GLORIA JONES	*	**NO. 2018-CA-0107**
VERSUS	*	
		COURT OF APPEAL
AMERICAN HOME ASSURANCE COMPANY, ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-00475, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

Judge Terri F. Love

* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

JENKINS, J., CONCURS IN PART AND DISSENTS IN PART WITH REASONS

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AFFIRMED
JUNE 27, 2018

Touro Infirmary and its insurers (collectively "Touro") appeal the trial court's judgment that awarded Gloria Jones ("Ms. Jones") reimbursement costs and judicial interest. We find judicial interest began to accrue from the date of the filing of the class action lawsuit, in which Ms. Jones was a putative class member. Additionally, because the deposition and trial transcripts were used to impeach the witnesses called at trial in this case, we find no error in the trial court's award of reimbursement costs for the transcripts. Accordingly, the trial court's judgment granting Ms. Jones' motion to tax costs is affirmed.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In July 2006, a class action lawsuit was filed by Cheryl Weems as the putative class representative against Touro for damages sustained during her mother's stay at Touro before, during, and after Hurricane Katrina.[1] A class certification hearing was held, and class certification was denied by judgment in

[1] *Cheryl Weems, Individually and on behalf of Her Deceased Mother, Veola Mosby, and on Behalf of All Others Similarly Situated v. Touro Infirmary and SHONO, Inc. d/b/a Specialty Hosp. of New Orleans*, CDC #06-6372.

August 2013.[2]

Thereafter, putative class members, including Ms. Jones, filed their individual lawsuits against Touro. Ms. Jones timely filed her petition for damages in January 2014. The trial court later found Touro liable in the amount of $30,000 for damages Ms. Jones suffered. In the December 2016 judgment, Ms. Jones was also awarded costs and legal interest from the date of judicial demand, and Touro did not appeal.

Ms. Jones subsequently filed a motion to tax costs to Touro and to determine legal interest owed. In support of her motion, Ms. Jones attached a copy of the itemization of the costs she incurred in bringing her suit to trial. She also attached affidavits certifying the accuracy of the costs and the December 2016 judgment that found Touro liable. Touro filed its opposition to the motion to tax costs, and a hearing on the motion was held.

The trial court rendered judgment in favor of Ms. Jones and against Touro for judicial interest at the legal rate on the principal sum of $30,000 awarded in the December 2016 judgment, commencing from the date of the filing of the putative class action on July 20, 2006, until the principal judgment was paid by Touro via deposit to the registry of the clerk of court on May 4, 2017. The trial court also awarded reimbursement costs for the clerk of court fees, sheriff fees, trial transcripts, deposition transcripts, and expert witnesses. Touro timely appeals the trial court's judgment that awarded judicial interest and reimbursement costs.

[2] No notice of the denial was issued to the putative class members.

STANDARD OF REVIEW

Touro raises two assigned errors on appeal: (1) the trial court erred in awarding Ms. Jones judicial interest from the date of the filing of the class action lawsuit; and (2) the trial court erred in awarding Ms. Jones one-half of the reimbursement costs for the depositions of Denice Eshleman and Suzanne Hoffpauir and one-half of the costs for the trial testimony of Scott Landry.

Touro contends that the trial court misapplied the law in awarding judicial interest and reimbursement costs, which invokes this Court's *de novo* review. By contrast, Ms. Jones asserts that the trial court's ruling should be upheld because it is not clearly erroneous.

On appeal, this Court applies a manifest error standard of review. When the issues presented on appeal raise mixed questions of fact and law, the manifest error standard applies. *Ursin ex rel. Eusan v. Bd. of Levee Com'rs of Orleans Levee Dist. of State*, 11-1105, p. 5 (La. App. 4 Cir. 9/26/12), 104 So.3d 534, 538 ("[A] mixed question of fact and law should be accorded great deference by appellate courts under the manifest error standard of review").

JUDICIAL INTEREST

Touro avers that the trial court misapplied La. R.S. 13:4203 to award Ms. Jones judicial interest from the date of judicial demand of the class action lawsuit as opposed to the date of judicial demand in Ms. Jones' individual lawsuit against Touro. Thus, the question for this Court to determine is whether legal interest runs from the date of the judicial demand of the original class action complaint on July

20, 2006, or the filing of the Ms. Jones' individual complaint on January 14, 2014, after class certification was denied.

"Legal interest is designed to compensate a plaintiff for his loss of the use of the money to which he is entitled, the use of which defendant had during the pendency of the litigation." *Trentecosta v. Beck, on reh'g*, 95-0096, p. 3 (La. App. 4 Cir. 2/25/98) 714 So.2d 721, 726. "The court shall award interest in the judgment as prayed for or as provided by law." La. C.C.P. art. 1921. Pursuant to La. R.S. 13:4203, "[l]egal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto,' which may be rendered by any of the courts." A judicial demand "is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction." La. C.C.P. art. 421.

Touro avers that although no case law directly addresses the issue raised in this case, the plain text of La. R.S. 13:4203 allows for only one conclusion. That is, the date of judicial demand commenced when Ms. Jones filed her individual suit in January 2014. In support, Touro analogizes the instant case to *Nat'l Bldg. & Contr. Co., Inc. v. Alerion Bank & Trust Co.*, 01-2201 (La. App. 4 Cir. 10/30/02) 832 So.2d 341. The issue raised in *Alerion* was whether legal interest commenced from the date of judicial demand in the state court proceeding or from the date of an earlier claim filed in federal court that was dismissed. *Id.*, 01-2201, p. 1, 832 So.2d at 341. This Court held that legal interest began from the date the state court claim was filed. *Id.*, 01-2201, p. 8, 832 So.2d at 345.

We found no error in the trial court's decision to award judicial interest from

the date that the state court claim was filed because the earlier claim filed in federal court was dismissed for lack of subject matter jurisdiction. *Id.*, 01-2201, p. 5, 832 So.2d at 343. In that case, the federal court was not a court of competent jurisdiction for plaintiff's claim against defendant. Because the federal court lacked jurisdiction, the demand could not be considered to have commenced pursuant to La. C.C.P. art. 421 until the state court claim was filed, at which time legal interest began to run.

In *Alerion*, this Court was faced with petitions filed in different jurisdictions. The case at bar is different. The class action lawsuit and Ms. Jones' individual lawsuit were both filed in Orleans Parish Civil District Court. At all times, Orleans Parish District Court has had full jurisdiction over the subject matter and all persons in the *Weems* class action lawsuit and in the present lawsuit.

Touro counters that a First Circuit opinion, which *Alerion* cites, also supports it position that legal interest runs from the date Ms. Jones' separate claim was filed. In *Merchant v. Montgomery*, the First Circuit held that interest ran from the date of the state court filing versus the demand in an earlier federal proceeding. *Id.*, 83 So.2d 920, 925 (La. App. 1st Cir. 1955). The First Circuit noted that its decision was persuaded by the fact that the delay in filing a state court action in which judgment was awarded "was not occasioned by action of the parties cast in judgment." *Id.*, 83 So.2d at 926. Touro claims similar circumstances exist here in that "there is no evidence Touro played any role in [Ms. Jones'] decision not to file suit until 2014, and where nothing prevented her from doing so."

Nevertheless, the trial court noted that the delay in filing individually was not because of something Ms. Jones did or failed to do. The only reason Ms. Jones filed a separate suit in January 2014 is because class certification was denied. It further reasoned had the class been certified, it would have been more cost-efficient for Ms. Jones because the costs of bringing the action to trial would have been divided among all the plaintiffs.

Touro also contends that during the pendency of the *Weems* class action lawsuit, there was no statutory prohibition on individual claimants, like Ms. Jones, from filing their own lawsuit. Additionally, Touro asserts it was never put on notice of Ms. Jones' claim, as she was not identified as a named member of the original class or identified as a prospective member. Thus, Touro did not know until Ms. Jones individually filed suit in January 2014 that she had a claim against it.

In a class action lawsuit, however, the putative class members are represented by the named class representatives. *See* La. C.C.P. art. 591. By filing a class action, a defendant is put on notice of all potential claims of all plaintiffs named and unnamed. It is undisputed that Ms. Jones was a putative class member. Even if Touro was not aware that Ms. Jones was a putative class member because she was not a named member or identified as a prospective member, Touro was in the best position to determine who the potential putative class members were. The trial court explained it was Touro, not Ms. Jones' counsel, who had that

information at its disposal.[3] Touro had the records to determine who may be potential class members.

Ms. Jones contends where class certification has been denied, judicial interest runs retroactively to the date that the original named class representative files her original suit on behalf of the putative class. Consequently, Ms. Jones avers that judicial interest runs from the date of judicial demand of the class action lawsuit. Judicial interest begins to accrue not only for the original named class representatives, but also for the non-named putative class members, who did not file suit until after class certification was denied by final judgment.

Ms. Jones argues the issue raised herein is analogous to the filing of a supplemental petition or substitution of a party plaintiff. She claims that, in effect, she stepped into the shoes of Ms. Weems in the class action to assert her own claims, after class certification was denied. She draws upon the similarities of her case to instances wherein a lawsuit was deemed filed for all plaintiffs from the date of the original petition even though additional plaintiffs were added by supplement and amendment pursuant to La. C.C. art. 1153.

In *Trentecosta v. Beck*, 00-0860 (La. App. 4 Cir. 5/2/01), 786 So.2d 885, the Bingo hall owner's corporation, which was added as a plaintiff in a successful defamation action by amendment of the original petition, was entitled to prejudgment interest beginning from the date of the filing of the original petition.

In *Arceneaux v. Amstar Corp.*, 06-1592 (La. App. 4 Cir. 10/31/07), 969

[3] Touro's argument suggests that because Ms. Jones' counsel also served as counsel for the class members, that Ms. Jones' counsel was in a position to notify Touro of Ms. Jones' claim.

So.2d 755, four plaintiffs filed a petition for damages from extraordinarily loud noise exposure. The petition was supplemented and amended more than a year later to add approximately 130 new plaintiffs, and the case was tried in flights of 15. Judicial interest was awarded on all the claims from the date of judicial demand of the original four plaintiffs despite the fact that the 130 new plaintiffs were added to the suit more than a year after the original petition was filed.

Also, in *Giroir v. S. La. Med. Ctr., Div. of Hosp.*, 475 So.2d 1040, 1041 (La. 1985), the husband of a patient filed survival and wrongful death actions against the doctors and hospital. Just over a year after the patient's death, an amended petition was filed adding the patient's two major children as plaintiffs to the actions, and changed the husband's capacity in the survival action so that he appeared as an individual rather than an administrator of his wife's estate. *Id.*, 475 So.2d at 1042. The trial court allowed the amended petition to relate back to the original petition and, after trial, awarded the father and children damages. *Id.*

The appellate court reversed the trial court's award to the children, holding their claims were time-barred and did not relate back. *Id.* The Louisiana Supreme Court reversed the appellate court and reinstated the children's award; it held:

> [a]n amendment adding a plaintiff relates back when the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original petition, the defendant either knew or should have known of the existence and involvement of the new plaintiff, the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated, and the defendant will not be prejudiced in preparing and conducting his defense.

Id., 475 So.2d at 1041.

While similarities and distinctions may be drawn from the cases both parties

have cited, we find the Court's reasoning in *Giroir* for permitting the claims to relate back to the date of the original petition's filing persuasive.

In this case, Ms. Jones' claims arise out of the same conduct, transaction or occurrence as set forth in the *Weems* class action lawsuit filed in July 2006. And as the trial court noted, Touro knew or should have known of the existence and involvement of Ms. Jones because they knew that Ms. Weems filed a class action lawsuit, that other individuals experienced the same or similar conditions as Ms. Weems' mother experienced, and that Touro was in the best position to know who the potential putative class members were. Likewise, Ms. Jones and Ms. Weems are sufficiently related by virtue of Ms. Weems' filing the class action lawsuit on behalf of herself and others similarly situated, where Ms. Jones was a putative class member. Therefore, she is not "wholly new or unrelated." *Id.* Finally, Touro was neither prejudiced in conducting its defense to Ms. Jones' lawsuit, nor was it prejudiced in litigating the issue of judicial interest from the date of the *Weems* class action lawsuit.

Considering every asserted claim for damages permits a claim for judicial interest from the date of judicial demand, judicial interest accrues from the earliest date of judicial demand. Here, the claim for judicial interest began when the original plaintiff and class representative Ms. Weems commenced a class action lawsuit against Touro. By virtue of La. C.C.P. art. 593(A), which suspended prescription of the claims for all putative class members, including Ms. Jones, judicial interest continued until the former putative class members filed their

individual causes of action after class certification was denied. Once the former putative class members, including Ms. Jones, filed their individual claims, they stepped into the shoes of the original plaintiff and class representative.

While Touro argues judicial interest ought to commence only once a former putative class member files their own suit, we find to do so would skirt efforts of the judiciary to promote outcomes that are judicially efficient and equitable. Ms. Jones notes that to preserve the right to judicial interest from the earliest date of judicial demand, every putative class member would have to file a separate lawsuit before a determination is made whether a particular court elects to certify a class and proceed with the class action. We consider such action not only a misuse of judicial time and resources, but also not required under the law.

We find judicial interest in this case began to accrue, as to the claims of former putative class member, Ms. Jones, from the date that the original named class representative filed the class action lawsuit on behalf of herself and similarly situated putative class members. Therefore, judicial interest commenced to accrue from the date of judicial demand filed on July 20, 2006, until May 4, 2017, when the principal judgment was paid by Touro via deposit in the registry of the clerk of court.

Reimbursement Costs

Touro's second assigned error contends that the trial court erred in awarding Ms. Jones one-half of the reimbursement costs for the depositions of Denice Eshleman and Suzanne Hoffpauir and one-half of the costs for the trial testimony

of Scott Landry. Touro claims that Ms. Jones is not entitled to reimbursement costs for these transcripts because they were taken in wholly separate lawsuits, of which Ms. Jones was not a party, and because they were not used at trial in this case.

"La. C.C.P. art. 1920 confers discretion on the trial court in the taxing of costs but requires that the exercise of such discretion be equitable." *Walton v. New Orleans Public Serv., Inc.*, 413 So.2d 527, 528 (La. App. 4th Cir. 1982). Therefore, this Court will not interfere with an award of costs absent an abuse of discretion. *Vela v. Plaquemines Parish Gov't.*, 00-2221, p. 29 (La. App. 4 Cir. 3/13/02), 811 So.2d 1263, 1282 (citing *Jacobs v. Loeffelholz*, 94-1123, p. 9 (La. App. 4 Cir. 12/15/94), 647 So.2d 1282, 1287); *Butler v. La. Mut. Medical Ins. Co.*, 15-1191, p. 3-4 (La. App. 4 Cir. 5/25/160), 195 So.3d 570, 573.

"The costs of the clerk, sheriff, witness' fees, costs of taking depositions and copies of acts used on the trial, and all other costs allowed by the court, shall be taxed as costs." La. R.S. 13:4533. Touro argues that in order for the depositions and trial testimony to be deemed "used on the trial" within the meaning of La. R.S. 13:4533, the transcripts must be introduced and accepted in evidence. In support, Touro cites *Succession of Franz*, 139 So.2d 216 (La. 1962), which held "in employing the phrase 'used on the trial' as a condition upon which costs of depositions and copies of acts are made taxable, the Legislature intended that their introduction and acceptance in evidence would constitute such use." *Id.*, 139 So.2d at 219.

Ms. Esheleman, Ms. Hoffpauir, and Mr. Landry were each called to testify at the trial on the merits in this case. Touro alleges Ms. Jones made no showing that the depositions and trial testimony were introduced into evidence. Touro admits, however, that Ms. Jones used the transcripts to impeach each witness' trial testimony. Still, Touro contends the failure to introduce the transcripts into evidence, alone, precludes Ms. Jones' recovery of the costs.

In *Tipton v. Campbell*, 08-0139, 08-0140, p. 27-28 (La. App. 4 Cir. 9/24/08), 996 So.2d 27, 45, we found the trial court did not abuse its discretion by ordering Louisiana Patient's Compensation Fund (PCF) to pay copy expenses for trial incurred by the patient without allegedly showing that all of such costs were incurred for documents that were actually introduced into evidence. The trial court awarded only approximately half of the copying costs patient sought, and the award was specifically for copies of documents used at trial. *Id.*, 08-0139, 08-0140, p. 27, 996 So.2d at 45.

Ms. Jones contends that the purpose of demonstrating that the transcripts were introduced into evidence is to resolve any dispute that the transcripts were used at trial. Here, though, Touro admits the transcripts were used to impeach the witnesses' testimony at trial. Ms. Jones avers she paid for the transcripts to use at trial to prevent Touro's witnesses from deviating from their prior testimony in other cases. Ms. Jones alleges that but for their attempts to change their testimony, there would have been no need for her to incur the costs of the transcripts.

Ms. Jones points out, like *Tipton*, that the trial court awarded half of the

costs she sought to recover and that the award was specifically for copies of transcripts which she used at trial. At the hearing on the motion to tax costs, the trial court stated if the transcripts were in fact introduced at trial, the trial court agreed to award the entire costs of transcripts. There is no indication in the record that Ms. Jones formally introduced the transcripts into evidence. La. C.C.P. art. 1920 confers upon the trial court the discretion to tax costs in an equitable manner. Under the facts presented, we find no abuse of the trial court's discretion in equitably awarding Ms. Jones one-half the full costs of the transcripts.

DECREE

Based on the foregoing, we find judicial interest commences from the date of the filing of the class action lawsuit, in which Ms. Jones was a putative class member. Further, because the deposition and trial transcripts were used to impeach the witnesses called at trial in this case, we find no error in the trial court's award of reimbursement costs for one-half the full costs of the transcripts. Accordingly, the trial court's judgment granting Ms. Jones' motion to tax costs is affirmed.

AFFIRMED