

No. 49876-6-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs,

v.

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

Defendant-Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor-Appellant.

REPLY BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REPLY ARGUMENT.....	2
	A. Judicial Review of the Department’s Interest Decision Must Comply with the Administrative Procedures Act and Pension Statutes	2
	1. The Department Does Not Rely on the Interest Statute, RCW 41.50.125, to Support Statutory Appeal and Review Requirements	3
	2. The Court of Appeals’ Previous Decision Did Not Abrogate the Administrative and Judicial Review Procedures for Challenging Agency Action.....	4
	3. The Department’s Intervention Did Not Waive the Right to Challenge the Superior Court’s Failure to Follow the APA and Pension Statutes.....	7
	4. The Priority of Action Doctrine Is Inapplicable in this Context.....	9
	B. The Superior Court Erred as a Matter of Law by Applying Equity to Review the Department’s Interest Decision in Derogation of Statutes Governing Pensions and Judicial Review of Administrative Orders.....	12
	1. The Superior Court Applied Equitable Principles Contrary to the Rules of Statutory Interpretation.....	12
	2. The Superior Court Applied Equitable Principles in Derogation of Statutory Mandates Providing an Adequate Remedy at Law	14
	C. Equity Does Not Support Shifting Responsibility for the Costs of King County’s Settlement to PERS Employers	

and Employees Who Received No Benefit from the Settlement	16
D. The Superior Court and the County Failed to Identify Any Equitable Principles Supporting Payment of King County’s Settlement Obligations by PERS Employers and Employees	19
1. The Negative Budget Effect of the County’s Settlement Does Not Justify Shifting the County’s Settlement Costs to Other PERS Participants	19
2. Substantial Evidence Demonstrated This Case Was the First Time a Single Employer’s Action Would Cause a General Rate Increase	20
3. The County’s Settlement Costs Are Not the Kind of Costs Socialized in Multi-Employer Pension Plans	21
4. Increases in Contribution Rates Unrelated to this Case Provide No Support for a Further Rate Increase	22
E. The Two Arguments Raised by the Plaintiff Class Are Irrelevant to this Appeal.....	23
III. CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Brundridge v. Fluor Fed. Servs, Inc.</i> , 164 Wn.2d 432, 191 P.3d 879 (2008)	9
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	9
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	11
<i>Dolan v. King County.</i> , 172 Wn.2d 299, 258 P.3d 20 (2011).....	23
<i>Dolan v. King County</i> , 2014 WL 6466710 (Wash. Ct. App., Nov. 18, 2014).....	4
<i>German American Bank of Seattle v. Wright</i> , 85 Wash. 460, 148 P. 769 (1915)	16, 18
<i>In re Marriage of Yates</i> , 17 Wn. App. 772, 565 P.2d 825 (1977).....	15
<i>James v. Kitsap County</i> , 154 Wn.2d 574, 115 P.3d 286 (2005).....	5
<i>King County v. City of Seattle</i> , 70 Wn.2d 988, 425 P.2d 887 (1967).....	13, 14
<i>McKart v. United States</i> , 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)	11
<i>Mulhausen v. Bates</i> , 9 Wn.2d 264, 114 P.2d 995 (1941)	13, 14
<i>Rabey v. Labor & Indus.</i> , 101 Wn. App. 390, 3 P.3d 217 (2000).....	15

<i>Shaw v. Dept. of Ret. Sys.</i> , 193 Wn. App. 122, 371 P.3d 106 (2016).....	11, 12
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981).....	10
<i>Skagit Surveyors v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998)	9
<i>Sorenson v. Pyeatt</i> , 158 Wn.2d 523, 146 P.3d 1172 (2006).....	14
<i>Stephanus v. Anderson</i> , 26 Wn. App. 326, 613 P.2d 533, review denied, 94 Wn.2d 1014 (1980).....	22
<i>United States v. Oregon</i> , 657 F.2d 1009 (9 th Cir. 1981)	9
<i>Wells Fargo Bank, N.A. v. Dept. of Revenue</i> , 166 Wn. App. 342, 271 P.3d 268, review denied, 175 Wn.2d 1009 (2012).....	2, 3, 5, 7, 10

Statutes

Laws of 1959, ch. 134.....	13
Laws of 1994, ch. 177, § 1	12
RCW 34.05.467	11
RCW 34.05.510	2, 3, 10
RCW 34.05.534	2, 3
RCW 34.05.542	11
RCW 34.05.550(1).....	11
RCW 34.05.574(1).....	14

RCW 41.40.068 2, 3
RCW 41.40.078 2, 3
RCW 41.50.125 3, 12, 13, 22

Rules

RAP 2.5(a) 9

I. INTRODUCTION

King County agreed to provide decades of retroactive pension service credit to a plaintiff class of County employees in exchange for a release from the employees' claims for past unpaid non-pension employee benefits. The County paid only the contributions owed to the Public Employees Retirement System (PERS) for the retroactive service credit, but refused to pay interest on the retroactive contributions. The interest is crucial to the solvency of the PERS funds because the County's late payment of contributions caused a loss of investment returns that would have financed over seventy percent of the class members' expected pensions. The superior court held non-consenting PERS employers and employees, who received no benefit from the County's settlement, must compensate for most of that loss through increases to their monthly pension contribution rates.

In allowing King County to avoid payment of most of the interest owed, the superior court improperly applied equity in derogation of pension statutes allowing the Director of the Department of Retirement Systems (the Department) to assess an employer the full cost of late pension contributions. The superior court also improperly allowed King County to bypass the Administrative Procedure Act (APA) and pension statutes governing the procedures and review standards for challenges to

the Department's assessments of pension contributions and interest.

The Department's authority to hold King County responsible for interest due on the County's late pension contributions is based on statute and should be affirmed under APA review standards and pension statutes. The superior court's order applying equity in derogation of statutes and requiring other PERS employees and employers to pay most of the interest due on the County's late pension contributions should be reversed.

II. REPLY ARGUMENT

A. **Judicial Review of the Department's Interest Decision Must Comply with the Administrative Procedures Act and Pension Statutes**

The APA "establishes the exclusive means of judicial review of agency action." RCW 34.05.510. This statute, as well as RCW 34.05.534, RCW 41.40.068, and RCW 41.40.078,¹ required King County to follow the statutory process for challenging the Department's order billing the County for interest on late pension contributions. *See* Brief of Appellant Department of Retirement Systems (hereinafter "App. Br."), pp. 19-21. A party challenging an administrative agency decision must comply with the procedural requirements of the APA. *Wells Fargo Bank, N.A. v. Dept. of*

¹ RCW 34.05.534 requires a party challenging agency action to exhaust "all administrative remedies available within the agency whose action is being challenged" before seeking judicial review of agency action. RCW 41.40.068 requires any party aggrieved by any Department decision to complete the Department's administrative hearing process "before he or she appeals to the courts" RCW 41.40.078 mandates judicial review of Department decisions is governed by the APA.

Revenue, 166 Wn. App. 342, 360, 271 P.3d 268, *review denied*, 175 Wn.2d 1009 (2012). Dismissal is required when a party has not followed statutes governing review of agency decisions. *Id.* at 359-62.

The County argues it can avoid the statutory appeal and review requirements for review of the Department's decision. The County's four arguments do not evade the mandatory statutes governing administrative appeals and review standards.

1. The Department Does Not Rely on the Interest Statute, RCW 41.50.125, to Support Statutory Appeal and Review Requirements

King County creates a "straw man" argument by incorrectly claiming the Department relies on RCW 41.50.125 for its argument on statutory appeal and review procedures. *See* Brief of Respondent King County (hereinafter "Resp. Br."), pp. 24-26, 34 n.5. The Department does not argue RCW 41.50.125 controls review processes. *See* App. Br., pp. 19-21. The Department cites RCW 41.50.125 only as authority for the Department to charge a PERS employer interest on late pension contributions to compensate for lost investment income on the late contributions. App. Br., pp. 28-29. The Department's argument regarding review of agency decisions is based on RCW 34.05.510, RCW 34.05.534, RCW 41.40.068 and RCW 41.40.078, which require the County to pursue administrative remedies and then seek judicial review under the standards

prescribed in the APA. App. Br., pp. 19-21.

Although the County ignores the statutes actually relied on by the Department, this Court should not. As a matter of law, the superior court erred by failing to dismiss the County's challenge because the County failed to comply with APA appeal and review procedures.

2. The Court of Appeals' Previous Decision Did Not Abrogate the Administrative and Judicial Review Procedures for Challenging Agency Action

Contrary to King County's argument, the Court of Appeals did not rule in the prior appeal that the superior court could ignore the APA when the County challenges an agency action. *See Dolan v. King County*, 2014 WL 6466710 (Wash. Ct. App., Nov. 18, 2014), at *5-6. This Court merely stated no specific agency action was being challenged at that time, so the APA's appeal and review prerequisites were inapplicable. *Id.*

Following remand, King County and the plaintiff class agreed to a second settlement in which the County gave the class approximately 35 years of retroactive pension service credit in exchange for the class waiving non-pension employment claims asserted against the County (such as medical and leave benefits). CP 417-30, 2167-68. The County gave employment data for the class to the Department after remand, which enabled the Department to calculate the precise amount of the pension contributions owed for the retroactive service credits the County agreed to

provide the class, and the interest owed on those contributions. *See* CP 1631; RP 225-26. Until the Department received this data, it could not determine the amount of contributions and interest owed. *See id.* Based on the Office of the State Actuary’s analysis of this data and consultations with stakeholders, the Department issued administrative orders assessing interest on the County’s approximately \$30 million of late contributions. CP 594-600, 624-28.

The circumstances now differ from those at the time of the Department’s prior appeal to this Court. There has been a specific “agency action” under the APA (the Department’s order assessing interest) and the County has challenged that agency action. In these circumstances, unlike in the prior appeal, the County must follow the statutes governing administrative and judicial review of administrative orders. *See Wells Fargo*, 166 Wn. App. at 360.² The superior court erred by concluding this Court held otherwise in the prior appeal. *See* RP 2171.

In response, King County mistakenly claims the “*Wells Fargo* case has no bearing on the circumstances here because the issue of interest on retroactive contributions did not arise from an ‘agency decision’ by DRS”

² After explaining the Supreme Court’s constitutional analysis in *James v. Kitsap County*, 154 Wn.2d 574, 587-89, 115 P.3d 286 (2005), the *Wells Fargo* court held that “before a challenge to agency action may invoke the superior court’s original appellate jurisdiction, parties must substantially comply with the APA’s procedural requirements.” *Wells Fargo*, 160 Wn. App. at 360.

and because “this lawsuit does not contest any decision by DRS.” Resp. Br., p. 24. These two erroneous statements ignore King County’s direct challenge to the Department’s September 17, 2015 and October 27, 2015 orders charging the County \$64,422,596.55 in interest on late pension contributions. *See* CP 594-600, 624-28. Until those agency orders were issued, the precise amount of interest had not been determined and the Department had not formally charged interest. *See id.*; RP 171-78.

Before the superior court hearing on the interest issues, the County offered the Department orders as exhibits, in addition to several discovery responses provided by the Department supporting those agency orders. *E.g.*, CP 507-08, 594-600, 624-28. The County’s focus at the hearing was on the Department’s allegedly flawed or misinformed process to arrive at those agency orders (although the County did not challenge the portion of the agency orders determining the precise amount the County owed PERS for the retroactive contributions). *E.g.*, CP 481-505; RP 38-46, 70-76, 107-12, 134-39, 155-56, 174-203, 206-20.

The Department’s decision assessing interest against the County in the full amount of \$64,422,596.55 is the core of the present dispute. *See, e.g.*, CP 2169 (the superior court’s final judgment stating the court’s hearing on the interest issues was to resolve “DRS’ payment demand” for interest on the retroactive contributions); Resp. Br., p. 42 (the County

characterizes the court's decision as a finding that "it would be inappropriate to require King County to pay the full amount of interest that DRS sought"). The superior court specifically addressed the Department's interest decision when issuing the final judgment currently on appeal, substituting its judgment for the Director's and reducing the County's interest obligation to \$10.5 million. CP 2158-62, 2169-75. The superior court held the County is responsible to pay a portion of the interest amount *as determined by the Department*, with the remaining amount *as determined by the Department* to be paid by PERS employers and employees. *See id.* The County is incorrect when it says "this lawsuit does not contest any decision made by DRS." Resp. Br., p. 24.

The *Wells Fargo* case is squarely on point because the amount of interest the County owes on the retroactive contributions arose from an agency decision determining that amount and the County's responsibility to pay. As held in *Wells Fargo*, the superior court erred by failing to dismiss the County's challenge to the Department's interest decision because the County failed to follow appellate procedures required by the APA. *See Wells Fargo*, 166 Wn. App. at 359-62.

3. The Department's Intervention Did Not Waive the Right to Challenge the Superior Court's Failure to Follow the APA and Pension Statutes

In addition to adopting King County's misinterpretation of the

Court of Appeals' prior decision, the superior court gave three reasons for concluding the County was not required to comply with the APA's administrative appeal and judicial review procedures. CP 2157-58, 2171-72. Apparently recognizing the flaws in the superior court's reasoning (*see* App. Br., pp. 23-26), the County does not try to defend much of it. Instead, the County asserts the APA is inapplicable for a reason the superior court did not adopt - - *i.e.*, by intervening in the action, the Department waived its right to challenge the County's and the superior court's failure to follow statutory procedures governing review of administrative decisions. Resp. Br., pp. 26-29.

The Department is not challenging the jurisdiction of the superior court to review administrative decisions properly before the court after administrative proceedings. The Department is challenging the County's failure to follow regular procedure by attempting to challenge the administrative decision in a trial-type proceeding directly before the superior court rather than completing the administrative process and then invoking the superior court's appellate jurisdiction as provided in the APA. Furthermore, even if the County could challenge the Department's decision directly in superior court and forgo administrative proceedings, the Department is challenging the superior court's failure to review the Department's interest decision under APA criteria rather than *ad hoc*. App.

Br., pp. 19-32.

The County cites two cases stating an intervenor is vulnerable to a complete adjudication of the issues before the court. Resp. Br., p. 27 (citing *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981); *Chelan County v. Nykreim*, 146 Wn.2d 904, 946 n.8, 52 P.3d 1 (2002)). While it is true courts can adjudicate all issues involving an intervenor, the County does not cite any authority preventing an intervenor from challenging the court's failure to follow applicable law. *Cf. Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (jurisdiction issues may be raised by intervenor). King County points to nothing prohibiting an intervenor from questioning a court's authority to hear the kind of action presented.

4. The Priority of Action Doctrine Is Inapplicable in this Context

The County raises the priority of action doctrine in this appeal, but did not raise it below. *See* CP 1685, 2142-47, 2171-72. Appellate courts ordinarily will not consider issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Regardless, the priority of action doctrine is inapplicable.

The priority of action doctrine applies "only when the cases involved are identical as to subject matter, parties and relief. This identity

must be such that a final adjudication of the case by the court in which it first became pending would, as *res judicata*, be a bar to further proceedings in a court of concurrent jurisdiction.” *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). Concurrent jurisdiction is required for the doctrine to apply. *Id.*

The doctrine is inapplicable here because, under RCW 34.05.510, the superior court does not have concurrent original jurisdiction with an administrative tribunal to review agency action in the first instance. *Wells Fargo*, 166 Wn. App. at 360. Acceptance of the County’s priority of action argument would be inconsistent with *Wells Fargo*. There, as here, dismissal was warranted when a litigant erroneously challenged agency action in superior court without first complying with the procedural requirements of the APA. *Wells Fargo*, 166 Wn. App. at 345-50.

The County also is mistaken that the Department is suggesting the case should be remanded for a “wasteful” administrative proceeding. *See* Resp. Br., pp. 31-32. The Department contends the superior court should have dismissed the County’s challenge to agency action because the County failed to timely seek administrative review of that agency action under the APA. *See, e.g.*, App. Br., pp. 19-21. The Department is not requesting a remand for an administrative proceeding because the time has long passed for the County to have properly initiated an administrative

proceeding challenging the Department's action under the APA. *See* RCW 34.05.542; CP 594-600, 624-28 (notifying King County it had 120 days from the Department's 2015 decision to timely initiate an adjudicative proceeding). The County could have timely requested an administrative proceeding and then requested a stay of that proceeding pending the outcome of the County's efforts to have the superior court review the agency decision in the first instance before exhausting the required administrative review process. *See, e.g.*, RCW 34.05.467 and .550(1).

In regard to whether administrative proceedings followed by judicial review under the APA are "wasteful," the Legislature adopted that procedure when enacting the APA, so it is not for the Court to reject the process. *Wells Fargo*, 166 Wn. App. at 359-60. The accepted rationale for mandating administrative proceedings as a condition precedent to judicial review is this process is *more* efficient than litigating all challenges to administrative decisions directly in superior court. *McKart v. United States*, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997).

Even if this Court disagrees, at the very least it should review the Department's order under the APA's judicial review standards, without regard to the superior court's decision. App. Br., pp. 26-32 (citing *Shaw v.*

Dept. of Ret. Sys., 193 Wn. App. 122, 128, 371 P.3d 106 (2016)). The County offers no rebuttal to the Department’s arguments that its decision should be affirmed under APA judicial review standards. The Department’s interest decision should be affirmed because it was lawful, supported by substantial evidence, and not arbitrary or capricious. App. Br., pp. 26-32.

B. The Superior Court Erred as a Matter of Law by Applying Equity to Review the Department’s Interest Decision in Derogation of Statutes Governing Pensions and Judicial Review of Administrative Orders

1. The Superior Court Applied Equitable Principles Contrary to the Rules of Statutory Interpretation

The superior court abrogated RCW 41.50.125 by creating an equitable exception to reduce the County’s interest obligation to \$10.5 million from \$64.5 million. The court ignored RCW 41.50.125, which allows charging interest on late employer contributions “subject only to explicit statutory provisions to the contrary.” Laws of 1994, ch. 177, § 1 (emphasis added). This statute does not allow courts to apply non-statutory equitable principles to “socialize” interest due on an employer’s late contributions to other PERS employers and employees. App. Br., pp. 32-34.

The County mischaracterizes the Department’s statutory interpretation argument as follows: “DRS believes that because the statute

[RCW 41.50.125] gives the Director discretionary authority to charge interest, superior courts are barred from taking any action that limits DRS's exercise of that discretion." Resp. Br., p. 36. Not true.

The superior court certainly could review the Department's exercise of discretion in charging interest. However, the review must be done under the APA and pension law review standards. Reviewing administrative decisions implementing statutory benefit schemes cannot be done in equity rather than under statutory review standards. The Washington Supreme Court established this fundamental principle of administrative law at the dawn of the modern administrative state when an employer challenged in equity an unemployment compensation assessment and failed to challenge the assessment under statutory procedures. *Mulhausen v. Bates*, 9 Wn.2d 264, 114 P.2d 995 (1941). The Supreme Court rejected equity as a basis for review of administrative decisions. *Id.* at 270-71. This was almost twenty years before Washington State adopted an administrative procedure law standardizing administrative rule making and adjudication processes, and providing procedures and review standards for "appellate" review of administrative decisions. *See* Laws of 1959, ch. 234.

Courts are neither to "read into a statute matters which are not there nor modify a statute by construction." App. Br., p. 33 (quoting *King*

County v. City of Seattle, 70 Wn.2d 988, 991, 425 P.2d 887 (1967)). Contrary to the County's suggestion (Resp. Br., pp. 36-37), statutory interpretation rules are not limited to mandatory statutes. The superior court's usurpation of the Department's discretion is contrary to RCW 34.05.574(1) (a court "shall not itself undertake to exercise the discretion that the legislature has placed in the agency"). King County offers no response to the Department's arguments based on statutes governing administrative decisions on pension funding, and on *Mulhausen's* rejection of equity as a basis for review of administrative decisions in statutory benefit programs.

2. The Superior Court Applied Equitable Principles in Derogation of Statutory Mandates Providing an Adequate Remedy at Law

Prominent among equitable principles is the "fundamental maxim that equity will not intervene where there is an adequate remedy at law." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 543, 146 P.3d 1172 (2006). The superior court erred by applying equity when the County had an adequate remedy at law under the APA that the County chose not to pursue. App. Br., pp. 34-37. The APA provides an adequate remedy at law for the County to challenge the Department's decision holding the County responsible for interest due on the County's late contributions. *Id.*

The County does not argue it lacked an adequate remedy at law

under the APA. *See* Resp. Br., pp. 33-38. Instead, the County cites two cases allegedly supporting application of equity in derogation of statutory mandates. *Id.*, p. 35 (citing *Rabey v. Dept. of Labor & Indus.*, 101 Wn. App. 390, 3 P.3d 217 (2000), and *In re Marriage of Yates*, 17 Wn. App. 772, 565 P.2d 825 (1977)). Both *Rabey* and *Yates* are inapposite because there was no adequate remedy at law available in those cases. App. Br., pp. 36-37.

The County also claims equitable principles are inapplicable because the County is not seeking equitable relief. Resp. Br., pp. 34-35. Yet, the County acknowledges it *is* seeking equitable relief, claiming the superior court's application of equity should be affirmed based on the "evidence that King County presented in support of its request for a fair and equitable remedy." Resp. Br., p. 38. *See also* CP 484-85 (where the County urged the superior court "to exercise its broad equitable authority over the issues at hand" regarding the Department's decision holding the County solely responsible for over \$64 million in interest).

The County fails to establish it lacked an adequate remedy of law, a necessary prerequisite to invoking equity. This failure justifies reversal of the superior court's application of equity.

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C. Equity Does Not Support Shifting Responsibility for the Costs of King County's Settlement to PERS Employers and Employees Who Received No Benefit from the Settlement

Even if this Court were to conclude the APA is inapplicable and equity may supplant pension statutes, no equitable principle supports ordering third parties to pay most of the cost of the County's settlement. This shifting of financial responsibility conflicts with "the well known rule of equity that he who makes a loss possible should suffer the loss." *German American Bank of Seattle v. Wright*, 85 Wash. 460, 471, 148 P. 769 (1915). There is no equity in ordering non-consenting third parties to pay the cost of a settlement between two other litigants. App. Br., pp. 37-39.

The County's response to this argument is threefold. The County first contends the Department's intervention in the litigation cures any inequitable consequence for the approximately 1,100 PERS employers and 118,000 PERS Plan 2 employees (RP 174, 180) whose monthly contribution rates would be increased. Resp. Br., p. 38. Neither the Department nor PERS participants consented to increasing PERS contribution rates to pay for the County's late pension contributions. The very reason for the Department's intervention and this appeal is the Department does *not* consent to charging other PERS participants the costs

of King County's settlement of non-pension benefit claims.

Second, the County argues because the Department did not seek a ruling on the County's statute of limitation defense or otherwise contest the amount of retroactive service credit the County agreed to give the plaintiff class, the Department waived its authority to seek interest. Resp. Br., pp. 39-41. The amount of service credit is not a basis for the Department's arguments seeking reversal of the superior court's decision. The amount of service credit the County agreed to give the class was merely a factor in establishing the amount of interest at issue. The County voluntarily chose to waive its statute of limitations defense and grant decades of retroactive service credit in return for the class releasing non-pension employment claims. CP 417-23. Although the Department ultimately chose not to upset the parties' settlement by raising the County's statute of limitations defense on the County's unwilling behalf, that does not mean the Department waived its right to collect interest due on late contributions for decades of retroactive service credit. *Contra* Resp. Br., p. 40.

Third, the County disingenuously argues the service credit it gave the class arose from the superior court's agreed Order Modifying Permanent Injunction (CP 425-30), rather than a second settlement with the class. Resp. Br., pp. 40-41. The County and the class entered a

stipulation agreeing to the same amount of service credit agreed to in the first settlement vacated by this Court. CP 417-21. As part of that stipulated settlement, the County stipulated to entry of the Order Modifying Permanent Injunction. CP 421, 425. The County's claim that the retroactive service credit the class received was the product of a court order, not a settlement, disregards the order was simply an approval and implementation of the second settlement between the County and the class. The Department was not a party to the County's second settlement. *See* CP 417-21. The Department only agreed to entry of the Order Modifying Permanent Injunction because the Department was expressly permitted to pursue interest on the County's late contributions. CP 425, 428.

The County cannot legitimately deny the County caused lost investment returns by making late contributions for retroactive service credit the County gave the class. The County's attempt to shift the cost of that lost investment income to PERS is improper. Application of "the well known rule of equity that he who makes a loss possible should suffer the loss" dictates the County should pay the full costs of the County's settlement with the Class. *See German American Bank*, 85 Wash. at 471.

D. The Superior Court and the County Failed to Identify Any Equitable Principles Supporting Payment of King County's Settlement Obligations by PERS Employers and Employees

The Department's opening brief rebutted the equitable reasons the superior court and the County raised below to justify shifting the County's settlement costs to PERS participants. App. Br., pp. 40-47. The County's response brief largely ignores the Department's rebuttal. This reply responds to County arguments the Department has not already addressed.

1. The Negative Budget Effect of the County's Settlement Does Not Justify Shifting the County's Settlement Costs to Other PERS Participants

The superior court offered four reasons for shifting the County's settlement costs to PERS participants, but did not identify any equitable principles underlying those reasons. CP 2160-61, 2173-74; *see also* App. Br., pp. 40-42 (addressing the flaws in the superior court's reasoning). The County fails to defend the court's reasoning, with one exception.

The County defends the superior court's ruling that the County should be relieved from paying most of the interest to avoid a negative effect on the County's budget. *See* CP 2174; Resp. Br., p. 48. Neither the court nor the County cites an equitable principle in support of shifting the negative budget effect of the County's settlement to the budgets of other PERS employers' and employees. *See id.* The County still fails to explain why it did not exercise the same budget discipline and prudence on

interest owed as the County exercised to pay the approximately \$30 million in late contributions. *See* App. Br., p. 41. The County also fails to explain why it agreed to a settlement while opposing proposed legislation allowing retroactive pension costs to be paid through adjusting future King County contribution rates (*see* RP 63-64), which would have avoided the allegedly draconian short term budget cuts necessary to make the interest payment. *Id.* The County cites no maxim of equity that supports shifting the negative budget effect of the County's settlement to other PERS employers and employees.

2. Substantial Evidence Demonstrated This Case Was the First Time a Single Employer's Action Would Cause a General Rate Increase

Despite the County's arguments to the contrary, the Department presented undisputed evidence the County's settlement was unprecedented. App. Br., pp. 42-44. The two cases the County previously settled are not comparable. *See* Resp. Br., pp. 44-45 (relying on *Logan v. King County* and *Clark v. King County*).

The County paid approximately \$1.5 million in retroactive contributions in the *Logan* case, and approximately \$4.3 million in contributions in the *Clark* case. CP 1549-51. These cases did not approach the minimum \$7 million liability triggering a rate increase. *See* CP 595-96; RP 170-71, 176-77, 266-67.

Without citation to evidence in the record, the County speculates the \$7 million threshold for a rate increase might have been lower in the late 1990's when those two other cases settled because "total payroll" was lower and there has been inflation. Resp. Br., p. 45. The actual evidence is contrary to the County's speculation that such factors significantly lowered the threshold. *E.g.*, CP 595-96; RP 174, 176-77.

3. The County's Settlement Costs Are Not the Kind of Costs Socialized in Multi-Employer Pension Plans

Just because certain kinds of multi-employer pension costs are socialized, that does not mean the cost of settling the plaintiff class's non-pension employment claims should be socialized among all PERS participants. *Contra* Resp. Br., pp. 43-44. As the County recognizes, socialized costs in multi-employer pension systems are the demographic and compensation differences among the workforces of the various employers in the PERS system. *See id.*; RP 304-06. This case does not involve the cost of demographic or economic assumptions, but rather most of the enrollment cost of over 600 new County employees, along with decades of retroactive service credit for those new employees. The County presented no evidence the costs of a single employer giving decades of retroactive service credit to hundreds of new employees is a kind of cost typically "socialized" in multi-employer pension systems.

The County did not seek socialization of the approximately \$30 million in late contributions for the class. The interest costs of the late contributions should not be socialized for the same reason the approximately \$30 million was not socialized. The late pension contributions the County paid for the retroactive service credit the County gave the class were based on the already socialized pension contribution rates all PERS employers and employees are required to pay. The interest the Department is charging the County for the late contributions is based on the amounts owed under the already socialized pension contribution rates. There is nothing unfair in charging the County interest, which is consistent with legislative intent that a tardy employer, not other PERS participants, should pay interest to compensate for lost investment returns on that employer's late contributions. *See* RCW 41.50.125. Equity follows the law. *Stephanus v. Anderson*, 26 Wn. App. 326, 334, 613 P.2d 533, *review denied*, 94 Wn.2d 1014 (1980).

4. Increases in Contribution Rates Unrelated to this Case Provide No Support for a Further Rate Increase

The County argues the increase in contribution rates that would occur if the \$64.5 million in interest is not paid by the County is relatively slight compared to the total increase in contribution rates occurring in recent years. *Resp. Br.*, pp. 47-48. The County suggests this comparison

justifies a further increase in PERS participants' contribution rates to pay for the County's settlement. *See id.* This argument is akin to saying equity supports increasing the financial burden of innocent third parties because they already are carrying a heavy burden. The County cites no authority supporting this inequitable proposition.

E. The Two Arguments Raised by the Plaintiff Class Are Irrelevant to this Appeal

The plaintiff class raised two issues that are not before this Court. First, the class claims the three year statute of limitations for employees challenging pension issues accrues at the time of retirement, not at the time of the challenged act or omission. Second, the class claims legislation enacted in 2012 did not prospectively reverse the decision in *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011). As the class acknowledges, the superior court did not rule on either of these issues and neither issue is material to the interest issues on appeal, so the Department does not address them in this reply.

III. CONCLUSION

The Department respectfully asks the Court to reverse the superior court and affirm the Department's decision on the amount of interest due from King County for late pension contributions. The superior court erred as a matter of law by disregarding the APA's limits on judicial review of

agency actions. The court further erred as a matter of law by applying equity in derogation of statutory mandates that provide an adequate remedy at law and place responsibility for interest on the employer making late pension contributions, not on other PERS participants. Finally, even if equity applied in this context, the superior court abused its discretion by holding equity supports ordering non-consenting third parties to pay the costs of the County's settlement. For these reasons, the Department's decision billing the County for interest on late pension contributions should be affirmed, and the superior court's decision holding third parties responsible for most of those interest charges should be reversed.

RESPECTFULLY SUBMITTED this 25th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 25th day of September, 2017.

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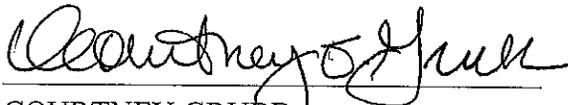
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of September, 2017, at Olympia, WA.


COURTNEY GRUBB

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