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INTRODUCTION

The brief of the Respondent Department of Retirement Systems (DRS) explains the abuse of discretion standard for reviewing a trial court's approval of a class action settlement and why the superior court did not abuse its discretion in approving this settlement. This is the brief of Respondent and plaintiff Jeff Probst and the plaintiff settlement class he represents, *i.e.*, the settlement class defined in the preliminary approval order of December 14, 2007, p. 3; CP 38. The plaintiff and the settlement class are collectively called "Plaintiffs" in this brief.

Plaintiffs, of course, agree with DRS that this appeal should be rejected and dismissed. Therefore, this brief does not duplicate DRS's arguments, which are incorporated by reference under RAP 10.1(g)(2).

STATEMENT OF THE CASE

Parties

Objector Attila Hegyi, *pro se* and as guardian of his daughter, Virag Hegyi, objected to the settlement – indeed, they were the only two class members who opposed approval. The Hegyis are the Appellants. The Hegyis mistakenly identify Plaintiffs' attorneys as Respondents. This is apparently because (see *e.g.*, Hegyi Br., p. 20) plaintiffs' attorneys received a common fund fee award out of the settlement pursuant to *Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 70-74, 847 P.2d 440 (1993).

The Settlement Class

Originally, the proposed class in this case included both Public Employees Retirement System (PERS) Plan 2 Members and Teachers Retirement System (TRS) Plan 2 members who had lost interest when they transferred from PERS/TRS Plan 2 to Plan 3 or when they withdrew entirely from Plan 2.¹ Complaint, CP 3-7; Order Certifying Class, CP 21-23.

Since the TRS Plan 2 to Plan 3 transfer occurred earlier than the PERS Plan 2 to Plan 3 transfer, DRS had a separate statute of limitations defense for the TRS transferees. The superior court deferred consideration of class certification as to the TRS members. CP 23. The parties agreed to settle the claims of those who were not subject to DRS's statute of limitations affirmative defense. CP 27. The claims of TRS members who transferred from Plan 2 to Plan 3 were *not* settled and remain pending, leaving those TRS members to litigate both the underlying interest claim and the statute of limitations.² CP 91-92.

Accordingly, only the claims of settlement class members are settled and thus within this appeal. TRS Plan 2 members who transferred

¹ There were never claims on behalf of members of the other state retirement systems mentioned in the Hegyis' brief, p. 22.

² There are several issues on the statute of limitations, including when the claims accrue, *see, e.g., Bowles, supra*, 121 Wn.2d at 78 (retirement claims accrue upon retirement or departure from employment), and *Samuelson v. Comm. Col. Dist.*, 75 Wn.App. 340, 345-48, 877 P.2d 734 (1994)(discovery rule applies to retirement option claim).

to Plan 3 are not within the settlement or this appeal. *Id.*

Facts

DRS's brief explains some of the procedural facts concerning approval, which will not be repeated here. The underlying facts concerning the merits of this litigation are not included in the record brought up by the Heygis. Therefore, the Superior Court's findings are "verities," presumed to be correct, and binding here. *Morris v. Woodside*, 101 Wn.2d 812, 815, 682 P.2d 905 (1984). Consequently, the correctness of the superior court's findings (CP 80-93) is not in disputed here.

DRS mentions its *defense* on the interest issue in this case, but it does not discuss the issue itself. DRS Br., p. 14. This case arose because DRS promised to pay interest at the rate of 5.5% on the accounts PERS/TRS plan 2 members when they transferred to PERS/TRS plan 3. DRS, however, denied all interest in the quarter of the transfers and denied interest on deposits in the quarter of each deposit. DRS's denial of interest violated several statutes (*e.g.*, RCW 41.50.260(1); RCW 41.04.445(4); RCW 41.40.795) and the common law. DRS argued the superior court should follow its past practice (DRS Br., p. 14).

DRS's internal presiding officer ruled against the plaintiff, and the parties did not know whether the superior court (then Judge Paula Casey) would overturn that decision. Since DRS's practice had gone on for a number of years, and DRS had an administrative decision, DRS had some inertia on its side. Accordingly, the parties settled this part of the case.

The settlement was a fair and reasonable compromise for about half or more of the interest owed, as the Superior Court found. CP 86, 90. DRS agreed to pay \$5.5 million; it is not a “coupon” or minimal settlement.

APPELLATE JURISDICTION

The superior court approved the settlement on June 30, 2008 and the Hegyis filed a notice of appeal from that approval of the settlement on July 29th. The superior court approved the fee award of Plaintiffs’ attorneys on September 5th. The Sept. 5th order (in the SCP) also stated the judgment is final under CR 54(b) for the settlement of the class members, whose claims were resolved in the Settlement Agreement. The Hegyis’ July 29th notice of appeal therefore became effective on September 6th pursuant to RAP 5.2(g).

Virag Hegyi (through her father/guardian) also filed a notice for discretionary review of the superior court’s refusal to appoint an attorney for her at public expense to represent her in the settlement hearing on June 30th. This has not been actively pursued and is moot in any event since (a) she was represented in the hearing by her court-appointed Guardian (Attila Hegyi) and (b) this issue, if it were alive, could have been raised in Appellants’ brief under RAP 2.4(b).

ARGUMENT

THE HEGYIS HAVE NOT ESTABLISHED THAT THE SUPERIOR COURT ABUSED ITS DISCRETION IN APPROVING THE SETTLEMENT.

Mostly, the Hegyis misstate the standards for approving a settlement. They contend they should have received “full real damages,” rather than a compromise. Hegyis’ Br., p. 18. They argue throughout their brief that the superior court should not have relied on the recommendation of experienced class counsel because the attorneys received a common fund fee out of the proceeds of the settlement. Neither of these points is correct. *Pickett v. Holland America Line*, 145 Wn.2d 178, 188-92, 199-200, 35 P.3d 351 (2002) (discussed at length in DRS brief); *Bowles v. Dept. of Retirement Systems*, *supra*, 121 Wn.2d at 70-73 (in class action against DRS, plaintiffs’ attorneys should receive a common fund percentage out of the recovery).

The Hegyis also attack the superior court’s findings of fact throughout their brief, but they fail to designate and provide the hundreds of pages of record on which those findings were based. Because the Hegyis did not submit the record of the litigation, and they do not cite any record facts showing the findings are wrong, the superior court’s findings are assumed to be correct. RAP 10.3(a)(5); *Morris v. Woodside*, *supra*, 101 Wn.2d at 815; *Starzewski v. Unigard Ins.*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Since the Hegyis base their appeal heavily on

attacks on the Superior Court's findings, without proving they are wrong by citing evidence, the appeal should be rejected.

For those reasons, and the reasons explained in the DRS brief, the Hegyis have not established any error in the trial court's approval of the settlement, much less on abuse of discretion.³

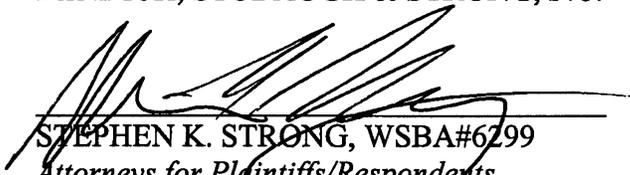
CONCLUSION

The Superior Court did not abuse its discretion in approving this fair and reasonable settlement. The Hegyis' objection and appeal should be rejected.

Dated this 23rd day of December, 2008.

Respectfully submitted,

BENDICH, STOBAUGH & STRONG, P.C.



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³ The Hegyis say the settlement agreement was not in the record for a while. Hegyis' Br., p. 13. It is true the clerk's office misplaced it for a time, but the settlement agreement was provided to the Superior Court, to class members, and objectors. See DRS Br., p. 8.

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Brief of Respondents Jeff Probst and the Plaintiff Class was filed in Division II of the Court of the State of Washington.

I further certify that one copy of the Brief of Respondents Jeff Probst and the Plaintiff Class was served on 12/23/08 *VIA COURIER* on counsel for Washington State Department of Retirement Systems:

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COPIED 23
STATE DEPARTMENT OF RETIREMENT SYSTEMS
BY [Signature] DEPUTY
DEC 23 10:10 AM '08

COURT OF APPEALS
DIVISION II

And by *USPS REGULAR MAIL* postmarked 12/23/08 on the Objector/Appellant (*pro se*):

Virag Hegyi by her Guardian, Attila Hegyi
Attila Hegyi
19620 81 Pl W
Edmonds, WA 98026

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

DATED: December 23, 2008, at Seattle, Washington.



Monica I. Dragoiu
Legal Assistant

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