

INTERVENORS-APPELLANTS' PETITION FOR RECONSIDERATION August

11, 2005 Opinion by DeMuniz, J.;

• Durham, J., joined

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INTERVENORS-APPELLANTS' PETITION FOR RECONSIDERATION

The court entered its opinion on August 11, 2005 in the above-captioned matter.

Intervenors petition the court for reconsideration for purposes of clarifying the effect of the court's opinion. Intervenors request the court to clarify its opinion and vacate the judgment of the trial court.

II. POINTS AND AUTHORITIES

This court ruled that most of the substantive issues presented by intervenors' appeal were resolved by intervening legislative amendments to PERS or by this court's decision in *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (2005) ("*Strunk*"). This court further held that the only substantive issue not resolved by the intervening legislative amendments to PERS or by *Strunk*, relating to employers' match on earnings on members' variable accounts, was resolved by the settlement agreement between PERB and the employers. Consequently, this court held that intervenors' appeal was rendered moot by actions which occurred after entry of the judgment. Slip Op. at 9.

This court concluded its opinion with the statement, "The appeals are dismissed as moot." However, the court failed to also state that the trial court's judgment of January 16, 2003 is vacated, as required under *First Commerce of America, Inc. v. Nimbus Center Associates*, 329 Or 199, 986 P2d 556 (1999) ("*Nimbus*").

A. Intervenor Requested the Court to Vacate the Judgment in the Event of Dismissal of the Appeal

In their Response to Petitioners-respondents' Motion to Dismiss Appeal intervenors noted (at pp. 19-20) that in the event of dismissal of the appeal the court must vacate the judgment, under the rule of *Nimbus*.

I. INTRODUCTION

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B. *First Commerce of America, Inc. v. Nimbus Center Associates*

In *Nimbus* this court pronounced the effect a dismissal of an appeal based on mootness has upon the trial court's judgment. This court held:

"On reflection, we hold that the better practice when a case becomes moot on appeal or on review is to vacate both the decision of the Court of Appeals and the Circuit Court judgment.... Reversal implies that a court incorrectly decided the case on the merits. Vacation of a decision, by contrast, suggests nothing about the propriety of the decision on the merits, because it conveys the message that the decision on the merits ought not to have been rendered at all (if the controversy was moot when the case was decided) or ought not have prospective effect (if the controversy became moot after the case was decided)." 329 Or at 208-09.

In Nimbus the debtor borrowed \$2.5 million from Benjamin Franklin Savings and Loan. After Benjamin Franklin Savings and Loan became insolvent the Resolution Trust Corporation became the owner of the loan and sold it at auction to National Mortgage Company. National Mortgage Company in turn sold the loan to plaintiff First Commerce of America, which sued defendant Nimbus to recover on the loan. Nimbus

asserted third party claims against National alleging that National had agreed to sell the loan back to Nimbus.

The trial court dismissed Nimbus's third party claims against National on the merits and thereafter First Commerce and Nimbus settled their dispute. Nimbus appealed, assigning error to the judgment of dismissal of its third party claims against National. The Court of Appeals concluded that the settlement between Nimbus and First Commerce rendered moot Nimbus's appeal.

This court denied Nimbus's petition for review. Nimbus then petitioned for reconsideration "only for the purpose of obtaining clarification of the effect that this court's order has on the disposition of the appeal." This court granted the petition for reconsideration and the petition for review in order to clarify the effect that the dismissal of the appeal by the

Court of Appeals had upon the trial court's judgment. As discussed above, this court held that once the appeal of the third party claims became moot because of settlement of the underlying dispute, the Court of Appeals should have directed the trial court to vacate its judgment of dismissal of the third party claims. This court explained:

"...Although dismissal of an appeal does not necessarily result in an affirmance of the judgment being appealed, dismissal of an appeal unquestionably leaves the judgment in place. The judgment disposing of Nimbus's third party claims against National was a disposition on the merits of those claims. Under familiar principles of claim preclusion, if the judgment were left in place, the judgment might preclude Nimbus from asserting its claims against National in a new action. As explained above, Nimbus's claims against National, pleaded as third party claims, became moot on entry of the judgment disposing of the primary claims, thereby precluding appellate review of the propriety of the dismissal of the third party claims on their merits. Therefore, rather than merely dismissing the appeal, the Court of Appeals also should have

vacated the judgment disposing of the third party claims and remanded with instructions to dismiss those claims as moot." 329 Or at 209.

C. The Rule of *Nimbus* Must Be Applied Here

In *Nimbus* the defendant-appellant caused its own appeal to become moot when it entered into a settlement with the plaintiff. Here, however, intervenors were not parties to the settlement agreement. Their appeal became moot through no action of their own. Consequently, they have not had the opportunity to test the correctness of the trial court's rulings. If the judgment is not vacated it could have preclusive or *stare decisis* effect to intervenors' detriment.

D. Unless Vacated, the Trial Court's Judgment Will Have Continuing Viability

This court concluded that only one substantive issue presented in this appeal had not been resolved by intervening legislative amendments to PERS or by this court's decision in

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Strunk. That issue is whether the trial court erred when it held that employers were not required to match all earnings on members' variable accounts.' This court held that the first assignment of error became moot when PERB, through a settlement agreement, adopted a rule to implement the trial court's decision.'

In the settlement agreement PERS committed to calculate money match benefits in a manner consistent with the ruling of Judge Lipscomb in the trial court. Because neither *Strunk* nor the legislature dealt with this issue, PERB would not be legally required to calculate money match benefits according to the trial court's method in the event of a vacation of the trial court's judgment. If challenged, the new rule adopted by PERB for the

The trial court held that the employers were required to match earnings but those earnings were to be calculated as if the member's account were invested in the regular PERS account, not the variable account, subject to an adjustment.

The settlement agreement provides:

1. PERB will implement the judgment entered in *City of Eugene v. State of Oregon, Public Employees Retirement Board* ("the judgment") as follows, except in the event of a supervening change in law (such as by a legislative enactment or further court order):

"1.1 No later than July 1, 2004, PERB will adopt a rule governing the calculation of money match benefits for members participating in the variable account program that conforms to July 2001 Court order in the *City of Eugene*. The Court ruled that the correct way to calculate a member's `variable account' money match option is through a three-step process. First, determine the member's account balance as if it had been invested solely in the regular account. Second, the `money match' option requires the member's regular account to be doubled and then annuitized. Third, the member's variable account balance is then to be compared to the member's regular account balance and the difference (whether positive or negative) is to be then annuitized and added or subtracted from the initial money match result. PERB will apply its money match calculation rule to retirements occurring on or after the earlier of the date that the rule is adopted or July 1, 2004."

calculation of these benefits will have to be justified by reference to existing statutes and not as an implementation of an existing court order. Thus, from the standpoint of intervenors, their retirement benefits are greatly affected depending upon whether the trial court's judgment is vacated or allowed to remain in place.

Furthermore, if intervenors now seek to challenge PERB's new method of calculation of benefits they could be met with a claim preclusion defense based on the trial court judgment which is still in place. *Nimbus* expressly recognized this problem as one of the rationales for the

decision. 329 Or at 209.

E. Intervenor and Thousands of Other Current and Retired Members of PERS Could Be Adversely Affected by the Trial Court's Judgment if it is not Vacated

Section 14b of House Bill 2003, 2003 Or Laws, Chapter 67, provides:

"(1) If the Public Employees Retirement Board is required to correct one or more of the erroneous benefit calculation methods identified in *City of Eugene et al. v. State of Oregon*, Case Nos. 99C-12794, OOC-16173, 99C-12838 and 99C-20235, the board shall recover the cost of benefits erroneously paid to retired members as a result of those erroneous benefit calculations by one or both of the following methods:

"(a) The board may withhold cost of living increases under ORS 238.360 from a retired member whose benefit is greater than the correctly calculated benefit of the member until such time as the member's benefit is equal to the correctly calculated benefit.

"(b) The board may treat all or part of the present value of the benefits erroneously paid and payable to retired members as a result of the erroneous benefit calculations as an administrative expense of the Public Employees Retirement System, to be paid exclusively from future income of the Public Employees Retirement Fund, and to be amortized over an actuarially reasonable period not to exceed 15 years.

"(2) In no event may the cost of erroneous benefit calculation methods identified in *City of Eugene et al. v. State*

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of Oregon be considered an employer liability or charged to employers through employer contributions."³

Intervenors and other current members of the system who would be affected by the use of future income to reimburse the allegedly erroneously paid benefits under Section 14b(1)(b) and retirees who would be affected by withholding of cost of living increases under Section 14b(1)(a) could be negatively impacted by the failure of this court to vacate the judgment.

F. This Court Should Only Vacate the January 16, 2003 Judgment

Intervenors asserted their own claims relating to the "employer-in-variable" rule adopted by PERB to distribute the 1999 earnings of the system. Although the trial court initially granted summary judgment in favor of intervenors, it agreed to reconsider its decision and so only entered a Rule 67B judgment on January 16, 2003 to address the court's rulings relating to the claims brought by petitioners. The court deferred final ruling on intervenors' claims until after further briefing. By judgment dated April 23, 2003 the court adhered to its previous decision and ruled in favor of intervenors on their claim.

Initially PERB and petitioner Eugene Water & Electric Board (EWEB) filed notices of cross-appeal from the January 16, 2003 judgment and the April 23, 2003 judgment. On April 7, 2004 this court granted PERB's motion to dismiss its appeal and on May 3, 2004 granted EWEB's motion to dismiss its appeal. Thus, the April 23, 2003 judgment was not part of this appeal or this court's decision. There is no claim that any portion of the April 23, 2003 judgment has become moot. Consequently, this court should only vacate the January 16, 2003 judgment.

³HB 3020, 2003 Or Laws, Chapter 625, § 31, added the following to Section 14b: "(3) Nothing in this section creates any contract right in any member of the Public Employees Retirement System."

III. CONCLUSION

This court should reconsider its decision and direct the trial court to vacate its January 16, 2003 judgment. It would be manifestly unjust to bind intervenors to a trial court decision which they appealed but which was rendered moot through no action of their own.

This court has already made clear that the proper procedure is to vacate the trial court's judgment so that it will have no further precedential or preclusive effect upon appealing parties.'

DATED this 24 day of August, 2005.

Respectfully submitted,
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⁴Intervenors do not know whether there will be any opposition to this petition from the other parties. Opposition would imply that those parties believe the trial court's judgment should have continuing effect. This alone should be cause for this court to vacate the lower court judgment.