

NO. 82842-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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KEVIN DOLAN and a class of  
similarly situated individuals,

Respondents,

v.

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

Petitioner.

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STATE OF WASHINGTON  
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**ANSWER TO MOTION FOR  
DISCRETIONARY REVIEW**

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## TABLE OF AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>Eberle v. Sutor</i> , 3 Wn.App. 387, 475 P.2d 564 (1970) .....	4
<i>Gavin v. Hieber</i> , 8 Wn.App. 104, 554 P.2d 390 (1972) .....	2, 3
<i>Greyhound Lines v. Tacoma</i> , 81 Wn.2d 525, 503 P.2d 117 (1972) .....	1, 3
<i>Rhodes v. DTD Enterprises</i> , 16 Wn.App. 175, 554 P.2d 390 (1976) .....	2
<i>Seattle-First Nat'l Bank v. Marshall</i> , 16 Wn.App. 503, 557 P.2d 352 (1976) .....	2
<b>Federal Cases</b>	
<i>Cox v. U.S.</i> , 402 US 469 (1975) .....	1
<i>Flor v. Bot Financial Corp.</i> , 79 F.3d 281 (2d Cir. 1996) .....	5
<i>In re Cement Antitrust Litigation</i> , 673 F.2d 1020 (9th Cir. 1982) .....	4
<i>Long v. BEA</i> , 646 F.2d 1310 (9th Cir. 1981) .....	2
<i>Matthews v. Eldridge</i> , 424 US 319 (1976) .....	1
<i>U.S. v. Woodbury</i> , 263 F.2d 784 (9th Cir. 1959) .....	4

**Statutes**

28 U.S.C. §1292(b) .....4

**Rules**

RAP 2.2 .....1

RAP 2.3(b)(4) .....3, 4

**Other Authority**

Tegland, *2A Washington Practice*,  
pp. 103, 161-62, 166 .....1, 4

## ANSWER TO MOTION FOR DISCRETIONARY REVIEW

Plaintiffs believe King County is entitled to appellate review as a matter of right because it is appealing from a permanent injunction. A permanent injunction is a type of final judgment and is therefore an appealable order. *Greyhound Lines v. Tacoma*, 81 Wn.2d 525, 527, 503 P.2d 117 (1972).

*Greyhound Lines* is a pre-RAP case, but its holding is still good law. Before RAP 2.2 was adopted, an order granting or denying a *temporary* injunction, or vacating or refusing to vacate a *temporary* injunction, was appealable under the previous rules even though a temporary injunction was not a type of final judgment. Tegland 2A Wash. Prac., p. 103 (see also task force comment for RAP 2.2 reproduced in Tegland, *supra*, p. 107). RAP 2.2 no longer allows an appeal as a matter of right of a *temporary* injunction, but RAP 2.2 did not eliminate the appealability of a permanent injunction, particularly those entered following a trial, as it was here, and as it was in the *Greyhound Lines* case. A permanent injunction is a type of final judgment, as the *Greyhound Lines* case holds.

A permanent injunction is normally a type of final judgment even though other issues may still need to be resolved because courts use an “intensely practical approach” in determining whether a decision is a “final judgment,” *Matthews v. Eldridge*, 424 US 319, 331 n. 11 (1976); see also *Cox v. U.S.*, 402 US 469, 478 n. 7 (1975) (In determining whether

there is a final judgment, “the requirement of finality is to be given a practical rather than a technical construction” [internal quotations omitted]). Thus, the United States Supreme Court has held that such decisions were final judgments subject to appeal, “even though there are further proceedings – even entire trials – yet to occur.” 420 US at 479. See also *Long v. BEA*, 646 F.2d 1310, 1317 (9th Cir. 1981), “in light of the practical finality of the district court’s injunctive order requiring disclosure,” the order was a final judgment and therefore an appealable order.

Washington follows the same approach in determining finality for purpose of appeal. In *Gavin v. Hieber*, 8 Wn.App. 104, 112-113, 554 P.2d 390 (1972), the Court found that an order directing a party delivering property to another was final judgment even though it “did not adjudicate the entire claim.” The Court explained (8 Wn.App. at 113):

When a litigant is required to deliver physical property to his protagonist by reason of an order which does not adjudicate the entire claim – if the order be deemed interlocutory and not appealable – he may refuse and face the possibility of contempt proceedings or he may comply and face the possibility that by the time a “final” order is entered his property is irrevocably beyond his reach. Litigants are not (usually) funambulists. They should not be required to glide across the intervening time period waiting either for the sword to fall or the chickens to scatter.

*Accord, Seattle-First Nat’l Bank v. Marshall*, 16 Wn.App. 503, 504-07, 557 P.2d 352 (1976) (order directing partner to purchase deceased

partner's partnership shares was a final judgment even though it left many other details about the partnership accounting for later resolution); *Rhodes v. DTD Enterprises*, 16 Wn.App. 175, 177, 554 P.2d 390 (1976) (a "Decree" interpreting the parties' contract, and requiring a party to convey a portion of property to the defendant was a final judgment even though the Decree left for further resolution which parcels would be conveyed).

Here, there is practical finality because the trial court's permanent injunction adjudicates plaintiffs' PERS claim in plaintiffs' favor and requires the County to enroll the plaintiffs in PERS, leaving the details concerning enrollment of particular individuals and their work histories for later resolution. The County should not be limited to the Hobson's choice referred to in *Gavin v. Hieber*, 8 Wn.App. at 113. Thus, practically speaking, the permanent injunction is final judgment and therefore an appealable order, as the *Greyhound Lines* case holds, even though it does not resolve all the issues in the case. 81 Wn.2d at 527.

Because the County is appealing from a type of final judgment, the County's motion for discretionary review is moot. But if the County is not entitled to an appeal as a matter of right, plaintiffs do not agree that the County has met the standards for discretionary review.

The County seeks discretionary review under RAP 2.3(b)(4). That rule provides that discretionary review *may* be granted when the trial court certifies that an issue is: [1] "a controlling question of law" [2] "as to which there is a substantial ground for difference of opinion," [3] and

“immediate review” could “materially advance the ultimate termination of the litigation.” This rule was adopted in 1998 and it is nearly identical to the federal procedure in 28 U.S.C. §1292(b). Tegland, 2A *Washington Practice*, pp. 161-62, 166 (Drafters Comments to 1998 Amendment). Washington courts may thus look to the construction of the federal rule by the federal courts in interpreting RAP 2.3(b)(4). *Eberle v. Sutor*, 3 Wn.App. 387, 389, 475 P.2d 564 (1970).

Under the federal procedure there is *no* deference to the trial court’s certifications: “the court of appeals must undertake a two-step analysis.” *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), the Ninth Circuit explained there are two steps to appellate review of the trial court certification (*id.*): “We must [first] determine whether the district court has properly found that the certification requirements have been met. Second, if the requirements are properly met, then the appellate court determines whether to grant review.”<sup>1</sup> *Id.*

Thus, this Court decides for itself whether discretionary review should be granted. That decision is not delegated to the trial court or the parties.

Plaintiffs agree that review now will materially advance the outcome of the litigation because a ruling in the plaintiffs’ favor will

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<sup>1</sup> See also *U.S. v. Woodbury*, 263 F.2d 784, 786 (9th Cir. 1959)(“opinion of the district judge that a controlling question is involved ... is not binding upon this court when we are called upon to exercise our own discretion under the statute”).

enable the parties to expeditiously, by agreement or by motion, resolve the remaining enrollment issues, whereas if the appellate court agrees with the County the case will be over.

Plaintiffs do not agree with the County, however, that there is a “controlling question” of law or that there are “substantial grounds for disagreement” about the law.

As explained in plaintiffs’ answer to the County’s Statement of Grounds for Direct Review, the trial court applied well-established legal principles in ruling that the plaintiffs were County employees and that the County had a duty to enroll the plaintiffs in PERS. The trial court’s decision is heavily fact-based, applying long-standing principles to those facts. While the County contends in its motion that there is a controlling issue of law, it nowhere states what that issue supposedly is. The only issue it identifies is that the trial court improperly weighed the facts in finding that the plaintiffs are County employees. Nor does the County explain why there are grounds for substantial disagreement about the supposed controlling issue of law. It erroneously contends that the case “involves issues of first impression”, but the “mere presence of a disputed issue” even if “a question of first impression, standing alone is insufficient to demonstrate a substantial ground for a difference of opinion.” *Flor v. Bot Financial Corp.*, 79 F.3d 281, 284 (2d Cir. 1996)(reversing trial court’s certification).

Plaintiffs did not agree below that there is a controlling issue of

law about which there was substantial grounds for disagreement. Plaintiffs' position below was the same as it is in this Court, *i.e.*, that the permanent injunction was a type of final judgment and therefore, was an appealable order.

The plaintiffs believe that the County has an appeal as a matter of right because it is appealing from a permanent injunction, but plaintiffs believe if the County were limited to discretionary review, review should be denied because the County has not met the standards for discretionary review.

While plaintiffs believe that the County is entitled to review now because it is appealing from a permanent injunction, plaintiffs oppose the County's request that this Court immediately review the trial court's decision. Review should occur, as it normally does, first by the Court of Appeals, and after the Court of Appeals issues its decision, this Court could review the decision, if there were any issues of law that needed to be addressed by this Court.

Respectfully submitted this 5th day of June, 2009.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the **Answer to Motion for Discretionary Review** was filed with the Washington State Supreme Court on June 5, 2009.

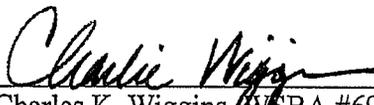
I further certify that one copy of the aforementioned document was served on Friday, June 5th, *via* hand delivery, on counsel for King County:

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

DATED: June 5, 2009, at Seattle, Washington.

  
\_\_\_\_\_  
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