

IN THE SUPREME COURT OF MISSISSIPPI

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI (PERS)**

APPELLANT

VERSUS

CAUSE NO. 2008-SA-00627

ALBERT "BUTCH" LEE

APPELLEE

BRIEF OF THE APPELLANT

Mary Margaret Bowers
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, Mississippi 39201-1005
Telephone: (601) 359-3592
(601) 359-3680
Fax. No. (601) 359-2285
Mississippi Bar No. [REDACTED]

IN THE SUPREME COURT OF MISSISSIPPI

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI (PERS)**

APPELLANT

VERSUS

CAUSE NO. 2008-SA-00627

ALBERT "BUTCH" LEE

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed people 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.

The Board of Trustees of the Public Employees' Retirement System

Honorable Mary Margaret Bowers, Counsel for Appellant

Honorable Jim Hood, Attorney General

Honorable Winston Kidd, Hinds County Circuit Court Judge

Honorable Mark Baker, Esq., Counsel for Appellee

Mr. Albert "Butch" Lee, Appellee

Respectfully submitted,



Mary Margaret Bowers, MSB
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, MS 39205-1005

TABLE OF CONTENTS

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| CERTIFICATE OF INTERESTED PARTIES | i |
| TABLE OF AUTHORITIES | ii,iii |
| STATEMENT REGARDING ORAL ARGUMENT | 1 |
| STATEMENT OF THE ISSUES | 2 |
| THE CIRCUIT COURT ERRED IN DENYING THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM'S MOTION FOR AN OUT-OF-TIME APPEAL WHEN PERS WAS NOT FURNISHED NOTICE OF THE ENTRY OF THE COURT'S OPINION AND ORDER . | |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF THE FACTS | 2 |
| SUMMARY OF THE ARGUMENT | 3 |
| ARGUMENT /INTRODUCTION | 4 |
| CONCLUSION | 7 |
| CERTIFICATE OF SERVICE | 8 |

TABLE OF AUTHORITIES

CASE

| | |
|------------------------------------------------------------------------------------------------------|-----|
| <i>Brewer v. Williams</i> , 542 So.2d 1186 (Miss. 1989) | 4 |
| <i>Horowitz v. Parker</i> , 852 So.2d 686 (Miss. App. 2003) | 6 |
| <i>Kelly L. Wright v. Public Employees' Retirement System</i> No. 251-03-1022-CIV | 6,7 |
| <i>Nunley v. City of Los Angeles</i> , 52 F.3d 792 (9 th Cir. 1995) | 5 |
| <i>Pinkston v. Mississippi Department of Transportation</i> , 757 So.2d 1017 (Miss. App. 2000) | 6 |
| <i>Pre-Paid Legal Services, Incorporated v. Anderson</i> , 873 So.2d 1008 (Miss. 2004) | 6 |
| <i>Williams v. State</i> , 456 So.2d 1042 (Miss. 1984) | 5 |

STATEMENT REGARDING ORAL ARGUMENT

The issues in this matter have been fully briefed, thus, the Appellant asserts that oral argument will not aid or assist the decisional process of this Court.

STATEMENT OF THE ISSUES

The Circuit Court erred in denying the Public Employees' Retirement System's (hereinafter PERS) Motion for an Out-of-Time Appeal when PERS was not furnished notice of the entry of the Court's Opinion and Order.

STATEMENT OF THE CASE

This matter involves a Motion for an Out-of-Time Appeal filed by the Appellee, the Public Employees' Retirement System, wherein it seeks review of the Order entered by the Circuit Court of the First Judicial District of Hinds County, Mississippi on November 21, 2007.

STATEMENT OF THE FACTS¹

On June 29, 2007, the Circuit Court of the First Judicial District of Hinds County, Mississippi signed its Opinion and Order in the above referenced cause of action. The Opinion and Order awarding Mr. Lee hurt-on-the job disability benefits was entered by the Circuit Clerk on July 2, 2007, in Book 614, Page 591. (Vol. I, R. 5-8.) Mr. Lee was previously awarded regular disability benefits by the PERS Board of Trustees. On August 30, 2007, the Executive Director for PERS received a telephone call from counsel representing Mr. Lee. Since the time for filing an appeal had run, counsel wanted to know when the appropriate notation would be made that Mr. Lee would be receiving a hurt-on-the-job disability benefit rather than a regular disability benefit. (Vol. I, R. 9.) This

¹ Reference to the record transcript is indicated by "Vol" for the volume number and "R." followed by the appropriate page number.

telephone conversation was the first notification that PERS had that an Opinion and Order had been entered in Mr. Lee's case. (Vol. I, R. 10.) PERS did not receive a copy of the Opinion and Order from the Office of the Circuit Clerk. (Vol. I, R. 10.)

A telephone call was then placed to the Circuit Clerk's Office in an effort to have a copy of the Opinion and Order faxed to PERS. (Vol. I, R. 10.) After being informed that a copy could not be faxed, Patricia Wolfe, assistant to counsel for PERS, made a trip to the Circuit Clerk's Office to retrieve a copy of the Honorable Judge Winston L. Kidd's Opinion and Order. (Vol. I, R. 10.) This was the first opportunity PERS had to review the Opinion and Order entered on July 2, 2007, wherein the Court addressed the merits of the appeal. (Vol. I, R. 5-8;10.) Later, on the afternoon of August 30, 2007, PERS received a fax of the Opinion and Order from the Circuit Clerk's Office. (Vol. I, R. 10.)

It was not until August 30, 2007, that PERS had knowledge that an Opinion and Order had been entered on July 2, 2007, as a copy had not been forwarded to counsel for PERS. (Vol. I, R. 10.) Thus, through no fault of PERS and without timely notice of the entry of the Circuit Court's Opinion and Order, the time for filing an appeal in the Supreme Court had lapsed.

SUMMARY OF THE ARGUMENT

The Circuit Court did not elaborate on the specific reason for denying PERS Motion to File an Out-of-Time Appeal. (Vol. I, R. 24.) Through no fault of the Appellee, it was not notified of the entry of the Circuit Court's ruling in the above styled and referenced cause of action until notified by counsel for the Appellant. The notice from counsel came after the time for filing an appeal had lapsed. Rule 11.05 of the Uniform

Circuit and County Court Rules mandates that “the clerk of the court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order”. PERS did not, within the time to appeal, receive notice from the clerk’s office that the Circuit Court had issued its Opinion and Order regarding this cause of action. PERS should not be penalized on the basis that it was not timely provided a copy of the Circuit Court’s Opinion and Order.

ARGUMENT

I.

THE CIRCUIT COURT ERRED IN DENYING THE PUBLIC EMPLOYEES’ RETIREMENT SYSTEM’S MOTION FOR AN OUT-OF-TIME APPEAL WHEN PERS WAS NOT FURNISHED NOTICE OF THE ENTRY OF THE COURT’S OPINION AND ORDER .

The Appellant in his Opposition to Appellee’s Motion for Leave to File an Out-of-Time Appeal stated that he proceeded in accordance with Rule 15 of the Mississippi Rules of Appellate Procedure (MRAP), inasmuch as the Court had not ruled within the 60 days as provided such, he mailed a proposed order to the Court as required by Rule 15. (Vol. I , R. 13.) PERS cited *Brewer v. Williams*, 542 So.2d 1186 (Miss. 1989) for the proposition that Rule 15 of the Rules of Appellate Procedure does not apply to cases such as this where the Circuit Court sits as an appellate court. (Vol. I, R. 19-22.)What does apply is Rule 4(h) of the Rules of Appellate Procedure which allows for reopening the time to appeal where a party entitled to notice of the entry of an order did not receive such notice within 21 days of its entry. Rule 4(h) of the Mississippi Rules of Appellate Procedure provides:

The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

In *Williams v. State*, 456 So.2d 1042 (Miss. 1984), three inmates requested an out-of-time appeal. They alleged that they never received notice of the order which denied their motion and that if they had known they would have filed a timely appeal. *Id.* This Court held that failure to notify state prison inmates that their applications for habeas corpus relief had been acted upon warranted remand to the Circuit Court for conduct of hearing in the case of each inmate to determine whether an appeal should be allowed. *Id.* Here, PERS did not receive notification from the Circuit Clerk that an Opinion and Order had been entered. PERS should have its Out-of-Time Appeal granted. PERS was clearly entitled to notice of the entry of the Opinion and Order and did not receive notice within 21 days of its entry. PERS is entitled to have the opportunity to file an appeal in this matter as in all other cases.

Appellant also cited the case of *Nunley v. City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995) as being dispositive of the Motion for Leave to file an Out-of-Time Appeal. In *Nunley* the Appellant received notice of the entry of the Court's Order, and could have sought an extension of time within 7 days of that notice, however, waited approximately one month after receiving notice. The court held that this wait was too long to seek relief. In this case, PERS filed its request to reopen the time for appeal within seven days of

being informed that an Opinion and Order had been entered in this cause. (Vol. I., R. 9-11.)

In this matter notice was not provided to PERS within 21 days of the entry of the Circuit Court's Opinion and Order. PERS should not be prejudiced on the basis that it was not provided timely notice of the entry of the decision from the Circuit Court of Hinds County, Mississippi. The interpretation of the statute applicable to claims for hurt-on-the-job disability benefits is at issue and PERS should have the opportunity to appeal to the Supreme Court. If after appealing to the Supreme Court, Mr. Lee is the successful party he will have the opportunity to correct his IRS Form 1099 received for his benefits.

The decision of whether to grant a motion to reopen the time for an appeal under Rule 4(h) of the Mississippi Rules of Appellate Procedure, for a party who has not received notice of the entry of a judgments is **discretionary**. *Pre-Paid Legal Services, Incorporated v. Anderson*, 873 So.2d 1008, 1009 (Miss. 2004); *See also, Horowitz v. Parker*, 852 So.2d 686,689 (Miss. App. 2003), *Pinkston v. Mississippi Department of Transportation*, 757 So.2d 1071, 1073 (Miss. App. 2000). Therefore, the appellate court reviews the decision of the lower court for **abuse of discretion**. *Id.* Here, the Circuit Court did not elaborate on the specific reason for denying the motion filed by the Appellee. (Vol. I R. 37.) In *Kelly L. Wright v. Public Employees' Retirement System* No. 251-03-1022-CIV, the Circuit Court of the First Judicial District of Hinds County, Mississippi with the Honorable Judge Winston L. Kidd presiding, granted PERS' Motion to File an Out-of-Time Appeal wherein PERS was not provided timely notice of the entry of the Circuit Court's Opinion and Order. (Vol. I, R. 28.) PERS argued that pursuant to Rule 4(h) of the Mississippi Rules of Appellate Procedure it was entitled to notice. The

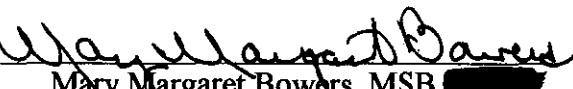

facts present for filing an Out-of-Time Appeal in *Wright* are the same as the facts in this cause of action that was before the Circuit Court and for which PERS' Motion for an Out-of-Time appeal was denied. PERS submits to this Honorable Court that the denial of its Motion for an Out-of-Time Appeal by the Circuit Court of the First Judicial District of Hinds County, Mississippi, was an abuse of discretion.

CONCLUSION

In this matter notice was not provided to PERS within 21 days of the entry of the Circuit Court's Opinion and Order. PERS should not be prejudiced on the basis that it was not provided timely notice of the entry of the decision from the Circuit Court of Hinds County, Mississippi. The interpretation of the statute applicable to claims for hurt-on-the-job disability benefits is at issue and PERS should have the opportunity to have its case heard.

Respectfully submitted this the 18 day of July 2008.

**PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLANT**

By: 
Mary Margaret Bowers, MSB 
Special Assistant Attorney General

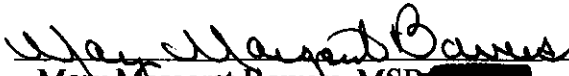
CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that a true and correct copy of the above and foregoing *Brief of Appellant* has been mailed, postage pre-paid, to:

Honorable Mark C. Baker, Sr., Esq.
Baker Law Firm
306 Maxey Drive
Suite D, Baker Building
Brandon, MS 39042

Honorable Winston L. Kidd
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, Ms 39205

So certified, this the 18 day of July 2008.


Mary Margaret Bowers, MSB [REDACTED]
Special Assistant Attorney General