DIVISION ONE
FILED: 04-15-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:	)	1 CA-CV 09-0362
	)	
ELIZABETH J. WILLERS,	)	DEPARTMENT E
	)	
Petitioner-Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	
	)	(Not for Publication –
WILLIAM H. WILLERS,	)	Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
Respondent-Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR 1989-012232

The Honorable Peter C. Reinstein, Judge

AFFIRMED

The Harrian Law Firm, P.L.C
by Julius Harms
Attorneys for Appellant — Glendale

Ryan, Rapp & Underwood, P.L.C.
by Terrie S. Rendler
Attorneys for Appellee — Phoenix

W E I S B E R G, Judge

¶1 William H. Willers ("Husband") appeals from a post-decree of dissolution judgment and order awarding Elizabeth J.

Willers ("Wife") $41,101.88 and $1,023.40 for arrearages on Wife's portion of Husband's pension plan benefits and from an order awarding Wife $4,500 for her attorneys' fees. For reasons that follow, we affirm.

PROCEDURAL HISTORY

¶2 Husband and Wife were divorced on August 13, 1990. Paragraph 3(J) of the Judgment and Decree of Dissolution of Marriage stated that Wife shall receive "50% of the balance of the Goodyear Aerospace retirement account which exceeds $8,200.00." Paragraph 4(B) of the decree stated that Husband shall receive the "Goodyear Aerospace retirement account to the extent of $8,200. To the extent that said retirement funds exceed $8,200.00 they will be equally divided by the parties."

¶3 The Goodyear Aerospace retirement plan is a defined benefit pension plan ("the Plan") and is only divisible by a Qualified Domestic Relations Order ("QDRO"). Husband retired on July 1, 1998 and began receiving 100 percent of the benefits from the Plan in the amount of $511.69 per month. After July 1, 1998, subject to the $8,200.00 offset, Wife was entitled to one-half of Husband's Plan benefits in the amount of $255.84 per month. Husband did not notify Wife, and she did not otherwise know that he had retired and was receiving benefits.

¶4 After several months of unsuccessful negotiations regarding division of the Plan benefits, on January 8, 2009,

Wife filed a motion to enforce the decree of dissolution seeking a judgment for arrearages for her one-half share of the benefits from July 1, 1998 through January 1, 2009, minus the $8,200.00 offset, together with interest at the rate of 10 percent on each payment as it became due. She also filed a notice of lodging Qualified Domestic Relations Order to obtain accruing benefits under the Plan.[1]

¶5 Husband responded to the motion asserting the affirmative defense of laches. He argued that Wife should receive her share of the monthly benefits beginning in April 2008, when he first received notice that she sought to enforce that portion of the decree. He also filed a later-dismissed counter-petition to enforce decree of dissolution re: sale of the family home. Husband then filed an amended response to Wife's motion in which he argued that pursuant to *Johnson v. Johnson,* 195 Ariz. 389, 988 P.2d 621 (App. 1999), Wife was only entitled to arrearages for Plan benefits beginning five years prior to filing the instant action and that any benefits accruing before then were time barred under Arizona Revised Statutes ("A.R.S.") section 12-1551(B)(Supp. 2009). Wife

[1]Goodyear Aerospace Corporation was acquired by Loral Corporation. Lockheed Martin Corporation acquired a portion of Loral Corporation. It appears Lockheed Martin may be the plan administrator for the Goodyear Aerospace Defined Benefit Plan and that the QDRO was prepared pursuant to Lockheed Martin's specifications.

asserted that she was entitled to arrearages in the total amount of $41,101.88 from July 1, 1998 to January 1, 2009 (ten years and six months) while Husband asserted that Wife was only entitled to arrearages for five years prior to January 1, 2009. Wife requested an award of all her attorneys' fees, and Husband requested that each party bear his or her own attorneys' fees.

¶6 The Court held an evidentiary hearing. Wife testified that she was seventy years old and in poor health. She stated she had been in the hospital four times in the last six months, suffered heart failure three times, and had only fifty percent lung capacity. She testified she was retired, had a combined monthly income of $2,400.00 from her pension and social security and $100.00 per month for disability, but that the latter amount would terminate in August 2009.

¶7 Wife further testified that she had thought Husband would retire from Goodyear when he was 65. She stated she knew Husband had been laid off from Goodyear when they divorced but had no "idea at all" that he had retired when he was 57 and was receiving Plan benefits because he never told her. She added that she saw Husband on several occasions at family functions during the preceding ten years, but that he never mentioned either his retirement or his receipt of benefits.

¶8 Husband testified that he currently was employed as a consultant for Labor Lynx working on a tank engine program for

Honeywell at the rate of $45.00 per hour. He stated that he did not always work full time, depending "on what they need[ed] [him] for." He further testified that after retiring from Goodyear Aerospace, he was employed by Honeywell, earning $68,000 to $70,000 per year and that he retired from Honeywell in 2006.

¶9 Husband, who had remarried, said that he owned a house in Heber, Arizona and another in Alabama that he rented on a two-year lease. He testified that in addition to the Plan benefits, he received regular monthly income payments of $1,800.00 from social security and $279.00 from a Honeywell pension plan and $160 in income from Loral Defense Systems.

¶10 Husband added that he did not believe he had a duty to notify Wife of his retirement. He explained that a former attorney told him that the payment of $19,500.00 to Wife to resolve an unrelated issue raised in her appeal from the divorce decree discharged his obligation to divide the Plan benefits. He also challenged Paragraph 9 of the draft of the QDRO on the ground that it incorrectly included survivor's benefits to Wife.

¶11 On April 8, 2008, the trial court entered judgment in favor of Wife in the amount of $41,101.88 for her share of Husband's Plan benefits from July 1, 1998 through January 1, 2009 and ordered him to pay an additional $1,023.40 for her share of the benefits between January 1, 2009 and May 1, 2009.

The court found that the *Johnson* case was distinguishable because there, the wife obtained a post-decree judgment for arrearages but did not enforce it within the statute of limitations "pertaining to judgments." The court also found that unlike in *Johnson,* in the instant case, Wife did not know Husband took an early retirement and was receiving benefits from the Plan. The court also found that "Wife had no reason to believe that the necessary preparation of the required QDRO would take place any time other than Husband's supposed retirement date in 2008." Finally, the court found "that it would be inequitable to deny Wife her community interest in the pension fund [and that] Husband does not come to court with clean hands."

¶12 Wife filed an application for attorneys' fees and costs pursuant to A.R.S. § 25-324 (Supp. 2009), requesting fees in the amount of $9,362.50 ($2,550.00 attributable to preparation of the QDRO), but before the court ruled on the application, Husband filed a timely notice of appeal from the April 8, 2009 judgment. The court awarded Wife attorneys' fees in the amount of $4,500.00, and Husband timely appealed from that order. We have jurisdiction pursuant to A.R.S. § 12.2101(B),(C)(2003)

DISCUSSION

¶13 On appeal, Husband argues that the trial court erred in granting to Wife her share of Husband's Plan benefits beyond that allowed by A.R.S. § 12-1551(B) and *Johnson,* 195 Ariz. at 623, ¶ 10, 988 P.2d at 391.[2] He also argues that the court abused its discretion in awarding Wife her costs and attorneys' fees pursuant to A.R.S. § 25-324.

¶14 Wife responds that A.R.S. § 12-1551(B) is inapplicable because that portion of the decree awarding Wife her share of Husband's Plan benefits is not a judgment within the meaning of the statute and that the facts in *Johnson,* which applied the statute, are distinguishable from the facts here. She also argues that even if A.R.S. § 12-1551(B) applies, the cause of action did not accrue until Wife knew or should have known that she had an actionable right to Husband's benefits ("the discovery rule") or alternatively that the statute was tolled because of Husband's fraudulent concealment from Wife of the facts of his retirement and receipt of benefits.

¶15 In reply to those arguments, Husband claims that Wife's right to Husband's retirement benefits was enforceable in

[2]At the hearing, Husband's counsel stated that his "laches argument was actually replaced when [he] found the *Johnson v. Johnson* case after [he had] asserted the laches argument." He stated that "the *Johnson* case actually establishes the laches [and] refers to . . . A.R.S. [§], 12-1551[], which gives the five-year limitations on judgments."

1990 when the divorce decree was entered. He contends that under the Employee Retirement Income Security Act of 1974 ("ERISA") and amendments thereto, Wife should have prepared a QDRO then to ensure receipt of her share of Husband's benefits when Husband began receiving his share. He claims that her lack of knowledge as to when Husband actually retired and her ignorance about her rights and obligations under ERISA did not excuse her from failing to enforce those rights until 2008.

Statute of Limitation

¶16 "Whether a particular statute of limitations applies to any given action is a matter of law." *Occhino v. Occhino,* 164 Ariz. 482, 484, 793 P.2d 1149, 1151 (App. 1990). "We review de novo 'any questions of law relating to the statute of limitations defense,' . . . [including] when a particular cause of action accrues if it hinges solely on a question of law rather than resolution of disputed facts." *Montano v. Browning,* 202 Ariz. 544, 546, ¶ 4, 48 P.3d 494, 496 (App. 2002) (citations omitted). Section 12-1551 provides in part that:

> A. The party in whose favor a judgment is given, at any time within five years after entry of the judgment and within five years after any renewal of the judgment either by affidavit or by an action brought on it, may have a writ of execution or other process issued for its enforcement.
>
> B. An execution or other process shall not be issued upon a judgment after the expiration of five years from the date of

> its entry unless the judgment is renewed by affidavit or process pursuant to § 12-1612 or an action is brought on it within five years from the date of the entry of the judgment or of its renewal.

¶17 In *Johnson,* this court applied that statute of limitation to bar recovery to the wife of a portion of the husband's retirement benefits. 195 Ariz. at 391, ¶ 10, 988 P.2d at 623. There, the husband and wife were divorced in 1978. *Id.* at 390, ¶ 1, 988 P.2d at 622. Under the decree, the wife was entitled to receive $200 per month as her interest in her husband's military retirement account, with "husband to cause an allotment in favor of wife to be issued so that she would receive the payments directly." *Id.* at ¶ 2. In 1982, the wife brought an action to enforce that provision of the decree, and the trial court entered a judgment in her favor in the amount of $1,600. *Id.* at ¶ 3. Fifteen years later, in 1997, she filed another action to enforce the decree. The wife had neither renewed the earlier judgment nor had she taken any legal action to collect any of the payments that accrued after 1982. *Id. at* ¶ 5. The wife contended she was entitled to all amounts due under the decree. Relying on A.R.S. § 12-1551(B), the husband claimed that the wife was not entitled to monthly payments that became due and payable more than five years prior to the wife's second petition to enforce the decree. *Id.* at 391, ¶ 6, 988 P.2d at 623. The trial court ruled that the 1982 judgment had

lapsed but that the wife was entitled to all monthly payments that had accrued since that time. *Id. at* ¶ 8.

¶18 We reversed that portion of the trial court's order granting the wife monthly payments accruing more than five years prior to filing the enforcement action and modified the judgment to reduce the amount owed. *Id.* at ¶¶ 9-10. We stated that under A.R.S. § 12-1551, "Arizona courts adhere to the rule that the five-year limitation period 'begins to run from the period fixed for the payment of each instal[l]ment as it becomes due,'" *id.* at ¶ 11 (citations omitted), and that with installment payments due under a contract, the applicable limitation period commences on the "due date of each matured but unpaid installment owed under [the] contract." *Id.* at 392, ¶ 11, 988 P.2d at 624 (citing *Navy Fed. Credit Union v. Jones,* 187 Ariz. 493, 930 P.2d 1007 (App. 1996)). We modified the judgment accordingly to reflect that the wife was entitled only to payments due during the period beginning five years before the enforcement action was filed. *Id.* at ¶ 14.

¶19 "The statute of limitations contained in A.R.S. § 12-1551, like all statutes of limitation, does not begin to run against a judgment if it is not suable." Furthermore, "when an action on a judgment would not be entertained until after the lapse of a certain time or until the occurrence of a particular event, the statute does not begin to run until the accrual of a

cause of action on the judgment." *Id.; Groves v. Sorce,* 161 Ariz. 619, 621, 780 P.2d 452, 454 (App. 1989). In *Groves*, the husband had been awarded a lien for $12,000 on the marital home in a divorce decree, but he could not enforce his right to foreclose on the lien until the wife defaulted on the payments, resulting in a foreclosure. The statute of limitation than began to run.

¶20 Therefore, applying *Johnson,* the Plan benefits due Wife were subject to the limitation period in A.R.S. § 12-1551(B), even though her right to file an enforcement action did not arise until Husband was obligated to share the benefits received. We therefore reject Wife's argument and the trial court's finding that there was no judgment within the meaning of the statute and controlled by *Johnson.*

¶21 In this case, when Husband began receiving monthly benefits beginning in 1998, after his receipt of the $8,200.00 offset, Wife was entitled to $255.81 per month. Where, as here, the divorce decree ordered installment payments in the division of property, the five-year statute of limitations period under A.R.S. § 12-1551(B) began to run from the date that each such installment became due and payable. In the absence of a QDRO, Wife could not receive her share of the benefits directly from the Plan; but she was entitled to payment from Husband pursuant to the terms of the decree and thus had a right of action

against him for arrearages. Therefore, except for reasons set forth below, Wife would only be entitled to amounts due her during the five-year period preceding the filing of her action against Husband.[3]

Accrual of Cause of Action

¶22 This, however, does not end our inquiry. Here, the court found that Wife did not know Husband retired from Goodyear and began receiving benefits in 1998. Husband admits he did not inform her of his retirement and believed he had no duty to do so. The court further found that Wife had no reason to believe that it was necessary to prepare a QDRO prior to Husband's anticipated retirement at age 65. The court also determined that Husband did not come to court with clean hands and that under these circumstances it would be inequitable to deny Wife her community interest in the pension plan.

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[3]Wife relies on *Baures v. Baures,* 13 Ariz. App. 515, 518, 478 P.2d 130, 133 (1970), to support her contention that A.R.S. § 12-1551(B) is inapplicable to divorce decrees. That case, however, is inapplicable because it involved unpaid child support. Under Arizona law, although "[e]ach vested child support installment is enforceable as a final judgment by operation of law," A.R.S. § 25-503(I), (Supp. 2009), "any judgment for support is exempt from renewal and is enforceable until paid in full." A.R.S. § 25-503. *See also* A.R.S. § 12-1551(D)(2) ("[t]his section does not apply to judgments and orders for child support . . . ."); *Murren v. Murren,* 191 Ariz. 335, 337, ¶ 10, 955 P.2d 973, 975 (App. 1998) (under section 12-1551(D), past due child support payments are not subject to the limitation period in section 12-1551(B)).

¶23 Statutes of limitations are "generally disfavored," although "claims that are clearly brought outside the relevant limitations period are conclusively barred." *Montano,* 202 Ariz. at 546, ¶ 4, 48 P.3d at 496. "The purpose of a statute of limitations is generally to 'protect[] defendants and the courts from litigation of stale claims' for which evidence may be lost or the memories of witnesses faded." *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008).

¶24 With regard to the question of when a cause of action accrues and a statute of limitation therefore begins to run, "Arizona follows the discovery rule." *Ritchie v. Krasner,* 221 Ariz. 288, 304, ¶ 57, 211 P.3d 1272, 1288 (App. 2009). This rule provides that a statute of limitation "does not begin to run until the plaintiff possesses a minimum knowledge sufficient to recognize that 'a wrong occurred and caused injury.'" *Id.* (citation omitted). Also, although first applied in tort cases, the rule has been extended to breach of contract cases. *See Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.,* 182 Ariz. 586, 591, 898 P.2d 964, 969 (1995). As stated by our supreme court:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury or both, have been difficult for the plaintiff to detect. In

> most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance.

Id. at 589, 898 P.2d at 967 (quoting *April Enters. v. KTTV,* 147 Cal. App. 3d 805, 195 Cal. Rptr. 421, 436 (Cal. App. 1983)). The court concluded that absent a legislative determination as to when a cause of action accrues, the discovery rule would apply in these circumstances. *Id.* at 588, n.1, 898 P.2d at 966, n.1.

¶25 The discovery rule also has been applied in other contexts. *See Walk v. Ring,* 202 Ariz. 310, 316, n.5, ¶ 25, 44 P.3d 990, 996, n.5 (2002)(actions for medical, legal, accounting and insurance malpractice); *Tom Reed Gold Mines Co. v. United E. Mining Co*, 39 Ariz. 533, 535, 8 P.2d 449, 450 (1932)(action for trespass and conversion). We conclude that the discovery rule equally applies to determine when a cause of action accrues for purposes of A.R.S. § 12-1551.

¶26 Husband acknowledges he did not tell Wife that he began receiving Plan benefits in 1998 and that she did not otherwise know about the payments. Furthermore, after their

divorce, Husband remarried, the parties lived in different cities and had minimal contact. In addition, because Goodyear Aerospace was acquired by other corporations, it appears that its pension plan may have changed its name and plan administrator. Thus, unless told by Husband, Wife would have been unlikely to discover that he began receiving benefits at a time "other than his supposed retirement date" of 65, or even discover the entity from whom he was receiving the benefits in order to enforce her rights. In this instance, because Husband was in the "superior position" to know the relevant facts, and knew Wife "remained ignorant" of them, Wife should not "suffer where circumstances prevent[ed] [her] from knowing [she was] harmed" and Husband "should not be allowed to knowingly profit from [her] ignorance." *See Gust, Rosenfeld,* 182 Ariz. at 589, 898 P.2d at 967. We therefore conclude that under these facts, and given the trial court's finding that she had no reason to act until 2008, the discovery rule applies and the limitation period in A.R.S. § 12-1551(B) does not bar Wife's right to recover from Husband her share of all past due Plan payments.

Attorneys' Fees and Costs

¶27 Husband next argues that the trial court abused its discretion in awarding Wife her attorneys' fees. He contends that the trial court incorrectly found that he had more financial resources than Wife because it did not consider his

expenses associated with his rental property in Alabama or the number of hours he worked on a contract basis. Husband asserts that Wife's net monthly income is actually greater than his. He also claims that because Wife failed to file a supporting affidavit of financial information as required by Rule 91(S), Arizona Rules of Family Law Procedure, there was insufficient evidence upon which to base the award. Finally, Husband argues that he did not adopt an unreasonable position; rather that because Wife could have enforced the decree earlier, but "waited unreasonably," "sat on her rights," and created her own "predicament," it was she who brought on their dispute.

¶28 The decision whether to award attorneys' fees and the amount of the award is left to the sound discretion of the trial court. *Roden v. Roden,* 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997). The court may "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings," award a "reasonable amount" to a party in a dissolution proceeding "for the costs and expenses of maintaining or defending any proceeding under this chapter." A.R.S. § 25-324 (Supp. 2009). In considering the financial resources of both parties, the court "must consider both the claimant's need and the other [party]'s capacity to bear the burden." *Roden,* 190

Ariz. at 412, 949 P.2d at 72. Under Rule 91(S), Arizona Rules of Family Law Procedure,

> In any post-decree/post-judgment proceeding in which an award of attorneys' fees, costs, and expenses is an issue, both parties shall file a completed Affidavit of Financial Information. If sought by the applicant, the Affidavit of Financial Information shall be filed with the petition [for post-decree relief] and served upon the opposing party along with a blank copy of an Affidavit of Financial Information.

¶29 Here, Wife did not file an affidavit of financial information with her motion to enforce decree of dissolution nor did she serve a blank one upon opposing counsel as required by Rule 91(S). Husband, however, did not object to Wife's failure to comply with Rule 91(S), nor did he file his own affidavit of financial information. Therefore, Husband's failure to object to this omission below precludes him from raising this argument on appeal. *See In re Marriage of Pownall,* 197 Ariz. 577, 583, ¶ 27, 5 P.3d 911, 917 (App. 2000). (failure to object to court's lack of finding of reasonableness of parties' positions in awarding attorneys' fees to wife waives argument on appeal). Further, at the evidentiary hearing, Husband did not present any evidence as to expenses incurred in connection with his rental property in Alabama, nor did he present evidence as to his average monthly income earned as a consultant, stating only that he did not always work full-time.

¶30 Instead, Husband filed an objection to the affidavit of counsel in support of the application for attorneys' fees on the grounds that (1) he should not be responsible for 100 percent of the cost of preparation of the QDRO; (2) he should not have to pay for costs associated with resolving a dispute over language in the draft QDRO awarding survivor's benefits to Wife; and (3) he "generally objects to the reasonableness of the total amount of fees, as [his] legal fees were approximately 2.5 times less than the amount Wife was charged . . . ." In awarding Wife a portion of her requested attorneys' fees, the judge stated that he "considered the factors contained in A.R.S. § 25-324" and found that Husband had considerably more financial resources than Wife.

¶31 Although the court did not make a finding as to the reasonableness of the parties' positions,[4] even if Husband's positions were reasonable, the "disparity in income" between the parties supports an award of attorneys' fees. *In Re Marriage of Pownall,* 197 Ariz. at 583, ¶ 29, 5 P.3d at 517 (citing *Burnette*

[4]Husband initially claimed that Wife was not entitled to any past due amounts from his retirement because of laches. He then changed his position to claim she was entitled to only the preceding five years of past-due amounts. He also filed a counter-petition which was not supported by the facts and later dismissed. Further, the court found that Husband did not come to court with clean hands, presumably because he failed to inform Wife about his receipt of retirement benefits in the first instance, requiring her to incur attorneys' fees to enforce her rights.

v. Bender, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995)). Here, the uncontroverted evidence was that wife's only source of income was a fixed amount of $2,400.00 per month. Also, she was in poor health, had been hospitalized four times in six months, and was unable to work. Although Husband received about the same amount in fixed monthly income, he was also employed at $45.00 per hour, had investment income, and had worked at Honeywell at a salary of $68,000 to $70,000 per year until 2006 or 2007. Based on the parties' testimony about their current financial situations, the evidence was sufficient to support an award of attorneys' fees to Wife.

¶32 The case cited by Husband, *Breitbart-Napp v. Napp,* 216 Ariz. 74, 84, ¶38, 163 P.3d 1024, 1034 (App. 2007), is inapposite because there, the court awarded the wife her attorneys' fees based upon a financial affidavit that was more than three years' old and the husband's financial affidavit that was more than eight months' old. This court found that the information was "inadequate to determine the parties' financial status." *Id. at* ¶ 39. Here, more current information formed the basis of the trial court's award. Finally, the amount of $4,500.00 for attorneys' fees (approximately one-half of the amount requested) for a contested action that began in the spring of 2008 and did not conclude until June of 2009 was not

unreasonable. The trial court did not abuse its discretion in awarding attorneys' fees to Wife.

Attorneys' Fees on Appeal

¶33 Both parties request an award of costs and attorneys' fees on appeal pursuant to A.R.S. § 25-324 and Rule 21 of the Arizona Rules of Civil Procedure. "Section 25-324 requires us to examine both the financial resources and the reasonableness of the position of each party." *Leathers v. Leathers,* 216 Ariz. 374, 379, ¶ 22, 166 P.3d 929, 934 (App. 2007). Based on the record before us, we award Wife her reasonable attorneys' fees.

CONCLUSION

¶34 For the foregoing reasons, we affirm the judgment and orders of the trial court. We award Wife her reasonable attorneys' fees and costs on appeal subject to compliance with Rule 21, Arizona Rule of Civil Appellate Procedure.

_/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

__/s/_____
PHILIP HALL, Judge

__/s/_____
JOHN C. GEMMILL, Judge