

FILED
SUPREME COURT
STATE OF WASHINGTON
2/14/2020 11:52 AM
BY SUSAN L. CARLSON
CLERK

No. 97863-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

S. MICHEAL KUNATH *et al.*

Respondents,

v.

CITY OF SEATTLE

Petitioner.

**REPLY OF PETITIONER CITY OF SEATTLE TO
KUNATH'S ANSWER TO PETITION FOR REVIEW**

PAUL J. LAWRENCE, WSBA # 13557
GREGORY J. WONG, WSBA #39329
JAMIE L. LISAGOR, WSBA #39946

ATTORNEYS FOR PETITIONER

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE, SUITE 2000
SEATTLE, WASHINGTON 98101
TELEPHONE: 206-245-1700

KENT MEYER, WSBA #17245

ATTORNEY FOR PETITIONER

PETER S. HOLMES
SEATTLE CITY ATTORNEY
701 FIFTH AVENUE, SUITE 2050
SEATTLE, WA 98104
TELEPHONE: 206 -615-1960

HUGH D. SPITZER WSBA # 5827

ATTORNEY FOR PETITIONER

5604 16TH AVE NE
SEATTLE, WA 98105-2521
TELEPHONE: 206 -615-1960

TABLE OF CONTENTS

REPLY OF PETITIONER CITY OF SEATTLE

I. INTRODUCTION..... 1

II. COURT OF APPEALS DECISION 1

III. ISSUE..... 2

IV. STATEMENT OF THE CASE..... 2

V. ARGUMENT 3

 A. There are no grounds under RAP 13.4(b)(1) or (2) to accept review because the Court of Appeals correctly ruled that each party should pay its own attorney fees consistent with existing case law. 3

 1. The common fund doctrine does not apply unless the prevailing party preserves or creates a common fund from which the attorney fees can be paid. 3

 2. The Court has not expanded the common fund doctrine to eliminate the requirement of a common fund from which an award of attorney fees can be taken. 4

 3. The possibility of an attorney fees award was not necessary to provide access to the justice system. 8

 B. The private attorney general doctrine does not apply in Washington..... 8

 C. The denial of attorney fees does not present an issue of substantial public interest for this Court to review under RAP 13.4(b)(4). 9

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Washington State Cases

<i>Blue Sky Advocates v. State</i> , 107 Wn.2d 112, 727 P.2d 644 (1986).....	9
<i>Bowles v. Dep't of Retirement Sys.</i> , 121 Wn.2d 52, 847 P.2d 440 (1993).....	4, 7
<i>City of Seattle v. McCready</i> , 131 Wn.2d 266, 931 P.2d 156 (1997).....	3, 9
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.2d 943(2006).....	3, 4, 5
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995).....	6, 7
<i>Crane Towing, Inc. v. Gorton</i> , 89 Wn.2d 161, 570 P.2d 428 (1977).....	4
<i>Grein v. Cavano</i> , 61 Wn.2d 498, 379 P.2d 209 (1963).....	7
<i>Kunath v. City of Seattle</i> , 10 Wn. App. 2d 205, 233, 444 P.3d 1235 (2019).....	passim
<i>Lyzanchuk v. Yakima Ranches Owners Ass'n</i> , 73 Wn. App. 1, 866 P.2d 695 (1994).....	7
<i>Miotke v. City of Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984).....	5, 6
<i>Seattle Sch. Dist. No. 1 of King Cnty. v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978).....	4, 5, 6
Washington State Statutes	
RCW 82.80.040	6

Washington State Rules

RAP 13.4..... passim

I. INTRODUCTION

In Respondent Kunath’s Answer, he asks this Court to review the Court of Appeals decision affirming the denial of attorney fees under the “common fund doctrine.” Under the longstanding American Rule, each party in litigation pays its own attorney fees. The common fund doctrine is a narrow exception to the rule that allows the court to award attorney fees that are paid by the prevailing party from a common fund created or preserved by the plaintiffs. In this case, the trial court invalidated the tax before the City imposed or collected the tax. Consequently, there is no common fund to pay attorney fees. The Court of Appeals’ decision is consistent with prior Washington appellate court decisions and does not present an issue of substantial public interest. This Court should deny Kunath’s petition to review the attorney’s fees issue.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its Published Opinion on July 15, 2019, as changed by Order Denying Motion for Reconsideration and Changing Opinion dated August 7, 2019, and as confirmed by Order Denying Motion for Reconsideration and Request for Oral Argument, dated October 30, 2019. *See Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 233, 444 P.3d 1235, 1251 (2019).

III. ISSUE

There are no grounds under RAP 13.4(b) for this Court to accept review of the decision to deny Kunath's request for attorney fees under the common fund doctrine.

IV. STATEMENT OF THE CASE

After the trial court granted Respondents' cross-motions for summary judgment, Kunath moved for attorney fees based on the common fund doctrine. CP 1365, 1473. He requested that the court award him \$35,000,000 which is 25 percent of the \$140,000,000 that Seattle estimated it would collect annually through its income tax. *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 233, 444 P.3d 1235, 1251 (2019). No other Respondents joined the motion. CP 1546-48. The trial court denied Kunath's motion and also denied a motion for reconsideration. CP 1546, 1602. The trial court ruled that because the City had not imposed or collected the tax, there was no common fund from which to pay attorney fees. CP 1548. The Court of Appeals affirmed. *Kunath*, 10 Wn. App. 2d at 233.

V. ARGUMENT

- A. There are no grounds under RAP 13.4(b)(1) or (2) to accept review because the Court of Appeals correctly ruled that each party should pay its own attorney fees consistent with existing case law.**

Respondent Kunath does not identify a specific consideration for accepting review under RAP 13.4(b). Based on his argument, he apparently contends that the decision of the Court of Appeals conflicts with previously reported decisions under RAP 13.4(b)(1) and (2). But the Court of Appeals correctly followed well-settled precedent to hold that Kunath is not entitled to attorney fees, even if he is the prevailing party.

- 1. The common fund doctrine does not apply unless the prevailing party preserves or creates a common fund from which the attorney fees can be paid.**

Washington courts follow the American rule and do not award “attorney fees as costs absent a contract, statute, or recognized equitable exception.” *City of Seattle v. McCready*, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997); *see also City of Sequim v. Malkasian*, 157 Wn.2d 251, 270-71, 138 P.2d 943 (2006).

Kunath relies on the exception to the American rule known as the common fund doctrine. As the Court of Appeals correctly held, “The common fund doctrine is a narrow equitable ground that authorizes an award of fees ‘only when a litigant preserves or creates a common fund

for the benefit of others as well as themselves.’ Attorney fees awarded under the common fund doctrine are paid by the prevailing party, which pays attorney fees out of the fund created or preserved for their benefit.” *Kunath*, 10 Wn. App. 2d at 233 (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 71, 138 P.2d 943 (2006); citing *Bowles v. Dep’t of Retirement Sys.*, 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993)). See also *Crane Towing, Inc. v. Gorton*, 89 Wn.2d 161, 176-77, 570 P.2d 428 (1977); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 544, 585 P.2d 71 (1978).

Any fees awarded under the common fund doctrine are “borne by the **prevailing** party, not the losing party.” *Bowles*, 121 Wn.2d. at 70 (emphasis in original). Here, as the lower courts recognized, the tax has not yet gone into effect and the City has not collected any taxes that would create a common fund from which to award fees. *Kunath*, 10 Wn. App. 2d at 234. CP 1548. Ordering the City to pay attorney fees instead of the prevailing party would be contrary to the common fund doctrine.

2. The Court has not expanded the common fund doctrine to eliminate the requirement of a common fund from which an award of attorney fees can be taken.

Kunath erroneously argues that this Court “has extended the rule to any situation where a lawsuit confers a substantial benefit on an ascertainable class of people,” thereby eliminating the requirement of a monetary fund from which an attorney fee award can be paid. *Kunath*

Answer at 11-12. Kunath argues that a substantial benefit itself is a common fund. Kunath Answer at 12. The Court specifically rejected this argument in *City of Sequim*, refusing to award attorney fees under the common fund doctrine because the petitioner “did not create or preserve a common fund.” 157 Wn.2d at 271. The Court rejected the dissent’s argument—made by Kunath here—that the “doctrine no longer requires creation or preservation of a common fund.” *Id.* The Court stated: “[T]he common fund/substantial benefit doctrine is applicable only when the litigant preserves assets or creates a common fund, in addition to conferring a substantial benefit upon others.” *Id.* at 272 (describing the petitioner’s argument as “directly contrary to Washington law”.) The Court of Appeals correctly ruled that “merely benefitting another is not sufficient.” *Kunath*, 10 Wn. App. 2d at 234. This Court has not eliminated the requirement of a common fund.

Kunath relies on *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), but disregards the Court’s specific confirmation that its prior cases did “not eliminate the need to create a **common fund** from which attorney fees may be drawn to justify an award of such fees.” 101 Wn.2d at 339 (quoting *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 543-44) (emphasis in original). In *Miotke*, landowners along the Spokane River recovered damages caused by the discharge of raw sewage into the river.

The Court refused to award attorney fees under the common fund doctrine because the litigation did not create an “immediate common fund” from which fees could be drawn. *Id.* at 340 (emphasis omitted); *see also Seattle Sch. Dist. No. 1*, 90 Wn.2d at 526 (refusing to apply common fund doctrine where the Court’s ruling on public school funding “secured a substantial benefit common to all public school children” but fee award against the state would “require payment by way of a judgment from taxing sources”). The same is true here.

By contrast, in both *Bowles* and *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the prevailing parties created a common fund for their benefit from which the court could award attorney fees. In neither case did the non-prevailing party have to pay attorney fees from its own funds.

In *Covell*, the City imposed and collected a residential street utility charge authorized by RCW 82.80.040. 127 Wn.2d. at 876. The Court agreed with the class-action plaintiffs that the charge was an unlawful property tax. The Court awarded attorney fees, holding that the common fund doctrine “applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves.” *Id.* at 891. The Court held that plaintiffs had “obtained a refund of street utility charges paid by Seattle residents” and that the attorney fees could be paid from that

common fund. *Id.* at 892. The refund to the prevailing plaintiffs was thus reduced by the attorney fees. The Court did not order the City to pay attorney fees from other tax revenues.

In *Bowles*, the class-action plaintiffs successfully challenged the state's calculation of pension benefits. 121 Wn.2d at 71. The Court awarded common fund attorney fees and repeated the longstanding requirements that "the award of fees is borne by the **prevailing party**" and that fees are available only "when the litigants preserve or create a common fund for the benefit of others as well as themselves." *Id.* at 70-71. The common fund consisted of the increased pension benefits to be paid to plaintiffs in the future. *Id.* at 71, 74-75. The attorney fees were taken from that fund and were not paid by the defendant state. *Id.*; *see also Grein v. Cavano*, 61 Wn.2d 498, 507-08, 379 P.2d 209 (1963) (attorney fees paid from increased union funds belonging to members of plaintiffs' union); *Lyzanchuk v. Yakima Ranches Owners Ass'n*, 73 Wn. App. 1, 8, 866 P.2d 695 (1994) (common fund "award of fees is borne by the prevailing party rather than the losing party").

The end result in this case will be a declaratory judgment that the Seattle income tax is or is not constitutional. Since no income taxes were collected, there are no income taxes to be refunded. Thus, even if the trial court is affirmed, there is no common fund created out of which fees can

be awarded. Kunath misinterprets the cases and incorrectly asks the Court to compel the City to pay attorney fees with general fund revenues paid by Seattle taxpayers unrelated to the income tax. *Kunath*, 10 Wn. App. 2d at 234.

3. The possibility of an attorney fees award was not necessary to provide access to the justice system.

The policy arguments behind the common fund doctrine articulated in *Covell*, i.e. to enable litigants to obtain counsel and to provide access to the justice system, are not borne out by this case. Here, 31 plaintiffs filed complaints and prevailed on summary judgment before the tax went into effect. CP 1294-95. They were represented by lawyers from prominent Seattle law firms and public interest organizations. CP 1294-1295. As described in their complaints, Respondents had significant financial, personal, and political motives for challenging the City's income tax. CP 105-108. Access to the justice system for these high-income Respondents is not at issue in this case.

There are no conflicts between the Court of Appeals' decision here and Washington case law. Review should be denied.

B. The private attorney general doctrine does not apply in Washington.

Because there is no common fund in this case from which to award attorney fees, Kunath, in effect, seeks fees based on the "private attorney

general” doctrine. Kunath contends that he felt compelled to bring this lawsuit because the attorney general refused to do so. CP 128, 1369; Kunath Answer at 10. The private attorney general doctrine allows for an “award of attorney fees when a successful litigant incurs considerable economic expense to effectuate an important legislative policy benefiting a large class of citizens.” *McCready*, 131 Wn.2d at 277.

But this Court held unequivocally in *Blue Sky Advocates v. State*, 107 Wn.2d 112, 122, 727 P.2d 644 (1986) that the “private attorney general doctrine does not apply in Washington.” The dissent in *Blue Sky*—which Kunath relied on in his trial court motion without identifying it as the dissent—advocated for the adoption of the private attorney general doctrine. CP 1367. But the majority in *Blue Sky* “specifically considered and rejected adopting the private attorney general theory as a further equitable exception to the American rule.” *McCready*, 131 Wn.2d at 274-75 (citing *Blue Sky*, 107 Wn.2d at 122). Thus, the Court of Appeals correctly affirmed the denial of Kunath’s request for attorney fees.

C. The denial of attorney fees does not present an issue of substantial public interest for this Court to review under RAP 13.4(b)(4).

It is not clear whether Kunath contends that the issue of common fund attorney fees presents an issue of substantial public interest under RAP 13.4(b)(4). Kunath does not specifically cite to RAP 13.4(b)(4) and

only argues that this lawsuit serves “an important purpose.” Kunath Answer at 11. The Court should not consider any issues not presented for review. RAP 13.4(c)(5)-(7) (requiring an answer to a petition to contain a statement of the reason why review should be accepted under RAP 13.4(b)(4)).

But even if the Court considers the issue, the denial of common fund attorney fees to Kunath, the one respondent who requested fees, does not present an issue of substantial public interest under RAP 13.4(b)(4) to warrant discretionary review by this Court. The decision of the Court of Appeals is consistent with common fund precedent and with the traditional American Rule by which each party in litigation pays its own attorney fees. There has been no denial of access to justice. Thirty-one plaintiffs represented by counsel filed complaints to challenge the tax before it ever went into effect. Respondent Kunath provides no basis for accepting review of the attorney fee issue under RAP 13.4(b)(4).

VI. CONCLUSION

The Court of Appeals relied on well-settled precedent and correctly affirmed the trial court’s denial of attorney fees under the common fund and private attorney general doctrines. There are no grounds for accepting discretionary review under RAP 13.4.

RESPECTFULLY SUBMITTED this 14th day of February, 2020.

PACIFICA LAW GROUP LLP

PETER S. HOLMES
SEATTLE CITY ATTORNEY

By s/Gregory J. Wong
Paul J. Lawrence, WSBA # 13557
Gregory J. Wong, WSBA #39329
Jamie L. Lisagor, WSBA #39946

By s/Kent Meyer
Kent Meyer, WSBA #17245
Assistant City Attorney

And

Hugh D. Spitzer WSBA # 5827

Attorneys for Petitioner City of Seattle

PACIFICA LAW GROUP

February 14, 2020 - 11:52 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97863-8
Appellate Court Case Title: City of Seattle, et al. v. S. Michael Kunath, et al.

The following documents have been uploaded:

- 978638_Answer_Reply_20200214114916SC180211_6386.pdf
This File Contains:
Answer/Reply - Reply to Answer to Petition for Review
The Original File Name was City Reply to Kunath Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Dawn.taylor@pacificallawgroup.com
- EStahlfeld@freedomfoundation.com
- Lise.Kim@seattle.gov
- andrienne@washingtonappeals.com
- both@pacificlegal.org
- carolv@thompsonhowle.com
- cate@washingtonappeals.com
- cfrantz@orrick.com
- christinej@thompsonhowle.com
- cindy.bourne@pacificallawgroup.com
- claire@smithandlowney.com
- ddunne@orrick.com
- edwardss@lanepowell.com
- ewb@pacificlegal.org
- galexander@bgwp.net
- howard@washingtonappeals.com
- hstrasberg@comcast.net
- hstrasberg@me.com
- iglitzin@workerlaw.com
- jamie.lisagor@pacificallawgroup.com
- kent.meyer@seattle.gov
- knoll@smithandlowney.com
- lawyer@stahlfeld.us
- matt@davisleary.com
- matt@tal-fitzlaw.com
- matthew@davisleary.com
- mcbrider@lanepowell.com
- paul.lawrence@pacificallawgroup.com
- phil@tal-fitzlaw.com
- rmckenna@orrick.com
- sea_wa_appellatefilings@orrick.com
- skahan@workerlaw.com
- spitzerhd@gmail.com
- woodward@workerlaw.com

Comments:

City of Seattle's Reply to Kunath's Answer to Petition for Review

Sender Name: Thien Tran - Email: Thien.Tran@pacificallawgroup.com

Filing on Behalf of: Gregory J Wong - Email: greg.wong@pacificallawgroup.com (Alternate Email: thien.tran@pacificallawgroup.com)

Address:

1191 Second Avenue, Suite 2100

Seattle, WA, 98101

Phone: (206) 245-1700

Note: The Filing Id is 20200214114916SC180211