NO. 91250-5

SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFREY PROBST, and a Class of similarly situated individuals,

Plaintiffs,

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

Plaintiffs-Petitioners,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Defendant-Respondent.

DEPARTMENT OF RETIREMENT SYSTEM'S ANSWER TO WASHINGTON EDUCATION ASSOCIATION'S AMICUS CURIAE MEMORANDUM

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I. RESPONSE TO STATEMENT OF GROUNDS FOR REVIEW

Amicus repeats the mistake of Plaintiffs in supporting an untimely review of constitutional issues addressed in a three-year-old Court of Appeals opinion, *Probst v. Department of Retirement Systems,* 167 Wn. App. 180, 271 P.2d 966 (2012). In that case, the Court of Appeals held that Plaintiffs' constitutional takings issue was moot because the Court resolved Plaintiffs' appeal on other grounds. *Id.* at 183, n. 1. Plaintiffs did not petition for review of *Probst* and the subsequent issuance of the mandate renders final the Court's decision that the constitutional issue was moot. RAP 12.7(b). Plaintiffs cannot petition for review of an issue that was resolved in a final decision of the Court of Appeals three years ago. Thus, the Court should reject the Washington Education Association (WEA) arguments supporting review of this issue, which was not decided by the Court of Appeals decision now on review and is not properly before this Court. In any event, WEA's arguments claiming a constitutional takings claim lack merit. The takings claim is moot because the Court of Appeals resolved the appeal on non-constitutional grounds. Moreover, the takings claim is based on the purported right to common law daily interest, a claim that the Court of Appeals rejected three years ago in *Probst*, 167 Wn. App. at 190-91.

II. ARGUMENT

A. Amicus Does Not Recognize That Plaintiffs' Petition For Review Is Improper And Cannot Raise The Issue Addressed In The Amicus Brief

WEA's amicus brief presents arguments in support of a petition for review that is not allowed under court rules. Plaintiffs concede that they are not seeking review of the Court of Appeals decision denying recall of the mandate. *See* Reply to Answer to Petition for Review (Reply) 1-5. They are seeking review of issues decided in *Fowler v. Department of Retirement Systems,* 2014 WL 7462567 (Wash. App. Div. 2). *Id.* However, Plaintiffs' "appeal" in *Fowler* was filed under RAP 12.9(a). The only issue properly to be decided was "if the trial court has complied with an earlier decision of this appellate court in the same case," *i.e.*, whether the trial court complied with the mandate. RAP 12.9(a). In a challenge to a trial court's compliance with a mandate, the appellate court cannot consider the merits of its prior decision that became final when the mandate issued unless it recalls the mandate, which did not occur here. *Frye v. King County,* 157 Wash. 291, 289 P. 18 (1930); *Kosten v. Fleming,* 17 Wn.2d 500, 136 P.2d 449 (1943); *Reeploeg v. Jensen,* 81 Wn.2d 541, 503 P.2d 99 (1972).[1]

[1] Recent cases under the current appellate rule (RAP 12.9) continue to follow this rule, citing these earlier cases. *See Shumway v. Payne,* 136 Wn.2d 383, 964 P.2d 349 (1998); *State v. Wade,* 133 Wn. App. 855, 138 P.3d 168 (2006).

The *Fowler* court could properly consider only Plaintiffs' argument that the trial court failed to comply with the *Probst* mandate, but not substantive issues finally decided and unappealed three years earlier in *Probst*. The *Fowler* court properly discussed the issues in *Probst* in the context of explaining why the trial court order complied with its decision, but the *Fowler* court did not revisit *Probst*. Both WEA and Plaintiffs fail to acknowledge that a RAP 12.9 appeal of trial court compliance with a mandate cannot re-adjudicate previously decided substantive issues when the mandate is not recalled. A decision under RAP 12.9 is not a decision terminating review that can be the foundation for this petition for review in support of which WEA files its amicus brief.

B. Amicus Incorrectly Asserts That Plaintiffs Were Not Required To Appeal In 2012

WEA argues that, because Plaintiffs were the prevailing party in *Probst*, they were unable to appeal the *Probst* Court's ruling that Plaintiffs were not entitled to common law daily interest. WEA Amicus Brief, p. 2, n. 2. Essentially, WEA argues that Plaintiffs in *Probst* were not "aggrieved" parties under RAP 3.1.

WEA is wrong in arguing that Plaintiffs' status as a prevailing party determines whether they are aggrieved. The outcome of a case itself does not determine whether a party is aggrieved; a party is aggrieved if

their protected interests are substantially affected by rulings in the case. *Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 189 P.3d 777 (2008). In *Probst*, Plaintiffs prevailed in the sense that the Court reversed the administrative decision that they appealed. However, the reversal was not on the merits of whether they were entitled to additional interest, but was based on an error in the adoption of the interest policy. *Fowler v. DRS,* 2014 WL 7462567, p. 4. Since Plaintiffs did not prevail on their claim that common law required that they be paid additional interest, whatever interest that they were to be awarded on remand was not required to be on the legal ground they argued or in the amount they sought. *Id.* Therefore, Plaintiffs pecuniary interest was adversely affected by the *Probst* Court's holding on the primary issue that Plaintiffs were not entitled to common law daily interest. Plaintiffs could have appealed the Court's decision on their entitlement to additional interest but did not, so the Court's decision on that issue became final when the mandate issued and is no longer subject to further review. RAP 12.7(b).

WEA's (and Plaintiffs') arguments about Plaintiffs' right to appeal are inconsistent. They claim they can raise *Probst* issues because Plaintiffs were not aggrieved by *Probst,* but are aggrieved now by the *Fowler* Court's reiteration of the *Probst* ruling. *Fowler* did not render any new decision on the merits of the issues in *Probst*; *Fowler* merely held

that the trial court correctly implemented the decision in *Probst*. If Plaintiffs were not aggrieved by *Probst*, they cannot be aggrieved by *Fowler*. If they are aggrieved by *Fowler*, then they were aggrieved by *Probst* and failed to timely appeal.

C. *Probst* Correctly Decided The Constitutional Takings Issue

WEA is wrong about the ability of Plaintiffs to petition for review of the issues decided in *Probst* that became final when the *Probst* mandate issued in 2012. Even if this Court could consider the issues that WEA addresses, WEA is also wrong on the merits of its argument that the Department of Retirement Systems (DRS) unconstitutionally "took" interest owed to Plaintiffs. The fundamental flaw in both Plaintiffs' and WEA's arguments regarding constitutional takings is that they presume that pension account holders are entitled to common law daily interest, when the pension statutes provide, and the Court of Appeals held, otherwise. *E.g.*, RCW 41.32.010(38); *Fowler* at 4.

WEA cites cases holding that prisoners and legal clients have a property right in interest that accrues on their funds held by government.[2] These cases do not establish that Plaintiffs have a right to earn a particular amount of interest on funds held by the government, but only a right to

[2] Citing *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001); *Schneider v. CA Dep't. of Corr.*, 151 F.3d 1194 (9th Cir. 1998); *Phillips v. WA Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925, 141 L.Ed.2d 174 (1998).

collect whatever interest is actually earned on such funds under the applicable scheme. *E.g., Dean v. Lehman,* 143 Wn.2d at 35-36 ("Of course, nothing in *Schneider [v. CA Dep't. of Corr.]* precluded the California Department of Corrections from placing inmate funds in noninterest bearing accounts"); *Phillips,* 524 U.S. at 168 (holding that owner of principal has constitutionally cognizable interest in interest that actually accrues, but agreeing that "the government has great latitude in regulating the circumstances under which interest may be earned"). WEA also cites *State ex rel. State Emps.' Ret. Bd. v. Yelle,* 31 Wn.2d 87, 195 P.2d 646 (1948), but that case only noted that individual pension accounts earn interest and did not indicate that the interest owed was anything other than what is provided by state pension statutes.

In *Probst,* Plaintiffs claimed that DRS improperly took interest because DRS was required to pay common law daily interest to them, which was more than the quarterly interest paid under the 1977 DRS policy governing interest on pension accounts. *See Probst,* 167 Wn. App. at 183; Petition for Review, p. 10. Plaintiffs claimed that failure to pay common law daily interest rather than interest pursuant to the DRS policy is a "taking" of interest legally owed to them. *Id.*

The shortcoming in WEA's and Plaintiffs' argument is that *Probst* held that the interest policy for teachers' pension accounts has been

determined since the 1930's not by common law, but by the Legislature, initially by statute, and since 1976 by a legislative delegation of interest policy to DRS. *Probst,* 167 Wn. App at 190-91. There is no common law right to daily interest on pension accounts within the statutory teachers' pension system. *Id.* If Plaintiffs have no common law right to additional interest, and their only right is to the amount of interest provided pursuant to the statutory scheme, then there is no unconstitutional taking when DRS pays interest under the policy adopted pursuant to legislative delegation. *Probst* eliminated the foundation for Plaintiffs' constitutional claim.

In addition to advancing the already rejected argument that common law gives Plaintiffs a vested right to more interest, WEA argues that RCW 41.04.445 creates a statutory right to more interest than has already been credited. RCW 41.04.445 states only that pension system members get "accrued interest" on their accounts. WEA points to nothing in the statute that establishes a right to a particular interest rate or compounding schedule other than the one DRS establishes under its delegated legislative authority to set interest policy.

D. Amicus Provides No Support For The Claim That Payment Of Additional Interest Has No Cost To The Pension System

WEA incorrectly asserts that payment of more interest on pension accounts will not cost the pension fund anything because that amount of

money is already in the fund. *See* Amicus Brief, 9-10. WEA does not explain how making increased payments to certain retirees would have no impact on the pension fund, when in fact, the effect ultimately is robbing Peter to pay Paul.

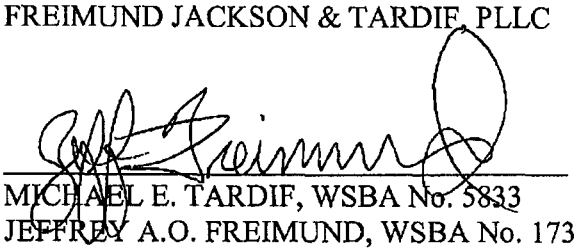
Pension contributions deducted from employee compensation are based on the cost of pension benefits and pension expenses. RCW 41.45.620(16); *see generally* Ch. 41.45 RCW. The contribution rates charged to pay the interest expense on pension accounts before *Probst* would have included the cost of the Department's 1977 interest policy. If Plaintiffs were to obtain additional interest for past periods, the extra cost of such interest would have to be included in the calculation of the rates for future contributions. Any future rate increase would affect TRS Plan 2 members to the benefit of class members who have transferred to Plan 3.

III. CONCLUSION

The Department of Retirement Systems respectfully asks the Court to deny the Petition for Review filed by Plaintiffs and supported by Amicus.

RESPECTFULLY SUBMITTED this 22nd day of April, 2015.

FREIMUND JACKSON & TARDIF, PLLC



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CERTIFICATE OF SERVICE

I certify that I served a copy of Answer to Petition for Review on all parties or their counsel of record on the date below as follows:

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DATED this 22nd day of April, 2015, at Olympia, Washington.

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Attached for filing please find Department of Retirement System's Answer to Washington Education Association's Amicus Curiae Memorandum.

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Supreme Court Cause no. 91250-5
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