

COURT OF APPEALS
DIVISION II
OCTOBER 16 PM 1:51
STATE OF WASHINGTON
BY _____
HEGYI

38094-3-II

COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

JEFFREY PROBST Respondent and
VIRÁG HEGYI et al., Appellants and
The Law Firm of BENDICH STOBAUGH & STRONG Respondent and
STEPHEN K. STRONG et al., Respondents

v.

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
Respondent

Appeal from Thurston Superior Court No: 05-2-00131-1

BRIEF OF APPELLANTS

Virág Hegyi Appellant by her Guardian Attila Hegyi (pro se) and
Attila Hegyi Appellant (pro se)
19620 81 PL W
Edmonds, WA 98026
Phone: (425) 778-4099
Cellular: (206) 388-8801

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1 Introduction

In reference to the Thurston Superior Court (Trial Court) Case No: 05-2-00131-1, this is an Appeal by ward Virág Hegyi (Ms. Hegyi) and her guardian Attila Hegyi (Mr. Hegyi) (Appellants), who are layperson members of both the Plaintiff Class and the Settlement Class, from Court Orders related to the Class Action Settlement Agreement (Settlement). Class Counsel negotiated, agreed to and proposed to the Court the Settlement for approval, while Ms. Hegyi and Mr. Hegyi (We) objected both the Settlement and the Trial Court's order of December 14, 2007 (referenced as Preliminary Order). The Trial Court's order of June 30, 2008 (Approval Order) overruled all elements of the objections without addressing any elements of their merit. We lack adequate legal training and experience and English is not our native language. The cost of properly maintaining this Appeal (including the preparation, reproduction and service of an effective Brief) is unaffordable to us and it is also disproportionate as to our financial stake. It is unnatural for us to formulate questions about the recognized inconsistencies or errors that appear to us as being either facts or the results of reasonable thinking "connecting the dots" using common sense (like "follow the money"). We ask for the Appellate Court's discretion to consider our Appeal and reverse the inappropriate said Court Orders.

2 Assignments of Error

2.1 The Trial Court erred in entering the order of December 14, 2007 (referenced as Preliminary Order) “Conditionally Certifying Settlement Class, Preliminarily Approving Settlement, Approving Class Notice and Setting Final Approval Hearing”.

Issues Pertaining to Assignments of Error

2.1.1 We incorporate by reference all issues pertaining to the Settlement and the Trial Court’s Preliminary Order and Settlement Agreement in our Objection of March 10, 2008, in our Reply to Response of March 19, 2008, and (in case the Appellate Court would receive any applicable Verbatim Report of Proceedings) we also incorporate by reference all applicable parts of Mr. Hegyi’s presentation at the June 30, 2008, [Final] Approval Hearing.

2.1.2 Whether "The Court has considered the Settlement Agreement, the prior proceedings in this case, and the materials submitted by ... objectors concerning the Settlement Agreement" in light of the facts that such Settlement Agreement was not filed with the Court and that the Trial Court overruled all elements of our objection without addressing any of their merit.

- 2.1.3** Whether it was in the best interest of Class Counsel to negotiate and agree to the Settlement in order to "avoid the uncertainty, risks, delays, burdens and costs of further litigation"?
- 2.1.4** Whether the relief of Attorney fees under RCW 49.48.030 (sought to be awarded in the Complaint Class Action, which deals with unpaid interest earned on funds in individual retirement accounts and filed January 20, 2005) was applicable to this Class Action; And whether seeking Attorney fees under the common-fund doctrine was in the best monetary interests of Class Counsel?
- 2.1.5** Whether the terms of the negotiated Settlement were fair, reasonable and adequate for all concerned in light of the fact that the majority of the Class Member "Individuals with estimated claims less than \$15 are not considered eligible for recovery" and whether the \$15 referred to such Individuals' claim for damages (Claim)?
- 2.1.6** Whether the following method would distribute the net recovery amount based on the estimated amount of allegedly earned but unpaid interest on Plaintiffs' funds in individual retirement accounts (the identified Claim): "the

individual recovery amount will be determined on a pro-rata basis that is calculated on the amount each individual transferred or withdrew from their retirement account ... Under this formula, the class members who transferred or withdrew larger monetary amounts from their retirement accounts will correspondingly receive a larger share of the monetary recovery than those class members who transferred or withdrew smaller monetary amounts from their retirement accounts"?

2.1.7 Whether the admission that the skilled and experienced Class Counsel was greatly uncertain about the likelihood of [his] success "weighs heavily in favor of a finding that the settlement is fair, adequate, and reasonable"?

2.1.8 Whether the allegations that the skilled and experienced Class Counsel could not find the "proper method to calculate damages and the amount of those damages" after several years of research and "The great uncertainty the parties faced in how the Court would ultimately resolve plaintiffs' claims" properly supported a finding that "the settlement was fair, adequate, and reasonable"?

2.1.9 Whether the mediator applied any objective method to

calculate the reasonable recovery amount (for [a fictitious] example, by asking Class Counsel for disclosing the minimum Attorney Fee they were willing to settle; and then, after learning that such number was \$1,500,000.00 (One and a Half Million Dollars) as fee plus ten percent (10%) of such fee for covering their expenses (including paying Attorneys other than Class Counsel) and then, because Counsel for Defendant were seeking to pay the minimum Settlement Amount contingent upon the \$1,650,000.00 Attorney Fee, he estimated that the highest percentage of the Settlement Amount that the Court would approve as Attorney Fee was 30%, and finally, he divided the agreed Attorney Fee of \$1,650,000.00 by 30% (or 0.3) resulting 5.5 Million Dollars¹, which he proposed, and Counsels for both parties accepted as the agreed Settlement Amount)?

2.2 The Trial Court erred in entering the order of June 30, 2008 (referenced as Approval Order) “Findings of Fact and Order Approving Settlement Agreement”.

Issues Pertaining to Assignments of Error

¹ $(1,500,000.00 + 0.1 * 1,500,000.00) / (0.3) = 5,500,000.00$

2.2.1 Because the Assignment of errors are numerous and they mostly overlap with issues pertaining to the Settlement Agreement and said Preliminary Order, we incorporate by reference all such issues referenced under ¶ 2.1.1.

2.2.2 Whether, under CR 23, class certification imposes the same requirements for settlement negotiation, settlement agreement and trial purposes, and whether conditional certification of an inhomogeneous Settlement Class (for settlement purposes only and only after the settlement negotiations were already conducted and completed by Counsels for the Parties) was appropriate under CR 23(b)(1) and (2) considering that:

2.2.2.1 The Trial Court supported this finding only by a reference to a part of the Certification Order of June 30, 2006, in which Order (under very different circumstances) the Trial Court certified a homogenous class (different from the Settlement Class) without conditioned purposes, and before the settlement negotiations and agreement were conducted and concluded;

2.2.2.2 Then, Class Counsel eventually negotiated the

practically same inhomogeneous Class they [and not Plaintiff] suggested into the Settlement without further briefing and/or further order of the Court on class certification, thus, contravening the Certification Order in relevant part: “Others suggested by plaintiff may be included in the class after further briefing and further order of the Court”?

2.2.3 Whether the Settlement Class had sufficient unity ensuring both that the interests of absent class members were properly protected and that absent members could be fairly bound by class representative?

2.2.4 Whether the end justifies the means² and whether the Complaint Class Action case could not have been maintained as a class action because the prerequisites of Civil Rules (CR) 23(a)(3) and (4) that protect the interests of unnamed Plaintiffs (absent members of the Plaintiff Class) by [respectively]requiring that the claims of the

² “‘The End justifies the Means’ is a maxim which originated in an accusation made by Protestants against the Jesuits. Although few would openly proclaim such a cynical maxim, it is clearly the conception which justified the atrocities of Stalinism and the use of terror by some who claimed to be pursuing the socialist objective” (<http://en.wikipedia.org/wiki/Consequentialism> in pertinent part

representative party (Mr. Probst) be typical of the claims of the proposed class, and that the representative party (Mr. Probst) fairly and adequately protects the interests of the class, were satisfied by neither the Claimant Class nor the Settlement Class³ and that relying only on its erroneous Preliminary Order could the Trial Court approve the terms of the Settlement Agreement, which terms included the definition of the Settlement Class (different from the definition of the Certified Class) without further briefing and Court order on class certification in spite of the fact that the Certification Order specifically ordered that “Others suggested by plaintiff [sic.⁴] may be included in the class after further briefing and further order of the Court.”?

2.2.5 Whether the established amount of total damage depends on the number of individuals claiming damages and the average damage of such individuals; and whether the total recovery amount depends on, or at least influenced by, the amount of total damage?

³ the prerequisites of Civil Rules (CR) 23(a)(3) and (4) were satisfied by the Certified Class that was properly certified by the Trial Court’s order of June 30, 2006, and referenced here as Certification Order

⁴ It was rather Class Counsel than Plaintiff who suggested to include others in the class

- 2.2.6** Whether the monetary interest of Class Counsel (to earn the highest percentage on the highest total recovery amount) and their client Jeffrey Probst (Mr. Probst) and a Class of similarly situated individuals (members of the Public Employees' Retirement system (PERS) Plan 2 (PERS 2) who transferred to PERS 3 in Phase 1 (to pay the lowest percentage on the highest individual recovery amount for past damages and prevent similar future damages from occurring) collided in significant part?
- 2.2.7** Whether, even after extensive search for evidence to the contrary, every single one of Class Counsel's pleadings (including the Complaint Class Action of January 20, 2005, referenced here as Complaint) have served the best monetary interests of the Law firm and their Attorneys representing Plaintiffs; and whether they represented only such interests of the represented parties⁵ that were in agreement with Class Counsel's interests during applicable stages of the Court proceedings?

⁵ consisting of their named client Jeffrey Probst (Mr. Probst); and then, Mr. Probst and the Class of similarly situated members of the Public Employees' Retirement system (PERS) Plan 2 (PERS 2) who transferred to PERS 3 in Phase 1; and then, Mr. Probst and all past, present and future members of those retirement systems subject to RCW 41.04.445 (Claimant Class); and then, Mr. Probst and all members of said Certified Class; and finally, Mr. Probst and all members of the said Settlement Class

2.2.7.1 Whether the best interest of both Mr. Probst and a Class of similarly situated individuals (members of PERS 2 who transferred to PERS 3 in Phase 1) was to submit and prosecute an unambiguous complaint on behalf of only Mr. Probst and the Class of such similarly situated individuals?

2.2.7.2 Whether the fact that Class Counsel included others than the similarly situated individuals (members of PERS 2 who transferred to PERS 3 in Phase 1) served the interests of Class Counsel overcomplicated, delayed and made risky to litigate the claims of Mr. Probst and the Class (Id.) and which were against the best legitimate interests of both Mr. Probst and the members of such Class (Id.)?

2.2.8 Whether Class Counsel fairly and adequately protected the interests of Mr. Probst and the Class of similarly situated members (Id.) considering that the interests of both Mr. Probst and members of such Class (Id.) was to submit and prosecute an unambiguous complaint on behalf of only Mr. Probst and such Class (Plaintiffs)?

2.2.9 Whether the representative party (Mr. Probst) fairly and adequately protected the interests of the Settlement Class and whether the Settlement Agreement fails to meet the standard set by CR 23(a)(4) in part: “the representative parties will fairly and adequately protect the interests of the class” in light of the following:

2.2.9.1 The interests of the majority of both the Claimant Class and the Settlement Class were not protected and, practically for nothing in exchange, the Settlement would release the claims and take away the rights of those Settlement Class members whose interests were not protected;

2.2.9.2 The Preliminary Order in relevant part ordered that, for “purposes of holding the Final Settlement Hearing regarding final approval of the proposed Settlement, Plaintiff Jeffrey Probst is appointed representative of the proposed Settlement Class” and that “Settlement Class Members who do not enter an appearance through their own attorneys will be represented at the Final Settlement Hearing by Plaintiff as Class

Representative” but Mr. Probst was absent from such Hearings;

2.2.9.3 [To the best of our knowledge] Mr. Probst did not participate in the settlement discussions and, consequently, he could not represent the interest of any class members.

2.2.10 Whether the Trial Court should have not directed the Parties to engage in mediation sessions, and (if the Trial Court still directed them to do so) whether the Trial Court should also have either directed the Parties to engage in such sessions on behalf of only the Certified Class (thus, upholding the June 30, 2006 Order, which clearly ordered in relevant part that: “Others suggested by plaintiff may be included in the class after further briefing and further order of the Court”) or requested further briefing [on class certification] and issued an order certifying the extended class, and also appointed adequate number of Plaintiffs to represent the different typical groups in the extended and inhomogeneous new Class to ensure that the interests of each typical group and each member of each typical group in the new Class could be adequately represented

during the settlement negotiation sessions and during further proceedings?

- 2.2.11** Whether the Trial Court could properly consider a proposed Settlement Agreement, including the attorney fee and class representative awards, final approval of the Settlement and entry of a Dismissal Order if the proposed Settlement Agreement was not filed with such Court?
- 2.2.12** Whether there were any facts or reasoning in the said Preliminary Order that supported the Trial Court's finding that the proposed Settlement Agreement was entered in good faith?
- 2.2.13** Whether Mr. Probst and Class Counsel disregarded the Trial Court Order (that is: "Settlement Class Members who do not enter an appearance through their own attorneys will be represented at the Final Settlement Hearing by Plaintiff as Class Representative and by Class Counsel.") because neither Mr. Probst (who was absent) nor Class Counsel represented the pro se Objectors at the Final Settlement Hearing?
- 2.2.14** Whether the proposed Settlement and the Claim Form provided Settlement Class Members with adequate

information necessary to make an informed decision about objecting the Proposed Settlement in light of the following:

2.2.14.1 The partial statement: “The Class Notice is accurate and informs the Potential Settlement Class Members of the claims and defenses asserted in the Consolidated Action” was not fully true, misleading and unfair because relevant information in the Complaint Class Action, other relevant documents including Court orders and the Trial Court’s order under §11, that is: “If a Settlement Class Member files an objection that the Court determines to be frivolous, the Settlement Class Member may be subject to monetary sanctions, including the payment of costs and attorney fees incurred by the Parties defending against the objection” were not provided with the Notice;

2.2.14.2 In spite of its importance, the said Preliminary Order was not attached to the Proposed Settlement Agreement as Exhibit A in spite of the

statement: ““Preliminary Approval Order” means the order, substantially in the form attached to this Settlement Agreement as Exhibit A, that will among other things, if entered by the Court, (a) preliminarily approve the settlement as fair, reasonable and adequate to the Settlement Class, (b) preliminarily certify the Settlement Class solely for settlement purposes and appoint Plaintiff as the representative Settlement Class, (c) approve the mechanisms set forth in this Settlement Agreement for giving notice to the Settlement Class Members, (d) approve the form of the Class Notice and the Claim Form, (e) set the Objection Period and the Claims Period, and (f) set the date and time for the Final Settlement Hearing...” as relevant part of § 38 in the Proposed Settlement;

2.2.14.3 In reference to CR 23(a)(3) and (4), the claims of the representative party (Plaintiff) were not typical to some groups of Settlement Class Members and Plaintiff did not fairly and

adequately protect the interests of each
Settlement Class Member;

2.2.14.4 The statement “The lawsuit claimed that the department failed to correctly calculate the amount payable to class members when they transferred from Plan 2 to Plan 3, or when they withdrew from Plan 2” under “1. What is this lawsuit about?” in the Notice was inaccurate?

2.2.15 Whether the Trial Court was in error when ordered that:
“6. ... The mailing and the form of the Class Notice are hereby authorized and approved, as satisfying the requirements of CR 23 and state and federal constitutional due process and being the best notice practicable under the circumstances.”?

2.2.16 Whether the Trial Court was in error when ordering that:
“7. If the Settlement Agreement is finally approved by the Court and the Effective Date occurs, each Settlement Class Members shall be bound by the terms of the Settlement Agreement and by the Dismissal Order entered pursuant to the Settlement Agreement, whether or not such Settlement Class Member receives an Individual

Recovery Amount under the Settlement Agreement.”?

2.2.17 Whether Mr. Probst could adequately represent the Settlement Class during the Final Settlement Hearings complying with the Trial Court’s orders: “2. For purposes of holding the Final Settlement Hearing regarding final approval of the proposed Settlement, Plaintiff Jeffrey Probst is appointed representative of the proposed Settlement Class” and “8. Settlement Class Members who do not enter an appearance through their own attorneys will be represented at the Final Settlement Hearing by Plaintiff as Class Representative and by Class Counsel” and in light of the fact that he did not attend such Hearing.

2.3 The Trial Court erred in entering the order of September 5, 2008 (referenced together with the Approval Order as the Dismissal Order) which approved the Class Counsel’s fee award.

Issues Pertaining to Assignments of Error

2.3.1 Because the Trial Court’s order of September 5, 2008 (which approved the Class Counsel’s fee award) was the second part of the final order approving the Settlement Agreement, we incorporate by reference all such issues under ¶ 2.1.1 (supra) that related to the Class Counsel’s

fee award, and (in case the Appellate Court would receive any applicable Verbatim Report of Proceedings) we also incorporate by reference those parts of Mr. Hegyi's June 30, 2008 presentation at the Approval Hearing that related to the Class Counsel's fee award.

3 Statement of the case

- 3.1** We (Appellants) assume that the purpose of the Court is to administer justice.
- 3.2** We also assume that the purpose of a class action is to make claimants whole because justice requires and strict liability ensures that all legitimate claimants are compensated for their full real damages.
- 3.3** We further assume that a class action settlement can only be fair when the Class Counsel attorneys selflessly represent every member of the [Claimant] Class (as opposed to Class Counsel's monetary interests) and they consider each member of the [Claimant] Class as their client.
- 3.4** This is an appeal necessitated by the Trial Court's June 30, 2008 order overruling all elements of our objections to the preliminary approval of a plaintiff class action settlement without addressing any elements of the merit of our approval:

- 3.4.1** Disregarding a Trial Court Order, (that is: “Settlement Class Members who do not enter an appearance through their own attorneys will be represented at the Final Settlement Hearing by Plaintiff as Class Representative and by Class Counsel”) neither Plaintiff Mr. Probst (who has not attended the Final Hearings) nor Class Counsel represented the pro se Objectors and the interests of most of the Class members at the Final Settlement Hearing; and they rather represented their own best financial interest they negotiated and secured in the Settlement Agreement.
- 3.4.2** In the said Approval Order, the Trial Court failed to consider the absence of good faith, which was relevant in this litigation.
- 3.4.3** The Trial Court failed to look into the issue of inequitable treatment between class members.
- 3.4.4** The Trial Court failed to protect those members of the Class whose rights were not given due regard by the parties negotiating the Settlement because it is injustice that the majority of Class members will receive nothing from the benefits while equally sharing the burdens that the Settlement imposed on all Settlement Class members.

- 3.4.5** The distribution of benefits are based not on the amount of the either calculated or estimated unpaid interest amount (which varies because of not only the varying amount of monetary funds in individual accounts but on the varying time period of accruing interest) and the utilization of this bogus method cannot guarantee a just distribution of the recovery, and which will likely result in an unfair distribution of said recovery.
- 3.4.6** The likelihood (probability) of success of Plaintiffs was quantified through neither determination nor estimation, and the likelihood (probability) of success of Defendants was not even considered.
- 3.4.7** That the experienced and skilled Class Counsel negotiated the Settlement (that provides them \$1,650,000.00) and that they supported such Settlement are facts that cannot and do not prove that the Settlement Agreement was fair, adequate and reasonable to the Class (for example, in case Class Counsel were selfish, did not act in good faith and/or they represented their best interests and not the best interests of most Class Member Plaintiffs).
- 3.4.8** In part, this Plaintiff Class Action requested relief for

monetary damages, and the Settlement Agreement precludes all Settlement Class Members from exercising their Seventh Amendment right to a jury trial without ensuring that their interests were adequately represented.

3.4.9 In summary, the Trial Court abused its discretion when finding that the settlement was fair, adequate and reasonable and when approved the Settlement Agreement.

3.5 The general legal question in this plaintiff class action was:

3.5.1 Whether the Department of Retirement Systems (DRS) had to calculate accrued interests on monetary funds in interest-earning individual employee retirement accounts for the entire period between the dates of deposit and either transfer or withdrawal of such monetary funds?

3.6 Two particular legal questions were in this plaintiff class action:

3.6.1 Whether the DRS failed to provide members of those retirement systems subject to RCW 41.04.445 with all interest accrued on individual retirement accounts from the dates of contribution deposits up to the dates of fund transfers or withdrawals?

3.6.2 Whether, when calculating the additional transfer payment pertinent to RCW 41.40.795(6), the DRS

included all interest that accrued on individual retirement accounts of applicable members from the dates of contribution deposits up to the dates of fund transfers?

- 3.7** The first particular legal question (sub-¶ 3.6.1 supra) in this plaintiff class action is both specific and common to the [Claimant] Class as defined in the Complaint Class Action as the Class “includes all former, current, and future members of the state retirement systems with claims for accrued interest under RCW 41.04.445”; and, in turn, such state retirement systems include all of the following:
- 3.7.1** Public Employees' Retirement System (PERS) Plans 1 & 2
 - 3.7.2** Teachers' Retirement System (TRS) Plans 1 & 2
 - 3.7.3** Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF) Plans 1 & 2
 - 3.7.4** Washington State Patrol Retirement System (WSPRS) and/or WSPRS Plans 1 & 2
 - 3.7.5** Judicial Retirement System (JRS) and
 - 3.7.6** School Employees' Retirement System (SERS) Plan 2.
- 3.8** The second of such legal questions (sub-¶ 3.6.2 supra) is both specific and common to those Plan 2 members eligible to receive the additional transfer payment of either one hundred ten or one

hundred eleven percent of the transfer basis pertinent to RCW 41.40.795(6)(a) or (b) respectively.

3.9 During the Court judicial review proceedings, both Class Counsel and Counsels for the DRS presented briefs respectively supporting and opposing that the answer to each of these two particular legal questions (sub-¶¶ 3.6.1 and 3.6.2 supra) was yes.

3.10 However, Counsels (including at least one Assistant Attorney General and a private law firm) for the DRS (found by the Court as “knowledgeable and experienced in class action litigation and in the subject matter involved in this case”) allegedly spent 4,276 attorney hours working on this case (and got paid from the funds of past, present and future public employee members of the state retirement systems) rather agreed that the DRS pays \$3,850,000.00 (Three Million Eight Hundred Fifty Thousand Dollars) from the funds of past, present and future public employee members of the state retirement systems to a relatively small number (as compared to all members) of the same state retirement systems and \$1,650,000.00 (One Million Six Hundred Fifty Thousand Dollars) to Class Counsel; and Class Counsel (skilled and experienced Attorneys allegedly working on this case for at least 2,990 attorney hours) rather agreed to receive such

\$1,650,000.00 as their Attorney Fee than seeking justice for all members of the [Claimant] Class as defined in the Complaint Class Action (sub-¶ 3.7 including sub-¶¶ supra) because, assuming good faith, skilled and experienced attorney Counsels for both parties believed they were right when providing opposite answers (yes by Class Counsel and no by Counsel for DRS) to the two particular legal questions in this plaintiff class action (sub-¶¶ 3.6.1 and 3.6.2 supra) but they were uncertain that the Court would serve justice, or Class Counsel were uncertain that Plaintiffs had just claims or Counsel for DRS were uncertain that the DRS had just defenses.

3.11 It is a double standard that the Court apparently accepted that the merits of both the claims and defenses could have been right, or the merits of either the claims or the defenses (or both) could have been wrong, but it did not accept that the merits of the objections could have been right.

3.12 Both the proposed Settlement Agreement and the Preliminary Order “put the carriage before the horse”.

3.12.1 The Settlement Class as defined in the Settlement Agreement and relevant Court Orders were the results of tricky jumps and/or step changes in time and between

different sets of circumstances in order to establish relationships between facts and making conclusions that are specific only to a unique set of circumstances and then, applying such established specific relationships and conclusions to a different set of circumstances without evaluating and establishing the validity of such established specific relationships and conclusions in the said different set of circumstances.

3.12.2 The representative parties (the named Plaintiff and Class Counsel) fairly and adequately protected the interests of neither the majority of the members in the [Claimant] Class (as defined in the Complaint Class Action) nor the [Settlement] Class (as defined in the Proposed Settlement). In spite of Class Counsel and the named Plaintiff were supposed to represent each member in the [Claimant] Class as defined in the Complaint Class Action, this plaintiff class action settlement rather serves the interests of the Class Counsel, Defendant and the named Plaintiff than the interests of the majority of the members in the [Claimant] Class (as defined in the Complaint Class Action) or the [Settlement] Class (as

defined in the Proposed Settlement). Consequently, such settlement fails to meet the standard set by CR 23(a)(4) in part: “the representative parties will fairly and adequately protect the interests of the class”.

3.12.3 The Settlement allows but not requires Class Counsel to form any new class or sub-class of Proposed Additional Class Members and continue the litigation of the Complaint Class action, perhaps, negotiate an agreement with terms more beneficial to the Additional Class Members than the terms negotiated for Settlement Class Members of subject Settlement Agreement and utilizing all applicable results of the proceedings up to date without any requirement of sharing the costs of such results with current Settlement Class Members.

3.13 The Court considered, and approved, the Settlement Agreement as fair, adequate and reasonable in spite of the fact that such Settlement Agreement was not filed with the Court.

3.14 As neither the Settlement of this plaintiff class action nor applicable Court orders served justice, the opportunity to assign errors should have been provided not only to applicable Court Orders but also to the Settlement Agreement.

- 3.15** The legitimate interest of both Mr. Probst and the Class of similarly situated members of PERS 2, who transferred to PERS 3 during Phase 1, was to submit and prosecute an unambiguous complaint on behalf of Mr. Probst and such plaintiff Class (Id.).
- 3.16** In contrary to Class Counsel's duty to represent the legitimate interests of Mr. Probst and the Class consisting of those members of PERS 2 who transferred to PERS 3 during Phase 1, Class Counsel included others in the Claimant Class, then, in the Settlement Class, which efforts well served the interests of Class Counsel in earning a higher Attorney Fee to be paid out from the funds of the state retirement systems but such efforts overcomplicated the litigation and it was against the legitimate interests of both Mr. Probst and the Class of those PERS 2 members who transferred to PERS 3 during Phase 1.
- 3.17** The representative party (Mr. Probst) and Class Counsel did not fairly and adequately protect the interests of the Settlement Class and the Proposed Settlement fails to meet the standard set by CR 23(a)(4) in part: "the representative parties will fairly and adequately protect the interests of the class":
- 3.18** The interests of the majority of both the Claimant Class and the Settlement Class were not protected and, practically for nothing

in exchange, the Settlement would release the claims and take away the rights of those Settlement Class members whose interests were not protected.

3.19 In agreement with their best monetary interests, Class Counsel presented some excellent pleadings on the merits, but failed to provide adequate representation for most members of both the Claimant Class and the Settlement Class.

3.20 In summary, the Settlement [Agreement] is not fair, not reasonable and not adequate.

4 Argument

4.1 We incorporate by reference applicable parts of our all arguments pertaining to the inadequacy of the representation of most class members and to said Preliminary Order and Settlement in our Objection filed with the Trial Court on March 10, 2008 and our Reply to Response filed with the Trial Court on March 19, 2008.

4.2 In addition, we incorporate by reference all applicable parts of our pleadings under all previous paragraphs under ¶¶1, 2, 3, and 4, including sub-¶¶ that the court find as rather being arguments than introduction, assignments of error, issues pertaining to the assignments of error or statement of the case.

4.3 The Settlement is not fair, not reasonable and not adequate.

5 Conclusion

- 5.1** The Appellate Court should reverse the Trial Courts said Preliminary Order, Approval Order and the Order that was referenced together with the Approval Order as Dismissal Order.

6 Table of Authorities

6.1 Constitutional Provisions

- 6.1.1** Seventh Amendment of the Constitution of the United States (on Page 21)

6.2 Statutes

- 6.2.1** RCW 41.04.445 (on Pages 9 [in footnote], 21 and 22)
- 6.2.2** RCW 41.40.795(6) (on Page 21)
- 6.2.3** RCW 41.40.795(6)(a) or (b) (on Page 23)
- 6.2.4** RCW 49.48.030 (on Page 3)

6.3 Court Rules

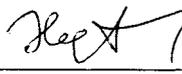
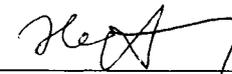
- 6.3.1** Civil Rule (CR) 23 (on Pages 6 and 16)
- 6.3.2** CR 23(a)(3) and (4) (on Pages 7, 8 [in footnote] and 15)
- 6.3.3** CR 23(a)(3) and (4) (on Pages 7, 8 [in footnote] and 15)
- 6.3.4** CR 23(a)(4) (on Pages 11, 26 and 27)
- 6.3.5** CR 23(b)(1) and (2) (on Page 6)

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7 Dates and Signatures

Dated in Edmonds, Washington this 14th day of November 2008, by:

(Virág Hegyi)  
Virág Hegyi by her Guardian Attila Hegyi and Attila Hegyi (Pro se)

8 Affidavit of Service

We declare that we have caused to hand-deliver a copy of the Brief of Appellants and this Reply to Response to Objection to each of the addressee below:

Department Counsel Timothy J. Filler, Esq.

Foster Pepper PLLC

1111 Third Ave. Suite 3400

Seattle, WA 98101-3299

Class Counsel Stephen K. Strong, Esq.

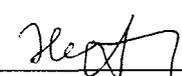
Bendich, Stobaugh & Strong, P.C

701 Fifth Avenue, Suite 6550

Seattle, WA 98104-7097

We declare under penalty of perjury under the laws of the state of Washington that the forgoing is believed to be true and correct.

Dated in Edmonds, Washington this 14th day of November 2008, by:

(Virág Hegyi)  
Virág Hegyi by her Guardian Attila Hegyi and Attila Hegyi (Pro se)

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

VIRÁG HEGYI et al.,
Appellants

v.

DEPARTMENT OF RETIREMENT SYSTEMS et al.,
Respondents

Thurston County No.: **05-2-00131-1**
COA No.: 38094-3-II

AFFIDAVIT OF SERVICE
of Brief of Appellants

I, the undersigned Marianna E. Hegyi, declare under penalty of perjury of the laws of the State of Washington that:

(1) I am over the age of 18 years;

(a) I delivered a photo-copy of said Brief of Appellants to Timothy J. Filler and Stephen K.

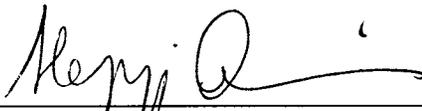
Strong by leaving one such photo-copy at each of the following addresses respectively:

Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, Suite 6550
Seattle, WA 98104-7097

(2) I have read the above, know its contents and believe the same is true and correct.

Dated at Seattle, WA, this 14th Day of November 2008

By: 
Marianna E. Hegyi

Thurston County No.: 05-2-00131-1
COA NO.: 38094-3-II

Marianna E. Hegyi
19620 81st PL W, Edmonds, WA 98026
(425) 220-3713

Affidavit of Service of Brief of Appellants - 1 of 1

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