

[Cite as *Poliseno v. Mitchell*, 2010-Ohio-2615.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Carol M. Poliseno,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-1001 (C.P.C. No. 07CVH-10-14221)
Theresa Mitchell et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	
Theresa Mitchell,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1002 (C.P.C. No. 08CVH-04-6005)
AXA Equitable Life Insurance Company et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Carol M. Poliseno,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on June 10, 2010

Daniel K. Friend and Elizabeth L. Roach; Douglas W. Bulson, Jr., for appellant.

Richard Cordray, Attorney General, and *Hilary R. Damaser*, for appellee Ohio Public Employees Retirement System.

Crabbe, Brown & James LLP, John C. Albert and Jeffrey D. Houser, for appellees Theresa Mitchell and Michael J. Polisenno.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Carol M. Polisenno, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion for summary judgment of defendant-appellee, Ohio Public Employees Retirement System ("OPERS"), and denying plaintiff's motion for summary judgment. Because the trial court properly concluded OPERS did not violate its statutory duty in distributing retirement and death benefits to defendant-appellee, Theresa Mitchell, we affirm.

I. Facts and Procedural History

{¶2} Plaintiff's complaint stems from the distribution of life insurance proceeds and state employee retirement and death benefits following the death of Howard Polisenno on August 15, 2007. Plaintiff is Howard's surviving spouse. Although they remained legally married, plaintiff and Howard were estranged and had not lived together since 1998. At the time of his death, Howard had been living with Theresa Mitchell, his girlfriend, for more than nine years. Michael J. Polisenno, an adult son of Howard, is not plaintiff's son. At all pertinent times, Howard was an actively contributing member of OPERS; both Mitchell and plaintiff also were members of OPERS.

{¶3} In January of 2007, doctors diagnosed Howard with an advanced stage of leukemia, inducing Howard to revise his estate plan. On July 30, 2007, Howard executed

an OPERS Member Designation of Beneficiary for Traditional Pension Plan Form ("Beneficiary Designation"); two nurses then helping with his medical care witnessed his signature. In the space for the primary beneficiary's name, the Beneficiary Designation instructed the name be completed as follows: First Name, MI, Last Name. The completed Beneficiary Designation listed Mitchell as the primary beneficiary on Howard's OPERS account and Michael as the first contingent beneficiary; the portion of the Beneficiary Designation requesting the name of the member's spouse was left blank.

{¶4} OPERS received a Beneficiary Designation from Howard on August 3, 2007. When OPERS staff reviewed Howard's Beneficiary Designation, it saw the word "THERESA" was written over the word "MITCHELL." Because of what initially was perceived as an alteration, OPERS stamped the Beneficiary Designation "VOID." By letter dated August 9, 2007, OPERS notified Howard that it could not approve the Beneficiary Designation because of the alteration. Michael, however, received permission from OPERS staff on August 15, 2007 to send an unaltered copy of the third page of the Beneficiary Designation. At 12:42 p.m. that day, Michael faxed OPERS an unaltered copy of the third page, which again named Mitchell as the primary beneficiary; at 1:38 p.m. the same day, Howard died.

{¶5} On August 29, 2007, OPERS senior staff, despite the previous decision declaring it void, approved Howard's original Beneficiary Designation received on August 3, 2007. Mitchell then applied for and received benefit payments from Howard's OPERS account: \$121,093.93 on September 19, 2007, and \$318.20 on September 27, 2007.

{¶6} Plaintiff filed a complaint on October 18, 2007 in the Franklin County Court of Common Pleas against Mitchell, Prudential Life Insurance Company of America ("Prudential"), and OPERS; an amended complaint filed November 9, 2007 added Michael as a defendant. In a second amended complaint filed on April 17, 2008, plaintiff sought a judgment (1) declaring both Beneficiary Designations invalid; (2) ordering OPERS to pay death benefits to plaintiff; (3) ordering payment of the proceeds of the Prudential policies to plaintiff; and (4) awarding attorney fees, costs, and interest. Mitchell filed a counterclaim against plaintiff for tortious interference with contract, conversion, unjust enrichment, intentional interference with inheritance, fraud, and enforcement of a constructive trust and/or equitable lien.

{¶7} On June 30, 2008, plaintiff filed a motion for summary judgment against OPERS. On August 1, 2008, OPERS responded with its own motion for summary judgment against plaintiff. All parties then filed memoranda addressing the pending motions for summary judgment. On September 24, 2009, the trial court journalized its entry granting OPERS' motion for summary judgment and denying plaintiff's motion for summary judgment. Specifically, the trial court concluded OPERS properly accepted Howard's Beneficiary Designation and was not required to investigate the circumstances surrounding a member's designation of a beneficiary. Because the trial court found no just cause for delay pursuant to Civ.R. 54(B), the trial court's decision is final and appealable.

II. Assignments of Error

{¶8} On appeal, plaintiff assigns the following errors:

I. The trial court erred by not finding that the actions of Ohio Public Employees Retirement System in allowing the

beneficiary change under the circumstances in this case were in violation of its statutory duty, arbitrary, and capricious.

II. The trial court erred when it failed to consider and give due weight to the fact that Ohio Public Employees Retirement System violated its fiduciary duty to Appellant.

III. The Court erred in not granting Summary Judgment for Appellant as a matter of law because the Member Beneficiary Designation form was determined to be void by the agency. That decision was final, and it was never properly appealed.

IV. The Court erred as a matter of law in granting Summary Judgment for Ohio Public Employees Retirement System because there existed genuine issues of material fact.

V. The Court erred as a matter of law in not granting Summary Judgment for Plaintiff-Appellant.

III. Standard of Review

{¶9} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶10} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the

record demonstrating the absence of a material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party cannot discharge its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must point to specific evidence of the type listed in Civ.R. 56(C) to affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment. *Id.* Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Id.*

IV. First Assignment of Error – OPERS' Statutory Duty

{¶11} In her first assignment of error, plaintiff asserts the trial court erred in failing to find OPERS violated its statutory duty. Plaintiff argues OPERS' decision to allow the beneficiary change pursuant to Howard's first Beneficiary Designation was arbitrary and capricious.

{¶12} The state retirement systems, including OPERS, are creatures of statute and "can only act in strict accordance with their enabling schemes." *Ohio Assn. of Pub. School Emp. v. School Emp. Retirement Sys.*, 10th Dist. No. 04AP-136, 2004-Ohio-7101, ¶23, citing *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 74. Public retirement systems nonetheless are entitled to due deference in interpreting their own statutes and rules. See *State ex rel. Schaengold v. Ohio Pub. Emps. Retirement Sys.*, 114 Ohio St.3d 147, 2007-Ohio-3760, at ¶23 (according OPERS

"the deference to which it is entitled in interpreting the statutes and administrative rules"), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289, 2001-Ohio-190; *McAuliffe v. Bd. of Pub. Emp. Retirement Sys. of Ohio* (1994), 93 Ohio App.3d 353, 360 (stating "we should pay due deference to a reasonable construction by an administrative agency in interpreting its own rule").

{¶13} Plaintiff argues that, under the circumstances present here, OPERS violated its statutory duty in approving Howard's Beneficiary Designation. R.C. 145.43(B) governs the payment of OPERS member benefits at a member's death. The statute provides that, upon the member's death, "the member's accumulated contributions and any applicable amount calculated" per R.C. 145.401, "shall be paid to the person or persons the member has designated in writing duly executed on a form provided by the public employees retirement board, signed by the member, and filed with the board prior to the member's death." R.C. 145.43(B). Thus, as the trial court noted, to properly designate a beneficiary on an OPERS account, the member must perform three steps: "(1) completion of the Beneficiary Designation form as provided by OPERS; (2) signature of [Howard] on the form; and (3) filing the Beneficiary Designation form prior to [Howard]'s death." (Decision and Entry, 7.)

{¶14} OPERS asserts Howard met the three requirements. The Beneficiary Designation named Mitchell the primary beneficiary and Michael the first contingent beneficiary. Howard signed the Beneficiary Designation on July 30, 2007. Finally, OPERS received the original Beneficiary Designation on August 3, 2007, 12 days before Howard's death. OPERS asserts that because Howard fulfilled the three requirements, OPERS was

statutorily correct in distributing member benefits in accord with the Beneficiary Designation.

{¶15} Plaintiff, however, contends Howard did not "duly execute" the Beneficiary Designation. Although the statute does not define "duly," plaintiff posits the term requires, at a minimum, due completion of the form. In that regard, plaintiff notes that not only did Mitchell's name appear written in the improper order, but the form did not list plaintiff as Howard's lawful spouse. Plaintiff argues such errors and omissions indicate Howard did not comply even minimally with the instructions OPERS provided for completing the form.

{¶16} Plaintiff further asserts OPERS recognized the significant deficiencies in the first Beneficiary Designation Howard forwarded. Plaintiff points to OPERS' August 9 letter that informed Howard OPERS refused to approve the Beneficiary Designation because it was altered and, as a result, any previous designations would remain valid unless OPERS received a new, "properly completed" Beneficiary Designation from Howard. With that factual premise, plaintiff argues OPERS did not consider the original Beneficiary Designation to be statutorily sufficient or OPERS would have accepted it as the relevant statute required.

{¶17} OPERS, in effect, reversed its decision regarding the Beneficiary Designation received on August 3, 2007 and decided to accept it. Nothing in R.C. 145.43(B), however, prohibits OPERS from accepting a Beneficiary Designation with alterations; similarly, nothing in R.C. 145.43(B) prohibits OPERS from accepting a Beneficiary Designation after initially rejecting it. Moreover, such actions are discretionary decisions left to OPERS staff members under the relevant administrative code provisions.

In particular, the OPERS board specifically authorized its staff in Ohio Adm.Code 145-1-09 to make decisions regarding benefits. Part of the staff's duty includes determining whether OPERS can administer the member's account based on the information provided in the Beneficiary Designation. The decisions of OPERS staff' regarding Howard's Beneficiary Designation thus fall within the administrative discretion afforded OPERS staff members and are entitled to due deference in court review of those actions. *Schaengold* at ¶23.

{¶18} Plaintiff nonetheless insists OPERS itself has a "zero tolerance" policy for accepting forms with alterations, citing an electronic mail message from OPERS staff. She contends OPERS' ad hoc decision to create an "exception" to the policy for Howard is arbitrary and capricious.

{¶19} Contrary to plaintiff's argument, an OPERS staffer senior to the author of the electronic mail message offered un rebutted evidence in the form of her affidavit that no such policy existed. Moreover, if such policy existed, the alteration at issue on the Beneficiary Designation Howard initially submitted did not render the intended beneficiary unidentifiable. Rather, the first name and last name appeared in the incorrect order, and the scribe attempted to correct the mistake so as to comply with the instructions on the form. Upon further review of the form, OPERS staff determined the alteration "was minor and the member[']s intention was clear." (Davis Affidavit, ¶16-17.) Under such circumstances, OPERS' strict application of a zero tolerance policy itself arguably would be arbitrary and capricious. Indeed, even if any confusion remained about whom Howard intended to designate as his beneficiary, OPERS' receipt of a second Beneficiary

Designation on August 15, 2007, prior to Howard's death, alleviated any possible ambiguity.

{¶20} Finally, neither the statutes nor the administrative code provisions governing OPERS mention a "zero tolerance" policy. We thus are unable to conclude, as plaintiff argues, that OPERS' staff members ran afoul of the OPERS statutory scheme if it deviated from a suggested "zero tolerance" policy. Because OPERS' decision to accept Howard's Beneficiary Designation form was consistent with R.C. 145.43(B) and within the discretionary authority R.C. 145.09 and Ohio Adm.Code 145-1-09 confer upon the OPERS staff, OPERS did not violate its statutory duty. We thus overrule plaintiff's first assignment of error.

V. Second Assignment of Error – Fiduciary Duty

{¶21} Plaintiff next asserts the trial court erred when it failed to properly consider OPERS' fiduciary duty to plaintiff. Plaintiff notes that, pursuant to R.C. 145.11(A), OPERS discharges its duties "with respect to the funds solely in the interest of the participants and beneficiaries [and] for the exclusive purpose of providing benefits to participants and their beneficiaries * * *." Plaintiff, herself a contributing member of OPERS, asserts not only that OPERS owes her a fiduciary duty in the administration of her plan but had a heightened duty to plaintiff that it breached when it failed to investigate the circumstances surrounding the Beneficiary Designation Howard submitted.

{¶22} Plaintiff's argument misapprehends the fiduciary duty R.C. 145.11(A) contemplates. As the trial court correctly explained, plaintiff's argument is inconsistent with R.C. 145.11(A) which requires the fiduciary, OPERS, to administer each individual's

plan for the benefit of the participant or its designated beneficiary OPERS' decision to reexamine Howard's Beneficiary Designation demonstrates OPERS conscientiously fulfilled its duty to Howard and his beneficiary. The trial court did not err in allegedly failing to "give due weight" to plaintiff's argument. (Plaintiff's brief, 15.) Accordingly, we overrule plaintiff's second assignment of error.

VI. Third Assignment of Error – Administrative Appeal

{¶23} Plaintiff's third assignment of error contends the trial court erred as a matter of law in failing to grant summary judgment to plaintiff. Plaintiff argues OPERS' initial decision to reject the Beneficiary Designation and mark it "void" constituted a final administrative decision, or "adjudication," within the meaning of R.C. 119.01(D). See R.C. 119.01(D) (defining "adjudication" as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person"). Since neither Howard nor Mitchell appealed that decision, plaintiff argues she remains the proper beneficiary under Howard's plan. In response, OPERS notes it is not an "agency" within the meaning of R.C. 119.01(A), so it is not subject to the administrative appeal provisions of R.C. 119.12.

{¶24} The procedural posture of this case does not present the prototype for plaintiff's argument. Even if, however, we assume plaintiff properly invokes the doctrine, plaintiff did not raise the R.C. Chapter 119 argument in the trial court and thus waived it. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210; *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456 (holding in syllabus that the doctrine of failure to exhaust administrative remedies is waived if not timely asserted). We need not address the

contentions with respect to administrative appeal under R.C. 119.12. Accordingly, we overrule plaintiff's third assignment of error.

VII. Fourth Assignment of Error – Summary Judgment for OPERS

{¶25} In her fourth assignment of error, plaintiff argues the trial court erred in granting summary judgment in favor of OPERS. Plaintiff contends the trial court erred because genuine issues of material fact remain for trial regarding (1) whether someone altered the Beneficiary Designation after Howard signed it, and (2) whether Howard maintained the capacity to remember plaintiff remained his wife.

{¶26} Plaintiff presented no evidence to the trial court suggesting Howard, at the time he executed the Beneficiary Designation, did not remember plaintiff was his wife. Moreover, plaintiff submitted no evidence indicating someone altered the Beneficiary Designation after Howard signed it, and thus her argument is only conjecture. Mere speculation is not sufficient to overcome OPERS' motion for summary judgment. *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶66, citing *Zacks v. Beck*, 10th Dist. No. 04AP-1364, 2005-Ohio-4567, ¶29.

{¶27} OPERS satisfied its burden to demonstrate it discharged its statutory duty in administering Howard's benefits to his intended beneficiary. Because plaintiff did not respond to OPERS' motion for summary judgment with Civ.R. 56 evidence that demonstrates a genuine issue of material fact for trial regarding either issue she raises under this assignment of error, the trial court did not err in granting OPERS' motion for summary judgment. We overrule plaintiff's fourth assignment of error.

VIII. Fifth Assignment of Error – Summary Judgment for Plaintiff

{¶28} In her fifth assignment of error, plaintiff asserts the trial court erred as a matter of law in denying her motion for summary judgment. Essentially, plaintiff contends that if this court sustains any of plaintiff's first four assignments of error, then we must, as a matter of law, conclude plaintiff is entitled to summary judgment. Because her fifth assignment of error is based on arguments deemed unpersuasive in the preceding four assignments of error, plaintiff's final assignment of error also lacks merit and is overruled.

IX. Disposition

{¶29} In the final analysis, the trial court did not err in granting OPERS' motion for summary judgment and denying plaintiff's motion for summary judgment. Having overruled plaintiff's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and KLATT, JJ., concur.
