

1432
NO. 2007-CT-04132-SCT

COPY

IN THE SUPREME COURT OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

FILED *APPELLANT*
VS.
MAY 26 2009

JOYCE DOZIER

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SUPREME COURT
COURT OF APPEALS

APPELLEE

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

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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. Joyce Dozier, Appellee;
2. George S. Luter, Attorney for Appellee;
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. Tomie T. Green, Hinds County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER


ATTORNEY FOR APPELLEE

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Statement of Proceedings before PERS and the Circuit Court

Joyce Dozier applied for PERS disability retirement benefits on January 15, 2003.

After a hearing before the PERS Disability Appeals Committee, Dozier was denied benefits by the PERS Board of Trustees on February 24, 2004.

Dozier appealed to the Circuit Court of the First Judicial District of Hinds County on March 25, 2004 asking the Circuit Court to reverse PERS' denial "with prejudgment interest." On January 25, 2007, the Circuit Court reversed such denial by PERS, finding such decision "not supported by substantial evidence, is arbitrary and capricious, and should be overturned."

Statement of Proceedings before the Court of Appeals

After appeal to the Supreme Court, the case was assigned to the Court of Appeals which affirmed the Circuit Court on October 21, 2008, finding "...there is a lack of substantial evidence in the record to support PERS' denial of Dozier's disability benefits." The Court further found "To the contrary, the evidence totally supports a finding that Dozier is disabled..". PERS filed a untimely Motion for Rehearing on November 6, 2009 which the Court of Appeals dismissed on November 25, 2008.

On December 16, 2008, the Court of Appeals issued its mandate. On December 18, 2008, pursuant to MRAP 41(e), Dozier filed her Motion to Amend Mandate to impose interest pursuant to Miss. Code Ann. 75-17-7. On December 22, 2008, PERS filed its Response in Opposition to Motion to Amend Mandate.

On January 15, 2009, the Court of Appeals issued its Order denying Dozier's motion to amend the Mandate. On January 28, 2009, Dozier filed her Motion for Rehearing of such denial. On February 19, 2009, the Court of Appeals denied Dozier's Motion for Rehearing. On March 4, 2009, Dozier filed her Petition for Writ of Certiorari. PERS filed its Response in Opposition to such petition on March 9, 2009.

The Supreme Court granted Dozier's petition on March 11, 2009.

SUMMARY OF THE APPELLANT'S ARGUMENT

Joyce Dozier would assert that statutory and case law exists to award interest when retirement benefits are wrongfully denied. The Court of Appeals failed to follow the precedent set forth by the Supreme Court in *Public Employees Retirement System v. John P. Freeman*¹, 868 So. 2d 327 (Miss. 2004) wherein the Court noted:

“Under well- settled Mississippi law, the award of prejudgment interest is in the discretion of the trial court, regardless of the statute under which such interest is sought. *United States Fid. & Guar. Co. v. Conservator of Melson*, 809 So. 2d 647, 662 (Miss. 2002). Miss. Code Ann. 75-7-17 provides:

All **judgments** or **decrees** on any **sale** or **contract** shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other **judgments** or **decrees** shall bear interest at the per anum rate set by the judge hearing the complaint from a date determined by such judge to be fair, but in no event prior to the filing of the complaint.”

Dozier 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.

¹ In that case, the issue of interest allowable on an equitable basis was fully briefed in the Brief of *Amici Curiae* AARP and Mississippi Protection & Advocacy System, Inc. supporting Appellee John P. Freeman.

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 Dozier*---is a judgment since it is “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 interest. *Aetna Casualty & Surety Co. v. Doleac Elec. Co.*, 471 So. 2d 325, 331 (Miss. 1985). Dozier’s case fits all dictates of Mississippi law for an award of interest to be paid by appellee in the discretion of the Circuit Court upon remand.

The Court of Appeals erred in failing to amend the mandate and grant interest to be paid by PERS since Dozier’s retirement benefits were wrongfully denied once the Court of Appeals found the denial by PERS “... is not supported by substantial evidence and is, therefore, arbitrary and capricious..”² Miss. Code Ann. 75-7-17. allows prejudgment interest to be awarded in such breach of contract.

STATEMENT OF THE ISSUE

DID THE COURT OF APPEALS ERR IN FAILING TO AMEND THE MANDATE TO INCLUDE INTEREST AND ALLOW THE CIRCUIT COURT TO EXERCISE ITS DISCRETION IN SETTING INTEREST ON DOZIER’S PAST DUE BENEFITS?

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 Dozier retirement benefits pursuant to Miss. Code Ann. 25-11-113(1)(a) the condition precedent of disability was met and a contract existed between herself and PERS pursuant to Miss. Code Ann. 25-11-113(b) (1972).

² The Court of Appeals further found no evidence to support PERS’ denial, stating: “To the contrary, the evidence totally supports a finding that Dozier is disabled, and she is unable to perform her duties as a teacher.” The Court of Appeals decision was also unanimous.

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. Oechslein*, *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 even when the pension law makes no provision for interest.” *Dorsey v. State ex rel. Murine*, Del.Supr., 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, rather, 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) our Court reiterated the authority of Mississippi courts to award interest where the amount due is liquidated or where the denial of a claim is frivolous or in bad faith---both present in Dozier’s case since the amount wrongfully withheld was readily ascertainable and the denial of her retirement benefits was

totally without justification. [“To the contrary, the evidence totally supports a finding that Dozier is disabled”]. The Court in *Warwick* 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 failed to follow the Court’s clear pronouncement in *Freeman, supra*, which followed long held Mississippi law which required the issue of interest pursuant to statute be remanded to the Circuit Court which would exercise its inherent discretion in ordering PERS to pay such 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).

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 appreciates the value of lost use of money when *their* monies are withheld or removed. Miss. Code Ann. 25-11-117 (1972) requires 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 Dozier's wrongfully withheld retirement benefits. Dozier contends that PERS' wrongful withholding and use of her retirement benefits for over six (6) years demands that she be compensated with interest³

CONCLUSION

The Supreme Court should reverse the Court of Appeals' denial of Dozier's Motion to Amend the Mandate, issue an Amended Mandate granting interest to Dozier on her wrongfully withheld retirement benefits, and then remand the case to the Circuit Court of Hinds County to exercise its discretion in the awarding of such interest pursuant to Miss. Code Ann. 75-17-11.

Respectfully submitted,

JOYCE DOZIER

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

³ Dozier made application for disability retirement pursuant on January 15, 2003. She received a check from PERS of her wrongfully withheld past due disability retirement benefits shortly after January 14, 2009, the date of such check.

CERTIFICATE OF SERVICE

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

Honorable Tomie T. Green
Hinds County Circuit Judge
Post Office Box 22711
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SO CERTIFIED, this the 26th day of May 2009.



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