

FILED
Court of Appeals
Division II
State of Washington
3/15/2019 1:59 PM

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.

**REPLY BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS**

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I. INTRODUCTION

As the Department has addressed, the order exempting Judge Laura Inveen from paying her share of the Class attorney fees violates the legal principle governing common fund attorney fees under *Bowles v. Dep't of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1993), and the standards governing mandatory classes certified under CR 23(b)(1) and (b)(2). The Class ignores these arguments.

Instead, the Class argues that the standard of review should be abuse of discretion because the superior court issued the order on Judge Inveen under its equitable power to modify injunctions and equitable orders. While it is true that the question of whether to award common fund attorney fees is within a trial court's equitable discretion, the question here is whether a non-litigant third party must pay such attorney fees, and *Bowles* and other authority confirm that this is a question of law.

The Class also argues that the Department invited the superior court to have the PERS fund absorb Judge Inveen's pro rata share of the common fund attorney fees. The Department did no such thing, as neither the Class nor the Department argued, or even suggested, that the PERS fund pay for Judge Inveen's share of attorney fees.

Therefore, the Department asks this Court to reverse the Inveen order. In the alternative, the Department asked this Court to provide

guidance on how to administer attorney fees for class members similarly situated as Judge Inveen, as Dolan class members who do not benefit from membership, because the Inveen order did not provide such guidance. The Class has made suggestions on how to treat these members, but the Department is seeking direction from the Court.

The Class further argues that this appeal is frivolous and asks for sanctions. Because the Department has raised valid legal issues about the Inveen order arising under *Bowles* and the nature of mandatory classes under CR 23(b)(1) and CR 23(b)(2), the Court should reject the Class' claim and request for sanctions. At the same time, the Court should also strike the letter the Class attached to its brief and improperly added to the clerk's papers after all superior court proceedings had concluded.

II. ARGUMENT

A. **Neither Party Requested that the Superior Court Direct the PERS Fund to Absorb Judge Inveen's Share of Attorney Fees**

The Class suggests that this appeal improperly raises an error the Department invited the trial court to make. They are incorrect. The Department did not invite the superior court to order the PERS fund to absorb Judge Inveen's share of attorney fees when it opposed the Class motion to assess fees against four other class members to offset Judge Inveen's pro rata share. Respondents' Br. at 2, 13.

Class counsel's argument refers to the invited error doctrine, which provides that "a party may not set up an error at trial and then complain of it on appeal." *Horne v. Aune*, 130 Wn. App. 183, 191, 121 P.3d 1227 (2005) (citing *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004)). The doctrine, however, does not apply when the court's action is materially inconsistent with the course of action suggested by the appealing party. *Id.* at 191. The Department did oppose the Class' motion, but it did not invite the error in the Inveen order.

Neither the Department nor the Class asked that the PERS fund pay for Judge Inveen's pro rata share of the common fund attorney fees. The Class moved for the superior court to offset Judge Inveen's share by recalculating the shares of four other class members. CP 222-23. They reasoned that it was fair to do so because, when the Department and the Office of the State Actuary (OSA) calculated each class member's pro rata of the common fund attorney fees, King County provided incomplete information for these four members. *Id.* This led the Department not to charge these four class members their full pro rata shares of the common fund attorney fees. *Id.* The Class then reasoned that it was fair to recalculate the pro rata shares of these four class members to offset the money the PERS fund would lose if the superior court exempt Judge Inveen from paying her pro rata share.

The Department objected to the Class' motion because it asked for a remedy that conflicted with two prior court orders. CP 236-38. The first was the agreed order entered on March 11, 2016, which provided that only new class members who were discovered before the notices were sent would be obligated to pay a pro rata share of the fees. CP 94-95 (the Class and the Department may submit newly discovered class members for the purposes of calculating attorney fees "after the final submission of the class member data to OSA and before the sending of the notices..."). This order was agreed to by the parties and approved by the superior court. CP 98. The second order, which is more salient to this appeal, was the superior court's order denying the Class' motion to exempt Judge Julia Garratt from paying her pro rata share of the attorney fees. CP 143-45.

Most important, the Department also objected to the motion because class counsel gave "no indication that the four class members who the Class claims should pay increased shares of Plaintiffs' fees have been notified of the Class's motion, let alone support this motion." CP 239. Without such notice, it is questionable whether the superior court could even consider the motion without violating these four members' "due process right to notice." *Id.* Put differently, the Department objected to the Class' motion believing it was unconstitutional for the superior court to apply the remedy asked for in the motion.

The superior court did not address any of the Department's arguments, choosing to apply a remedy not requested, or even suggested, by either the Class or the Department. CP 262-64. Therefore, neither the Class nor the Department "invited" the superior court to order the PERS fund to absorb Judge Inveen's pro rata share of the common fund attorney fees. The superior court issued this order independent of the parties' arguments.

B. Whether the Superior Court Violated Class Action Principles Under *Bowles* and the Court Rules Is a Question of Law Subject to De Novo Review

The Department argued in its opening brief that the superior court's order on Judge Inveen violates common fund attorney fee principle under *Bowles* and standard for mandatory class actions under CR 23(b)(1) and (b)(2). Appellant's Br. at 15-21. Instead of addressing these arguments, the Class declares that the superior court's "jurisdiction and power here is based on equity" and that the court has wide equitable discretion to modify its injunctions and equitable orders. Respondents' Br. at 13-14, 17-21. In the context of the issues presented in this appeal, the Class is wrong.

While common fund attorney fees are awarded by trial courts exercising their equitable jurisdiction, not all trial court decisions relating to common fund attorney fees are within trial courts' equitable

jurisdiction. Some are questions of law. *See Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 329, 229 P.3d 893 (2010), *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).

For example, in *Matsyuk*, the Court of Appeals determined that an insurer was not required to contribute, under the common fund theory, to the legal expenses incurred by the insured to recover from the tortfeasor. *Matsyuk*, 155 Wn. App. at 329. The Court of Appeals addressed this as a legal question, subject to *de novo* review. *Id.* While the Supreme Court ultimately reversed the Court of Appeals, it did not reverse on whether this was a question of law. *Matsyuk*, 173 Wn.2d at 656.

Specifically, the Supreme Court ruled that “[t]he rule requiring a pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy language,” but the Court then determined that whether an insurer is liable for the pro rata share of the common fund attorney fees of its insured is a legal question involving interpretation of the insurance policy. *Id.* at 659-61. Thus, the question of whether common fund attorney fees are applicable in any particular case is an equitable one, while the question of whether an insurance company is

liable for the pro rata share of the common fund attorney fees of its insured is a question of law. *Id.*

Here, as in *Matsyuk*, the issue is whether a third party that was not a litigant in the lawsuit in question should pay attorney fees under the common fund theory. The PERS fund, similar to insurance companies and their insureds, has a contractual relationship with its members. *See, e.g., Bakenhus v. City of Seattle*, 48 Wn.2d 695, 698, 296 P.2d 536 (1956) (a contractual relationship exists between public pension plan and its members); *Noah v. State by Gardner*, 112 Wn.2d 841, 843, 774 P.2d 516 (1989) (PERS is a contract between the State and PERS members); *Washington Educ. Ass'n v. Dep't of Retirement Systems*, 181 Wn.2d 212, 332 P.3d 428 (2014) (examining the contractual relationship between public pension plans and their members). The Court in *Matsyuk* addressed whether the insurance company must pay for one of its insured's share of the common fund attorney fees as a question of law. Likewise, the Court here should also address whether the PERS fund must pay for one of its member's common fund attorney fees as a question of law. And as a matter of law, it should not.

C. The Superior Court's Order on Judge Inveen Is Inconsistent with *Bowles* and the Standard Governing Mandatory Class Actions

The Class overlooks and does not address the Department's primary legal argument, which is that the superior court's Inveen order violates principle established in *Bowles* for application of common fund attorney fees in cases impacting public pension systems. Likewise, the Inveen order is at odds with the standard for mandatory classes certified under CR 23(b)(1) and (b)(2). Even if Judge Inveen's share of the attorney fees is, as the Class argues, small in comparison to the other payments and awards that were at issue in this case, the superior court must still follow established legal principles. Respondents' Br. at 14 (comparing Judge Inveen's attorney fee share to the amount of interest involved in a prior appeal in this case, *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.*

If the superior court had followed the principle set forth in *Bowles* for implementing the common fund attorney fees in a public pension case, the PERS fund would only front the attorney fees, with the Class remaining responsible for the fees and for reimbursing the fund. *See Bowles*, 121 Wn.2d at 77. Instead, the superior court exempted Judge

Inveen from paying her pro rata share of the common fund attorney fees, effectively ordering the PERS fund to pay for that share, and, thereby, deviating from the common fund attorney fee principle under *Bowles*. This deviation effectively made the fund liable for the attorney fees of its members, which is contrary to *Bowles* and unsupported by any other authority.

Additionally, Judge Inveen is a class member under CR 23(b)(1) and CR 23(b)(2). Classes certified under CR 23(b)(1) are designed to avoid prejudice to the defendant or absent class members stemming from separate actions by or against individual members of the class. *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003). CR 23(b)(2) is appropriate when injunctive or declaratory relief is requested, and when the defendant has acted or refused to act or failed to perform a legal duty on grounds generally applicable to the class. *Id.* Unlike a class action certified under CR 23(b)(3), class members under CR 23(b)(1) and (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).

Thus, while class certification is within the trial court's equitable discretion, if the superior court allows class members to opt out of the class, then the court must certify or recertify the class under CR 23(b)(3).

The Court has not done so in this case, but, by exempting Judge Inveen from paying her share of common fund attorney fees, the Court effectively allowed Judge Inveen to opt out of *Dolan* class membership.

Respondents do not address the legal issues of whether the superior court violated *Bowles* and CR 23 by exempting Judge Inveen from paying her pro rata share of the common fund attorney fees. The superior court clearly has, and because of these violations, the Court should reverse the superior court's order on Judge Inveen.

D. The Class Does Not Deny that the Superior Court Provided No Guidance on How to Treat Class Members Similarly Situated to Judge Inveen

The Class argues that the superior court's rulings on Judge Garratt and Judge Inveen are consistent because Judge Inveen currently is not benefiting from *Dolan* class membership, while Judge Garratt is. Respondent Br. at 21-22. They miss the point.

At some point, Judge Garratt, like Judge Inveen, may be a class member who does not benefit from class membership. Other judges may also reach the same situation. To achieve finality, the Department has no guidance on how to administer the common fund attorney fees reimbursement process for Judge Garratt once she has earned enough PERS credits to no longer benefit from *Dolan* class membership, or for

other members who earn enough PERS credits to no longer benefit from *Dolan* class membership.

Because the Department offered no standards of its own, the Class purports to provide the Department guidance on how to treat Judge Garratt and other similarly situated judges. *Id.* at 23. But the Class does not have authority here to issue such guidance, and the Department cannot rely on their suggestions as authority on how to administer the PERS fund.

Further, the Department cannot speculate on how the superior court will treat Judge Garratt and other similarly situated judges in the future. Guidance from the Court in this case would provide the Department with a legal basis on how to proceed with administering the common fund attorney fees in the future. The Department's suggested guidance would be this: To bring finality to these proceedings, the Court should rule that, henceforth, all class members, regardless of their circumstances as judges or their years of service credit, are responsible for their pro rata share of the common fund attorney fees, because that share is part of a debt owed by the Class to the PERS fund. It is time for litigation of these individual circumstances and questions to end and for the parties to be able to go forward with certainty regarding their respective obligations. *See* CR 1 (construe and administer civil rules "to secure the just, speedy, and inexpensive determination of every action"). Having

already been held responsible for over \$50 million of King County's liability for interest on the late contributions for class members, *Dolan III*, 3 Wn. App. 2d 1046, at *11-14, the Department is extremely concerned with achieving finality for the PERS fund.

E. Even if the Class Prevails in This Appeal, the Department's Arguments Are Not Frivolous, and Respondents Are Not Entitled to Attorney Fees

The Class motion for monetary sanctions against the Department is baseless. Respondents' Br. at 25-26. An appeal is not frivolous unless "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Boyles v. Dep't of Retirement Systems*, 105 Wn.2d 499, 507, 716 P.2d 869 (1986) (citing *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). "[A]ll doubts as to whether the appeal is frivolous should be resolved in favor of the appellant," and "an appeal that is affirmed simply because the arguments are rejected is not frivolous." *Boyles*, 105 Wn.2d at 507.

The Class argues this appeal is frivolous because the Court had already ruled, in equity, that the PERS fund must absorb some of the *interest* King County owes on retroactive PERS contributions. CR 25-26. This appeal, however, addresses the separate matter of the common fund *attorney fees*, not interest on retroactive pension contributions.

Here, the Department relies on published appellate cases where courts addressed issues regarding common fund attorney fees as questions of law, and specifically in circumstances like this case where a non-litigant is asked to pay for attorney fees. *See Matsyuk*, 155 Wn. App. at 329; *Delagrave*, 127 Wn. App. at 605. The Class has not countered the Department's legal arguments and simply asserts that the superior court has wide discretion over its injunctions and equitable orders. Respondent's Br. at 13-14. As the Class appears to have no direct legal authority to counter the Department's argument that the question here is a question of law and answered by the court in *Bowles*, this appeal has merit and is not frivolous. The Court should deny the request for sanctions.

F. The Department Moves to Strike the Irrelevant Letter Class Counsel Improperly Added to the Record Long After the Superior Court Entered Its Order

The Department requests that this Court strike from the record on appeal the letter attached as Appendix A to Respondents' Brief, and the references to it on page 25 of their brief. The Class attaches the letter in support of its argument that the Department's appeal is frivolous, but the letter is nothing more than class counsel's expression of that same opinion to the Department's counsel several months ago. The letter is not part of the record on appeal, and it has clerk's papers numbers (CP 276-78) associated with it only because class counsel artificially added it to the

superior court record by “notice” *after* the Department filed its opening brief before this Court. The letter is irrelevant and has been put before this Court improperly. This Court should not consider it.

The purpose of the appellate record is to show what the trial court had considered when it decided the issues on appeal. *See State v. Murphy*, 35 Wn. App. 658, 699 P.2d 891 (1983); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 849 P.2d 669 (1993). A party cannot supplement the record with materials that were not before the trial court. *Murphy*, 35 Wn. App. at 669 (denying a request in a criminal case to supplement the record with materials not presented to the trial court).

To see why the letter is improperly before the Court, a timeline is useful:

5/1/18	Court of Appeals issues decision on interest decision (<i>Dolan III</i>).
7/18/18	Trial court enters Inveen order.
8/8/18	Department files Notice of Appeal of Inveen order.
9/5/18	Supreme Court denies petition for review of <i>Dolan III</i> .
9/13/18	Class counsel sends letter to Department’s counsel urging dismissal of appeal from Inveen order.
12/13/18	Department files opening brief in Court of Appeals in appeal from Inveen order.
12/19/18	Class counsel files “Notice of Filing of Correspondence” in Superior Court, attaching September 13, 2018, letter.

1/10/19 Class counsel files Supplemental Designation of Clerk's Papers, designating the Notice of Filing of Correspondence with the letter. *See* CP 274-80.

As this timeline shows, class counsel filed the letter to Department's counsel in the Superior Court *after* the Department filed its opening brief in this appeal and five months *after* the Superior Court entered the Inveen order. No proceedings were pending before the trial court at that time, and the letter was never before the trial court in any prior proceedings.

In a recent case, Division One of this Court denounced use of the court file to memorialize communications between attorneys:

The court file is not a bulletin board for attorneys to post information for the press. *Neither is it an archive for communications between lawyers.* It exists so attorneys may provide the court with *documents relevant to the proceedings pending before it* so that the court can consider this information when resolving a request for relief.

Heckard v. Murray, 5 Wn. App. 2d 586, 599-600, 428 P.3d 141 (2018)

(affirming sanctions on attorney for filing documents for improper

purpose of pre-trial publicity), *review denied*, 192 Wn.2d 1013 (2019)

(emphasis added). The circumstances may be different in this case, but the same underlying principles are present: The trial court file records actual proceedings before the trial court, not communications between attorneys that were not part of those proceedings.

Likewise, the Rules of Appellate Procedure protect the integrity of that record by dictating procedures for identifying and transmitting the record to the appellate court for review, including procedures for supplementing the record. *See* RAP 9.12 and RAP Title 9 generally. Regardless of the Class' views on the merits of the Department's appeal, artificially putting the September 2018 letter into the trial court record in order to be able to cite it in this appeal was improper. The Court should strike the letter and references to it in Respondents' Brief.

RESPECTFULLY SUBMITTED this 15th day of March, 2019.

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DATED this 15th day of March, 2019 at Tumwater, WA.



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March 15, 2019 - 1:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: WA State Dept of Retirement Systems, Appellant v. Kevin Dolan, et al.,
Respondents
Superior Court Case Number: 06-2-04611-6

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