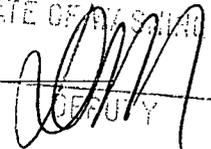


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STATE OF WASHINGTON

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No. 44982-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs/Respondents,

v.

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

Defendant/Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor/Appellant.

BRIEF OF RESPONDENTS – PLAINTIFF CLASS

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INTRODUCTION

This is the brief of the plaintiff *Dolan* class, a respondent in this appeal by intervenor Department of Retirement Systems (DRS).

The Supreme Court remanded this class action to the trial court “for further proceedings regarding remedies.” *Dolan v. King County*, 172 Wn.2d 299, 301, 258 P.3d 20 (2011). Upon remand the plaintiff class and King County reached a class action settlement on these remedy issues. The settlement ends the litigation and thereby saves the parties and the court system years of additional litigation.

The trial court determined that the settlement is fair, adequate and reasonable and complied with the law. It rejected DRS’s objections and entered findings of fact, conclusions of law and an order approving settlement. No class member appealed and thus the approval would be final except for this appeal by intervenor DRS.

Rather than specifically argue that any of the trial court’s findings and conclusions of law are erroneous, DRS broadly argues that the trial court did not have any authority or jurisdiction to decide DRS’s arguments and that DRS itself should have decided the remedy issues. DRS’s position is directly contrary to the Supreme Court’s mandate, remanding the case to the trial court, not DRS, to resolve the remedy issues. *Dolan v. King County*, 172 Wn.2d at 301.

DRS also argues that the trial court erred in granting it limited intervention. But the trial court allowed DRS to intervene to litigate any issue it wanted. The trial court only rejected DRS's request for "full party" status to the extent that DRS said that with such status it could stop the trial court from deciding the remedy issues or approving any settlement without DRS's written consent.

The trial court did not err in rejecting DRS's position that the court lacked authority or jurisdiction to issue the findings, conclusions of law, and order rejecting DRS's arguments and approving the settlement. This Court should affirm.

ISSUES

1. After six years of litigation and our Supreme Court remanding the case to the trial court to resolve remaining remedy issues, did the trial court err in rejecting DRS's argument that the trial court did not have jurisdiction or authority to resolve the remaining issues?

2. Did the trial court abuse its discretion in granting DRS intervention to argue, brief and litigate every issue DRS said it had an interest in, while refusing DRS's request for some sort of "full party" status that, according to DRS, would prohibit the trial court from approving the settlement, or even deciding the remanded issues, without DRS's consent?

3. Did the trial court abuse its discretion in entering the

findings, conclusions of law, and order approving the Settlement Agreement when DRS neither assigns error to any finding nor explains with argument or citation any error in the conclusions of law?

STATEMENT OF THE CASE

The Dolan Case. This *Dolan* pension case began in 2003-05 with investigation and public record requests. CP 316. Before bringing suit, plaintiffs' counsel hoped DRS would assist the plaintiffs, as the Oregon PERS Board had in *State ex rel. Pub. Emps. Retirement Brd v. City of Portland*, 67 Or.App. 117, 684 P.2d 609 (1984). CP 240-41, 316. DRS counsel was not willing to assist the plaintiffs, or even discuss it. CP 241-43. Instead, DRS opposed plaintiffs' PERS claims. CP 241.

The *Dolan* class action was filed in January 2006. Dolan alleged that King County breached its duty to enroll the lawyers and staff of the public defense agencies in the Public Employees Retirement System (PERS) and that King County failed to make required PERS contributions. CP 503, Finding of Fact (FF) 6.¹ DRS was aware of the *Dolan* lawsuit at or near its beginning and DRS communicated with King County about the case. *Id.*; CP 169, 240-41.

The trial court certified the class as a mandatory injunctive class under CR 23(b)(1) and (2). CP 503 FF 7.

¹ The trial court's Findings of Fact, Conclusions of Law, and Order Approving Settlement are at CP 501-15 and are attached to the Notice of Appeal, CP 517-33.

Following a trial, the trial court, the Honorable John R. Hickman, held that King County should have treated the public defense employees as County employees and enrolled them in PERS. CP 503 FF 7; CP 632-67; 172 Wn.2d at 301, 310. It granted an injunction requiring enrollment, but stayed it pending appeal. *Id* at 310; CP 503 FF 7. King County appealed to our Supreme Court. *Id*. The Attorney General submitted three *amicus* briefs to the Supreme Court, agreeing with King County and arguing that the public defense employees could not be enrolled in PERS. CP 169, 245, 503 FF 6.

In August, 2011, the Supreme Court affirmed the trial court in *Dolan*. As DRS acknowledges, the decision determined “the eligibility of King County public defenders for retroactive membership over a period of 35 years, and whether the County should report the defendants to the Department as PERS members.” DRS Br. at 11, citing *Dolan*.

Dolan Case After Remand. After the Supreme Court remanded to the trial court for further proceedings regarding remedies, 172 Wn.2d at 301, the trial court modified its permanent injunction on March 2, 2012. CP 509 FF 9; CP 749-50. It required King County to enroll current King County public defense employees in PERS and make contributions on their behalf. *Id.*. That same day, the trial court postponed the time at which class members (not already enrolled in PERS 1 or PERS 3) may choose between PERS Plan 2 and 3. *Id*. The trial court ordered that class

members be enrolled in PERS 2 until such time as there is adequate information to make an informed choice between PERS 2 and 3. CP 504 FF 9; CP 752-53. DRS was served with copies of these orders. CP 245.

In March 2012, DRS wrote to the trial court. CP 287. DRS acknowledged that the *Dolan* case “was remanded to you [the trial court] after the Washington Supreme Court review to resolve remaining questions regarding enrollment of King County public defenders into the Public Employees’ Retirement System (PERS).” *Id.* DRS asked the “court to consider appointing the Department . . . to serve as *amicus curiae* to the court on pension-related issues throughout the resolution of the remaining issues in the case.” *Id.* DRS offered to assist “by identifying issues and providing information to the Court that may be of help in making its decisions.” CP 288. DRS also said “the current parties have different interests and loyalties than the Department” *Id.*

Plaintiffs’ counsel said that if DRS wanted to participate as *amicus curiae*, it should file a motion to which the parties could respond. CP 245, 290. DRS thereafter said it would not pursue *amicus curiae* status. CP 176-77, 245. DRS noted that the parties were discussing settlement, and it offered to be a “resource” in the settlement discussions. *Id.*

While the parties were discussing settlement, the trial court entered orders requiring immediate retroactive enrollment and retirement of three seriously ill class members. CP 503 FF 10, 246, 451-52, 755-762. The

orders directed King County to enroll them and make all contributions back to the class members' initial hire dates in the late 1980s. *Id.* King County provided DRS with copies of the orders, enrolled the class members, and provided their pay and service information on the required DRS forms. DRS never sought interest on the omitted contributions. The employees retired and started receiving PERS retirement benefits. *Id.*

During settlement discussions, the parties decided to consult DRS about the settlement structure they were considering. CP 246. The King County Executive talked with Governor Gregoire. CP 221. Dwight Dively, Director of the Office of Performance, Strategy and Budget for King County, thereafter discussed the proposed settlement structure with DRS on two occasions. CP 221-22. After the first discussion, DRS sent a letter to Mr. Dively on September 4, 2012, which said that DRS was opposed to class counsel receiving a common fund attorney fee under *Bowles v. DRS*, 121 Wn.2d 52, 72-73, 847 P.2d 440 (1993). CP 224-25. DRS did not raise any concerns about any other aspect of the proposed settlement. *Id.* The parties discussed the letter, but did not agree with DRS because the common fund fee was expressly authorized by the Supreme Court in *Bowles* and does not violate federal tax law. CP 246.

Mr. Dively then had a telephone conference on October 2, 2011 with Steve Hill (DRS Director), Marci Frost (DRS Assistant Director) and David Nelsen (DRS Legal Affairs Coordinator) to again discuss the proposed

settlement structure. CP 222. In that conference call, DRS said that it did not plan to charge interest for the estimated \$30 million of retroactive contributions because that was its normal practice in situations like this. CP 510 FF 43; CP 222. DRS's only concern then about the settlement structure was the common fund attorney fee provision. CP 222. DRS told Mr. Dively to have King County's lawyer talk with DRS's lawyer. *Id.*

King County's counsel then talked with DRS counsel Anne Hall about the DRS letter objecting to the common fund fee as provided in *Bowles*. CP 217-18. Ms. Hall said that DRS did not agree with *Bowles*, that *Bowles* was "wrongly decided," and that DRS had concerns about federal tax law with respect to the common fund fee. CP 218. The parties did not agree with Ms. Hall's view of the law. CP 218, 246. Because *Bowles* is the law in Washington and the common fund fee does not violate federal tax law, the plaintiffs and King County decided to proceed with the settlement structure despite DRS's objection and worked on finalizing the details of the agreement. CP 246-47.

On December 18, 2012 the trial court entered an order noting that the parties had reached a tentative settlement agreement subject to approval by the King County Council. CP 1. DRS received a copy of the proposed settlement agreement the day it was announced. CP 169.

The King County Council conducted hearings on the settlement. DRS testified at one hearing and asked the Council to reject the settlement. CP 501

FF 1 and 2. After three months of consideration, the County Council approved the settlement on March 18, 2013. *Id.*; VRP [3/29/13] at 7.

The parties then, with notice to DRS, noted the settlement agreement for the trial court's preliminary approval on March 29, 2013. CP 5. On the day before the hearing, DRS requested an order shortening time to March 29 to allow DRS to argue as *amicus curiae* to object to preliminary approval and to alert the trial court that it would file a motion to intervene. CP 96-99. DRS argued that "preliminary approval of proposed settlement . . . is premature." CP 99. DRS contended that the parties "should first work with DRS" before any proposed settlement could be submitted to the Court. *Id.* DRS argued its position to the trial court. VRP [3/29/13] at 3-5. Because the settlement agreement specifically provided that DRS could be heard (CP 147; see also CP 59), the court said there was no prejudice to DRS from scheduling a settlement hearing and there was ample time to address DRS's motion to intervene before the hearing in June. CP 147; VRP [3/29/13] at 8, 10-11.

DRS then filed its motion to intervene, CP 153-66, and its objections to the settlement. CP 194-97. DRS submitted a declaration from its lawyer, Anne Hall, which established that DRS had known about the case since its inception, had advised King County about it, and had submitted *amicus* briefs in the Supreme Court agreeing with King County's position. CP 168-70; see also VRP [5/10/13] at 19. DRS said it sought to intervene to object to provisions of the settlement that it

contended were “inconsistent . . . with Washington statutes” (CP 155), and that the attorney fee provision “appears to violate federal [tax] law.” CP 159. And DRS also wanted to assure it would be able to appeal. CP 166.

Plaintiffs and King County agreed that DRS could intervene to raise the issues in its motion and its objections to the settlement. CP 218, 247. (Indeed, the plaintiffs and King County thought the agreement already gave DRS that right, CP 312.) DRS, however, replied that it wanted to be a “full party for all purposes.” CP 218.

DRS explained in its reply what it meant by “full party status”—that there could be neither a settlement nor court approval of the settlement without DRS’s written “assent,” citing CR 2A, or alternatively that DRS could “opt out of the agreement.” CP 297-98. The parties opposed DRS’s request for such “full party status.” CP 209-16; 226-37.

The trial court rejected as untimely DRS’s request for what it called “full party status.” CP 312. The trial court explained that waiting until after a settlement had been reached made it too late if DRS wanted more than a chance to object and litigate its terms. VRP [5/10/13] at 34.

The trial court further explained that the court, not DRS, would decide whether the agreement complied with the law and whether it should be approved, but DRS would have the opportunity “to litigate and argue” its points (VRP [5/10/13] at 35-36):

They [DRS] do not have full intervention powers, nor do they have full right to veto the agreement, but they do have a right to litigate

and argue those portions that they believe do not meet their internal approval requirements. Because it's not really a CR 2A that's going to bind them to this agreement. It's going to be an order from a court of competent jurisdiction that's going to be the ultimate authority that binds the Department of Retirement Systems.

Accordingly, the trial court granted DRS intervention to “*argue, brief and litigate* those portions of the agreement . . . that they [DRS] disagree with . . . in terms of what they [DRS] believe the agreement conflicts with their Department of Retirement Systems protocols and requirements.” VRP [5/10/13] at 35 (emphasis added); CP 312-13.

The Settlement Agreement. The settlement is comprehensive, covering not only retroactive PERS enrollment pursuant to the *Dolan* opinion, but other aspects of King County public defense. The agreement provided that public defense employees would be recognized on July 1, 2013 as King County employees with full pay and benefits for their positions. CP 47-48. The agreement provided for carryover of vacation and using the employee's initial hire date at a public defense agency for purposes of establishing a vacation accrual rate as a King County employee. CP 49. The agreement also provided for carryover of sick leave, *id.*, and provided retroactive PERS service credit in accordance with the opinion in *Dolan* and DRS service credit rules. CP 45-47; 69.

For purposes of relief the agreement divided the class into five groups (CP 40-41), the members of which are listed in exhibits (CP 70-91). Most class members are still working, as public defenders,

prosecutors, assistant attorneys general, judges (both trial and appellate), administrative law judges, paralegals and investigators.

Under the agreement King County agreed to pay retroactive employer and employee contributions going back to 1978 for those in groups one through four. CP 46-47. For group five — employees with less than five years of PERS service — King County agreed to pay retroactive PERS contributions if the employee both obtains a PERS job in the future and the omitted King County public defense service coupled with new service would allow the employee to vest in PERS. CP 47. The PERS contribution rates are incorporated in the agreement. CP 92-93.

The agreement provided that, subject to court approval, class counsel would receive a common fund attorney fee as provided in *Bowles v. DRS*, 121 Wn.2d at 70-75, based on the common fund of about \$130 million, which is the estimated value of the PERS service credit obtained by class counsel's efforts. CP 61-62. As in *Bowles*, the common fund fee would be deducted from the employee contributions that King County was making and the employees will repay DRS with interest through deductions from their future retirement benefit checks. CP 46-47. Alternatively, class members could pay DRS in advance for their pro rata shares of the common fund attorney fee. CP 47.

The agreement specifically provided that DRS could be heard on matters concerning DRS. CP 41-42, 59.

The Settlement Hearing. The Supreme Court said in *Pickett v. Holland Am. Line*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001), that in determining whether a settlement is fair and reasonable for the class as a whole, the superior court should consider: (1) the settlement terms and conditions; (2) recommendation and experience of counsel; (3) recommendation of neutral parties; (4) the future expenses and likely duration of further litigation; (5) plaintiff's or defendant's likelihood of success, *i.e.*, risk factors; (6) the extent of discovery or evidence; (7) good faith bargaining; and (8) number of objections and nature of objections.

The trial court conducted a settlement hearing on June 7, 2013. Although the notice said employees need not comment if they support the settlement, 166 class members affirmatively informed the court that they supported the settlement and the common fund fee. CP 502 FF 4. The King County Executive and the King County Council supported the settlement, VRP [3/29/13] at 7, CP 502 FF 4, as did SEIU Local 925, which had collective bargaining agreements representing the majority of King County public defense employees. CP 417.

The evidence and briefing before the court showed that factors 1-7 were overwhelmingly established. CP 366-70. The settlement provided (1) excellent relief for the class through both pension relief and recognition as King County employees with full benefits starting on July 1, 2013; (2) the settlement was recommended by experienced

counsel; and (3) the settlement was recommended by neutral parties. Moreover, (4) without settlement the remaining issues addressed by settlement would have to be decided by the court and could take several more years of litigation. Indeed the trial court thought that the remedy details could be even more “litigious” than the first phase of the case, which was “one of the most complicated issues that [the court] had before it and probably will during the course of my judicial career.” VRP [6/7/13] at 59-60. And (5), the plaintiffs and defendant carefully considered and verified the risks in continuing with litigation; and (6) considerable discovery had occurred and the parties had compiled a great deal of additional evidence to confirm the identity of class members, and to obtain pay and employment information needed to determine relief. CP 314-25. (Indeed, the settlement information was much better than usual. CP 325.) And (7) the plaintiffs and King County had bargained in good faith to achieve a final resolution of the case.

Only factor number 8, “the number of objections and nature of objections,” was at issue. Thus, the hearing focused on the objections, particularly those raised by DRS. VRP [6/7/13] at 16-59.

Only one class member objected. CP 502 FF 4, 25. He objected on the basis that the employee recognition provision might cause layoffs, but King County reassured him that no layoffs would occur. CP 455. And this class member essentially withdrew his objection at the hearing.

CP 504 FF 5; 572 FF 48.

Most of the settlement hearing was devoted to the DRS objections. DRS argued again its “global” objection that the trial court could not approve the settlement because DRS had not “assented to the agreement under CR [2A].” VRP [6/7/13] at 16. DRS also argued its specific objections that were set forth in its briefs and declarations. *Id.* at 18-36. DRS said the settlement eliminated an employee’s choice between PERS 2 and PERS 3, apparently because that option is stated in an agreed order rather than in the settlement agreement itself. *Id.* at 18-19. It also argued against the method by which the class members will repay their shares of the common fund fee. *Id.* at 28-35. And DRS argued about interest. *Id.* at 20-27.

Each of DRS’s points were addressed and refuted by the parties. CP 371-90; 427-44. The parties explained that the attorney fee provision follows *Bowles*, including the repayment mechanism the Supreme Court approved there. The parties explained that DRS did not have the legal authority to demand interest in this situation. VRP [6/17/13] at 39-41. And even if DRS had the discretion to seek interest, it would be an abuse of discretion here. *Id.* at 52-53. The parties also noted that the amount of interest DRS said might be at issue was greatly exaggerated — \$35 million at most, rather than \$90 to \$100 million asserted by DRS — and that the \$35 million was not material because the PERS fund was

overfunded by \$2 billion and \$35 million was only one-sixth of one percent of the nearly \$21 billion PERS 2 fund and investment values vary more than that on a daily basis. (See p. 42, *infra*.)

The trial court rejected the DRS objections and approved the settlement. VRP [6/7/13] at 59-65.

The Trial Court's Findings. Findings of fact and conclusions of law were later presented to the Court, as it requested. VRP [6/7/13] at 59. DRS objected to the findings as a whole because, it argued, they are "not required" under CR 52. VRP [6/21/13] at 4-6. DRS made no specific objection to any finding; it submitted a proposed order without any findings or rulings on DRS objections. CP 799. The trial court ruled that it would enter the findings because they reflected its decision and so the appellate court could have the facts and reasons for approving the settlement. VRP [6/21/13] at 12-17. The trial court then signed the proposed findings of fact, conclusions of law and order. CP 501-15. DRS appealed. CP 467, 517. No class member appealed.

Post-Appeal Proceedings. After the settlement was approved, King County implemented the employee recognition provisions and in the November 2013 general election the King County voters approved a charter amendment creating a county public defense department with an independent public defender as the head of the agency. King County Charter Amendment No. 1 (2013) (creating Dept. of Public Defense).

The settlement agreement contains a provision allowing certain class members who are of retirement age to retire pending appeal. CP 59. All parties — plaintiffs, King County and intervenor DRS — agreed to an order to implement this interim provision and these class members are now retiring. CP 789-92.

STANDARD OF REVIEW

DRS appealed the order approving the settlement. CP 511. The trial court decides whether a class action settlement is fair and reasonable and complies with the law, considering the factors listed by the Supreme Court in *Pickett*, 145 Wn.2d at 198, listed *supra* at p. 12. The standard of review is abuse of discretion. *Pickett*, 145 Wn.2d at 191-92. And the reviewing court attaches “great weight” to the trial court’s decision to approve a class action settlement. *Id.* at 189.

Pickett explains that “voluntary reconciliation and settlement are the preferred means of dispute resolution.” *Id.* at 190. Therefore in considering objections to the settlement, the reviewing court will not overturn approval unless the “objectors to that settlement have made a clear showing that the [trial court] has abused its discretion.” *Id.*

An abuse of discretion occurs only when approval of a class settlement “rests on an error of law or a clearly erroneous factual finding or when its decision cannot be located with the range of permissible

decisions.” *Charron v. Wiener*, 731 F.3d 241, 247 (2nd Cir. 2013).²

DRS also appealed the order permitting DRS to intervene. CP 467. DRS was permitted to intervene, so the appeal relates to the form of the order. DRS Br. at 17-19.

A trial court may impose limits on intervention based on the facts and circumstances of the case. *Marino Property v. Port Commissioners*, 97 Wn.2d 307, 316, 644 P.2d 1181 (1982). It may also deny intervention because it is untimely. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989). These are discretionary decisions by the trial court that are reviewed under the abuse of discretion standard. *Id.*

ARGUMENT

I. THE SUPREME COURT DECIDED THE MERITS OF THIS PENSION CASE AND REMANDED ALL REMAINING REMEDY ISSUES TO THE TRIAL COURT, NOT TO DRS, AND THE TRIAL COURT ACTED ON THESE REMEDY ISSUES.

DRS does not contest the substance of the issues in the trial court’s decision, such as by assigning error to the findings and conclusions, or by arguing why the court’s rulings were erroneous. (See pp. 33-35, *infra*). Instead, it challenges the trial court’s authority and jurisdiction to approve the settlement or to otherwise decide the remedy issues remanded by the Supreme Court. DRS Br. 20-21, 41-43.

DRS’s argument is, first, contrary to the Supreme Court’s mandate.

² *Pickett* notes that on settlement issues “federal cases interpreting the analogous federal provision [FRCP 23(e)] are highly persuasive.” 145 Wn.2d at 188.

The Supreme Court's *Dolan* opinion, as DRS acknowledges, affirmed "the eligibility of King County public defenders for retroactive PERS membership over a period of 35 years." DRS Br. at 11. And the Supreme Court's decision added "members to PERS for a period potentially extending back 35 years." *Id.* at 1. DRS also acknowledged below that "the state Supreme Court held the defender corporations' employees are retroactively eligible for PERS membership." CP 155.

The Supreme Court expressly "remand[ed] to the trial court for further proceedings regarding remedies." *Dolan*, 172 Wn.2d at 301. The Supreme Court *did not remand to DRS* to resolve the remedy issues. This Supreme Court mandate "must be strictly followed" so that the litigation may end and not be unduly prolonged. *Ethredge v. Diamond Drill Contracting Co.*, 200 Wash. 273, 276, 93 P.2d 324 (1934); *Gudmundson v. Commercial Bank & Trust Co.*, 160 Wash. 489, 496, 295 P. 167 (1931).

DRS acknowledged after the Supreme Court's remand that it fully understood that the trial court had both the authority and mandate to resolve the remaining pension issues. DRS wrote to the trial court and expressly acknowledged that the Supreme Court remanded the "remaining questions" to the trial court to resolve: "[DRS is] writing in regard to *Dolan v. King County*, a case which was *remanded to you* after Washington Supreme Court review to *resolve remaining questions* regarding enrollment of King County public defenders into [PERS]."

CP 287 (emphasis added).

DRS offered to assist the trial court as *amicus curiae* by “identifying issues and providing information to the court that may be of help in making its decisions.” CP 288. And DRS said it believed that the “parties have differing interests [from those of] the Department.” *Id.*

A bit later, DRS said it was informed that the parties were discussing settlement and therefore, it said, there was “no current role for the Department of Retirement Systems (Department) to educate the court regarding retirement issues implicated by the parties’ litigation.” CP 176 (DRS lawyers’ letter, 4-4-12). DRS said that it was available as a resource to discuss any of the settlement issues and it said “any settlement negotiated between the parties must conform to the law.” *Id.* DRS acknowledged, when the parties presented the settlement to the trial court, that “[t]he parties have proposed a *settlement to implement the Court’s rulings concerning retroactive eligibility.*” CP 155 (emphasis added).

DRS objected to some parts of this comprehensive settlement agreement on the ground that they “appear” to violate state and federal law. CP 195. And it moved to intervene with respect to these points. *Id.*; CP 153-66. The trial court permitted DRS intervention and provided DRS a full opportunity to “argue, brief and litigate” any pension issues that DRS identified. VRP [5/10/13] at 35-36.

The trial court *considered on the merits and rejected DRS’s*

arguments when it decided to approve the settlement, ruling that the provisions to which DRS objected were consistent with pension statutes and regulations.³ CP 501-15. And the trial court therefore approved the settlement. CP 514. By this order, the trial court carried out the Supreme Court’s mandate to resolve the remedy issues.⁴

DRS’s central argument on appeal is that the trial court had no authority to decide the remedy issues that were remanded to it by the Supreme Court. DRS argues that only DRS, not the court, could approve the settlement or decide the statutory pension issues that DRS raised: “[s]uperior courts do not have original jurisdiction over [the] claims” and the “Supreme Court’s decision [had to] unavoidably be implemented through the administrative process.” DRS Br. at 20 n. 8, 21, 43.

DRS’s argument is quite radical: “[p]ension administration issues are ultimately matters not subject to original jurisdiction in superior court.” DRS Br. at 43. DRS asserts that courts could not decide the

³ CP 502, FF 2: “DRS was fully and timely informed of the Settlement Agreement and it had ample opportunity — several months — to become fully informed and make its arguments with any evidence it had before and at the final settlement hearing.”

DRS submitted five briefs about its objections (CP 96-101, 153-167, 194-97, 293-94, 658-663), five declarations (CP 105-118, 168-183, 183-193, 301-04, 305-10) and orally argued its objections. VRP [5/10/13], pp. 7-22; VRP [6/7/13], pp. 15-36; VRP [6/21/13], pp. 4-7, 11-12.

⁴ Despite the trial court’s ruling that DRS could make any argument on pension issues that it wanted to raise, DRS says repeatedly that its objections were “never litigated.” DRS Br. at 3, 4, 16, 42. In fact, DRS’s issues were litigated, see n. 3 above, and DRS concedes that the trial “court’s findings, conclusions and order *decided*” those issues against DRS. DRS Br. at 41 (emphasis added). DRS’s “never litigated” contention seems to be based on DRS’s argument that the trial court had no jurisdiction and therefore the litigation didn’t really occur.

pension issues; rather, “the Department would make pension administrative decisions, subject to review by a court under the APA.” *Id.* DRS’s argument strongly implies that the Supreme Court had no jurisdiction over the pension issues it decided, *id.* at 21,⁵ or at least that the Supreme Court had no authority to remand the remedy issues to the superior court instead of DRS, *id.* at 43.

DRS stakes its position on appeal on its argument that there is “no original jurisdiction” in superior court for this action. As discussed *infra* (pp. 33-35), DRS neither assigns error to the trial court’s findings and conclusions, nor does it explain, with authority and argument, how and why the trial court erred. It contends the findings, conclusions, and order were not within the superior court’s original jurisdiction, but are matters within DRS’s jurisdiction as “the agency managing public pension systems.” DRS Br. at 42. DRS contends that only DRS, *not* the court, can decide whether to accept a “comprehensive resolution” of the issues by the parties. DRS Br. at 43. And, if the issues are not resolved by the parties to DRS’s satisfaction, it “would make pension administrative decisions” on these matters, *not* the trial court. *Id.* at 43; also at 21.

DRS disregards the basic principle of court jurisdiction set forth in the Washington Constitution, which “vests the superior court with original

⁵ While effectively asserting the Supreme Court had no authority to decide the pension issues it decided in *Dolan*, DRS says it now has no “interest” in re-litigating these issues. DRS Br. at 21.

jurisdiction ‘in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.’”

Ledgerwood v. Lansdowne, 120 Wn.App. 414, 419, 85 P.3d 950 (2004) (quoting Wash. Const. Art. IV, §6). “On its face, article IV, section 6 allows the legislature to limit the superior court’s jurisdiction in certain matters, provided it vests authority over such matters *in some other court*, presumably a court of limited jurisdiction.” *Young v. Clark*, 149 Wn.2d 130, 133, 65 P.3d 1192 (2003) (Supreme Court’s emphasis). Accordingly, under the Constitution, to deprive superior courts of original jurisdiction over a specific type of action, the Legislature must provide exclusive original jurisdiction in some other court and, “[w]hen the Legislature means exclusive original jurisdiction, it says exclusive original jurisdiction.” *Ledgerwood*, 120 Wn.App. at 120 and n.1.⁶

DRS does not point to any statute that deprived the trial court (and the Supreme Court) of original jurisdiction to decide the *Dolan* pension issues because there is no such statute. The parties litigated this pension action for years in superior court (with DRS’s full knowledge and without any DRS motion to dismiss, without its intervention, and without any objection) and the superior court decision was then reviewed and affirmed

⁶ See, for example, RCW 13.04.030(1) (“juvenile courts in this state shall have exclusive original jurisdiction over all proceedings . . .”); RCW 3.50.020 (“municipal court shall have exclusive jurisdiction over traffic infractions arising city ordinances and exclusive jurisdiction of all violations of city ordinances”); RCW 13.38.060 (“An Indian Tribe shall have exclusive jurisdiction over any child custody involving an Indian child who resides or is domiciled within the reservation”).

by the Supreme Court. DRS evidently recognizes there are no statutes that deprived the courts of jurisdiction by arguing only that pension cases “are *typically* decided by the Department,” with review through the APA. And, it says, if “this case had followed a *typical* path, any judicial review decision allowing eligibility would have been remanded to the agency for implementation. . . .” DRS Br. at 20, 21 (emphasis added).⁷ But “typicality” cannot deprive the superior court of jurisdiction, particularly in a case litigated in the court for six years and expressly remanded to the court by the Supreme Court to decide the remaining remedy issues.

DRS cites the Administrative Procedure Act (APA) for the proposition that the trial court here has only “appellate jurisdiction,” not original jurisdiction. DRS Br. at 20-21, 42-43. DRS argues that review under the APA is the only way to challenge agency action. DRS Br. at 20 n. 8 (citing *Wells Fargo v. Dept. of Revenue*, 166 Wn.App. 342, 271 P.3d 268 (2012)), and DRS Br. at 42-43.

But this lawsuit never involved “agency action” by DRS. Instead, this lawsuit was brought by the plaintiffs against King County for injunctive relief alleging the County failed to enroll them in PERS.⁸ The

⁷ DRS cites a few cases where DRS itself violated the retirement statutes or regulations and it was sued or its administrative decisions were reviewed. DRS Br. at 20-21. It has no authority to show the courts have no jurisdiction over an injunction case against an employer (such as King County) that was allegedly violating PERS statutes and regulations by a failure to enroll employees in PERS.

⁸ The APA has no relevance to actions by, or a lawsuit against, a county. RCW 34.05.010(2).

trial court ruled King County should have enrolled the public defenders in PERS, and this decision was affirmed. *Dolan*, 172 Wn.2d at 301, 322.

The remedy issues remanded to the trial court, involving enrollment, service credit, contributions, interest, and attorney fees, are ancillary to the injunctive relief the trial court granted several years ago. And the Supreme Court expressly told the trial court to decide these remedy issues. 172 Wn.2d at 301. And, after the Supreme Court's decision, DRS expressly told the trial court that the Supreme Court "remanded to you . . . to resolve remaining questions regarding enrollment" and DRS would help by "identifying issues and providing information to the court that may be of help in making its decisions." CP 287 and 288, respectively. DRS has no basis to argue now the trial court lacked jurisdiction to decide the remedy issues here.⁹

Moreover, if DRS had *any* authority to support its argument that the remedy issues had to be remanded to DRS instead of the trial court, DRS had to tell the Supreme Court. The Attorney General, representing the State (including DRS), submitted three briefs to the Supreme Court — before review was granted, on the merits, and in support of reconsideration — but none of those briefs requested remand to the

⁹ If the trial court actually had erred in deciding the issues remanded to it, DRS invited it. *Pulich v. Dame*, 99 Wn.App. 558, 565-66, 991 P.2d 712 (2000).

agency instead of the trial court.¹⁰ CP 248-86.

The Supreme Court specifically *remanded the remedy issues to the trial court*. 172 Wn.2d at 301. And DRS cites no authority showing that the Supreme Court *could not* remand the remedy issues to the trial court. Accordingly, the trial court had both authority and a duty to decide the issues raised by the settlement agreement, and it did so.¹¹

II. THE TRIAL COURT GRANTED DRS INTERVENTION AND PERMITTED IT TO ARGUE, BRIEF AND LITIGATE ALL THE MATTERS OF CONCERN TO DRS.

A. DRS Was Permitted to Intervene on All the Matters On Which It Asserted an Interest.

DRS argues that the trial court erred by granting “limited” intervention. DRS Br. at 3, 4, 16, 19, 23, 44. “The extent of intervention rights is subject to case-by-case determination by the trial court,” and thus the trial court may allow intervention as befits the interest of the would-be intervenor. *Marino Property*, 97 Wn.2d at 316. This is a discretionary decision. *Id.*

¹⁰ *Pulich*, 99 Wn.App. at 564-65 (party waived argument that trial court lacked jurisdiction).

¹¹ DRS mentioned “primary jurisdiction” in its objections below. CP 153. The primary jurisdiction doctrine concerns potentially deferring to an agency when both the agency and superior court have *concurrent original jurisdiction* over a matter. *Chaney v. Fetterly*, 100 Wn.App. 140, 148-51, 995 P.2d 1284 (2000). Deferring to an agency, however, is “not mandatory in any given case, but rather is within the sound discretion of the court[.]” *Id.* at 149 (citation omitted). Here, although DRS mentioned primary jurisdiction in its objections below, CP 97, it never raised this while the merits were being decided before the appeal, nor in the Supreme Court, nor when the remaining issues were remanded, waiting until the complete Settlement Agreement was before the superior court for approval. It was thus quite untimely, as the trial court held. VRP [5/10/13] at 34; CP 512.

DRS admitted that it wanted *limited* intervention: “DRS is not raising a new claim or defense that would justify filing a Complaint or Answer in intervention.” CP 298. DRS said it was not quarreling with retroactive eligibility, i.e., “the state Supreme Court held the defender corporations’ employees are retroactively eligible for PERS membership,” CP 155, and that under the *Dolan* opinion, “PERS membership for some of the employees (or former employees) spans a period of 35 years.” *Id.*; *accord*, DRS Br. at 1.¹² DRS acknowledged that “[t]he parties have proposed a settlement to implement the Court’s ruling concerning retroactive eligibility.” CP 155. Thus, DRS’s interest in intervention was limited to issues it had with the parties’ agreement — some provisions are “inconsistent . . . with Washington statutes” (CP 155) and the common fund attorney fee “appears to violate federal law.” CP 159; CP 195 (some provisions of the agreement “appear to violate the law”).

The trial court therefore granted DRS intervention and allowed DRS to raise and litigate *all* issues it asserted an interest in — to “argue, brief and litigate those portions of the agreement . . . that they (DRS) disagree with . . . in terms of what they [DRS] believe the agreement conflicts with their Department of Retirement Systems protocols and

¹² DRS also says (Br. at 21): “*At this point, . . . the Department’s interest is not in the merits of pension eligibility issue decided by the Supreme Court,*” although DRS grumbled that “the parties [skirted] the administrative process. . . .” [Emphasis added.]

requirements.” VRP [5/10/13] at 35, CP 312-13.¹³ And the trial court rejected DRS’s “global” contentions that (1) DRS, not the court, should decide whether the agreement complied with the law [VRP 5/10/13] at 35-36 (quoted *supra*, pp. 9-10) and (2) that the court could not approve the settlement unless DRS “assented” to it. VRP [5/10/13] at 34; see also VRP [6/7/13] at 63-64; VRP [6/21/13] at 14-15.¹⁴ And, as discussed below (pp. 33-49), the trial court’s also rejected DRS’s specific objections.

B. Assuming *Arguendo* That “Full Party Status” Meant That DRS Could Prevent the Parties From Settling and the Trial Court Could Not Approve the Settlement Without the Agency’s Consent, the Trial Court Did Not Abuse Its Discretion in Deciding That DRS’s Request For Such Status Was Untimely.

DRS contends that if it had been granted “full party” status, its “consent” would have been required to approve any settlement or for the

¹³ Although the trial court granted intervention to DRS, DRS argues repeatedly that it was “not a party.” DRS Br. at 4, 17, 34, 38. This argument is specious. Intervenors are parties. *Fairfield v. Binnian*, 13 Wash. 1, 5, 42 P.632 (1895); *State v. 119 Vote No ! Committee*, 135 Wn.2d 618, 622-23 and n. 5, 957 P.2d 691 (1998).

Moreover, even if DRS had not intervened, it would have been bound by the trial court’s decision because of its participation in the case and its failure to intervene when it had complete knowledge of the case and knew that the proceeding affected it. *Garcia v. Wilson*, 63 Wn.App. 516, 520-21, 820 P.2d 964 (1991). Indeed, DRS acknowledged below that if it did not intervene there was a substantial risk that it would be bound by the trial court’s approval of the settlement. CP 99, 103.

¹⁴ DRS contends that the settlement violated Civil Rule 2A because it had not agreed in writing to the settlement. DRS Br. at 34-35. But CR 2A is irrelevant because, as the trial court explained, DRS was not bound by the settlement agreement, but rather, after DRS intervened, it was bound by the court’s order on the statutory issues, when the court decided the merits of DRS’s objections in the course of approving the settlement. VRP [5/10/13] at 35, quoted *supra*, pp. 9-10. Moreover, DRS agreed below that if the parties had litigated the remedy issues, it would have simply followed the trial court’s decisions on these issues. CP 165: “If the case had been litigated to its end, DRS would have simply implemented the Court’s final coverage determination under the applicable pension statutes and rules.”

trial court to make any decision on the issues raised by DRS. DRS Br. at 15-2, 22, 23, 43. DRS asserts the trial court erred in limiting its intervention to the issues on which DRS had objections. That was no error,¹⁵ but even it were, DRS's untimeliness in seeking intervention would bar it from complaining about this limitation.

The first requirement for "intervention" under either CR 24(a) and (b) is a "timely application." *Chemical Bank v. WPPS*, 102 Wn.2d 874, 886-889, 691 P.2d 524 (1984); *Westerman v. Cary*, 125 Wn.2d 277, 303-04, 892 P.2d 1067 (1994). "Timeliness is a critical requirement of CR 24(a)." *Kreidler*, 111 Wn.2d at 832-33. Whether an application is timely is a factual decision for the Court, taking into account "all circumstances . . . including the matter of prior notice and the circumstances contributing to the delay in moving to intervene." *Martin v. Pickering*, 85 Wn.2d 241, 244, 533 P.2d 386 (1975); *Kreidler*, 111 Wn.2d at 833.

DRS did not seek to intervene until *after* the parties had negotiated a comprehensive settlement agreement. The trial court found that DRS's

¹⁵ DRS's argument on "full party" status is wrong for many reasons, but it also is based on the faulty assumption that if DRS were a "full party" the plaintiff class and King County could not have settled without DRS's consent. DRS Br. 2. DRS's assumption is faulty because even if DRS had been a "full party," the plaintiff class and King County could have still settled their differences, but conditioned their settlement on the court deciding the statutory issues that affected DRS. DRS would then have the opportunity to litigate these issues. If the court agreed with the plaintiff class and King County, then there would be a settlement and if it did not, then there would be no settlement. This is basically what occurred here. DRS had a full and fair opportunity to argue, brief and litigate the issues that concerned it. CP 502 FF 2. See *Bird v. Best Plumbing Group LLC*, 175 Wn.2d 756, 773-74, 287 P.3d 551 (2012) ("Due process is satisfied by notice and an opportunity to intervene in the underlying action.").

request to intervene at that time with “full party” status was “untimely.” CP 312, VRP [5/10/13] at 34. The trial court found that waiting to intervene until after a settlement agreement had been reached and submitted to the court for preliminary approval was way too late if DRS wanted something more than a chance to object to the settlement terms (VRP [5/10/13] at 34):

I can't find it to be a timely intervention, especially for purposes of arguing a [CR 2A] type we-didn't-sign-so-we're-not-bound-by-it. I think that the minimum time to have intervened if you were going to argue as far as a [CR 2A] type status that if we don't sign, we're not bound, would have been immediately after the Supreme Court decision was announced. Because at that point in time, the Supreme Court had upheld my decision that they had a right to a pension, and Department of Retirement Systems would have been put on notice that they would automatically be involved in determining those details. But they waited until they actually saw the agreement that was reached between the two parties before they intervened, and I think they should have intervened long before that. To now come back and say after you've done all this hard work, we're now going to intervene and say we have the right not to be bound by it and to veto it, I don't think that's what the law requires, nor is it something I'm going to allow. [Court reporter's reference to rule and punctuation corrected.]

See also VRP [6/7/13] at 63-64, VRP [6/21/13] at 14-15.

The trial court's factual decision that DRS's motion to intervene with “full party” status was untimely is reviewed under the abuse of discretion standard. *Kreidler*, 111 Wn.2d at 832. And “the reviewing court will find an abuse of discretion only when no reasonable person would take the position adopted by the trial court.” *Id.*

The facts show that DRS was long aware that its interests as the

PERS administrator were implicated in the *Dolan* lawsuit. (See pp. 3-10, *supra* [Statement of Case]; CP 503 FF 6; CP 504 FF 9 and 10; CP 168-69, 187-88, 221-222, 224-25, 246, 451-52.) The trial court did not abuse its discretion in rejecting DRS's argument that the trial court was required to allow DRS to intervene as a "full party." There was no harm to DRS in any event, because DRS had a full and fair opportunity to be heard on each of its concerns, as stated in Argument II.

III. DRS FAILS TO ASSIGN ERROR TO THE TRIAL COURT'S FINDINGS, FAILS TO EXPLAIN WHY THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND FAILS TO EXPLAIN WITH ARGUMENT AND CITATION TO AUTHORITY HOW THE TRIAL COURT ERRED.

A. The Trial Court's Findings and Conclusions Were Required by CR 23(e).

DRS does not assign error to the trial court's findings and conclusions, nor does it explain why they are wrong. It tries to excuse this by arguing that the trial court's findings of fact and conclusions of law "are superfluous" because they are not required by CR 52. DRS Br. 40; see also pp. 38-39. This is incorrect. CR 52(a)(2)(c) provides that the required findings are not limited to trials before the court, but also include any "other decision where findings are required . . . by another rule."

Cases interpreting CR 23 require findings in class actions so that the appellate court may review whether the trial court abused its discretion. *Miller v. Farmer Bros. Co.*, 115 Wn.App. 815, 822-23, 64 P.3d 49 (2003) (reversing trial court class certification because the

findings were insufficient for review); *Pickett v. Holland Am. Line*, 145 Wn.3d 178, 35 P.2d 351 (2001) (discussing the standard of review and why the trial court did not abuse its discretion in approving the settlement and rejecting objections). Both the majority and dissent in *Pickett* discuss the trial court's findings in deciding whether the trial court erred in approving the settlement. 145 Wn.2d at 185-86 (majority) and at 202-03, 206-07 (dissent).

Pickett also notes that on the settlement issues “federal cases interpreting the analogous federal provision [FRCP 23] are highly persuasive.” 145 Wn.2d at 188. Under federal cases interpreting FRCP 23, findings are required any time a court approves a settlement, approves attorneys fees, and rejects or sustains an objection in a class action. *Mandujaro v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 836 (9th Cir. 1976); *accord, Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977): (“The Court should examine the settlement in light of the objections and set forth a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response.”); *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1287, 1290 (10th Cir. 2008) (reversing trial court because the order approving the settlement merely overruled the objections without entering any findings that could be reviewed by the appellate court to determine whether the trial court abused its discretion in

rejecting the objections).¹⁶

In deciding whether to approve a class action settlement, the trial court does not decide the underlying merits of the compromised claims and defenses, but it may consider the “probabilities of success” on the compromised claims. *Pickett*, 145 Wn.2d at 190. DRS contends that the trial court’s entry of the findings and conclusions that set forth the basis for overruling DRS’s objections was improper under *Pickett* because the court addressed the “merits” of its objections. DRS Br. at 39.

Here, DRS conceded that it had no claims or defenses. CP 298 (quoted *supra* at 26). DRS only had some objections to the settlement. CP 153-66, 194-96. And the trial court is required to address the merits of objections, and enter findings of fact and conclusions of law setting forth the basis for its rejecting the objections. *Mandujuro*, 541 F.2d at 836; *Cotton v. Hinton*, 559 F.2d at 1331; *New England Health Care Employees Pension Fund*, 512 F.3d at 1287, 1290; *Manual for Complex Litigation*,

¹⁶ *The Manual for Complex Litigation* (Federal Judicial Center, 4th Ed. 2011) Section 21.635, explains why Rule 23 requires findings when a court approves or disapproves a settlement:

Even if there are no or few objections or adverse appearances before or at the fairness hearing, the judge must ensure that there is sufficient record as to the basis and justification for the settlement. Rule 23 and good practice both require specific findings as to how the settlement meets or fails to meet the statutory requirements. The record and findings must demonstrate to a reviewing court that the judge has made the requisite inquiry and has considered the diverse interests and the requisite factors in determining the settlement’s fairness, reasonableness, and adequacy.

§21.65. Thus, the trial court was required to issue findings of fact and conclusions addressing the merits of DRS's objections.¹⁷

B. DRS Does Not Assign Error to the Trial Court's Findings, Nor Does It Present Any Argument Supported by Legal Authority to Explain Why The Trial Court Erred In Rejecting DRS's Objections to the Settlement, and Therefore DRS Waived Its Arguments Against the Trial Court's Settlement Approval.

DRS Does Not Assign Error to Any Findings. DRS does not assign error to any of the trial court's findings nor does it present any argument why the findings are not supported by substantial evidence.¹⁸ The findings are therefore verities on appeal. *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995); *Johnson v. DSHS*, 91 Wn.App. 737, 741, n. 1, 959 P.2d 1166 (1998) (because the State did not assign error to the trial court's findings of fact, they are verities on appeal); *In the Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998) (even if the appellant assigns

¹⁷ DRS cites *Green v. City of Wenatchee*, 148 Wn.App. 351, 365-66, 199 P.3d 1029 (2009), for the proposition that findings approving settlement are not needed in a non-class-action lawsuit. DRS Br. at 40-41. That is sometimes true for non-class actions but irrelevant because this is a class action. The trial court error in *Green* was that it found that the insurer was bound by the agreed findings of fact and conclusions of law without first giving the insurer the opportunity to contest them. Here, the trial court gave DRS a full and fair opportunity to argue, brief and litigate its concerns *before* the court approved the settlement and entered findings overruling DRS's objections. In fact, the settlement hearing procedure followed by the trial court here is quite analogous to the process that the court in *Green* said the trial court should follow. The insurer was to be given an opportunity to be heard on whether the settlement was reasonable before the trial court decided whether to accept the parties' settlement.

¹⁸ DRS's failure to assign error to any of the findings is deliberate; it outright rejects the trial court's authority to enter them: "[t]he pension system issues have never been litigated, so the findings, conclusions and order should not have been entered" because the issues are not within the superior court's "original jurisdiction," DRS Br. at 42. (See pp. 17-25, *supra*, for discussion of this argument.)

error to particular findings, these findings are verities on appeal if the appellant does not present argument to the court why those specific findings of fact are not supported by the evidence and does not cite to the record to support that argument).

Moreover, DRS must explain in its argument in its opening brief why it believes the trial court erred in its legal rulings and conclusions and to support these contentions with specific argument and citation to authority. If it does not, any argument is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 528 P.2d 549 (1992); *McKee v. American Home Products*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *Bryant v. Palmer Cooking Coal Co.*, 86 Wn.App. 204, 216, 936 P.2d 1163 (1997). It is too late to do so in a reply brief. *Cowiche Canyon*, 118 Wn.2d at 809; *Yakima County Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993).¹⁹

In its Statement of the Case DRS mentions a few aspects of the settlement which it disliked. DRS Br. at 11-15. DRS also notes that some findings (“2, 6, 11, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49 and 50”) “related to Department responsibilities for public pensions,” as well as “conclusions of law. . . 5, 6, 7, 8, 10 and 11 and subparts of the order, 2, 4, 6 and 9.” DRS Br. at 41. But DRS does

¹⁹ Respondents therefore object to any DRS effort to use its reply to argue there are errors in any of these findings and conclusions.

not assign error to any of the listed findings or conclusions, nor does it explain why or how the trial court supposedly erred in making these findings and rulings.²⁰ It just says these findings and conclusions are “related to Department responsibilities.” *Id.* DRS thereby waived any argument against their accuracy. *Cowiche Canyon*, 118 Wn.2d at 809; *McKee*, 113 Wn.2d at 705; *Bryant*, 86 Wn.App. at 216.

DRS Discusses Only One Finding, No. 43. The one finding DRS actually quarrels with (albeit without an argument as to why it was wrong and without citation to authority or to the record) is finding number 43. It mischaracterizes the finding as stating that “the Department *agreed* that it would not charge interest.” Br. at 41 (emphasis added). But Finding 43 actually states that (CP 510):

When King County discussed the settlement provisions regarding interest with DRS, the DRS representatives informed King County that DRS *did not plan* to charge King County interest on the retroactive contributions because this was its normal practice in situations like this. [Emphasis added.]

King County never said that DRS had “agreed” that it would not charge interest; rather, DRS told King County that it did not “plan” on charging interest because that was its normal practice in situations such as

²⁰ DRS’s listing of findings on matters in which DRS says it has “responsibilities,” without assigning error to any of them, is evidently related to DRS’ position that the trial court had no jurisdiction to decide matters concerning “pension administration.” DRS Br. at 42-43.

this one.²¹ CP 222; VRP [6/7/13] at 41-42; see also CP 527, FF 36.

DRS's plan changed only after DRS learned that King County intended to agree to the payment mechanism for the common fund fee provided in *Bowles v. DRS*, *supra*, 121 Wn.2d at 70-75, because the parties disagreed with DRS's view that *Bowles* was wrongly decided. CP 502, FF 44; CP 218, 246-47; see also *supra* pp. 6-8 and *infra* pp. 47-49.

PERS Members' Plan 3 Option. DRS complains in its Statement of the Case that the settlement "eliminate[s]" the option that employees have to choose between PERS Plan 2 and 3. DRS Br. at 14-15. DRS made the same mistake below. CP 160-61. The trial court found that DRS misunderstood the agreement because neither the parties nor the trial court intended to eliminate the statutory option. The trial court accordingly overruled DRS's objection because the statutory option is not being eliminated (CP 512, FF 50):

DRS raises an objection that the Settlement Agreement removes the option that class members have under state law of choosing either PERS Plan 2 or 3. This is incorrect. The Settlement Agreement is merely following the Court's order of March 2, 2012 that enrolls everyone in PERS 2 except those already in PERS 1 or 3. As provided in the Court's order, the class members will be allowed to choose between PERS Plan 2 and 3 at a later date set by the Court. See Finding 9.

²¹ The factual point in this finding arose because of DRS's erroneous assertions to the trial court that the parties had "not consulted" DRS about the settlement and therefore its motion to intervene was timely. (See CP 234 discussing these false assertions.) In response, King County submitted declarations explaining that it had in fact consulted extensively with DRS on several occasions about the settlement. CP 221-22; see also CP 218, 246-47.

DRS Can Review the Accuracy of the Correction Reports. DRS also mistakenly complains that the agreement “provides that retroactive service credit and contributions are determined by the parties without retaining the Department’s right to review and approve the correctness of the calculations of the parties.” DRS Br. at 11. The agreement sets forth in paragraphs 85-89 the employment information that King County is to transmit to DRS for determining the amount of contributions and service credit. This is the normal information provided by King County or any employer when it submits corrections to DRS. CP 450-53.

The agreement does *not* provide that DRS must accept class members’ employment information without question. Indeed, as it can whenever an employer submits a correction report, DRS can review this information, and if the parties do not agree on how to resolve their differences, the court will decide the questions. CP 512 FF 49.

Interest. DRS also complains that the PERS contributions are to be made without interest. DRS Br. at 12, 41. The trial court determined, however, that DRS had no authority to charge interest in this situation, where the employees were not enrolled by the employer due to a mistake (shared by DRS) that the employees were not eligible for enrollment and no bill was ever sent by DRS for past contributions because the amount was uncertain and unliquidated. CP 509 FF 35 and 36; CP 513, CL 7; WAC 415-114-100-400. Indeed, DRS never sent King County a bill, and

never allowed contributions for class members, because DRS maintained that class members were not eligible for PERS and enrolling them would jeopardize the federal tax-qualified status of the plan. CP 270, 285-86.

Even in the circumstances where DRS has authority to charge interest (unpaid overdue bills), it is discretionary (“may”: RCW 41.50.120 and .125). The trial court thus ruled that for unbilled omitted contributions, it would be an abuse of discretion for DRS to charge interest. This is because DRS never charged interest in the past when employers made enrollment mistakes and DRS actively argued for years that the public defenders could not be enrolled in PERS and told King County not to make contributions. CP 509-10 FF 36, 41-44; CP 513, CL 8.²²

Indeed, the State told the Supreme Court that it “supports King County on the merits of the case” and it adopted King County’s arguments. CP 264. The State told the Supreme Court (along with the parties here) that enrolling the public defenders would have “potentially catastrophic” consequences to the “state, local government, and to PERS

²² DRS did not charge interest for retroactive contributions in two other class actions where King County made mistakes in not enrolling class members in PERS. CP 222, 446-47, 456-57, 718. Nor did it charge interest for the three seriously ill class members that were enrolled and contributions made under the trial court’s orders here. CP 246, 451-52. DRS did not deny that it had never charged interest when an employer makes a mistake in not enrolling an employee.

members” because it would jeopardize the tax status of the plan.²³

CP 286. It said the “negative consequences” of enrolling the public defenders in PERS “cannot be overstated.” CP 270. The State told the Supreme Court that “accepting employer and employee contributions” would be extremely damaging to PERS. CP 270.

Moreover, after the *Dolan* decision, the State said that public defenders’ late enrollment in PERS was not due to any error by King County. According to the State, their late enrollment was due to an error by the Supreme Court — the “majority neither correctly applies the PERS statute defining a ‘public employer’ for PERS, nor the PERS statute and regulation defining a ‘public employee’ for purposes of PERS.” CP 278.

The State told the Supreme Court that the majority had “applied ad hoc factors that substantially unsettle the law” (CP 278), and had created “unplanned and unintended financial obligations,” that were completely unpredictable, *e.g.*, “under the *Dolan* decision King County must now pay the employer and employee contribution for all class members” (CP 284 n. 6) that the State previously said it could not accept because the employees were not eligible. CP 270.

Payment of interest is appropriate when one is aware of an

²³ The State’s argument on tax qualifications was pure rhetoric — the public defenders are now enrolled in PERS, and PERS has not and will not lose its tax-qualified status. DRS had the federal tax law completely backwards. To maintain tax-qualified status DRS is required to enroll the excluded eligible employees in PERS and to provide them with the benefit accruals (service credit) for all years that they were excluded. IRS Revenue Procedure 2013-12, §101 and Appendix A §.05(1).

obligation, but does not fulfill the obligation in a timely manner, as provided in DRS's regulation. WAC 415-114-100 *et seq.* It allows DRS to charge interest on unpaid *overdue bills* for contributions. Under the statutes, DRS has statutory "authority to assess interest on the overdue unpaid balance of a receivable owed to the department." WAC 415-114-100. Under this WAC, the "first calendar day that the receivable is overdue, interest will be charged, based on the due date." WAC 415-114-400. A "receivable" is defined as an "amount owed to DRS, where there is a legal obligation to pay DRS" and "overdue receivable" is defined as a "receivable with an unpaid balance at the close of business three days after the due date [.]" WAC 415-114-400(2) and (4).

Here, King County made a mistake in not enrolling the class members in PERS, a mistake shared (and encouraged) by DRS. There was no "overdue receivable" to DRS, nor an unpaid bill. The County was not aware of any obligation to DRS to enroll class members in PERS. On the contrary, DRS affirmatively told King County (and the courts) that not only did King County not have an obligation to enroll class members, but it would be a violation of the PERS statutes and regulations and federal tax law to enroll them and DRS would not accept contributions for them. CP 168, 252-57, 263-71, 277-78, 283-86.

Accordingly, the trial court found, based on the facts and circumstances here, that it would be arbitrary and capricious and an abuse

of discretion for DRS to charge interest on King County's PERS contributions arising because of the *Dolan* decision. CP 509-10; CP 513 CL 8. The trial court also found there was "no evidence before the Court that PERS members or employers would be negatively affected by the Settlement Agreement's provision that PERS contributions will be made without interest." CP 509, FF 37.²⁴

The trial court also found that DRS "exaggerates the interest at issue here." CP 509 FF 38; CP 27-29, 457-58. DRS says it "estimate[s]" the interest on past contributions "to be up to \$100,000,000," DRS Br. at 2. This number is greatly exaggerated and does not represent a loss in the funds needed to pay retirement benefits. DRS appears to have taken the amount of contributions to be paid by King County (\$30.3 million) and multiplied by three for its interest "calculation," to account for the fact that benefits are funded one quarter (25%) by contributions and three quarters (75%) by investment gains. CP 187 ¶10, 188 ¶13.²⁵

DRS's estimation method was far off. A pension valuation

²⁴ At the settlement approval hearing, DRS's lawyer said he was making an "offer of proof" about the possible effect on contribution rates for employers and employees. VRP [6/7/13] at 23-24. But an "offer of proof" was improper because the trial court had not prohibited DRS from submitting evidence on anything. ER 103; *see, e.g., Aubin v. Barton*, 123 Wn.App. 592, 605-06, 98 P.3d 126 (2004) (illustrating the proper use of an offer of proof). If DRS had evidence to support its argument, it was supposed to submit it (CP 502, FF 27), not make a factual argument without any evidence.

²⁵ King County pointed out that interest, not investment gains, when calculated by the method in the WAC (even though it does not apply here, *see pp. 37-40, supra*), would actually come to about \$35 million, not \$90-100 million. CP 456-58.

expert²⁶ explained that DRS's estimate disregarded the facts concerning contributions for class members. About 600 class members will have contributions made by King County (CP 505 FF 12). Their average age is 48.6 years, with a post-retirement average life expectancy of 21.75 years, making the median benefit checks due in over 27 years. CP 328. DRS will have many years to receive further contributions from class members and their employers and many years to invest both the contributions King County is making now and the future contributions to be made for class members. *Id.*

Moreover, when the more accurate estimate of \$35 million in unbilled interest is considered, this amount is tiny compared to the size of the overfunded PERS 2 fund. It is about one-sixth of one percent of the \$20.7 billion PERS 2 fund, well within the range of daily investment gains and losses. CP 328. Since the theoretical amount of interest is comparatively so low, and the PERS 2 fund is \$2 billion overfunded, the settlement cannot have any material effect on the funding of PERS 2.²⁷ CP 328-29, CP 510 FF 39, 40.

Statute of Limitations. DRS complains that it had "no opportunity

²⁶ Steven Kessler, CPA, is a recognized expert in pension valuation. CP 326-27. See also *Aubin v. Barton*, *supra*, 123 Wn.App. at 609-10.

²⁷ DRS tries to obfuscate on this point by saying the PERS 1 fund is underfunded. CP 188 ¶14. But class members are being enrolled in PERS 2, which is overfunded. The settlement agreement provides that any class members not previously enrolled in PERS 1 (a handful at most) will be enrolled in PERS 2, CP 504 FF 9, or they can choose to be in PERS 3.

to assert the statute of limitations defense to retroactive claims.” DRS Br. at 24. DRS, however, did not raise any concerns about the statute of limitations below, nor did not raise it as a defense (and it expressly said it did not have any defense, CP 298). The trial court never restricted DRS on what concerns it could raise below. VRP [5/10/13] at 34-35; CP 312-13. Therefore, DRS waived any argument about this portion of the agreement.²⁸ *Linblad v. Boeing Co.*, 108 Wn.App. 198, 207, 31 P.3d 1 (2001) (“we will not review an issue, theory, argument or claim of error not presented at the trial court level.”); *Pulich*, 99 Wn.App. at 564-65 (a party cannot raise issue that was waived in the trial court).

Moreover, the statute of limitations is not pertinent to DRS here, because it has a statutory duty “at any time to correct errors” in DRS records that affect a member’s pension. RCW 41.50.130(1); *City of Pasco v. DRS*, 110 Wn.App. 582, 586-91, 412 P.3d 992 (2002); *Serres v. DRS*, 163 Wn.App. 569, 587 and n. 31, 261 P.3d 173 (2011), *review denied*, 173 Wn.2d 1014, 222 P.3d 341 (2012). And neither the “statute of limitations” nor “laches” affect this duty. RCW 41.50.130(3). Therefore, in the *City of Pasco* case DRS corrected an enrollment error made by the employer 20

²⁸ In 2006, the parties agreed that the statute of limitations was three years as set forth in the class definition. The issue was when does the limitations period accrue (begin to run) for a PERS pension claim. King County argued that it accrued paycheck to paycheck. CP 669. Plaintiffs argued that it accrued at retirement or when the employee left service. CP 705-10, citing *Bowles*, 121 Wn.2d at 78-9. There, our Supreme Court ruled that for “actions alleging a breach of state employee pension rights . . . the limitations period begins to run upon the employee’s retirement.” *Id.* The trial court deferred ruling on the issue (CP 682) and the parties resolved it in the settlement agreement (CP 50).

years earlier when it affected the member's pension. *See also* CP 718. Here, the class members are now PERS members pursuant to the *Dolan* opinion and the trial court's injunction. CP 750. DRS records need to be corrected because of errors made by the employer King County in not enrolling and reporting the class members. DRS accordingly has a statutory duty to correct these enrollment errors that is completely unaffected by the statute of limitations.

Attorney Fees Paid by Class. DRS, in its Statement of the Case, not its argument, criticizes the repayment mechanism for the common fund attorney fee approved by the trial court and paid by members of the class, but it does not explain how or why the trial court supposedly erred. DRS Br. at 13-14. The common fund fee in the agreement is based on the Supreme Court's explanation and ruling in *Bowles v. DRS, supra*, 121 Wn.2d at 70-74.

Under the settlement agreement, the employee contributions used to pay the common fund fee will be repaid to DRS through deductions from the class members' future retirement checks. CP 507 FF 27; CP 65-66. DRS only needs to figure out once, at the time of each class member's retirement, the proper percentage to deduct from their future retirement checks and then apply that percentage to all checks. *Id.* Class members can also choose to pay their pro rata share of the fee at once by rolling

over funds in an existing retirement account. CP 508 FF 24; CP 66-67.²⁹

In its Statement of the Case, DRS makes the same blanket assertions against the repayment mechanism of the common fund fee that it made in the trial court, which the trial court rejected in detailed findings and conclusions. For example, DRS contends that there is “no provision for interest” on the employee contributions that will be used to pay the common fund fee and “no assurance that the pension fund will be fully reimbursed.” DRS Br. at 13. But the trial court expressly found that the “repayment mechanism and the deduction percentage . . . are reasonable and sufficient to assure DRS is repaid with interest by the class for the employee PERS contributions used to pay the common fund attorney fee.” CP 508 FF 28; CP 513 CL 5. DRS failed to provide any argument or authority that the trial court erred. Indeed, CPA Steven Kessler explained that the class members will pay interest on the contributions because such interest is inherent in the present value calculation used to determine each class member’s pro rata share of the recovery and the present value calculation also assures DRS will receive all of the contributions plus interest. CP 329-39.

DRS next maintains in its Statement of the Case that the “attorney

²⁹ No class member objected to paying their share of the common fund fee and many class members wrote to the trial court supporting the fee. CP 525. DRS has no standing to challenge the fee itself because the class members, not DRS, are paying the fee out of the recovery. *Serres v. DRS*, 163 Wn.App. at 588-89.

fee provision runs afoul of state and federal law” because a common fund fee “requires that fees be paid out of funds belonging to class members, and not out of undifferentiated trust funds[.]” DRS Br. at 13. The trial court rejected this argument. CP 505 FF 33. DRS’s argument that the employee contributions are not “funds belonging to class members” is directly contrary to two Supreme Court decisions — *Bowles*, 121 Wn.2d at 75; *State ex rel. State Ret. Bd. v. Yelle*, 31 Wn.2d 87, 111-13, 201 P.2d 172 (1948).

In *Bowles* our Supreme Court held that “employees contributions [to the retirement system] are not public funds” and are instead employee funds of a “proprietary nature” that can be used to pay a common fund fee. 121 Wn.2d at 75. In *Yelle*, cited by *Bowles*, our Supreme Court decided whether employees contributions in the state employee’s retirement system are public funds, and the Supreme Court held that the employee contributions and interest in the employees’ individual accounts “are not *state funds*.” *Yelle*, 31 Wn.2d 87 at 111 (Court’s emphasis). It is therefore baseless for DRS to argue that the employee contributions used to pay the common fund fee are “undifferentiated trust funds” rather than “funds belonging to the class” that can be used to pay the common fund fee. DRS BR. at 13.

In its Statement of the Case DRS also complains that it has the burden of implementing the repayment procedure for the common fund

fee. DRS Br. at 13. The trial court found, however, that “[t]he small administrative burden on DRS does not penalize or harm DRS in any significant way.” CP 526. DRS does make any argument or cite any authority that shows the trial court erred. Indeed, DRS is the *administrator* of the retirement system, which in 2011 included more than 480,000 members and about \$68 billion in plan assets. CP 329, 347. Here, as previously explained, DRS only needs to figure out once the proper percentage to deduct from class members’ future retirement checks and then apply that same percentage to all checks. CP 65-66; see *supra* p. 44. The very small administrative burden placed on DRS is not a basis to reject the settlement, particularly since the agency refused to tell King County to enroll the class members and argued against their enrollment for years (*supra* at 38-39).

Finally, the trial court’s undisputed finding is that DRS only brought up charging King County interest on the omitted contributions after it learned that King County agreed to the attorney fee repayment mechanism as part of the settlement. CP 510 FF 44; pp. 6-8, *supra*. The undisputed evidence in the record is that DRS is strongly opposed to lawyers ever receiving common fund fee awards as set forth in *Bowles* because common fund fees provide attorneys an economic incentive to obtain recoveries for classes. CP 359-60.

DRS’s desire to charge King County interest, arising only after it

learned King County agreed to the common fund fee, is completely contrary to Washington public policy. As our Supreme Court said in *Bowles*, a common fund fee “further[s] important policy interests” because plaintiffs receive “greater access to the judicial system” when they are able to obtain counsel and “[l]ittle good comes from a system where justice is available only to those who can afford its price.” 121 Wn.2d at 71.³⁰ Washington “state policy” thus favors class actions for “efficiency, deterrence, and access to justice.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 851-57, 161 P.3d 1000 (2007),³¹ citing *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982).

DRS is opposed, however, to this public policy and the economic incentive provided by common fund fees because the fees “make class actions against DRS possible that would otherwise not occur” by permitting employees to find representation. CP 360. The undisputed evidence is that it would “not be economically feasible to do this type of work” due to the high financial risk and uncertainty — *i.e.*, bring a case

³⁰ Consistent with *Bowles*, the United States Supreme Court explained many years ago that contingent fees in class actions, which is what a common fund fee represents, provides “economic reasons” for “vindicating the rights of individuals who might otherwise not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.” *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166 (1980). “[P]laintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceed on a contingent-fee basis. This, of course, is a central concept of Rule 23.” *Id.* at 338 n. 9.

³¹ *Scott* was later overruled on another ground -- federal preemption. *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

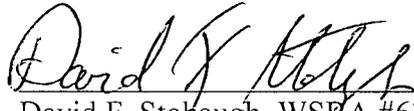
such as *Dolan* — without a common fund fee. CP 318; CP 360. The trial court found that the “*Dolan* litigation that class counsel undertook is high-risk litigation at best” as shown by the Supreme Court’s 5-4 decision in favor of the plaintiffs — if just one justice in the majority had joined the dissent, class counsel would not only have received nothing for the years of representing the class here, but they would have also lost years of time and substantial expenses invested in the case. CP 507 FF 21-23.

DRS’s argument against the common fund fee repayment mechanism is thus really an argument against any common fund fee, which is couched here in terms of discussing the repayment mechanism. DRS’s position is contrary to *Bowles* and the public policy behind common fund fees and class actions.

CONCLUSION

This action commenced back in 2006. DRS opposed enrolling the class members and argued against the County making contributions on their behalf. The parties settled the matter after extensive litigation, including Supreme Court review. DRS had a full and fair opportunity to be heard, and the trial court rejected its objections to the settlement. The trial court had the jurisdiction and authority to decide the issues raised by DRS under both the state constitution and the Supreme Court’s *Dolan* mandate. This Court should affirm.

Respectfully submitted this 27th day of January, 2014.



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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs/Respondents,

v.

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

Defendant/Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor/Appellant.

CERTIFICATE OF SERVICE

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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 Monday, January 27, 2014 I emailed and mailed via USPS Regular Mail a copy of the Brief of Respondents – Plaintiff Class and this Certificate of Service to:

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In accordance with the laws of the State of Washington, the original and one copy of the Brief of Respondents – Plaintiff Class and

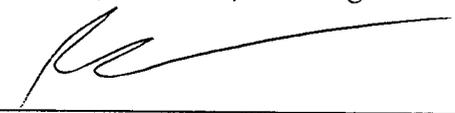
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DIVISION II
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BY _____
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this Certificate of Service were filed via USPS Regular Mail, postmarked on Monday, January 27, 2014 as follows:

Court of Appeals of Washington, Division II
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: Monday, January 27, 2014, at Seattle, Washington.



Monica I. Dragoiu, *Legal Assistant*