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Order on Attorney's Fees (SMITHA ANDERSON)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SMITHA ANDERSON,	)(	
	)(	
On behalf of herself and all other members of her class similarly situated,	)(	**CIVIL ACTION FILE NO. 2008CV154757**
	)(	
Plaintiffs,	)(	
	)(	**CLASS ACTION**
v.	)(	
	)(	
PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM OF GEORGIA, et al.	)(	
	)(	
Defendants.	)(	
	)(	

FILED IN OFFICE
JUL - 8 2009
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON ATTORNEYS' FEES

Counsel for the parties appeared at a hearing held on July 8, 2009 to present oral argument and evidence regarding the application of counsel for Plaintiffs ("Class Counsel") for an award of attorneys' fees. The Court, having considered the record of the case and the arguments and evidence presented, and the brief submitted on the issues, finds as follows:

Class Counsel for Plaintiffs (individually, "Class Members," or, collectively, the "Class") seek an award of attorneys' fees and expenses as a percentage of the common fund in this action (the "Fee and Expense Award).[1] As agreed upon by the parties in their Settlement Agreement, 25% of certain amounts paid by PSERS has been set aside previously as the Fee and Expense Fund, subject to this Court's determination of the amount to be awarded Class Counsel. As further provided in the Settlement Agreement, amounts previously set aside as the Fee and Expense Fund will become the Fee and Expense Award, and certain future amounts will

[1] Section II(A)(16) of the Settlement Agreement filed with the Court on May 1, 2009 defines the elements that make up the common fund.

thereafter be added to the Fee and Expense Award, consistent with this Court's determination of the percentage of the common fund to be awarded. After payment of expenses of notice and administration and of an incentive award to the Class Representative from the Fee and Expense Award (or, to the extent paid before entry of this Order, from the Fee and Expense Fund), as provided in the Settlement Agreement and this Court's Orders, the amount remaining in the Fee and Expense Award shall be the amount awarded as attorneys' fees in this action.

I. UNDER GEORGIA LAW, A PERCENTAGE OF THE COMMON FUND GENERATED IN CLASS ACTION CASES IS GENERALLY AWARDED AS ATTORNEYS' FEES.

Under Georgia law, where a common fund is generated in litigation for the benefit of persons other than the named plaintiff, reasonable attorneys' fees are paid from the fund:

> "[A] person who at his own expense and for the benefit of persons in addition to himself, maintains a successful action for the preservation, protection or creation of a common fund in which others may share with him is entitled to reasonable attorney fees from the fund as a whole."

Barnes v. City of Atlanta, 281 Ga. 256, 260 (2006) (*quoting* State v. Private Truck Council of America, Inc., 258 Ga. 531, 534-35 (1988). This principle is an exception to the ordinary rule that each litigant bears his own attorneys' fees. It is grounded in substantial part on "'the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" Barnes, 281 Ga. at 260.

The Georgia courts have also held that the fees to be paid from the common fund should be based on a percentage of the fund. In adopting this rule, the Court of Appeals canvassed federal authorities and selected the common fund approach. "We ... hold that when assessing attorney fees in a common fund case, a percentage of the fund analysis is the preferred method of determining these fees ...." Friedrich v. Fidelity Nat'l Bank, 247 Ga. App. 704, 707, (2001).

The Court of Appeals imposed the following requirements on this Court's decision-making process:

> [W]e also conclude that when awarding attorney fees in this type of case, a trial court must "articulate specific reasons for selecting the percentage upon which the ... award is based." [Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991)] at 775. The trial court's order must identify all factors on which the court relied and explain how each factor affected the selection of the percentage awarded as attorney fees. Id. at 775. While these factors may vary from case to case, Camden I identifies several that should be considered:
>
>> [T]he Johnson factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases. Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the [trial] court's consideration.

Friedrich, 247 Ga. App. at 707-708 (*quoting* Camden I, 946 F.2d at 775). The "Johnson factors" are standards enumerated by the U.S. Court of Appeals for the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), for use by courts in analyzing and setting a statutory award of fees. That Court's analysis of the basis for awards of attorneys' fees is well accepted by all federal and most state courts. The Johnson factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results

obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

In Camden I, relied upon by the Georgia Court of Appeals in Friedrich, the U.S. Court of Appeals for the Eleventh Circuit identified the result obtained by class counsel as *the* pre-eminent consideration: "In this context, monetary results achieved predominate over all other criteria." 946 F. 2d at 774. The court also noted that a majority of common fund fee awards fall between twenty and thirty percent (20% to 30%) of the fund, with an upper limit of fifty percent (50%) as a general rule. The court recognized twenty five percent (25%) as a "'bench mark' percentage fee award which may be adjusted in accordance with the individual circumstances of each case." Id. at 775. Subsequently, the Eleventh Circuit has recognized a district court's use of a thirty percent (30%) bench mark. Waters v. International Precious Metals Corp., 190 F.3d 1291,1294 (11th Cir. 1999) (thirty percent bench mark used by the district court and adjusted upward to a final award of thirty three and one-third percent in part because the case advanced public policy concerns).

The Court observes that this case is one of several cases brought by Class Counsel against Georgia state retirement systems that failed to follow the applicable statutes when they calculated payments owed to retirees who chose a retirement benefit that would provide for beneficiaries who survive the retirees. The three systems at issue are the Teachers Retirement System of Georgia ("TRS"), the Employees Retirement System of Georgia ("ERS"), and the Public School Employees System of Georgia ("PSERS"). As ultimately determined by the Supreme Court of Georgia, the Georgia statutes required that these retirement systems use the same mortality tables as a basis for all of their calculations, rather than using a new table for

some purposes while relying on an old table when they calculated benefits for retirees and their beneficiaries. This mistaken use of mortality tables resulted in an improper reduction in retirement benefits for thousands of retirees and their beneficiaries.

The services performed by Class Counsel on the merits in the first of these cases, Plymel v. Teachers Retirement System of Georgia, Civil Action No. 2004-CV-84312 in this Court, resulted in decisions in this Court, in the Supreme Court of Georgia, and in the Court of Appeals of Georgia that substantially advanced and resolved the merits in the other two cases, Willis v. Employees Retirement System of Georgia, Civil Action No. 2007-CV-128923, and Anderson v. Public School Employees System of Georgia, Civil Action NO. 2008-CV-154757. The Defendants have recognized the binding effect of the Supreme Court's rulings in Plymel in applying the statutes that govern benefits due to Class Members in all three of the cases. In addition to the inter-relationship between the merits of the cases, the settlement of the Anderson case was directly connected to the settlement of the Willis case. The connections between the cases, the benefits derived for the Class in Willis from the services of Class Counsel in Plymel, and the benefits derived for the Class in Anderson from the services of Class Counsel in both Plymel and Willis are clear and unmistakeable. The Court has previously entered an award in Plymel of 30% of the common fund, and the Court of Appeals of Georgia has affirmed that decision. Teachers Retirement System of Georgia v. Plymel, 296 Ga. App. 839, 846-47 (2009).

II. A PERCENTAGE OF 25% OF THE COMMON FUND IS THE PROPER PERCENTAGE FOR AN AWARD TO COVER FEES, EXPENSES, AND OTHER DISBURSEMENTS IN THIS CASE.

The benchmark for an award of attorneys' fees is between twenty and thirty percent (20-30%) of the common fund, and, consistent with the case law, this Court views twenty-five percent (25%) as an appropriate starting point in this case. Upon consideration of the relevant

factors, the Court concludes that the benchmark would appropriately be adjusted upward because of the extraordinary result and reward to the Class, the risk and responsibility assumed by Class Counsel over the course of the three inter-related cases, the benefits conferred on the Classes in the second and third cases by the services earlier performed by Class Counsel, and the significant obstacles facing the Classes. In this instance, however, in light of Class Counsel's agreement to request an award of no more than 25%, the Court will not make the upward adjustment from the benchmark.

In reaching its conclusion, the Court makes the following analysis as required by Friedrich. The Court's analysis tracks in substantial part its previous analysis in the Plymel case in light of the connection between the cases:

1. The Johnson Factors[2] Support an Upward Adjustment.

a. Difficulty and Novelty of Issues in This Case Increased the Time, Skill, Dedication, and Compensation Risks in Bringing This Action.

Plymel was filed in April, 2004, and took nearly four (4) years to reach the stage of a final judgment. Final judgment was followed by an additional one (1) year to conclude the second appeal in that case. In litigating the questions in Plymel that led to resolution of this case, Class Counsel addressed novel and difficult issues which required a significant amount of time, labor, and resources to identify, understand, and effectively argue. O.C.G.A. §§ 47-2-1, §§ 47-3-1, et seq., and §§ 47-4-1, et seq.

Not only did Class Counsel have to sue the agencies charged[3] with interpreting and

[2] In Class Counsel's petition for attorneys' fees award, they did not address the fifth (customary fees) except to the extent of their discussion of contingent fees or the eleventh (nature and length of professional relationship with client) Johnson factors. In light of the abundance of evidence justifying an upward award adjustment, the Court will base its analysis on the remaining ten factors addressed.

administering the plan, but they had to argue difficult and novel questions of law. TRS and ERS, as the administrators,[4] held the information and had unparalleled familiarity with the systems and their governing statutes, but had been misinterpreting the statute for twenty (20) years, in the case of TRS, and fifteen (15) years, in the case of ERS. When faced with this litigation, TRS and ERS vigorously defended their position, including arguing that the State's interpretation of the statute was entitled to special consideration because of familiarity with the statutes and the plan. TRS even rejected a proposed settlement after the Supreme Court held that their calculations were not actuarially equivalent, and thus, that it was liable to the Plaintiff Class in Plymel. ERS at that time was not even in a position to discuss the amounts owed to the Plaintiff Classes because of the status of its re-calculations.

Because of the extremely complex nature of the case, Class Counsel first had to master the underlying statutory scheme of the TRS retirement plan, O.C.G.A. §§ 47-3-1, *et seq.,* and its underlying subject matter – actuarial science. In order to do so, Class Counsel employed considerable legal skill in first mastering a working knowledge of the plan and its calculations and then examining experts in these fields. In this process, Class Counsel hired six (6) actuaries to assist them in understanding the complicated calculations underlying the payments in question.

Because of the difficulty and importance of the cases, Class Counsel devoted substantial amounts of their time and percentage of their practices to Plymel and subsequently to Willis and Anderson, to the exclusion of other cases. Necessarily, Class Counsel's involvement in the cases

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[3] Because of the need to sue an agency of the State of Georgia, many may perceive the cases to be undesirable, thus satisfying the tenth Johnson factor.

[4] ERS administers both the Employees Retirement System and the Public School Employees Retirement System.

significantly precluded their work on other matters.

It is important to note Class Counsel's willingness to make the cases such a priority given their contingent-fee based representation and risk of zero recoupment. For example, Plymel was dismissed on an earlier motion for summary judgment, which would have foreclosed the opportunity for Class Counsel to recoup expenses (at that time, approximately $200,000.00) and fees associated with this action had the Georgia Supreme Court not found TRS liable, reversed the earlier judgment, and remanded that case on the remaining issues. In addition, the appeal that followed this Court's entry of final judgment in Plymel placed at risk any recovery at all for many Class Members in all three of the cases because of the statute of limitations questions at issue.

b. The Time Considerations for the Affected Class Members Justify an Upward Adjustment of the Common Fund Award.

Time is running out for many Class Members. The nature of the cases – seeking redress for elderly retirement beneficiaries – starkly demonstrates time limitations related to any meaningful recovery for Class Members. This is truly a case in which justice delayed is justice denied for many members of the Classes. Moreover, retireees live on the modest fixed incomes that their membership in the retirement systems provides. The extra dollars that they would have received had TRS, ERS, and PSERS correctly calculated their benefits would have made a substantial difference in the quality of their lives over the years of their retirement.

c. The Result Obtained and the Amount of Recovery for the Classes Are Exemplary.

In accordance with the Georgia Supreme Court's decision, TRS, ERS, and PSERS failed to use the correct mortality tables and incorrectly calculated "option" member benefits. Before 2003, TRS had not updated its mortality tables for calculating the "option" benefits at issue in

Plymel since 1983; thus, the Plymel Class consists of over 15,000 members. Before 2007, ERS had not updated its mortality tables for calculating the "option" benefits at issue in Willis and Anderson since 1992; thus the Willis Class consists of over 16,000 members, and the Anderson Class consists of over 1,200 members.

The sum of back benefits, with interest, and future benefits reduced to present value, for each Class Member, constitutes the common fund in this case. Because the Classes are numerous and the breaches spanned a twenty (20) year period in Plymel and a fifteen (15) year period in Willis and Anderson, and the Classes are recapturing one hundred percent (100%) of the principal of the benefits owed,[5] the common fund in Willis has been estimated to be approximately $135 million, and the common fund in Anderson has been estimated to be approximately $1.4 million. As Camden I recognizes, the "'*common fund is itself the measure of success* . . . [and] represents the benchmark on which a reasonable fee will be awarded.'" Camden I, supra, 946 F.2d. at 774 (quoting Newburg, Attorney Fee Awards § 2.07 at 47 (1986)).

Most important, however, is not the final dollar amount, but that the Class awards in Willis and Anderson represent a near-total recovery under the law as now determined in the course of two appeals in Plymel. The Class recovery is not a settlement of a compromised and negotiated portion of the benefits sought, with a compromise on interest rate only. In accordance with the Friedrich standard, the award of attorneys' fees should be commensurate with this significant result.

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[5] As part of the settlement of Willis and Anderson, the parties agreed to apply interest rates to the amounts owed on the legal theory adopted by this Court in its final judgment in Plymel but later reversed by the Court of Appeals. This agreement in the context of settlement does not lessen the 100% recovery of principal to Class Members within the period of the statute of limitations on which the Court of Appeals ruled in Plymel.

The Court also deems it important to note that, while Anderson, in absolute dollars, is a substantially lesser number than the dollars in Plymel and Willis, this results from the smaller Class size and the smaller retirements paid under the Public School Employees statute.[6] In addition, it appears to the Court that an allocation to the Fee and Expense Award of 25% will mean that, after payment of expenses already incurred and an incentive award to the Class Representative, little if anything will remain of the Fee and Expense Award from the payments made by PSERS to date (which the Court understands cover roughly half of the Class).

d. The Combined Experience, Reputation, and Ability of Class Counsel Are Significant.

The combined experience of lead Class Counsel, Mr. Cook, Mr. Gregory, and Mr. Forehand, is one-hundred and twelve (112) years of practicing the law in Georgia.

Mr. Cook is a well-known litigator who has practiced law for over five (5) decades and who was recognized as one of Georgia's Super Lawyers in 2006 and 2008. Mr. Gregory, a member of the bar since 1966, has been a litigator, a Superior Court Judge, and a Georgia Supreme Court Justice. Mr. Gregory also authored the treatise, *Georgia Civil Practice* (LexisNexis/Mathew Bender), now in its third edition. Mr. Forehand has twenty (20) years litigation experience, including previous work against Georgia's retirement systems and work on other complex cases. Mr. Forehand also co-authored a chapter in Kaplan's Nadler, *Georgia Corporations, Limited Partnerships and Limited Liability Companies* (Thompson/West).

In addition, Mr. Richard H. Sinkfield has been a member of the State Bar of Georgia since 1971, and is well-known as a skilled trial lawyer in this state. Mr. Sinkfield was also recognized as a 2006 and 2008 Georgia Super Lawyer, and he is a Fellow of the American

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[6] Retirement benefits under the Public School Employees system are not calculated on the basis of annuitized employee contributions. Instead, OC.G.A. § 47-4-101(b) provides a maximum benefit of $15 per month times the number of creditable years of service.

College of Trial Lawyers.

Each of these attorneys has substantial experience, a good reputation, and the ability to address the issues presented in this case. The efforts of each have been necessary to bring the case successfully to this point on behalf of the Class.

e. An Award of 30% is Consistent with Similar Cases.

The Johnson factors include consideration of awards in similar cases. The following is a sampling of cases that illustrate the range of recovery granted to counsel in common fund cases in Georgia.

1. Plymel v. Teachers Retirement System of Georgia, Civil Action No. 2004-CV-84312 (Fulton County Superior Court), has been previously discussed in this Order and is also substantially described in the record before the Court on the application of Class Counsel for an award in Willis and Anderson. This Court awarded 30% of the common fund in that case, and the Court of Appeals affirmed that award.

2. Barnes v. City of Atlanta, Civil Action No. 2000CV24809 (Fulton County Superior Court). Barnes was a hard-fought case in which attorneys practicing law in the City of Atlanta contested the City's right to collect occupation taxes. This Court awarded thirty three and one-third percent (33% %) of the common fund of $18.3 million to compensate counsel for the class. City of Atlanta v. Barnes, 276 Ga. 449 (2003); Barnes v. City of Atlanta, 281 Ga. 256 (2006).

3. Mabry v. State Farm Mutual Auto Ins. Co., Civil Action No. U99CV4915 (Muscogee County Superior Court). Mabry was a case on behalf of State Farm

policyholders with property damage claims. The primary question was whether policyholders should have been paid for the diminished value of their vehicles when they submitted claims. The case settled after the Georgia Supreme Court ruled on the merits, State Farm Mutual Auto. Ins. Co. v. Mabry, 274 Ga. 498 (2001), with a settlement fund of $100 million and $100 million attributed to "going forward relief" to Georgia policyholders. Counsel's fee award of $50 million represented twenty percent (20%) of the combined recovery and thirty three and one-third (33 1/3) percent of the money paid by State Farm to settle. (The going-forward relief was an estimated amount, paid to policyholders who may not have been class members.)

4. Friedrich v. Fidelity National Bank, Civil Action No. 98-CV01383 (Fulton County Superior Court). Friedrich was a class action arising out of a failed securities offering. The case was settled for $500,000.00 after about three (3) years of litigation. After an appeal on the question of attorneys' fees, Friedrich v. Fidelity Nat. Bank, 247 Ga. App. 704 (2001), this Court awarded twenty five percent (25%) of the common fund to class counsel.

5. In re Tri-State Crematory Litigation, MDL Docket No. 1467 (Northern District of Georgia (2004)). Tri-State arose from the infamous operation of a crematory in northwest Georgia. The case was brought on behalf of relatives of the persons whose remains had been mishandled by the crematory. The case was settled, with the settlement fund estimated to reach approximately $80 million. Judge Murphy awarded attorneys' fees for class counsel in the amount of thirty three percent (33%) of all amounts collected.

6. Flournoy v. Honeywell Int'l. Civil Action No. CV-205-184 (Southern District of Georgia (2007)). Flournoy was a suit by coastal property owners for injury caused by chemical contamination of the Turtle River Estuary. The case settled for $25.3 million, and Judge Alaimo awarded counsel the bench mark twenty five percent (25%) of the fund.

Friedrich and Flournoy each were awarded twenty five percent (25%) of the common fund. Barnes and Tri-State were awarded thirty three percent (33%), and Mabry was something of a hybrid, with the award characterizable as thirty three percent (33%) or as twenty (20%) and with the real value closer to the former than the later. The instant three cases against retirement systems, like Barnes, Mabry, and Friedrich, were substantially affected by appeals. Also, these cases, like Barnes, achieved a high class return, whereas the other cases highlighted in this section were resolved through settlements that may have substantially reduced recovery. Finally, this case, like Barnes, brought about a result that but for class representation would not likely have happened: TRS refused requests from retired teachers to voluntarily recalculate the option benefits, and ERS refused to take any corrective action until after the Supreme Court ruled in Plymel. The individual Class Members most likely would have been unable to obtain or pay for individual representation. Thus, these cases, like the Barnes case, warrant an upward adjustment of the common fund percentage because of the degree of difficulty, the overall monetary award, and the results for the Class Members.

2. Freidrich Additional Factors Also Support an Upward Adjustment.

The Freidrich additional factors take into consideration the time to resolution, objections by class members, non-monetary benefits, the economics of the lawsuit, and any factors unique to the case. Considering that the Plymel case was appealed to the Supreme Court and the Court

of Appeals, that the TRS trustees rejected a settlement which their counsel recommended that they accept, and that ERS was even slower in meeting its obligations, the five (5) year journey to resolution of the cases was replete with obstacles. Few Class Members opted out of the Classes. Third, the resolution of these cases will bring significant non-monetary benefits in that it requires statutory compliance by TRS, ERS, and PSERS and the correct future calculations of all benefits owed to Class Members. In addition, the dollar amount owed to each Class Member, by itself, could not have justified or supported the legal challenge necessary to succeed on the merits of this case.

Finally, a unique factor not to be overlooked in this lawsuit is that the Class Members are public employees who served this State and its citizens. These employees invested a portion of their modest salaries into the retirement funds and now are merely seeking a full return of their investment to which they are entitled. This money, while a significant amount in sum total, is, in reality, going to be a payment of dollars to each Class Member. That money will be significant in its impact on the retired, fixed-income recipients. The Class Members spent their lives serving Georgia, and it is past time for them to receive the retirement benefits they are due under the law of this State.

III. CONCLUSION.

The factors that the Court has reviewed and considered demonstrate that, based on the results obtained, the substantial legal questions and risk involved, and the work performed on behalf of the Classes, the benchmark would be properly adjusted upward in this case. In light of the terms of the settlements in Willis and Anderson, however, the Court **GRANTS** an award of twenty-five percent (25%) of the common fund as the Fee and Expense Award. The Court directs that amounts previously allocated under the parties' Settlement Agreement to the Fee and

Expense Fund and not yet expended for the costs of notice and administration shall be added to the Fee and Expense Award to the extent of this Court's percentage award, consistent with the provisions of Section III of the Settlement Agreement. After payments of remaining expenses of notice and administration and of an incentive award to the Class Representative from the Fee and Expense Award as provided in the Settlement Agreement and this Court's Orders, the amount remaining in the Fee and Expense Award shall be the amount awarded as attorneys' fees in this action.

SO ORDERED, this 8th day of July, 2009.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
SUPERIOR COURT OF FULTON COUNTY