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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON

CEP
KEVIN DOLAN and a class of
similarly situated individuals,

Respondents,

v.

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

Appellant.

NO. 82842-3

MOTION TO STRIKE
THE CLASS'S ANSWER
REGARDING FURLOUGHS
AND TO IMPOSE
SANCTIONS

A. IDENTITY OF MOVING PARTY

Appellant King County ("County") asks for the relief designated in
part b.

B. STATEMENT OF RELIEF SOUGHT

Striking the class's Answer to Court's Question About Furloughs
and the accompanying declarations of Anne Daly and Eileen Farley, and
imposing sanctions against the class pursuant to RAP 10.7.

C. FACTS RELEVANT TO MOTION

On June 24, 2009, this Court granted King County's motion for
direct discretionary review. The parties filed their briefs and the case was
set for consideration.

On March 5, 2010, the class moved to supplement the record on
review with new declarations from Anne Daly ("Daly") and Eileen Farley

ORIGINAL

("Farley") addressing County furlough days in 2009. The County objected, noting the class failed to address all of the requirements of RAP 9.11 for expansion of the record. Resp. at 3-4. More critically, the class's motion was directed at a tangential issue with minimal relevance to the main issues on appeal. *Id.* at 1.

On April 7, 2010, the Commissioner denied the class's motion to supplement the record. Comm'r Ruling at 3.

On October 28, 2010, the Court heard oral arguments in the case. The next day, the class filed an "answer" purporting to answer the Court's questions relating to the County's budget furloughs. Ans. at 1. Attached to the answer were the declarations of Daly and Fairly, which *the class admits were previously rejected* by the Commissioner. *Id.* at 2. The class renews its motion to supplement the record. But once again, it makes no attempt to address the six requirements of RAP 9.11 except to self-servingly state: ". . . the Court's questions at oral argument indicate that all of the requirements of RAP 9.11(a) have been met." Ans. at 2. The class is mistaken.

D. GROUNDS FOR RELIEF AND ARGUMENT

a. The Court Should Strike the Declarations

The declarations of Daly and Farley are admittedly not part of the record on review. Ans. at 2. Instead, they are a thinly disguised attempt

to provide the Court with newly created evidence not submitted to or considered by the trial court. No rule permits the class to supplement the record in this manner.

RAP 9.11 articulates six criteria that must be met before new evidence is allowed on appeal.¹ *See also, State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990) (noting all six criteria must be met before new evidence is allowed on appeal). *See also, Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983); *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (2003) *review denied*, 151 Wn.2d 1027 (2004). The rule severely restricts this Court's consideration of adjudicative facts when the facts are not already in the record. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000) ("Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review."). Here, the class cannot satisfy all six

¹ RAP 9.11 provides that additional evidence will be taken by this Court only if:

- (1) additional proof of facts is needed to fairly resolve the issues on review,
- (2) the additional evidence would probably change the decision being reviewed,
- (3) it is equitable to excuse a party's failure to present the evidence to the trial court,
- (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive,
- (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and
- (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

requirements.

The class makes *no* attempt to address the rule's six requirements in its answer. It half-heartedly argues that it would be inequitable to excuse its failure to present the evidence to the trial court where the declarations were prepared after the trial. Ans. at 2. But it neglects to address the remaining five factors, stating only that the Court's questions at oral argument indicate the rule's requirements have been met. *Id.* The class's self-serving statements are not enough. Where the class cannot satisfy all six factors, the declarations should be stricken from the record.

Once again, the class has failed to demonstrate that the declarations are needed to fairly resolve the actual issue on review. Instead, the class would seem to prefer that the Court focus on an issue having little impact on the actual issue before the Court. As the Commissioner noted in his ruling denying the class's original motion to supplement the record, "the furlough is at best of tangential relevance to the main issues in the case." Comm'r Ruling at 3. Second, the class has failed to demonstrate that the declarations would probably change the decision being reviewed. Third, while it is true that the declarations could not have been presented to the trial court, the class has failed to demonstrate why the declarations should be considered by this Court when the Commissioner has already rejected them. The class cannot satisfy the

remaining three factors of RAP 9.11.

Insofar as the class has failed to meet the requirements of RAP 9.11, the Court should grant the County's motion and strike the declarations from the record on review. Alternatively, if the Court chooses to permit the supplementation, it should allow the County to file its own declaration challenging the accuracy of the allegations contained in the declarations of Daly and Farley. *See attached.*

b. The Court Should Impose Sanctions Against the Class Under RAP 18.9

The class's belated attempt to supplement the record after the Commissioner rejected the declarations is highly improper. The class retained experienced counsel who should know the rules. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 924 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992). The class disrespect's the Commissioner's ruling. Accordingly, sanctions under RAP 18.9 are appropriate.²

The County was compelled to file this motion to strike the class's improper answer and incurred attorney fees in the process. It anticipates the class will submit a response in opposition that attempts to justify its improper submission. The County will then be required to submit a reply in support of the motion to strike. All of this briefing could have been

² RAP 18.9 provides, in part, that the Court may order a party or counsel who fails to comply with the appellate rules to pay terms or compensatory damages to any other party who has been harmed by the failure to comply.

avoided if the class had complied with the rules of appellate procedure. The Court should impose sanctions against the class under RAP 18.9.

E. CONCLUSION

The class admits that the declarations of Daly and Farley were not before the trial court and that the Commissioner already rejected them as part of the record on review. Yet the class filed an answer purportedly answering questions from the Court during oral argument and attempts to expand the record under RAP 9.11 with those exact declarations. The Court should strike the declarations and disregard any factual assertions in the class's "answer" supported by them. Sanctions under RAP 18.9 should be imposed against the class.

DATED this 5th day of November, 2010.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

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SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of
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KING COUNTY, a political subdivision
of the State of Washington,

Appellant.

NO. 82842-3

DECLARATION OF
V. DAVID HOCRAFFER,
KING COUNTY PUBLIC
DEFENDER

V. David Hocraffer declares and states as follows:

1. In my capacity as the King County Public Defender, I direct the King County Office of the Public Defender. I am over the age of eighteen, competent to testify, and make this declaration based on personal knowledge.

2. The 2009 funding reductions that occurred in the four public defense corporations' ("the corporations") contracts reflected an amount proportional to the 2009 reductions in compensation experienced by PAO attorneys as a result of unpaid County furloughs. The funding reductions in the public defense contracts were in overall contract compensation; however, the corporations were free to handle the reductions as they individually saw fit – whether they imposed furloughs on attorneys (and/or staff) without pay (similar to the PAO), made

Declaration of V. David Hocraffer - 1

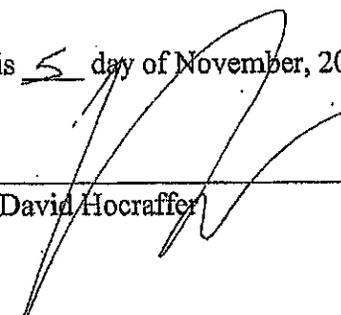
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adjustments to the overall compensation of the attorneys, took layoffs of attorneys or support staff, or absorbed the cutback by using corporation reserves. The manner in which the reductions were absorbed was entirely within the discretion of the corporations and their respective boards.

3. There was discussion between the corporations and OPD as to whether the reduction was to be incorporated into the contract as part of each caseload, or simply a "below the line" lump sum reduction to the contract amount. The corporations urged OPD to impose it as a "below the line" lump sum, which was the way it was handled in the contracts.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed in Seattle, Washington this 5 day of November, 2010.



V. David Hocraffer

DECLARATION OF SERVICE

On said day below I emailed and deposited in the US mail a true and accurate copy of the following document: Motion to Strike the Class's Answer Regarding Furloughs and to Impose Sanctions and Declaration of V. David Hocraffer, King County Public Defender in Supreme Court Cause No. 82842-3 to the following:

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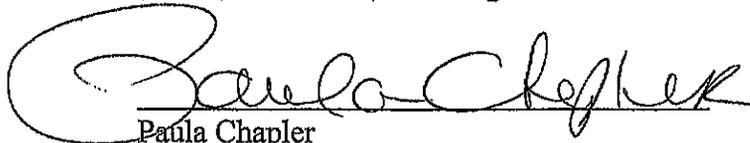
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Original efiled with:

Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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

DATED: November 5, 2010, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick

FILED AS
ATTACHMENT TO EMAIL

DECLARATION

ORIGINAL

10 NOV -5 AM 11:21
BY RONALD R. LANGRISH
STATE OF WASHINGTON
CLERK OF COURT

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Dolan v. King County

Rec. 11-5-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]
Sent: Friday, November 05, 2010 11:17 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Dolan v. King County

Per Mr. Talmadge's request, please see the attached Motion to Strike the Class's Answer Regarding Furloughs and to Impose Sanctions and Declaration of V. David Hocraffer, King County Public Defender and Dec. of Service for filing in the following matter.

Case Name: Kevin Dolan v. King County
Cause No. 82842-3
Attorney: Philip A. Talmadge, WSBA #6973
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Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick