

NO. 2006-CT-00841-SCT

IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

APPELLEE

SUPPLEMENT BRIEF OF APPELLANT
UPON THE GRANTING OF THE PETITION FOR
WRIT OF CERTIORARI OF THE APPELLEE

GEORGE S. LUTER
MSB [REDACTED]
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Telephone: (601) 948-0021
Facsimile: (601) 354-5548
GEOLAW1502@AOL.COM

Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON

APPELLANT

VS.

NO. 2006-CT-00841-SCT

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Sheryl Stevison, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Hon. Bobby DeLaughter, Hinds County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER


ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	PAGE(S)
CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii-iv
STATEMENT OF PROCEEDINGS BEFORE PERS AND THE CIRCUIT COURT.....	1
STATEMENT OF PROCEEDINGS BEFORE THE COURT OF APPEALS.....	1
SUMMARY OF THE APPELLANT’S ARGUMENT.....	2-3
STATEMENT OF THE ISSUE.....	3-9
1. DID THE COURT OF APPEALS ERR IN AWARDING PREJUDGMENT INTEREST TO STEVISON ON HER WRONGFULLY DENIED RETIREMENT BENEFITS SINCE A CONTRACT EXISTS BETWEEN STEVISON AND PERS AS TO THE PAYMENT OF SUCH BENEFITS AND STATUTORY AUTHORITY EXISTS TO AWARD INTEREST IN SUCH CASES ?	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Aetna Casualty & Surety Co. v. Doleac Elec. Co., 471 So. 2d 325, 331 (Miss. 1985)	3
Brand v. Brand, 482 So.2d 236 (Miss. 1986)	8
Commercial Union Ins. Co. v. Byrne, 248 So 2d 777, 783 (Miss. 1971)	3
Dorsey v. State ex rel. Mulrine, 283 A.2d 834 (Del.Supr.1971)	4
Faulkenbury v. Teachers' & State Emp. Ret. of North Carolina, 483 S.E. 422 (N.C. 1997)	5
Glantz Contracting Co. v. General Electric Co., 370 So. 2d 912, 918 (Miss. 1980)	7
Halpin v. Nebraska Patrolmen's Retirement System, 211 Neb. 892, 320 N.W. 910 (1982)	4
Petras v. State Board of Pension Trustees, 364 A.2d 1228 (Del.Supr.1976)	4
Preferred Risk Mut. Ins. Co. v. Johnson, 730 So. 2d 574 , 577 (Miss. 1998)	7
Public Employees' Ret. System v. Freeman, 868 So. 2d 327 (Miss. 2004)	2
Sentinel Indus. Cont. v. Kimmins Indus., 743 So. 2d 954 (Miss. 1999)	7
Shapiro v. Kansas Pub. Emp. Ret. System, 216 Kan. 353, 532 P. 2d 1081 (1975)	6
Singer v. City of Topeka, 227 Kan. 356, 363, 607 P.2d 467,473 (1980)	5
State v. Calhoun, 634 A.2d 335 (Del. 1993)	4
Thompson v. State Board of Pension Trustees, 552 A.2d 850 (Del.Supr.1988)	3, 4
Warwick v. Matheney, 603 So. 2d 330 (Miss. 1992)	7
 <u>OTHER AUTHORITIES</u>	
Miss. Code Ann. 25-11-13	8
Miss. Code Ann. 25-11-111(d)(1)	4

Miss. Code Ann. 25-11-113(1)(a)	4
Miss. Code Ann. 25-11-113(b)	3, 4
Miss. Code Ann. 25-11-117	8
Miss. Code Ann. 75-17	1, 8
MRAP 41(e)	1

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CT-00841-SCT

SHERYL STEVISON

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

APPELLEE

**SUPPLEMENTAL BRIEF OF APPELLANT
UPON THE GRANTING OF THE PETITION FOR
WRIT OF CERTIORARI OF THE APPELLEE**

Statement of Proceedings before PERS and the Circuit Court

Sheryl Stevison applied for PERS disability retirement benefits on August 26, 2002. After a hearing before the PERS Disability Appeals Committee¹, Stevison was denied benefits by the PERS Board of Trustees on August 26, 2003.

Stevison appealed to the Circuit Court of the First Judicial District of Hinds County on September 23, 2003 asking the Circuit Court to reverse PERS' denial "with interest at the legal rate from the first month she became disabled." On April 10, 2006, the Circuit Court affirmed the denial by PERS.

Statement of Proceedings before the Court of Appeals

After appeal to the Supreme Court, this case was assigned to the Court of Appeals which reversed and rendered the decision of PERS on October 16, 2007. **PERS did not file a Motion for Rehearing asking the Court of Appeal to reconsider its decision reversing PERS.**

On November 6, 2007, the Court of Appeals issued its mandate. On November 11, 2007, pursuant to MRAP 41(e), Stevison filed her Motion to Amend Mandate to impose prejudgment interest pursuant to Miss. Code Ann. 75-17-7. On November 16, 2007, PERS filed its Response

¹ Stevison represented herself at her administrative hearing.

Stevison would further assert that receipt of retirement benefits under the Public Employees' Retirement System is a ~~contract between the State of Mississippi and its members~~. See *Thompson v. State Board of Pension Trustees*, 552 A. 2d 850 (Del. Sup. 1988), "It is settled that Delaware's pension laws are a form of contract between the State and its employees."

Further, ~~the amount~~ due under such contract---*the past due benefits owed Stevison--* ~~constitutes a judgment "capable of being made certain by a mere calculation,"~~ *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 783 (Miss. 1971), ~~and thus "liquidated" in order to justify an~~ award of prejudgment interest. *Aetna Casualty & Surety Co. v. Doleac Elec. Co.*, 471 So. 2d 325, 331 (Miss. 1985). Thus, Stevison's case fits all dictates of Mississippi law for an award of prejudgment interest to be paid by appellee in the discretion of the Circuit Court upon remand.

The Court of Appeals was correct in amending the mandate and granting prejudgment interest to be paid by PERS since Stevison's retirement benefits due to disability were a matter of law wrongfully denied once the Court of Appeals ruled the denial by PERS of the retirement application of Stevison "lacked the support of substantial evidence and was arbitrary and capricious.." Thus, a contract for retirement benefits existed between Stevison and PERS and such breach by PERS allows prejudgment interest to be awarded pursuant to Miss. Code Ann. 75-7-17.

STATEMENT OF THE ISSUE

DID THE COURT OF APPEALS ERR IN AWARDING PREJUDGMENT INTEREST TO STEVISON ON HER WRONGFULLY DENIED RETIREMENT BENEFITS SINCE A CONTRACT EXISTS BETWEEN STEVISON AND PERS AS TO THE PAYMENT OF SUCH BENEFITS AND STATUTORY AUTHORITY EXISTS TO AWARD INTEREST IN SUCH CASES ?

Miss. Code Ann 25-11-113(b) states:

"(b) Except as provided in paragraph (c) of this subsection (2), an eligible member **who is retired for disability** and who has not attained sixty (60) years of age **shall** receive a disability

benefit as computed in Section 25-11-111(d)(1)..."

Once the Court of Appeals ruled that PERS wrongfully denied Stevison retirement benefits pursuant to Miss. Code Ann. 25-11-113(1)(a) a contract existed between herself and PERS pursuant to Miss. Code Ann. 25-11-113(b) (1972). Delaware's Superior Court recognized such in *Thompson v. State Board of Pension Trustees*, 552 A. 2d 850 (Del Sup. 1988), noting "~~It is settled that Delaware's pension laws are a form of contract between the State and its employees.~~" *Petrus v. State Board of Pension Trustees*, 364 A. 2d 1228 (Del. Supr. 1976); *Dorsey v. State ex rel. Mulrine*, 283 A. 2d 834 (Del. Supr. 1971) ("*Dorsey I*").

Such was reiterated by the Supreme Court of Delaware in *State v. Calhoun*, 634 A.2d 335,338 (Del. 1993) wherein the Court stated:

"Calhoun's entitlement to a disability pension is based on his participation in, and contributions to, the State Employees' Pension Plan, 29 Del.C. Ch. 55. ~~Although the plan is legislatively established, it is contractual in nature, and when vested, confers a constitutionally protected property right.~~ *In re State Employees' Pension Plan*, Del.Sup., 364 A. 2d 1228 (1976).

The Supreme Court of Nebraska in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W. 2d 910 (1982) also recognized the contractual nature of public retirement systems with their members since pensions were generally accepted by courts to be deferred compensation, and not gratuities, and thus such created a contract between the retirement system and the retiree:

"The decisions in other states are now generally in agreement that pension payments constitute deferred compensation for services rendered. *Brazelton v. Kansas Public Employees Retirement System*, 227 Kan. 443, 607 P.2d 510 (1980); *Kleinfeldt v. New York Emp. Ret. System*, 73 Misc.2d 310, 341 N.Y.S. 2d 784 (1973); *Miller v. State of California* 18 Cal.3d 808, 557 P. 2d 970, 135 Cal.Rptr, 386 (1977); *Opinion of the Justices*, 364 Mass. 847, 303 N.E. 2d 320 (1973);

Pineman v. Oechslin, supra.

“Since Nebraska law recognizes that public pensions are deferred compensation, *Gossman v. State Employees Retirement System, supra*, it follows that Nebraska public employees, no less than those in other states, have “reasonable expectations which are protected by the law of contracts” with regard to their pension rights.”

[320 N.W. 2d at 914.]

Kansas has also recognized the contractual nature of public retirement benefits:

“State retirement systems create **contracts** between the state and its employees who are members of the system. This is the rule followed in most recent cases on the subject, and seem to us the more enlightened view.” *Singer v. City of Topeka*, 227 Kan. 356, 363, 607 P. 2d 467, 473 (1980).

North Carolina in *Faulkenbury v. Teachers' and State Emp. Ret. System of North Carolina*, 483 S.E. 2d 422 (N.C. 1997) reiterated its earlier pronouncement that a contract existed between retirees and retirement systems:

“The Court of Appeals held and we affirmed in *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988). a case almost on all fours with this case, that the relationship between the employees and the governmental units was contractual. *Simpson* governs this case.”

Further, the Delaware Superior Court in *Thompson, supra*, noted that when such contract was breached interest was appropriate:

~~“Given this contractual relationship, the right to interest on overdue pension benefits has been recognized whenever the pension law makes no provision for interest.”~~ *Dorsey v. State ex rel. Murine*, Del.Sup., 301 A. 2d 516 (1972) (“*Dorsey II*”); *State ex rel. Board of Pension Trustees v. Dineen*, Del.Ch., 409 A. 2d 1256 (1979).

The Delaware court also recognized that when the contract between the retirement system and the retiree is wrongfully broken and interest awarded the interest begins when the retirement payment is due: "~~Normally upon such a breach, interest will run from the date the payment is due.~~" *Dorsey II, supra* at 518.

Further, the Delaware court held that the right to interest by the retiree is not prohibited because a judgment has not been entered:

"The right to interest in breach-of-contract cases does not turn upon whether or not a judgment has been entered. ~~A judgment does not create the right to interest, and it is a means of enforcing a right that already exists.~~ The "allowance of interest is in the nature of damages; [it is] as much of an injured plaintiff's substantive right as the right to the damages themselves." *Superior Tube Co., v. Delaware Aircraft Industries, Inc.* 60 F. Supp. 573, 575 (D. Del.1945).

Finally, the Kansas Supreme Court in *Shapiro v. Kansas Public Employees Retirement System*, 216 Kan. 353, 532 P.2d 1081 (1975), recognizing long time Mississippi contract law, held the Kansas retirement system had to repay interest to a widow of a retiree whose ~~death~~ ~~benefits~~ were wrongfully withheld:

"Interest has been defined as the compensation allowed by law or fixed by the parties for the use, detention, or forbearance of money. In our society today money is a commodity with a legitimate price on the market and loss of its use, whether occasioned by the delay or default of an ordinary corporation, citizen, state or municipality should be compensable. In this case the plaintiff's husband during his lifetime made regular and continuous contributions to KPERS in consideration of which KPERS promised to pay specific benefits upon his death or retirement. A member of KPERS or his beneficiary should be provided the same protection and the same redress as if the breach of contract had been committed by a private insurance company. Interest chargeable as additional compensation for detention of a liquidated sum has traditionally been a part of the damages to be awarded for breach of contract. Since the state legislature has expressly provided that KPERS may be sued on its contractual obligations it seems to us that basic principles of justice require that interest should be allowed as a proper element of damages for its breach of contract. (*State Highway Comm. v. Wunderlich*, 194 Miss. 119, 11 So.2d 437).

In *Warwick v. Matheney*, 603 So.2d 330,342 (Miss. 1992) ~~the Court held that the~~
~~authority of Mississippi to award prejudgment interest where the amount due is~~
~~liquidated under the denial of a claim is frivolous or in bad faith~~—both present in Stevison's
case where the amount she was wrongfully withheld was readily ascertainable and where the
denial of her retirement benefits “lacked the support of substantial evidence and was arbitrary
and capricious.” [*Stevison*, 966 So. 2d at 883] The Court therein stated:

“Mississippi recognizes judicial authority to award prejudgment interest
to a prevailing party in a breach of contract suit. *City of Mound Bayou v.*
Roy Collins Construction Co., 499 So. 2d 1354, 1361 (Miss. 1986); *Stockett v.*
Exxon Corp., 312 So.2d 709, 712 (Miss.1975)...Under Mississippi law prejudgment
interest may be allowed in cases where the amount due is liquidated when the claim
is originally made or where the denial of a claim is frivolous or in bad faith. *Id.*
No award of prejudgment interest may rationally be made where the principal
amount has not been fixed prior to judgment. *Stanton & Assoc., Inc. v. Bryant*
Const. Co., 464 So.2d 499, 504 (Miss.1985).”

Here the Court of Appeals merely followed the Court's pronouncement in *Freeman*,
supra, which followed long held Mississippi law and would then remand the issue of interest
pursuant to statute to the Circuit Court which would exercise its inherent discretion in ordering
PERS to pay prejudgment interest. “Considerable discretion is vested in the trial courts, giving
due attention to the peculiar facts and circumstances of the particular case.” *Glantz Contracting*
Co. v. General Electric Co., 379 So. 2d 912, 918 (Miss. 1980). “An award of prejudgment
interest is normally left to the the discretion of the trial judge.” *Preferred Risk Mut. Ins. Co. v.*
Johnson, 730 So. 2d 574, 577 (Miss. 1998).

Prejudgment interest in breach of contract cases begins from the date of the breach of the
contract. *Sentinel Indus. Cont. v. Kimmins Indus.*, 743 So. 2d 954 (Miss. 1999) states:

“Mississippi has long held that the prevailing party in a breach of contract suit
is entitled to have added legal interest on the sum recovered computed of the
from the date of the breach of the contract to the date of the decree.”

Finally, our Supreme Court almost twenty years ago recognized that under the aforementioned Miss. Code Ann. 75-17-7 that the use of money belonging to another calls for the payment of interest. In *Brand v. Brand*, 482 So.2d 236 (Miss. 1986) the Court noted such squares with today's economic reality:

"This approach mandated by Section 75-17-7 is consistent with economic reality. The use of one's money by another has value in economic theory and in fact. In our society this use frequently is compensated by the charging of interest, such charges being imposed variously under the authority of public and privately made law. Charges made upon the use of one's money for forbearance to collect a debt are called interest. *Mississippi Power & Light Co. v. Kustener & Co.*, 156 Miss. 22, 34, 125 So. 429, 432 (1930); *State Highway Commission v. Wunderlich*, 194 Miss. 119, 122, 11 So. 2d 437, 438 (1943).

~~PERS, apparently, though, appreciates the value of lost use of money. Miss. Code Ann. 25-11-117 (1972) provides a former PERS member who receives a refund of contributions and then later becomes a member again to repay the refund with interest if the member wishes to receive credit for the refunded period.~~

"(3) If any person who a received a refund reenters the state service and again becomes a member of the system, the member may repay all or part of the amounts previously received as a refund, *together with regular interest covering the period from the date of refund to the date of repayment*;... Upon the repayment of all or part of such refund *and interest*, the member shall again receive credit for the period of creditable service for which full repayment has been made to the system."

Further, Miss. Code Ann 25-11-13 (1972) also notes the value of interest to PERS whereupon it establishes a "special fund" which gives the PERS full power over such fund in which it deposits member contributions and *interest* on "all contributions":

(1) There is hereby established a special fund, separate and apart from all public moneys or funds of this state, to be know as a contribution fund which shall be administered by the board exclusively for the purposes of

this article. Such fund shall consist of and there shall be deposited in such fund: (a) All contributions, *interest*, and penalties collected under Sections 25-11-9 and 25-11-11; ... (d) *interest earned* upon any moneys in the fund;..."

Thus, PERS obviously collected interest on Stevison's wrongfully withheld retirement benefits. Stevison would likewise argue that ~~PERS did not withhold retirement payments for almost~~
~~three years and that she has compensated with interest.~~

CONCLUSION

The Supreme Court should affirm the Court of Appeals' granting prejudgment interest and the Supreme Court thus affirm its earlier pronouncement regarding prejudgment interest as stated in *Freeman, supra*.

Respectfully submitted,

SHERYL STEVISON

BY: George A. Luter
GEORGE S. LUTER, Her Attorney

GEORGE S. LUTER
Attorney for Appellant
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Phone: (601) 948-0021
FAX: (601) 354-5548
GeoLaw1502@AOL.COM
MSE [REDACTED]

³ Stevison made application for retirement pursuant to Miss. Code Ann. 25-11-113(1)(a) on August 26, 2002.

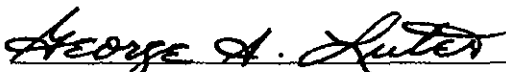
CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellant, hereby certify that I have this day mailed postage prepaid a true and correct copy of the foregoing Supplement Brief of Appellant to the following:

Honorable Bobby B. DeLaughter
Hinds County Circuit Judge
Post Office Box 27
Raymond, Mississippi 39154

Mary Margaret Bowers, Esq.
Special Assistant Attorney General
Public Employees' Retirement System of Mississippi
429 Mississippi Street
Jackson, Mississippi 39201-1005

SO CERTIFIED, this the 30th day of June 2008.



GEORGE S. LUTER, Attorney for Appellant