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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

ANSWER TO WASHINGTON EDUCATION ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Ave. SW
Suite C, Third Floor
Seattle, WA 98126
(206) 574-6661
Email: phil@tal-fitzlaw.com

David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #4850
Seattle, WA 98104
(206) 622-3536
Email: skstrong@bs-s.com
Email: davidfstobaugh@bs-s.com
Email: skfestor@bs-s.com

Attorneys for Plaintiffs/Petitioners

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INTRODUCTION

The Petitioners are Mickey Fowler, Leisa Fowler and a certified class of over 25,000 teachers in Teachers Retirement System (TRS) Plan 3, collectively the "teachers." The teachers submit this answer to the Amicus Curiae Brief of the Washington Education Association (WEA).

ARGUMENT

The Court Should Accept Review.

As explained by WEA, the fundamental issue in this case is whether the Department of Retirement Systems (DRS) was required to pay the teachers all the interest owed for their contributions at the established rate of 5.5% per annum when they withdrew their funds from TRS plan 2 and deposited them in TRS plan 3.[1] DRS had a secret practice of not paying the teachers all the interest their contributions earned at the interest rate of 5.5% per year when they withdrew their contributions and instead applied a portion of that interest to employer accounts. DRS has consistently maintained that the teachers were only entitled to that portion of the interest that DRS credited to their account, not the amount earned at the established interest rate of 5.5% per annum. DRS does not dispute that

[1] CP 542 Ans.¶5: "regular rate of interest is 5.5% per year compounded quarterly."

AR 232 Admission No. 1: "The following is admitted. The regular rate of interest on the member account of an individual PERS Plan 2 member is 5.5 percent annual interest compounded quarterly."

the teachers contributions earned daily interest, but it says it had no "legal duty" to pay that daily interest earned to the teachers. DRS Ans.at 17. DRS thus contends that "the failure to pay daily interest did not deprive plaintiffs of interest accrued on sums in their accounts." DRS Ans. at 18.

WEA correctly explains that the Court of Appeals erred in ignoring RCW 41.04.445(4) because it provides that the teachers "shall be paid" their contributions "plus accrued interest" when they withdrew their funds from TRS plan 2 and deposited them in TRS plan 3. Amicus at 5-6. "Accrued interest" is not defined in the statute and thus it has its ordinary dictionary meaning. *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). "Accrued interest means interest earned, though not credited or otherwise paid." Dictionary of Banking Terms, 4th Ed. 2000, p. 7, AR 684. Other dictionaries agree. See Petition for Review at 6 n. 5. Indeed DRS agreed below on this meaning of "accrued interest." AR 713. And in this appeal DRS did not dispute that the Court of Appeals erred in saying that RCW 41.04.445(4) does not apply to DRS. *Probst v. DRS*, 167 Wn.App. 180, 189 n. 7, 271 P.3d 966 (2012). In fact, when the DRS presiding officer made the same error, saying the accrued interest statute did not apply to TRS, DRS itself asked the officer to correct her error. AR 948-49.

The teachers asked the Court of Appeals to correct its error of

ignoring RCW 41.04.445(4), but it refused to do so, even though DRS did not dispute that it had erred. The Court of Appeals had a responsibility to correct the error in its earlier opinion. *State v. Trask*, 98 Wn.App. 690, 990 P.2d 976 (2000); RAP 2.5(c)(2). There, the Court of Appeals determined that its earlier opinion erred on construction of the interest owed to *Trask* as prejudgment interest versus judgment interest and the Court correctly decided to "complete and correct," . . . [its] "previous discussion of *Trask's* claim of interest." 98 Wn.App. at 695.

The Court of Appeals error here in ignoring the "accrued interest" statute caused it to make another fundamental error — misconstruing RCW 41.50.033, enacted in 2007, ten years after the teachers withdrew their money and were supposed to receive their contributions plus accrued interest.

The Court of Appeals said that the 2007 statute, which gave DRS authority to determine the "amount to be *credited*," means that DRS has "*de facto* authority over how interest is *earned*." *Probst*, 167 Wn.App. at 188 (emphasis added).[2] (The Court of Appeals never explained how the 2007 law gave DRS retroactive *de facto* authority over how interest was

[2] Because a prior statute giving DRS authority on "the amount to be credited" to accounts was repealed in 1992 (Laws of 1992, Ch. 212 §11), the Legislature enacted the 2007 law. Thus, before the 2007 statute, DRS had no authority on crediting interest on accounts, although it promised interest at the rate of "5.5% per year compounded quarterly." CP 542 Ans. ¶5 b. The 2007 statute gave DRS this authority on crediting interest, which it lacked.

earned in 1996-97 when the teachers withdrew their funds.) The Court of Appeals' construction of the 2007 statute makes RCW 41.04.445(4) meaningless because "accrued interest" means "interest earned though not credited or otherwise paid." It does *not* mean the interest credited or the interest paid. The Court of Appeals made this error in construing the 2007 statute because it did not consider RCW 41.04.445(4) to be pertinent, *Probst*, 167 Wn.App. at 189 n. 7, when in fact it governs the teachers' situation, entitling them to their contributions plus accrued interest upon withdrawal of their contributions, not just the amount that DRS had credited or posted to their accounts upon withdrawal.

DRS's presiding officer found there was "legislative silence" on when members earned interest on their funds (AR 22, ¶29), and DRS repeatedly agreed with this finding. CP 414, lines 18-19 ("The Legislature did not provide any guidance on how interest is to be calculated on member accounts; when a member's contributions begin to accrue and earn interest[.]"); CP 417, lines 8-9 and 13-14 ("There is no statute or regulation that requires the department to calculate interest in [any] manner . . . there is no requirement for how interest must accrue, how the rate must be calculated, or that pro rata interest must be paid when funds are withdrawn."); CP 418, lines 19-20 ("The PERS statutes, including the

transfer statute at issue here, do not define or dictate any interest calculating method.")

Because the statute was silent on when interest accrued, the common law daily interest rule applied. *Faulkenbury v. Teacher's and State Retirement System of North Carolina*, 144 N.C. App. 587, 515 S.E.2d 743 (1999). There, a statute defined "regular interest" as "interest compounded annually at such rate as shall be determined by the board of trustees" and the board "established an interest rate of 4 percent," but the parties did "not agree on the method of accruing and compounding interest." 515 S.E.2d at 746. Under the board's approach interest only accrued if the funds were held "for a year." *Id.* (DRS's position here is similar in that the employees are not credited with the interest unless their contributions are on deposit for a full quarter.) The statutes were "silent" on when interest accrued and thus "principles of common law" applied and the teachers were entitled to "daily interest." *Faulkenbury*, 515 S.E.2d at 747.

The Court of Appeals distinguished *Faulkenbury* because the 2007 statute gave DRS the authority to determine when interest is earned. *Probst*, 167 Wn.App. at 190. But before 2007, ten years earlier, in 1996-97 when the teachers withdrew their funds, the statutes were silent on how interest was earned as DRS admits. Thus the common law daily interest

rule applied at that time. *Faulkenbury*, 515 S.E.2d at 747; *In re Parentage of LB*, 155 Wn.2d 679, 689, 122 P.3d 161 (2005).

The Court of Appeals said that the 2007 law abrogated the common law rule that interest is earned daily. *Probst*, 167 Wn. App. at 190. But the common law is not changed unless a statute is clearly and explicitly "repugnant" to the common law. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77 and n. 8, 196 P.3d 691 (2008). Aside from the fact that that the requirement for paying daily interest predates the United States Constitution and thus it is a protected property right under the Constitution's takings clause (Petition for Review at 8-11), the Court of Appeals statement that the 2007 law abrogated the common law rule that interest is earned from the day of deposit to the date of withdrawal is erroneous because it ignores the accrued interest statute, RCW 41.04.445(4), which the Legislature did not repeal. The 2007 law gave DRS the authority on when to "credit" interest, not on when it is *earned.* Indeed, because "accrued interest" means interest that is earned though not yet credited or paid, crediting interest and paying the interest earned are simply not the same thing. RCW 41.04.445(4) thus implements the common law rule that interest is earned from day to day, even if payable only in intervals. *Faulkenbury*, 515 S.E.2d at 747-47. See also Petition for Review at 10.

Accordingly, the 2007 law did not clearly and explicitly revoke the common law rule that interest is earned daily, assuming arguendo that 2007 statute could retroactively revoke a vested right to accrued interest earned in 1996-97. Indeed, the Court of Appeals never explained how a 2007 statute could retroactively take away interest earned when the funds were withdrawn in 1996-97. The WEA Amicus Brief at 8-9 correctly explains that the teachers had a vested right which cannot be retroactively taken away.

The Court of Appeals also erred in saying daily interest was not owed because the interest rate of 5.5% per annum compounded quarterly, set by DRS (CP 542 Ans. ¶5, AR 232 Admission No. 1) has an objective meaning requiring that interest is earned each day. "Annual" and "per annum" mean "by the year." Webster's Third Int. Dict. p. 88 (1976 ed.); Black's Law Dict. p. 115 (6th Ed. 1990). And a year is 365 days during which interest is earned *each day* at the specified rate. *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 691-92, 586 P.2d 830 (1978); *Gesa Federal Credit Union v. Mutual Life Ins. Co. of New York*, 39 Wn.App. 875, 882-83, 96 P.2d 607 (1985), *aff'd.*, 105 Wn.2d 248, 713 P.2d 728 (1986); *Schrom v. Brd of Volunteer FireFighters,* 153 Wn.2d 19, 36, 100 P.3d 814 (2004). Thus, annual or per annum interest means that interest is earned each day of the 365-day year. DRS itself uses a

365-day calendar to determine the interest owed by employers, employees, and others to DRS, requiring interest for each day. CP 876 (quoting DRS Employer Handbook).

The Court of Appeals in *Trask* recognized this very point and corrected its opinion to account for the interest that Trask *earned each day* for prejudgment interest and judgment interest. 98 Wn. App. at 698-99. Accordingly, the interest rate of 5.5% per annum set by DRS has an objective meaning, requiring that interest is earned each day.

There is no dispute here that DRS did not pay the teachers all the interest earned on their contributions at the rate of 5.5% per annum compounded quarterly. DRS took part of the daily interest earned by the teachers and "allocated" it to the employers' account, instead of to the teachers' TRS Plan 3 accounts. DRS Resp. Br. at 7. But DRS contends "the failure to pay daily interest did not deprive plaintiffs of interest accrued on sums in their accounts." DRS Ans. p. 18.

WEA correctly notes in *Dean v. Lehman*, 143 Wn.2d 12, 35, 18 P.3d 523 (2001), this Court held that under a very similar statute entitling inmates to accrued interest on their inmate accounts, the State could not take that interest and apply it to an "Inmate Betterment Fund."[3]

[3] The statute in *Dean*, RCW 72.09.111(1)(d), provided that "[t]he department personal inmate savings account, *together with any accrued interest*, shall only be available to an inmate at the time of his or her release from confinement. . . ." (Court's emphasis).

Amicus at 6. This Court noted that interest "is sufficiently fundamental that states may not appropriate it without implicating the Takings Clause." *Dean*, 143 Wn.2d at 35, citing *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1196-1201 (9th Cir. 1988). The Court in *Dean* did not reach the takings issue because the statute gave the inmates the right to the accrued interest, just as RCW 41.04.445(4) similarly gives the teachers the right to accrued interest for their contributions at the 5.5% per annum rate set by DRS, not just the portion that DRS credits to their account, with the rest going to the employers.

There is a plain takings clause violation here because all the interest at the rate of the 5.5% per annum belongs to the teachers. WEA Amicus at 3-8; *Phillips v. Washington Legal Foundation,* 524 US 156, 165-66, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 US 155, 164, 101 S.Ct. 446, 66 L.Ed. 358 (1980); *Dean*, 143 Wn.2d at 34-36; *Schneider*, 151 F.3d at 1196-1201.

The Court of Appeals refused to consider the takings issue; it misconstrued the law because it erroneously thought that the pertinent statute, RCW 41.04.445(4), was only "tangentially related," *Probst*, 167 Wn.App. at 189 n. 7; and it refused to correct this error though it had a responsibility to do so. *State v. Trask*, 98 Wn.App. at 695; RAP 2.5(c)(2). DRS did not dispute that the Court of Appeals erred. Nevertheless, the

Court of Appeals affirmed the trial court, which remanded the ten-year-old case to DRS for rule-making so that DRS can enact a rule which supposedly will retroactively determine the interest earned by the teachers on their contributions that were withdrawn in 1996-97 and deposited in their TRS Plan 3 accounts. The whole concept of retroactive rule-making – in a case that never involved rule-making – to enact a new interest rate rule that will supposedly apply 20 years backward in time is certainly an unprecedented self-contradiction.

Accordingly, WEA is correct in asking the Court to accept review. As in *Dean v. Lehman*, this Court would not need to reach the Constitutional Takings issue and the vested rights issue if it agreed with WEA and the teachers on the construction of the statute.

Respectfully submitted this 21st day of April, 2015.

Philip A. Talmadge, WSBA #6973
2775 Harbor Ave. SW
Suite C, Third Floor
Seattle, WA 98126
(206) 574-6661

David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Stephen K. Festor, WSBA #23147
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #4850
Seattle, WA 98104
(206) 622-3536

Attorneys for Plaintiffs/Petitioners

DECLARATION OF SERVICE

I, Monica I. Tofoleanu, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

On April 21, 2015, I personally served a true and correct copy of Plaintiffs' **Answer to Washington Education Association's Amicus Curiae Brief in Support of Petition for Review** and this Certificate of Service as follows:

Michael Tardif (miket@fjtlaw.com)
Jeffrey Freimund (jeffF@fjtlaw.com)
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capital Way South, Ste 602
Olympia WA 98501
VIA EMAIL and US MAIL, POSTMARKED April 21, 2015

Sarah Blocki (sarahb@atg.wa.gov)
Assistant Attorney General
PO Box 40100
Olympia WA 98504
VIA EMAIL and US MAIL, POSTMARKED April 21, 2015
Attorneys for Respondent DRS

Harriet Strasberg (HStrasberg@comcast.net)
203 Fourth Ave, Ste 520
Olympia, WA 98501
VIA EMAIL
Attorney for WEA Amicus

In accordance with the laws of the State of Washington, the **Answer to Washington Education Association's Amicus Curiae Brief in Support of Petition for Review** and this Certificate of Service were filed with the Washington State Supreme Court Clerk on April 21, 2015 by email sent to SUPREME@COURTS.WA.GOV.

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

DATED this 21st day of April, 2015, at Seattle, Washington.

Monica I. Tofoleanu, *Legal Assistant*

OFFICE RECEPTIONIST, CLERK

To: Monica Tofoleanu
Cc: miket@fjtlaw.com; jeffF@fjtlaw.com; Frances Depalma; Blocki, Sarah (ATG); phil@tal-fitzlaw.com; Roya Kolahi; Harriet Strasberg; Steve Festor; Steve Strong; David Stobaugh; Alex Strong
Subject: RE: Supreme Court Cause No.:91250-4; Fowler v. DRS

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From: Monica Tofoleanu [mailto:mtofoleanu@bs-s.com]
Sent: Tuesday, April 21, 2015 4:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: miket@fjtlaw.com; jeffF@fjtlaw.com; Frances Depalma; Blocki, Sarah (ATG); phil@tal-fitzlaw.com; Roya Kolahi; Harriet Strasberg; Steve Festor; Steve Strong; David Stobaugh; Alex Strong
Subject: Supreme Court Cause No.:91250-4; Fowler v. DRS

Attached for filing please find Petitioners' Answer to Washington Education Association's Amicus Curiae Brief in Support of Petition for Review.

Case Name: Fowler v. DRS
Supreme Court Cause No.: 91250-4
Attorneys for Petitioners: David F. Stobaugh, WSBA No. 6376
Stephen K. Strong, WSBA No. 6299
Stephen K. Festor, WSBA No. 23147
Bendich Stobaugh Strong
701 Fifth Avenue, Suite 4850
Seattle, WA 98104
Tel: 206-622-3536
Email: skstrong@bs-s.com
Email: davidfstobaugh@bs-s.com
Email: skfestor@bs-s.com

Phil Talmadge, WSBA No. 6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW, Suite C, Third Floor
Seattle, WA 98126
Tel: 206-574-6661
Email: Phil@tal-fitzlaw.com

This document is being served on all counsel of record by email and US mail.

Thank you.

Monica I. Tofoleanu, Legal Assistant
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, Suite 4850
Seattle, WA 98104
Telephone: (206) 622-3536
Fax: (206) 622-5759
http://www.bs-s.com