SUPREME COURT OF NEBRASKA

Hill v. City of Lincoln, 221 Neb. 719

380 N.W.2d 296 (1986) · No. No. 85-257 · Decided January 24, 1986

SUMMARY

The Supreme Court of Nebraska affirmed a judgment concerning refunds of improper wage deductions for municipal police and fire pension benefits. The court held that class counsel failed to prove a net benefit to the class sufficient to support an attorney fee award. It also held that the claims were not liquidated because recovery depended on resolving a reasonable statutory interpretation dispute, and therefore prejudgment interest was unavailable.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Per Curiam; Krivosha, C.J.; Boslaugh, J.; White, J.; Hastings, J.; Caporale, J.; Shanahan, J.; Grant, J.
JURISDICTION	Nebraska
DECIDED	January 24, 1986
DOCKET	No. 85-257
DISPOSITION	affirmed
PROCEDURAL POSTURE	Class-action appeal and cross-appeal concerning an attorney-fee request and prejudgment interest after the court's earlier decision ordered refunds of certain wage deductions and corresponding recomputation of retirement benefits.
STANDARD OF REVIEW	The opinion does not expressly state a formal standard of review. It reviews the district court's attorney-fee determination and prejudgment-interest ruling for legal correctness based on the evidentiary record and applicable law.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	James D. Hill, Kenneth L. Ideen, J. Murry Shaeffer v. City of Lincoln, Nebraska, Members of Lincoln Police Union Local No. 544, Employees affected by the decision

TOPICS

class actions · attorney fees · prejudgment interest · statutory interpretation · declaratory judgment

PRACTICE AREAS

municipal law · class actions · employment law · remedies · appellate procedure

QUESTIONS PRESENTED

1. Whether class counsel proved a net benefit to the class sufficient to support an attorney-fee award from the fund created by the litigation.
2. Whether the employees' refund claims were liquidated so that prejudgment interest was recoverable.
3. If prejudgment interest was recoverable, whether the district court properly limited the period for which interest accrued.

HOLDINGS

1. Class counsel was not entitled to an attorney fee because counsel failed to present evidence establishing a net benefit to the class.
2. No prejudgment interest was recoverable because the claims were not liquidated where the existence and amount of the overpayment depended on resolving a reasonable dispute over statutory interpretation through a declaratory judgment action.

KEY QUOTATIONS

> *"We hold that where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed."* (300)

FACTUAL BACKGROUND

The City of Lincoln had withheld portions of police and firefighter wages for retirement benefits, calculating deductions and benefits using base pay, overtime, holiday-service remuneration, and college credits. The prior decision required refunds of amounts attributable to compensation above base pay but also required retirement benefits to be recomputed on the lower base-pay figures. Refunds exceeded $200,000, while the record did not establish the resulting net effect on each employee's retirement benefits. The district court denied attorney fees and awarded limited prejudgment interest.

PROCEDURAL HISTORY

The underlying class action challenged the City's withholding of portions of police and firefighter compensation for retirement-benefit purposes. In Hill v. City of Lincoln, 213 Neb. 517, 330 N.W.2d 471 (1983), the court held that amounts calculated on compensation exceeding base pay had to be refunded and that retirement benefits likewise had to be based on base pay. On remand, the district court denied class counsel's request for an attorney fee from the fund and awarded prejudgment interest only from May 25, 1979, through October 19, 1983. The parties appealed and cross-appealed.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The portion of the district court judgment allowing prejudgment interest is ordered stricken. The judgment is otherwise affirmed as modified.

CASES CITED

- Hill v. City of Lincoln, 213 Neb. 517, 330 N.W.2d 471 (1983)
- Moyer & Moyer v. State Farm Mut. Ins. Co., 190 Neb. 174, 206 N.W.2d 644 (1973)
- Simmons v. Friday, 190 F.2d 849 (8th Cir. 1951)
- Raskin v. Seldin Dev. & Management Co., 213 Neb. 729, 331 N.W.2d 783 (1983)
- Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, 438, 197 N.W.2d 646, 648 (1972)
- Classen v. Becton, Dickinson & Co., 214 Neb. 543, 334 N.W.2d 644 (1983)
- Lewis v. Rountree, 79 N.C. 122, 128, 28 Am. R. 309, 313 (1878)

OPINION

PER CURIAM.

380 N.W.2d 296 (1986) 221 Neb. 719 James D. HILL and Kenneth L. Ideen, in Person and for all Persons Similarly Situated, Appellants and Cross-Appellees, v. CITY OF LINCOLN, Nebraska, a Municipal Corporation, Appellee and Cross-Appellant. No. 85-257. Supreme Court of Nebraska. January 24, 1986. *297 Ronald Rosenberg, of Rosenberg Law Offices, Lincoln, for appellees members Lincoln Police Union Local No. 544.

Charles F. Noren, Lincoln, for appellees employees affected by the decision. William G. Blake, of Pierson, Ackerman, Fitchett, Akin & Hunzeker, Lincoln, for appellee City of Lincoln. Edward F. Carter, Jr., of Barney, Carter & Johnson, P.C., Lincoln, for appellant Shaeffer. J. Murry Shaeffer, of Shaeffer, Boucher & Hawk, P.C., Lincoln, for appellants Hill and Ideen et al. KRIVOSHA, C.J., and BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ. PER CURIAM.

This case was brought as a class action and sought the return of a certain portion of wage deductions which had been contributed to the funding of retirement benefits for policemen and firemen employed by the City of Lincoln.

The appeal on the substantive issue was decided by our opinion found in Hill v. City of Lincoln, 213 Neb. 517, 330 N.W.2d 471 (1983). The effect of that decision was to *298 entitle some or all of the members of the class to a refund of a part of their withholdings, but at the same time to mandate smaller retirement benefits than those previously computed.

The present appeal is actually in two segments, involving two different sets of parties. Appellant J. Murry Shaeffer, the attorney for the "class," claims the trial court erred in failing to award him an attorney fee from the "fund" which he generated. Appellants Hill and Ideen, on behalf of the "class," object to the claimed insufficiency of prejudgment interest awarded by the trial court following the initial remand of the case.

Appellees in the Shaeffer appeal include certain members of the "class" who object to the award of any attorney fee, as well as those policemen and firemen who opted out of the "class." In the Hill-Ideen appeal the appellee is the City of Lincoln. A reference to the opinion cited above will reveal that for pension purposes the city had been withholding a portion of wages computed on the base pay of each employee, as well as on overtime pay, remuneration for holiday service, and college credits.

In interpreting the statute, we held that sums computed on anything in excess of base pay must be refunded. This was obviously a benefit to those employees affected. However, we also determined that pension benefits, which had been figured in the same way, must also rest on the same foundation; i.e., base pay rather than total remuneration. This could prove to be detrimental to the employees affected.

As matters now stand, because of the disparate effect this litigation had upon each employee, a serious doubt must be entertained as to whether this was in fact a proper case for class litigation. However, that question has not been raised. A review of the record leaves little doubt that the employees received a benefit from this litigation. Recomputation of the amounts which should have been deducted from wages resulted in the ascertainment of refunds aggregating in excess of $200,000.

By the same token, it cannot seriously be questioned that retirement benefits, which must now be computed on the same smaller wage figures, will be proportionately less. However, the record does not deal in specifics.

The appellant Shaeffer made no effort to present evidence in that regard. It was his burden to show a benefit conferred upon the "class." Moyer & Moyer v. State Farm Mut. Ins. Co., 190 Neb. 174, 206 N.W.2d 644 (1973).

In dealing with benefits to a class for the purpose of awarding an attorney fee, we must look to the "net" benefit. In Simmons v. Friday, 190 F.2d 849 (8th Cir. 1951), the court denied an attorney fee in litigation allegedly benefiting one of the parties.

In doing so it stated at 851-52: Since G.A. Franz [the decedent] as a remainderman was entitled to but onetenth of the corpus of the estate, the entire estate was therefore augmented ten times this amount, or in the amount of $871,185.70. This increase in the appellant's estate was purely incidental; and the court must recognize the fact that G.A. Franz's estate by this same litigation lost one-half of $871,185.70 or $435,592.85.

If we subtract the "benefits", $87,118.57, from the "detriment", $435,592.85, the litigation resulted in a net loss to the estate of G.A. Franz of $348,474.28. The record does disclose testimony of several of the appellees' witnesses that this particular litigation did not prove beneficial to the employees' interests because of the decrease in pension rights.

The evidence was of questionable validity because of the weakness of the foundation for such opinions. However, the fact remains, as earlier stated, that the appellant Shaeffer offered no evidence at all in this regard.

We see little difference between the burden Shaeffer has in this instance of showing a net benefit to the class and that of one trying to prove a case of lost profits in a breach of contract action. In the latter instance the burden of proof is not met by the plaintiff's evidence of probable gross sales. It is incumbent upon such plaintiff *299 to show such items as cost of merchandise, labor, and other expenses tending to establish net profits.

Such items need not be proven by the defendant. It is the duty of the plaintiff to present some evidence from which the amount of loss reasonably can be computed. Raskin v. Seldin Dev. & Management Co., 213 Neb. 729, 331 N.W.2d 783 (1983).

In Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, 438, 197 N.W.2d 646, 648 (1972), this court said: Plaintiff testified that his gross receipts amounted to $8 to $10 a day before defendant began to compete but that subsequent to such competition his gross receipts amounted to only $4 or $5 a day. There was no evidence as to plaintiff's business expense except the fact that he merely paid expenses when his gross receipts diminished.

With language extremely applicable to the instant situation the court discussed the plaintiff's burden in such an instance: "Plaintiff must not only show in such a case his right of recovery but the elements and facts which compose the measure of his recovery and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation."

The trial court was correct in finding that the appellant Shaeffer failed in his burden of proving a benefit to the class. After hearings following the mandate from this court, the district court concluded that the plaintiffs' claims were liquidated and that the city must pay interest.

However, it decreed that such interest would be payable only from May 25, 1979, the date upon which this action was filed, and until October 19, 1983, the date upon which the trial court concluded its hearing on the question of interest.

The district court gave no explanation of its limitation as to the May 25 date other than to recite that it was equitable for such interest to be computed only from and after that date. The order went on to state: "The hearing upon Plaintiffs' attorneys fees having been convened on September 26 and October 19, 1983, and continued upon the request of the Plaintiffs' counsel, it is hereby ordered that prejudgment interest shall accrue and be due only until October 19, 1983, and no prejudgment interest shall thereafter accrue."

Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. If a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Classen v. Becton, Dickinson & Co., 214 Neb. 543, 334 N.W.2d 644 (1983). Neither party disputes that the amount of the claim was ascertainable by a simple mathematical computation, involved though the process might be. Additionally, there was no reasonable controversy over the right to recover from a factual basis, only as to the legal interpretation of the appropriate statute.

Although its holding has been somewhat "watered down" throughout the intervening years, the case of Lewis v. Rountree, 79 N.C. 122, 128, 28 Am.R. 309, 313 (1878), has interesting language appropriate to this case: It is a rule which may be gathered from the cases that whenever a debtor has notice or ought to know that he owes a certain sum, and when he is to pay, if he fails to pay it, he ought to pay interest.

In the present case although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet as a fact, not only was the amount technically unliquidated, but owing to the unsettled state of the law, it was uncertain. At the time this litigation was commenced, neither party knew whether improper amounts were being withheld from wages.

It was necessary to bring an action *300 to declare the rights of the parties before it could be determined that anyone was entitled to anything. The final result as expressed by the court's final judgment on the mandate was not anticipated by any of the parties or by the trial court. Until that judgment was entered no city official had any authorization to step up and return the amount of any overpayment.

It is still not known what the "net" overpayment, if any, might be. It could hardly be said that the amount due in this instance was a liquidated amount. We hold that where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.

The judgment of the district court is affirmed except as to that portion allowing prejudgment interest, which is ordered stricken. AFFIRMED AS MODIFIED.