during the first 18 months that those benefits would be payable if the DRO is ultimately deemed a QDRO. 29 U.S.C. S 1056(d)(3)(H)(v). This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO.

Third, Congress expressly contemplated that further state court proceedings might ensue during the 18-month QDRO-determination period, through which the alternate payee could attempt to cure any defects in the original DRO and obtain an enforceable QDRO.

*Id.* at 421-22. This position has been adopted by the United States Court of Appeal for the Eighth Circuit as well. See *Hogan v. Raytheon Co.*, 302 F. 3d 854 (8<sup>th</sup> Cir. 2002).

In this case, the Administrator claims that Patricia Langston is not entitled to any retirement benefit payments because Gary Langston had already retired at the time the QDRO was served. See Exhibit D, (A. 86). While it is true that in certain situations, a QDRO can be served too late to protect an alternate payee's right to retirement benefits, (see *Rivers v. Central and South West Corporation, et al.*, 186 F.3d 681 (5<sup>th</sup> Cir. 1999), those cases occur when the alternate payee's right to receive the benefits does not exist at the time the plan participant retires or dies. *Id.* at 682.

Here, Patricia Langston's entitlement to retirement benefits was created in 1993. The QDRO now at issue is merely a vehicle for enforcing Patricia Langston's interest in the benefit payments. Accordingly, the fact that Appellants had already commenced benefit

payments to Gary Langston at the time the QDRO was served in August 2005 does not divest Patricia Langston of her entitlement.

In this case, Langston obtained a court ordered entitlement to a portion of Gary Langston's survivor benefits more than a decade before Gary Langston's retirement - and served the July 2005 QDRO on Appellants two months before Gary Langston's death. As such, this case falls squarely within the decisions of the Third, Eighth, Ninth and Tenth Circuits, as well as the United States District Court for the District of Vermont,<sup>4</sup> the Supreme Court of Hawaii,<sup>5</sup> and the United States District Court for the Eastern District of Michigan.<sup>6</sup>

Each of these courts has held that state courts may enter QDROs after a participant has died or the right to benefits has otherwise been transferred or expired. See *Hogan v. Raytheon Co.*, 302 F.3d 854, 857 (8th Cir. 2002); *Tise*, 234 F.3d at 421, as amended upon denial of reh'g, 255 F.3d 661 (9th Cir. 2000); and *Patton v. Denver Post Corp.*, 326 F.3d 1148, 1153-1154 (10th Cir. 2003).

In *Tise*, as set forth above, the Ninth Circuit held that the participant's death does not preclude the entry of a QDRO. The *Tise* Court ruled that a state court domestic relations order that is not a QDRO nonetheless transfers an interest in the pension from the participant

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<sup>4</sup> *IBM Sav. Plan v. Price*, 349 F. Supp. 2d 854 (D. Vt. 2004)

<sup>5</sup> *Torres v. Torres*, 60 P.3d 798, 819-824 (Haw. 2003).

<sup>6</sup> *Payne v. GM/UAW Pension Plan*, 1996 WL 943424 (E.D. Mich. May 7, 1996).

to the claimant. 234 F.3d at 421. The absence of a QDRO, the Ninth Circuit asserted, "merely prevent[s] [the claimant] from enforcing that interest until the QDRO is obtained." *Id.* "Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before . . . death." *Id.* The Eighth Circuit's decision in *Hogan* is to the same effect, see, 302 F.3d at 857 (following *Tise*), as is the Third Circuit's decision in *Exxonmobil Pension Plan v. Files*, 428 F.3d 478 (3<sup>rd</sup> Cir. 2005).

In *Patton*, the Tenth Circuit went to far as to uphold a *nunc pro tunc* DRO issued eleven years after a divorce decree pertaining to plan benefits not known about at the time of the divorce. The Tenth Circuit declined to infer that the plan must have been notified of the interest prior to the death of the participant. *Patton*, 326 F.3d at 1153-1154.

Two cases wherein the court disqualified the surviving former spouse from benefits are *Rivers v. Central and Southwest Corp.*, 186 F.3d 681 (5<sup>th</sup> Cir. 1999) and *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4<sup>th</sup> Cir. 1997). These cases actually prove Langston's case.

In *Rivers*, "a community property settlement agreement was entered into between Rivers and Franklin on the day of their divorce. The agreement did not address Franklin's pension benefits in SWEPCO." 186 F.3d at 681 (Emphasis added). After Franklin had retired and died, Rivers sought and obtained an order purporting to confer upon Rivers an

entitlement to Franklin's benefits. The court refused to recognize Rivers' proposed QDRO.

The time line of the *Rivers* case is instructive:

1. Rivers and Franklin marry 1946
2. Rivers and Franklin divorce and the divorce decree makes no mention of Rivers' right to benefit payments 1972
3. Franklin remarries 1972
4. Franklin retires and begins receiving benefit payments 1983
5. Franklin dies 1987
6. Rivers files suit seeking QDRO and benefit payments 1997

*Id.* at 681.

In the case presently before this Court, Petitioner's divorce decree specifically states:

Petitioner shall be awarded a one-half interest in the marital share of all future pension payment received by Respondent. This shall include one-half of all payments made to Respondent pursuant to a plan that Respondent is currently participating in, even if Respondent is not currently fully vested in said plan.

(A. 72-3). 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. For this reason, any reliance on *Rivers* would be misplaced.

In *Hopkins*, Vera Hopkins and her former husband had been divorced for eight years before Vera Hopkins sought a QDRO. At the time of the divorce, "Mr. Hopkins's pension was deemed a marital asset; nevertheless, Vera Hopkins was not awarded a portion of the pension in the equitable distribution of the marital assets." *Hopkins*, 105 F.3d at 154. After Mr. Hopkins retired, Vera Hopkins obtained a judgment against the participant for unpaid

alimony. *Id.* at 155. Vera Hopkins then sought to satisfy this post-retirement judgment via a QDRO. Again, as in *Rivers*, Hopkins' divorce settlement made no mention of the participant's pension benefits. On these particular facts, the United States Court of Appeals for the Fifth Circuit held that the participant's second spouse could not be divested of her survivor benefit payments.<sup>7</sup>

Accordingly, as set forth in both *Rivers* and *Hopkins*, when the ex-spouse fails to obtain any right to benefit payments prior to divorce, he or she may be divested of any right in those payments. In this case, Petitioner's divorce decree does entitle her to receive a portion of Respondent's benefit payments. This entitlement should now be enforced.

Based upon the ERISA statute, interpretive regulations and overwhelming authority from those courts that have addressed the issue, the 2005 QDRO was sufficiently timely and Langston is, as a matter of law, entitled to the benefits awarded by the default judgment granted. For this reason, the district court did not abuse its discretion in finding that Appellants lacked a reasonable defense on the merits.

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<sup>7</sup> While *Hopkins* is so factually distinct that it should not be applied to the instant matter, Plaintiff does note that the reasoning of the *Hopkins* court is fundamentally flawed. For a detailed criticism of *Hopkins* see *Torres v. Torres*, 60 P.3d 798 (Haw. 2003). ("Based on the foregoing, we do not find the conclusion in *Hopkins* that surviving spouse benefits vest in the participant's current spouse at the time of retirement to be persuasive.")

**iii. The District Court Did Not Abuse Its Discretion In Concluding That Vacating The Default Judgment Would Prejudice Langston.**

The Appellants also bore the burden of establishing that vacating the default judgment would not prejudice Langston. On this point, Appellants lone argument is that delay and expense alone do not constitute prejudice. In fact, the prejudice to Langston is not confined to delay and expense.

Langston has counted on the withheld benefit payments for years. Moreover, Appellants owe Langston the duties of a fiduciary because she is a beneficiary and an alternate payee of the Plan. Appellants' constant disregard for Langston is contrary to the mountain of case law, statutory law, and regulatory law cited herein, and it is a practice that should not be permitted to continue any longer.

Based on these facts, the district court did not abuse its discretion in denying Appellants' motion to vacate the default judgment entered on April 18, 2007.

**C. The District Court Properly Exercised Jurisdiction Over Langston's Claims.**

Appellants' also moved the district court to vacate the default judgment pursuant to Minn.R.Civ.P. 60.02(d). Appellants argue that Langston's lawsuit could only be brought in federal court. This argument is flawed for two reasons. First, ERISA expressly states that a beneficiary or alternate payee may seek to establish their right to benefit payments in state court. Second, the relevant case law makes clear that federal and state courts have concurrent jurisdiction over Langstons' claims. For these reasons, this Court should reject

the Appellants' argument that the default judgment is void for lack of subject matter jurisdiction.

29 U.S.C. §1132(e) entitled "Jurisdiction" provides: "*Except for actions under subsection (a)(1)(B) of this section*, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section." *Id.* (Emphasis added).

29 U.S.C. §1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary to recover benefits due him or her under the terms of the plan, to enforce her rights under the terms of the plan or to clarify her right to future benefits under the terms of the plan. *Id.*

29 U.S.C. §1056(d)(3)(J) provides that "[a] person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan." Even if Langston does not qualify as an alternate payee, she is undoubtedly a "beneficiary" of the Plan as a former spouse of a plan participant.

Appellants cite to three sources of law in support of their jurisdictional challenge: this Court's unreported decision in *Welter v. Welter*, 2004 WL 2163149 (Minn. App. 2004), federal case law, and a single piece of legislative history from 1974. Not one of these

authorities supports Appellants' claim that the district court lacked jurisdiction over Langston's claim for benefit payments.

The unreported *Welter* decision states:

Furthermore, we note that whether a document is a QDRO is a matter relevant to ERISA, determinable by the plan administrator, and reviewable by a federal court. See 29 U.S.C. § 1056(d)(3)(G)(i)(II) (2000) (stating, "plan administrator shall determine whether such order is a qualified domestic relations order"); 29 U.S.C. § 1132(a) (2000) (stating civil action may be brought by participant or beneficiary to recover benefits due); 29 U.S.C. § 1132(e) (2000) (stating, **except for actions under section 1132(a)(1)(B)**, federal courts shall have exclusive jurisdiction of civil actions under this subchapter brought by participant or beneficiary);

*Id.* at p.2 (Emphasis added.) (A.Addendum, p. 5).

Not only is this case unpublished, and of no binding precedent, it expressly states that except for actions under section 1132(a)(1)(B), federal courts have exclusive jurisdiction. Section 1132(a)(1)(B) is precisely the statute under which Patricia Langston is in court seeking benefit payments. See *Cary v. TIAA Creff*, 2006 WL 4070768 (W.D.N.Y. Dec. 18, 2006) (Surviving spouse entitled to bring state court claim for ERISA controlled benefits paid to prior spouse). DeVincke Aff., Exhibit J, (R.A. 14). Accordingly, the *Welter* holding does nothing to support Appellants' subject matter jurisdiction argument.

There is no question that Appellants, had they responded in a timely manner, could have removed this matter to federal court, but that is an entirely different issue than whether there is concurrent jurisdiction in the state district court. As the Sixth Circuit has held

“[m]oreover, pursuant to the relevant provisions of 29 U.S.C. § 1132(e)(1), state and federal courts have concurrent jurisdiction over civil actions brought by plan participants or beneficiaries to recover benefits or enforce rights under the plan. See also 29 U.S.C. § 1132(a)(1)(B). In such situations, a defendant may seek removal of the matter to federal court . . . .” *Letourneau v. General Motors Corporation*, 24 Fed.Appx. 332, 334-5 (6<sup>th</sup> Cir. 2001). Accordingly, the *Welter* case does not support Appellants’ argument.

Appellants next claim that the Eighth, Third, Fourth, Fifth and Sixth Circuit Court of Appeal” support their jurisdictional argument. In fact, none of the cited cases support Appellants’ conclusion that the district court lacked concurrent jurisdiction over Langston’s lawsuit.

Appellants first cite to *Hogan v. Raytheon Co.*, 302 F.3rd 854 (8<sup>th</sup> Cir. 2002). The Hogan case does not discuss jurisdiction at all. *Id.* Accordingly, it does not support Appellants’ jurisdictional challenge.

Next, Appellants cite to *Samaroo v. Samaroo*, 193 F.3d 185 (3<sup>rd</sup> Cir. 1999). In *Samaroo*, the spouse/claimant filed the action in state court, and the benefit plan administrator removed the case to federal court. *Id.* at 188. Accordingly, *Samaroo* is entirely consistent with Langston’s position - her claims could have been removed to federal court, but that jurisdiction was also proper in the state court. *Samaroo* does not hold that the claims before the United States Court of Appeals for the Third Circuit were subject to exclusive

federal jurisdiction. Accordingly, that case does not support Appellant's jurisdictional challenge.

Next, Appellants cite to *Hopkins v. AT & T Global Information Solutions, Co.*, 105 F.3rd 153 (4<sup>th</sup> Cir. 1997). *Hopkins*, however, does not provide any discussion regarding jurisdiction over a beneficiary's claim for benefit payments. Accordingly, it does not support Appellants' jurisdictional challenge.

Next, Appellants cite to *Dial v. NFL Payer Supplemental Disability Plan*, 174 F.3rd 606 (5<sup>th</sup> Cir. 1999). In *Dial*, there was actually some discussion regarding jurisdiction - but not any analysis that obtains here. In that case, a benefit plan had been paying 50% of a participant's benefits to his ex-wife. *Id.* at 611. The plan participant filed a federal court action against his plan's administrators claiming breach of fiduciary duty and seeking all benefit payments. *Id.* at 610. The benefit plan responded that the husband/participant should have filed a state court action to clarify the settlement agreement that he had entered into with his ex-wife. *Id.* The United States Court of Appeals for the Fifth Circuit agreed with the participant/husband that his lawsuit against the plan administrators could be filed in federal court. *Id.* at 611.

The *Dial* court never held, nor even considered, whether a plan beneficiary seeking benefit payments pursuant to §1132(a)(1)(B) could bring his or her claim in state court. Accordingly, *Dial* is inapplicable to this case.

The Sixth Circuit Court of Appeals decision in *Rouse v. DaimlerChrysler Corporation UAW*, 300 F.3d 711 (6<sup>th</sup> Cir. 2002), also cited by Appellants, certainly does not hold that federal courts have exclusive jurisdiction over claims like Langston's. In *Rouse*, the United States Court of Appeals for the Sixth Circuit reviewed the district court's application of the *Burford* abstention doctrine. That analysis calls upon the federal court to determine whether the exercise of federal jurisdiction would conflict with a state's administration of its own affairs. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In making this determination, the federal court in *Rouse* held that the question before the Court was entirely federal in nature and did not implicate any state agencies or difficult question of state law. *Rouse*, 300 F.3d at 716. Appellants have cut out one phrase from the *Rouse* opinion ("is strictly federal")<sup>8</sup> and commended that sentence to this Court for the proposition that Langston's claims belong exclusively in federal court. In so doing, Appellants misstate the *Rouse* holding as well as the law.

Finally, Appellants claim that one piece of the legislative history of ERISA lends support to their jurisdictional challenge - 1974 conference report. In fact, the quoted conference report of the United States Congress was published ten years before the QDRO-related provisions of ERISA were enacted. See *Board of Trustees of the Laborers Pension Trust Fund for Northern California, et al, v. Livingston, et al.*, 816 F.Supp. 1496, 1499 (N.D. Cal. 1993). The relevant conference report, issued in 1984, provides that QDRO

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<sup>8</sup> Appellants' Brief, p. 25.

determinations are to be by a “court of competent jurisdiction” - an unnecessary description if exclusive federal jurisdiction was intended. 1984 U.S. Code. Cong. And Ad. News. 1547, 2586.

Further, the conference report cited by Appellants is at odds with the plain, unambiguous language of the statute. “Where alleged ‘intent’ expressed in a legislative report is in direct conflict with the apparent intent as manifested in the words of the statute themselves, we surely must apply the statute rather than the report; after all, it is the statute, not the report, that was enacted by Congress.” *Id.* at 1500 (citation omitted).

As the United States District Court for the Northern District of California correctly noted “Section 1132(e)(1) provides concurrent jurisdiction for all actions under that section, and nothing in § 1132(a)(1)(B) limits its scope to actions which do not require the application of title I provision.” *Id.*

Further, a statute should be interpreted, whenever possible, to give effect to all of its provisions; ‘no word, phrase, or sentence should be deemed superfluous, void or insignificant.’ *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). Here, as correctly pointed out by the *Levingston* court, Appellants’ interpretation of ERISA would render some language in the statute superfluous. Specifically, ERISA provides that “During any period in which the issue of whether a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator

shall separately account for amounts [in dispute].” 29 U.S.C. §1056 (d)(3)(H)(I). “Moreover, the provision that creates concurrent jurisdiction 1132(e)(1), refers to ‘State courts of competent jurisdiction and district court of the United States,’ indicating, albeit obliquely, that the general term ‘court of competent jurisdiction’ refers to state or federal courts as specified in the second sentence of 1132(e)(1).” *Levingston*, 816 F.Supp. at 1499.

It is beyond question that Langston’s claim for benefit payments could have been brought in state court or federal court. Indeed, ERISA itself expressly permits state court jurisdiction over such claims. Further, the case law is unanimous that such claims may be brought in either state or federal court. For these reasons, this Court should affirm the district court’s determination that it had jurisdiction over Langston’s claim for benefits.

**D. This Court Should Reject Appellants’ Newly Minted Rule 60(f) Argument Because It Was Not Raised Before The District Court And Because It Lacks Merit.**

Appellants argue that this Court should grant relief pursuant to Minn.R.Civ.P. 60.02(f). This argument constitutes a new theory of its case, one which was neither presented to nor considered by the district court. Minnesota appellate courts do not consider new legal theories presented for the first time on appeal. “A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Mattson v. Underwriters at lloyds of London*, 414 N.W.2d 717, 721-22 (Minn. 1987); *State*

*v. Kremer*, 239 N.W.2d 476, 478 (Minn. 1976) (holding the court will not decide issues raised for the first time on appeal.)

New theories are not considered on appeal for the simple reason that they are generally irrelevant to the matter before the Court, having formed no part of the decision under review. Because Appellants new theory formed no part of the district court's deliberations, it cannot support that court's ruling.

In support of this new argument, the Appellants claim that "if the Fund follows Judge Walker Jasper's Order, it will be in violation of Judge Hall's Order, and vice-versa, with the latter likely giving rise to an action by Langston to enforce the more beneficial order." Appellants' Brief, p. 44. This red herring of an argument is belied by Langston's position that the most recent district court order denying the motion to vacate is the controlling law in this case. Accordingly, the Appellants' purported fear of a lawsuit by Langston seeking to enforce "the more beneficial order" is not based on any facts and should therefore be ignored by this Court.

Moreover, even if the Appellant had raised this argument in the district court, it would have been to no avail. There is no requirement that the Appellants pay the same funds to both Langston and any other person for the simple reason that only Langston is entitled to the benefits awarded her in the 1993 judgment and decree. For these reasons, this Court should reject Appellants' newly minted Rule 60(f) argument and affirm the district court.

#### IV.

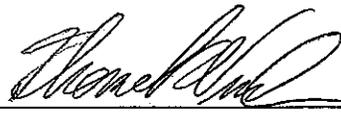
#### Conclusion

Appellants failed to meet their burden under Rule 60.02(a). Appellants could not establish an excuse for their failure to answer Langston's complaint. Further, Appellants failed to establish any meritorious defense because the benefits awarded Langston are plainly due her. Finally, Appellants failed to establish that Langston will not be prejudiced by vacation of the default judgment. Accordingly, three of the four relevant factors weighed in favor of denying Appellants' motion. On these facts, this Court should find that the district court did not abuse its discretion in denying Appellants' Rule 60 motion to vacate the default judgment of April 18, 2007.

As for jurisdiction, both the express language of ERISA and the relevant case law confer upon state and federal courts concurrent jurisdiction over Langston's claims. The fact that these claims could have been brought in federal court or removed to federal court did not divest the district court of jurisdiction here. Accordingly, this Court should reject Appellants' argument that the default judgment is void for lack of subject matter jurisdiction and affirm the district court in all respects.

Dated: February 4, 2008.

Respectfully submitted,

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**Certification of Brief Length**

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 brief is 8,513 words. This brief was prepared using WordPerfect 10.

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