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SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs,

v.

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

Defendant-Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor-Appellant.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This answer is submitted by the plaintiffs/respondents, *i.e.*, the class of King County public defense employees that the Supreme Court held are eligible for Public Employees Retirement System (PERS) benefits. *Dolan v. King County,* 172 Wn.2d 299, 301, 320, 258 P.3d 20 (2011) [*Dolan I*]. The class is concerned that DRS's position could unfairly drive up the costs of public defense in King County instead of the normal spreading of PERS costs across all the employees in this system. *Dolan v. King County*, No. 49876-6 II, 2018 WL 202528 (May 1, 2018) [*Dolan III*] at *12-13.

DRS intervened in this case specifically to litigate interest. CP 171-72. DRS's petition nonetheless states that review should be granted because (Petition 1):

> In this case, the Plaintiff Class and King County negotiated a settlement requiring other public employees and employers to fund $50 million in interest associated with the Class's retroactive pension benefits … It would be easy for plaintiffs and defendants to settle cases if they could simply agree that third parties would pay most of the cost. That is not allowed, of course, but it is exactly what the lower courts approved here … ignoring black letter law, the equities, and the Administrative Procedure Act.

This is not what actually happened. What happened is explained in the Court of Appeals opinion.[1]

[1] DRS's petition submitted by the Attorney General/Solicitor General's Office did not attach a copy of the Court of Appeals decision as required by RAP 13.4(c)(9).

In a nutshell, the County and the class did not negotiate a settlement concerning the interest owed by King County and did not prevent DRS from seeking interest. Rather, the intervenor DRS and the County litigated that issue before the Superior Court in a trial. The Superior Court issued a decision with findings following the trial, determining the amount of interest King County should pay for its PERS contributions. DRS did not assign error to any of these findings. During all the years DRS participated as an Intervenor, DRS *never asked* the Superior Court to allow it to initially decide the interest issue under the doctrine of primary jurisdiction.

Rather, after the Superior Court set a date with DRS and the County for the trial on the interest issue, DRS tried to do an end run around the trial court by issuing a letter addressed to King County which it called a "decision" stating that King County owed over $65 million in interest. CP 594-96. The letter said King County had to seek review under the Administrative Procedure Act (APA), under which judicial review would be in Thurston County. CP 596.

The trial court decided that the letter did not deprive it of jurisdiction, particularly since DRS had long ago intervened in the case specifically to litigate interest, and this Court had expressly remanded the case to the trial court to address remedies, which included interest owed, if any.

The Court of Appeals affirmed, finding that the trial court had not abused its discretion in fashioning a remedy for interest requiring King County to pay $10.5 million of interest.

The issues listed by DRS are all based on its fictional account of what happened. The only actual issue is whether the trial court abused its discretion in deciding the interest issue upon remand by this Court. The Court of Appeals opinion explains that the trial court did not abuse its discretion.

RESTATEMENT OF THE CASE

The decision by the Court of Appeals has a detailed statement of the case, which is summarized here. *Dolan III* at *2-6. After this Court ruled the class members are eligible for PERS (*Dolan I*), the class and the County entered into a tentative settlement agreement. *Id.* at *2. Under the tentative settlement agreement the public defense employees would receive PERS service credit for their service, and the County would pay DRS $30 million in omitted employer and employee contributions. *Id.* The County would not have had to pay interest on those contributions but DRS could disagree and object to the settlement. *Id.* DRS moved to intervene. *Id.* at *3. The trial court denied full party intervention, but allowed DRS limited intervention to object to the settlement and to appeal. *Id.*

The trial court approved the settlement, and DRS appealed. *Dolan v. King County*, 184 Wn. App 1038, 2014 WL 6466710) (2014) [*Dolan II*]. In *Dolan II*, the Court of Appeals rejected DRS's argument that the trial court did not have original jurisdiction to decide the remaining issues in the action, and it held that DRS is not bound by any terms in the settlement agreement since it was not a full party. *Dolan III* at *3; *Dolan II*, 2014 WL 64667710 at **1, 7. The Court of Appeals reversed the trial court's order granting DRS only partial intervention in the matter. *Id.*

On remand from *Dolan II*, DRS was allowed to "intervene as a full party." *Dolan III* at *3. The class subsequently moved to modify the trial court's April 2009 permanent injunction to clarify certain issues of service credit for class members. The County and the class then agreed to the service credit the class members would receive and that the County would pay DRS retroactive employee and employer contributions of approximately $32 million. *Id.* at *3-4. The County stipulated that "it would pay any interest required by agreement between the County and DRS or by court order." *Id.* at *3. Initially, DRS opposed the motion to modify and the County's stipulation. But DRS subsequently changed position and it agreed to the order modifying the permanent injunction in accordance with the stipulation. The modification order thus states: "DRS initially opposed the motion [to modify], but now has agreed to entry of

the order in the interest of partially settling this long dispute and obtaining a workable structure for the complexities of establishing the extensive retroactive service credit involved in this litigation." *Dolan III* at *3 quoting CP 425. DRS signed the order as approved for entry. *Id.*

The modification order specifically listed the common fund attorney fee and interest as two remaining issues to be decided. Indeed, the modification order expressly said that the County and DRS did not agree on whether DRS could assess interest on the retroactive contributions and the order did not resolve that issue, leaving it for further resolution in the case. *Id.* at *4.

On the same day DRS signed the agreed modification order after consulting with the parties, the trial court scheduled a hearing to address payment of interest. *Id.* at *4; CP 428; RP 14: 17-18 (June 5, 2015). Shortly prior to the scheduled hearing date the DRS director sent the County a letter stating DRS had decided to charge the County the full amount of interest on the retroactive contributions. *Dolan III* at *4; CP 594-96. The letter said the County had to appeal the "decision" within 120 days under the APA. CP 596. Under the APA, jurisdiction would be in Thurston County Superior Court.

The trial court conducted a trial on the interest issue, and both the County and DRS presented evidence and arguments at the hearing. *Dolan III* at **4-5. The trial court entered a written decision, which first

found it had jurisdiction to decide the issue of interest, rejecting DRS's argument that the letter deprived the Superior Court of jurisdiction. *Id.* at **5-6. The trial court then decided based on the circumstances and evidence presented that it was equitable to assess the County interest in the amount of $10.5 million and the remaining interest would be socialized among PERS employers and employees, if necessary. *Id.* at *6. DRS appealed the trial court's decision. *Dolan III* at *6.

The Court of Appeals affirmed the trial court's jurisdiction to decide the interest issue. *Dolan III*, **6-9. The Court of Appeals rejected DRS's argument that the trial court erred in exercising its equitable authority to determine the County's interest obligation. *Id.* at **9-11. Finally, the Court of Appeals reviewed the trial court's findings and decision on interest, and it rejected DRS's argument that the trial court abused its discretion in deciding the interest issue. *Id.* at **9-14.[2]

The Court of Appeals said three important factual findings supported the trial court's decision: (1) "the testimony of all four of the parties' witnesses established that multi-employer plans are designed to socialize pension costs"; (2) "requiring PERS to absorb most of the interest obligation would have a limited impact on contribution rates, particularly relative to other recent increases"; and (3) "imposing the

[2] The Court of Appeals noted that DRS did not contend that substantial evidence did not support the traial court's findings. *Dolan III*, at *14, n.8.

entire obligation of approximately $64 million on the County would have a substantial negative impact on the County and its programs." *Dolan III* at **12-13.

DRS then filed its petition for review.

ARGUMENT

A. DRS Wrongly Asserts That the Amount of Interest the County Owes Was Determined by the Terms of Settlement Agreement, When in Reality the Amount Was Determined by the Trial Court Following a Trial Between DRS and King County Concerning Interest Owed.

DRS misleadingly asserts throughout its petition that the interest at issue was determined by a settlement agreement between the class and the County, and the agreement cannot bind third parties. DRS's petition thus starts out by stating: "the Plaintiff Class and King County negotiated a settlement requiring other public employees and employers to fund $50 million in interest . . . . The settlement thus imposes costs on public employees and employers to which they never consented . . . . [T]he parties and the court had no authority to use a settlement agreement to justify forcing other public employees and employers to pay costs to which they had never consented." Petition at 1. This misstatement permeates DRS's petition.

The Court of Appeals' decision and DRS's petition itself, in its procedural history, recognize that DRS's framing of the issue here is wrong. For example, DRS admits that as a full party to the matter it

withdrew any opposition it had to the class members' service credit after "[t]he County and class filed a stipulation stating that the County would pay interest, as required by court order or agreement between the County and DRS." Petition at 5-6, citing CP 425-30. DRS admits that the interest "matter proceeded to trial." Pet. at 7. And at the trial it presented witness testimony and argument. *Id.* DRS further admits that the trial court decided the interest issue "in equity[.]" Petition at 9, citing CP 2160.

The Court of Appeals thus states on remand from *Dolan II* that the stipulation on the class members' service credit "[l]eft unresolved . . . whether the County also would be required to pay approximately $64 million in interest on the retroactive contributions to replace lost investment returns[.]" *Dolan III* at *1. And "DRS agreed" to the modification order incorporating the stipulation. *Id.* at *3, quoting the modification order CP 425 as follows: "DRS initially opposed the motion [to modify], but now has agreed to the entry of this Order in the interest of settling this long dispute and obtaining a workable structure for the complexities of establishing the extensive retroactive service credit involved in this litigation." Accordingly, DRS ultimately "agreed to the settlement terms in the stipulation when it approved the order modifying the injunction as did the stipulation." *Id.* at *3. And the modification order to which DRS agreed "stated that the County and DRS did not agree on whether DRS could assess interest on retroactive service credit

contributions, and that the order did not resolve that issue," leaving in for further resolution in the case. *Id.* at *4. Right after entering the agreed modification order, the trial court scheduled a hearing for the interest issue. The issue was then tried.

Accordingly, contrary to DRS's statements in its petition, the interest at issue here was not decided as part of a settlement, but was instead determined by the trial court after a trial in which DRS was a full party with no limits on its ability to present evidence and argument on the interest issue. DRS represented the interest of all PERS participants in that trial.

B. Primary Jurisdiction Is Discretionary, Not Mandatory, And DRS Did Not Ask The Court to Rule on Primary Jurisdiction And If It Had, The Trial Court Would Have Not Abused Its Discretion in Deciding That It Would Decide the Interest Issue Instead of Initially Referring It to DRS.

DRS contends that the trial court decision on interest conflicts with the primary jurisdiction doctrine. Pet. 17-20. But DRS did not raise primary jurisdiction with either the trial court or the Court of Appeals. As this Court explained in the case relied on by DRS: "The application of the doctrine of primary jurisdiction is not mandatory in any given case but is rather within the sound discretion of the court." *In Re Real Estate Litigation*, 95 Wn.2d 297, 305, 622 P.2d 1185 (1980) (internal quotations omitted). How could the trial court abuse its discretion when the issue was not brought to its attention for a decision by DRS?

"The function of the doctrine of primary jurisdiction is to guide a court in determining whether it should refrain from exercising its jurisdiction until an administrative agency with special competence has resolved an issue arising in a proceeding before the court." *In Re Real Estate Litigation*, 95 Wn.2d at 301. (Defendants raised the primary jurisdiction issue through a motion which allowed the trial court to decide whether to invoke the doctrine.)

Thus, to invoke primary jurisdiction, a party or the agency has to ask a court to address primary jurisdiction so that the court can decide whether to refer the issue to the agency. *Id.* at 299. Here, DRS did not ask the Superior Court to invoke the primary jurisdiction doctrine. By not raising primary jurisdiction as an issue for Judge Hickman to decide, DRS waived that argument.

Indeed, instead of asking the trial court to consider referring the interest issue to DRS, *after* the trial court set a date for the hearing on the interest issue, DRS purported to deprive the trial court of jurisdiction by issuing a letter which DRS calls a "decision."[3] This violates the primary jurisdiction doctrine because the trial court, not the agency, decides whether the issue will be referred and initially addressed by the agency. *Id.* at 301-02. DRS's action also violates this Court's mandate in *Dolan I*

[3] Neither the County nor the class were consulted or had any input with DRS before it issued the letter.

because the issues concerning remedies were remanded to the Superior Court, not to DRS. 172 Wn.2d at 301. And interest was one of the remedy issues that were part of the case from its inception (CP 5) (Complaint) and DRS specifically intervened in the case to litigate interest. CP 171-72.

DRS did not ask the trial court to refer the interest issue to DRS for an initial determination. But if it had done so, the trial court would not have abused its discretion in deciding not to do so for two independent reasons. First, the interest issue required a balancing of the equities since interest is not mandatory under the statute (RCW 41.50.125) and balancing equities is what courts do, not DRS. Second, DRS was already a part of the case, having intervened to contest the interest issue. Thus, the case is not a "private dispute" to which DRS is a stranger. Pet. at 18. Moreover, DRS's views were not being ignored (Pet. at 18) but instead were fully considered at trial during which DRS fully presented evidence and arguments on behalf of all PERS participants.

C. The Unpublished Decision by the Court of Appeals Does Not Present Far Reaching Consequences Because the Situation in *Dolan* is Very Unusual.

DRS contends that the unpublished Court of Appeals opinion has "far reaching consequences." Pet. at 18. But the Court of Appeals and the trial court recognized that the class's claim presented "unusual" circumstances because it concerned a large group of employees who were

denied PERS membership and service credit over a 34-year period. *Dolan III* at *4. Some class members were thus entitled to 30 or more years of service credit due to the case. *Id.*

The Court of Appeals noted that "[i]n two prior class actions in the 1990s, with a combined total of approximately $5.2 million in retroactive contributions, DRS had not charged the County interest for retroactive contributions." *Dolan III* at *14, n. 1. In contrast, *Dolan* concerned approximately $30 million in retroactive contributions. *Id.* The DRS director testified "how unique" the case was. *Dolan III* at *5. And DRS argued the "novelty" of the case as a reason to "charge interest, despite DRS's decision not to do so in previous cases." *Dolan III* at *14. Accordingly, the Court of Appeals agreed with the trial court that its ruling will "not have any significant precedential effect that might negatively affect PERS in the future." *Id.*

Moreover, even with the large amount of retroactive contributions ($32 million) and the total interest DRS sought ($64 million), DRS acknowledged that the $64 million involved only five basis points of possible increased contribution rates - each basis point equal one one-hundredth of a percent – and that from July 2009 and July 2015 DRS had increased the employer contribution rate by more than 600 basis points and the employee contributions rates by over 220 basis points. *Dolan III*

at *13.[4] The number of basis points is so small because PERS II is a $36 billion fund and the $64 million of possible interest is in relative comparison a very small amount.

DRS now says the *Dolan* case is not atypical and "presents an issue of pressing public interest" because King County is being sued by a class of paramedics and "King County may once again face a substantial bill for retirement contributions and the associated interest," citing a case *Merritt v. King Co.,* No. 18-2-050070-7. Petition at 12-13. Class counsel here is also counsel for the proposed class in *Merritt* and therefore has knowledge of the *Merritt* case. DRS's argument is wrong and misleading for a number of reasons.

First, DRS contends that unless the Court of Appeals decision is reversed "King County will be empowered to resolve the [*Merritt*] lawsuit by entering a generous settlement" that will bind other PERS members. Pet. at *13. This is the same erroneous framework addressed above, *i.e.*, interest was litigated by DRS and the County; it was not settled by the class and the County. And with regard to any potential settlement in a different lawsuit, the Court of Appeals made clear in *Dolan II* that any settlement between employees and the County *could not bind DRS*. 2014

[4] The contribution rates are set every two years. http://www.drs.wa.gov/publications/member/multisystem/contributionrates.htm, last reviewed 6/29/2018. The amount of contributions depends on demographic factors and what the investment returns are for the pension funds. *Id.*

WL 6466710 at **1, 7. Under *Dolan II* the County is not "empowered to resolve" whether it owes interest on omitted contributions; indeed, the opposite is true. *Id.*

Second, DRS contends the Court of Appeals decision "may well embolden other groups to sue state and local governments" for PERS benefits. Petition at 13. But the amount of interest an employer may or may not have to pay on omitted contributions is irrelevant to whether an employee will bring an action to recover omitted PERS service credit for prior service.

Third, the paramedic lawsuit against the County that DRS references illustrates the novelty of the *Dolan* case. In contrast to *Dolan*, the paramedics allege they were wrongly omitted from PERS, not during their entire service for the County, but only during their first year of employment with the County and the County generally hired only two or three paramedics a year at a very low salary. The class size is thus only about 80 people. The amount of omitted contributions at issue in *Merritt* (about $80,000 in employer contributions) is a tiny fraction of *Dolan*, well below the $5.2 million that DRS determined was not material for purposes of interest in earlier cases.

Thus, the *Merritt* lawsuit is nothing like *Dolan. Dolan* is a very unusual case and the Court of Appeals did not err in affirming the trial

court in its fashioning of a remedy for interest, deciding that the County should pay $10.5 million in interest.

CONCLUSION

There is no issue of substantial public importance presented by this case. And the Court of Appeals did not err in finding that the trial court did not abuse its discretion.

Respectfully submitted July 2, 2018.

BENDICH, STOBAUGH & STRONG

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DECLARATION OF SERVICE

I, Anders Forsgaard, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows.

On July 2, 2018, I served via the Court's e-filing system a copy of **Answer to Petition for Review** to:

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

DATED: July 2, 2018, at Seattle, Washington.

Anders Forsgaard, *Legal Assistant*

BENDICH STOBAUGH & STRONG

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