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No. 52253-5-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs/Respondents,

LAURA INVEEN,

Respondent,

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant/Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor/Appellant.

RESPONDENT INVEEN'S BRIEF

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INTRODUCTION

Intervenor Department of Retirement Systems is appealing an order that concerns one person, Laura Inveen, King County Superior Court Judge. Judge Inveen's situation is "unique" because she is the only person on the *Dolan* class list who actually received *no benefit* from the *Dolan* litigation. CP 263, Decision lines 17, 25. In this unique circumstance Judge John R. Hickman, who has presided over the *Dolan* case since its inception in 2006, exercised his equitable powers and determined Judge Inveen did not owe the \$14,482. fee that DRS had assessed against her as a supposed pro rata share of the \$12.554 million dollar common fund fee. CP 261, 263-64. (The fee was to be collected by reducing Judge Inveen's pension at retirement.) Judge Hickman found that it was "inherently unfair and an unintended consequence of the *Dolan* litigation" to assess fees against Judge Inveen when she actually received *no benefit* from the *Dolan* litigation. CP 263, lines 18-19. DRS does not assign error to these findings concerning Judge Inveen. Therefore, they are verities on appeal. *Dolan v. King County*, 2018 WL 2027258 *11, 3 Wn. App 2d 1046, *review denied*, 191 Wn.2d 1010 (2018);¹ CP 203.

DRS's first argument is (DRS Br. 16):

By ordering the Department not to collect from Judge

¹ The opinion was not published, and, while it can be cited as non-binding under GR 18.1, it is part of this same litigation and therefore it is the law of the case. *State v. Worl*, 129 Wn.2d 416, 424-26, 918 P.2d 905 (1996)

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. [Assignment of Error 1 and Issue 1].

There are two fundamental flaws with DRS's argument. First, DRS *opposed* the class's request to assess fees against the four class members who actually received benefits, unlike Judge Inveen. CP 244, RP 16-23.² And Judge Hickman accepted DRS's position on those four class members: "the Court adopts the arguments of DRS in denying their motion." CP 264, line 16. The over \$21,000 in fees for these four class members, who unlike Judge Inveen, actually substantially benefitted from the litigation, exceed the fees DRS is trying to collect from Judge Inveen. CP 225. Indeed, DRS counsel conceded this point: "We will agree that they're [the four class members] going to be billed more than DRS was supposed to receive to be fully reimbursed for attorney fees." RP 21. Thus if Judge Hickman erred in denying the class's request to assess and reassess fees for the four class members, supposedly making the repayment "short," the "error" was one that DRS invited and indeed insisted on. Consequently, DRS cannot complain here that the PERS fund is theoretically short. *Int'l Raceway, Inc.*, 97 Wn. App 1, 10, 970 P.2d 343

² RP refers to the Report of Proceedings for June 12, 2018 filed with the Court as part of this appeal.

(1999).

The second, even more fundamental flaw with DRS's first argument is that DRS *fails* to address this Court's *Dolan* opinion affirming Judge Hickman's equitable discretion to require the PERS fund, instead of the County, to absorb over \$50 million of the cost *Dolan* litigation. Nowhere does DRS address or explain how the trial court supposedly abused its equitable discretion by "effectively" (DRS's word) requiring the PERS fund to absorb \$14,482 in wrongly assessed common fund fees for Judge Inveen, when the trial court did not abuse its discretion in requiring the PERS fund to absorb over \$50 million of interest in *Dolan*. Indeed, \$14,482 is below infinitesimal for the \$40 billion PERS 2 fund, *i.e.*, 0.00000036205 of \$40 billion or, rounding up, about four hundred-thousandths of one percent.³ Nor does DRS ever explain how equity is served by making Judge Inveen pay \$14,482 in common fund fees when the case did not benefit her at all.

DRS's second argument, assignment of error 2, is that Judge Hickman erred "by not providing guidance" on how to assess or reassess fees against the *Dolan* class in the future. DRS Br. 4. The flaw with this argument is that DRS adamantly opposed any further guidance on

³ DRS Comprehensive Annual Financial Report for fiscal year ended June 30, 2018, statement of fiduciary net position for PERS Plan 2/3 shows PERS 2/3 fund with over \$40 billion in assets. <https://www.drs.wa.gov/administration/annual-report/cafr/CAFR-2018.pdf>, last visited on January 10, 2019.

assessing or reassessing attorney fees for any other class members. DRS said (CP 244, lines 12-16):

Recognizing the future will likely bring other judges similarly situated to Judges Garratt and Inveen, and other newly discovered class members or *Dolan* service credits, DRS also respectfully requests that Plaintiffs be notified that bringing future motions substantially similar to the current motion may result in the imposition of sanctions.

DRS said it wanted finality. And the Superior Court agreed with DRS's argument in denying the class's attempt to assess and reassess fees for the four class members to make their shares actually reflect the benefits received. DRS wanted to never have to assess or reassess fees in the future for the *Dolan* litigation. Judge Hickman agreed with DRS: "the Court adapts the [finality] arguments of DRS . . . the Doctrine of Finality has credibility" here. CP 264.

Thus DRS got exactly what it asked for.

ISSUES PRESENTED

1. Can DRS complain about the infinitesimal, theoretical loss to the PERS 2 fund for not charging an incorrect fee to Judge Inveen, who received no benefit, when DRS opposed assessing fees –more than covering any loss – on four additional class members who, unlike Judge Inveen, actually benefitted from *Dolan* class membership?
2. When the trial court ruled in equity that it was "inherently unfair and an unintended consequence of the *Dolan* litigation" to assess fees

against Judge Inveen because she actually received no benefit from the *Dolan* litigation, did the court abuse its discretion in deciding that DRS could not charge fees to Judge Inveen by reducing her pension at retirement?

3. Did the trial court err in not providing further guidance regarding class members in the judicial multiplier program when the trial court agreed with DRS below and gave DRS what it requested, finality?

4. Should the Court impose sanctions – a monetary fine – paid by DRS to the Court for a frivolous appeal?

FACTS

There are three appellate opinions in this case. *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011); *Dolan v. King County and DRS*, No. 44982-0-II (unpublished), 2014 WL 6466710, CP 23-38; and *Dolan v. King County and DRS*, No.49876-6-II (May , 2018) (unpublished), 2018 WL 2027258, CP 182-210. They set forth a detailed procedural history of the case and contain the law of the case.

After this Court’s opinion in 2014, and the intervention of DRS as a full party, the Superior Court entered *an agreed order* modifying it permanent injunction providing that the *Dolan* class members could receive service credit during the period of January 1978 to March 31, 2012, CP 41-46. The order defined the class (CP 42):

All W-2 employees of the King County public defense

agencies and any former or predecessor King County public defense agencies who work or who have worked for one of the King County public defense agencies within three years of the filing of this lawsuit;

and

All W-2 employees of the King County public defense agencies and any former or predecessor King County public defense agencies who have not worked for one of the King County public defense agencies within three years of the filing of this lawsuit, but who work or have worked in a PERS-eligible position within three years of the filing of this lawsuit.

The lawsuit was filed January 24, 2006. The agreed order noted that the “parties learn of the existence of additional class members from time to time. These individuals are Class Members entitled to relief under this injunction if they are within class definition.” CP 42.

After the agreed order was entered, King County transmitted the information needed for DRS to determine service credit. Thereafter, the Court approved of a common fund fee of \$12.554 million. CP 47-50. (No class member opposed the fee request.) Judge Hickman denied DRS’s motion for reconsideration. CP 76-81.

Judge Hickman then conducted an evidentiary hearing to determine the discount rate (interest rate) used to determine the present value of the pensions obtained in *Dolan* and the class members' pro rata shares, if they elected to pay with cash, and the deduction percentage if they elected to have their pension reduced at retirement to account for the fee. Thereafter Judge Hickman entered an agreed order requiring the

Office of the State Actuary to determine the present value of the pension credit for each class member and the class as a whole and to determine each class member's pro rata share of the common fund fee and the deduction percentage. CP 92-99. At the same time the Court entered a separate agreed order requiring King County to pay contributions to DRS. CP 100-102.

Eventually, the Office of the State Actuary completed its work and its calculations were provided to the parties. Certain issues were discovered concerning the calculations and pro rata share of fees. Eventually, the parties resolved most of these issues, but two issues affecting class members remained unresolved: (1) how pro rata fees were assessed for those whose *Dolan* service made them eligible for early retirement with a full pension at 62, *e.g.*, 28 years of non-*Dolan* service and 2 years of *Dolan* service, and (2) for those whose *Dolan* service made their pensions become vested when previously their service was not vested because it was less than five years (*e.g.*, 3 years of *Dolan* service coupled with 3 years of other previous service resulted in a vested pension). The State Actuary had assigned all the value of early retirement at 62 and all the value of vested pensions to *Dolan*, instead of valuing it on a pro rata basis based on the ratio of *Dolan* service to total service. Plaintiffs filed a motion on these points. CP 122-28, 146-48.

At the same time, one class member Julia Garratt raised an issue

and a motion was filed concerning her situation. CP 119-20, 150-52. Ms. Garratt is a Superior Court Judge and participates in the judicial multiplier program. CP 119. Judge Garratt had independently contacted DRS and learned that she had twelve years of *Dolan* service, but that with six more years of judicial service her PERS pension could be at the maximum 75% of her average final salary, at which point her *Dolan* service would be irrelevant. *Id.* Judge Garratt could have retired with her *Dolan* service, but she wanted to continue working as Judge. RP 8, CP 119-20. Judge Garratt's proposal was that she would use and have her pension reduced for *Dolan* service only to the extent that her *Dolan* service actually affected her pension at retirement. *Id.*; CP 154. There was in Plaintiffs' view no possible loss to the PERS fund because the contributions, plus interest, King County already paid for her *Dolan* service exceeded her pro rata share of the fees. CP 154-55. Thus if her *Dolan* service turned out to be irrelevant to her pension, the contributions King County made for the unused *Dolan* service would offset her share of fees.

Judge Hickman denied these motions. CP 161-62, 163-64. Thereafter he entered an agreed order in August 2017 concerning the notice that would be given to class members concerning their pro rata share of fees. CP 169.

The notice was sent to 635 class members. CP 211. About half elected to account for their share of the fees by paying DRS with cash and

half elected to account for the fee by having their pension reduced at retirement based on the ratio of *Dolan* service to total service times the deduction percentage, 12.67%. CP 211-12, RP 17. Only one class member had an issue with the allocation of the pro rata fee, Laura Inveen, a King County Superior Court Judge. Laura Inveen's only involvement in *Dolan* was that she filled out a questionnaire about her work history that class counsel sent to her. CP 212, 215. Judge Inveen had worked in 1980, 1981, and a small part of 1982 for a King County public defense agency. CP 215. When she received her notice from DRS, that was the first notice she had received about her class member service or fees. CP 216. And when she received the notice in September of 2017 she was already at the maximum pension of 75% of her average final salary without any *Dolan* service and she was already over 62 with 30 years of service and thus eligible to retire with a full pension. CP 216-17. But she planned to continue working. CP 217.

Around the same time that Judge Inveen raised her concern that she was being assessed a fee despite receiving no benefit from the *Dolan* litigation, class counsel learned that there are four class members – Anne Dederer, Carolyn Frimpter, Robin Jones, and Linda Moland – for whom salary information and service credit were omitted from the information sent by King County to DRS, which DRS in turn forwarded to the Office of the State Actuary to determine each class member's pro rata share of

the fee. CP 222-23, 224-25. King County later reported the information for the four class members to DRS and made the required PERS contributions. CP 247.

Anne Dederer and Robin Jones received the notice from DRS, but the notice was incorrect because it did not include all their service. Ms. Dederer was missing 68 months of *Dolan* service credit and Ms. Jones was missing 22 months of service credit. CP 218-19. The omitted service substantially increased the value of their PERS pensions. Because the additional service was not included in the information transmitted to the State Actuary, the notices sent to Ms. Dederer and Ms. Jones understated their pro rata share of the common fund attorney fee for obtaining the *Dolan* service credit that substantially increased their PERS pensions. CP 227, 219.

Carolyn Frimpter and Linda Moland are also class members, but they did not receive any notice from DRS because the parties did not know they were class members at that time. CP 219, RP 5.⁴

Plaintiffs calculated the present value and resulting pro rata share

⁴ The Superior Court's order expressly provides, CP 42, lines 14-17, that class members are entitled to relief when the parties learn of their existence:

The parties' prior settlement agreement listed Class Members then known to the parties. Additional Class Members have been identified since then and the parties learn of the existence of additional Class Members from time to time. These individuals are Class Members entitled to relief under this injunction if they are within the Class definition. (emphasis added)

of attorney fees for the four class members for their newly discovered *Dolan* service. CP 219. The chart below summarizes that information (*id.*):

Last	First	PERS Plan	PERS Active?	Additional Service Credits	Current/ Final Salary	Projected Salary at Retirement	Age on 7/31/15	PV of Pension	Pro Rata Share of Fee	Fee Amount
Frimpter	Carolyn	2	Yes	15.00	73,327	124,627	51.5	16,295	0.0166%	2,083.22
Moland	Linda	2	Yes	63.00	68,434	69,913	64.5	101,309	0.1032%	12,952.16
Dederer	Anne	2	No	68.00	50,664	50,664	53.9	36,050	0.0367%	4,608.88
Jones	Robin	1	No	22.00	40,742	40,742	58.3	13,019	0.0133%	1,664.49

Total Fees: \$21,308.75

After attempting to resolve these outstanding issues outside of court, class counsel filed a motion on pro rata fees, asking the Superior Court (1) to direct DRS to send corrected notices to Anne Dederer and Robin Jones stating their revised pro rata share and notices to Carolyn Frimpter and Linda Moland stating their pro rata share, and (2) to determine Laura Inveen’s PERS 2 pension will not be reduced at retirement due to this case because she received no benefit from the litigation. CP 223-24.

DRS opposed both parts of the motion. CP 235-244, RP 11-23. Judge Hickman granted the motion with respect to Judge Inveen and accepted DRS’s position on the other four class members. CP 260-64.

ARGUMENT

I. DRS Cannot Complain About the Infinitesimal, Theoretical Loss to the PERS 2 Fund Because if the Trial Court Erred, DRS Invited the Error by Opposing DRS Fees for Four Class Members Who Did Benefit.

DRS argues (DRS Br. 16):

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. [Assignment of Error 1 and Issue 1].⁵

But DRS expressly opposed the motion to assess and reassess fees for the four class members. CP 235-45, RP 11-23. The over \$21,000 in fees for these class members' *Dolan* service exceeds the \$14,482 that DRS is trying to collect from Judge Inveen's pension at retirement. Indeed, DRS agrees that the fees owed for the four class members would more than offset what it was seeking from Judge Inveen. "We will agree that they're going to be billed more than DRS was supposed to receive to be fully reimbursed for attorneys' fees." RP 21.

If the \$40 billion PERS 2 fund were theoretically short of funds (and Plaintiffs do not agree that it is "short"; see below at 19-20), the only reason it could be "short" is because DRS *opposed* collecting the fees actually owed by the four class members named above.

⁵ See also DRS Br. 2:

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.

And DRS Br. 3:

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.

Accordingly, if the Superior Court erred, it is because DRS invited the error. “It is a well-settled rule that a party cannot complain of error for which he is himself responsible or of rulings which he has invited the trial court to make.” *Int’l Raceway, Inc.*, 97 Wn. App at 10 (internal quotations and citation omitted). Accordingly, DRS cannot complain here about the supposed shortfall because it created the shortfall by opposing the class’s request to assess and reassess fees for the four class members.

II. Because Laura Inveen Received No Benefit from *Dolan*, Judge Hickman Did Not Abuse His Discretion in Deciding DRS Could Not Collect Fees from Judge Inveen by Reducing Her Pension at Retirement.

Assuming *arguendo* that DRS can complain about the \$40 billion PERS 2 fund being theoretically short \$14,482 when it created the “shortage” by opposing the class’s motion for the four class members who actually substantially benefitted from the litigation, Judge Hickman did not abuse his discretion in deciding DRS could not collect fees from Judge Inveen when she received no benefit from the PERS litigation.

DRS argues that Judge Hickman erred as a “matter of law.” DRS Br. 3, Assignment of Error 1. But in making this argument DRS completely ignores the standard of review governing the trial court’s rulings established by this Court in *Dolan v. King County* 2018 WL 202758, No. 49876-6-II, CP 182-209. Judge Hickman’s jurisdiction and power here is based on equity. 2018 WL 202758 *9, 11; CP 199, 203.

The standard of review is abuse of discretion *Id.* at *11. “A trial court abuses its discretion if its decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary.” *Id.*

DRS argued below that based on “[p]rinciples of finality” the trial court could not prevent DRS from collecting fees from Judge Inveen, even though she received no benefit from the litigation. CP 235, 37, 41, 43, 44. DRS uses different words in its appeal, but essentially its argument is the same, *i.e.*, the trial court was powerless to remedy the substantial unfairness to Judge Inveen and could not prevent DRS from collecting fees from her. Even though this Court previously affirmed Judge Hickman using his equitable authority to shift over \$50 million of interest costs from King County to the PERS 2 fund as a whole, according to DRS he was powerless to use his equitable authority to bar DRS from collecting \$14,482 in wrongly assessed fees from Judge Inveen. The order preventing DRS from collecting fees from Judge Inveen is well within Judge Hickman’s authority, like the order on the County’s interest affirmed by this Court, although this order is of a much, much smaller scale than the interest order.

Here, the orders entered by the trial court, including the attorney fee orders, are all equitable orders associated with a permanent injunction that can be modified by the trial court. Indeed, our Supreme Court long ago held that a court has inherent power to modify an injunction “where a

change in circumstances demonstrates that the continuance of the injunction would be unjust or inequitable or no longer necessary.” *State v. Stubblefield*, 36 Wn.2d 664, 674, 220 P.2d 305 (1950); *accord, Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 179 and n.30, 381 P.3d 71(2016), citing and quoting *Stubblefield* (affirming the trial court’s modification of its receivership order because such orders are equitable orders that may be changed at any time).

Moreover, a court has not only the power, but also a responsibility to modify equitable orders whenever newly revealed facts show they are unjust or inequitable. “ ‘[A] sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed or new ones have since arisen.’ ” *U.S. v. Washington*, 853 F.3d 946, 979 (9th Cir. 2017), quoting *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). Thus, a “court should not hesitate to modify its injunction” if “newly revealed facts or circumstances . . . justify a modification of the injunction.” *Id.* at 979.

Because injunctions and equitable orders derived from injunctions may always be modified, principles of finality that apply to other judgements and orders do not apply to them. *Stubblefield*, 36 Wn.2d at 675: “the existence of this inherent power of a court to modify its own injunctions at a time when the power to modify a judgement at law would

have ceased to exist is based upon the principle that a preventive injunction is fundamentally different from any other judgement.”

This Court affirmed the trial court’s order on interest, an equitable order ancillary to its injunction. *Dolan v. King County*, 2018 WL 2027258 (2018). The Court affirmed the trial court’s shifting of over \$50 million from King County to the PERS fund. *Id.* at *4, 6. In doing so the Court explained that “Article IV, section 6 of the Washington Constitution gives trial courts authority to fashion equitable remedies . . . [and an] injunction is a form of equitable relief. A trial court’s equitable power is inherently flexible and fact-specific.” *Id.* at *9 (citations and internal quotations omitted) . . . “The trial court has broad discretion to fashion an equitable remedy.” *Id.* at *11. The Court then noted that “when a trial court exercises its equitable authority it attempts to balance the relative interests of the parties.” *Dolan*, 2018 WL 2027258 at *14. The trial court did that here when it ruled that collecting \$14,482 in fees from Judge Inveen when she received no benefit was “inherently unfair and an unintended consequence of the *Dolan* litigation.” CP 263.

The common fund doctrine is based on equity and accordingly common fund fees are “a recognized ground in equity for granting attorney fees.” *Bowles v. DRS*, 121 Wn.2d 52, 70,847 P.2d 490 (1993). The equitable principle underlying a common fund fee is that each party “benefitting from the fund” should be “obligated to pay its pro rata of the

fees and costs reasonably incurred to generate the fund, in accordance with the ‘equitable sharing rule’ known as ‘the common fund doctrine.’”

Winters v. State Farm, 99 Wn. App. 602, 610, 994 P.2d 881 (2000).

The common fund doctrine is grounded in the equitable principle of “unjust enrichment[.]” 4 Newberg on Class Actions, § 14.6, p. 547 (4th ed. 2002). The doctrine is therefore intended to prevent class members from benefiting from litigation without paying their share of the attorney fee because otherwise they would be “unjustly enriched.” *Boeing v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 622 E.2d 676 (1980). The common fund doctrine presumes that, if attorney fees are to be paid from the fund by an individual class member, it will be because some benefit was conferred on that class member. *Id.* at 478-80. After all, “[t]hose who receive no benefit from the lawyer’s work should not be required to pay for it.” *Van Gemert v. Boeing Co.*, 573 F.2d 733, 736 (2nd Cir. 1978); reversed on other grounds 590 F.2d 433 (2nd Cir. 1978) (*en banc*); affirmed, *Boeing v. Van Gemert*, 444 U.S. at 478-80 (1980).⁶

Judge Hickman was confronted with a very unusual situation:

⁶ In *Van Gemert v. Boeing*, 573 F.2d 733 (2nd Cir. 1978), the panel held that those who did not submit a claim to obtain their share of the fund had not benefitted from the litigation and therefore the common fund fee could only be based on the claims submitted. The 2nd Circuit (*en banc*) reversed, holding that those who did not submit claims had benefitted from the litigation, even if they did not avail themselves of the benefit. 590 F.2d at 439. The Supreme Court affirmed the *en banc* decision. 444 U.S. at 478-80. No Court has ever held that common fund fees can be assessed against those who have no benefit from the litigation. Such a holding would be completely at odds with the equitable principles for common fund attorney fees.

substantial attorney fees were being charged personally against Laura Inveen by DRS for her supposed “pro rata share” of fees when she actually had no benefit from the litigation. She is being assessed \$14,482 in fees despite receiving nothing. Her actual pro rata share of the common fund fee of \$12.554 million is not \$14,482, it is \$0, *i.e.*, her zero benefit is zero percent of \$12.554 million. DRS counsel conceded this (RP 12-13): “When notices were sent approximately a year later, it happened to be right at the same month that Judge Inveen turned 62 and therefore the benefit from being a class member evaporated, if you will.”⁷

DRS contends that Judge Inveen was similarly situated to Judge Garratt and therefore she should be barred by the court’s order on Judge Garratt. DRS Br. 21. But DRS counsel agreed that “they [Judge Inveen and Judge Garratt] aren’t identical. I’ll concede that.” RP 13.

The difference between the two is profound. When Judge Garratt received her notice, she substantially benefitted from *Dolan* because she could retire with her PERS pension. RP 8, CP 119-20. But she wanted to

⁷ Judge Inveen’s two plus years (27 months) of *Dolan* service was valued by the Office of the State Actuary at \$121,459 with pro rata fees of \$14,482. For another King County Superior Court Judge with 32 months of *Dolan* service that service was valued at \$40,359 and pro rata fees of \$4,811.65 were assessed. The two judges are nearly the same age. (Inveen was born in 1955 and the other judge in 1953.) The two judges worked at the same King County public defense agency at the same time (1979-82). CP 223. The substantial difference between the two is apparently due to the State Actuary’s office assigning all the value of possible early retirement to the *Dolan* service, instead of pro rata based on the ratio of total service and *Dolan* service. In Judge Inveen’s situation this calculation is doubly wrong because it failed to account for the fact that she was still working and then when she got to be 62 a year later she would be eligible for early retirement with a full pension without using any of her *Dolan* service. CP 217, 223.

continue working. Whereas when Judge Inveen received her notice, she already had no benefit. Indeed, DRS begrudgingly noted in its brief that the “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 has not yet earned enough service credits to no longer benefit from *Dolan* class membership.” DRS Br. 22; see also DRS Br. 12 (“Unlike Judge Garratt, [Judge Inveen] has already reached her maximum [pension] allowance.”).

In theory, relieving Judge Inveen from the fees could create a theoretical shortage for the PERS fund, but the “shortage” for the fund is well below the \$50 million “shortage” that this Court affirmed in *Dolan*, 2018 WL 2027258. Indeed, the amount, \$14,482, is below infinitesimal for the \$40 billion PERS 2 fund, *i.e.*, 0.00000036205 of \$40 billion or rounding up four hundred-thousandths of one percent.⁸ This is far below DRS’s admitted *\$7 million threshold for materiality* (1 basis point) necessitating a change in contribution rates (and below the \$21,308.75 in fees from the four class members that DRS opposed receiving). *Dolan*, 2018 WL 2027258 *5. Anything below \$7 million is absorbed by the fund. *Id.* Indeed, the fund absorbed the cost of opposing Plaintiffs’

⁸ To use numbers that are perhaps more readily understood, if one had an investment account with \$100,000 in it, four hundred-thousandths of one percent would be less than a penny; it would be .4 cents.

motion below and is absorbing the costs of making this appeal, which surely well exceed the \$14,482 that DRS claims to be “short.” RCW 41.50.255⁹

Moreover, although Judge Inveen’s pension is already at the 75 percent maximum, she is still contributing 15.95 percent of her pay to DRS even though she cannot obtain additional service. And she intends to work at least until her term ends in 2.7 years. CP 217. Thus, these contributions will offset any theoretical shortfall. *Id.*

In addition, while assessing and reassessing fees for the four class members who, unlike Judge Inveen, substantially benefitted from the litigation, would more than offset the theoretical shortage, DRS was opposed to collecting those fees. CP 241-44; RP 16-23. DRS’s opposition demonstrated that theoretical shortage was not important to DRS or to the fund because it was so small. Indeed, DRS did not even make a fallback argument, such as fees should be assessed or reassessed for the four class members, if relief is granted for Judge Inveen. DRS was opposed to recalculating fees for the class or any class members under any circumstances. RP 23.¹⁰

The fact before Judge Hickman was that Laura Inveen was

⁹ Under RCW 41.50.255 the costs of DRS’s litigation here may be taken from the fund.

¹⁰ Because of the administrative burden, plaintiffs also did not ask for fees to be recalculated for the class as a whole, but did seek to offset any theoretical loss to the fund from not collecting improper fees from Judge Inveen. See above 8-11. The administrative cost alone would far exceed the value of their appeal.

“unique” because she was the only *Dolan* class member who received *no benefit* from the litigation. CP 214, 263. Moreover, it was never anyone’s intent to include individuals in the class and bill them for fees when they could not benefit from the litigation. CP 212.

Accordingly, consistent with the equitable principles governing common fund fees, Judge Hickman found collecting fees from Laura Inveen is “inherently unfair and an unintended consequence of the *Dolan* litigation.” CP 263. And he therefore ordered that “DRS shall not withhold any sums from Ms. Inveen’s retirement based on the *Dolan* litigation.” CP 261.

Judge Hickman did not abuse his discretion in doing so.

III. The Trial Court Did Not Err in Not Providing Further Guidance and Instead Giving DRS What It Asked for – Finality.

DRS’s final argument is that the trial court erred “by not providing guidance” on how DRS “is to administer the process of obtaining reimbursements . . . for those who are similarly situated to Judge Inveen and Judge Garratt.” DRS Br. 4 (Assignment of Error 2). But as explained in the Introduction to this brief (pp. 3-4 above), DRS did not want any further guidance from the trial court. It wanted finality and the trial court agreed with DRS. *Id.*

Moreover, DRS’s guidance argument is based on its contention that the orders regarding “Judge Garratt and Judge Inveen are

contradictory.” DRS Br. 21. This is not correct, as explained in Argument II *supra* 13-21. To repeat: when Judge Inveen was given notice of her service and of her pro rata share of fees she had *no benefit* from the *Dolan* litigation. In effect, her inclusion as a class member and her being included in the State Actuary’s calculation was a mistake (CP 212), “an unintended consequence of the *Dolan* litigation.” CP 263 Decision. In contrast, when Judge Garratt received her notice she had 12 years of *Dolan* service which coupled with her other PERS service made her eligible to retire with a full pension. CP 119-20, RP 8. She could still accrue more service credit but could eventually hit her 75 percent maximum. Thus when she received her notice, she had a substantial benefit conferred by the *Dolan* litigation. The other class members who are judges, other than Laura Inveen, are in the same situation as Garratt. None of them raised any issue about their pro rata share of fees apparently because they all benefitted from the case when they were given notice by DRS.

DRS asks this Court for guidance if it does not reverse the order on Judge Inveen. DRS Br. 21-23. DRS does not state what this guidance should be.

Plaintiffs suggest by way of guidance that DRS rethink its position about judges who are *Dolan* class members. Employees in PERS 2 who are not judges have no maximum limit on their pension, *i.e.*, they can

exceed 75% of average final salary. CP 213. Those employee class members all benefit from their *Dolan* service. Judges are limited to 75% of their salary and thus *Dolan* service may become irrelevant at retirement if their pension is at 75% of salary without any *Dolan* service.

While Plaintiffs do not contend here that Judge Hickman abused his discretion by denying Julia Garratt's motion, she did have a point. Under the equitable common fund doctrine, her retirement pension should not be reduced at retirement if the *Dolan* litigation ultimately had no effect on her pension because she reached the maximum 75 percent without the use of any *Dolan* service credit. And there is no harm to the PERS 2 fund because she would not use any of the *Dolan* service credit to increase her pension benefit and the employer contributions plus interest made by King County on her behalf for her unused *Dolan* service exceed her assessment for fees. CP 54-55. Her motion explains how to account for any *Dolan* service that is actually used at retirement (CP 154):

Judge Garratt anticipates that the PERS service obtained in this case will be completely irrelevant to her ultimate pension at retirement. But she wants to retain the possibility of using some of the PERS service obtained in this case, if she had to retire early, became disabled and could no longer work, or lost her position as a judge. Under no circumstances does Judge Garratt want to use the cash method to account for the common fund attorney fee even if she needs some of her *Dolan* service to obtain her full pension. Rather, in that event, she asks to use the pension reduction method available to all class members. Like all other class members, the pension reduction for Judge Garratt is determined at retirement as provided in the

Court's order. By way of example, suppose Judge Garratt can no longer work as a Judge and needs four years of PERS service obtained in this case to reach her maximum pension of 75% of her average final salary. In that instance, her four years of Dolan service equals 8% (4 years times 2% per year) of her 75% pension and accordingly, her pro rata pension reduction percentage would be $8/75$ (.107) times .1267, which equals .0135569 or 1.356%. Thus, with four years of Dolan service, Judge Garratt's pension at retirement would be reduced by 1.356%.¹¹

By way of further guidance for DRS, Plaintiffs suggest that it should adopt this approach for class member judges who have elected to account for their pro rata share of fees by reducing their pension and who do not need all of their *Dolan* service.

Plaintiffs suggest that for *Dolan* class member judges who did not elect to pay for their pro rata share of fees with cash and who at retirement are at the maximum pension for a judge without any use of their *Dolan* service that their pension under equitable principles should not be reduced. Most likely the theoretical shortfall is offset by the pension contributions plus interest that King County made for the *Dolan* service not used, as they did for Judge Garratt. But in any event the theoretical shortfall would

¹¹ In order to properly calculate the effect of *Dolan* service for judges in the judicial multiplier program, one has to calculate the percentage of pension benefit at retirement attributed to *Dolan* service at 2% for each year of service and attributable to judicial service at 3.5% for each year of service. While regular employees always earn 2% and each year of *Dolan* service has the same value at retirement as each year of non-*Dolan* service, judges in the judicial multiplier program have additional value for each year as a judge because they get 3.5% for each year, which is more valuable than their *Dolan* service. As an illustration, if a judge in the judicial multiplier program had at retirement 10 years of *Dolan* service and 10 years of judicial service, the judge's pension at retirement would be 55% of salary (20% for *Dolan* and 35% as a judge).

be relatively small. The amount would be much smaller than the interest that DRS has not pursued when employers do not make contributions for employees, see *Dolan* 2018 WL 202758 *5 n. 1. And it is a bit odd for judges to have their pensions reduced at retirement to account for *Dolan* service if in fact the *Dolan* service does not increase their monthly pension checks at all.

IV. The Court Should Impose Sanctions – a Monetary Fine – Paid by DRS to the Court for a Frivolous Appeal.

After this Court affirmed Judge Hickman’s order on interest and confirmed that his authority in the case was based on equitable principles, the Plaintiffs wrote to DRS asking it to voluntarily dismiss the appeal. A copy of this letter is attached as an appendix and is part of the clerk’s papers. CP 275-77. Basically, the letter explained the same points made here, including the fact that the motion and the appeal would actually cost the fund more than the amount in controversy. *Id.* Under RCW 41.50.255 the litigation costs are deducted from the fund. See n. 9 at 20. DRS did not dismiss its appeal and instead filed its brief.

RAP 18.9 allows the Court to impose sanctions for a frivolous appeal. The Supreme Court held in imposing sanctions in *State v.*

Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) that:

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. (Citation, internal quotation, and bracket omitted.)

Often the sanctions requested and awarded are payment of fees for responding to the appeal. Here, plaintiffs do not seek fees. Rather they suggest that the Court impose a monetary penalty on DRS because its appeal “is so totally devoid of merit that there is no reasonable possibility of reversal.” Indeed, DRS makes no attempt to explain how the trial court abused its discretion in deciding Judge Inveen owes no fee because she received no benefit from the litigation nor does it explain why it can complain about a supposed infinitesimal shortage to the PERS 2 fund when it opposed Plaintiffs’ motion to make sure there was not any, even an infinitesimal, theoretical shortage.

CONCLUSION

For the foregoing reasons the Court should affirm the trial court and impose sanctions against DRS in the form of a monetary penalty paid to the Court.

Respectfully submitted this 14 day of January, 2019.

BENDICH, STOBAUGH & STRONG, P.C.



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Attorneys for Plaintiffs/Respondents

DECLARATION OF SERVICE

I, Anders Forsgaard, declare under penalty of perjury that I am over the age of 18 and competent to testify.

On January 14, 2019, I personally served a copy of

Respondent Inveen's Brief to the parties listed below as follows:

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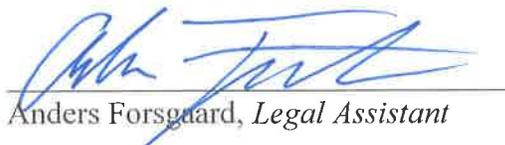
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: January 14, 2019, at Seattle, Washington.



Anders Forsgaard, *Legal Assistant*

Appendix A

CP 275-76

DAVID F. STOBAUGH
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Via U.S. mail and email

Re: *Dolan v. King County*
DRS appeal of order concerning Judge Laura Inveen

Dear Ms. Egeler, Ms. Wyatt, Mr. Nguyen, and Mr. Freimund:

I am writing to urge you to dismiss the Department of Retirement Systems (DRS) appeal of the Superior Court's order concerning Judge Laura Inveen.

DRS's petition for review was denied by the Washington State Supreme Court and the Court of Appeals has issued its mandate. Accordingly, the Court of Appeals opinion, confirming that Judge Hickman "has broad discretion to fashion an equitable remedy," is the law of the case. *Dolan v. King County and DRS* 2018 WL 2027258 (2018) at *11. As explained by the Court of Appeals under the Washington State Constitution Article IV, section 6, a "trial court's equitable power is inherently flexible and fact specific." *Id* *9. Common fund attorney fees are based on equitable principles. *Bowles v. DRS* 121 Wn.2d 52, 70 (1993); *Winters v. State Farm* 99 Wn App 602, 610 (2000).

Thus, under the law of the case Judge Hickman has the ability to fashion whatever fact specific relief is equitably appropriate. And paragraph 13 of the Court's June 5, 2015 Order Modifying Permanent Injunction expressly provides that the Court has the authority to address "[i]ndividual issues."

Judge Hickman exercised his equitable authority in fashioning a remedy to address Ms. Inveen's "unique" situation, *ie.*, being assessed over \$14,000 for attorney fees under the common fund doctrine when she receives no benefit from the *Dolan* litigation. Decision p. 2 line 25. As Judge Hickman explained (June 28, 2018 Decision on Motion to Correct Notices and Pro Rata Fees p. 2, lines 18-21):

The Court finds this inherently unfair and an unintended consequence of the *Dolan* litigation. Both in law and equity the Court has reserved jurisdiction over this type of issue since the issue is a direct result of the Court's prior decisions in

this case. Appellate review has confirmed the Court's continuing jurisdiction.

Under the Court of Appeals decision the standard of review for Judge Hickman's decision on Laura Inveen's situation is abuse of discretion. DRS cannot show an abuse of discretion. Indeed, DRS would have a very hard time convincing a panel of appellate judges that Judge Hickman's decision on Judge Inveen is wrong even if the standard of review were *de novo*.

DRS opposed reassessing the common fund attorney fees for the four class members who actually did substantially benefit from the litigation and whose pro rata share of fees assessed was quite inaccurate because it did not include all their service. The reassessed fees that DRS opposed for those class members far exceeded the \$14,482 DRS sought to obtain from Judge Inveen. Thus DRS cannot complain about the loss of money for the fund.

In any event, \$14,482 is not material to the \$36 billion PERS II fund. Indeed, DRS established in this *Dolan* litigation that anything less than 1 basis point (one hundredth of a percent) or \$7 million is not material to the fund. *Dolan v. King County and DRS* 2018 WL 2027258 at *5.

There is another reason why the \$14,482 DRS seeks to obtain from Judge Inveen is not material. DRS will spend substantially more than that sum in pursuing its appeal. Thus, there is no economic reason to pursue the appeal for several reasons.

DRS's primary argument below was that the injunction, and the associated orders based on the injunction, including the equitable common fund attorney fee order, cannot be modified because of "[p]rinciples of finality." Resp. 1, 3, 7, 9, 10. Judge Hickman rejected this argument. Indeed, our Supreme Court long ago held that a court has inherent power to modify an injunction "where a change in circumstances demonstrates that the continuance of the injunction would be unjust or inequitable or no longer necessary." *State v. Stubblefield*, 36 Wn.2d 664, 674 (1950); accord, *Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 179 and n.30 (2016), citing and quoting *Stubblefield*, 36 Wn.2d 664 (affirming the trial court's modification of its receivership order because such orders are equitable orders that may be changed at any time).

Thus, a court has a responsibility to modify equitable orders whenever newly revealed facts show they are unjust or inequitable. " '[As] sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed or new ones have since arisen.' " U.S. v. Washington, 853 F.3d 946, 979 (9th Cir. 2017), quoting *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). Thus, a "court should not hesitate to modify its injunction" if "newly revealed facts or circumstances . . . justify a modification of the injunction." *Id.* at 979.

Because injunctions and equitable orders derived from injunctions may always be modified, principles of finality that apply to other judgements and orders do not apply to them. *Stubblefield*, 36 Wn.2d at 675: "the existence of this inherent power of a court to modify its own injunctions at a time when the power to modify a judgement at law would have ceased to exist is

based upon the principle that a preventive injunction is fundamentally different from any other judgement.”

Thus, Judge Hickman has ample authority to use his equitable powers to fashion a fact specific remedy for Judge Inveen. And in fact Judge Hickman accepted DRS’s finality argument for the other four class members. Decision p. 3, lines 16-17.

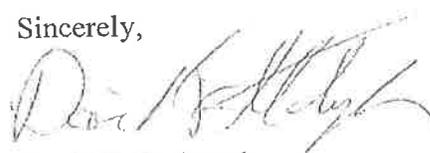
DRS also argued below that Judge Inveen should be denied relief because she is “collaterally estopped” and bound by the law of the case from the Court’s prior order on Judge Garratt. Resp. p. 6. It is undisputed that Judge Inveen’s facts and the issue presented by those facts are fundamentally different than Judge Garratt’s. Indeed, Mr. Freimund agreed in the argument that Judge Inveen’s situation was not identical to Judge Garratt’s, and Judge Hickman found that Laura Inveen’s situation was “unique.” Decision p. 2, line 24. Accordingly, neither collateral estoppel¹ nor law of the case apply because the issue is not identical. It would also be manifestly unjust to Judge Inveen to require her to pay fees when she receives no benefit. *Kennedy v. Seattle*, 94 Wn.2d 376, 378-79 (1980).

Judge Hickman agreed finding that assessing fees against Judge Inveen when she receives no benefit from the litigation was “inherently unfair and an unintended consequence of the *Dolan* litigation.” Decision p. 2, lines 18-19.

Before the Supreme Court denied DRS’s petition for review DRS may have been trying to protect its position with respect to its petition for review by filing a notice of appeal of the order on Judge Inveen. But now that the Court of Appeals mandate has been issued confirming Judge Hickman’s ample equitable authority, there is no longer a legal justification for the appeal. Judge Hickman did not abuse his discretion in fashioning a remedy for Judge Inveen and there is no economic basis for pursuing the appeal.

Accordingly, we ask that DRS dismiss its appeal.

Sincerely,



David F. Stobaugh

cc. Laura Inveen

¹ Technically collateral estoppel also does not apply because collateral estoppel pertains only to an issue actually decided in a different case, not an issue in the same case.

BENDICH STOBAUGH & STRONG

January 14, 2019 - 4:33 PM

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