

NO. 40861-9-II

Washington State Court of Appeals
Division II
11/21/11 10:24
STATE OF WASHINGTON
BY: *JW*

**WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

[Thurston County Superior Court No. 05-2-00131-1]

JEFFREY PROBST, and a class of similarly situated individuals,
Plaintiffs,

MICKEY FOWLER, *et al.*, and a class of similarly situated individuals,
Appellants/Plaintiffs,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
Respondent/Defendant.

PM 1/21/11

BRIEF OF APPELLANTS

Catherine Wright Smith,
WSBA #9542
Edwards, Sieh, Smith &
Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974
Attorneys for Appellants

Stephen K. Strong, WSBA #6299
David F. Stobaugh, WSBA #6376
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #6550
Seattle, WA 98104
(206) 622-3536
Attorneys for Appellants

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	5
Relationship Between Probst and Fowler Class Actions	5
DRS’s Interest Practices and How They Affected the Fowlers and Other Teachers in TRS.....	8
DRS Did Not Inform The Teachers About Its Interest Practices	13
Trial Court Decisions	14
ARGUMENT.....	16
I. THE COMMON LAW RULE THAT PRINCIPAL EARNS INTEREST DAILY IS PART OF THE RETIREMENT STATUTES, AND THE STATUTORY REQUIREMENTS THAT DRS PAY “REGULAR INTEREST” AND “ACCRUED INTEREST,” AND DRS’S PROMISE OF “5.5% ANNUAL INTEREST COMPOUNDED QUARTERLY,” IMPLEMENT AND INCLUDE THE COMMON LAW’S DAILY INTEREST RULE.	16
A. <i>DRS and the Trial Court Have the Law Completely Backwards; The Retirement Statutes Do Not Need to Expressly Restate the Common Law Daily Interest Rule Because The Common Law Applies Unless It Is Clearly Repealed.</i>	16
B. <i>The Common Law Is Part of All Legislative Enactments Unless It is Expressly Repealed.</i>	19
C. <i>Under The Common Law Interest Is Earned Daily, Regardless of When It Is Credited or Paid.</i>	22
D. <i>The Requirement That DRS Pay “Regular Interest” on Employee Contributions and “Accrued Interest” When the Contributions Are Withdrawn Each Implement the Common Law Daily Interest Requirement.</i>	25
E. <i>DRS’s Promise to Pay “5.5 Percent Annual Interest Compounded Quarterly” Also Requires Daily Interest.</i>	31

II. A STATUTE ENACTED IN 2007 CANNOT JUSTIFY DRS'S EARLIER MISCALCULATION OF EARNED INTEREST, BECAUSE THAT STATUTE DID NOT EXPRESSLY REPEAL THE COMMON LAW DAILY INTEREST RULE AND, IF IT DID, IT WOULD RETROACTIVELY TAKE AWAY PREVIOUSLY EARNED INTEREST AND WOULD THEREFORE VIOLATE THE CONSTITUTION'S TAKINGS CLAUSE.	33
A. <i>The Legislature's 2007 Enactment Did Not Repeal the Common Law Daily Interest Rule.</i>	33
B. <i>The 2007 Statute Would Be Unconstitutional Under DRS's And the Trial Court's Interpretation, But Is Constitutional Under the Teachers' Interpretation.</i>	38
III. DRS ACTED ARBITRARILY AND CAPRICIOUSLY BY CHARGING EMPLOYEES DAILY INTEREST BUT NOT PAYING THEM DAILY INTEREST, AND BY USING TO CALCULATE INTEREST A FLAWED COMPUTER PROGRAM THAT DRS KNEW IT SHOULD CHANGE.....	42
IV. THE APPROPRIATE RELIEF HERE IS REQUIRING DRS TO TRANSFER THE UNPAID DAILY INTEREST FROM THE EMPLOYER'S PLAN 2/3 ACCOUNT TO THE TEACHERS' INDIVIDUAL PLAN 3 ACCOUNTS.....	47
CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Appren. Comm. v. Training Council</i> , 131 Wn. App. 862, 129 P.3d 838 (2006).....	42
<i>Becker v. Lagerquist</i> , 55 Wn.2d 425, 348 P.2d 423 (1960)	22
<i>Beckford v. Tobin</i> , 1 Ves.Sen. 308, 310, 27 Eng.Rep. 1049, 1051 (Ch. 1749).....	22
<i>Brown v. Legal Foundation of Washington</i> , 538 U.S. 216 (2002)	40
<i>California State University v. Riley</i> , 74 F.3d 960 (9 th Cir. 1996).....	42, 43
<i>Chern v. Bank of America</i> , 127 Cal.Rptr. 110 (Cal. 1976).....	32
<i>City of Pasco v. DRS</i> , 110 Wn. App. 582 (2002).....	47
<i>Clapp v. Astor</i> , 2 Edw.Ch. 379, 6 N.Y. Ch. Ann. 436 (1834).....	24
<i>Clark Cty PUD v. Elect. Workers</i> , 150 Wn.2d 237, 76 P.3d 248 (2003)	25
<i>Dean v. Lehman</i> , 143 Wn.2d 12, 18 P.3d 523 (2001)	29, 30, 40, 41
<i>DSHS v. Personnel Board</i> , 61 Wn. App. 778, 812 P.2d 500 (1991).....	20
<i>Ex Parte Smyth</i> , 1 Swan. 337, 348 (1818).....	23
<i>Faulkenbury v. Teachers and State Employees Retirement Sys.</i> , 515 S.E.2d 743 (N.C. App. 1999)	25, 26, 27, 31, 36, 37
<i>Hearde v. City of Seattle</i> , 26 Wn. App. 219, 612 P.2d 436, rev. denied, 94 Wn.2d 1021 (1980).....	41
<i>Hisle v. Todd Pac. Shipyards</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	2
<i>Hospital Dist. v. Safety Employees</i> , 24 Wn. App. 64, 600 P.2d 589 (1979).....	2

<i>In Re Cross</i> , 99 Wn.2d 373, 662 P.2d 828 (1983)	41
<i>In re Flickwir’s Estate</i> , 136 Pa. 374 (Penn. 1890)	24
<i>In re Hudson</i> , 13 Wn.2d 673, 126 P.2d 765 (1942)	22
<i>In re Oil Spill by the “Amoco Cadiz,”</i> 794 F.Supp. 261 (N.D. Ill. 1992).....	32
<i>In Re Tyler’s Estate</i> , 140 Wash 679, 250 P. 456 (1926)	20, 21, 25
<i>Jordan v. O’Brien</i> , 79 Wn.2d 406, 486 P.2d 290 (1971)	30
<i>Mann v. Anderson</i> , 32 S.E. 870, 871 (Ga. 1899)	24
<i>McKeen’s Appeal</i> , 42 Pa. 479 (Penn. 1862)	24
<i>Multicare Med. Ctr. v. DSHS</i> , 114 Wn.2d 572, 790 P.2d 124 (1990)	19
<i>Niggeling v. Mich. Dept. of Transp.</i> , 488 N.W.2d 791 (Mich. App. 1992)	31
<i>Owens v. Graetzel</i> , 126 A. 224 (Md. Ct. App. 1924)	24
<i>Phillips v. Washington Legal Foundation</i> , 545 US 156 (1998)	22, 39, 40, 41
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 146 P.3d 691 (2008)	20, 25, 37
<i>Price v. Kitsap Transit</i> , 125 Wn.2d 456, 886 P.2d 556 (1994)	19, 25
<i>Puget Sound Nat’l Bank v. Dept. of Revenue</i> , 123 Wn.2d 284, 868 P.2d 127 (1994)	42, 43
<i>Quadrant Corp. v. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005)	28
<i>Rios v. Dept. of Labor & Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002)	43
<i>Schneider v. Cal. Dep’t of Corrections</i> , 151 F.3d 1194 (9th Cir. 1998).....	40, 41

<i>Silverstein v. Shadow Lawn Savings & Loan Ass'n</i> , 237 A.2d 474 (N.J. 1968)	32
<i>Teacher Retirement Sys. et al. v. Duckworth</i> , 260 S.W.2d 632 (Tex. Civil App. 1953)	27, 37
<i>Wilson v. Harmon</i> , 2 Ves. Sen. 671 (1755)	23

Statutes

RCW 4.04.010	19
RCW 34.05.570(3) and (3)(i)	42
RCW 41.04.445(4)	16, 28, 30, 35, 40
RCW 41.32.010	36
RCW 41.32.010(1)(b).....	16, 26, 36
RCW 41.32.010(23)	26, 34, 36
RCW 41.32.042	8
RCW 41.32.780	8
RCW 41.32.817	8
RCW 41.32.817(5)	9, 16
RCW 41.32.831(2)	9
RCW 41.32.840(1)	8
RCW 41.34.060	9
RCW 41.40.020	34
RCW 41.45.035(1)(c).....	39
RCW 41.50.033	34, 38, 41
RCW 41.50.033(1)	34, 35
RCW 41.50.033(3)	36
RCW 41.50.145(2)	47
RCW 72.09.111(1)(d).....	29, 30
WAC 415-114-400	45

Other Authorities

32 Halsbury's Laws of England, § 127 Interest in General (4th ed. 2005 Reissue)	23
Black's Law Dictionary (7 th ed. 1999), p. 421.....	22, 28
Dictionary of Banking Terms (4 th ed. 2000), p. 7.....	28
Laws of 1982, Ch. 52, § 18, CP 203-06	33
Laws of 1992, ch. 212, sec. 11.	33
Webster's Third New International Dictionary (1976), p. 13	31

INTRODUCTION

Nature of the Case

Respondent Department of Retirement Systems (DRS) is statutorily obligated to pay teachers “regular interest” on their employee contributions to their state-managed retirement plans and to pay “accrued interest” when they withdraw their funds. The 250-year-old common law rule is that interest is earned daily, even if it is credited or paid at intervals. And the ordinary meaning of “accrued interest” is “interest earned since the last settlement date, but not yet due or payable.” No legislation otherwise defines interest, and the common law applies unless the Legislature expressly repeals it. The trial court affirmed DRS’s presiding officer’s summary judgment ruling denying daily interest. The trial court also retroactively applied a statute enacted in 2007 that did not change the common law and only gave DRS discretion in deciding when to “credit” or post interest (but that did not affect how interest is earned) to hold that teachers were not entitled to interest calculated on a daily basis through the date of withdrawal of their contributions. This Court should reverse and enter an order requiring DRS to account for the unpaid earned interest and pay it into the teachers’ retirement accounts.

Standard of Review

This appeal is taken from the trial court’s order affirming a ruling

by DRS employee Ellen Andersen, acting as “presiding officer,” on cross-motions for summary judgment. AR 17. A court “reviews summary judgment orders *de novo*, performing the same inquiry” as the decision maker below. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). This Court sits in the same position as the trial court in reviewing the presiding officer’s summary judgment decision. *Hospital Dist. v. Safety Employees*, 24 Wn. App. 64, 68, 600 P.2d 589 (1979). Thus, review is *de novo*.

ASSIGNMENTS OF ERROR

1. The DRS presiding officer erred in granting summary judgment for the State and the trial court erred in affirming this summary judgment and dismissing the teachers’ petition. AR 17-32; CP 670-86.

2. The DRS presiding officer erred in not granting summary judgment for the teachers, and the trial court erred by failing to reverse this summary judgment ruling. AR 17-32; CP 670-86.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The common law applies unless the Legislature expressly repeals it. The 250-year-old common law rule is that “interest is earned daily, even if it is credited or paid in intervals.” DRS’s presiding officer decided that because the statute is “silent” on when interest is earned, the teachers did not earn daily interest, and interest is earned only as and when

DRS credits it. The trial court agreed. Did the presiding officer and trial court err because legislative silence means that the common law daily interest rule applies ?

2. The statutory requirement that DRS pay the teachers “regular interest” on their contributions implements the common law rule that interest is earned daily, even if credited or paid in intervals. The common law rule applies because there is no statutory directive on how “regular interest” accrues. DRS’s presiding officer ignored the common law and so did the trial court. Did the trial court err in affirming the presiding officer’s ruling because, it said, “[d]aily interest is not required by the language of the statute?”

3. Consistent with the daily interest rule, a statute requires DRS to pay the teachers their contributions and “accrued interest” when they withdraw their funds. The ordinary meaning of “accrued interest” is “interest earned since the last settlement date, but not yet due or payable.” DRS’s presiding officer’s decision makes the statutory requirement of paying “accrued interest” meaningless because, in DRS’s view, there is never any interest earned, but not yet payable. Did the trial court err in agreeing with DRS’s presiding officer?

4. DRS promised the teachers that their contributions will earn “5.5% annual interest compounded quarterly.” But DRS always paid

the employees less than this promised regular rate because it did not follow the rules for quarterly compounding or for annualized interest, both of which require daily interest. Did the trial court err in agreeing with DRS's presiding officer that DRS could pay less than the promised regular 5.5% annual rate of interest ?

5. A new statute enacted in 2007 states that DRS has authority over "crediting" interest, which is different from *earning* interest. The Legislature did not repeal the common law daily interest rule nor did it change the statutory requirements to pay "regular interest" and "accrued interest," both of which implement the daily interest rule. The trial court nevertheless retroactively applied the 2007 statute to absolve DRS from its failure to pay the teachers daily interest long before the statute was enacted. Did the trial court err, and did its interpretation of the 2007 statute violate the Takings Clause of the U.S. Constitution?

6. DRS has a double standard on daily interest, charging the teachers daily interest when the teachers owe DRS money on their accounts, but not paying the teachers daily interest on the same accounts. DRS also uses a computer program that does not calculate interest based on the true dates of employee deposits and withdrawals, and that always pays the teachers less than the promised regular rate of 5.5% annual interest compounded quarterly. Did the trial court err in holding that DRS

had not acted arbitrarily and capriciously even while deciding that the teachers had lost interest by DRS's methods?

STATEMENT OF THE CASE

Relationship Between Probst and Fowler Class Actions

This consolidated petition for review and class action was initially brought by Public Employees' Retirement System (PERS) member Jeff Probst. Probst requested that the Department of Retirement Systems (DRS) correct the error in its Plan 3 individual accounts resulting from the its failure to pay daily interest on employees' retirement contributions when they were moved from PERS 2 to PERS 3, *i.e.*, interest on all deposited funds from the date each employee contribution was deposited in his or her Plan 2 account up to the date the funds were withdrawn and transferred to his or her Plan 3 account. Administrative Record ("AR") 123-28.¹

Probst's request that DRS correct the interest paid on Plan 2 accounts was considered in a lengthy administrative process. AR 1-1135. DRS argued that because the Legislature was silent in the retirement statutes on when interest was earned, it had been given the authority to determine that interest was earned only when DRS credited it in the

¹ The index for the Administrative Record is at CP 694-95. The Administrative Record has been transmitted to the Court by the Clerk of the Superior Court. RAP 9.7(c).

teachers' accounts. AR 691, 692-93, 713-14, 82, 86. Ellen Anderson, a DRS employee acting as "presiding officer," agreed, holding that "legislative silence has the same effect as an express delegation of authority to the agency." AR 22, ¶29. The DRS presiding officer also agreed with DRS that it could pay less than the stated rate and thus she found that 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.

After DRS's final administrative decision, Probst filed a petition for review. CP 687-692. The trial court certified a class of PERS members who had transferred from PERS Plan 2 to Plan 3 with Jeff Probst as the class representative. CP 118-121. The trial court said it would later decide how to proceed with the Teachers Retirement System (TRS) members who transferred from TRS Plan 2 to Plan 3. CP 120.

The parties filed briefs on the merits. DRS argued, as it had in the administrative proceeding, that because the Legislature was "silent" on how interest is earned on member accounts, it had given DRS discretion to not pay daily interest and provide interest only when DRS decided to credit the members' accounts with interest. CP 169, 176-77, 180, 182-83; CP 208-09 n. 4 (quoting the 15 times that DRS argued that the Legislature was silent on when interest is earned). The employees noted, however,

that DRS was relying on a repealed statute mentioning “crediting” (CP 203-06) and that, in any event, the frequency of crediting is immaterial because the bookkeeping matter of when interest is *credited* to an account does not affect when interest is *earned*, which is daily under the common law. CP 207-18.

Before the trial court ruled, the parties partially settled the Probst action. CP 261-86. The partial settlement included payment for the claims that DRS acknowledged are not within its affirmative statute of limitations defense, *i.e.*, claims by both PERS and TRS members back to January 20, 2002. CP 264, 269, ¶¶6, 45. The settlement class did not include teachers who had transferred from TRS Plan 2 to TRS Plan 3 between 1996 and January 20, 2002 (all PERS members transferred to Plan 3 after January, 2002). CP 269, 274-75.

The parties agreed that the daily interest claims of these teachers would be addressed in this litigation “based on the agency record developed in the *Probst* administrative proceeding, supplemented by any party with any matter related to TRS or to timeliness issues, or anything specific to the plaintiffs in the case.” CP 275, ¶69. The parties agreed to resolve the teachers’ claims in this case because DRS acknowledged that the “TRS and PERS plans apply the same practices concerning interest” and “there are no material differences in the procedures for calculating and

crediting interest on members' accounts in the TRS and PERS Plans.”

CP 54.

Thereafter, the parties stipulated and the trial court ordered that the Fowlers could file a supplemental pleading in the *Probst* case for the claims of the teachers that were not resolved in the Probst partial settlement. CP 287-89; CP 290-300. The parties then stipulated to class certification and the trial court certified a class of teachers who transferred from TRS Plan 2 to TRS Plan 3 before January 20, 2002. CP 321-324.

***DRS's Interest Practices and How They Affected
the Fowlers and Other Teachers in TRS***

Representative plaintiffs Mickey Fowler and Leisa Fowler are public school teachers. They were members of TRS Plan 2, under which the teachers must contribute part of each paycheck toward retirement. RCW 41.32.780; RCW 41.32.042. DRS is required to manage the teachers' contributions for retirement by tracking the contributions and interest in individual member accounts. RCW 41.32.042.

In 1996 the Legislature created TRS Plan 3 and gave TRS Plan 2 members an option to transfer their employee contributions and accrued interest to Plan 3. RCW 41.32.817. The employers' contributions for all transferring members would remain in the Plan 2/3 fund to provide a pension at one-half the usual defined benefit formula. RCW 41.32.840(1); AR 343. The teachers' funds (employee contributions and interest) would

be withdrawn from TRS 2 and transferred to TRS 3 individual investment (defined contribution) accounts. AR 349; RCW 41.32.817(5); 41.32.831(2); RCW 41.34.060. The retirement benefits for the transferring teachers in their individual defined contribution accounts are the sum of the contributions plus interest and investment gains. AR 345.

The rate of interest on Plan 2 employee contributions is “5.5 percent annual interest compounded quarterly.” AR 232 (Admission No. 1). DRS affirmatively assured the teachers in formal publications that “your contributions are earning 5.5 percent interest compounded quarterly” (CP 503); and that “DRS pays 5.5 percent annual interest compounded quarterly on employee contributions.” CP 505. Consistent with what DRS told them, the Fowlers believed during the time they were TRS Plan 2 members and thereafter until this litigation that their retirement contributions earned daily interest, *i.e.*, that their contributions earned daily interest from the date of deposit to the date of withdrawal and transfer to TRS 3. CP 325-26, ¶¶3-5; CP 331, ¶¶4-5, 11.

DRS did not, however, calculate daily interest to be compounded quarterly on the teachers’ contributions. Instead, DRS “posts” or “credits” interest on deposits to TRS members’ individual accounts on the fourth Saturday of the last month in each quarter (*i.e.*, March, June, September, and December), and the amount of interest credited by DRS is based only

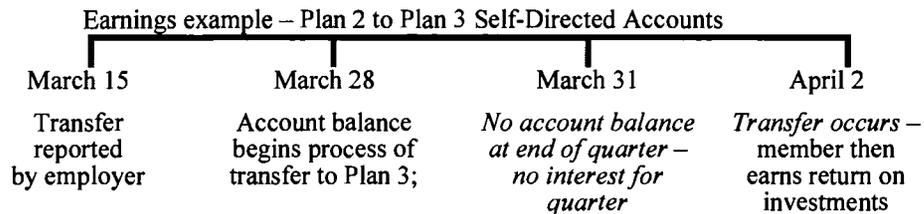
on the previous quarter's ending account balance, not including the contributions deposited during that quarter. AR 261, 320. Thus, DRS pays no interest on the teachers' contributions made during a quarter. AR 320. The teachers' contributions therefore do not earn the promised 5.5% annual interest rate compounded quarterly. Indeed, the deposits made during a quarter do not even earn simple interest, *i.e.*, interest to be added to the principal and compounded at the end of the quarter. AR 261. The teachers thus always earn less than the 5.5% annual interest rate compounded quarterly that DRS told them they were earning. AR 261.

In addition, due to a flaw in DRS's computer program, if a member's Plan 2 account is shown as zero (\$0) in DRS's database on the fourth Saturday of a quarter on which interest is credited, for whatever reason — even when the zero balance is just a computer accounting entry and the money actually remains in the account through the end of the quarter — DRS pays no interest for that entire quarter on the teacher's balance at the end of the previous quarter, as well as no interest for the deposits made during the last full quarter. AR 261, 320, 643. This occurs because in DRS's computer program, data entry dates, rather than the dates money is actually withdrawn, determine whether members receive

any interest in a quarter.² DRS’s computer program thus treats employee contributions as withdrawn before the end of a quarter even though “[t]he transfer occurs” after the quarter ends. AR 643

This is exactly what happened to Jeff Probst.³ AR 253-59. When DRS transferred Probst’s funds to PERS Plan 3, DRS debited Probst’s Plan 2 account to \$0 in its database on March 27, 2002, even though his funds were not actually withdrawn from his Plan 2 account and deposited in his new Plan 3 investment account until after the quarter ended, on April 2, 2002. AR 253-56. As a consequence, DRS provided Probst “no interest” on his entire account balance from January 1, 2002 through the date his funds were “liquidated,” on April 2, 2002. AR 250-56.

² An internal DRS document used to train employees on “contribution processing” disclosed to Probst in discovery several years after his transfer to PERS Plan 3, illustrates how its computer program for tracking interest does not correspond to actual deposit and withdrawal dates. AR 643; AR 575-76 (explaining AR 643). This DRS document shows that DRS’s computer program considers an employee to have “no account balance at end of quarter” (March 31) and therefore the computer provides the employees “no interest for quarter” on the previous quarter’s balance – even when actually the “transfer occurs” after the quarter ends, on April 2 (AR 643):



(Emphasis added.)

³ The parties agreed that the teachers’ appeal here will be litigated based on Probst’s administrative record (CP 275 ¶69) and DRS acknowledges that the interest practices for PERS and TRS are the same. CP 54.

Accordingly, even though Probst's funds actually remained in the Plan 2 account until April 2, since the DRS computer program had debited Probst's Plan 2 account to \$0 on March 27, four days before the quarter ended, DRS paid Probst no interest in the first quarter of 2002 on his Plan 2 contributions in the last quarter of 2001. AR 250-56. And because DRS does not pay any interest on funds deposited during any quarter, DRS also paid Probst no interest on contributions he made in the first quarter of 2002. AR 251-53. Thus, under the DRS computer program for calculating interest on employee accounts, Probst received *no* interest on any of his contributions in the fourth quarter of 2001 and the first quarter of 2002, *i.e.*, no interest for six months. AR 250-56, 261, 643.

The Fowlers and the teachers in the class similarly lost money due to DRS's failure to pay daily interest on their contributions to the day of their withdrawal from TRS 2. Rather than DRS paying the teachers all the interest their principal had earned, DRS retained some of this interest in the employers' Plan 2/3 account, where it remains. AR 4, ¶3; CP 326, 334. And even though up to six months can go by before DRS pays interest on an employee's contributions to his or her individual retirement plan, DRS charges employees interest on a daily basis when it is owed money by employees who are restoring withdrawn contributions — “you [must] pay the full amount of the original withdrawal plus recovery

interest [8% per annum] compounded from the time of withdrawal until the restoration costs are paid in full.” AR 433.

DRS Did Not Inform The Teachers About Its Interest Practices

Although DRS *charges employees daily interest*, AR 433, DRS did not tell the teachers or other employees that under its computer program it was *not paying them daily interest* on their contributions, nor did it tell them that they did not actually receive the promised 5.5% annual interest rate compounded quarterly. CP 673, 680-81. DRS acknowledged that it could pay members daily accrued interest if it “change[d] computer programs.” AR 541-42. DRS also recognized that the “industry standard” is to pay daily interest to the date the funds are withdrawn. AR 484. DRS also acknowledged internally that DRS *should* change its computer program to “bring DRS interest credit practice closer to industry standards” so that employee members “would likely receive closer to the 5.5% interest rate.” AR 289. But DRS did not change its computer program.

Similarly, DRS employees internally acknowledged that “we [DRS] need to make sure people understand how quarterly interest is applied to Plan 2 accounts and how that may impact someone’s decision about timing of transferring,” AR 312, and that “[m]embers may feel they should have been forewarned of the potential disadvantage of transferring

to Plan 3 as early as possible.” AR 321.⁴ DRS employees also acknowledged that how the DRS computer program calculates and posts interest for employee contributions should be codified in a WAC regulation to give the employees notice, but it was not:

[T]here is no general agency rule to explain how interest is calculated and posted to a member’s account. To avoid any potential misunderstandings and ensure all members fully understand how their accumulated contributions are determined, the interest calculation rate and method should be documented within an agency rule (WAC).

CP 354, AR 301. The Fowlers thus did not discover until many years after they transferred to Plan 3, and only as part of this lawsuit, that DRS does not pay daily interest, and the agency instead pays interest only on the previous quarter’s ending balance. CP 326, ¶5; CP 334, ¶11.

Trial Court Decisions

Statute of Limitations

The trial court, the Honorable Paula Casey, first addressed whether the teachers’ claim was barred by the statute of limitations because this lawsuit was brought more than three years after they transferred from TRS Plan 2 to Plan 3. CP 673, 677-68. Judge Casey ruled that the “plaintiffs in this case did not know and had no reason to know that interest was not

⁴ The “disadvantage” is that under DRS’s quarter-end computer interest program, transferring at the beginning of a quarter minimizes the interest rate loss, while transferring at the end of the quarter maximizes the loss (as it did for Jeff Probst) who received no interest on his contributions for six months. AR 250-56, 261, 643.

calculated to the date that they believe it should have been calculated until they were advised in 2006.” CP 682. Indeed, “[i]t is most likely that they would have had the expectation that interest was being calculated as of the date of the transfer[,]” *i.e.*, DRS was paying daily interest on their contributions. CP 681.

The trial court further found that DRS never told the plaintiffs that it did not pay them daily interest on their accounts, that DRS was paying interest only on the prior quarter’s balance, or that this could impact their decision on when to transfer to TRS Plan 3:

It is my understanding that the Department acknowledges and there is no dispute that the plaintiffs received no notice of the particular formula of computing interest on the transfer from Plan 2 to Plan 3 prior to the transfer. The plaintiffs received no advice, notice, or warning that the date of transfer from Plan 2 to Plan 3 could make a difference in the amount that was being transferred. . . .

CP 680. The trial court thus ruled “the discovery rule should apply in this case” and the teachers’ claim is not barred by the statute of limitations. CP 673, ¶1; CP 682.

Decision on the Merits

The trial court ruled against plaintiffs on the merits. CP 684-86. Judge Casey affirmed the DRS’s presiding officer’s summary judgment ruling that DRS’s practices did not violate the law even though the employees did not receive the 5.5% annual interest DRS promised them.

CP 686. Judge Casey agreed with plaintiffs that the teachers had “missed out on some interest on accumulations while transferring between retirement plan options and plaintiffs were not advised that the date of the transfer between plans could affect the amount of interest transferred.”

CP 686. The trial court held that “[d]aily interest is **not** required by the language of the statute.” CP 686 (emphasis by trial court). And it said that it did “not find that the Department acted arbitrarily and capriciously.”

CP 686.

ARGUMENT

I. THE COMMON LAW RULE THAT PRINCIPAL EARNS INTEREST DAILY IS PART OF THE RETIREMENT STATUTES, AND THE STATUTORY REQUIREMENTS THAT DRS PAY “REGULAR INTEREST” AND “ACCRUED INTEREST,” AND DRS’S PROMISE OF “5.5% ANNUAL INTEREST COMPOUNDED QUARTERLY,” IMPLEMENT AND INCLUDE THE COMMON LAW’S DAILY INTEREST RULE.

A. DRS and the Trial Court Have the Law Completely Backwards; The Retirement Statutes Do Not Need to Expressly Restate the Common Law Daily Interest Rule Because The Common Law Applies Unless It Is Clearly Repealed.

The retirement statutes provide that DRS must pay teachers “regular interest” on their contributions to TRS Plan 2 and “accrued interest” when they withdraw those funds. RCW 41.32.010(1)(b); RCW 41.04.445(4); RCW 41.32.817(5). The main issue here is whether under the retirement statutes the teachers’ mandatory retirement contributions

earn *daily* interest, as required by the common law, or whether the contributions earn interest only when interest is posted or “credited” to their accounts by DRS.

DRS’s presiding officer stated that “legislative silence” on daily interest gave DRS “authority” to determine whether and how accounts earn any interest and “discretion” in “the practice for crediting interest.” AR 22, ¶29. The presiding officer decided as a matter of law that **“legislative silence has the same effect as express delegation of authority.”** AR 22, ¶29 (emphasis added). On judicial review, DRS defended the presiding officer’s decision by saying that the common law is irrelevant because the Legislature did not specify in the retirement statutes when “regular interest” was earned (CP 576; emphasis added): *“The Legislature has never given any indication that ‘regular interest’ was being ‘earned,’ much less that it was being earned on a pro rata basis, or ‘de die in diem,’ throughout the interest period.”*⁵

⁵ In the briefing on the merits on judicial review before the partial Probst settlement, DRS repeatedly argued that the Legislature had not expressly stated when interest was earned and, therefore, it had discretion to determine that interest was earned only when posted or credited:

- “The Legislature did not provide any guidance on how interest is to be calculated on member accounts; when a member’s contributions begin to accrue and earn interest.” CP 175, lines 18-19 (emphasis added).
- “There are *no requirements* in the PERS statutes for how ‘regular interest’ must be calculated.” CP 168, lines 1-2 (emphasis added).
- “the broad grants of authority to the Department combined with *the absence of any direction from the legislature* lead inexorably to the conclusion that the Department
(continued)

The trial court agreed with the DRS presiding officer, holding that because the statute does not expressly specify that interest is earned daily, DRS could determine that interest is earned only when “credited”

(continued from previous page)

has the authority and broad discretion to determine how ‘regular interest’ is to be credited to PERS members accounts.” CP 118, lines 21-23 (emphasis added).

- “*statutes* authorize the Department to determine ‘regular interest’ on PERS members’ accumulated contributions, but *do not indicate when they first must begin to earn interest, how interest is computed or the period in which it is to be calculated.*” CP 169, lines 8-10 (emphasis added).
- “the Legislature provided *no guidance* ... as to how the Department would conduct transfers or calculate transfer balances. It left these matters to the expertise of the Department.” CP 710, line 23 and 711, lines 1-3 (emphasis added).
- “The *PERS statutes do not provide a particular method for crediting* interest to member accounts.” CP 175, lines 11-12 (emphasis added).
- “Determining when interest accrues, how it accrues and whether it will be compounded are all necessary powers to fulfill the Department’s statutory mandate to calculate and credit interest. Considering the broad grant of authority given to the Department and *the Legislature’s silence on interest calculation methods*, the authority to make these decisions rests with the Department.” CP 176, lines 10-14 (emphasis added).
- “no other specific directions to DRS [on how to calculated interest] accompanied or followed the amendment.” CP 177, lines 9-10 (brackets original).
- “There is *no statute* or regulation that requires the department to calculate interest in this manner [daily interest] ... there is *no requirement for how interest must accrue, how the rate must be determined, or how the pro rata interest must be paid* when funds are withdrawn.” CP 178, lines 8-9 and 13-14 (emphasis added).
- “The *PERS statutes*, including the transfer statute at issue here, *do not define or dictate any interest collecting method.*” CP 179, lines 19-20 (emphasis added).
- “The definition of ‘regular interest’ *does not include any requirement that interest be earned daily.*” CP 180, lines 5-6 (emphasis added).
- “the legislature has placed authority for these decisions firmly in the hands of the Department and *has indicated no intent* to require any different type of interest calculation...” CP 182, lines 17-19 (emphasis added).
- “*The term ‘accrued interest’ does not address when or how interest is earned and accrued*” CP 183, lines 8-9 (emphasis added).
- “the *Legislature has never directed* that this method of calculation be changed” CP 185, line 12, emphasis added).
- “*the legislature included no such requirement* [interest earned daily].” CP 188, line 10 (bracketed language added).

(CP 686):

I am satisfied that the Director of Department of Retirement Systems has statutory authority to calculate interest for members transferring between plans (as when withdrawing from membership) according to the interest amount last *credited*. *Daily interest is not required by the language of the statute*. (Bold by the trial court; italics added.)

DRS's presiding officer and the trial court have Washington law completely backwards. As explained next, the common law is included within and part of the statute unless the common law rule is expressly repealed by the Legislature. Thus, a statute need not explicitly restate the common law rule that interest is earned daily even if paid in intervals. Accordingly, if the statute is "silent" on when interest is earned, as DRS repeatedly maintained throughout the proceedings, then the common law rule of daily interest applies because it has not been expressly repealed.

B. The Common Law Is Part of All Legislative Enactments Unless It is Expressly Repealed.

Because the common law is the law of Washington, RCW 4.04.010, the Legislature is presumed to incorporate it when legislating unless it is *expressly* repealed. *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). Undefined statutory terms have their common law meaning. *Multicare Med. Ctr. v. DSHS*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990). The common law also "fill[s] interstices that legislative enactments do not cover." *DSHS v. Personnel Board*, 61 Wn. App. 778,

783, 812 P.2d 500 (1991). As a consequence, legislative enactments are always construed in light of the common law's requirements. *In Re Tyler's Estate*, 140 Wash 679, 689, 250 P. 456 (1926) (“[w]hether the statute affirms the rule of the common law as the same point, or whether it supplements it, supercedes it, or annuls it, the legislative enactment must be construed with reference to the common law” (citations and internal quotations omitted)).

The common law accordingly always applies unless it is repealed. And the Court will not find that the common law is repealed without “clear evidence of the legislature’s intent.” The Court explained this in *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76-77 and n. 8, 146 P.3d 691 (2008):

[W]e are hesitant to recognize the abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law. “It is a **well-established principle of statutory construction that ‘[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.’**” . . . A law abrogates the common law when “the provisions of a . . . statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” . . . A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” [footnote 8] . . . **The legislature’s intent to deviate from the common law must be clear and explicit. [I]t must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such**

intent. (Emphasis added; citations and internal quotations omitted.).

Tyler's Estate, supra, is illustrative. In *Tyler's Estate*, the Supreme Court held that the common law rule that a slayer of a spouse could not inherit from the deceased spouse was incorporated into and not repealed by a statute that provided that the "surviving spouse" should receive up to \$3,000 in lieu of the homestead exemption. 140 Wash. at 684-89. The Supreme Court held that "[w]hile it is true that this statute nowhere specifically provides that the rule or doctrine of the common law [that a slayer cannot inherit] should apply," 140 Wash. at 684, the common law exception nevertheless applied because the Legislature had not expressly repealed it (140 Wash. at 688):

The maxims of the common law are made a part of our laws by express statute of this state adopting the common law. The common law in this respect [slayer cannot inherit] has not been repealed, modified or annulled by the statute relied upon by respondent authorizing an award out of the community or separate property of the decedent to the surviving spouse in lieu of homestead.

Thus, in *Tyler's Estate* the surviving spouse was not entitled to the homestead exemption award even though the statute did not expressly mention the common law slayer exception or contain any express exceptions.

The Legislature accordingly always incorporates the existing common law into legislative enactments unless the Legislature expressly

repeals the common law rule.

C. Under The Common Law Interest Is Earned Daily, Regardless of When It Is Credited or Paid.

Washington common law includes “[t]he common law of England, including the English statutes in force at the time of the Declaration of Independence, as adopted by the territorial law of 1863[.]” *In re Hudson*, 13 Wn.2d 673, 685, 126 P.2d 765 (1942). The right to receive interest on funds held in an account has been a common law rule for well over 250 years, as explained by the U.S. Supreme Court in *Phillips v. Washington Legal Foundation*, 545 US 156, 165 (1998):

The rule that “interest follows principal” has been established under English common law since at least the mid-1700’s. *Beckford v. Tobin*, 1 Ves.Sen. 308, 310, 27 Eng.Rep. 1049, 1051 (Ch. 1749) (“[I]nterest shall follow the principal, as the shadow the body”). Not surprisingly, this rule has become firmly embedded in the common law of the various States. (Footnote with citations omitted).

And under the common law, interest accrues on principal daily, or “*de die in diem*.”⁶ Halsbury’s Laws of England⁷ explains that “interest accrues from day to day even if payable only at intervals”:

Interest in General. Interest is the return or compensation for the use or retention by one person of a

⁶ “*De die in diem*” is a Latin phrase used in the law meaning “from day to day; daily.” Black’s Law Dictionary (7th ed. 1999), p. 421.

⁷ The Washington Supreme Court has looked to Halsbury’s Laws of England for the common law that is incorporated in this state’s statutes. See, e.g., *Becker v. Lagerquist*, 55 Wn.2d 425, 435, 348 P.2d 423 (1960).

sum of money belonging to or owed to another. ***Interest accrues from day to day even if payable only at intervals,*** and is, therefore, apportionable in respect of time between persons entitled in succession to the principal. (Italicized bold added, footnote omitted.)

32 Halsbury's Laws of England, § 127 Interest in General, p. 78 (4th ed. 2005 Reissue).

The daily interest rule has been a part of the common law since at least 1755, when the English High Court of Chancery noted the rule that **“interest is supposed to grow due from day to day to be sure; and the person intitled to the produce is intitled to it to the last hour of the day”** in *Wilson v. Harmon*, 2 Ves. Sen. 671, 672 (1755) (emphasis added). The common law rule derives from the fact that interest is paid to compensate the person for the *time loss* use of their money: “the principle of apportionment is therefore TIME, ... the total payment being distributed in proportion to the respective periods of enjoyment.” *Ex Parte Smyth*, 1 Swan. 337, 348 (1818) (capitalization in original).

American cases in the 1800s also applied the common law rule that interest accrues and is earned daily (“*de die in diem*”). For example, in 1834 the Chancery Court of New York restated the common law rule that interest “accrues and becomes due *de die in diem*” because interest compensates for the “forbearance of the principal” in *Clapp v. Astor*, 2

Edw.Ch. 379, 6 N.Y. Ch. Ann. 436 (1834). The Court explained this rule applies regardless when the interest is payable (*id.*):

[I]nterest upon money put out on bond or mortgage, **notwithstanding it is expressly made payable half-yearly or quarterly**, may be apportioned; for although it is reserved at fixed periods, the same **accrues and becomes due *de die in diem* for the forbearance of the principal...** (Italics in original; bold added.)⁸

Accordingly, for over 250 years the common law rule is that interest is *earned daily* -- "*de die in diem*" -- regardless of when it is credited or paid. And common law daily interest is not an antiquated rule; instead, DRS does not dispute that daily interest is the current "industry standard" -- *i.e.*, financial institutions "normally post interest monthly," but if a person "withdraw[s] everything from [an] account mid-month" the person receives "the interest earned up to the date of withdrawal." AR 484; AR 289. Indeed, DRS charges teachers daily interest when they owe DRS interest for withdrawn contributions that are redeposited. See *infra*, pp. 42-47 (discussing how DRS's double standard is arbitrary and capricious).

⁸ *Accord, McKean's Appeal*, 42 Pa. 479 (Penn. 1862)(interest "becomes due *de die in diem* for forbearance of the principal"); *In re Flickwir's Estate*, 136 Pa. 374, 382 (Penn. 1890) ("Interest accrues *de die in diem*, but it is calculated at a rate per annum"); *Mann v. Anderson*, 32 S.E. 870, 871 (Ga. 1899) ("Interest was apportionable at common law because it was held to accrue *de die in diem*, and therefore to be susceptible of immediate division. This is the rule of the common law...."); *Owens v. Graetzel*, 126 A. 224, 227 (Md. Ct. App. 1924) (the "rule is that interest accumulates day to day"); *Faulkenbury v. Teachers and State Employees Retirement Sys.*, 515 S.E.2d 743, 746-47 (N.C. App. 1999) (common law requires "daily interest").

This common law daily interest rule is part of the retirement statutes because the rule is not expressly repealed by the statutes. *Faulkenbury v. Teachers and State Employees Retirement Sys.*, 515 S.E.2d 743, 746-47 (N.C. App. 1999) (discussed *infra*, p. 26-27); *Price, supra*, 125 Wn.2d at 463; *Potter, supra*, 165 Wn.2d at 76-77 and n 8; *Tyler, supra*, 140 Wash. at 688. Indeed, DRS has never argued that the common law rule had been repealed by the retirement statutes. Nor did the trial court ever address the issue. Rather, DRS argued that the Legislature was “silent” on when interest was earned and this “silence” gave DRS discretion to decide that no interest is earned at times. See *supra*, pp. 17-18. But if DRS were correct that the Legislature was “silent” and had offered “no guidance” in the retirement statutes on when regular interest is earned, the common law rule would apply. *Clark Cty PUD v. Elect. Workers*, 150 Wn.2d 237, 245, 76 P.3d 248 (2003); *Tyler, supra*, 140 Wash. at 684-89; *Faulkenbury, supra*, 515 S.E.2d at 746-47.

D. The Requirement That DRS Pay “Regular Interest” on Employee Contributions and “Accrued Interest” When the Contributions Are Withdrawn Each Implement the Common Law Daily Interest Requirement.

Moreover, the retirement statutes are *not silent* on when interest is earned. In fact, statutory requirements that DRS pay “regular interest” and “accrued interest” both implement and incorporate the common law rule. The retirement statutes require DRS to pay “regular interest.” RCW

41.32.010(1)(b). And “regular interest” means “such rate as the director may determine,” RCW 41.32.010(23), which DRS agreed is “5.5 percent annual interest compounded quarterly.” AR 232.

The statutory term “regular interest” incorporates the common law requirement that interest is earned daily, regardless of when it is paid or credited. *Faulkenbury, supra*, 515 S.E.2d at 746-47. In *Faulkenbury*, as here, a public retirement statute providing “regular interest” allowed the state retirement system to determine the interest rate, which it set at 4% compounded annually. The statute was “completely silent as to when the interest is to accrue.” 515 S.E.2d at 746. The North Carolina retirement system argued, based on its traditional method, that “interest accrues *annually*” and “interest is due only on funds that have been owed for a year.” *Faulkenbury*, 515 S.E.2d at 746 (emphasis in original). This is the same argument DRS makes, except that rather than “annually,” DRS says interest is earned “quarterly.”

The *Faulkenbury* court rejected the retirement system’s argument that “interest is due only on funds that have been owed for a year” because the Court “must accept that the legislature was aware of the principles of the common law in place at the time of the statute’s enactment.” 515 S.E.2d at 746. In the “absence of a specific directive from the legislature,” the common law rule is “daily interest,” *i.e.*, interest accrues and is earned

daily. 515 S.E.2d at 746-47. The Court therefore held that the retirement system's "'traditional' method does not comport with the statutory requirement for 'regular interest'" (515 S.E.2d at 748) and it reversed the trial court.

A similar retirement case is *Teacher Retirement Sys. et al. v. Duckworth*, 260 S.W.2d 632 (Tex. Civil App. 1953). In the Texas Teacher Retirement System, the Retirement Board paid retired employees a monthly annuity. The Board had a longstanding rule that when a retired employee died, his or her spouse could not receive the pro rata amount of the monthly annuity. 260 S.W.2d at 634-36. Because this rule was contrary to the common law, which required pro rata payments, the Texas Court held that although the Retirement Board had "broad administrative powers" and the express authority to enact rules, it "was without power to adopt and enforce the regulation" because the Board had no authority to modify the common law that was part of the retirement statutes. 260 S.W.2d at 635-36. The fact that "the regulation has been unchallenged for a long period of time" did not matter because a "rule of an administrative agency is void if it conflicts with the statutes, regardless of how long standing such rule may be." 260 S.W.2d at 636.

Here, as in *Faulkenbury*, DRS must comply with the common law rule -- that interest is earned daily even if credited or paid in intervals --

unless that rule is repealed by the statute. The teachers' argument here is even stronger than in *Faulkenbury*, because the statute governing DRS payments on withdrawals expressly requires that “[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 in this statute, and so the term has the ordinary dictionary meaning. *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). And DRS agreed that the “dictionary definition” of “accrued interest” controls. AR 713. “Accrued interest” means “**interest earned, though not credited** or otherwise paid.” Dictionary of Banking Terms (4th ed. 2000), p. 7, AR 684 (emphasis added).⁹ RCW 41.04.445(5) is thus consistent with and implements the common law rule that “[i]**nterest accrues from day to day even if payable only at intervals,**” because “**accrued interest**” means “**interest earned, though not credited or otherwise paid.**”

⁹ 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.

“Accrued interest” thus does *not* mean, as DRS would have it: Interest that has been paid or credited to the account. AR 82, 86, 691, 692-93, 713-14. Indeed, DRS’s position would make the term “accrued interest” meaningless because if interest were earned only when credited, there would never be any “interest earned” but not yet credited or paid since the last posting date. Accordingly, the Legislature’s requirement that DRS pay “accrued interest” when TRS members withdraw their funds implements the common law rule that interest is earned daily, even though it may be credited or paid at intervals, such as quarters.

The Supreme Court construed a statute that has a very similar “accrued interest” provision in *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001). The statute at issue in *Dean* provided that funds deposited in an inmate savings account “together with any accrued interest” be available upon the inmates’ release:

The department personal inmate savings account, *together with any accrued interest*, shall only be available to an inmate at the time of his or her release from confinement.
(Emphasis by Supreme Court.)

Dean, 143 Wn.2d at 34, quoting RCW 72.09.111(1)(d). The Department of Corrections (DOC) did not provide inmates the accrued interest, but instead placed the interest in an “Inmate Betterment Fund” that provided inmates amenities that they would not otherwise obtain. 143 Wn.2d at 33. As a consequence, when the inmates were released they had no interest in

their accounts. 143 Wn.2d at 33-34, n. 9.

The Supreme Court held in *Dean* that the statute's "accrued interest" requirement ("available" on release) created a protected property right in the interest accruing on inmate deposits. 143 Wn.2d. at 34-36. "DOC violated RCW 72.09.111(1)(d) by failing to make 'accrued interest . . . available . . . to an inmate at the time of his or her release.'" 143 Wn.2d at 36. The Supreme Court ordered that the "accrued interest be credited to the accounts of those inmates currently incarcerated and returned to those who have already been released." *Dean*, 143 Wn.2d at 36.

Here, as in *Dean*, the retirement statute provides that the teachers "shall" receive "accrued interest" when they withdraw their funds. RCW 41.04.445(4). As in *Dean*, "shall" creates a mandatory duty for DRS. *Jordan v. O'Brien*, 79 Wn.2d 406, 410, 486 P.2d 290 (1971). The teachers withdrew their funds from Plan 2 when they took them out to deposit into the new individual Plan 3 accounts. But DRS did not pay the teachers the 5.5% annual interest compounded quarterly that DRS promised them and that had accrued on their deposits. Instead, DRS erroneously left some of the employees' accrued interest in the employers' Plan 2/3 account. This violates RCW 41.04.445(4) and the teachers' vested property right to the accrued interest. *Dean*, 143 Wn.2d at 34-36.

E. DRS's Promise to Pay "5.5 Percent Annual Interest Compounded Quarterly" Also Requires Daily Interest.

The established rate of interest on Plan 2 employee contributions is "5.5 percent annual interest compounded quarterly." AR 232 (Admission No. 1). DRS assured the teachers that their contributions would earn "5.5 percent annual interest compounded quarterly." AR 207; CP 505 and 503. The established "annual" interest rate "compounded quarterly" assumes and requires daily interest, as explained next.

Compound interest is "interest paid or computed on the combined sum of the original principal of a loan and interest accrued and payable at the end of each agreed period (as monthly, quarterly, ...)." Webster's Third New Inter. Dict., p. 467 (1976); *Niggeling v. Mich. Dept. of Transp.*, 488 N.W.2d 791, 792 (Mich. App. 1992) ("Compound interest means interest on interest, in that **accrued interest is added periodically to the principal**, and interest is computed upon the new principal thus formed." (emphasis added)). (See also definitions of "compound interest" and "compounding" at AR 669, 673.)

When DRS promised the teachers that the "5.5% annual interest rate" is "compounded quarterly," that promise means that interest will be earned on the amounts in the account during the quarter at the 5.5% annual rate, and then added to the principal at the end of the quarter.

Faulkenbury, supra, 515 S.E.2d at 747. But DRS did not do the required

compounding because it never treats deposits made during a quarter as earning interest in that quarter. AR 261.

Similarly, DRS's promise that interest will be earned on an "annual" or "per annum" basis incorporates the requirement of daily interest, *i.e.*, annual interest must be calculated on a daily basis using a 365-day year. *Chern v. Bank of America*, 127 Cal.Rptr. 110, 116 (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, 265-66 (N.D. Ill. 1992). Indeed, DRS uses a 365-day calendar to determine the daily interest owed by employers, employees and others. CP 479 (quoting DRS Employer Handbook). See also p. 45, n. 14, *infra*. But because deposits in a quarter do not earn any interest in that quarter, DRS is not using a 365-day year to calculate the interest on teachers' contributions. Instead, DRS is using at most three-quarters of the 365-day year in calculating interest on their deposits, and sometimes only half of the 365-day year (as it did for Jeff Probst). AR 643, AR 250-56, AR 261.

Thus, the statute's requirement that DRS pay "regular interest" and "accrued interest," as well as DRS's agreement that the employees would earn the statutorily established rate, 5.5% annual interest compounded quarterly, each incorporate and implement the common law daily interest requirement.

II. A STATUTE ENACTED IN 2007 CANNOT JUSTIFY DRS'S EARLIER MISCALCULATION OF EARNED INTEREST, BECAUSE THAT STATUTE DID NOT EXPRESSLY REPEAL THE COMMON LAW DAILY INTEREST RULE AND, IF IT DID, IT WOULD RETROACTIVELY TAKE AWAY PREVIOUSLY EARNED INTEREST AND WOULD THEREFORE VIOLATE THE CONSTITUTION'S TAKINGS CLAUSE.

A. The Legislature's 2007 Enactment Did Not Repeal the Common Law Daily Interest Rule.

In the administrative proceeding and prior briefing on the merits, DRS's argument was based primarily on a statute giving it authority to determine when interest is "credited" to a member's account. Laws of 1982, Ch. 52, § 18, CP 203-06 (quoting pertinent parts of DRS's opposition). But not only was the statute relied on by DRS immaterial because it concerned "crediting" interest, rather than when interest is *earned*, the Legislature had repealed the statute relied on by DRS in 1992. Laws of 1992, ch. 212, sec. 11.

After the parties agreed on the material terms to a *partial* settlement, DRS wrongly (and without notifying the plaintiffs or their counsel) implied to the Legislature that the entire case had settled¹⁰ and the Legislature then enacted a new statute concerning the DRS Director's authority in "crediting interest to retirement system accounts." RCW

¹⁰ "This [bill] stems from the result of recently settled litigation, and as a result had to be brought late during session." SB 6167, House Bill Report (2007).

41.50.033.¹¹ RCW 41.50.033(1) states that the “amounts to be credited and the methods of doing so shall be at the director’s discretion,” and that the Legislature intended the enactment to be “curative, remedial, and retrospectively applied.” RCW 41.50.033(1).

The trial court held that because the new statute gave DRS the authority to decide how and when to “credit interest,” interest is only earned by employees when DRS credits it. CP 685, quoting RCW 41.50.033(1). The trial court then applied the new statute retroactively to the teachers’ transfers, which had occurred well before the statute was enacted. CP 686. But there is nothing in the 2007 statute that *clearly expressed* the Legislature’s intent to repeal the common law daily interest rule. *See, supra*, pp. 19-25. Instead, subsection (1) of the new statute gives the DRS director authority over “when interest” is “*credited* to accounts” and the “amounts to be *credited* and the methods of doing so

¹¹ RCW 41.50.033 states:

- (1) The director shall determine when interest, if provided by a plan, shall be credited to the 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).
- (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.

shall be at the director's discretion." RCW 41.50.033(1) (emphasis added). When interest is *credited* to an account is different from when interest is *earned* under the ordinary meaning of those words.

Thus, "accrued interest" ordinarily means "**interest earned, though not credited or otherwise paid**" (emphasis added). See pp. 28-30 and n. 9, *supra* and AR 684. Consistent with the ordinary meaning of "accrued interest," under the 250-year-old common law rule "[i]nterest accrues from day to day even if payable only at intervals." *Id.* The Legislature therefore did not "clearly express" any intent to repeal the common law daily interest rule because it did not state that interest is earned only when credited. "Crediting" interest is just a bookkeeping function in which the account books are updated at intervals to reflect the daily interest that is earned under the common law.

Moreover, if the Legislature had intended to repeal the common law daily interest rule, it would not only have "clearly expressed" its intent to repeal the rule, but it would also have repealed or amended the statute, RCW 41.04.445(4), requiring DRS to pay members "accrued interest" when they withdraw funds. RCW 41.04.445(4)'s requirement that DRS pay "accrued interest" implements the common law daily interest rule because "accrued interest" is "interest earned, though not credited." See *supra*, pp. 28-30 and n. 9.

DRS's arguments equating interest earning with interest crediting are also inconsistent with the statutory definition of "accumulated contributions." RCW 41.32.010 provides:

(b) "Accumulated contributions" ... means the sum of all *contributions standing to the credit* of a member in the member's individual account, ... *together with the regular interest thereon.* (Emphasis added.)

The statutory definition does not provide, as DRS would have it, "together with the regular interest thereon [only if and when interest is credited to the account]."

The 2007 statute also "affirms" the DRS director's "authority and responsibility to establish the amount and all conditions for regular interest, if any." RCW 41.50.033(3). The Legislature did not "clearly express" any intent to repeal the common law daily interest rule with this subsection. Indeed, the new subsection does not even mention, much less purport to define, when a member "earns" interest on contributions; it still refers to "regular interest" as the statute did previously and still does. RCW 41.32.010(1)(b), .010(23). DRS admitted that the "amount" or rate of regular interest is "5.5 percent annual interest compounded quarterly." AR 232. And because the statute does not modify or say anything about when "regular interest" is *earned*, the common law rule that interest is earned daily still applies. *Faulkenbury, supra*, 515 S.E.2d at 746-47; see pp. 26-27, *supra*.

The common law daily interest rule applies because the Legislature has not repealed it and an agency such as DRS does not have the ability to repeal the common law. *Duckworth, supra*, 260 SW.2d at 635-36; *cf. Potter, supra*, 165 Wn.2d at 76-77. Accordingly, in setting the terms for “regular interest” under this new statutory authority, DRS must comply with the common law requirement that interest is earned daily, *Faulkenbury, supra*, 515 S.E.2d at 746-47, as well as the statutory requirement that it pay “accrued interest.” See pp. 28-30 and n. 9, *supra*.

The 2007 statute’s legislative history also shows that the Legislature did not intend to repeal the common law daily interest rule. Although DRS presented the bill as arising out of “recent litigation” that was “settled,” there is *no evidence* DRS disclosed to the Legislature that its computer program uses a quarter-end accounting method that is different from the common law daily interest rule, or that it was not adhering to the normal standard that interest is earned daily – as DRS itself charges interest to employees on restored withdrawals in the same accounts. AR 433. Nor did DRS disclose to the Legislature that teachers had a pending claim or that DRS considered teachers to earn *no interest* at all on their contributions for at least a quarter and sometimes for up to six months, even though the contributions were held in an interest-bearing account that DRS represented to employees (and the Legislature) has a

rate of return of 5.5% annually, compounded quarterly.¹² Instead, consistent with the language in the statute and the statute's title, DRS simply told the Legislature that the statute concerned agency discretion regarding the "crediting" of interest on member accounts. RCW 41.50.033.

There is nothing in RCW 41.50.033 by which the Legislature "clearly expressed" its intention to repeal the 250-year-old common law rule that interest accrues daily. The trial court thus erred by relying on the new 2007 legislation to justify DRS's much earlier failure to pay the teachers daily interest.

B. The 2007 Statute Would Be Unconstitutional Under DRS's And the Trial Court's Interpretation, But Is Constitutional Under the Teachers' Interpretation.

The interpretation of the statute advocated by DRS and adopted by the trial court (CP 685-86) must be rejected for the additional reason that if the trial court were correct, RCW 41.50.033 would be unconstitutional under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

¹² DRS continued to tell both employees and the Legislature after the 2007 statute was enacted that employee contributions receive "5.5 percent annual interest . . . compounded quarterly," CP 500, 505, 508; when, in fact it is undisputed that it pays less than that rate. AR 250-56, 261, 289, 643; also see AR 23 ¶33.

The teachers contribute part of their own earnings towards retirement, and DRS then takes the employees' money and places it into an investment account, the Commingled Trust Fund. AR 4, ¶3. The Legislature presumes the employees' contributions (as well as the employers' contributions) in the Commingled Trust Fund on average earn 8% annually. RCW 41.45.035(1)(c). But due to DRS's quarter-end accounting method, there are periods of up to six months where the employees' funds earn returns in DRS's comingled fund, AR 577, 624-27, 791-94, 800, but the employees themselves receive *no* interest (not 5.5% or any other amount) because DRS says no interest earnings are credited or "applied" to these individuals. AR 589.

Under the common law "**interest earned belongs to the owner of the funds** that generated the interest" and "**interest earned by deposit of money. . . is an increment that accrues to that money** and its owners." *Phillips, supra*, 524 U.S. at 165-66 and n. 5 (IOLTA case) (emphasis added). The "rule that 'interest follows principal' has been established under English common law since the mid-1700's." *Id.* at 165. "[A]ny interest that *does* accrue" on deposited funds is therefore "a property right incident to the ownership of the underlying principal." *Id.* at 168 (italics by Court). Accordingly, **the Takings Clause of the Fifth Amendment prohibits the government from appropriating accrued interest from**

the owners of the underlying funds. *Id.* at 165-71; *accord, Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233-35 (2002); *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998) (“interest income . . . is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause”); *Dean, supra*, 143 Wn.2d at 35 discussing *Schneider* and *Phillips*.

The interest earned on the teachers’ funds is not just a property right under the Constitution. The Legislature affirmed this property right when it said that upon withdrawal of funds a member “shall” receive all “accrued interest.” RCW 41.04.445(4); *Dean, supra*, 143 Wn.2d at 34-35 (statute providing that inmates shall receive “accrued interest” on their deposits created a constitutionally-protected property right).

The Takings Clause does not prevent DRS from deducting administrative costs for investing and accounting for the money. *Phillips*, 524 U.S. at 171 (State can “impos[e] reasonable *fees* it incurs in generating and allocating interest income”) (emphasis added). But DRS’s failure to recognize the existence of and then credit earned interest is not an administrative “fee.” DRS has no authority to take income earned on employee contributions, for periods of up to six months, and make it the

State's income.¹³ *Id.*; *Schneider*, 151 F.3d at 1201.

Here, the teachers have a property interest in their retirement contributions and the accrued interest on those contributions. *Phillips, supra*, 524 U.S. at 165-66; *Dean, supra*, 143 Wn.2d at 34-35. Thus, assuming the Legislature could take the teachers' interest earned on their contributions, it could only do so *prospectively*. *Harde v. City of Seattle*, 26 Wn. App. 219, 221-22, 612 P.2d 436, *rev. denied*, 94 Wn.2d 1021 (1980). Although there are circumstances under which the Legislature can act to approve an action retroactively, denying the teachers already earned interest is not one of them because a statute cannot operate retroactively if it interferes with a vested right, including a property right in accrued interest. *Id.*; *Dean, supra*, 143 Wn.2d at 34-35.

The 2007 statute should be interpreted to be constitutional. *In Re Cross*, 99 Wn.2d 373, 382-83, 662 P.2d 828 (1983). Under the trial court's interpretation, it is not. Accordingly, just as the statute and the legislative history explicitly states, this Court should interpret RCW 41.50.033 to address the Director's discretion in "crediting" interest, which is different from when a retirement system member *earns* interest

¹³ Any administrative "fee" is at least covered by the 2.5% difference between the 8% earned by the state and the 5.5% promised to TRS members. Plaintiffs did not raise a "taking" issue as an affirmative claim. The "takings" issue arose because DRS sought to retroactively use the new 2007 statute to justify its taking of the interest previously earned on the plaintiff teachers' accounts well before the statute was enacted.

on their contributions.

III. DRS ACTED ARBITRARILY AND CAPRICIOUSLY BY CHARGING EMPLOYEES DAILY INTEREST BUT NOT PAYING THEM DAILY INTEREST, AND BY USING TO CALCULATE INTEREST A FLAWED COMPUTER PROGRAM THAT DRS KNEW IT SHOULD CHANGE.

Under RCW 34.05.570(3) and (3)(i), “the court shall grant relief from an agency [DRS] order” that is “arbitrary and capricious.” The trial court concluded, with no explanation, that it did “not find that the Department acted arbitrarily and capriciously in following its historic crediting policy for determining the interest to be transferred.” CP 686.

“Agencies may not treat similar situations in different ways.”

Appren. Comm. v. Training Council, 131 Wn. App. 862, 879, 129 P.3d 838 (2006) (agency must “rule with consistency”). In *Puget Sound Nat’l Bank v. Dept. of Revenue*, 123 Wn.2d 284, 291, 868 P.2d 127 (1994), for instance, the Supreme Court held that it was “inconsistent and capricious for the Department to hold that an assignment” of installment contracts between auto dealers and a bank transferred the dealers’ “tax liability” on the contracts, “but not [the dealers’] tax benefit” on the contracts. *Id.* (emphasis in original). Similarly, the Ninth Circuit held in *California State University v. Riley*, 74 F.3d 960, 966-67 (9th Cir. 1996), that the Department of Education’s interest calculations were inconsistent and therefore arbitrary and capricious because it used a method to calculate

interest when it was owed interest by the universities that is different from the method that the Department used when it owed money to the universities.

Here, as in *Puget Sound Nat'l Bank* and *Riley*, DRS has a double standard, *i.e.*, when DRS is owed money by teachers restoring withdrawn contributions, DRS recognizes that interest accrues and is earned on a daily basis, AR 433, but when DRS owes employees interest on contributions, DRS does not pay them the same daily interest. It instead uses a computer program that pays the teachers zero interest for at least a quarter, and sometimes for up to six months. AR 250-56, 261, 643. Because it applies a double standard on calculation of interest, DRS's action is "inconsistent and capricious." *Puget Sound National Bank, supra*, 123 Wn.2d at 291; *Riley, supra*, 74 F.3d at 966-67.

In addition, an "[a]gency action is arbitrary and capricious if it willful and unreasoning and taken without regard to the attending facts or circumstances." *Rios v. Dept. of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). A method for calculating interest is arbitrary and capricious if it is not based on the real dates of deposit and payment, and is therefore inaccurate. *California State Univ. v. Riley, supra*, 74 F.3d at 966-67. The Ninth Circuit explained that (*id.*):

The Department calculated interest by crediting itself with interest for a full month in which CSU had Department

money on deposit on the last day of the month, as though that amount had been on deposit for the entire month. It ignored months in which, on the last day, the CSU account showed a negative balance because CSU was owed money [by the Department]. This method of accounting was arbitrary and capricious.

The Court rejected the Department's argument that the agency did not have to "select the most accurate accounting method." 74 F.3d at 966.

Here, DRS uses an undisclosed computer program, which, like the method rejected in *Riley*, uses fictional deposit and withdrawal dates, resulting in "an inaccurate calculation of interest." DRS's computer program is inaccurate in at least four ways. First, it treats the teachers' funds as withdrawn when the funds are still in their account and should therefore earn interest. AR 250-56; 643. Second, it treats teachers' deposits made during a quarter as if they were made in the next quarter and they therefore *earn no interest* during the quarter they are actually made. AR 261. Third, it does not properly compound interest on employee contributions made during a quarter because these deposits *earn no interest* to be added to the principal at the end of the quarter. AR 261. Fourth, it does not calculate and add interest on employee deposits on an annualized basis — the 365-day year that DRS uses when it is owed money by the employees and others — but only on $\frac{3}{4}$ or $\frac{1}{2}$ of the year. AR 250-56, 261, 643.

DRS recognizes that it could have accurately paid the teachers daily interest on their contributions if it would have simply “change[d] computer programs.” AR 542. DRS clearly has the capability to correctly calculate accrued interest because it correctly calculates “accrued interest” when employees, employers, and third parties *owe* DRS money, imposing annual interest on a daily basis from the “first calendar day that the receivable is overdue” until the payment date. WAC 415-114-400; AR 433.¹⁴

DRS also was aware that it should change its inaccurate computer program so that the employees would receive the stated interest rate. DRS Senior [Legal] Counsel Pete Cutler recommended in 1997 that employees who transfer to Plan 3 should receive “any interest which has accrued before that date [for calculating the account balance], even though the . . .

¹⁴ DRS’s Employer Handbook further explains that “interest charges [on amounts *owed to DRS*] are posted once a month,” but “[i]nterest accrues daily” under WAC 415-114-400. See CP 479, quoting DRS Employer Handbook:

How is Interest Calculated?

Interest accrues daily on outstanding debit balances for each receivable, and *interest charges are posted once a month* to each receivable.

As of January 1999, interest is charged on each past due receivable balance, rather than on the overall account balance. *Interest is calculated daily on the daily balance and posted once a month* on the balance of each receivable with a debit balance. Multiply the daily rate times the outstanding balance times the applicable number of days to determine the amount of interest due. [Emphasis added.]

$$\frac{12\%}{365 \text{ (days per year)}} = .0003288 \text{ daily rate}$$

(http://www.drs.wa.gov/Employer/EmployerHandbook/chpt10/rms_interest.htm)

interest had not yet been posted to the member accounts.” AR 452.

Senior Counsel Cutler also advised that DRS’s “new database system . . . allows for more timely posting of member contributions and timely posting of interest,” noting that “more timely” posting of interest would “bring DRS interest credit practice closer to industry standard”¹⁵ and that would provide “a real rate of interest that is closer to the 5.5% indicated rate” (AR 287). The Department, however, took no action and made no decision on these recommendations. AR 520-26.

DRS knows how to properly calculate interest. It does so when the employees and others owe DRS money. It could have changed its inaccurate computer program for determining the interest actually earned by employees, but it did not. And under DRS’s undisclosed and inaccurate computer program for calculating interest owed to members, employees never receive the established rate of 5.5% annual interest compounded quarterly.

¹⁵ Internal DRS documents explain the “industry standard,” which is the same as the common law daily interest rule (AR 484):

Industry Standard:

As you’re aware, the banking industry will normally post interest monthly. However, if you withdraw everything from your account mid-month, they will post the interest earned up to the date of withdrawal.

Also, the 3rd party administrator for Deferred Compensation under contract with DRS follows the industry standard.

DRS's interest calculation, performed by its inaccurate computer program, is accordingly arbitrary and capricious. Indeed, the presiding officer's conclusion (AR 23, ¶33) that "'regular interest' is what[ever] the agency determines it to be, not simply the stated [5.5%] rate" confirms that DRS's actions with respect to the interest earned by employees are arbitrary and capricious. DRS thus acted arbitrarily and capriciously by having a double standard on daily interest and by using an inaccurate computer program to determine the earned interest on employee accounts.

IV. THE APPROPRIATE RELIEF HERE IS REQUIRING DRS TO TRANSFER THE UNPAID DAILY INTEREST FROM THE EMPLOYER'S PLAN 2/3 ACCOUNT TO THE TEACHERS' INDIVIDUAL PLAN 3 ACCOUNTS.

Under RCW 41.50.130(1) DRS is authorized to correct errors in member "at any time." *See also City of Pasco v. DRS*, 110 Wn. App. 582 (2002) (to ensure "full compliance" with retirement statutes, DRS is "obligated" to correct errors in members' records at any time, even 20 years later). And under RCW 41.50.145(2), if a Plan 3 member loses investment income due to departmental error, DRS "shall credit to the member's account from the appropriate retirement system combined Plan 2 and 3 fund the amount ... necessary to correct the department's error."

DRS failed to pay the teachers daily interest. This unpaid earned interest remains in the employers' Plan 2/3 account. The appropriate relief

here is an order (1) requiring DRS to account for the unpaid daily interest up to the date that DRS transfers the unpaid interest to the teachers' accounts, and (2) requiring DRS to transfer that unpaid earned interest to the teachers' individual TRS Plan 3 accounts.

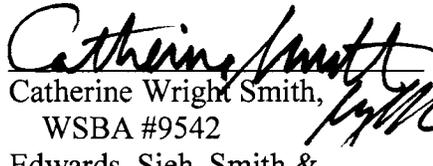
In the Probst partial settlement for members who transferred from PERS Plan 2 to Plan 3 and from TRS Plan 2 to Plan 3 from January 20, 2002 to the time of the settlement, DRS made direct deposits into the class members' individual Plan 3 accounts from the settlement amount, after deducting the class members' pro rata share of the common fund fee. CP 276. The Court should order the same relief here.

CONCLUSION

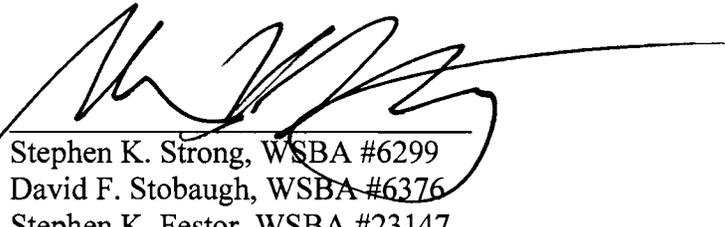
This court should reverse the trial court's order affirming the DRS presiding officer's decision and dismissing the teachers' claims and enter an order (1) requiring DRS to account for the unpaid daily interest up to the date that DRS transfers the unpaid interest to the teachers' accounts, and (2) requiring DRS to transfer that unpaid earned interest, minus a pro rata share of the common fund attorney fee that is determined by the trial court,¹⁶ to the teachers' individual TRS Plan 3 investment accounts.

¹⁶ Class counsel seeks a common fund fee as stated in *Bowles v. DRS*, 121 Wn.2d 52, 71-74, 847 P.2d 440 (1993).

Respectfully submitted this 21st day of January, 2011.



Catherine Wright Smith,
WSBA #9542
Edwards, Sieh, Smith &
Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974
Attorneys for Appellants



Stephen K. Strong, WSBA #6299
David F. Stobaugh, WSBA #6376
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #6550
Seattle, WA 98104
(206) 622-3536
Attorneys for Appellants

DECLARATION OF SERVICE

I, Monica I. Dragoiu, 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 1/21/11, I served via email and USPS regular mail a copy of Brief of Appellants to:

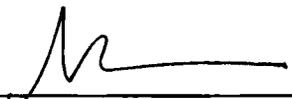
Tim J. Filer, Samuel Bull
Attorneys for Defendant DRS
Foster Pepper PLLC
1111 Third Ave, Ste 3400
Seattle, WA 98101
filet@foster.com
BullS@foster.com

Sarah Blocki, *Attorney for Defendant DRS*
Assistant Attorney General
PO Box 40100
Olympia WA 98504
sarahb@atg.wa.gov

Via USPS Regular Mail, postmarked 1/21/11

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

DATED: 1/21/11, at Seattle, Washington.



Monica I. Dragoiu, *Legal Assistant*