No. 91250-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MICKEY FOWLER, et al., and a class of TRS Plan 3 members,

Petitioners,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

REPLY ON ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The Department of Retirement Systems ("DRS") argues for the first time on appeal that the class's petition for review of the Court of Appeals' decision is foreclosed because the class did not seek discretionary review under RAP 13.5 of the Court of Appeals' earlier summary denial of their motion to recall of mandate. Answer at 7-17.[1]

The motion to recall the mandate did not raise the two issues presented in the class's petition for review. Apparently out of concern that the Court of Appeals erred in the class's appeal, DRS tries to divert this Court from those two questions -- the need for this Court's definitive interpretation of RCW 41.04.445 on the interest due to the class members upon their withdrawal of contributions from the Teachers Retirement System,[2] and whether DRS's failure to provide the class members with all the interest they earned on their pension contributions constitutes a taking.

DRS's argument under RAP 13.5 is a diversionary, red herring tactic because the class has not petitioned this Court for review of the Court of Appeals' summary denial of its motion to recall the mandate.

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[1] In making this argument, DRS is asking this Court to consider an "issue that is not raised in the petition for review." RAP 13.4(d). The class is entitled to respond to that argument in this reply.

[2] Class members withdrew their pension contributions from TRS 2 in order to join TRS 3 on the representation they would receive their contributions plus the interest earned on them. Pet. at 2-3.

Instead, the class asks the Court to review the Court of Appeals' decision on their *appeal*, a decision terminating review under RAP 13.4. RAP 13.5 therefore has nothing to do with the issues raised in the petition for review because the class is not seeking review of that interlocutory Court of Appeals decision, but rather of the Court of Appeals' merits decision, one terminating review under RAP 13.4.

B. STATEMENT OF THE CASE

For *decades*, DRS has deprived the class members of the full amount of the interest earned on their TRS 2 pension contributions when class members opted to leave TRS 2, particularly when joining TRS 3, a plan that is more investor-directed like a 401(k) account. Pet. at 2-3.

There is *no dispute* that the class members were entitled to interest at the rate 5.5% per annum earned on their TRS 2 contributions. There is also no dispute that the class members did not receive 5.5% per annum interest. Rather, DRS kept some of each class member's interest and used it to fund employer obligations.

In *Probst v. Dep't of Retirement Systems*, 167 Wn. App. 180, 271 P.3d 966 (2012) ("*Probst I*"), the Court of Appeals reversed a trial court judgment in DRS's favor, because DRS's practice was arbitrary and capricious. DRS moved for reconsideration and its motion was denied. That court further determined that the class, not DRS, prevailed in

awarding costs.

On remand after *Probst I*, the trial court further remanded the case to DRS for rule-making to address the interest earned by the class in 1996-97.

The class moved to recall the Court of Appeals' mandate, a motion that court summarily denied only a day after the class filed the motion. The motion to recall did not raise the two issues raised in this petition. The class also, at the same time, appealed the trial court's decision, arguing that the trial court misapplied RCW 41.04.445, requiring payment of interest earned on the class's TRS 2 contributions upon withdrawal of these contributions and failed to address the class's contention that a failure to pay the class members all the daily interest their pension contributions earned at the 5.5% annual rate and diverting the part of that earned interest to fund employer obligations constituted a taking.

C. ARGUMENT

It is important to identify precisely what is, and what is not, at issue in this case.

The *core issues* presented in the class's petition are: (1) the requirement under RCW 41.04.445 for paying the class the interest earned at the rate of 5.5% per annum on their TRS 2 contributions once they are

withdrawn from that account (Pet. at 5-8),[3] and (2) whether the failure to pay the class members all the daily interest earned on their TRS II contributions at the rate of 5.5% per annum and DRS's consequent diversion to the employers part of the interest earned by the class members constituted a taking under the Fifth and Fourteenth Amendments to the United States Constitution. Pet. at 8-15.

The case presents one ancillary issue. As the class has noted, the Court of Appeals' opinion suggests that the summary denial of a motion to recall mandate forecloses appellate review on whether the mandate was violated. This is wrong. Pet. at 19-20.[4] DRS goes much farther than the Court of Appeals. It contends that the class cannot seek appellate review of *other issues* under RAP 13.4 on whether daily interest was required under RCW 41.04.445 or whether DRS violated the takings clause because the class did not seek review under RAP 13.5 of the summary denial of the motion to recall the mandate. Answer at 8-14. But the motion to recall the mandate did not address the issues raised in the

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[3] "Per annum" means by the year and a year is 365 days during which interest is earned *each day* at the specified rate. *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 691-92, 586 P.2d 830 (1978); *Gesa Federal Credit Union v. Mutual Life Ins. Co. of New York*, 39 Wn. App. 875, 882-83, 96 P.2d 607 (1985), *aff'd*, 105 Wn.2d 248, 713 P.2d 728 (1986). Thus, "per annum" means that interest is earned each day.

[4] This Court often grants review on such rule-based issues to clarify the application of court rules. *E.g., Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (clarifying application of CR 50).

petition for review. These were only raised in the appeal.

The only relevance of a recall of mandate is therefore whether a summary denial of a motion to recall mandate somehow forecloses an appeal that raises the *same* mandate issues. The answer is no for the reasons stated in the class's petition. Pet. at 19-20.

DRS fully and correctly understood that the class's petition for review here indeed *has nothing to do with the substance of the Court of Appeals' decision to deny the class's motion to recall mandate under RAP 12.9.* Answer at 15. ("Plaintiffs' Petition does not argue that the Court of Appeals erred by failing to recall the mandate.").

Rather, the class seek review of their appeal issues decided by the Court of Appeals. That appeal raised two issues for which the class seeks review in this Court. The class asked the Court of Appeals to correct the error in the first Court of Appeal's opinion stating that RCW 41.04.445 did not apply to DRS, when it plainly does and it requires DRS to pay the accrued interest, which is interest earned but not yet credited or posted. Pet. at 6-8.[5] Second, the class asked this Court to address whether DRS diverting part of the interest earned by the class members to fund

[5] Case law arising under the law of the case rule in RAP 2.5(c)(2) confirms that the rule *limits* the application of the traditional doctrine and allows an appellate court, particularly this Court, to re-visit a legal issue. *E.g., State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000) (appellate court could revisit earlier decision on interest). This is sensible where, as here, the class was not aggrieved by *Probst I*, but, in fact, prevailed there. Pet. at 1 n.1, 4.

employer obligations was a taking. These issues are raised in the class's appeal and are properly before this Court for review under RAP 13.4.

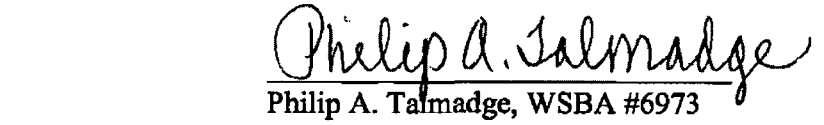
Consequently, DRS is wrong where it now contends that the class's failure to seek review of the summary denial of its motion to recall the mandate under RAP 13.5 forecloses review by this Court under RAP 13.4. It is wrong because the class seeks review under RAP 13.4 of two other (non-mandate) issues in their appeal.

D. CONCLUSION

DRS's entire argument concerning RAP 13.5, answer at 7-17, should be disregarded because the class seeks review of an order terminating review under RAP 13.4. This Court should grant review for the reasons set forth in the class's petition.

DATED this 10th day of April, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply on Answer to Petition for Review in Supreme Court Cause No. 91250-5 to the following parties:

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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: April 10th, 2015, at Seattle, Washington.

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Good morning:

Attached please find the following document for filing with the Supreme Court:

Document to be filed: Reply on Answer to Petition for Review
Case Name: Fowler v. Department of Retirement Systems
Case Number: 91250-5
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If you have any questions, please feel free to contact me. Thank you!

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