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NO. 52253-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs/Respondents,

v.

KING COUNTY,

Defendant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF RETIREMENT SYSTEMS,

Appellant/Intervenor.

**BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS**

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I. INTRODUCTION

This case presents an issue from a class action settlement with which this Court is familiar. In 2011, the Washington State Supreme Court ordered King County to enroll a class of employees and former employees of non-profit public defender corporations into the Public Employees' Retirement System (PERS). *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (*Dolan I*). The Supreme Court remanded the case to the superior court to implement the Class's enrollment, which has led to subsequent appeals before this Court. In the first appeal, this Court granted the Department of Retirement Systems full party status in the litigation. In the second appeal, this Court affirmed the superior court's order that King County is liable for \$10.5 million in interest related to retroactive employee and employer contributions. This, the third appeal, relates to how the superior court has allocated the responsibility for payment of attorney fees awarded to class counsel.

Guided by an earlier class action case concerning PERS, the superior court awarded \$12.544 million to counsel for the Class under the "common fund/common benefit" theory. Under this approach, the prevailing party, rather than the losing party, pays attorney fees to the prevailing party's counsel when the litigants have created a common fund for the benefit of others. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70-

71, 847 P.2d 440 (1993). Here, payment to class counsel of the attorney fee award came out of the settlement funds King County owed to the PERS fund for retroactive employer and employee contributions. Class members remained responsible for reimbursing the PERS fund for their individual pro rata shares of the attorney fee award under one of two payment options.

Approximately one year after the Department began implementing the plan for class members to reimburse the PERS fund, class counsel moved to exempt class member Judge Laura Inveen from paying her pro rata share of the attorney fee award. Because she is now a member of the judiciary, Judge Inveen's benefits under PERS are different than those of ordinary PERS members. The superior court ordered the Department to not collect attorney fees from Judge Inveen, and not to recalculate the pro rata fees for other class members, which effectively means that the PERS fund will end up covering Judge Inveen's pro rata share of the fee award.

The superior court's order exempting Judge Inveen from paying her pro rata share of the attorney fee award violates the common fund/common benefit theory for granting attorney fees. It also violates the principles emphasized in *Bowles*, specifically, that the PERS fund is not a public fund, but a fund to pay for all PERS members' retirement benefits, and the class members must reimburse the fund. As in *Bowles*, the PERS

fund in this case serves only as a conduit for “fronting” attorney fees owed by class members to their attorneys.

By exempting Judge Inveen from paying her portion of attorney fees, the superior court has compromised the PERS fund by not offsetting the loss to the fund. The superior court’s order exempting Judge Inveen from paying her share of the attorney fee award is also contrary to an order it previously entered, *denying* class counsel’s motion to exempt class-member Judge Julia Garratt from paying her pro rata share of the attorney fee award. This Court should reverse the superior court’s order exempting Judge Inveen from paying class-member attorney fees because the order improperly takes money from the PERS fund for what amounts to a private obligation. In the alternative, this Court should provide guidance to the parties on how the Department is to obtain reimbursements to the PERS fund for class members who are similarly situated to Judge Inveen and Judge Garratt, or remand this issue for the superior court to provide such guidance.

II. ASSIGNMENT OF ERROR

1. The superior court erred as a matter of law by issuing an order that will result in the PERS fund, which includes money from PERS members and employers not involved in *Dolan*, paying Judge Inveen’s pro rata share of the attorney fee award.

2. The superior court erred by not providing guidance on how the Department is to administer the process of obtaining reimbursement to the PERS fund of class-member shares of the attorney fee award for those who are similarly situated to Judge Inveen and Judge Garratt.

III. ISSUE

1. Did the superior court violate the common fund attorney fee principles under *Bowles* by ordering the Department to not collect from Judge Inveen her pro rata share of class-member attorney fees, resulting in the PERS fund absorbing her share?

2. If this Court does not reverse the superior court's order, should this Court provide guidance to the parties on the circumstances under which class members who are also members of the judiciary must pay their pro rata share of the common fund attorney fee award and when they are exempt?

IV. STATEMENT OF THE FACTS

A. Background: *Dolan v. King County (Dolan I)*

In 2006, employees and former employees of non-profit public defense corporations (the Class) sued King County in Pierce County Superior Court, claiming that the County should have enrolled them in PERS. CP 1-6. The superior court certified the case as a class action under CR 23(b)(1) and CR 23(b)(2). CP 5. The Class demanded that the County

pay the employees' and the employers' retroactive contributions. CP 1-6.

The Department of Retirement Systems, which administers PERS and other State retirement systems, was not a party to the lawsuit.

The superior court ordered the County to enroll the Class in PERS. *Dolan I*, 172 Wn.2d at 310. On appeal, the Washington State Supreme Court explained that King County gradually extended control over the public defender organizations through a series of actions beginning in 1988 and culminating in 2005. *Id.* at 303-07. The Court concluded that the employees of the public defender organizations were employees of the County for purposes of PERS, and therefore entitled to PERS membership. *Id.* at 320. Without specifying an enrollment date, or determining whether retroactive service credit was due, the Court remanded the case to the superior court for further proceedings. *Id.* at 322.

B. Background: The *Dolan* Settlement and the Department's Involvement (*Dolan II* and *Dolan III*)

On remand from the Supreme Court, the superior court ordered the County to enroll the class members in PERS, without determining whether the Class should receive pension service credits for past years, when neither the employees nor employers had paid any contributions into the PERS system. *Dolan v. King County*, No. 49876-6-II, 2018 WL 2027258, 3 Wn. App. 2d 1046, at *2 (Wash. Ct. App. May 1, 2018) (unpublished)

(*Dolan III*), review denied, 191 Wn.2d 1010 (2018). In December 2012, the County settled with the Class. *Id.*

After the proposed settlement was revealed, the Department moved for intervention as a full party, contending it had not consented to the settlement, and the County had no authority to harm the state pension system by waiving interest. *Dolan v. King County*, No. 44982-0-II, 2014 WL 6466710, 184 Wn. App. 1038, at *1-3 (Wash. Ct. App. Nov. 18, 2014) (unpublished) (*Dolan II*). The superior court granted the Department partial intervention to object to the settlement. *Dolan II* at *3-4. Over the Department's objections, the superior court approved the settlement and prohibited the Department from charging interest on the late contributions. *Id.* at *5; CP 378-79, 382, 2167. The Department appealed.

This Court reversed, holding that "it is axiomatic that an entity cannot be bound to a contract to which it is not a party," and therefore the Department could not be bound by the settlement contract between King County and the Class. *Dolan II* at *1 (quoting *Jones v. Matson*, 4 Wn.2d 659, 670, 104 P.2d 591 (1940)). The Court vacated the order approving the settlement and reversed the superior court's decision allowing the Department only limited intervention. *Id.* at *6-7.

On the subsequent remand, the Department participated as a full party. *Dolan III* at *3. The County and the Class agreed to a new settlement, again providing retroactive PERS service credits from 1978 to 2012. *Id.*; CP 425-30. The settlement agreement did not resolve the question of whether King County would pay the interest on late contributions to replace lost investment returns on the retroactive contributions. The settlement agreement also did not resolve the issue of the amount of attorney fees class counsel was entitled to, or who would pay them.

On the interest issue, the superior court found that it had original jurisdiction to decide, in equity, the County's liability for interest owed on late contributions, but held that the County was liable for only \$10.5 million out of an interest obligation of approximately \$64 million. CP 2162. This Court affirmed. *Dolan III* at *11-14.

C. Background: Attorney Fee Litigation (*Dolan IV*)

The last significant remedy to be addressed is attorney fees. On October 28, 2015, the superior court awarded Class counsel common fund attorney fees of \$12.554 million. CP 80. The court then issued another order, on March 11, 2016, to implement a payment plan for the fees. CP 92-99. King County would pay the \$12.554 million from the contributions the County held for payment to PERS for the class members' service

credits. CP 98. The Class would then reimburse the PERS fund, with each class member having one of two repayment options. One option was an upfront payment of a pro rata share of the \$12.554 million in contributions owed by the member. CP 96. The second, and default option if the first was not chosen, was a reduction in the member's future monthly pension allowances. CP 96.

The March 2016 order gave the Office of the State Actuary (OSA) the tasks of calculating (i) the individual and total pension liability added by *Dolan* service credits (from which the Department could determine the contributions owed by each member), and (ii) an alternative lifetime pension reduction percentage to be applied to each class member's pension.¹ CP 96. OSA and the Department calculated contribution amounts for each member and the alternative pension reduction percentage. These amounts are actuarially equivalent. CP 137-142. If the contributions owed by any members are increased or decreased, the court-ordered contribution amounts of all members would have to be recalculated to ensure the PERS fund recovers the \$12.554 million in contributions used to pay class attorney fees. CP 137-142.

¹ The parties later agreed to cap the percentage reduction at 12.67%. CP 110.

After OSA completed the calculations, the Department sent notices to each known class member. CP 211. The superior court, anticipating the parties might discover new class members, provided for class members discovered before the notices were sent:

If, after final submission of class member data to OSA and before the sending of notices as provided in paragraph 3 below, the parties learn of additional class members eligible for Dolan service, the Department and class counsel will estimate a pro rata share of the attorney fee for such newly identified members.

CP 96. However, no provision in the agreed order approved by the superior court addressed whether class members discovered *after* the notices were sent would be obligated to pay additional shares of the fees.

None of the parties appealed either the October 25, 2015, order awarding the attorney fees or the March 11, 2016, order establishing the payment and reimbursement plan.

On June 27, 2017, the Class requested an additional option for class members “(1) who are eligible for early retirement with full pension at age 62 after their Dolan service was tardily credited or (2) who were not previously vested before their Dolan service was tardily credited.” CP 110-112. The Class argued that OSA’s valuation would “result in requiring affected individuals to pay attorney fees with more cash than they should in the lump-sum method.” CP 115. The Class asked the court

to give these class members “the option of asking that their pro rata share be recalculated” if they wished to pay their pro rata share of the common fund attorney fee in cash. CP 115. None of the parties knew, at that time, the identity of these class members. CP 110, 115.

The superior court denied the Class’ motion on July 17, 2017. Thereafter, the Department sent notices to class members.² CP 211.

D. Background: Judge Julia Garratt

On June 27, 2017, the Class filed a motion asking the superior court to rule that Judge Julia Garratt and other similarly situated class members are not responsible for their pro rata share of the common-fund attorney fees. CP 117-121. Judge Garratt is a PERS Plan 2 member and a class member because she previously was employed with a King County public defender organization. CP 117. PERS Plan 2 members are entitled to a retirement allowance calculated by the formula: 2% x service credits amount x average final compensation (AFC) (the average compensation of the members’ final two years of work in a PERS-eligible position). RCW 41.40.620. This retirement allowance is funded by members’ and their employers’ contributions to the PERS fund, which the State invests to pay for retirement benefits.

² Because the superior court certified the class under CR 23(b)(1) and CR 23(b)(2), class members could not opt out of participating in the *Dolan* settlement. CP 5.

Unlike most PERS members, Judge Garratt also participates in the judicial multiplier program, which allows judges to earn 3.5% for each year of judicial service, but caps their retirement allowance at 75% of their AFC. CP 119; RCW 41.40.767. In other words, by participating in the judicial multiplier program, Judge Garratt's monthly retirement allowance is calculated using 3.5% instead of 2% for each year she serves as a judge i.e. $3.5\% \times \text{service credits amount earned while serving as a judge} \times \text{AFC}$. However, her participation in the program means that her retirement allowance is capped at 75% of her AFC. Because of this cap, if Judge Garratt were to continue to work as a judge, she will eventually reach a point where she will no longer benefit from *Dolan* class membership.³ As of the date of the Class's motion, Judge Garratt will reach that point with about six more years of judicial service. CP 119.

On July 17, 2017, the superior court denied the Class's motion to exempt Judge Garratt from paying her pro rata share of attorney fees. CP 163-164.

E. Background: Judge Laura Inveen

On May 21, 2018, the Class filed a similar motion to exempt Judge Laura Inveen from having to pay her pro rata share of the attorney fees.

³ At whatever point Judge Garratt has enough PERS service credits to have a monthly retirement allowance of 75% of AFC, she would no longer benefit from earning additional service credits, including the additional credits she earned as a class member.

CP 220-234. Judge Inveen served as a public defender from 1980 to 1982, making her a class member. CP 216. She began her judicial service in 1988 as a King County District Court Judge. CP 216. She began serving as a King County Superior Court Judge in 1992, and she is currently the Presiding Judge for the King County Superior Court. CP 216.

Like Judge Garratt, Judge Inveen is enrolled in PERS Plan 2 and the judicial multiplier program. CP 216. Unlike Judge Garratt, she has already reached her maximum allowance of 75% of her AFC. CP 216. This means that she will not receive any retirement benefit as a result of her work as a public defender. In other words, Judge Inveen does not benefit from being a *Dolan* class member, but she remains responsible for her pro rata share of the common-fund attorney fees, which, for her, totals \$14,482. CP 223.

The Class asked the superior court to exempt Judge Inveen, just as it had asked the court to exempt Judge Garratt, from having to pay her pro rata share of the attorney fees. CP 249. Unlike the motion regarding Judge Garratt, the Class's motion regarding Judge Inveen sought to offset Judge Inveen's share by having OSA recalculate the pro rata shares of four other class members. King County had not sent these members' salary and service credit information to the Department, and, in turn, OSA had not fully calculated their pro rata shares of the attorney fees. CP 222. Thus,

lacking the required calculations, the Department was unable to charge two of these members their full pro rata shares, and the Department did not charge the other two members for any share at all of the common-fund attorney fees, despite all four members receiving all the PERS service credits they are entitled to under *Dolan*. CP 264. The Class moved for the Department to charge these newly discovered members their full pro rata shares of the attorney fees, a combined \$21,308.75, and to exempt Judge Inveen from paying her share.

On June 28, 2018, the superior court granted the motion in part. CP 262-264 (Inveen order). The court held that the Department shall not assess Judge Inveen for her pro rata share of common-fund attorney fees, finding in equity that doing so “is inherently unfair and an unintended consequence of the Dolan litigation.” CP 263-264. The superior court also ordered the Department not to recalculate and reassess attorney fees for the newly discovered four members, because “[t]he fact that other class members may pay for these class members’ share of the attorney’s fees is not sufficient reason to go back and attempt to correct the error.” CP 264. In effect, the PERS fund must absorb Judge Inveen’s pro rata share of common fund attorney fees.

The Department timely appealed the Inveen order.

V. ARGUMENT

When a court orders a prevailing party, or a prevailing plaintiff class, to pay common fund/common benefit attorney fees that the court has awarded to class counsel, the plaintiff class must actually pay those fees. Neither *Bowles* nor any other recognized authority allows the plaintiff class or class members to opt out of that obligation or impose the obligation on a third party that fronted the initial payment. The superior court's order exempting Judge Inveen from paying her allotted share of the attorney fee award erases a debt she owes to the PERS fund, and the court should have ordered the Class to make other arrangements to pay that amount to the PERS fund rather than requiring the fund to absorb the cost of the Class's attorney fees. The Inveen order should be reversed.

In addition to being legally flawed, the Inveen order exempting Judge Inveen from reimbursing her share of the common-fund class attorney fee award reaches the opposite result of a prior order declining to exempt Judge Garratt from her reimbursement obligation. The inconsistency in these two orders creates uncertainty as to what standards apply to determine when a judge, who is also a class member, is exempt or not exempt from paying a pro rata share of the attorney fee award. If this Court declines to reverse the Inveen order, both the Class and its members

and the Department would benefit from guidance on how to apply attorney fee reimbursement to class members who are also judges.

A. Under *Bowles*, the Superior Court Cannot Force Uninvolved Third Parties to Pay for Common-Fund Attorney Fees

The question here is whether the superior court improperly exempted a class member from paying a pro rata share of the common-fund attorney fee award when doing so puts the burden on the PERS fund to absorb the cost of those fees. Like the original question of whether a common fund/common benefit basis for an attorney fee award was appropriate in this case, this is a question of law to be reviewed de novo. *See Bowles*, 121 Wn.2d at 70-74 (reviewing grounds for attorney fee award on a de novo basis, while reviewing the reasonableness or amount of fees under a discretionary standard); *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 329, 229 P.3d 893 (2010) (reviewing de novo whether insurer required to contribute under common fund theory to insured's legal expenses to obtain her liability recovery from tortfeasor), *rev'd on other grounds*, 173 Wn.2d 643 (2012); *Delagrave v. Employ. Sec. Dep't*, 127 Wn. App. 596, 605, 111 P.3d 879 (2005) (reviewing as a legal question whether ESD should be required to pay a portion of attorney fees a claimant successfully recovered from L&I under common fund theory).

By ordering the Department not to collect from Judge Inveen her share of attorney fees and rejecting the Class's request to pay for her share by recalculating the shares of four other Class members, the superior court has effectively ordered the PERS fund to absorb Judge Inveen's pro rata share of the common-fund attorney fees. This means that all PERS members and employers — not just the Class — will pay for Judge Inveen's pro rata share of the common-fund attorney fees. These other members and employers played no part in the *Dolan* litigation, and ordering them to cover for Judge Inveen's share of attorney fees violates the "common fund/common benefit" procedure for attorney fees in class action cases.

- 1. The Inveen order violates *Bowles* and the common fund/common benefit theory by saddling the PERS fund with a portion of the attorney fees awarded**

To determine whether the Class's attorneys are entitled to attorney fees, the superior court followed the "common fund/common benefit" theory under *Bowles*. CP 76. Under this theory, an award of attorney fees is appropriate "when the litigants preserve or create a common fund for the benefit of others as well." *Bowles*, 121 Wn.2d at 70-71. Unlike attorney fees under statute or other legal theories, under the "common fund/common benefit" theory, the losing party — King County in this — case is not responsible for paying attorney fees to the prevailing party. *Id.*

at 69 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)). Instead, it is members of the prevailing party — the Class in this case — who are responsible for paying fees to their attorneys; no one else.

In *Bowles*, the Supreme Court affirmed the trial court’s decision to apply common fund attorney fees in a class action case where PERS Plan 1 members gained the right to have leave cashouts included in their AFC, “because the suit secured additional pension benefits for many other PERS I members.” 121 Wn.2d at 71. The difference between *Bowles* and most other common-fund attorney fee cases is the procedure for paying the fee. The Court in *Bowles* affirmed the trial court’s payment procedure of having the PERS fund front the \$1.5 million of attorney fees, with *Bowles* class members later reimbursing the fund. *Id.* at 73. It is unusual for a court to order a third party to “front” common fund attorney fees.

The Court, however, expressly stated that “the attorney fee award remains a liability of the plaintiff class.” *Id.* at 76; *see also Serres v. Dep’t of Ret. Sys.*, 163 Wn. App. 569, 588, 261 P.3d 173 (2011) (holding that the Department could not seek appellate review of an award of common fund attorney fees because the “plaintiff class has the burden of paying the attorney fees awarded” and “DRS has not demonstrated any financial impact to it from the award”).

Here, the superior court followed *Bowles* in placing the ultimate burden of paying the attorney fees on the Class. The only difference between the cases is that, instead of ordering the PERS fund to front the attorney fees as the court did in *Bowles*, the superior court in this case ordered King County to pay the \$12.544 million to class counsel from money King County was holding to pay for the class members' PERS service credits. CP 98. This money would have gone into the PERS fund, and, therefore, the Class still must reimburse the PERS fund. CP 92-99.

With the Inveen order, the superior court has moved outside of what is permissible under "common fund/common benefit" attorney fee doctrine. By having the fund absorb Judge Inveen's pro rata share of the common-fund attorney fees, without any subsequent reimbursement, the superior court has shifted the responsibility of paying attorney fees away from the Class to the PERS fund. This is impermissible under *Bowles* because the Class, not the fund, is solely responsible for attorney fees. *Bowles*, 121 Wn.2d at 76. The PERS fund may only *front* the attorney fees. *Id.* It should go without saying that the same is true here.

2. Contrary to *Bowles*, the Inveen order improperly treats the PERS fund as property of the Class.

The superior court's order on Judge Inveen also impermissibly treats the PERS fund as property of the Class. It is not. *Bowles* stated, and

the superior court recognized, that the PERS fund is not a public fund, but a fund for the benefit of all PERS members. *Id.* at 74-75 (citing *State ex rel. State Employees' Ret. Bd. v. Yelle*, 31 Wn.2d 87, 195 P.2d 646, 201 P.2d 172 (1948)); CP 78 (“the PERS fund is not public, but ‘a special fund of a proprietary nature (i.e., owned by the individuals)’”). As it does not belong to the Class, the PERS fund’s only purpose here is to serve as a conduit for fronting the attorney fees. Class counsel implicitly recognized the need for the Class to reimburse the fund, by asking the court to recalculate the pro rata shares of four other class members to offset exempting Judge Inveen from paying her pro rata share. CP 220-234. In doing so, class counsel implicitly acknowledged that the PERS fund cannot pay *Dolan* attorney fees without getting reimbursed.

Put differently, if the PERS fund were instead replaced by a private bank that had agreed to front attorney fees with subsequent reimbursement, there is no question that it would be improper to later force the bank to pay for Judge Inveen’s pro rata share without reimbursing the bank in any way. Even more so, it is improper to require other public employees and employers, who receive no benefit from the *Dolan* settlement, to pay attorney fees, with no reimbursement to the fund that ensures their retirement benefits. Accordingly the Inveen order violates the common fund/common benefit attorney fee procedure under *Bowles* by

treating the PERS fund as a guarantor of private class member obligations. It should be reversed.

3. Allowing Judge Inveen to avoid a class-member obligation is inconsistent with procedures applicable to CR 23(b)(1) and CR 23(b)(2) classes

In addition to violating the common fund/common benefit theory of attorney fees as applied in *Bowles*, the Inveen order is inconsistent with class action law. The Class is certified as a “mandatory” class under CR 23(b)(1) and CR 23(b)(2). CP 5. Unlike classes certified under CR 23(b)(3), class members certified under CR 23(b)(1) and CR 23(b)(2) do not have an opportunity to be excluded or opt out. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189, 157 P.3d 847 (2007) (citing *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003)).

Under the superior court’s order, Judge Inveen no longer has to pay her pro rata share of attorney fees like the rest of the Class, and, effectively, does take any benefit or accrue any obligation as the other class members, despite undeniably meeting the definition of a class member. In other words, the court excluded Judge Inveen from the Class. Because this is a class action certified under CR 23(b)(1) and CR 23(b)(2), however, the court cannot exclude or allow any class member to opt out, and its order on Judge Inveen should be reversed.

B. In the Alternative, This Court Should Provide Guidance On How The Department Should Implement Attorney Fee Reimbursements for Class Members in the Judiciary

If the Court does not reverse the superior court's Inveen order, it should, in the alternative, provide the parties guidance on how to implement the requirements for reimbursing the PERS fund for fronting class counsel's attorney fee award if additional class members are identified in the future who are members of the state judiciary. The superior court's orders on Judge Garratt and Judge Inveen are contradictory. CP 262-264 & 163-164.

The superior court previously ruled with respect to Judge Garratt and similarly situated judges participating in the judicial multiplier program that it was too late to change the March 11, 2016, order implementing a payment plan for the fee award. *See* CP 92-99. OSA completed its assigned tasks and calculations over two years ago. CP 211. And the Department completed implementation of that March 11, 2016, order over a year ago by sending notices to each class member billing them for their pro rata share of the Class' attorney fees. CP 211.

But then, on June 28, 2018, the superior court ordered the Department to not collect from Judge Inveen, who also participates in the judicial multiplier program, her pro rata share of the cost of the attorney fee award. The only difference between the two judges is that Judge

Inveen has earned enough PERS service credits to no longer benefit from *Dolan* class membership, whereas Judge Garratt had not yet earned enough PERS service credits to no longer benefit from *Dolan* class membership.

These two contradictory orders do not provide any guiding standards on how the Department is to ensure reimbursement of the PERS fund from similarly situated class members who may be identified in the future. In other words, the superior court failed to set out how the Department is to administer the common-fund attorney fee reimbursement process for other members of the judicial multiplier program, or even whether Judge Garratt can move to exempt herself from paying her pro rata share once she has earned enough PERS credits to no longer benefit from *Dolan* class membership.

Additionally, the superior court's orders do not resolve liability for the common-fund attorney fees for a subset of the Class - those who are similarly situated to Judge Garratt and Judge Inveen. As it stands, each member of this subset must move for the superior court, or have class counsel move on their behalf, to determine whether he or she must pay his or her share of the attorney fees. Thus, the conflicting orders on Judge Garratt and Judge Inveen creates uncertainty for the Class and its members, not just for the Department, in ensuring proper use of the PERS

fund and compliance with the March 2016 order implementing the attorney fee award payment plan.

Therefore, if this Court decides not to reverse the superior court's order on Judge Inveen, it should provide guidance on how the Department should implement the *Dolan* common fund attorney fee process for class members who are, or who will become, participants of the judicial multiplier program, or remand that question to the superior court.

VI. CONCLUSION

This Court should reverse the superior court's June 28, 2018, order on Judge Inveen because it violates the "common fund/common benefit" doctrine for paying attorney fees under *Bowles* by imposing a portion of those fees in this case on the PERS fund, which has no liability for the fees. In the alternative, this Court should provide guidance to the Department on how to implement attorney fees for class members who are similarly situated to Judge Inveen and Judge Garratt.

RESPECTFULLY SUBMITTED this 13th day of December, 2018.

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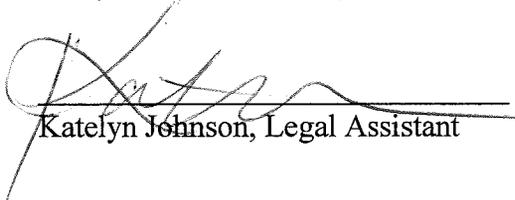
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DATED this 13th day of December, 2018 at Tumwater, WA.


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ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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