

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

LINDA GERKEN, ET AL.

Respondents

v.

GARY SHERMAN, ET AL.

Appellants

DOCKET NUMBER **WD72601**

DATE: June 28, 2011

Appeal From:

Circuit Court of Cole County, MO
The Honorable Patricia S. Joyce, Judge

Appellate Judges:

Division One
Mark D. Pfeiffer, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

LINDA GERKEN, ET AL., Respondents, v.
GARY SHERMAN, ET AL., Appellants

WD72601

Cole County

Before Division One Judges: Pfeiffer, P.J., Newton, and Ahuja, JJ.

Respondents, a class of recipients of Missouri's blind pension fund (Pensioners), sought a declaratory judgment that Appellants, Missouri Family Support Division and the Director of the Department of Social Services Division (collectively "Division"), improperly calculated the amount of their monthly pensions. Additionally, they sought an accounting of the pension fund. In *Gerken I*, the trial court denied Pensioners' request. We reversed the trial court, holding that the Division's method for calculating the pensions was contrary to law, and remanded for the trial court to assess Pensioners' request for an accounting. On remand, the trial court ordered an accounting and subsequently adopted the findings of a special master calculating underpayments to Pensioners. Judgment was entered against the Division and for Pensioners in the amount of \$18,832,188 for underpayments from 1992 to the time of judgment, plus prejudgment interest. It determined that each pensioner was entitled to his or her portion of the pension underpayment with interest, and the parties were ordered to submit a proposed claims process. Finally, the trial court awarded twenty-five percent of the damages as attorney's fees. The Division appeals.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Division One Holds:

The Division raises five points. In its first two points, the Division argues that the trial court erred in refusing to apply the five-year statute of limitations in section 516.120(2). We agree. On remand in *Gerken I*, we directed the trial court to consider whether Pensioners had proven a right to an accounting and to order one, if such was the case. Because the statute of limitations could have precluded Pensioners' right to an accounting or limited Pensioners' recovery, determination of the issue was within the scope of our mandate. The Division next argues that the statute of limitations in section 516.120(2) applied and Pensioners' damages should be limited to those accruing from February 16, 2001. We agree. The Pensioners' damages should be limited to those accruing from February 16, 2001. The Division's first and second points are granted.

In its third point, the Division argues that the method the trial court used to calculate damages was erroneous. First, it contends the calculation of the required monthly pension increase under section 209.040.4 requires the use of estimated numbers. Based on the plain language of the statute, we do not agree. It next argues that it was erroneous for the trial court to determine damages using the annual average number of pensioners and, as a result, the damages award was inflated. However, it was attested that the use of averages was necessary because of flaws in the data provided by the Division, and further, proof of aggregate class damages to a reasonable certainty is proper. After remand, once individual pensioners are credited their claims, any surplus can be ascertained and followed by an appropriate determination by the trial court. The Division's third point is denied.

In the fourth point, the Division argues that the prejudgment interest award was barred by sovereign immunity. We disagree. Section 207.020 defines the powers of the Division and grants it the power to sue and be sued, which effects a waiver of sovereign immunity. Further, as noted by Pensioners, we have previously found the Department of Social Services, of which the Division is a part, to be subject to the payment of prejudgment interest. The Division next argues that it was error to award prejudgment interest because the damages were not liquidated. Again, we disagree. The accounting and the parties' calculations show that the damages were readily ascertainable by computation or a recognized standard. The Division's fourth point is denied.

Finally, in its fifth point, the Division argues the trial court erred in awarding twenty-five percent of damages as attorney fees because it is only permitted to spend money from the pension fund pursuant to an appropriations bill passed by the General Assembly. The Division was not ordered to spend money from the pension fund. Under the common fund doctrine, Pensioners were ordered to share in the costs of bringing suit with the result being a *pro rata* deduction of their damages awards. The Division's fifth point is denied.

Opinion by Thomas H. Newton, Judge

June 28, 2011

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