

NO. 44982-0-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

KEVIN DOLAN, and a Class of similarly situated individuals,

Plaintiffs-Respondents,

v.

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

Defendant,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor-Appellant.

**BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS**

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I. INTRODUCTION

The Washington State Supreme Court held that employees of non-profit public defender corporations were employees of King County eligible for membership in the state Public Employees Retirement System (PERS). *Dolan v. King Co.*, 172 Wn.2d 299, 258 P.2d 20 (2011). The decision added 900 to 1,000 new members to PERS for a period potentially extending back 35 years. The Department of Retirement Systems (Department) was not a party in the lawsuit. The lawsuit did not make claims against the Department or PERS.

After remand of the case to superior court, the *Dolan* Plaintiffs and King County (the parties) asked the superior court to approve, and order the Department to comply with, a settlement agreement containing terms adverse to the Department and the PERS trust fund and plan members. The Department was not a party to the agreement. The Department did not approve the terms affecting PERS pension benefits and funding.

The settlement terms are adverse to the Department and PERS because they require the Department to implement benefit provisions that are contrary to statute, require PERS to advance attorney fees out of trust funds, and prohibit the Department from applying the statute authorizing recovery of lost investment income on late pension contributions. The loss of funds to PERS from the inability to collect interest on retroactive pension

contributions is estimated to be up to \$100,000,000.¹ The effect of the settlement agreement is that most of the cost of the retroactive pensions for the new King County public defender PERS members will be charged to all state and local government employers who make pension contributions for their PERS employees, and all current employees who are members of PERS Plan 2.²

The Department moved to intervene as a party in this lawsuit when the parties first asked the superior court to order the Department to comply with settlement terms to which it had not agreed. The purpose of the motion to intervene was to require the parties to obtain the Department's consent to any settlement terms affecting PERS pension benefits and funding.

The superior court erred by granting the Department only limited intervention to object to settlement terms under the class settlement process. The superior court denied the Department's request to be a full party whose consent is required to be bound to a settlement affecting the interests of PERS and its members. The superior court also erred in rejecting the Department's objection to being ordered to comply with a settlement agreement to which it

¹ The amount cannot be precisely determined until the County and non-profit public defender organizations provide payroll data to the Department.

² PERS is divided into Plans 1, 2, and 3. PERS Plan 1 member contribution rates are set by statute. Plan 3 members choose their contribution rate. Plan 2 member rates fluctuate based on the financing needs for Plan 2 benefits. The structure of PERS means that the settlement agreement will charge the cost of King County public defender benefits to all PERS Plan 2 members and all PERS employers and not to the employees and King County who incurred the cost.

had not consented, and in rejecting the Department's objections to findings of fact and conclusions of law on pension issues that had never been litigated.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the order of May 10, 2013, denying the Department full party status and granting limited intervention.

B. The trial court erred in entering the order of March 29, 2013, preliminarily approving the settlement agreement.

C. The trial court erred in entering the findings of fact, conclusions of law and order on June 21, 2013, approving settlement.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Is the Department entitled to full, rather than limited, intervention in a lawsuit that seeks to determine pension funding, benefit and administration issues that are the sole responsibility of the Department under state law? (Assignment of Error 1.)

B. Was the Department's motion to intervene timely when the Department moved for intervention at the time that the existing parties first moved for a court order to bind PERS to terms of their settlement agreement? (Assignment of Error 1.)

C. Can the parties to this lawsuit bind PERS to a settlement agreement to which the Department has not agreed? (Assignments of Error 2 and 3.)

D. Can a trial court enter findings of fact and conclusions of law on issues of public pension funding, benefits, and administration when the Department was not a party to the lawsuit in which the findings and conclusions were entered, and the issues covered by those findings and conclusions were never litigated by the parties or the Department? (Assignment of Error 3.)

E. Can a trial court order a non-party to a lawsuit to comply with terms of a settlement agreement when the non-party has not consented to the agreement? (Assignment of Error 3.)

IV. STATEMENT OF THE CASE

A. Statement Of Facts

1. The State Department Of Retirement Systems Is Responsible For Administration Of Public Pension Systems

The Legislature created the Washington State Department of Retirement Systems (Department) in 1976. CP 184; *see* RCW 41.50.020; 41.50.030. The Department administers several public retirement systems, including the Public Employees Retirement System (PERS), for the benefit of members and retirees. CP 184. Contribution rates are set by the Legislature or the Pension Funding Council, who are advised by the State Actuary. *Id.* Funds are held and invested by the State Treasurer and State Investment Board. CP 184; RCW 41.50.077; 41.50.080.

The Department decides pension eligibility, service credit, and benefit amounts. Chapter 34.05 RCW; CP 185; *see* RCW 41.40.068; 41.40.073; 41.40.078. The Department's pension decisions can be appealed to administrative tribunals, with judicial review under the Administrative Procedures Act (APA). *Id.*

State and local government employers in PERS plans, and their PERS-covered employees, pay contributions to the PERS pension trust fund. CP 184, 558; *see* RCW 41.40.042. The contributions are invested. *Id.* Contributions themselves are insufficient to pay future PERS pension benefits. *Id.* Investment earnings on contributions finance approximately 75% of pension benefits. CP 187-188.

The Department collects interest on late payments of employer and employee contributions. *Id.* The Department charges two kinds of interest. First, the Department charges interest at a 12% annual rate for late payments of monthly contributions or amounts billed, to encourage timely payments and compensate to the loss to pension fund earnings caused by late payments. RCW 41.50.120. The Department can also charge employers and employees interest, at a rate set by the Department, on retroactive contributions.³ CP 187-88; RCW 41.50.125. This rate is

³ "Retroactive" contributions are pension funding payments made at a time later than when they should have been paid, because an employee received pension "service credit" for periods before the employer and employee paid for future pension benefits.

currently 7.9%. CP 185. This interest replaces income lost because retroactive contributions have not been invested to earn returns that finance pensions. *Id.* RCW 41.50.125; Laws of 1994, ch. 177, § 1.

2. The *Dolan* Plaintiffs Filed A Complaint Against King County But Did Not Make The Department A Party

In 2006, Kevin Dolan, representing a class of public defenders, sued King County (County) for “failure to enroll him and the other King County public defense employees in PERS and its [King County’s] failure to make contributions on their behalf.” CP 539-544. If the class was certified under CR 26(b)(1) or (2) (not allowing “opt-outs”), Plaintiffs sought an order requiring the County to report the class to the Department for retirement purposes and to “make all omitted contributions⁴] needed to properly fund Plaintiffs’ and class members’ state retirement benefits.” CP 5. If the class was certified under CR 26(b)(3) (allowing “opt-outs”), Plaintiffs sought damages from the County “equal to the actual value of the lost pension including future pension value” plus an additional amount for lost tax benefits. CP 542-543.

The complaint did not name the Department as a party, demand monetary or injunctive relief from the Department, ask that the Department bear any cost of the claim, or ask that the Department modify pension

⁴ In briefing on the class certification and opt-outs issue, Plaintiffs noted that the term PERS contributions “may include interest owed to DRS, if any.” CP 566.

statutes and rules. CP 539-544. The County's answer raised affirmative defenses, and cross-claimed against Plaintiffs for the employees' share of money owed to PERS to fund pensions for the class, if the class established PERS eligibility. CP 545-556. The answer made no third party claims against PERS. *Id.*

In 2005, prior to the filing of this lawsuit, Plaintiffs' counsel informed the Department's counsel of an upcoming lawsuit against an unspecified county over pension eligibility for employees of a non-profit group. CP 109-110. He asked if the Department had an interest in joining the suit as a plaintiff. *Id.* The Department responded that it had statutory authority to investigate reporting errors and invited him to send his claims to the Department for review. *Id.*

Plaintiffs filed this lawsuit in January 2006 without consulting with the Department. The superior court found that the class was eligible for enrollment in PERS. *See Dolan*, 172 Wn.2d 299. The County sought Supreme Court review of the decision. The Court affirmed and remanded the case for further proceedings. *Id.* at 322. The Supreme Court decision became final when the Court denied reconsideration on January 10, 2012. *Id.*

The Department did not participate in the trial or appeal. The Attorney General's Office did file amicus briefs supporting King County's

position that independent contractors did not qualify for PERS membership under state pension and federal tax laws. CP 248-286. The Attorney General's briefing focused on the interest of public employers on the merits of enrolling independent contractors, and did not address the administrative and funding issues involved in the Department's motion to intervene in this lawsuit. *Id.*

3. Plaintiffs And King County Declined Department Advice On Pension Implementation Requirements

In March and April 2012, the County enrolled current public defenders and began making PERS contributions on their behalf. CP 185, 397. In April 2012, the Department sent a letter to counsel for Plaintiffs and the County asking that the Department be consulted about any settlement discussions that implicated benefit eligibility and other retirement issues for which statutes required Department determinations. CP 112-113. The Department expressed concern that a resolution that did not comply with pension statutes would result in litigation about benefit eligibility. *Id.*

After the April 2012 letter, Plaintiffs did not communicate with the Department. The County communicated with the Department on only two issues. First, on August 15, 2012, a County official spoke to a Department assistant director about the Department's advancing attorney fees from the pension fund. CP 218. The Department Director responded in a letter dated

September 10, 2012, stating that federal and state laws did not allow payment of attorney fees out of trust funds when the litigation did not benefit all pension plan members.⁵ CP 224-225.

A county official discussed the second issue on October 2, 2012, when he spoke to the Director and two other officials by telephone. CP 222, 302. These officials discussed approximately \$19,000,000 in County and \$12,000,000 in employee retroactive contributions owing to the pension fund. CP 222. The discussion included the topic of interest due on retroactive contributions. *Id.*; CP 302. Department officials discussed past cases involving small amounts of retroactive contributions, where payments of those contributions without interest did not cause a liability to the funding status of the PERS fund. CP 302-303. Department officials recall that the County did not ask, and the Department did not make, a commitment to a position on the large amount of interest owing in this case.⁶

The Department first received a copy of a draft settlement agreement between Plaintiffs and the County on December 18, 2012. CP 103, 247, 307-308. Until this date, the Department did not know that Plaintiffs and the County had agreed to a settlement purporting to bind PERS to terms that the

⁵ County counsel also discussed the attorney fee issue with the Department in early October 2012, but the Department did not change its position. CP 306.

⁶ The County official believes that Department officials stated that no interest would be charged on retroactive contributions based on “normal practice.” CP 222. There are no contemporaneous documents recording the content or outcome of the October 2, 2012, telephone conversation.

Department believed were unacceptable or unlawful. CP 307-308. The County's agreement surprised the Department because County counsel, who negotiated the settlement, was also a Special Assistant Attorney General representing the Department and PERS in another pension lawsuit. CP 306. The Department did not expect that this attorney, who no longer represents the Department and PERS, would propose settlement terms adverse to PERS. *Id.*

Deputy Director (now Director) Frost informed the County that the Department would charge interest on retroactive contributions because of the magnitude of the amount owed to the pension trust and the effect the failure to pay interest would have on the funding status of the PERS trust fund. CP 302. On January 7, 2013, Department counsel sent a letter to Plaintiffs and the County stating that the Department was a non-party that could not be bound by the agreement. CP 115-118. The Department objected to specific provisions, including advancing attorney fees from pension funds and foregoing interest on retroactive contributions. *Id.* The Department asked the parties to withdraw the agreement and work with the Department on a resolution consistent with pension laws. *Id.*

Plaintiffs and the County did not respond to the request to negotiate pension issues with the Department. CP 170, 308. Instead, the King County Council approved settlement with Plaintiffs on March 18, 2013, and the

County moved for court approval of the agreement at a hearing set for March 29, 2013. CP 5.

4. The Settlement Agreement Creates Pension Administration And Funding Problems

This lawsuit involved the eligibility of King County public defenders for retroactive PERS membership over a period of 35 years, and whether the County should report the defenders to the Department as PERS members. *See Dolan*, 172 Wn.2d 299. The Supreme Court concluded that the public defenders were eligible for PERS membership but did not resolve pension implementation issues, such as retroactive contributions and interest owed to the pension fund, and the specific service credit and benefits for new members. *Id.* Nonetheless, the settlement agreement between Plaintiffs and the County contains terms governing pension issues that were not part of the lawsuit. Many terms conflict with contribution, interest, and benefit provisions in state pension statutes. CP 115-118, 185-186. The conflicts relevant to this appeal are summarized below.

a. Pension Contributions

The agreement improperly provides that retroactive service credit and contributions are determined by the parties without retaining the Department's right to review and approve the correctness of the calculations of the parties. CP 50-51. While state statutes provide that employers submit

contributions monthly with current payrolls (RCW 41.40.048, 41.50.120), statutes also specifically provide that the Department determines retroactive service credit, pension contribution, and interest. RCW 41.50.140(2); CP 186-187. For retroactive billing and service credit in this case, the parties must provide accurate payroll data and employment history to the Department and allow the Department to calculate the bill and establish the service credit of each new member. *Id.*

b. Interest Owed On Retroactive Contributions

The agreement provides only for retroactive contributions but not for interest to replace lost investment income on overdue payments. CP 43, 56. Pension statutes give the Department discretion to charge interest to replace income lost through delayed payment of employer and employee contributions. RCW 41.50.125; Laws of 1994, ch. 177 § 1. Based solely on the parties' estimate of \$30.9 million in retroactive contributions, the Department estimates interest owed for 35 years at \$90 to \$100 million, but the amount cannot be accurately calculated until the parties provide employment and payroll data to the Department. CP 188. The Director has determined that the PERS pension trust fund cannot forego this large amount of interest without causing either unfunded pension liability or cost increases for PERS members not in the class. CP 188-189.

c. Attorney Fees

The agreement provides that \$12 million of the \$31 million of retroactive contributions now due to the PERS pension trust fund will not be paid into the trust. CP 61-67. The \$12 million will be paid to class counsel as attorney fees. *Id.* This money is to be slowly collected by the Department from monthly pensions of individual class members when they ultimately retire. *Id.* There are many problems with this provision.

First, the settlement agreement makes no provision for interest on payments deferred for a very long time. CP 189-190. If the amount was collected now as it should be, it would be invested and earn market returns for the pension trust. Under the agreement, decades might pass before the \$12 million is collected, thereby depriving the trust of significant income. Second, there is no assurance the pension fund will ever be fully reimbursed for delayed contributions. CP 190. Third, the burden and expense of fee collection is placed on the Department and not on the parties. CP 189.

Finally, the attorney fee provision runs afoul of state and federal law. Washington State's common fund theory for payment of attorney fees requires that fees be paid out of funds belonging to class members, and not out of undifferentiated trust funds that pay the benefits of all pension beneficiaries. CP 305-306. The retroactive contributions being

paid to the pension trust are not funds owned by this class, but are funds that become part of the trust that exists to fund payments over time to all beneficiaries. *Id.* In regard to federal law, the payment of attorney fees, from monies taken from deposits to the pension trust, appears to violate federal rules for qualified retirement plans by using trust funds for the benefit of the non-member attorneys. *Id.*; 26 U.S.C. § 401(a)

d. Benefit And Service Credit

The agreement dictates service credit and benefit eligibility. CP 45-49, 185-192. Service credit and benefit eligibility are governed by statutes and “legislative” regulations adopted by the Department to implement statutes. *Id.*; *see generally, e.g.*, RCW 41.40.023 - .057; chapters 415-02 and 415-108 WAC. The Department decides pension benefits and administration. CP 191. Employers and employee members of PERS cannot alter pension rules by private agreement. *Id.* The rules are common to all members of the PERS. *Id.*

An illustrative benefit problem is that the agreement removes transfer and new hire options, dictating that all class members are enrolled in PERS 2 (except for those with PERS membership prior to the lawsuit). CP 191. Statutes require that new PERS members choose membership in either PERS 2 or PERS 3, and that current PERS 2 members can transfer to PERS 3. *Id.*;

RCW 41.40.785 and .795. The agreement requires the Department to administer membership provisions that eliminate mandated choices. *Id.*

B. Statement of Procedure

On March 29, 2013, Plaintiffs and King County asked the court to enter a court order preliminarily approving settlement terms that were contrary to Department interests on retroactive pension benefits, contributions, and interest. CP 98. The Department appeared at the hearing to advise the court that the Department would move to intervene; the court set a hearing date for the motion to intervene. CP 96-101; RP 1-13 (March 29, 2013). The Department was concerned that, if collateral proceedings were needed to resolve benefit and pension funding issues related to the class, there was a risk that the parties would raise failure to intervene as a defense. CP 99.

The Department moved to intervene as a party on April 22, 2013. CP 153-167. The court denied “full party” status because the motion was “untimely.” CP 312. The court granted “limited intervention” to allow the Department to present objections to the settlement along with objecting class members, and to permit Department appeal of the court’s approval of the settlement. CP 311-313.

The Department filed objections to the agreement and made a detailed oral presentation of objections at the June 7, 2013, settlement

approval hearing. CP 194-197; RP 16-36 (June 7, 2013). The Department reiterated its global objection to being bound to an agreement without its consent and its particular objections to provisions that were contrary to law or to decisions committed to the Department by law. *Id.* The Department also filed an opposition to entry of the findings of fact, conclusions of law, and order approving the agreement because findings and conclusions were not authorized by CR 52 and they adjudicated pension issues that had not been litigated by the parties or the Department. CP 658-663. The court entered Plaintiffs' proposed findings, conclusions, and order, and approved the agreement. CP 519-534.

The Department timely filed notices of appeal on June 10, 2013, and June 24, 2013.

V. ARGUMENT

A. This Appeal Raises Errors Of Law And The Appellate Review Is De Novo

The standard for review for denial of intervention under CR 24(a) is generally error of law. *Aguirre v. AT&T Wireless*, 109 Wn. App. 80, 33 P.3d 1110 (2001). The standard of review for timeliness of intervention can be abuse of discretion, but is error of law if the decision on timeliness depends on a legal issue. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 989 P.2d 1260 (1999). In this case, error of law

applies because timeliness depends on an analysis of when the parties first took legal action adversely affecting PERS in a lawsuit previously making claims only against a public employer and not against PERS.

The approval of a settlement agreement binding PERS despite its lack of consent, and the entry of findings, conclusions, and an order binding non-party PERS, raise legal issues under case law, a statute (RCW 2.44.010(1)), and several court rules (CR 2(A), 23, and 52). Whether a non-party is bound by an agreement is an issue of law. *Powell v. Sphere Drake Insurance*, 97 Wn. App. 890, 988 P.2d 12 (1999). Errors of law are reviewed de novo. *Id.*

B. The Department Should Be Allowed To Intervene As A Full Party In This Lawsuit To Protect The Interests Of The Public Employees Retirement System And Its Members

Intervention of right is governed by CR 24(a). This rule provides that intervention “shall” be allowed when three criteria are met:

- When the applicant claims an interest relating to the property or transaction which is the subject of the action
- The applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest.
- The applicant’s interest is [not] adequately represented by existing parties.

CR 24(a)(2). In addition, CR 24 requires that the intervention be “timely.”

King County opposed the Department's motion to intervene on the ground that it was untimely. CP 209-216. Plaintiffs opposed the motion to intervene primarily on the ground that it was untimely, but also argued that the Department's interests were insufficient because they were only "administrative," and because King County represented the Department's interests, a claim that the County did not make. CP 226-237.

The superior court ruled the Department satisfied the three criteria for intervention of right, stating:

THE COURT: Okay, thank you. Well, I think that DRS has a right of intervention, and I think it's under Civil Rule 24(a). I think they have a right to intervene because certainly the issues that are addressed in this settlement document directly affect DRS. The implementation and follow through with the agreement that's been reached in terms of coverage and those details intimately involve the Department of Retirement Systems.

RP 33-34 (May 10, 2013). However, the court then ruled that the motion to intervene was untimely because it should have been made at the time the Supreme Court ruled against the County on the eligibility issue. RP 34 (May 10, 2013). Despite the finding of untimeliness, the court then granted "limited," intervention.

1. The Department Has An Interest In A Settlement And Court Order That Purport To Determine Pension Benefit And Contribution Matters That Are The Responsibility Of The Department

The Department of Retirement Systems is the state agency that administers all state public pension systems.⁷ RCW 41.50.020 and 41.50.030. When the King County public defenders are enrolled in PERS, the Department is the agency that determines how current and retroactive pension eligibility will be implemented *Id.* This responsibility includes collection of retroactive pension contributions, and interest replacing lost investment returns on delayed contributions. CP 184, 186-189. The Department also implements laws governing service credit and benefit eligibility. CP 191-192.

PERS is a government pension system whose benefits and contributions are set by statute rather than agreement of members and beneficiaries. CP 191. The benefits are not subject to any process of law or assignment, except as specified in pension statutes. RCW 41.40.052. Service credit, benefits, and contributions, are determined or collected by the Department, with appeal of Department decisions, if necessary, to the courts under the Administrative Procedures Act (APA). CP 185; RCW 41.40.068 and 41.40.078.

⁷ The Cities of Seattle, Tacoma, and Spokane are the only Washington jurisdictions with separate pension systems.

The settlement agreement and court approval order state how the Department is to perform its statutory responsibility to manage PERS. CP 29-95, 519-534. Thus, the Department has a direct interest in the enrollment of employees of public defender organizations in PERS.

The Department's need to intervene, and the nature of its interest, arose from the way the parties chose to litigate pension eligibility for public defenders. A public employer and employees of non-profit corporations litigated state pension eligibility for public defenders without requesting an administrative decision or joinder of the agency that manages the pension system.

Pension claims are typically decided by the Department and judicial review is under the APA, with the Department as a party.⁸ *See, e.g., City of Pasco v. Department of Retirement Systems*, 110 Wn. App. 582, 42 P.3d 992 (2002); *Probst v. State Department of Retirement Systems*, 167 Wn. App. 180, 271 P.3d 966 (2012); *Serres v. Washington Department of Retirement Systems*, 163 Wn. App. 569, 261 P.3d 173 (2011). In cases challenging pension laws and administrative rules, rather than challenging only application of laws and rules, parties do not always exhaust administrative remedies; they file actions directly in superior

⁸ Superior courts do not have original jurisdiction over claims arising from administrative actions because administrative matters can be reviewed only on appeal under the APA. *Wells Fargo v. Dept. of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012).

court, but the Department is still a party. *See, e.g., Bowles v. Washington Department of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1989) (challenge to legislation reducing allegedly “vested” benefits for retirees); *County Officials v. Washington Public Employees’ Retirement Systems Board*, 89 Wn.2d 729, 575 P.2d 230 (1978) (challenge to policy of including vacation cashouts in salary to determine pensions).

The Department’s presence in pension cases as adjudicator or party means pension issues are decided with the participation of pension systems. If this case had followed a typical path, any judicial review decision allowing eligibility would have been remanded to the agency for implementation, with the employees or the employer having rights to appeal decisions about implementation. The consideration of PERS interest in the implementation of the *Dolan* decision would have occurred by operation of the APA.

At this point in the lawsuit, the Department’s interest is not in the merits of pension eligibility issue decided by the Supreme Court. However, the decision by the parties to skirt the administrative process for deciding pension eligibility does not eliminate the Department’s interest in pension funding and benefit issues after eligibility is decided. The Supreme Court’s decision must unavoidably be implemented through the administrative process.

The parties acknowledged that the Department is entitled to intervene to object to terms in the agreement and order. CP 215, 218. However, they argued that the Department should only be a “limited” intervenor whose consent is not required for the agreement. *Id.*

The parties rely on *Marino v. Port Commission*, 97 Wn.2d 317, 646 P.2d 113 (1982). *See* CP 215, 228-229, 236. *Marino* states the general rule that the court determines the extent of intervention by the relative concerns of the parties and the nature of the proceedings, but *Marino* does not support the parties’ position.

In *Marino*, the Court limited the intervenor to presenting argument and evidence at a port “surplus property” hearing, and did not allow discovery, because the hearing was a limited purpose hearing on a limited issue. The limited intervention suited the issue and nature of the proceeding. Here, the matters in dispute are a settlement and court order with terms affecting vital interests of PERS and its members. The Department seeks to intervene to negotiate terms of the settlement and order that directly affect PERS interests at a time when those very terms were being considered by the court. The request to intervene is appropriate to the nature of the current court proceedings and to the kind of interests asserted.

Plaintiffs cite *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994), to argue that the Department cannot intervene as of right under CR 24(a), but is limited to permissive intervention under CR 24(b). *See* CP 236. *Westerman* does not support this argument.

In *Westerman*, a county prosecutor sought intervention in a lawsuit to present legal argument regarding the interpretation of a criminal procedure rule. The Court held that the prosecutor was limited to permissive intervention under CR 24(b) because the prosecutor had no direct interest in the outcome of the proceeding. Unlike *Westerman*, the Department has a direct interest in the correct application of the retirement statutes and the collection of the contributions needed to fund the PERS retirement trust. The Department is entitled to intervene as a full party to ensure that retirement statutes are correctly applied and PERS receives the funds that are owed to it.

2. Public Employees Retirement System Interests Are Impaired By A Settlement Agreement And Court Order That Interfere With The Department's Responsibilities For Pension Funding And Benefit Eligibility Decisions

The parties' settlement agreement impairs the interests of PERS and its members. The impairment is described in the declaration of Director Marcie Frost (CP 183-193), at pages 10-15 above, and in the Department's objections presented in the trial court. RP 16-36 (June 7,

2013). In regard to pension benefit entitlement, the settlement requires the Department to follow benefit eligibility and service credit rules that are inconsistent with state statutes. CP 191-192. In regard to pension system funding, the agreement provides that the County will not pay interest to compensate for lost investment returns on the estimated \$31,000,000 in retroactive contributions owed to the trust fund, or to compensate for loss of investment income caused by the deferral of the payment of \$12,000,000 of contributions for attorney fees. CP 187-188. Investment returns typically comprise 75% of a defined benefit pension fund. CP 187-188. Thus, the combined effect of foregone investment returns on contributions, and contributions deferred to pay attorney fees, is a likely loss of well more than 75% of the funds needed to pay retirement benefits to the public defenders. *Id.*

The settlement agreement is also prejudicial to the Department because the Department has no opportunity to assert the statute of limitations defense to retroactive claims that will be very costly to PERS, if lost investment returns are not reimbursed as the agreement provides. The statute of limitations for pension claims is three years. *Noah v. Sate*, 112 Wn.2d 841, 774 P.2d 516 (1989); *Retired Public Employees Council of Washington v. State*, 104 Wn. App. 147, 16 P.3d 65 (2001). Employees must assert a claim within three years of when they were harmed by

failure to enroll them in the pension system. *Id.* The superior court deferred ruling on the County's statute of limitations motion until the court decided liability, but then did not rule after the liability decision. CP 667-682. As a result, a major issue that affects pension implementation was left undecided and it has a big affect on PERS if PERS must absorb a major part of the cost of hundreds of pensions extending back to 1978.

The parties recognized the effect that application of the statute of limitations would have on the retroactive claims and cited King County's agreement to waive the defense as one of the County's major compromises in settling with Plaintiffs. The parties stated:

King County is further compromising by foregoing its statute of limitations defense that class members could not receive service credit for any time period more than three years before this lawsuit was filed, i.e., before January 24, 2003.

CP 15 (notice of class action settlement) (emphasis added). Application of the statute of limitations would significantly reduce the cost and complexity of retroactive pension benefits because those benefits would be limited to relatively few employees for relatively few recent years. PERS interests are severely damaged by the parties' failure to resolve the limitations issue, and the denial of intervention, which prevents the Department from seeking resolution of the limitations issue.

The impairment of PERS interests by the settlement agreement and order is patent. In response to the intervention motion, the parties did not argue that the Department's interests were unimpaired by their settlement. *See* CP 209-216, 226-239.

3. Public Employees Retirement System Interests Are Not Represented By Plaintiffs And King County

There is no party representing PERS interest in this lawsuit. The two existing parties oppose the Department's efforts to represent PERS in resolving issues about retroactive enrollment of King County public defenders in the state pension system. Neither Plaintiffs nor the County claim that they represent PERS interests by entering a settlement agreement contrary to those interests. *See* CP 209-216, 226-239.

4. The Department Made A Timely Motion To Intervene Because The Department Made The Motion When The Parties First Asserted A Claim Against The Public Employees Retirement System In The Lawsuit

The parties' primary objection to the Department's motion to intervene was that intervention was untimely. *See* CP 210-214, 229-234. The County suggests that the Department should have intervened in the fall of 2012 "[s]ince at least last fall, [2012] DRS has been fully informed about the parties intended structure for the settlement...." and "DRS did not assert its request to intervene for months following its knowledge".

CP 214. Plaintiffs recite a long history of the Department's knowledge about the lawsuit, from being "aware of the lawsuit before it was filed" (CP 230) to the Department's admission that it "received a copy of the proposed Settlement Agreement on December 18, 2012." CP 233. Plaintiffs' argument implies that the Department could have intervened at any time because it always knew that its interests were impaired by the suit.

The superior court denied full intervention for untimeliness, but did not adopt the view of either Plaintiffs or the County. The court stated the Department should have intervened immediately after the Supreme Court decision because the Department knew "they [the class] had a right to a pension, and the Department of Retirement Systems would have been put on notice that they [DRS] would automatically be involved in determining the details." RP 34 (May 10, 2013).

The inconsistency between the parties and the court about the reasons for and when the Department should have intervened is telling. The parties and the court have not accurately analyzed what action or event in the lawsuit would have told the Department that it needed to intervene to protect pension system interests, when the Department knew about the adverse action or event, and when it was possible to seek intervention in view of the status of the lawsuit. The events and issues in

the lawsuit need to be examined at the various stages of the lawsuit to determine timeliness.

Before this suit was filed, in January 2006, the Department did not know about this specific lawsuit, but only that an attorney proposed to sue an unnamed county over failure to enroll unspecified non-profit employees in a state pension system. CP 109. The Department responded that it had authority to investigate such a claim and suggested that it be handled by the Department. *Id.*

Plaintiffs filed the lawsuit in 2006. There was no claim in the lawsuit against PERS. *See* CP 539-544. The lawsuit asked only that the employees be enrolled in PERS and that the County be required to pay all omitted contributions, including any interest. *Id.*; CP 588-589. Although the Department had jurisdiction over pension eligibility issues, the fact that Plaintiffs did not request Department adjudication, and the County did not demand it, was not a problem for the Department as pension administrator because a court determination of eligibility simply causes enrollment of new employees in the system that the Department administers. A court's decision finding eligibility is adverse to a government employer that must pay for part of the eligibility (employees pay the other part); it is not adverse to the Department, as administrator of the pension system. *See City of Pasco*, 110 Wn. App. 582.

Plaintiffs' lawsuit continued in the same status from the time it was filed in January 2006 until the Supreme Court's final decision in January 2012. The Attorney General filed amicus briefs, but the issues briefed were the merits of the pension eligibility issue, and the negative effect non-profit eligibility would have on government employment and operational interests. The amicus briefs did not discuss issues of pension funding or benefits because there were no such claims against PERS at the time.

The status of the parties and the Department did not change when the Supreme Court issued its opinion in January 2012. The superior court stated that the Department should have intervened at this point because it was put on notice that it "would automatically be involved in determining those [pension] details." RP 34 (May 10, 2013). However, administering the benefits and contributions resulting from new eligibility is not a ground for intervention because simply administering a pension plan does not impair or impede the Department's interest as required by CR 24(a). PERS had no interest that was threatened by the claims in the lawsuit at that time. In January 2012, the Department had no knowledge that Plaintiffs and the County would later file a pleading in the lawsuit asking the court to order the Department to disregard pension statutes and require

PERS to absorb the majority of the employer and employee cost of the retroactive eligibility.

The status of the parties and the Department also did not change in the year after the opinion. Pursuant to the *Dolan* decision, in March and April 2012, King County sought to enroll all current public defense employees, and began paying contributions. CP 248. The Department worked with the County to accomplish the enrollment. *Id.* In regard to the retroactive service credit and benefits, the Department sent a letter to the parties in April 2012 asking them to work with the Department on benefit issues for new system members so that the Department could ensure that membership and benefit eligibility complied with pension laws. CP 112-113. CP 106. As reflected in the content of the letter, the Department had concerns only with administration of pension benefits and had no notice that the parties intended to make a claim against PERS interests. The parties did not respond to the Department's request.

In August and early October 2012, the County had three discussions with Department officials about two issues: whether retroactive contributions could be used for attorney fees; and whether retroactive contributions required interest payments. CP 291, 301-303, 305-306. The Department rejected, in writing, using retroactive contributions to fund attorney fees, but there is no document indicating the

content or outcome of discussions about interest owed on retroactive contributions. *Id.* At this point, the Department was aware the parties were discussing retroactive pension issues, but had no knowledge the parties would ultimately agree to a settlement impairing interests of PERS. CP 302. In addition the Department had no contemplation that the County would assert positions contrary to PERS, because County counsel in this lawsuit was also representing the Department in a separate lawsuit at that time. CP 306-307.

The Department's first knowledge that the parties were contemplating actions that would impair PERS and PERS members' interests was when the parties made their proposed agreement public in late December 2012. CP 304, 308. The Department immediately called the County to say that the terms of the proposed agreement were unacceptable. CP 302. The Department followed the call with a letter to the parties making specific objections, and stating the Department believed that their agreement could not bind the Department. CP 115-118.

Although the Department finally knew by January 2012 that the parties were contemplating a settlement agreement with terms adverse to PERS, the parties had taken no action in the lawsuit itself against Department interests. The pleadings still stated only claims by Plaintiffs against King County and the County's defenses and cross-claims against

Plaintiffs, but no third-party claims against the Department. *See* CP 539-544, 545-556. Until the parties moved for court approval of their agreement, and an order enforcing its terms against the Department, there was no foundation for intervention. There was nothing in CR 24 allowing the Department to intervene in the parties' private negotiations. The agreement was not yet part of the lawsuit and it was unknown when, or even if, the parties would proceed with the agreement over Department objections, and unknown that the parties would request a court order binding the Department to their agreement.

Timeliness of intervention is determined by examining "the surrounding circumstances, such as opportunity to identify the threatened interest, reason for delay, and any adverse impact of delayed intervention." *Columbia Gorge Audubon Society*, 98 Wn. App. at 626 (citing cases). "[P]rejudice in the context of CR 24(a) does not mean the extra bother resulting from having to deal with the intervenor's issues." *Id.* at 629.

The merits of the public defender pension eligibility issue were a matter between the putative employer (King County) and the public defenders. CP 112-113. The problem requiring the Department's intervention arose only with the parties' request in March 2013 that the court order the Department to comply with a settlement agreement that

went beyond the issues in the lawsuit and negatively affected administration and funding of PERS. There was no legal basis for intervention until the parties filed a pleading in this lawsuit asking the court to impose a major part of the obligations and costs of their settlement on the Department and PERS. In effect, Plaintiffs and the County asserted a claim against the Department in the lawsuit even though the Department had never been made a party. If parties in a lawsuit make a claim against a non-party, intervention is timely at the point the claim is made in the lawsuit and the parties have knowledge of the claim. *Ferencak v. Department of Labor and Industries*, 142 Wn. App. 713, 175 P.3d 1109 (2008)⁹

There was no delay by the Department in asserting its interests after the parties first sought to impair those interests by requesting the court to approve their settlement agreement. The Department filed a motion within six (6) days to inform the court of its intention to request

⁹ In *Ferencak*, a workers compensation claimant appealed a denial of benefits by the Department of Labor and Industries to the Board of Industrial Insurance Appeals. In the appeal, he also claimed that the Board should pay his interpreter fees. The Board denied his benefit appeal and his interpreter fee claim. When the claimant appealed his benefit claim to court, he also asserted a claim against the Board for interpreter fees, but he failed to name the Board, in addition to the Department of Labor and Industries, as a party in his appeal. Despite not naming the Board as a party, the claimant, at trial, asked the court to award interpreter fees and the Board immediately moved to intervene when the claimant asserted this claim. The court held that intervention was timely at the point the claimant sought to proceed in his lawsuit with the claim against the non-party.

intervention. CP 94-101; RP 1-13 (March 29, 2013). The Department then promptly moved to intervene. CP 153-167.

There was no prejudice to the parties in the timing of the intervention because the motion to intervene occurred when the court first considered settlement issues and not at some later point when the settlement had already been the basis for actions by the court or parties. The settlement agreement itself anticipated and provided for Department intervention into the lawsuit at this point to raise Department objections to the agreement. *See* CP 4, 56, 59-60 (paragraphs 59, 106, 117-119 of agreement). Therefore, the Department's motion to intervene was appropriate and timely.

C. The Settlement Agreement Between The Parties Cannot Bind The Department Because It Was Not A Party To The Lawsuit And Did Not Consent To The Terms Of The Agreement

Plaintiffs stipulated the Department could intervene to object to terms of the agreement. CP 215, 228-229. The Court granted limited intervention for this purpose. RP 35 (May 10, 2013).

The declaration of Director Frost, and the pleadings and objections filed by the Department related to its intervention, set out the Department's objections to specific settlement terms that are in conflict with public pension funding and benefits laws. CP 183-193, 194-197. *See*

also RP 16-36 (June 7, 2013), pp. 7-10 above. The superior court committed error by approving a class action settlement with terms conflicting with pension laws in the manner described in the Department's submissions to the court.

In addition to objections to the conflict between terms of the agreement and specific provisions of pension laws, the Department objected globally to the agreement because the Department had not consented to it. CP 294, 297; RP 16-17 (May 10, 2013). A written document is required to enforce an agreement against the Department. CR 2(A) provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the records, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2(A) (emphasis added). RCW 2.44.010(a) similarly provides in relevant part:

(1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney[.]

RCW 2.44.010(a) (emphasis added). Both the court rule and the statute “require a stipulation in open court on the record, or a writing acknowledged by the party to be bound.” *Bryant v. Palmer Cooking Coal Company*, 67 Wn. App. 176, 178, 858 P.2d 1110 (1992) (emphasis added). A settlement agreement is unenforceable if it is not stipulated on the record in open court or memorialized in a writing signed by the party to be bound. *Id.* at 179.

The superior court used the agreement to order the Department to obey settlement terms about pension benefits, contributions, and interest. Pertinent parts of the court order provide:

2. Each term in the Settlement Agreement is and shall be a binding order of the Court.
3. This Court retains jurisdiction in this matter as provided in the Settlement Agreement.
4. King County shall pay class counsel the \$12 million common fund attorney fee from the employee PERS contributions that King County is making for the class members within thirty-five (35) calendar days after the effective date, as defined in ¶60 of the Settlement Agreement.
6. DRS shall provide the class members with service credit and retirement benefits as provided in the Dolan decision by the Supreme Court and the Settlement Agreement. DRS shall assist the parties and the Court in implementing the Settlement Agreement. King County shall make the PERS contributions as provided in the Settlement Agreement. The Court will, if needed, assist the

plaintiffs, King County and DRS in implementing these retirement provisions, including those for determining the amount owed for contributions and those for determining service credit. DRS shall not charge interest on the PERS contributions required by the Settlement Agreement.

9. The parties, including the limited intervenor DRS, are subject to and shall comply with the Court's orders, including those concerning implementation of the Settlement Agreement.

CP 532-533 (emphasis added). An agreement that is invalid for non-compliance with consent provisions in CR 2(A) and RCW 2.44.010(1) cannot be the foundation for legal claims and defenses by other parties or for an order of the court. *Bryant*, 67 Wn. App. at 178-179; *see also Eddleman v. McGhan*, 45 Wn.2d 430, 275 P.2d 729 (1954). A contract cannot impose obligations on “strangers to the agreement.” *Watkins v. Restorative Care Center*, 66 Wn. App. 178, 195, 831 P.2d 1085 (1992) (rejecting attempt to apply attorney fee clause in purchase and sale agreement to third party beneficiary/former owner who was not a party to the agreement); *see also Powell v. Sphere Drake Insurance*, 97 Wn. App. 890, 988 P.2d 12 (1999) (rejecting attempt to impose insurance arbitration clause on a claimant who was not a party to insurance contract). The superior court erred in using a class action settlement to which the Department had not consented as a foundation to issue an order to the Department to comply with the settlement terms.

D. The Entry Of Findings Of Fact, Conclusions of Law, And Order Relating To Department Of Retirement Systems Pension Responsibilities Was Improper Because The Department Was Not A Party To The Lawsuit And Never Litigated The Issues In The Findings, Conclusions, And Order

The entry of findings and conclusions is governed by Civil Rule 52. This rule provides that findings and conclusions must be entered for actions tried without a jury. CR 52(a)(1). The Rule provides for findings and conclusions in only three other circumstances: 1) temporary injunctions; 2) certain domestic relations cases; and 3) where specifically required by statute or court rule. CR 52(a)(2)(A)-(C). In this case, CR 52 would require findings and conclusions about Department matters only if the Department had been a party at trial or if findings and conclusions were otherwise required by statute or rule.

There has been no trial on the issues in the settlement agreement, so no findings and conclusions are required as a result of a trial. The findings and conclusions are being entered for approval of a settlement of a class action governed by CR 23. This rule provides for court approval of compromises of the claims, but has no provision requiring findings, conclusions, and an order to approve a compromise. *See* CR 23(e). There is also nothing in CR 23(e) authorizing the court to enter an order making terms of a private settlement agreement enforceable as a court order. A

settlement agreement is a contract between the settling parties that the parties can enforce in court against each other. *See Watkins*, 66 Wn. App. 178. Plaintiffs and the County provide no authority allowing the parties or the court to enforce its terms against non- parties.

In approving class action settlements, courts determine whether proposed settlements are “fair, adequate, and reasonable,” using eight established criteria. *See Pickett v. Holland America*, 145 Wn.2d 178, 189-90, 35 P.3d 351 (2001). The court does not decide the merits of a class action when it reviews a proposed settlement and there is no trial requiring findings and conclusions. *Id.* The *Pickett* court held that courts reviewing class action settlements are not “to reach any ultimate conclusions of the contested issues of fact and law which underlie the merits on the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Id.* The superior court’s findings and conclusions on the merits of pension administration issues related to PERS directly conflict with the *Pickett* court’s admonitions.

CR 52 further states that findings and conclusions are unnecessary for decisions on motions.

(5) When Unnecessary. Findings of fact and conclusions of law are not necessary:

...

(B) Decision on motions. On decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2).

CR 52(a)(5)(B) (emphasis added). Decisions on motions do not require findings and conclusions, except as specifically required for motions under CR 41(b)(3) and 55(b)(2), which are not involved here. Approval of the settlement came before the court on a motion. Findings and conclusions on motions are superfluous. They are not considered by an appellate court, which makes the same inquiry as the trial court concerning the legal ruling on a motion. *See Donald v. City of Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986).

In *Green v. City of Wenatchee*, 148 Wn. App. 351, 199 P.3d 1029 (2009), a plaintiff and an insured sought to bind an insurer to findings and conclusions entered by the trial court based on an agreement between only plaintiff and the insured. Plaintiffs and the County seek a similar result here. *Green* held that the insurer was not bound by the unnecessary findings and conclusions.

The Fed.R.Civ.P. 52 counterpart in Washington is CR 52, which likewise does not require the entry of findings in an action that has been settled. *See In re Prather*, 178 B.R. 501, 502 (W.D.Wash.1995) (construing CR 52 and citing *Yakima Cement Prods. Co.*, 14 Wash.App. at 562, 544 P.2d 763). Indeed, CR 52 unambiguously requires findings of fact and conclusions of law (subject to certain exceptions), "[i]n all actions tried upon the facts without a jury or with an advisory jury." CR 52(a). Here, since the underlying liability

lawsuit in this matter was settled, Mr. Barker's and Ms. Green's agreed findings and conclusions were not necessary. As in *Yakima Cement Products Company*, the CR 52 findings requirement does not apply and Westport had no standing to challenge the agreed findings and conclusions embodying the settlement to which it was not a party.

Green, 148 Wn. App. at 365-66 (emphasis added). The findings and conclusions in this case have the same deficiency as those in *Green*. The parties put pension system administration terms in their class action settlement and then incorporated those terms into findings and conclusions as if they had been decided by the court at a trial in which PERS was a party.

The court's findings, conclusions, and order decided multiple issues related to Department responsibilities for public pensions. These findings of fact include numbers 2, 6, 11, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, and 50. The conclusions of law include numbers 5, 6, 7, 8, 10, and 11, and the subparts of the order include 2, 4, 6, and 9. *See* CP 519-538.

An example of a finding on a Department issue is number 43, which states that the Department informed King County that the Department agreed that it would not charge interest on retroactive pension contributions. The Department disputes this finding and did not have the opportunity to contest the facts on which this finding is based. An example of a conclusion of law is number 7, which states the Department has no authority to charge interest.

This is contrary to the plain language of RCW 41.50.125. The legislative findings to RCW 41.50.125 note:

“Whenever employer or member contributions are not made at the time service is rendered, the state retirement trust funds lose investment which is a major source of pension funding.”
“[DRS has] broad authority to charge interest to compensate for the loss to the trust funds, subject only to explicit statutory provisions to the contrary.”

RCW 41.50.125. The pension system issues have never been litigated, so the findings, conclusions, and order should not have been entered.

A second problem with the findings, conclusions, and order is that pension administration is within the jurisdiction of the agency managing public pension systems. The superior court does not have original jurisdiction. *See Wells Fargo v. Dept. of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012). Under the APA, an agency adjudicates disputed matters within its jurisdiction and the courts act in an appellate capacity. *Id.*; RCW 34.05.510; RCW 41.40.068; RCW 41.40.082. This court recently described the jurisdiction of agencies and courts over administrative actions as follows:

[T]he legislature created a general right to sue the State under RCW 4.92.010. But it specifically set limitations on challenges to state agency actions, expressly stating its intent that the APA “establishe[d] the exclusive means of judicial review of agency action.” RCW 34.05.510. Harmonizing RCW 4.92.010 and the APA, the legislature intended to limit legal claims involving agency actions to the APA’s procedures. To the extent RCW 4.92.010 and the APA conflict, the APA’s specific procedures control.

Wells Fargo, 116 Wn. App. at 358 (emphasis added).

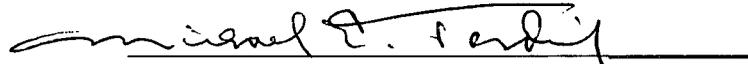
Pension system administration issues are ultimately matters not subject to original litigation in superior court. This does not mean that the Department would reject comprehensive resolution of the pension implementation issues through discussions with the parties. It means only that, for implementation issues not resolved by agreement, the Department would make pension administration decisions, subject to review by a court under the APA.

VI. CONCLUSION

Appellant Department of Retirement Systems respectfully requests the Court to reverse the order granting the Department limited intervention in this lawsuit and to direct the superior court to issue an order allowing the Department to intervene under Civil Rule 24 as a “full party” without any limitation on its status. Appellant further requests that the Court reverse the superior court’s approval of settlement terms relating to the Department of Retirement Systems in the class action settlement agreement and reverse the court’s findings of fact, conclusions of law, and subparts of the class action settlement approval order that purport to bind the Department.

RESPECTFULLY SUBMITTED this 14th day of November,
2013.

FREIMUND JACKSON & TARDIF, PLLC

A handwritten signature in cursive script, appearing to read "Michael E. Tardif", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 14th day of November, 2013.

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

DATED this 14th day of November, 2013, at Olympia, WA.

Frank Depalma
FRAN DEPALMA