COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-2276-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ESTATE OF TIMOTHY ODDSEN, BY ITS PERSONAL REPRESENTATIVE, MARJORIE M. ODDSEN AND ELIZABETH A. BURKLAND,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MILWAUKEE AND MILWAUKEE EMPLOYES' RETIREMENT SYSTEM/ANNUITY AND PENSION BOARD,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. The Estate of Timothy Oddsen, by its personal representative Marjorie M. Oddsen, and Elizabeth A. Burkland appeal from a

decision granting summary judgment to the City of Milwaukee and the City of Milwaukee Employes' Retirement System/Annuity and Pension Board. The Estate commenced this lawsuit to obtain Oddsen's "pension benefit that would have been provided had Oddsen elected a [Protective Survivorship Option (PSO)]" prior to his death. On appeal, the Estate contends that Oddsen, a disabled police officer at the time of his death, was a "member" of the Milwaukee Employes' Retirement System (MERS) and that he should therefore have been informed of his eligibility to elect a PSO prior to his death.[1] The Estate contends that if Oddsen had been aware of the PSO, he would have made that election. By order dated August 26, 1997, this case was submitted to the court on the expedited appeals calendar. We affirm the circuit court's judgment dismissing the Estate's case because, even assuming that Oddsen had been eligible to elect the PSO and had been informed of that option, there is nothing in the record to establish that he would have elected the PSO or, if he had, which payment option he would have selected or who he would have designated as his beneficiary.[2] Without such information, the basis for the Estate's request for the benefit is merely speculative.

[1] In general, participation in a PSO reduces certain retirement benefits paid to the employee during his or her lifetime, in exchange for continuation of those benefits after death, which are paid to a designated beneficiary. Absent election of that option, benefits terminate upon the death of the employee.

[2] This appeal raises questions regarding the Estate's standing to participate in this action, as well as questions relating to Oddsen's "member" status in the MERS and whether he had attained the requisite number of years of "creditable service" with the police department to qualify for the PSO election. Given the basis of our disposition, however, we need not address these issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

BACKGROUND

The relevant facts are undisputed. Timothy Oddsen was born on January 9, 1948, and became a police officer for the City of Milwaukee on March 24, 1969. As a Milwaukee police officer, Oddsen became a participant in the MERS.

Oddsen was injured on November 8, 1992, while performing his official duties. On August 26, 1993, Oddsen was placed on Duty Disability Retirement Allowance (DDRA). Thus, Oddsen had served almost twenty-four and one-half years as a Milwaukee police officer at the time he began receiving DDRA benefits. Oddsen died on October 4, 1994.

At the time of his death, Oddsen had not been notified of the PSO. This option, available to any member of the MERS after the member has attained twenty-five years of creditable service as a police officer, was not afforded Oddsen because, the City claimed, Oddsen had commenced his DDRA prior to achieving twenty-five years of creditable service, and his time on DDRA did not count toward that calculation. It also claimed that once Oddsen became a "beneficiary" under the DDRA, he ceased being a "member" of the MERS and so was not eligible for the PSO election.

The circuit court, after initially noting that "[t]here is no indication that [Oddsen] would have chosen to elect the [PSO]" even if he had been specifically notified of the option, held that Oddsen had attained twenty-five years of creditable service. However, it noted that, because Oddsen was a beneficiary of the DDRA at the time of his death, he was no longer a member of the MERS and thus was not eligible for the PSO election. The Estate appeals, contending that

Oddsen was a member of the MERS who had attained twenty-five years of creditable service and was therefore entitled to elect the PSO prior to his death.

DISCUSSION

This court owes no deference to a circuit court's decision to grant summary judgment; rather, we independently apply the methodology set forth in § 802.08(2), STATS., to the record *de novo*. *See* ***Garcia v. Regent Ins. Co.***, 167 Wis.2d 287, 294, 481 N.W.2d 660, 663 (Ct. App. 1992). Summary judgment will be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id***. at 294, 481 N.W.2d at 663.

Although we reach the same ultimate conclusion as the circuit court, we do so for a different reason. We have thoroughly examined the record and can only conclude that there is nothing to indicate whether Oddsen, if presented with the opportunity to elect a PSO, would have done so. Although the Estate suggests that Oddsen would have elected the PSO if he had been aware of it, that suggestion, given this record, is based on nothing but speculation.

In addition, a person electing a PSO must choose from three or four pay-out options. There is nothing in the record to establish which option Oddsen would have chosen had he been aware of the PSO election. Consequently, there is no way to determine which benefit would be payable to Oddsen's beneficiary. Finally, we note there is nothing in the record to definitively establish who Oddsen would have designated as his beneficiary if Oddsen had chosen the PSO.

Given the potential trade-offs involved in election of a PSO pay-out option – reduced benefits during the life of the member in exchange for a benefit to be paid to a designated surviving beneficiary – nothing in the record clearly

indicates that Oddsen, who was forty-six years old when he died, would have chosen a PSO option even if it would have been available to him and he was aware of that availability.[3] Given the absence of any indication in that regard, we cannot see how the Estate could be granted the relief it seeks: specifically, "the pension benefit that would have been provided had Oddsen elected the PSO …."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] At the summary judgment hearing, the Estate's counsel suggested that Oddsen, at the time he presumably would have made the election, was a "dying man." Counsel indicated that, as such, Oddsen would have made a PSO election "unless he was really badly advised by a lawyer." There is nothing in the record to support either contention. The assertions regarding Oddsen's health and whether he would have selected a PSO pay-out option remain, on this record, mere speculation.