No. 45128-0-II

SUPREME COURT
OF THE STATE OF WASHINGTON

MICKEY FOWLER, *et al.*, , and a class of TRS Plan 3 members,
Plaintiffs (via Supplemental Complaint in settled *Probst* case),
Petitioners,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
Respondent.

PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Ave. SW
Suite C, Third Floor
Seattle, WA 98126
(206) 574-6661
Email: phil@tal-fitzlaw.com

David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #4850
Seattle, WA 98104
(206) 622-3536
Email: davidfstobaugh@bs-s.com
Email: skstrong@bs-s.com
Email: skfestor@bs-s.com

Attorneys for Petitioners/Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Jurisdictions

Statutes

Other Authorities

Rules

A. IDENTITY OF PETITIONERS

Mickey Fowler, Leisa Fowler, and a certified class of over 25,000 teachers in Teachers Retirement System (TRS) Plan 3 ask this Court to accept review of this case.

B. COURT OF APPEALS DECISIONS

The Court of Appeals decisions on review are the published opinion in *Probst v. Dept. of Retirement Systems (DRS)*, 167 Wn. App. 180, 271 P.3d 966 (Div. II, 2012), and the subsequent unpublished decision on appeal after remand, No. 45128-0-II, 2014 WL 7467567 (Dec. 30, 2014).[1]

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that the statute, RCW 41.04.445, that gave *all* pension system members a right to "accrued interest" on their accounts did not apply to TRS, when the statute explicitly states that it does apply to TRS accounts?

2. Did the Court of Appeals err in refusing to decide constitutional taking claims and remanding the case to DRS, where (1) DRS has no competence to consider or decide constitutional taking

[1] Plaintiffs could not earlier seek review of two issues they did not win in the published *Probst* opinion because they were not "aggrieved parties" under RAP 3.1 (see p. 4 *infra*). Indeed, DRS moved to reconsider the decision and its motion was denied. CP 37, 132. With respect to the statutory issue the teachers lost in the first appeal, the Court of Appeals should have corrected its earlier error in the second appeal. RAP 2.5(c)(2); *Eserhut v. Heister,* 62 Wn.App. 10, 14, 812 P.2d 902 (1991).

claims, (2) the claims have now been pending for ten years or more, (3) DRS has conceded all elements of the takings claim, and (4) plaintiffs have a right to have their constitutional issues decided by a court?

3. Did the Court of Appeals err in remanding this class action for rulemaking when this case never involved rulemaking and plaintiffs actually challenged DRS's historical practice of denying interest on their accounts 20 years ago?

4. Did the Court of Appeals err in construing RAP 12.9(a)?

D. STATEMENT OF THE CASE

Facts. The plaintiff class of TRS members ("teachers") transferred from TRS Plan 2 to Plan 3 in 1996-97. The transfer to Plan 3 meant that TRS members would cut in half their defined benefits (from 2% of final compensation per year of service down to 1% per year). The employers' contributions, plus investment gains, remained in the TRS Plan 2/3 fund to pay for the reduced defined benefit. In exchange for the reduced pension benefit, the teachers would withdraw their employee contributions plus accumulated interest from their TRS Plan 2 accounts and place these funds into new self-directed investment accounts in TRS Plan 3.[2]

The beginning principal balance of a teacher's individual TRS Plan 3 account was thus the total of all the teacher's Plan 2 employee

[2] RCW 41.32.817; --.831(2); --.840(1); --.8401; RCW 41.34.060.

contributions, with all the interest accrued in the teacher's Plan 2 accounts, plus an incentive match. The amount transferred was important because anything less would diminish both future investment returns and the amount available for the teacher's retirement. CP 803 (Fowler testimony).

DRS promised TRS Plan 2 members they would accrue interest at 5.5% per annum, compounded quarterly. 167 Wn. App. at 183.[3] DRS, however, did not record ("post") *any* interest on some or all funds deposited in Plan 2 accounts for varying periods. *Id.* at 183, 193. DRS tracked TRS members' interest only in the quarterly "postings" and any interest not so "posted" was forever disregarded and neither added to the account nor compounded. This meant that DRS did not track accrued interest on any funds in an account for less than one full quarter, and sometimes considerably longer. *Id.*

DRS admitted that by this "posting" practice it denied the teachers the full 5.5% per annum interest it promised. *Id.* at 183, 193; AR 23.

When the teachers transferred to TRS Plan 3 in 1996-97, any of the teachers' accrued interest that was not "posted" was kept in the Plan 2/3 fund, and used to fund the benefits that were supposed to be funded exclusively by employers. CP 670.

Procedure. Plaintiffs brought this action because all the accrued

[3] Further facts and record citations are in the Fowlers' Opening Brief at 3-9.

interest in their Plan 2 accounts, not just the "posted" interest, should have transferred to their Plan 3 individual accounts.[4] 167 Wn. App. at 182-83.

The Court of Appeals in *Probst* identified three issues in the teachers' claims, *id.* at 183, and decided them as follows. It (1) "d[id] not reach the Fowlers' constitutional takings argument" because the case was "resolved on other grounds," *id.* at 183 n. 1, (2) it rejected the Fowlers' statutory/common law argument, *id.* at 191, and (3) it decided the arbitrary and capricious argument in the teachers' favor, *id.* at 183, 191, 194.

The Court of Appeals found DRS was arbitrary and capricious in its pre-1996 historical interest posting practice due to its "unfairness" and DRS's failure to follow the "industry standard" of interest accrual (interest accrues from deposit date to withdrawal date), from 1977 up to the 1996-97 transfers. 167 Wn. App. at 183, 191, 194.

DRS, however, argued that it had really prevailed in the *Probst* appeal, not the Fowlers, CP 107, 123, and that it could establish that its interest practice had not been arbitrary and capricious by retroactively rewriting a 1977 interest policy. CP 146-48, 169-70. The trial court agreed with DRS and remanded the case to DRS. CP 209, 238. DRS said

---

[4] This TRS (*Fowler*) class action was filed in 2009 as a supplemental complaint to a previous *Probst* class action (PERS interest calculations), which in turn had been consolidated with a petition for review. 167 Wn. App. at 184. The *Probst* class action and petition for review were settled, and the parties agreed that the *Fowler* class action would be decided on the record of the *Probst* petition, because the relevant facts concerning interest accruals on PERS and TRS accounts are the same. *Id.* (The *Probst* caption remained on the case despite the settlement of the *Probst* claim.)

that issuance of the new rule justifying its practice would be followed by another administrative adjudication and decision, followed by an entirely new appeal through the courts. CP 148.

The Fowlers appealed again, contending, among other things, that the trial court's remand to DRS for retroactive rulemaking violated the mandate because rulemaking could not retroactively correct an "arbitrary and capricious" practice that had already been fully completed at that time of Plan 3 transfers in 1996-97. Moreover, the Fowlers contended, the trial court's remand of the case to DRS wrongly denied them a hearing on their constitutional Takings Clause claim and the Court of Appeals erred in ruling against them on the statutory claim.

E. ARGUMENT

1. Review is Warranted Under RAP 13.4(b)(4) Because This Case Concerns Whether the Accrued Interest Statute, RCW 41.04.445(4), Requires DRS to Pay More Than 25,000 Teachers the Interest Earned on Their Contributions.

The Legislature cannot "abrogate" the common law rule that interest is earned on deposits in interest-bearing accounts from the day of deposit to the day of withdrawal because that interest is a fundamental property right protected by the Constitution. See *infra* 9-10. In *Probst* the Court of Appeals decided, however, that the Legislature abrogated the common law through a 2007 statute that provides DRS discretion on when to "credit" interest on members' accounts. 167 Wn.App. at 190-91.

The Legislature did not abrogate the common law rule, however, because RCW 41.04.445(4) still expressly requires "[a]ll member contributions . . . plus the *accrued interest* earned thereon, shall be paid [by DRS] to the member upon the withdrawal of funds or lump sum payment of accumulated contributions." RCW 41.04.445(4) (emphasis added). "Accrued interest" is not defined, and the term therefore has the ordinary dictionary meaning. *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). "Accrued interest" means "*interest earned, though not credited* or otherwise paid." Dictionary of Banking Terms (4th ed. 2000), p. 7, AR 684 (emphasis added).[5] RCW 41.04.445(4) thus implements the common law rule that interest accrues from day to day on principal, even if payable only at intervals, because "accrued interest" means "interest earned, though not credited [posted] or otherwise paid."

In *Dean*, this Court held that a very similar statute providing that inmates shall receive "accrued interest" on their deposits upon their release created a constitutionally protected property right to receive all the interest earned in their accounts. *Dean v. Lehman,* 143 Wn.2d 12, 34-35,

[5] Other dictionaries agree. "Accrued interest" is "interest earned since the last settlement date but not yet due or payable." Webster's Third New International Dictionary (1976), p. 13, AR 662. Black's Law Dictionary (7th ed. 1999), "accrued interest" means "interest that is earned but not yet paid." AR 668 (Black's definition of accrued interest was cited by DRS, AR 714). "Accrued interest" is "[i]nterest earned but not yet due and payable." Dictionary of Banking (1994), p. 5; AR 672.

18 P.3d 523 (2001). Thus, even assuming *arguendo* that the right to receive interest that accrues on funds from the date of deposit to the date of withdrawal were not a core property right protected by the U.S. Constitution, the Legislature created a constitutionally protected property right in that interest when it required DRS to pay members their "accrued interest" when they withdraw their funds.[6] *Id.*

The Court of Appeals erred by disregarding the accrued interest statute (RCW 41.04.445(4)) based on its statement that "the words 'accrued interest' never appear in the relevant TRS statutes" and it declined to "interpret an undefined term in a tangentially related statute[.]" 167 Wn.App. at 189 n. 7. But rather than being "a tangentially related statute," RCW 41.04.445(4) governs the exact situation here because it concerns what DRS must pay to pension system members when they withdraw funds from a retirement plan.

The Court of Appeals thought RCW 41.04.445 is "tangential" because it thought the statute did not apply to TRS. 167 Wn. App. at 189 n. 7. But the statute expressly "applies to all members who are . . . under the retirement systems established by chapter 41.32 [TRS]" and it governs the payment of accrued interest when a member withdraws the funds from

[6] States may not encroach by statute upon core property rights protected by the Constitution, but States may by statute confer new property rights protected by Constitution. *Schneider v. Cal. Dep't of Corrections,* 151 F.3d 1194, 1200-01 (9th Cir. 1998 ("The States' power vis-à-vis property . . . operates as a one-way ratchet of sorts").

TRS Plan 2 accounts. RCW 41.04.445(1)(c). The DRS presiding officer made this same kind of error in the administrative action, saying the section did not apply, and DRS itself asked the presiding officer to correct this part of her decision. AR 948-49.

The Court of Appeals thus erred when it disregarded RCW 41.04.445(4). The teachers requested that the Court of Appeals correct its error. Opening Br. of Fowler Appellants at 33, 41; Reply Br. of Fowler Appellants at 20; RAP 2.5(c)(2) (appellate court can correct an earlier decision in a subsequent appeal). The Court of Appeals, however, failed to correct the error.

Accordingly, review is warranted because, due to this error, the Court of Appeals decision is contrary to RCW 41.04.445(4) and *Dean*. This raises a matter of substantial public interest concerning the amount of interest DRS is statutorily required to pay members when they withdraw their money from state retirement accounts. RAP 13.4(b)(4).

2. Review is Warranted Because the Question of Whether DRS Violated the Takings Clause of the U.S. Constitution by Retaining a Portion of the Interest Earned on the Teachers' Mandatory Deposits Meets the Criteria of RAP 13.4(b)(1), (b)(3), and (b)(4).

This class action involves an important legal question under the United States Constitution. RAP 13.4(b)(3). Specifically, does the Takings Clause prohibit DRS from seizing and retaining interest earned on public employees' mandatory deposits in state retirement plans when

those employees withdraw the deposits with the accumulated interest? The answer is "yes" under decisions by both this Court and the U.S. Supreme Court. (If the Court ruled in favor of the teachers on their statutory claim for interest, *supra*, then the Court would not need to reach this constitutional claim.)

This Court recognizes that under "the Takings Clause of the Fifth Amendment, 'private property [shall not] be taken for public use, without just compensation.' U.S. Const. Amend. V. This provision is applied to the states through the Due Process Clause of the Fourteenth Amendment." *Dean,* 143 Wn.2d at 31. In *Dean*, this Court said that interest income is a fundamental property right under the U.S. Constitution that states may not appropriate without implicating the Takings Clause. *Id.* at 35, *citing Schneider,* 151 F.3d at 1198, and *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165-66, 118 S.Ct. 1925 (1998) (IOLTA case).

In *Phillips*, the U.S Supreme Court explained that "a State may not sidestep the Takings Clause by disavowing property interests" that were long ago recognized by the common law, starting before the Constitution was adopted. 524 U.S. at 167. And the right to receive the interest earned on funds held in an account has been part of the common law for well over 250 years. *Id.* at 165. Therefore, "any interest that *does* accrue" on deposited funds is "a property right incident to the ownership of the underlying principal." *Id.* at 168 (Court's emphasis).

The common law rule for more than 250 years is that interest is earned from the date of deposit until the date of withdrawal, regardless of when the interest is paid or posted -- "interest accrues from day to day even if payable only at intervals[.]" 32 Halsbury's Laws of England, § 127 Interest in General, p. 78 (4th ed. 2005 Reissue).[7]

Accordingly, the teachers have a constitutionally protected property right in all interest that accrues on their mandatory employee contributions, from the time the contributions are deposited in the plan to the precise date they withdraw their funds from the plan. *See Phillips,* 524 U.S. at 165-68. And no statute, rule, or practice can authorize DRS to withhold that property without violating the Takings Clause. *Dean*, 143 Wn.2d at 34-36; *Phillips*, 524 U.S. 165-67 and n. 5; *Schneider*, 151 F.3d at 1196, 1198-1201. Neither the Legislature nor DRS can "abrogate" this pre-Constitution common law property right of the teachers. *Id.*

Here, DRS promised the teachers and admitted in discovery responses that the teachers' contributions earned "5.5 percent annual

---

[7] This Court has cited Halsbury's Laws of England for the common law. See, *e.g.*, *Becker v. Lagerquist*, 55 Wn.2d 425, 435, 348 P.2d 423 (1960). The Court of Appeals accepted Halsbury's statement of the common law of interest as the law of Washington. 167 Wn. App. at 189 n. 6; *accord, Faulkenbury v. Teachers and State Employees Retirement Sys.*, 515 S.E.2d 743, 746-47 (N.C. App. 1999); *Owens v. Graetzel,* 126 A. 224, 227 (Md. Ct. App. 1924); *Mann v. Anderson,* 32 S.E. 870, 871 (Ga. 1899); *In re Flickwir's Estate,* 136 Pa. 374, 382 (Penn. 1890); *McKeen's Appeal,* 42 Pa. 479 (Penn. 1862); *Clapp v. Astor,* 2 Edw.Ch. 379, 6 N.Y. Ch. Ann. 436 (1834).

interest compounded quarterly."[8] CP 869-905; AR 207, 232; 167 Wn. App. at 183. DRS conceded that it did not pay the teachers all the interest their contributions earned at the promised 5.5% per annum rate; indeed, the DRS presiding officer said that DRS could pay less than this stated rate because she said the regular interest members receive on their contributions is "what[ever] the agency determines it to be, not simply the stated [5.5% annual] rate." AR 23, ¶33. DRS also admitted that some accrued, but not posted, interest is "allocated" to pay the employer-funded defined benefits. DRS Resp. Br. at 7. On its face this is a Takings Clause violation because the teachers are entitled to all accrued interest earned on their principal at the 5.5% annual interest rate, not just the amount that DRS decides to "allocate" to the teachers' individual accounts. *Dean*, 143 Wn.2d at 34-36; *Phillips*, 524 U.S. 165-67 and n. 5; *Schneider*, 151 F.3d at 1196, 1198-1201.

DRS tried to justify its seizure of accrued interest by arguing that the teachers' contributions are "the property of the retirement system" and "members have no property interest in . . . their own contributions[.]"

---

[8] DRS's promise and admission that the teachers' contributions would earn interest on an "annual" or "per annum" basis also means the teachers contributions earned interest from the date of deposit to the date of withdrawal because annual interest must be calculated on a daily basis using a 365-day year. *Chern v. Bank of America*, 544 P.2d 1310, 1312 (Cal. 1976); *Silverstein v. Shadow Lawn Savings & Loan Ass'n*, 237 A.2d 474, 481 (N.J. 1968); *In re Oil Spill by the "Amoco Cadiz,"* 794 F.Supp. 261, 264-66 (N.D. Ill. 1992).

DRS Br. [3/24/11] at 1 and 8.[9] But DRS's argument that the teachers' (employee's) contributions and the interest accrued on those contributions are the property of the retirement system directly conflicts with two of this Court's opinions. *Bowles v. DRS,* 121 Wn.2d 52, 847 P.2d 440 (1993); *State ex rel. State Ret. Bd. v. Yelle*, 31 Wn.2d 87, 201 P.2d 172 (1948). In *Bowles,* the Court held that "employees contributions [to the retirement system] are not public funds" and are instead employee funds of a "proprietary nature." 121 Wn.2d at 75. In *Yelle* the Court held that the employee contributions and interest in the employees' individual accounts "are not *state funds.*" 31 Wn.2d at 111 (Court's emphasis). One reason the Court gave for this holding is that "any member withdrawing his contributions from the employees' savings fund is entitled to interest thereon[.]" *Id.* at 113.

The Court of Appeals' remand of the case and the constitutional issue to DRS is also contrary to binding precedent because DRS has no competence to rule on the teachers' constitutional takings claim. Indeed, the judiciary, not the executive branch, has both the competence and a duty to rule on constitutional claims. *Miller v. Johnson,* 515 U.S. 900, 922-23, 115 S.Ct. 2475 (1995); *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976). The Court of Appeals thus erred in remanding

[9] This brief can be found at https://www.courts.wa.gov/content/Briefs/A02/408619%20Respondent's.pdf (last accessed on January 29, 2015).

the teachers' constitutional claim to DRS for "rulemaking" after 10 years of litigation because DRS has *no authority* to decide the constitutional claim through rulemaking or any other procedure. *Yakima Clean Air v. Glascam Builders*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975); *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 329 (1974).

The Court of Appeals said that it remanded the constitutional claim to DRS, instead of deciding it, because the constitutional claim is "speculative" and it would not issue an "advisory opinion" on a "possible" dispute. 2014 WL 7462567 at *6. But these statements are based on a misstatement of the claim, *i.e.*, the court said that the teachers "argue that if the DRS is allowed under RCW 41.50.033 [a 2007 statute] to make and apply a new rule, the *potential failure to pay interest* based on that rule will result in an unconstitutional taking." The court said there is no present or actual injury breach, therefore, "this argument is *premature*[.]" 2014 WL 7462567 at *6 (emphasis added).

The Court of Appeals erred because the teachers' claim is not that there might be a *potential* taking of interest based on a new rule; the teachers' claim is that the injury *already occurred, almost 20 years ago, because DRS retained the accrued interest on their deposits when the teachers transferred from TRS 2 to TRS 3 in 1996-97 and because DRS, for almost 20 years, has invested the teachers' interest for another account (employers).* There is no *possible* failure to pay the accrued

interest here; there is a *completed* failure — the injury occurred almost 20 years ago. And the injury is continuing to harm the teachers because the teachers have still not received their property (the accrued interest) and they are unable to both direct investment of that property and receive those funds when they retire.

The Court of Appeals decision is also in conflict with this Court's decision that there is a justiciable controversy and a case is not moot "if a court can still provide effective relief." *State v. Turner,* 98 Wn.2d 731, 733, 658 P.2d 658 (1983). Under *Turner*, if the Court can provide "effective relief," there is a justiciable controversy. *Id.*[10]

Here, the Court can provide effective relief by requiring DRS to account for and provide the teachers their interest that the agency has unlawfully retained in another account for almost 20 years.[11] The teachers requested this relief below long ago (CP 532) and there is an existing controversy. *Turner,* 98 Wn.2d at 733. The Court's assertion that there is no "justiciable" controversy before DRS rulemaking also turns judicial review of constitutional claims on its head because only courts, not

---

[10] Under this Court's decision cited by the Court of Appeals, *Washington Beauty College, Inc. v. Huse,* 195 Wn. 160, 80 P.2d 403 (1938), there is plainly a lively controversy here because the Fowlers claim that DRS unconstitutionally seized their property almost 20 years ago and DRS has unlawfully retained that property since that time. There is an actual, not speculative, dispute by the parties over the ownership of existing property that the Court should resolve. *Id.*

[11] There is, accordingly, no issue of legislative appropriation or budgeting, since DRS already has the teachers' money; it is simply in the wrong account.

administrative agencies, can decide constitutional claims. *Yakima Clean Air,* 85 Wn.2d at 257; *Bare*, 84 Wn.2d at 383.

Accordingly, review is appropriate here because whether there is an unconstitutional taking is a significant question of law under the U.S. Constitution, the question presented involves issues of substantial public interest affecting more than 25,000 teachers' retirement accounts, and the Court of Appeals decision is contrary to decisions of both this Court and the U.S. Supreme Court. RAP 13.4(b)(1), (b)(3), and (b)(4).

3. Review is Warranted Under RAP 13.4(b)(4) Because an Issue of Substantial Public Importance is Whether the Court of Appeals Erred in Remanding the Claims of 25,000 Teachers to DRS for "Further Rulemaking," When the Court of Appeals Previously Determined DRS's Agency Action is Arbitrary and Capricious and This Case *Never* Involved Rulemaking.

This petition concerns whether more than 25,000 teachers must suffer further delay in obtaining a remedy for DRS's unlawful seizure of the interest earned in their retirement accounts almost 20 years ago. The Court of Appeals ruled in 2012 that it had "resolved" this action because DRS's interest "posting" practice was arbitrary and capricious. 167 Wn. App. at 183 n. 1, 191, 194. The Court of Appeals said the practice was "unfair" and contrary to "industry standards" because the practice meant that some interest was never posted and therefore neither compounded nor provided to TRS members. *Id.* at 183, 193.

The unfairness of DRS's practice is based on undisputed facts in the record: (1) DRS had a double standard on interest under which it

charged the teachers daily interest when they restored withdrawn contributions, but it failed to pay the teachers the same accrued interest when they withdrew contributions; (2) DRS's undisclosed computer program showed the teachers' funds as transferring from their TRS Plan 2 individual accounts before the end of the quarter and the teachers therefore received no interest for the quarter, when the teachers' funds actually remained in their TRS Plan 2 accounts until after the quarter ended; (3) DRS knew of the problems and unfairness, and DRS could have paid the teachers daily interest based on changing its computer program, but DRS took no action. 167 Wn. App. at 183, 193-94; Opening Br. of Fowler Appellants, 11/21/13, at 26-30; Reply Br. of Fowler Appellants, 3/21/14, at 5-8; 2014 WL 7462567 at *4.

This litigation and the teachers' appeal was thus always based on challenging *agency action* that *already* occurred in 1996-97 when they transferred from TRS Plan 2 to TRS Plan 3. The *Probst* class action was brought *in court* because DRS's presiding officer ruled there is "no source in Washington State authorizing Washington State administrative agencies to entertain litigation for class relief" and the "Superior Court, not this agency, is thus the proper forum for any possible class action related to Mr. Probst's claim." AR 1040; 167 Wn. App. at 184.

The teachers therefore brought their TRS claims in a class action complaint filed in Superior Court. *Id.* The parties just agreed to use the

administrative record in the *Probst* administrative proceeding to resolve the teachers' claims because there were no factual disputes and DRS acknowledged that the TRS and PERS plans applied the same challenged practices concerning interest. *Id.*; CP 293, 514.

The teachers *never* challenged any rule in the class action. And the Court of Appeals in 2012 expressly "reversed the DRS's order as it pertains to the class the Fowlers represent," and the precise DRS decision that the Court of Appeals reversed was that "DRS was not required to pay daily interest" on the teachers' contributions. 167 Wn.App. at 194, 185.

DRS now seeks rulemaking because it is a one-sided procedure without an independent decision-maker in which DRS plans to only make *post hoc* rationalizations for its failure to pay the teachers the interest the agency has withheld for almost 20 years. CP 107 (on remand "the Department will provide additional documentation to show that its quarterly interest methodology was neither arbitrary nor capricious"). But there is nothing in the law that requires such an unfair process. Indeed, *post hoc* rationalizations are meaningless. *See Christopher v. SmithKline Beecham Corp.*, __ U.S. __, 132 S.Ct. 2156, 2166-67 (2012) (court will not defer to a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack); *Cowiche Canyon Cons. v.*

Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).[12]

Even if there could be a remand to DRS, the APA expressly states that a court should not remand a matter to an agency if it "would cause unnecessary delay." RCW 34.05.574(1). If there were ever a situation that met this criteria, it is this action because the teachers have already litigated their claim for more than 10 years and they should not have to start all over through a new rulemaking process to have their claims heard. The trial court recognized the delay here is unwarranted, saying "[n]o case should take as long as this case has taken, and [the teachers' attorneys] are representing persons who depend on these moneys and who have suffered injury," but it erroneously thought it had no authority to require DRS to provide the teachers the withheld interest. VRP 6/20/13 at 16 (CP 231).

It is also erroneous for the Court of Appeals to assume that in 2015 or later DRS will issue a rule that will re-determine the amount of interest the teachers earned on their funds more 20 years ago. The teachers' property rights in the interest earned on their accounts prior to 1996 are "vested rights" that DRS cannot interfere with through a 2015 rule. *Gillis*

---

[12] DRS also cannot through rulemaking remedy the injuries already incurred by the teachers being denied the right to direct the investment of the interest DRS has unlawfully retained for the last 20 years. A rule will not correct the interest accounting and order the funds moved from the employers' account to each teacher's Plan 3 account with all accrued interest up to that transfer. CP 107 (DRS says rulemaking will re-enact the arbitrary and capricious practice with new rationale). DRS also has no competence to decide the teachers' constitutional claims — upon which the facts are undisputed — and DRS has already repeatedly issued its interpretation of the TRS statutes at issue here. AR 1-33; CP 400-30.

v. King County, 42 Wn.2d 373, 376, 255 P.2d 546 (1953); *Godfrey v. State,* 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975).

This Court should accept review because ensuring the teachers receive prompt review of their claims concerning their funds for retirement, rather than starting the litigation all over again by agency rulemaking, is an issue of substantial public importance. RAP 13.4(b)(4).

4. Review is Warranted Under RAP 13(b)(1) and (b)(4) Because the Court of Appeals Wrongly Determined That a Summary Denial of a Motion to Recall the Mandate Was a Decision on the Merits Barring an Appeal.

The teachers filed at the same time a new appeal and a motion to recall the mandate in the previous appeal. The Court of Appeals said this appeal is barred by its one-day-turnaround denial of the motion to recall the mandate to compel compliance with it (without any record and without any answer by DRS). 2014 WL 7462567 at *3. This is wrong under RAP 12.9(a), as the case cited by the Court of Appeals shows. *Bank of America v. Owens*, 177 Wn. App. 181, 188, 311 P.3d 594 (Supreme Court denied motion to recall the mandate and transferred the appeal, bringing the same issue to the Court of Appeals, and the Court of Appeals found the trial court had violated the mandate).

Under RAP 12.9(a) the "appellate court *may* recall a mandate [*i.e.*, regain jurisdiction over the case] . . . to determine if the trial court complied with an earlier decision of the appellate court in the same case." (Emphasis added.) But this is a discretionary procedural decision (*id.*),

similar to the procedural decision on whether to accept discretionary review. RAP 2.3(b) ("discretionary review *may* be accepted only in the following circumstances . . ." [emphasis added]). It is not a ruling on the merits. *Bank of America, supra*, 177 Wn. App. at 188; *Deweerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994) (summary denial of motion to recall the mandate is a discretionary procedural ruling, not a ruling on merits to which the law of the case doctrine applies).[13] Accordingly, the Court of Appeals was procedurally wrong.

In addition, the appeal is based on much more than enforcement of the mandate in *Probst* because it includes the statutory and constitutional issues in this petition. The Court of Appeals also addressed the mandate after saying the denial of recall of the mandate barred the appeal. 2014 WL 7462567 at *3. The Court should both rectify the error in applying the RAPs and correct the Court of Appeals' errors on the merits.

[13] *Accord, Prudential Ins. Co. of America v. HMO Partners*, 413 F.3d 897, 903-04 (8th Cir. 2005); *Wilmer v. Brd. of County Commissioners of Leavenworth County*, 69 F.3d 406, 409 (10th Cir. 1995). The Court of Appeals relied only on a pre-RAP case, *Reeploeg v. Jensen*, 81 Wn.2d 541, 503 P.2d 99 (1972), that is quite different because the appellate court plainly had jurisdiction under the rules then in effect and the court actually decided whether the mandate was violated after full briefing and argument.

Respectfully submitted this 29th day of January, 2015.

TALMADGE/FITZPATRICK

Philip A. Talmadge WSBA #6973
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

BENDICH, STOBAUGH & STRONG, P.C.

David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Stephen K. Festor, WSBA #23147
701 Fifth Avenue, #4850
Seattle, WA 98104
(206) 622-3536

Attorneys for Petitioners/Plaintiffs

Fowler/Pldgs/Petition for Review 3.doc

PROOF OR SERVICE

I, Monica Tofoleanu, declare under penalty of perjury that I am over the age of 18 and competent to testify and that defendant, Department of Retirement Systems, was served as follows:

On January 29, 2015, I personally served a true and correct copy of Plaintiffs' **Petition for Review** and this Certificate of Service as follows:

Michael Tardif (miket@fjtlaw.com)
Jeffrey Freimund (jeffF@fjtlaw.com)
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capital Way South, Ste 602
Olympia WA 98501

VIA EMAIL and US MAIL, POSTMARKED January 29, 2015

Sarah Blocki (sarahb@atg.wa.gov)
Assistant Attorney General
PO Box 40100
Olympia WA 98504

VIA EMAIL and US MAIL, POSTMARKED January 29, 2015

In accordance with the laws of the State of Washington, the original and one copy of the **Petition for Review** and this Certificate of Service were filed on January 29, 2015 as follows:

Washington State Court of Appeals
Division One
600 University St
One Union Square
Seattle, WA 98101-1176

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

DATED: January 29, 2015 at Seattle, Washington.

MONICA TOFOLEANU
Legal Assistant

APPENDIX

[No. 40861-9-II. Division Two. March 13, 2012.]

JEFFREY PROBST, *Individually and on Behalf of a Class of Similarly Situated Individuals*, ET AL., *Appellants*, v. THE DEPARTMENT OF RETIREMENT SYSTEMS, *Respondent*.

[1] **Pensions — Public Employees — Administrative Decision — Judicial Review — Governing Law.** Judicial review of a final order by the Department of Retirement Systems in a dispute over public employee pension benefits is governed by the Administrative Procedure Act (ch. 34.05 RCW).

[2] **Administrative Law — Judicial Review — Appellate Review — Burden of Proof — In General.** Under RCW 34.05.570(1)(a), in proceedings before an appellate court for review of an administrative adjudicator's order, the party seeking relief from the order has the burden of showing that the order is invalid.

[3] **Statutes — Construction — Administrative Construction — Review — Standard of Review.** An appellate court reviews de novo an administrative adjudicator's construction of a statute and may substitute its judgment for that of the administrative adjudicator.

[4] **Statutes — Construction — Administrative Construction — Deference to Agency — Test.** An appellate court will accord deference to an agency's interpretation of a statute only if (1) the agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise.

[5] **Statutes — Construction — Administrative Construction — Deference to Agency — Agency Authority.** A court does not defer to an administrative agency's determination of the scope of its own authority.

[6] **Statutes — Construction — Question of Law or Fact — In General.** The meaning of a statute is a question of law.

[7] **Statutes — Construction — Legislative Intent — In General.** A court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.

[8] **Statutes — Construction — Legislative Intent — Statutory Language — Plain Meaning — In General.** A court gives effect to a statute's plain meaning as an expression of legislative intent. In determining the plain meaning of a statute, a court may look to the statute as a whole, including related enactments.

[9] **Administrative Law — Agency Authority — Implied Powers — Scope.** Administrative agencies have implied authority to do everything lawful and necessary to effectuate the powers granted to them.

[10] **Statutes — Construction — Superfluous Provisions.** A statute is construed so that no portion is nullified or rendered meaningless or superfluous.

[11] **Statutes — Construction — Common Law — Derogation of Common Law — In General.** When a statute is inconsistent with the common law, the statute is deemed to abrogate the common law.

[12] **Pensions — Teachers Retirement — Plan 3 — Transfer From Plan 2 — Accumulated Contributions — Interest — Determination — Statutory Provisions — Effect.** Under RCW 41.50-.033(1), which gives discretion to the Department of Retirement Systems to determine the "amounts [of interest] to be credited" to accounts in the teachers' retirement system, the department has the implied authority to determine how interest is earned when a teachers' retirement system member transfers accumulated contributions from Plan 2 to Plan 3 under RCW 41.32.817. The department's discretionary authority under RCW 41.50.033(1) to determine how interest is earned is inconsistent with and, thus, abrogates the common law rule that interest is earned daily.

[13] **Administrative Law — Judicial Review — Arbitrary and Capricious — What Constitutes.** An agency's decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances.

[14] **Pensions — Public Employees — Contributions — Interest Calculation — Quarterly Interest Calculation Method — Validity.** Inasmuch as the Department of Retirement Systems has recognized that its use of the quarterly method to calculate interest on contributions to its retirement systems is unfair and that advantages would be realized by moving to a more frequent interest calculation method, the department's continuing use of the quarterly interest calculation method without identifying any reasons for doing so is arbitrary and capricious.

WORSWICK, J., delivered the opinion for a unanimous court.

Nature of Action: A member of the public employees' retirement system and members of the teachers' retirement system who transferred their retirement funds from Plan 2 to Plan 3 sought relief on claims that the Department of Retirement Systems breached its statutory and fiduciary duties by failing to pay accrued interest on the sums transferred between the plans.

Superior Court: After ruling that the claims of the members of the teachers' retirement system were not statutorily time barred, the Superior Court for Thurston County, No. 05-2-00131-1, Paula Casey, J., on May 21, 2010, entered a summary judgment in favor of the department, ruling that the department had the authority to calculate interest as it did, that the department was not statutorily required to pay daily interest, and that the department did not act arbitrarily and capriciously.

Court of Appeals: Holding that the department was not statutorily required to pay daily interest, but that the department acted arbitrarily and capriciously by using a quarterly interest calculation method, the court *reverses* the judgment and *remands* the case for further proceedings.

Stephen K. Festor, *David F. Stobaugh*, and *Stephen K. Strong* (of *Bendich Stobaugh & Strong PC*); *Catherine Wright Smith* (of *Edwards Sieh Smith & Goodfriend PS*), for appellants.

Robert M. McKenna, *Attorney General*, and *Sarah E. Blocki*, *Assistant*; and *Timothy J. Filer* and *Samuel T. Bull* (of *Foster Pepper PLLC*), for respondent.

LexisNexis® Research References

Washington Administrative Law Practice Manual
Annotated Revised Code of Washington by LexisNexis

[As amended by order of the Court of Appeals May 8, 2012.]

¶1 WORSWICK, J. — Mickey and Leisa Fowler are class representatives for plaintiffs who are members of the Teachers' Retirement System (TRS) and who transferred from TRS Plan 2 to TRS Plan 3 before January 20, 2002. The superior court dismissed their claim that the Department of Retirement Systems (DRS) was required to pay class members daily interest on the full balance of employee contributions transferred between Plan 2 and Plan 3. The

Fowlers appeal, arguing that (1) common law required the DRS to pay daily interest, (2) the DRS's failure to pay daily interest was arbitrary and capricious, and (3) the DRS's failure to pay daily interest effected an unconstitutional taking. We reverse, holding that although the DRS had authority to decide how to calculate interest, the DRS's interest calculation method was arbitrary and capricious because the agency did not render a decision after due consideration.[1]

FACTS

¶2 In March 2002, Jeffrey Probst, a member of the Public Employees' Retirement System (PERS), requested to transfer his retirement plan from PERS Plan 2, a defined benefit plan, to PERS Plan 3, a plan that is part defined benefit and part defined contribution. Probst contacted the DRS when he realized that his contributions for the last quarter of his enrollment in PERS Plan 2 had not accumulated interest, which, according to the DRS, was earned at a five and a half percent annual rate, compounded quarterly.

¶3 The DRS informed Probst that in order to receive interest on his full transferred balance, he would have had to wait until after the end of the quarter to transfer between plans. This is because the DRS uses the quarter's ending balance to calculate interest, and if an account has a zero balance at the end of the quarter, it earns no interest for that quarter. The DRS uses this calculation method for both PERS and TRS. Probst appealed before the DRS, claiming that (1) the DRS erroneously denied him accrued interest on his transferred balance, contrary to statute; (2) the DRS had failed to inform him of how interest was credited; and (3) the DRS erroneously deemed his transfer to have occurred before it actually did.

[1] Because we decide this case on the grounds of arbitrary and capricious agency action, we do not reach the Fowlers' constitutional takings argument. *Cmty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008) (appellate courts avoid deciding constitutional issues where case may be fairly resolved on other grounds).

¶4 In January 2005, Probst filed a class action suit, challenging the same interest calculation practices as his DRS appeal. Probst's suit claimed that the DRS breached its statutory and fiduciary duties by failing to pay accrued interest to Probst and a class of similarly situated individuals. In October, in Probst's DRS appeal, the DRS presiding officer granted summary judgment in favor of the DRS. Probst sought judicial review of the presiding officer's decision in superior court. In March 2006 the parties filed a joint motion to consolidate Probst's judicial review case with his class action lawsuit, which the superior court granted.

¶5 In June 2008 the superior court approved a partial settlement of the claims at issue. The settlement class included both PERS and TRS members who had transferred from Plan 2 to Plan 3 of their respective retirement systems after January 20, 2002. The class did not include TRS members who had transferred from TRS Plan 2 to Plan 3 before that date because the DRS argued that such claims were time barred. Aside from the statute of limitations issue, the excluded class members had the same claims against the DRS as the settlement class. The parties agreed in the settlement agreement to base any litigation by those excluded from the settlement class on the record developed in Probst's case, subject to the right to seek additional discovery or dispute the relevance or admissibility of materials in the record.

¶6 The Fowlers became class plaintiffs in February 2009 when they filed an amended supplemental complaint as TRS members excluded from the settlement agreement. The Fowlers alleged that (1) the DRS breached a duty to accurately account for TRS member funds, (2) the DRS breached a duty to provide pertinent information to TRS members, and (3) the DRS breached a duty under the common law to pay daily interest on TRS members' accounts. The Fowlers sought declaratory and/or equitable relief, monetary relief, prejudgment interest, and attorney

fees. The parties then stipulated to the certification of a class of plaintiffs consisting of all TRS members who transferred between Plan 2 and Plan 3 before January 20, 2002.

¶7 The superior court ruled that the Fowlers' claims were not time barred because the statute of limitations did not begin to run until the plaintiffs discovered the injury. The superior court further ruled that the director of the DRS had the authority to calculate interest as it did and that the statutory language at issue did not require the DRS to pay daily interest. The superior court also ruled that the DRS had not acted arbitrarily and capriciously. The superior court thus affirmed the DRS's decision that the DRS was not required to pay daily interest[2] and dismissed the Fowlers' claims. The Fowlers appeal.

ANALYSIS

I. Standard of Review

[1, 2] ¶8 We review a final DRS order under the Administrative Procedure Act (APA).[3] *Int'l Ass'n of Fire Fighters Local 3266 v. Dep't of Ret. Sys.*, 97 Wn. App. 715, 717, 987 P.2d 115 (1999). Under the APA, a party challenging agency action bears the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a). Although RCW 34.05-.570(3) provides nine bases for overturning an agency order in an adjudicative proceeding, we address only two: whether the DRS erroneously interpreted or applied the law or acted arbitrarily or capriciously. RCW 34.05.570(3)(d), (i).

---

[2] Although the DRS rendered its decision based on the PERS statutes, the DRS uses the same interest calculation for TRS as for PERS. Thus, the DRS decision applied with equal force to the Fowlers' case.

[3] Ch. 34.05 RCW.

II. DRS's Authority

A. *Plain Meaning of TRS Statutes*

¶9 The Fowlers argue that the TRS statutes require the DRS to pay daily interest to TRS members who transfer from TRS Plan 2 to Plan 3. The DRS responds that the TRS statutes give the DRS authority to decide how TRS members earn interest. We agree with the DRS.

[3-5] ¶10 We review questions of statutory interpretation de novo and may substitute our interpretation for that of an agency. *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 308, 157 P.3d 388 (2007). We accord deference to an agency's interpretation of a statute if "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). But we do not defer to an agency on the scope of the agency's authority. *US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997).

[6-8] ¶11 The meaning of a statute is a question of law. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our fundamental objective is to ascertain and carry out the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9. We give effect to a statute's plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. But we may look to the statute as a whole, including related enactments, to determine plain meaning. *Campbell & Gwinn*, 146 Wn.2d at 10-12.

[9-12] ¶12 RCW 41.32.817 permits TRS Plan 2 members to transfer to Plan 3. That section provides that upon transfer to Plan 3, "[t]he *accumulated contributions* in plan 2 . . . shall be transferred to the member's account in the defined contribution portion established in chapter 41.34

RCW,[4] pursuant to procedures developed by the department." RCW 41.32.817(5) (emphasis added). RCW 41.32-.010(1)(b) defines "accumulated contributions" for Plan 2 members as "the sum of all contributions standing to the credit of a member in the member's individual account . . . together with the regular interest thereon." And RCW 41.32.010(38) defines "regular interest" as "such rate as the director may determine."

¶13 These sections show that the legislature has delegated to the DRS authority to determine the *rate* of interest credited when TRS members transfer between Plan 2 and Plan 3. But they do not specify whether the DRS may determine when and how interest is *earned*. However, in 2007, the legislature passed a new statute, RCW 41.50.033. LAWS OF 2007, ch. 493, § 1. This statute clarifies the legislature's intent regarding the DRS's authority, providing,

> (1) The director shall determine when interest, if provided by a plan, shall be credited to accounts in . . . the teachers' retirement system . . . . *The amounts to be credited* and the methods of doing so shall be at the director's discretion, except that if interest is credited, it shall be done at least quarterly.
>
> (2) Interest as determined by the director under this section is "regular interest" as defined in RCW . . . 41.32.010(23).[5]
>
> (3) The legislature affirms that the authority of the director under RCW 41.40.020 and 41.50.030 includes the authority and responsibility to establish the amount and all conditions for regular interest, if any. The legislature intends [this act] to be curative, remedial, and retrospectively applicable.

RCW 41.50.033 (emphasis added).

¶14 Thus, in RCW 41.50.033, the legislature expressly gave the DRS authority to determine not only the methods

---

[4] Chapter 41.34 RCW provides parameters for contributions to Plan 3 retirement systems.

[5] When RCW 41.50.033 was passed, the definition of "regular interest" was codified at former RCW 41.32.010(23) (2007) (LAWS OF 2007, ch. 50, § 1). The definition of "regular interest" has since been renumbered to RCW 41.32.010(38) but has not changed.

of crediting "regular interest," but the *amount* to be credited. However, the Fowlers argue that this did not give the DRS authority to determine how interest would be earned, only how it would be credited. The Fowlers argue that "crediting" interest is merely a bookkeeping function and is distinct from the actual earning of interest. Br. of Appellants at 35.

¶15 Under the plain meaning of the words "amount to be credited," the DRS has authority to determine how interest is earned. Authority over the *amounts* credited is de facto authority over how interest is earned. If the DRS was required to pay daily interest under RCW 41.50.033, then the DRS would lack any authority to determine the amounts credited—the amounts to be credited would be fixed according to the rate of interest and the DRS would not have authority to vary them.

¶16 Agencies have implied authority to do everything lawful and necessary to effectuate the powers granted to them. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) (quoting *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 481, 206 P.2d 456 (1949)). In order for the DRS to determine the amounts to be credited as RCW 41.50.033 expressly provides, it is necessary for the DRS to have authority to determine how interest is earned. Thus, under the plain meaning of the statute, the DRS has implied authority to determine how interest is earned.

¶17 The Fowlers' argument on this point also contravenes the principle that courts do not construe words of a statute to be nullities. *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) ("[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same."). If we accepted the Fowlers' argument, the words "amounts to be credited" in RCW 41.50.033(1) would be superfluous. Former RCW 41.32.010(23) already gave the DRS authority to

determine the rate of interest before the legislature enacted RCW 41.50.033. And the words "and the methods of doing so" in RCW 41.50.033(1) clearly gave the DRS authority to determine the procedures for crediting interest. As such, in order for all the words of RCW 41.50.033(1) to have legal effect, the words "amounts to be credited" must give the DRS some authority beyond setting the rate of interest and the procedures for crediting it. The words "amounts to be credited" must authorize the DRS to determine how interest is earned, otherwise the words are superfluous.

B. *Common Law Daily Interest Rule*

¶18 The Fowlers argue that rather than giving the DRS authority to decide how interest is earned, the TRS statutes incorporate the common law rule that interest is earned daily.[6,7] In *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008), our Supreme Court held that the courts should not recognize an abrogation or derogation of the common law absent clear evidence of legislative intent. But we have recognized that if a statute is inconsistent with the common law, it is deemed to abrogate the common law. *State v. Butler*, 126 Wn. App. 741, 750, 109 P.3d 493 (2005) (citing *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 517 P.2d 585 (1973)).

---

[6] The Fowlers rely in part on 32 *Halsbury's Laws of England* § 127, at 78 (4th ed. 2005), for the proposition that at common law, interest was deemed to accrue daily, regardless of when it was payable. Our Supreme Court has previously relied on *Halsbury's Laws of England* to determine the common law. *See, e.g., Becker v. Lagerquist Bros.*, 55 Wn.2d 425, 429 n.4, 348 P.2d 423 (1960). Although our Supreme Court has not spoken on the daily interest common law rule, the DRS does not contest that the rule is valid common law in Washington.

[7] To make this argument, the Fowlers rely in part on an analogy to RCW 41.04.445. That statute provides that employers must pay "accrued interest" on balances withdrawn from the retirement systems or paid to the employee as a lump sum. RCW 41.04.445(4). The term "accrued interest" is undefined in chapter 41.04 RCW. The Fowlers argue that this undefined term incorporates the common law daily interest rule for the purposes of chapter 41.32 RCW. But the words "accrued interest" never appear in the relevant TRS statutes. We decline to interpret an undefined term in a tangentially related statute as controlling over the plain meaning of the statutes directly at issue.

¶19 The Fowlers cite *Faulkenbury v. Teachers' & State Employees' Retirement System*, 133 N.C. App. 587, 515 S.E.2d 743 (1999), to support their argument that "regular interest" incorporates the common law daily interest rule. *Faulkenbury* held that under a North Carolina statute that was silent as to when "regular interest" would accrue, the common law daily interest rule applied. 515 S.E.2d at 746-47. In contrast here, the statutes at issue expressly give the DRS authority to determine when interest accrues. *Faulkenbury* is therefore distinguishable and unpersuasive.

¶20 The Fowlers further cite *Teacher Retirement System v. Duckworth*, 153 Tex. 141, 260 S.W.2d 632 (Tex. Civ. App. 1954). There, the Court of Civil Appeals of Texas held that the agency administering a teacher retirement system lacked authority to abrogate the common law regarding the apportionment of annuities. 260 S.W.2d at 635. But the court based this conclusion on the fact that the statute was clear and unambiguous in adopting the common law rule. 260 S.W.2d at 637. *Duckworth* is distinguishable and unpersuasive here, where the legislature has clearly expressed its intent to give the DRS authority to determine how interest is earned.

¶21 The legislature's intent to abrogate the daily interest rule as to the TRS is plainly evident in RCW 41.50.033. Giving the DRS authority to determine how interest is earned is inconsistent with the common law rule that interest is earned daily, abrogating the common law rule.

¶22 Moreover, even before RCW 41.50.033 was enacted, there was clear evidence that the legislature did not intend for "regular interest" to mean daily interest. RCW 41.50-.215, originally enacted in 1937,[8] provides that "at the close of each fiscal year the department shall make an allowance of regular interest on the balance which was on hand at the beginning of the fiscal year in each of the teachers' retire-

[8] LAWS OF 1937, ch. 221, § 7(2).

ment system funds as they may deem advisable." As noted above, we look to related provisions to determine the plain meaning of statutory language. RCW 41.50.215 deals with regular interest on TRS fund balances and thus is related to chapter 41.32 RCW. And RCW 41.50.215 does not contemplate the words "regular interest" incorporating the common law daily interest rule because it directs the DRS to credit "regular interest" based on beginning-of-year balances, not year-round daily balances. This provides clear evidence that when the legislature defined "regular interest" in RCW 41.32.010, it intended to abrogate the common law.

¶23 Because there is clear evidence that the legislature intended to abrogate the common law, the Fowlers' arguments fail. We hold that the TRS statutes do not require the DRS to pay daily interest on balances transferred from Plan 2 to Plan 3.

III. Arbitrary and Capricious Agency Action

[13, 14] ¶24 The Fowlers next argue that if the DRS had discretion to determine how interest is earned, the way the DRS calculates interest is arbitrary and capricious because it rendered its decision to use the quarterly interest calculation method without due consideration. We agree.

¶25 An agency's decision is arbitrary and capricious if it results from willful and unreasoning disregard of the facts and circumstances.[9] *Overlake Hosp. Ass'n v. Dep't of Health*,

[9] The Fowlers cite *Trustees of California State University v. Riley*, 74 F.3d 960 (9th Cir. 1996), to argue that any accounting method that can be termed "inaccurate" is arbitrary and capricious. There, the Ninth Circuit Court of Appeals held that the Department of Education's method of calculating interest based on month-end balances instead of daily account balances was arbitrary and capricious under the federal Administrative Procedure Act. 74 F.3d at 966-67. The Ninth Circuit based this holding on the fact that the month-end accounting method caused "arbitrary and highly inaccurate calculations" that were "vulnerab[le] to manipulation." 74 F.3d at 967. *Trustees of California State University* did not address the relevant question under the Washington APA, however: whether the agency acted in willful and unreasoning disregard of the facts and circumstances. The Fowlers cite no Washington law to support their contention that any

170 Wn.2d 43, 50, 239 P.3d 1095 (2010). " 'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.' " *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 47, 959 P.2d 1091 (1998) (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)); *see also Hayes v. City of Seattle*, 131 Wn.2d 706, 717, 934 P.2d 1179 (1997) (holding agency action arbitrary and capricious where agency's findings were too conclusory to show consideration of the facts and circumstances).

¶26 Before the legislature created the DRS, it directly controlled the state retirement systems by statute. Since the inception of the TRS in 1937, the legislature had defined "regular interest" as interest "compounded annually." LAWS OF 1937, ch. 221, § 1(22). In 1947, the legislature specified that regular interest was to be credited to TRS retirement funds based on "the balance which was on hand at the beginning of the fiscal year." LAWS OF 1947, ch. 80, § 19. In 1976, the legislature created the DRS and gave it authority to administer Washington's retirement systems. LAWS OF 1975-76, 2d Ex. Sess., ch. 105, §§ 4, 5.

¶27 In 1977, the director of the DRS issued a memorandum stating that "regular interest" would be set at five and a half percent annually, to be credited each quarter based on the previous quarter's accumulated balance. In 1978, the director circulated another memorandum reaffirming this calculation method but stated, "Programs should be developed to provide the means to credit interest monthly on the prior month end balance. I will provide instructions when the appropriate time arrives for instituting the monthly interest program." Administrative R. at 880-81. The record

calculation method that can be termed "inaccurate" is per se arbitrary and capricious under the Washington APA.

reveals no action taken to implement this planned change in interest calculation.

¶28 In 1989, the DRS evaluated a proposal to delay processing of interest payments to accommodate late employer transfers to the DRS. The DRS evaluated the impact of such a change and elected to continue using its current interest procedures. However, the DRS did not consider at that time whether to alter the quarterly interest calculation method in favor of more frequent compounding.

¶29 In 1992, in conjunction with developing a new database system, the DRS considered whether to continue using its quarterly interest calculation method. The agency considered alternatives including continuing its existing practices or moving to one of several methods for compounding interest monthly. In evaluating this decision, the agency recognized that the quarterly interest calculation method was unfair because an employer's late transfers to the DRS could lead to the employee's being denied interest, a similar problem to the denial of interest that later occurred with transfers to Plan 3. Despite this problem, the DRS elected to continue using the quarterly interest calculation method. Nothing in the record shows that the DRS considered any advantages in continuing the quarterly calculation method; rather, the DRS elected to continue using the existing method despite the recognized unfairness it created.

¶30 Furthermore, in 2002, a DRS employee raised concern that the quarterly interest calculation method did not conform to industry standards. The record reflects that a DRS manager agreed that the matter should be considered. But the record does not show that the DRS undertook any consideration of the benefits and drawbacks of retaining the quarterly calculation method.

¶31 All in all, the record reflects that the DRS elected to continue using its historical interest calculation method without due consideration of the facts and circumstances. The DRS consistently recognized the advantages that would be realized by moving to a more frequent interest

calculation but rejected such a move without identifying any reasons for doing so. The decision to continue using the quarterly interest calculation method was therefore undertaken in willful and unreasoning disregard of the facts and circumstances, making it arbitrary and capricious.

¶32 We accordingly reverse the DRS's order as it pertains to the class that the Fowlers represent and remand for further proceedings.

PENOYAR, C.J., and VAN DEREN, J., concur.

After modification, further reconsideration denied May 8, 2012.

Not Reported in P.3d, 2014 WL 7462567 (Wash.App. Div. 2)
(Cite as: 2014 WL 7462567 (Wash.App. Div. 2))

H

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.
Jeffrey PROBST, and a class of similarly situated individuals, Plaintiffs,
Mickey Fowler and Leisa Fowler, and a class of TRS 3 Plan members, Appellants,
v.
DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.

No. 45128–0–II.
Dec. 30, 2014.

Appeal from Thurston Superior Court; Hon. H. Christopher Wickham, J.
Stephen Kolden Strong, Stephen Kirk Festor, David Frank Stobaugh, Bendich Stobaugh & Strong P.C., Philip Albert Talmadge, Talmadge/Fitzpatrick, Seattle, WA, for Appellants.

Michael E. Tardif, Jeffrey A.O. Freimund, Freimund Jackson Tardif & Benedict Garra, Sarah Elizabeth Blocki, Attorney at Law, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

LEE, J.

*1 Mickey Fowler and Leisa Fowler (the **Fowlers**) [FN1] appeal the superior court's order remanding the action to the Department of Retirement Services (DRS) based on our mandate issued in *Probst v. Department of Retirement Services.*[FN2] The **Fowlers** argue: (1) the trial court failed to comply with our mandate when it refused to calculate the interest the **Fowlers** were entitled to based on the common law daily interest rule and instead remanded the action to the DRS, (2) the DRS cannot retroactively apply a newly adopted rule, and (3) the DRS's retroactive application of a new rule that does not use the common law daily interest rule will result in an unconstitutional taking. Additionally, the **Fowlers** seek costs and a common fund attorney fee award at the conclusion of the litigation. Because the superior court properly interpreted our mandate and properly remanded the action to the DRS pursuant to the Administrative Procedure Act (APA), we affirm the superior court's order remanding the case to the DRS for further rulemaking consistent with our mandate in *Probst.*

FN1. Appellants are referred to as "the **Fowlers**"; some briefing refer to them as "the Teachers."

FN2. *Probst v. Dep't of Ret. Sys.,* 167 Wn.App. 180, 271 P.3d 966 (2012).

FACTS

This is the parties' second appeal to this court.[FN3] This case arises from a dispute over how the DRS calculates interest on the Public Employees Retirement Systems (PERS) and the Teachers Retirement Systems (TRS) accounts and on funds transferred between PERS/TRS Plan 2 and PERS/TRS Plan 3. The DRS stated, "[It] has set the rate of interest to be credited to PERS Plan 2 member accounts at 5.5% per year, compounded quarterly." Administrative Record (AR) at 261. The DRS credits interest on deposits to members' accounts on the fourth Saturday of the last month in each quarter.

FN3. The parties do not dispute the substantive facts underlying this appeal; the sub-

stantive facts presented for context are taken from our opinion in the first appeal, the *Probst* opinion. *Probst,* 167 Wn.App. 180.

A. INITIAL ACTION AND FIRST APPEAL

Jeffrey Probst contacted the DRS after finding that his contributions for the last quarter before transferring to Plan 3 had not earned interest. The DRS told him that it "uses the quarter's ending balance to calculate interest, and if an account has a zero balance at the end of the quarter, it earns no interest for that quarter." *Probst,* 167 Wn.App. at 183.

Probst unsuccessfully appealed the calculation methods before the DRS. *Probst,* 167 Wn.App. at 184. In his administrative appeal, Probst requested that the DRS pay interest on deposited funds from the date of deposit into Plan 2 through the date that the DRS withdrew and transferred the funds to the Plan 3 account. Probst then filed a class action suit in superior court challenging the DRS's calculation practice and sought judicial review of the DRS's decision. The administrative appeal was consolidated into the superior court action. The superior court then approved a class settlement agreement, which excluded some class members based on the date that they transferred from Plan 2 to Plan 3. The settlement agreement provided that excluded proposed additional class members' claims may still be brought against the DRS.

The **Fowlers,** who were part of the proposed additional class, filed an amended complaint. The superior court dismissed the claims; the **Fowlers** appealed to this court.

*2 We reviewed the DRS order pursuant to the APA, and ultimately reversed and remanded the case. *Probst,* 167 Wn.App. at 185, 194. We found that "although the DRS had authority to decide how to calculate interest," its method "was arbitrary and capricious because the agency did not render a decision after due consideration." *Probst,* 167 Wn.App. at 183. Additionally, we held that the "statutes do not require the DRS to pay daily interest" and that the legislature had abrogated the common law daily interest rule. *Probst,* 167 Wn.App. at 191. We declined to address the **Fowlers'** unconstitutional takings argument because we were able to decide the case based on the APA. *Probst,* 167 Wn.App. at 183 n. 1. We remanded the case and later issued a mandate for further proceedings in accordance with our opinion.

B. REMAND AND CURRENT APPEAL

On remand to the superior court, the **Fowlers** argued that our opinion required that judgment be entered in their favor and required the DRS to pay daily interest. The superior court disagreed and remanded the action to the DRS under the APA for proceedings consistent with our opinion in *Probst.* The superior court signed the order remanding the action to the DRS on June 20, 2013.

On July 22, 2013, the **Fowlers** filed a motion to recall the mandate in *Probst* and to require compliance under RAP 12.9. In the **Fowlers'** motion to recall, they argued that the superior court failed to comply with our mandate issued in *Probst* by remanding the action to the DRS for rulemaking under the APA instead of determining the interest itself. The **Fowlers** also argued that our opinion held the DRS's failure to pay daily interest was arbitrary and capricious. The **Fowlers** argued, alternatively, that if the superior court was correct, then their constitutional claims are unresolved and they have the right to again appeal our decision in *Probst.* In August 2013, we denied the **Fowlers'** motion.

Also on July 22, 2013, the **Fowlers** appealed the superior court's order remanding the action to the DRS. The **Fowlers** make the same arguments in their appeal as they made in their motion to recall the mandate.

ANALYSIS

Not Reported in P.3d, 2014 WL 7462567 (Wash.App. Div. 2)
(Cite as: 2014 WL 7462567 (Wash.App. Div. 2))

The **Fowlers** argue that the superior court did not comply with our mandate when it remanded the action to the DRS instead of ordering the DRS to pay the **Fowlers** interest based on the common law daily interest rule. Next, the **Fowlers** argue that if the DRS is allowed to make a new rule determining the interest calculation method, it will improperly apply it retroactively. The **Fowlers** further argue that an unconstitutional taking will likely result if the DRS is permitted to calculate interest by not using the common law daily interest method.

Whether the superior court properly implemented our mandate in *Probst* is the only issue properly before us. The superior court did not abuse its discretion by remanding the action to the DRS under the APA based on our opinion. As discussed below, the other issues are not properly before us. Accordingly, we affirm the superior court's order remanding the case to the DRS for further rulemaking consistent with our opinion in *Probst.*

A. MOTION TO RECALL MANDATE AND EFFECT ON APPEAL

*3 As an initial matter, the DRS argues that the **Fowlers** are precluded from appealing the superior court's order because they previously filed a motion to recall the mandate making the same arguments being made in this appeal, and we have already ruled on the matter. The **Fowlers** argue that their motion to recall was an opportunity for this court to exercise discretionary review, while this appeal automatically gives us jurisdiction and is a separate review of the lower court's post-mandate decision.

An "appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case." RAP 12.9. Rule 12 .9(a) gives an appellant two choices.

> (a) **To Require Compliance With Decision.** The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate.

Rule 12.9 clearly contains the disjunctive conjunction "or." The disjunctive "or" signals a choice of methods for litigants. Here, the **Fowlers** are using both methods to present the same issues. On July 22, 2013, the **Fowlers** filed both a motion to recall the mandate and a notice of appeal, raising the same arguments in both.

We "considered" the motion to recall, which raised the same arguments as in the appeal, and denied the motion. Specifically, we ruled: "Upon consideration by the court, the motion is denied." Order Denying Mot. to Recall Mandate, No. 40861–9–II (Aug. 1, 2013). Thus, we have already decided the issues in this appeal when we denied the motion to recall after consideration. The **Fowlers** are not entitled to a second review of the same issues with a different panel. *Reeploeg v. Jensen,* 81 Wn.2d 541, 546, 503 P.2d 99 (1972) (noting that to "require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice").

We do not approve of a party manipulating procedural rules in order to relitigate issues that have been previously resolved by this court. However, because of the particular circumstances of this case, we exercise our discretion to address the merits of the **Fowlers'** arguments. RAP 1.2(a), (c).

B. THE *PROBST* DECISION

We apply the law of the case doctrine " 'to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one

opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.' " *State v. Harrison,* 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting 5 AM.JUR. 2d Appellate Review § 605 (2d ed.1995)). "Once an appellate court issues its mandate, the court's decision becomes 'effective and binding oh the parties' and 'governs all subsequent proceedings in the action in any court.' " *State v. Strauss,* 93 Wn.App. 691, 697, 969 P.2d 529 (1999); RAP 12.2.

*4 When the appellate court issues a directive that leaves no discretion to the lower court, the lower court must comply. *Harp v. Am. Sur. Co. of N.Y.,* 50 Wn.2d 365, 368, 311 P.2d 988 (1957). "[A] remand 'for further proceedings' 'signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case." *Bank of Am., N.A. v. Owens,* 177 Wn.App. 181, 189, 311 P.3d 594 (2013), *review denied,* 179 Wn.2d 1027 (2014) (citing *In re Marriage of Rockwell,* 157 Wn.App. 449, 453, 238 P.3d 1184 (2010)); *McCausland v. McCausland,* 129 Wn.App. 390, 400, 118 P.3d 944 (2005), *rev'd,* 159 Wn.2d 607, 152 P.3d 1013 (2007)). When a mandate merely remands for further proceedings, compliance with that mandate is reviewed for an abuse of discretion. *State v. Kilgore,* 167 Wn.2d 28, 34, 42–43, 216 P.3d 393 (2009) (finding that the trial court did not abuse its discretion following remand for further proceedings); *see Rockwell,* 157 Wn.App. at 454 (reviewing the trial court record to determine whether it exercised its discretion on remand, noting that it "intended that the trial court exercise its discretion on remand").

In *Probst,* we reversed the superior court's original order and remanded the case for further proceedings consistent with the opinion, intending for the trial court to exercise its discretion. Specifically, the mandate stated, "this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion ." Clerk's Papers at 5. Thus, on remand, we review the superior court's decisions for an abuse of discretion. *Rockwell,* 157 Wn.App. at 454; *see also Kilgore,* 167 Wn.2d at 43.

The crux of the **Fowlers'** argument seems to be that when we said "although the DRS had authority to decide how to calculate interest, the DRS's interest calculation method was arbitrary and capricious because the agency did not render a decision after due consideration" and "the ... statutes do not require the DRS to pay daily interest," *Probst,* 167 Wn.App. at 183, 191, we actually meant: the DRS's "failure to pay daily interest was arbitrary and capricious," and the "DRS is required to pay daily interest." Mot. Hearing Transcript (MHT) at 7. The **Fowlers** assert that the DRS's "argument that daily interest is not required is contrary to the express language in the opinion." MHT at 7.

The **Fowlers** misconstrue our holding in *Probst.* In *Probst,* we stated, "We hold that the TRS statutes do not require the DRS to pay daily interest on balances transferred from Plan 2 to Plan 3." *Probst,* 167 Wn.App. at 191. We also held that "the legislature has clearly expressed its intent to give the DRS authority to determine how interest is earned." *Probst,* 167 Wn.App. at 190. Thus, the DRS had the authority to determine how interest is calculated. However, in exercising that authority, we found that the DRS acted arbitrarily and capriciously by electing to continue using a "historical interest calculation method without due consideration of the facts and circumstances" and without identifying the reasons for continuing to do so, even when the DRS consistently recognized the historical method did not conform to industry standards and was unfair. *Probst,* 167 Wn.App. at 193–94. Therefore, contrary to the **Fowlers'** assertion, we held that the DRS acted arbitrarily and capriciously by not giving due consideration to the facts and circumstances when it elected to continue the historical method of calculating interest; we did not hold that the DRS was required to pay daily interest.

Not Reported in P.3d, 2014 WL 7462567 (Wash.App. Div. 2)
(Cite as: 2014 WL 7462567 (Wash.App. Div. 2))

*5 On remand, the superior court found that "it's not up to [the superior court] to determine what an agency should or shouldn't do" and that it is not appropriate for it to "set interest rates ... when there is an agency who is given that discretion." MHT at 15, 18. It went on to say that finding that the DRS's method was arbitrary and capricious "is not the same thing as saying [the calculations] ha[ve] to be done a particular way." MHT at 18–19. The superior court correctly interpreted our mandate to say that the DRS has the authority to determine how to calculate interest, but it must undergo the appropriate processes. It follows that it is reasonable to remand to the DRS to allow it to undergo the appropriate processes to exercise its authority.[FN4] The superior court did not abuse its discretion.

> FN4. Under the APA, "[t]he court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay." RCW 34.05.574(1). Courts substantially defer to the agency and do not substitute its opinion "for that of the agency entrusted to make such decisions." *Hillis v. Dep't of Ecology,* 131 Wn.2d 373, 396, 932 P.2d 139 (1997). In *Hillis,* the court invalidated the agency's decision that was made without appropriate rule making. 131 Wn.2d at 400. The *Hillis* court found that it "is not for the courts to make the decision or set the priorities for the agency," and "[o]n remand, it is within the discretion of the agency what specific procedures" to use after an agency decision has been invalidated. *Hillis,* 131 Wn.2d at 400.

The **Fowlers** also argue that the superior court improperly relied on the APA when it remanded the action to the DRS because their claim falls under an exception to the APA. The **Fowlers'** argument is without merit.

The **Fowlers** assert that RCW 34.05.510 excludes their claim from the APA because their claim involves money damages. This assertion is based on an incomplete reading of the statute. RCW 34.05.510 states:

> This chapter establishes the exclusive means of judicial review of agency action, except:
>
> (1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.
>
> (2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

RCW 34.05.510(1), (2). Thus, the APA does not govern "litigation in which the sole issue is a claim for money damages or compensation *and* the agency whose action is at issue does not have statutory authority to determine the claim." RCW 34.05.510(1) (emphasis added).

Also, Washington courts have consistently held that RCW 34.05.510(1) applies only to suits in which the sole issue is a claim for money damages. For example, in *Wells Fargo,* the court found that because appellant's "complaint contained a request for a declaratory judgment ... its action did not fit within the exception for suits limited to money damages." *Wells Fargo Bank, N.A. v. Dep't of Revenue,* 166 Wn.App. 342, 353, 271 P.3d 268, *review denied,* 175 Wn.2d 1009 (2012).

In their first appeal, "[t]he **Fowlers** sought declaratory and/or equitable relief, monetary relief, prejudgment interest, and attorney fees." *Probst,* 167 Wn.App. at 184. Here, in their second appeal, they seek enforcement of the mandate based on that prior appeal; the **Fowlers** have not offered any evidence or argument that this is now solely a claim for money damages.

*6 The superior court correctly ruled that the APA applied to the case and properly remanded the action to the DRS for proceedings consistent with our opinion in *Probst.* The **Fowlers'** argument that the superior court erred by remanding the action is not supported by law.

C. RETROACTIVE APPLICATION AND UNCONSTITUTIONAL TAKINGS

The **Fowlers** argue that if the DRS enacts a new rule adopting the original interest calculation methods under the authority of RCW 41.50.033, the new rule could not be retroactively applied because it would interfere with their vested rights. However, the DRS has not yet had the opportunity to make such a rule. Therefore, this argument is premature and is not ripe for review.

Washington law has long established that courts are not "authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act ." *Wash. Beauty Coll., Inc. v. Huse,* 195 Wash. 160, 164, 80 P.2d 403 (1938); *see Kitsap County Prosecuting Attorney's Guild v. Kitsap County,* 156 Wn.App. 110, 122, 231 P.3d 219 (2010) (noting that this court does not give advisory opinions). To be justiciable, "the interests must be direct and substantial and involve an actual as distinguished from a possible or potential dispute." *Huse,* 195 Wash. at 164–65. The **Fowlers** ask us to ignore the fact that the DRS has not yet had the opportunity to resolve this issue, and therefore, there is no rule to be retroactively applied. Their argument is speculative; we do not render advisory opinions. *Huse,* 195 Wash. at 164–65.

The **Fowlers** also argue that if the DRS is allowed under RCW 41.50 .033 to make and apply a new rule that does not use the common law daily interest rule to calculate interest, the potential failure to pay interest based on that rule will result in an unconstitutional taking. Pursuant to the takings clause of the Fifth Amendment and applied to the states through the Fourteenth Amendment, the government cannot take private property for public use without just compensation. U.S. Const., amend. V. This argument is also speculative because the DRS has not made or applied a new rule resulting in an unconstitutional taking; therefore, this argument is premature. We do not render advisory opinions. *Huse,* 195 Wash. at 164–65.

ATTORNEY FEES AND COSTS

The **Fowlers** seek attorney fees pursuant to the common fund doctrine. Under the American rule, which Washington follows, attorney fees must be authorized by contract, statute, or a recognized equitable principal. *City of Seattle v. McCready,* 131 Wn.2d 266, 273–74, 931 P.2d 156 (1997). Whether an equitable exception authorizes an award of attorney fees is a legal question. *Tradewell Group, Inc. v. Mavis,* 71 Wn.App. 120, 126, 857 P.2d 1053 (1993). The Washington Supreme Court found that "the 'common fund/common benefit' theory" is a "narrow equitable ground for awarding attorney fees." *City of Sequim v. Malkasian,* 157 Wn.2d 251, 271, 138 P.3d 943 (2006).

*7 In order to award attorney fees based on the common fund doctrine, a court has to determine whether the **Fowlers'** litigation benefited the class and others. *Malkasian,* 157 Wn.2d at 271. A court then grants the award based on the size of the judgment. *Bowles v. Dep't of Ret. Sys.,* 121 Wn.2d 52, 75, 847 P.2d 440 (1993). Until the end of litigation, there is no basis to determine whether the award of attorney fees is appropriate. Furthermore, the **Fowlers** themselves note that the fee award "awaits the conclusion of this

litigation." Br. of Appellant at 46.[FN5] Accordingly, the request for attorney fees from this court is premature.

> FN5. We recognize that the **Fowlers**, in an abundance of caution, are preserving their right to claim attorney fees pursuant to the common fund doctrine; however, for the reasons stated above, we do not decide this issue.

The **Fowlers** also request costs on appeal. RAP 14.1 and 14.2 provide that the clerk of the appellate court will award costs to the substantially prevailing party. Here, the **Fowlers** are not the prevailing party. Accordingly, the **Fowlers'** request for costs on appeal is denied.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: WORSWICK, P.J., and MAXA, J.

Wash.App. Div. 2,2014.
Probst v. Department of Retirement Systems
Not Reported in P.3d, 2014 WL 7462567 (Wash.App. Div. 2)

END OF DOCUMENT