

No. 49876-6-II
(Pierce County Superior Court, Cause No. 06-2-04611-6)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

KEVIN DOLAN, and 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 RESPONDENT KING COUNTY

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I. INTRODUCTION & SUMMARY OF ARGUMENT

In the liability phase of this case, the trial court issued an injunction requiring class members to be enrolled in the Public Employees Retirement System (“PERS”). On direct review, the Washington Supreme Court affirmed the injunction and remanded the case to the trial court to determine the remedies necessary to implement the injunction.

Appellant Washington State Department of Retirement Systems (“DRS”) demanded and was granted “full party status” as an intervenor so that it could appear before the trial court and be heard on the remedies issues, including on the issue of whether King County should pay interest to DRS on retroactive retirement contributions. The trial court presided over proceedings involving written and deposition discovery, an evidentiary hearing and pre- and post-hearing briefing in which the parties presented their positions. The trial court then issued its ruling requiring King County to pay \$10.5 million in interest.

Despite having intervened and fully participated in the remedies phase of the case, DRS remarkably now appeals on the grounds that the trial court lacked jurisdiction to decide the interest issue. DRS’s attempted end-run away from the trial court’s decision-making authority should be rejected for three reasons.

First, both the Supreme Court and this Court have previously remanded the remedies issues in this case to the trial court for resolution. In a prior appeal, this Court rejected the argument (which DRS advances again) that a statute had removed the remedies issues from the trial court's broad jurisdiction under Washington's constitution.

Second, once DRS intervened as a "full party," it was subject to having the trial court enter a binding resolution on all issues in the case. *See Chelan Cnty. v. Nykreim*, 146 Wn.2d 904, 946 n. 8, 52 P.3d 1 (2002) (An intervenor is "as much a party to the action as the original parties, and renders himself vulnerable to complete adjudication of the issues in litigation between himself and the adverse party.") (internal citation omitted). Having intervened so that it could be heard on whether King County should have to pay interest on retroactive contributions, DRS cannot now complain that the trial court proceeded to resolve that very issue.

Third, DRS cannot deprive the trial court of jurisdiction with its after-the-fact, ad hoc "administrative decision." Whether King County should pay interest on retroactive contributions was unquestionably one of the remedies issues before the trial court when DRS intervened. The trial court was therefore the first forum in which these same parties contested whether this specific relief should be granted. The priority of action

doctrine vests the trial court with exclusive authority over the interest issue and bars as a matter of law DRS's improper attempt to exercise jurisdiction in a later-commenced administrative proceeding. *See City of Yakima v. Int'l Ass'n of Firefighters, Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1335 (1981).

With the interest issue properly before the trial court for decision, the remaining question in this appeal is whether the trial court abused its discretion by requiring King County to pay \$10.5 million in interest on the retroactive contributions (which King County has paid). The trial court's exercise of its discretion is presumed to be correct, the order was entered after a full and fair process, and it should be affirmed.

The trial court based its decision on an extensive record. Both sides conducted fact and expert witness discovery and submitted pre-hearing briefs and extensive exhibits. The trial court conducted a multi-day evidentiary hearing with both sides submitting testimony from lay and expert witnesses. The trial court received and considered extensive post-hearing briefs from both parties and then issued a written ruling, and subsequently entered a detailed order based on that ruling.

After presiding over this challenging case for more than a decade, the trial court was uniquely situated to decide which remedies were needed to implement its injunction. With the benefit of a fully developed

record and after DRS presented all of its evidence and arguments on behalf of PERS, the trial court engaged in a balancing process in an effort to “recognize the equities presented by both parties in a difficult case[.]” CP 2161. The trial court’s decision is supported by substantial evidence and is well within the broad latitude that trial courts have in fashioning equitable remedies.

Accordingly, the trial court’s informed exercise of its discretion in resolving the interest issue should be affirmed.

II. STATEMENT OF THE CASE

A. **Until The Supreme Court Decided *Dolan I*, DRS, King County And PERS Employers All Agreed That The *Dolan* Class Members Were Not Proper PERS Members.**

This lawsuit was filed against King County in January 2006 on behalf of employees of non-profit corporations that contracted to provide public defender services to King County. CP 715-18. The class members alleged they should have been treated as county employees for purposes of enrollment in PERS. CP 715-18.

Before filing the *Dolan* lawsuit, class counsel contacted DRS about the case, hoping that DRS would provide assistance, as the Oregon PERS Board did in an earlier case involving employees of non-profit government contractors. CP 515-16, ¶ 8. DRS declined class counsel’s request but said that if DRS “discover[ed] some error in [King County’s] reporting,” then

the Department would take “action to correct such error through its administrative process.” CP 187. DRS never initiated any investigative or administrative process and has never determined that King County made a mistake by failing to enroll the class in PERS before the Supreme Court’s decision. RP 231:24-232:2 (May 20, 2016).

The trial court divided the case into two phases: liability and then remedies. Following a bench trial on liability, the trial court determined that King County was an employer of the public defense organizations’ employees for purposes of PERS. CP 767. The court issued an injunction requiring King County to enroll class members in PERS but left open the enrollment date pending further proceedings on remedies. CP 786.

King County sought direct review of the injunction by the Washington Supreme Court. The Attorney General supported King County’s interlocutory appeal with an amicus curiae memorandum outlining the interests of DRS and other State agencies. CP 819-30. The State defended the common practice of governmental bodies contracting with outside organizations and argued that the trial court’s ruling requiring the class members to be enrolled in PERS represented a substantial departure from the then-current understanding of state law governing who was entitled to be enrolled in PERS. CP 828-29. According to the State, this departure threatened negative consequences to many other state

agencies that, like King County, often contracted with individuals, corporations, and organizations to provide various services. CP 828-29.

The Supreme Court affirmed the trial court's injunction in a five-to-four decision, holding that "employees of the agencies are also county employees for the purposes of PERS." *Dolan v. King Cnty.*, 172 Wn.2d 299, 322, 258 P.3d 20, 33 (2011), *as corrected* (Jan. 5, 2012) ("*Dolan I*"). The Supreme Court did not determine *when* the class members became employees of King County. *Id.*

King County filed a motion for reconsideration before the Supreme Court with broad amicus support, including, again, from the State. *See generally* CP 832-962. The State cautioned that "[t]he approach taken by the majority in *Dolan* generates great uncertainty and will lead to litigation over whether employees of a host of yet unidentified independent contractors are eligible for pension and other yet unidentified benefits of public employment." CP 843. Associations representing PERS employers also urged the Supreme Court to reconsider its decision because of its implications for the widespread practice among PERS employers of contracting with private entities. CP 865-67, 872, 952-60.

The Supreme Court denied reconsideration. CP 964. In early 2012, the Supreme Court remanded the case to the trial court "for further

proceedings regarding remedies,” *Dolan I*, 172 Wn.2d at 301, and to implement the injunction requiring PERS enrollment. CP 964.

B. King County Proposed, DRS Supported, And The Legislature Adopted Legislation Rejecting The *Dolan I* Reasoning, Protecting PERS Plans From Similar Claims In The Future.

At King County’s urging and with support from DRS, the Legislature passed EHB 2771 in March 2012, rejecting the Supreme Court’s reasoning in the *Dolan I* decision. CP 971-74; RP 25:9-28:20 (May 20, 2016). The Legislature never intended that employees of government contractors should be eligible for enrollment in public retirement systems. CP 972.

DRS’s Legal Affairs Manager testified in support of the amendments, reiterating DRS’s position that the Supreme Court improperly applied DRS’s regulations governing PERS eligibility for the class members. *See* CP 973; RP 28:8-14. The legislation did not, however, eliminate the requirement that the *Dolan* class members had to be enrolled in PERS. CP 972; RP 28:15-20 (May 20, 2016).

C. After Remand, DRS Asked To Serve As Amicus Curiae For The Trial Court As It Decided Pension-Related Remedies Issues And Was Informed Of Proposed Settlement Terms.

After remand from the Supreme Court in February 2012, the trial court began conducting proceedings on the remedies phase of the case. The plaintiff’s complaint sought a number of remedies, including an order

requiring King County to report class members to DRS and to “make all omitted contributions needed to properly fund” the class members’ pension benefits, including “the omitted employer’s payments plus interest” and “the employee’s portion of the defined contribution plan, plus interest.” CP 5. King County and the class agreed on an order under which then-current employees would be enrolled effective April 16, 2012, and prospective contributions would be paid, but reserved for later decision issues on contributions and service credit for prior work. CP 20.

In March 2012, DRS sent a letter asking the trial court to “consider appointing the Department, through its attorneys, to serve as *amicus curiae* to the court on pension-related issues throughout the resolution of the remaining issues in this case.”¹ DRS recognized that, on remand, the trial court would be resolving “remaining questions regarding enrollment of King County public defenders into [PERS],” including “who pays for lost investment earnings[.]” *Id.* Class counsel objected that if DRS wanted to participate as *amicus curiae*, it must file a motion to which the parties could respond. *Id.* at 43. DRS did not file such a motion. CP 134-35.

On April 4, 2012, DRS wrote to King County and the class acknowledging the parties’ settlement discussions and offering to serve as

¹ Declaration of David F. Stobaugh (May 2, 2013), Attachment at 40-42, as designated in the Designation of Clerk’s Papers by King County filed June 26, 2017 (“KC Desig.”).

a resource on pension issues. CP 134-35. By early August 2012, it appeared that a general settlement framework was in place, though many details remained to be negotiated. CP 235; RP 30:7-31:16 (May 20, 2016).

Between August 2012 and October 2012, King County's Budget Director, Dwight Dively, conferred with DRS representatives regarding the settlement on several occasions, including conversations and written correspondence. RP 31:12-33:22 (May 20, 2016); *see also* CP 234-36. King County understood that DRS's primary concern with the settlement was the attorney fee payment mechanism. RP 33:23-34:14 (May 20, 2016); *see also* CP 235-36. Mr. Dively informed DRS that the total amount of expected retroactive contributions for the *Dolan* class would be approximately \$30 million and he was told that DRS did not plan to charge interest on the retroactive contributions because that was DRS's normal practice in situations like this. RP 32:22-34:14; 48:14-49:16; 228:9-20 (May 20, 2016); *see also* CP 236.

D. After The Class And King County Proposed A Settlement, DRS Announced It Would Seek To Require King County To Pay Interest On Retroactive Retirement Contributions.

After extended negotiations, King County and the class signed a proposed settlement agreement resolving the remedies issues in December 2012. As Mr. Dively had previously informed DRS, the agreement did not require payment of interest on retroactive contributions. RP 32:11-34:14

(May 20, 2016); *see also* CP 354, ¶¶ 7-8. The parties immediately sent a copy of that agreement to DRS. *See* CP 183-84. In a January 7, 2013 letter, DRS's counsel announced that "the Department must and will require the payment of interest on employer and employee contributions in this situation." *See* CP 183-84, 195; RP 52:21-53:11 (May 20, 2016).

Shortly after the settlement agreement was submitted to the trial court for preliminary approval, DRS moved for intervention as a matter of right, requesting full party status in the remedies phase of the case. CP 167-80. DRS's intervention motion specifically called out the issue of interest on retroactive contributions as one of the reasons it sought to intervene. CP171-72. The trial court allowed DRS to intervene for the limited purposes of objecting to the settlement agreement and appealing the order approving the settlement. CP 260-62. DRS then objected to and urged the trial court to reject the proposed settlement, in part, because it did not require King County to pay interest on retroactive contributions. CP 208-09; *see also* CP 171-72.

The trial court found that even if DRS had discretion and legal authority to charge interest, it would be "unfair, inequitable, arbitrary and capricious and an abuse of discretion for DRS to charge King County interest here." CP 379, ¶ 41. The trial court overruled DRS's objections and approved the settlement. CP 378-80, 383.

E. This Court Affirmed The Trial Court’s Jurisdiction Over Remedies Issues And Ordered That DRS Be Given “Full Party” Status As Intervenor In The Remedies Phase.

DRS appealed the order approving the settlement and the order permitting only partial intervention. Among other arguments, DRS asserted that the trial court lacked jurisdiction over “pension administration” issues based on the Administrative Procedures Act (“APA”). *See Dolan v. King Cnty.*, 184 Wn. App. 1038, 2014 WL 6466710, *6 (2014) (“*Dolan I*”) (unpublished decision); *see also* CP 1091. This Court rejected DRS’s jurisdiction argument, finding that “[b]ecause this case does not concern a challenge to agency action, RCW 34.05.510 has not vested jurisdiction over this case exclusively in some other court, and thus has not removed the superior court’s original subject matter jurisdiction to hear this case.” *Dolan II*, 2014 WL 6466710, at *6.

This Court also reversed the trial court’s order limiting the scope of DRS’s intervention, finding that DRS was entitled to “full party” intervention to advocate for the interests of PERS during the “trial on remedy, *how* to enroll the public defenders in PERS and make retroactive PERS payments” *Id.* at *8 (emphasis in original).

After vacating the order approving the settlement agreement, this Court issued a mandate instructing the trial court to conduct “further proceedings in accordance” with the opinion. *Id.*

F. Following Remand, The Trial Court Conducted Proceedings On Various Remedies Issues With Full Participation By DRS.

After the remand in *Dolan II*, the trial court held hearings to determine various remedies issues. DRS, King County and the class all actively participated in those hearings. *See, e.g.*, RP 3:9-4:10 (June 5, 2015); RP 3:9-4:4 (Dec. 11, 2015).

In May 2015, the class moved to modify the Permanent Injunction to establish the amount of service credit that class members were entitled to receive. CP 386-402. DRS opposed the class members' request on several grounds, including a statute of limitations defense. CP 411-12.

On June 5, 2015, the trial court issued an Order Modifying Permanent Injunction, establishing the amount of service credit and approving a release of certain claims by the class. CP 426, 429. The order also established that King County would pay the employer and the pick-up or employee contributions, as applicable, attributable to the retroactive PERS service credit. CP 427-28. DRS was ordered to "provide the Class Members with the service credit established in this Order while the issues regarding King County's payment of employer contributions, ... employee contributions ..., [and] interest or other costs or charges are being resolved...." CP 438, ¶ 8.

DRS, the class, and King County all agreed to the entry of the Order. CP 425. By agreeing to the order, DRS elected not to pursue a final ruling from the trial court on the statute of limitations defense, which had been another of the reasons DRS sought to intervene. RP 223:20-24, 224:15-25 (May 20, 2016); *see also* CP 1073-74. In its appeal brief, DRS asserts for the first time that it only agreed to entry of the order (which it inaccurately describes as a “second settlement”) because there was an “acknowledgment” that the Department would “*consider* seeking interest on the late contributions.” DRS Br. at 9 (emphasis). While the interest issue was certainly reserved for further proceedings, the description in DRS’s brief creates the false impression that the Order gave DRS authority to make that decision. To the contrary, the court unambiguously confirmed that it was “retain[ing] jurisdiction for all other remaining issues as between DRS and King County.” CP 445, 34:9-12.

Upon entering the Order, the court specially set two hearing dates on the remaining remedies issues: (i) one for the resolution of how class counsel’s attorney fees would be paid; and (ii) one to determine “whether DRS is owed, may assess or should be permitted to collect any additional charges beyond employer and pick-up or employee contributions ... including, without limitation, interest on such contributions.” CP 428; RP 14:17-18:19 (June 5, 2015). In discussing dates for the hearing on interest,

DRS's counsel indicated that DRS needed enough time to determine "if there is interest or there's a decision to charge interest, then that has to be calculated." RP 18:10-13, 17:9-25 (June 5, 2015). DRS gave no indication that it believed any interest calculation or "bill" would be binding or exclusively subject to administrative review. *See id.*

The evidentiary hearing on the interest issue was originally scheduled for October 30, 2015, but was postponed several times because of scheduling issues.² RP 18:25-19:12 (June 5, 2015).

G. After The Trial Court Set A Hearing On The Interest Issue, DRS Issued A "Decision" And Invoices Purporting To Require Payment Of Interest.

On September 17, 2015, months after the trial court scheduled a hearing to decide the interest issue, DRS sent the King County Budget Director, Dwight Dively, a letter framed as a "decision" on the interest issues that were set for hearing. CP 594-96. Despite DRS's lawyer's letter from January 2013 saying DRS "must and will" charge interest, the "decision" claimed that DRS had only recently "decided" to seek interest "for the large amount of investment returns foregone by the PERS pension

² In the interim, the trial court conducted multiple hearings (in which DRS participated) and issued three oral rulings and two written orders regarding whether class counsel should receive a common fund attorney fee award, the amount of that award, and how funds advanced to pay that award were to be reimbursed to DRS. *See, e.g.*, CP 433-80.

fund as a result of the untimely receipt of contributions for the *Dolan* plaintiffs who received retroactive service credit.” CP 595.

DRS’s Director claimed that she “made [her] [discretionary] decision to charge interest after considering information from the Office of the State Actuary and consulting with groups and individuals interested in state pension systems, including employer, government, and pension member organizations, and legislators with pension and fiscal responsibilities.” CP 538 at 11:1-13:1; *see also* CP 595-96; RP 199:21-200:23 (May 20, 2016).

The letter also announced the amount of interest purportedly owed as \$65,704,577.60, which was calculated by DRS, not the state actuary. RP 137:5-138:11, 177:14-18 (May 20, 2016). Despite statutory provisions stating that the assumed rate of return on PERS assets is 7.8 percent per annum, DRS used monthly compounding in its interest calculation, meaning DRS purports to charge King County interest at 8.02 percent per annum. CP 547 at 47:3-21; RP 137:5-138:11 (May 20, 2016).

The letter asserted that if “the County disagrees with [DRS’s] calculation of contributions or assessment of interest,” the County must file a petition for review “within 120 days of receipt of this decision.” CP 596. DRS subsequently issued a letter with revised invoices. CP 1644-48. King County promptly sent a response letter explaining King County’s

position that DRS lacked authority to make or enforce any “decisions” on remedies issues that were then pending before the trial court. CP 1546-47.

H. DRS Fully Participated In Proceedings Before The Trial Court On The Interest Issue.

DRS participated in party discovery leading up to the evidentiary hearing, including depositions and propounding document requests to King County. *See, e.g.*, CP 673-81, 689-90, 708-10, 1497, 1351. In February 2016, DRS and King County submitted pre-hearing briefs as requested by the trial court. Between the parties, more than 43 exhibits were submitted with the pre-hearing briefs. Notwithstanding this Court’s prior ruling that the trial court had jurisdiction over remedies issues, DRS argued that (i) it had sole authority to decide whether and how much interest should be assessed against King County and (ii) the Court lacked jurisdiction because King County had not exhausted administrative remedies under the APA. CP 1623-35. King County argued that the interest issue was properly before the trial court. CP 491-96.

The evidentiary hearing took place on May 20 and June 10, 2016. DRS requested a ruling on jurisdiction at the outset, and the court heard oral argument. RP 5:19-8:19 (May 20, 2016). King County explained that DRS’s after-the-fact “decision” did not interfere with the court’s continuing broad and comprehensive original jurisdiction, particularly in

light of DRS's status as a full-party in post-remand proceedings on remedies. RP 7:3-21 (May 20, 2016); CP 491-96. The court ruled that it had full jurisdiction over "all aspects of this case," including remedies issues. RP 8:20-9:18 (May 20, 2016). The court also found that applying administrative standards of review would be inappropriate because the interest issue did not arise from the review of a decision under the APA. RP 11:19-13:9 (May 20, 2016).

The court heard testimony from four witnesses. King County presented testimony from King County Budget Director Dwight Dively and Dr. Ethan Kra,³ who was retained by King County as an expert witness on actuarial issues. DRS presented testimony from then-DRS Director Marcie Frost and Deputy State Actuary, Lisa Won, who performed the analysis and calculations that DRS requested in connection with its "decision" on interest.

I. The Trial Court Decided That King County Should Pay \$10.5 Million In Interest In Addition To The \$32 Million Of Retroactive Contributions.

Following the evidentiary hearing, DRS and King County each submitted two post-hearing briefs. The trial court issued a written decision

³ Dr. Kra's extensive actuarial qualifications, including as a Fellow of the Society of Actuaries, an Enrolled Actuary under the Employee Retirement Income Security Act of 1974 ("ERISA") and as a member of the State of New Jersey Pension and Health Benefits Commission, are detailed in his expert report at CP 1329-46.

on October 10, 2016. CP 2169. The court decided that King County should pay an additional amount to PERS in the lesser amount of either (a) the amount necessary to reduce by 1.5 basis points the increase in PERS contribution rates the Office of the State Actuary testified would occur if King County paid no interest to PERS in connection with the retroactive service credit granted to the *Dolan* class or (b) a maximum, capped amount of \$10.5 million. CP 2169. The court decided that the remainder of the interest amount calculated by DRS would be “socialized” through increased contribution rates paid by all PERS Plan 2 employers and employees. CP 2168-69.

The court’s October 10, 2016 decision contemplated that King County and DRS would engage in further analysis to determine which of these amounts King County would pay. CP 2162. King County and DRS subsequently agreed that King County would pay to DRS the \$10.5 million to avoid the need for further calculations. *Id.*

At the trial court’s request, DRS and King County prepared an order and final judgment memorializing the court’s decision, which was entered on December 19, 2016. CP 2165. King County satisfied the terms of the judgment by paying the \$10.5 million interest payment to DRS.

III. RESTATEMENT OF THE ISSUES

(1) Did the trial court have jurisdiction to determine the remedies issues necessary to implement its injunction, due to the lack of any statute divesting it of jurisdiction, DRS's "full party" intervention and participation in the remedies phase of the case and by reason of the trial court's exclusive authority over that issue under the priority of action rule?

(2) After considering an extensive and fully developed record, the trial court balanced "the equities presented by both parties in a difficult case" and determined that requiring King County to pay \$10.5 million in interest was a fair and equitable remedy necessary to implement the injunction. Did the trial court act within the broad scope of its discretion in formulating this remedy?

IV. STANDARD OF REVIEW

Issues relating to whether the trial court has jurisdiction to decide the interest issue, including whether any statute has deprived the trial court of jurisdiction, whether DRS subjected itself to the trial court's decision-making authority by intervening as a full party in the remedies phase of the case, and whether the priority of action doctrine bars DRS from asserting jurisdiction in a later-commenced administrative action, are all issues this Court will review de novo. *See Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011).

In considering the implementation of an injunction, there is “considerable inherent discretion vested in the trial court.” *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). “The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities of the case before it.” *Id.* “Upon the granting or continuing of an injunction, the court may impose such terms and conditions as may be deemed equitable.” 15 Wash. Prac., Civ. P. § 44:27 (2d ed.). A trial court’s discretionary power is designed to “do substantial justice to the parties and put an end to the litigation.” *Buck Mountain Owner’s Ass’n v. Prestwich*, 174 Wn. App. 702, 715 n.14, 308 P.3d 644 (2013) (internal quotation omitted). A trial court’s decision granting an injunction and its decision regarding the terms of the injunction are reviewed on appeal under the deferential “abuse of discretion” standard. *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 446, 327 P.3d 600 (2013), *as amended* (Jan. 10, 2014). Further, a trial court’s decision “is presumed to be correct and should be sustained absent an affirmative showing of error.” *Id.* (citing *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)).

V. ARGUMENT

A. The Trial Court Has Jurisdiction Over Decisions Regarding The Remedies Necessary To Implement The Injunction.

After affirming the trial court's order granting the injunction requiring the *Dolan* class to be enrolled in PERS, the Supreme Court remanded the case to the trial court for further proceedings on the remedies that would flow from that decision. *Dolan I*, 172 Wn.2d at 301. Whether King County would be required to pay interest on the retroactive contributions is unquestionably one of the remedies questions before the trial court for decision after remand.

1. This Court Previously Ruled That The Trial Court Had Jurisdiction To Decide Remedies Issues In This Case.

In its prior appeal in this case, DRS argued that only it could decide how the trial court's injunction should be implemented, subject to review under the APA. This Court rejected that argument finding that “[b]ecause *this case does not concern a challenge to agency action*, RCW 34.05.510 has not vested jurisdiction over this case exclusively in some other court, and thus *has not removed the superior court's original subject matter jurisdiction to hear this case.*” *Dolan II*, 2014 WL 6466710, at *6 (emphases added). This Court then remanded the case for further proceedings in the remedies phase of the case *before the trial court* consistent with its opinion. *Id.* at *8.

2. King County Did Not Request The Hearing On The Interest Issue To Challenge An Agency Action.

Conspicuously aware of the unambiguous consequences of this ruling on jurisdiction, DRS sought to create a new fact pattern for this appeal by issuing a purported “administrative decision” on interest in September 2015. In its appeal brief, DRS says that King County “challenged the agency action,” *i.e.* the administrative decision, by requesting an evidentiary hearing before the trial court. DRS Br. at 22. This statement is false and is plainly rebutted by the undisputed timeline of events. The trial court scheduled the evidentiary hearing on interest *three months* before DRS sent the letter purporting to convey its “decision” on interest. RP 17:6-19:12 (June 5, 2015). King County did not ask the court for the hearing as a reaction to, or in an effort to challenge, DRS’s decision. To the contrary, King County’s response to DRS explained that these issues were already scheduled to be decided by the court. CP 1546-47.

DRS improperly attempts to distinguish the decision on interest from the other remedies issues before the trial court by claiming that “interest was an issue specifically reserved for *independent resolution* in the order approving the County’s second settlement with the Class.” DRS Br. at 24 (emphasis added). It is unclear what DRS means by “independent

resolution,” but there is nothing in the record reflecting that the issue would be reserved for resolution *by DRS*. Interest was one of the issues that was reserved for future resolution in the Order Modifying Permanent Injunction. RP 17:6-18:11 (June 5, 2015). The trial court unambiguously confirmed that it was “retain[ing] jurisdiction for all other remaining issues as between DRS and King County,” CP 445, 34:9-12, and set a hearing to resolve the interest issue. RP 17:6-19:12 (June 5, 2015).

DRS fails in its attempts to muddy the waters by repeatedly referring to its purported “agency action” issued long after the remedies phase of the case had commenced, long after DRS had intervened, and months after the trial court had already set a hearing to decide the interest issue. DRS’s claim that King County requested the hearing as a challenge to DRS’s mid-litigation “decision” is simply a fiction invented by DRS in an apparent attempt to avoid the inevitable application of this Court’s earlier holding affirming the trial court’s jurisdiction over remedies issues.

DRS offers no applicable case authority to support its position. The sole case relied upon by DRS – *Wells Fargo v. Department of Revenue* – is inapposite. 166 Wn. App. 342, 271 P.3d 268 (2012). That case centers on whether Wells Fargo timely appealed an “agency decision” under RCW 34.05.510 and stands for the unremarkable proposition that failure to commence a timely appeal bars review. *Id.* at 351-52.

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. The fact that DRS issued unilaterally a purported “decision” in the midst of the trial court’s proceedings aimed at resolving that very issue does not alter the origins of the dispute over interest. The remedies phase of this lawsuit does not contest any decision made by DRS – rather, it involves enforcing an injunction entered against King County. Implementation of the injunction is precisely what the Supreme Court instructed the trial court to do upon remand.

3. No Other Statute Deprives The Trial Court Of Jurisdiction To Rule On Whether Interest Should Be Paid As A Remedy Under The Injunction.

Washington’s superior courts are courts of general jurisdiction. Wash. Const. Art. IV § 6. Trial courts have “broad and comprehensive original jurisdiction over all claims which are not within the *exclusive jurisdiction of another court.*” *Orwick v. City of Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984) (emphasis added). DRS points to no other statute purportedly depriving the trial court of jurisdiction to decide the interest issue.

The statute that DRS identified as the sole basis for Ms. Frost’s authority to issue a “decision” on interest – RCW 41.50.125 – does not

give DRS *exclusive* authority to determine interest and certainly does not purport to divest the Superior Court of Jurisdiction. The statute provides:

The department may charge interest, as determined by the director, on member or employer contributions owing to any of the retirement systems listed in RCW 41.50.030. The department's authority to charge interest shall extend to all optional and mandatory billings for contributions where member or employer contributions are paid other than immediately after service is rendered.

WAC 415-114-100 explains that RCW 41.50.125 "provide[s] [DRS] the authority to assess interest on the overdue unpaid balance of a receivable owed to the department" in order to "encourage payment in a timely matter."

To remove "original" or subject matter jurisdiction from the trial court and assign it to an administrative agency, the Legislature must adopt a statute that explicitly gives the agency exclusive jurisdiction. *See, e.g., Davis v. Wash. Dep't of Labor & Indus.*, 159 Wn. App. 437, 441-42, 245 P.3d 253 (2011) (Industrial Insurance Act, RCW 51.04.010, specifically "abolishes the state courts' original jurisdiction" over such causes of action); *compare State ex rel. Wash. Pub. Disclosure Com'n v. Permanent Offense*, 136 Wn. App. 277, 286, 150 P.3d 568 (2006) ("plain reading" of statutes showed that the Public Disclosure Commission did not have "priority jurisdiction"). Nothing in the language of RCW 41.50.125 purports to give DRS exclusive jurisdiction to determine the amount of

interest King County should be required to pay on the *Dolan* contributions. As the trial court’s decision recognized, RCW 41.50.125 simply says that DRS “may” assess interest. As such, it is within the “broad and comprehensive original jurisdiction” of the trial court to determine the amount of interest King County should be required to pay. *Dolan II*, 2014 WL 6466710, at *6 (quoting *Orwick*, 103 Wn.2d at 251).

B. DRS Subjected Itself To The Trial Court’s Decision-Making Authority On Interest By Intervening In The Remedies Phase.

After affirming the injunction requiring the *Dolan* class to be enrolled in PERS, the Supreme Court remanded to the trial court, “for further proceedings regarding remedies.” *Dolan I*, 172 Wn.2d at 301. The remedies sought by the class included interest on “all omitted contributions,” pre-judgment interest, and attorney fees. CP 5. The Supreme Court’s remand thus vested the trial court with jurisdiction to decide these issues. By intervening as a full party at the remedies stage, DRS subjected itself to the trial court’s decision-making authority over the remaining issues in the case, including whether King County would be required to pay an amount of interest on the retroactive contributions.

Intervenors enter the suit with the same status as the original parties and are fully bound by all future court orders. 3A Wash. Prac., Rules Prac. CR 24 (6th ed.) (citing *Dumas v. Gagner*, 137 Wn.2d 268, 295

n.98, 971 P.2d 17 (1999)); *see also United States v. State of Or.*, 657 F.2d 1009, 1014 (9th Cir. 1981). “Intervenors must accept the original parties’ pleadings **as they find them** upon entry into the litigation.” 3A Wash. Prac., Rules Prac. CR 24 (6th ed.) (*citing Casebere v. Clark Cnty. Civil Serv. Comm’n-Sheriff’s Office*, 21 Wn. App. 73, 77, 584 P.2d 416 (1978)) (emphasis added).

“By successfully intervening, a party makes himself vulnerable to **complete adjudication** by the [trial court] of the issues in litigation between the intervener and the adverse party.” *State of Or.*, 657 F.2d at 1014 (emphasis added; internal quotation omitted) (citing Moore’s Federal Practice.).⁴ An intervenor is “as much a party to the action as the original parties, and renders himself vulnerable to complete adjudication of the issues in litigation between himself and the adverse party.” *Chelan Cnty.*, 146 Wn.2d at 946 n. 8 (internal quotation omitted).

DRS subjected itself to complete adjudication by the trial court over all remedies issues necessary to implement the injunction by intervening as a full party during the remedies phase of this case. *See id.* DRS cannot claim to be surprised by the state of the case or the trial

⁴ Federal cases interpreting Fed.R.Civ.P. 24 provide persuasive authority because the Washington and federal rules are nearly identical. *See Geonerco, Inc. v. Grand Ridge Prop. IV, LLC*, 159 Wn. App. 536, 542, 248 P.3d 1047 (2011).

court's adjudication of the amount of interest on retroactive contributions. More than a year before seeking intervention, DRS recognized that interest was a remedy issue before the trial court in its letter asking to be appointed as *amicus curiae* after the Supreme Court's remand. KC Desig., Declaration of David F. Stobaugh (May 2, 2013), Attachment at 40-42 ("There are a myriad of issues related to PERS Plan 2 and Plan 3 membership for defender employees, including...who pays for lost investment earnings...").

DRS made the decision to seek intervention, and this Court confirmed that DRS was entitled to "full party" intervention to advocate for its interests during the "trial on remedy, *how* to enroll the public defenders in PERS and make retroactive PERS payments...." *Dolan II*, 2014 WL 6466710, at *8 (emphasis in original).

After remand from this Court, DRS took full advantage of its role as a full party by extensively litigating the remedies issues. DRS had ample opportunity to place its arguments about remedies before the trial court. It filed more than twelve briefs on remedies issues, with at least three of them dealing with specifically with interest. CP 1616-48, 2098-2137. DRS also participated in depositions, written discovery, and multiple hearings regarding the interest issue, including the evidentiary hearing the court held before exercising its equitable authority on the

remaining remedies issue: DRS's request for interest on the retroactive contributions. DRS's belated claim that this issue should be resolved in a separate, later-commenced administrative proceeding rather than in the pre-existing lawsuit in which DRS is a "full party" is fundamentally inconsistent with its intervention and participation in the remedies phase of this case.

The impact of the trial court's interest decision on PERS does not take this remedy issue outside the scope of the case. Indeed, that is precisely the reason this Court decided that DRS should be permitted to intervene as a full party – so that it could be heard *as the trial court decided* all remaining issues in the case, including interest.

C. The Priority Of Action Doctrine Bars DRS From Divesting The Trial Court Of Jurisdiction Over The Interest Issue.

DRS apparently contends that it was entitled to take over jurisdiction of the interest issue by reason of the purported administrative "decision" that it promulgated shortly before the initially scheduled hearing before the trial court on the interest issue. DRS Br. at 21-22. From that flawed contention, DRS asserts that the only way King County could have challenged that decision was by participating in a new, separate administrative appeals process, followed by a proceeding for judicial review under the APA. *Id.* at 19-21. Fortunately, Washington law does not

require unnecessary, wasteful and duplicative proceedings when the parties have already joined an issue in a previously pending case.

Under the priority of action doctrine, the forum that first gains jurisdiction over a matter retains *exclusive* authority over it. *City of Yakima*, 117 Wn.2d at 675 (quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)). This doctrine applies when the forums involved are both courts. *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 42–43, 321 P.3d 266 (2014). It also applies when one of the forums is a superior court and the other is an administrative agency. *City of Yakima*, 117 Wn.2d at 675 (superior court erred in assuming jurisdiction of a case already proceeding before an administrative agency); *see also State of Washington ex rel. Evergreen Freedom Foundation v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 606-07, 49 P.3d 894 (2002) (barring superior court action because of previously commenced administrative action). The doctrine prevents unseemly, expensive, and dangerous conflicts of jurisdiction and of process of the type DRS seeks to create here. *See City of Yakima*, 117 Wn.2d at 675.

For the priority of action doctrine to apply, the proceedings at issue must involve identical (1) subject matter, (2) parties, and (3) relief. *Id.* The identity of these elements must be such that a decision in one tribunal would bar proceedings in the other tribunal because of *res judicata*. *Id.*

Application of the doctrine is appropriate in this case to preclude DRS's belated attempt to take administrative action.

The trial court proceedings unquestionably have priority in time. The issue of whether King County should have to pay interest on retroactive contributions was first joined between King County and DRS before the trial court when DRS placed that question at issue by intervening to object to the original proposed settlement. CP 171. DRS joined the issue before the trial court again when it litigated that issue as a full party following remand from this Court. CP 1626-28.

The subject matter, parties and relief at issue are identical: after hearing evidence and considering briefing from both King County and DRS, the trial court decided whether King County should pay interest and in what amount. The purported administrative "decision" from DRS addressed precisely the same questions. As explained above, by intervening as a full party in the remedies phase of the case, DRS also unquestionably subjected itself to having the trial court render a binding decision on the interest issue.

Application of this doctrine to preclude DRS's unilaterally commenced administrative proceeding also serves the underlying purpose of avoiding wasteful proceedings, conflicts of jurisdiction and process, and the possibility of inconsistent results. King County and DRS were

provided a full and fair opportunity to present their respective evidence and arguments before the trial court. There is no purpose in requiring new administrative proceedings (before DRS) and judicial review proceedings (under the APA) to cover precisely the same ground.

Accordingly, the priority of action doctrine applies as a matter of law to prevent DRS's belated attempt to seize jurisdiction of an issue that was already pending in the trial court proceedings.

D. The Trial Court Crafted An Appropriate Remedy To Implement The Injunction Based On A Robust Record.

After hearing testimony on the purpose and operation of multi-employer pension plans from the Director of DRS, the Deputy State Actuary, King County's budget director, and King County's actuarial expert witness, the trial court properly exercised its broad discretion to craft a fair remedy necessary to implement the injunction. The court concluded that, based on the facts and circumstances of this unique case, King County should pay an additional \$10.5 million to offset the forecasted costs to fund future retirement benefits of the *Dolan* class and that the remainder of those costs should be spread across the plan, consistent with the treatment of other single-employer actions that result in increased pension benefit costs. CP 2160-62. The trial court's exercise of

discretion in formulating this remedy is supported by substantial evidence in the record.

DRS characterizes the trial court's decision as requiring "non-consenting third parties" to finance a "settlement" between King County and the class. DRS Br. at 2, 37-39. This inaccurate description ignores several critical facts: (1) DRS voluntarily placed itself before the trial court by intervening in the remedies phase of the case; (2) DRS consented to the Order Modifying Permanent Injunction that gave rise to the retroactive service credit knowing that the trial court would decide whether King County would pay interest; and (3) DRS participated as a full party in the proceedings, repeatedly asserting that it was representing the interests of the PERS plans and their members. This was not a situation in which DRS had no opportunity to provide input on behalf of PERS into the outcome – DRS was involved every step of the way.

1. The Trial Court Has Broad Discretion To Craft Remedies Necessary To Implement The Injunction.

A suit for an injunction is an equitable proceeding with "considerable inherent discretion vested in the trial court." *Rupert*, 31 Wn. App. at 30. "The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities of the case before it." *Id.* "Upon the granting or continuing of

an injunction, the court may impose such terms and conditions as may be deemed equitable.” 15 Wash. Prac., Civ. P. § 44:27 (2d ed.). A trial court’s discretionary power is designed to “do substantial justice to the parties and put an end to the litigation.” *Buck Mountain*, 174 Wn. App. at 715 n.14.

On appeal, DRS argues for the first time that the trial court was bound by certain recognized maxims of equity in forming its decision. This argument misstates the context of the trial court’s decision and confuses the actual issues on appeal. Maxims and principles of equity guide courts in deciding whether to grant relief *to a party seeking an equitable remedy*. The decision on interest did not involve a request for relief – equitable or otherwise – by King County, so the cases cited by DRS are inapplicable.⁵ Rather, the decision on interest arose from the

⁵ For example, in *Stephanus v. Anderson* the court held that equity “cannot provide a remedy where legislation expressly denies it.” 26 Wn. App. 326, 334, 613 P.2d 533 (1980). Here, DRS cites to no statute prohibiting the Court from using its equitable authority to fashion an injunction it deemed appropriate under the circumstances. Likewise, the Supreme Court in *Goodwin Co. v. Nat’l Disc. Corp.* explained that the maxim “He who seeks equity must do equity...applies in case[s] where affirmative equitable relief is sought...” 5 Wn.2d 521, 529, 105 P.2d 805 (1940). Here, the County has not sought any affirmative relief. Finally, DRS cites *Rummens v. Guar. Trust Co.* for the premise that the “novelty of a situation...has no bearing on the application of equity,” see DRS Br. at 42, but what the Supreme Court in *Rummens* actually held was that “Mere novelty of incident or mere absence of precedent furnishes no sound reason for denying relief when the situation equitably demands it.” 199 Wn. 337,

plaintiff's request for equitable relief in the form of the injunction – and only after the class members' entitlement to that relief had long been established.

The trial court properly exercised its broad discretion to craft a remedy in order to fulfill the Supreme Court's mandate to implement the injunction. The decision on the amount of interest that King County should pay (if any) was squarely within the trial court's broad remedial powers as a necessary component of the implementation of the Order Modifying Permanent Injunction. *See Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 396, 3 P.3d 217 (2000); *see also In re Marriage of Yates*, 17 Wn. App. 772, 773, 565 P.2d 825 (1977).

The trial court correctly concluded that there is “no statutory authority, or case law, that would limit the Court in ordering a fair and equitable remedy under the unique fact pattern of this case,” and reached a decision on interest that does substantial justice and puts an end to this more than a decade-long litigation. CP 2160, 2162.

2. The Trial Court's Equitable Authority Is Unaffected By RCW 41.50.125.

DRS asserts that RCW 41.50.125 limits the trial court's exercise of equitable authority because “equitable principles cannot be asserted to

347, 92 P.2d 228 (1939). In other words, a lack of precedent will *not* preclude a court from fashioning an equitable remedy.

establish equitable relief in derogation of statutory mandates.” DRS Br. at 34 (internal quotations omitted). In other words, DRS believes that because the statute gives the Director discretionary authority to charge interest, superior courts are barred from taking any action that limits DRS’s exercise of that discretion.

The cases relied upon by DRS simply do not stand for that broad principle and are otherwise inapposite to this case. Both *Boronat* and *Guidry* are statutory interpretation cases in which the reviewing courts refused to read exceptions into *mandatory* statutes. *See generally Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990); *Boronat v. Boronat*, 13 Wn. App. 671, 537 P.2d 1050 (1975).⁶

In *Boronat*, an ex-wife sought to recover a judgment from her ex-husband by garnishing his contributions to the state pension fund. 13 Wn. App. at 672-73. The court held she was barred from doing so because RCW 41.40.380⁷ exempted such funds from “execution, garnishment,

⁶ DRS’s reliance on *Mulhausen v. Bates* is likewise misplaced because it involved an administrative appeal from an agency decision and the denial of a request for equitable relief enjoining the agency’s enforcement of that decision. *See* 9 Wn.2d 264, 266-67, 114 P.2d 995 (1941). In contrast, “this case does not concern a challenge to agency action,” *see Dolan II*, 2014 WL 6466710, at *6, and the trial court’s decision on interest was a proper exercise of its equitable authority to implement the injunction.

⁷ Now recodified as RCW 41.40.052.

attachment, the operation of bankruptcy or insolvency laws, or other process of law.” *Id.* at 673-74. The Court found that no “exception [was] made in the statute” and refused to read one into it for execution of the ex-wife’s judgment. *Id.*

In *Guidry*, the U.S. Supreme Court similarly overturned a trial court’s decision creating a constructive trust on the pension benefits of a union official who had been convicted of embezzling union funds. 493 U.S. at 371-73, 377. The constructive trust was intended as insurance until the judgment benefiting the union was satisfied. *See id.* The Court held, however, that the constructive trust violated ERISA’s prohibition on assignment or alienation of pension benefits. *Id.* at 376-77. The Court found no applicable exception and declined to approve a general exception to the law.⁸ *Id.*

Unlike the statutes in *Boronat* and *Guidry*, RCW 41.50.125 is not a mandatory or exclusive statute. It does not require DRS to charge interest; it merely gives DRS the option – an option it has never before chosen to exercise for court-ordered retroactive contributions. *See* RP 189:7-20, 207:7-20, 228:9-20 (May 20, 2016); *see also* CP 548-49, 53:1-55:23. As explained above, nothing in this discretionary statute vests DRS with

⁸ *Guidry* is also inapplicable because it was decided under ERISA, which has no application to PERS. *See* 29 U.S.C. § 1003(b)(1) (exempting governmental plans like PERS from ERISA provisions).

exclusive jurisdiction over the whether an employer must pay interest on retroactive contributions. The Legislature has made no absolute prohibition on courts determining pension-benefits issues, such as the amount of retroactive contributions and interest on contributions.

Moreover, the trial court did not create an “equitable exception” to any PERS statute. RCW 41.50.125 does not remove this Court’s equitable authority to fashion the remedies necessary to implement the injunction entered in this case. As explained in Section V.D.4 below, the trial court relied on the extensive evidence that King County presented in support of its request for a fair and equitable remedy.

3. DRS Represented The Interests Of PERS And Had Every Opportunity To Litigate The Amount Of Retroactive Service Credit That Would Be Awarded.

DRS cannot claim that the trial court’s decision binds “non-consenting third parties” because DRS intervened in this litigation for the very purpose of representing the interests of PERS participants. DRS explained that it needed full party status in order to “ensure resolution of the case will comply with DRS’s statutory responsibilities to administer the public pension systems for the benefit of *all* PERS members.” CP 177 (emphasis in original). This Court found that DRS was entitled to full party status and remanded the case for further proceedings.

DRS availed itself of every opportunity to advocate on behalf of PERS members, both in connection with the attorneys fee repayment mechanism and on the issue of interest. Though it may be dissatisfied with the trial court's decision, DRS cannot claim that PERS members' perspective was not represented in the evidentiary proceedings on interest.

DRS claims that King County's decision not to seek a final ruling on its statute of limitations defense⁹ will result in increased costs to PERS because of the amount of retroactive service credit. But DRS also decided not to seek a final ruling on this issue from the trial court, even though one of DRS's stated reasons for intervention was so that it could raise the statute of limitations defense. RP 223:20-24, 224:15-25 (May 20, 2016); *see also* CP 1073-74.

In the prior appeal, DRS asked this Court to vacate the order approving settlement because DRS had not had an "opportunity to assert the statute of limitations defense to retroactive claims that will be very

⁹ King County litigated the statute of limitations issue throughout the case, and the trial court held that factual issues needed to be determined before issuing a ruling. *See* KC Desig., King County's Motion For Partial Summary Judgment Re: Statute of Limitations (Dec. 7, 2006); King County's Reply Brief In Support Of Motion For Partial Summary Judgment Re: Statute of Limitations (Jan. 30, 2007); Order Denying Defendant's Motion For Partial Summary Judgment On Statute of Limitations (April 11, 2007). After remand from the Supreme Court, the Plaintiffs filed a motion on the issue but took it off calendar when the parties commenced settlement discussions. KC Desig., Plaintiffs' Motion on King County's Statute of Limitations Defense (March 20, 2012).

costly to PERS, if lost investment returns are not reimbursed. . .” CP 1073. After this Court vacated the settlement order and remanded to the trial court, DRS had every opportunity to pursue the statute of limitations and other arguments that would impact the amount of service credit awarded. For example, because the Supreme Court’s decision did not make any determination as to *when* class members became employees for purposes of enrollment in PERS,¹⁰ DRS could have pursued a ruling on this issue from the trial court. But DRS made the tactical decision not to seek a ruling on the statute of limitations defense or otherwise contest the amount of retroactive service credit.

DRS’s brief inaccurately describes the retroactive service credit as flowing from a “settlement” between the class and King County. But the retroactive service credit arose from the Court’s Order Modifying Permanent Injunction, which was entered with the agreement of all parties

¹⁰ DRS mischaracterizes the holding in *Dolan I* by claiming the Supreme Court determined that class members became County employees in 2005. *See, e.g.*, DRS Br. at 6, 9,38-39. The Supreme Court made no determination about *which* exercise of County control caused the class members to become employees. After considering a number of examples over the course of several decades, the Supreme Court emphasized “that *no single factor controls.*” *Dolan I*, 172 Wn.2d at 317 (emphasis added). Even if the Supreme Court had made a determination about the time at which class members became employees (it did not), such commentary would be dicta at most because the issue was not before the Supreme Court for review. As the Supreme Court explicitly recognized, the trial court’s injunction left the enrollment date open pending further motions by the parties. *Id.* at 310.

– *including DRS*. CP 425, 430. The Order recognizes that “DRS initially opposed [the plaintiff’s motion to modify the permanent injunction], but has now agreed to the entry of this Order in the interests of partially settling this long dispute and obtaining a workable structure for the complexities of establishing the extensive retroactive service credit involved in this litigation.” CP 425. DRS consented to the Order even though it knew there were no guarantees about whether King County would be required to pay interest. The Order did not contain any provisions giving DRS authority to decide the interest issue, CP 425-30, and DRS has cited no evidence in the record to support its claim that it agreed to entry of the Order on that basis.

If the Order Modifying Permanent Injunction is to be characterized as a settlement, it is one to which DRS knowingly agreed. DRS cannot now rely on the amount of retroactive service credit as the basis for asking the Court to vacate the trial court’s decision.

4. The Trial Court’s Exercise Of Its Discretion Is Supported By Substantial Evidence.

“Appellate courts are required to give great weight to the trial court’s exercise of discretion in equitable cases.” *Rupert*, 31 Wn. App. at 30. A trial court abuses its discretion “only when its decision is manifestly

unreasonable or based on untenable grounds or reasons.” *State v. Kaiser*, 161 Wn. App. 705, 726, 254 P.3d 850 (2011).

Facing a unique and novel circumstance, the trial court exercised discretion to craft an appropriate remedy. The court observed that “[t]here is little in the way of prior practice or case law to assist” the court in its decision. CP 2159. It further noted that given the “unprecedented nature of this case, exceptional remedies are in order.” CP 2160.

After giving both DRS and King County ample opportunity to present evidence and argument supporting their respective positions, the trial court engaged in a balancing process in an effort to “recognize the equities presented by both parties in a difficult case.” CP 2161. The court concluded that based on the facts and circumstances, it would be inappropriate to require King County to pay the full amount of interest that DRS sought. CP 2161. However, to reduce the amount of anticipated contribution rate increases for PERS members, the trial court decided that King County should assume some greater burden by paying \$10.5 million in addition to the approximately \$32 million it previously paid in retroactive contributions. CP 2161-62; RP 17:11-17 (May 20, 2016).

The trial court identified a number of factual considerations that formed the basis for its equitable remedy, including a list of key facts from

King County's post-hearing response brief. CP 2160-61. Each of these facts is supported by substantial evidence in the record.

Socializing Unexpected Pension Costs Is A Normal Outcome For Multi-Employer Plans. Increases in pension costs in multi-employer plans are commonly socialized across all participants, even when costs result from a unilateral decision by a single employer. The trial court heard testimony at the evidentiary hearing establishing that PERS, like all multi-employer plans, is designed to share risk by spreading costs equally across participants without regard to which participants are the source of the costs. *E.g.*, RP 18:25-20:5, 94:21-95:21, 103:13-104:6 (May 20, 2016); RP 302:25-303:9 (June 10, 2016); CP 1313, 1321-22. The employer and employee contribution rates for Washington PERS Plan 1 and 2 are set by the Legislature, and every employee pays the same contribution rate, despite the vast demographic differences between the members, such as salary or length of service. CP 1536-37, 40:18-41:16; RP 19:5-21, 94:21-95:21, 180:18-25 (May 20, 2016); RP 319:5-22 (June 10, 2016). Employers likewise pay the same contribution rates, *even though some groups invariably subsidize other groups* due to demographic and investment differences. CP 1321-22; RP 19:5-21, 94:21-95:21, 180:18-25 (May 20, 2016); RP 319:5-22 (June 10, 2016).

DRS's actuarial witness confirmed that the actions of a single employer, such as a general salary increase, can also increase the future costs of pension benefits for those employees. RP 302:23-303:9, 312:11-313:18 (June 10, 2016). The increased costs are socialized across all PERS members, even though they result from a unilateral decision by a single employer. *Id.*

No Interest Previously Charged. DRS has never before sought to recover interest from a single employer who enrolled and paid the contributions for retroactive service credit pursuant to a court order. *See* RP 189:7-190:3, 207:7-20, 228:9-20 (May 20, 2016).

No Prior Analysis. Undisputed evidence established that DRS has never previously analyzed whether a court-ordered grant of retroactive service would cause contribution rates to increase by more than one basis point. CP 707; RP 207:7-20 (May 20, 2016); RP 291:23-292:6, 293:6-294:2 (June 10, 2016). In fact, Ms. Frost testified that DRS cannot identify any other case in which it underwent any fact-finding analysis to determine whether interest should be charged. CP 549-51, 57:25-59:5, 61:20-63:18; RP 207:7-20 (May 20, 2016).

No Basis For DRS Assertion That This Is The First Time A Single Employer Action Caused A Rate Increase. DRS's assertion that this is the first time a single employer action gives rise to a system-wide contribution

rate increase (DRS Br. at 42-44) is wholly unsupported and contradicted by testimony from its own witness, the Deputy State Actuary. Ms. Won acknowledged that actions by a single employer, such as implementing an above-average pay increase, can result in a higher than expected retirement benefit. RP 312:3-313:14 (June 10, 2016). Even though the liability is attributable to the single employer that decided to raise salaries, the cost is socialized across all employers and employees. RP 312:3-313:14 (June 10, 2016); *see also* RP 96:23-97:14, 102:22-104:6 (May 20, 2016).

DRS's claim that earlier cases involving court-ordered retroactive service credit did not cause contribution rates to rise is based on a seriously flawed analysis. DRS makes this speculative assumption by comparing the amount of retroactive contributions paid in those cases in the late 1990's to the amount that DRS estimates is the current threshold for a basis point increase, \$7 million. But the \$7 million threshold is an estimate based on the *current* total payroll covered by the system. In the 1990's, when the *Logan* and *Clark* cases occurred, the total payroll was much lower, meaning the threshold for a rate increase would have been lower as well. In addition, DRS's comparison fails to adjust for inflation from the 1990's. RP 74:11-76:7, 134:23-136:12 (May 20, 2016).

No Ability To Enroll Before *Dolan I* Decision. Until the Supreme Court's decision, DRS, like King County, did not consider the *Dolan* class members eligible for enrollment in PERS. CP 2160; RP 45:15-20 (May 20, 2016)). Ms. Frost testified that at the time the class members provided public defense services, the interpretation of PERS enrollment rules adopted by DRS and all PERS employers did not allow those class members to be enrolled in PERS. RP 220:23-222:15 (May 20, 2016). Mr. Dively calculated that the interest on the retroactive contributions from the date of the mandate in *Dolan I* through the date on which King County paid those contributions was approximately \$10 million. CP 1604.

Supported Legislation Minimizing The Impact On PERS. King County's support of the legislation effectively reversing the Supreme Court's *Dolan I* reasoning helped to minimize the impact on other PERS employers. CP 2160; RP 25:9-28:20 (May 20, 2016). Amicus briefs filed in support of King County's motion for reconsideration to the Supreme Court reveal the widespread practice among PERS employers of contracting with private entities. CP 832-962. Many PERS employers would have incurred retroactive pension liability for their contractors' employees had the Legislature not rejected the Supreme Court's holding. Mr. Dively testified that King County took steps *expressly supported by DRS* to protect PERS and other PERS employers from that exposure.

RP 25:9-28:14 (May 20, 2016). The Legislature confirmed that it had never intended employees of government contractors to be eligible for or to be included in state pension plans like PERS. CP 2058-59 (EHB 2771).

Misleading Solicitation of Input by DRS. DRS conducted the survey of stakeholder positions on interest in order to “gather political support for its unilateral decision.” CP 2158 Stakeholders did not have collateral information from King County, so their decisions supporting DRS’s position had minimal probative value. CP 2158 (“The Court is not surprised that the stakeholders supported DRS based on the way the issue was framed.”). Ms. Frost testified that she told politicians and union representatives that the total *Dolan* liability is estimated to be \$98 million, but did not disclose that King County had already agreed to pay roughly a third of the total alleged liability in the form of retroactive contributions. RP 210:18-211:3 (May 20, 2016); *see also* CP 605 (“Talking Points” used by Ms. Frost); RP 208:22-209:9, 210:18-211:3 (May 20, 2016).

Context of Basis Point Increase to Contribution Rates. Relying on the testimony from Ms. Won, DRS’s witness, the trial court determined that requiring King County to pay \$10.5 million would cause, at most, a 4 basis point increase in contribution rates for PERS employers and a 3 basis point increase for PERS employees. CP 2162; *see* RP 259:18-260:10 (June 10, 2016). This is a small increase compared to other contribution rate

increases. Since the *Dolan I* decision was issued, employer contribution rates have gone up more than 400 basis points for reasons wholly unrelated to *Dolan*.¹¹ CP 2049-50; *see also* RP 20:6-22:21; 205:16-206:8 (May 20, 2016). Any employer rate increase will be shared by King County and, as one of the largest employers in PERS, King County will pay a higher proportion of the remaining *Dolan* liability through any increased contribution rates. *See* RP 22:22-23:18, 107:3-18 (May 20, 2016).

Large Negative Impact on King County. The request by DRS for more than \$65 million in interest would have a substantial negative budget impact on King County and its ability to provide vital service programs. CP 2160. This is supported by undisputed testimony by Mr. Dively that King County would incur debt service costs of approximately \$7.5 million each year for the next 10 years to fund the interest amount sought by DRS. RP 41:3-19 (May 20, 2016). King County cannot raise taxes to pay this amount, so it would need to create savings through program cuts or employee layoffs. RP 42:8-43:22, 44:13-23 (May 20, 2016).

¹¹ Over the same period, employee contribution rates increased 148 basis points, from .0464 to .0612, for reasons entirely unrelated to the *Dolan* matter, almost fifty times the predicted increase at issue here. CP 2050.

VI. CONCLUSION

King County respectfully requests that the trial court's order requiring King County to pay \$10.5 million in interest on the retroactive contributions be affirmed.

DRS's attempt to overturn the order by contesting the trial court's jurisdiction to decide the interest issue fails for three critical reasons.

First, both the Supreme Court and this Court have previously remanded the remedies issues in this case to the trial court for decision and this Court has already rejected DRS's argument that a statute deprives the trial court of jurisdiction to implement the injunction. The trial court's decision on interest did not arise from the review of an agency action, despite DRS's inaccurate characterization.

Second, DRS subjected itself to the trial court's "complete adjudication of the issues" by intervening as a full party in the remedies phase of the case. *See Chelan Cnty.*, 146 Wn.2d at 946 n. 8. After intervening to be heard on whether King County should be required to pay interest on retroactive contributions, DRS cannot now complain that the trial court proceeded to adjudicate that very issue.

Third, DRS's mid-litigation, ad hoc "administrative action" does not deprive the trial court of jurisdiction. The trial court was the first forum in which DRS and King County contested the interest issue, so the

priority of action doctrine vests the trial court with exclusive authority to decide the issue. *See City of Yakima*, 117 Wn.2d at 675.

With the interest issue properly before the trial court, the trial court's exercise of discretion is entitled to great deference. The trial court's decision is supported by substantial evidence in an extensive record that was developed by both King County and DRS after conducting fact and expert witness discovery, submitting pre- and post-hearing briefs with many exhibits, and participating in a multi-day evidentiary hearing. DRS cannot contest that it was given a full and fair opportunity to present all of its evidence and arguments on behalf of PERS. With the benefit of having presided over this case for more than a decade, the trial court engaged in a balancing process in an effort to "recognize the equities presented by both parties in a difficult case." CP 2161.

The trial court's exercise of discretion is well within the broad latitude that trial courts have in fashioning equitable remedies to implement injunctions and should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of June, 2017.

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s/Tim J. Filer

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Attorneys for Respondent King County

CERTIFICATE OF SERVICE

The undersigned declares that on Monday, June 26, 2017, I caused the foregoing to be served in the manner of service as indicated below.

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I declare under penalty of perjury under the laws of the State of Washington on June 26th, 2017 at Seattle, Washington.

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June 26, 2017 - 3:32 PM

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