

SUPREME COURT OF LOUISIANA

01-C-0631

LULA MAE JENNINGS

VERSUS

JOHNNY E. TURNER, JR.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS**

TRAYLOR, J., dissenting

I agree with the majority's conclusion that the parties' intent regarding the pension must be established when the agreement is silent on the issue. *See Robinson*, 778 So. 2d at 1121. However, I disagree that the evidence before us in the record establishes that the parties did not intend to partition the pension when they signed the agreement in 1990.

At the trial to partition the pension, a representative from the husband's employer, the New Orleans Steamship Association (NOSA) testified regarding the husband's pension fund, the International Longshoremen's Association Pension Fund (ILA). He testified that the pension plan sends out notices any time changes are made to the plan, or when an employee separates service, and that publications are sent notifying participants of their status on benefits in general. The pension fund office mails the information to the participants, and that mailings were sent to participants during the period from 1981 to 1990. On cross-examination, the plaintiff admitted that publications from "the union" came to the house, but that she didn't open them.

Plaintiff further testified that she had no knowledge regarding the

longshoreman's union or the fact that they are entitled to pensions. However, as she was leaving her attorney's office after she got her cash settlement of \$30,000, her attorney mentioned that she "at 65 you can go in and draw his pension." It seems odd that her attorney would make this offhand remark about a pension when the plaintiff allegedly did not know of the pension, and thus would not be able to inform her attorney about it.

Apparently, the trial court came to the same conclusion. The trial court found that the plaintiff had notice of the pension in 1990, either on the basis of the mailings to the house or on plaintiff's testimony that she found out about it from her attorney. While he used this finding to establish an erroneous legal conclusion based on prescription, the trial court's finding remains a viable finding of fact on the issue of intent. At the very least, if any doubt at all exists regarding the parties' intent, the case should be remanded for the trial court to clarify this factual issue. Because the record evidence relied on by the majority fails to establish that the parties did not intend to partition the husband's pension, I respectfully dissent.