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SUPREME COURT
STATE OF WASHINGTON

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JAMES DIDLAKE, et al,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING

Respondent,

PETITION FOR REVIEW

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Didlake, et al, v. Washington State, and Washington State Department of Licensing, Case No. 71633-6-I; filed March 16, 2015

I. IDENTITY OF PETITIONERS

Petitioners are James Didlake, Dustin Johnson, Shelly Burke, Monica Fischer, and Michael Bennett. Collectively they are referred to as "Didlake" throughout this petition.

II. CITATION TO COURT OF APPEALS DECISION

Didlake, et al, v. Washington State, and Washington State Department of Licensing, Case No. 71633-6-I; filed March 16, 2015.

III. ISSUES PRESENTED FOR REVIEW

Does the fee-for-hearing requirement in the Implied Consent statute violate the due process clause of the Federal and State constitutions by forcing drivers to pay a fee to receive a meaningful hearing in response to a State initiated suspension of a driver's license?

IV. STATEMENT OF THE CASE

This petition addresses the fee-for-hearing requirement found in the Implied Consent statute.[1] A driver arrested for DUI is read a statutory warning advising that either a refusal to submit to a breath-alcohol test or a test result over .08[2] results in a mandatory license suspension.[3] If either

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[1] RCW 46.20.308.
[2] For drivers under age 21 the test level is .02. RCW 46.20.308(2)(c)(ii).
[3] RCW 46.20.308(2).

occur the officer is required to notify the Department of Licensing by filing a sworn report.[4]

The Department, "upon receipt of the sworn report," initiates the suspension.[5] The driver's options are to do nothing, in which case the suspension is automatic, or request a hearing before a Department of Licensing hearing examiner.[6] The driver must pay a fee to receive the hearing or seek a waiver of the fee by claiming indigency.[7] The hearing examiner either sustains or rescinds the suspension order.[8]

Petitioners were arrested for DUI and became subject to automatic suspensions issued by the Department.[9] Each paid the fee to receive a hearing.[10] All suspension orders were rescinded, except for Johnson.[11]

Petitioners filed a lawsuit against the Department of Licensing seeking reimbursement of the hearing fee.[12] Petitioners alleged that payment of the fee to receive an initial evidentiary hearing violated the due

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[4] RCW 46.20.308(5)(d).
[5] RCW 46.20.308(6).
[6] RCW 46.20.308(6).
[7] RCW 46.20.308(6). Note: At the time Petitioners filed suit in superior court this fee was $200. As of Oct. 2012 the fee has increased to $375. (CP 2)
[8] RCW 46.20.308(7). The Department carries the burden of proving statutory requirements for the suspension were met. Id.
[9] CP 2-3.
[10] Id.
[11] Id.
[12] CP 1-7.

process clause of the Federal and State constitutions.[13] Petitioners further sought class certification.[14]

The King County Superior Court granted the Department's CR 12(c) motion without ruling on Petitioners' motion for class certification.[15] The Court of Appeals, following transfer from this Court, affirmed.[16]

V. ARGUMENT

Petitioners contend review should be granted for two reasons.[17] First, this petition raises a significant question of law under the Constitutions of the State of Washington and United States (RAP 13.4(b)(3)). Second, there is a conflict between decisions from Division One and Two of the Court of Appeals on the issue whether a fee-for-hearing requirement to defend against a state initiated action to take property from a citizen violates due process (RAP 13.4.(b)(2)).

1. This petition raises a significant question of law under the due process clause of the Federal and State constitutions that has not been adequately resolved by prior case law.

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[13] Id.
[14] Id.
[15] CP 247-253.
[16] Didlake, et al, v. Washington State, and Washington State Department of Licensing, Case No. 71633-6-I; filed March 16, 2015; pg. 3.
[17] Petitioners raise a facial due process challenge. *Didlake*, at 4; 15. The issue of class certification has not been ruled on by the trial court.

The retention of the state sanctioned privilege to drive constitutes a "substantial" and "important" property interest. *City of Redmond v. Moore*, 151 Wn.2d 664, 670-671, 91 P.3d 875 (2004). Courts have described this right as not simply a mere "privilege," but an essential component to social and economic mobility.

> "Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."
>
> *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586 (1971);
>
> "[T]he State "will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures."
>
> *Moore*, 151 Wn.2d at 670-671.

Due process of law is guaranteed under both the United States and Washington State Constitutions.[18] The Washington due process clause is co-extensive with that of the federal Constitution. *State v. Morgan*, 163 Wn. App. 341, 352, 261 P.3d 167 (2011). The purpose of the due process clause is to protect the people from the actions of the State. *DeShaney v.*

[18] U.S. Const., Amend. XIV; Wash. Const., Article I, §3.

Winnebago Cty., 489 U.S. 189, 196, 109 S.Ct. 998 (1989). Procedural due process constrains governmental decision-making that deprives individuals of liberty or property interests within the meaning of the due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976). Where a property interest is at stake, at a minimum due process requires notice and the right to be heard at a meaningful time and in a meaningful manner. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652 (1950); *Olympic Forest Prods., Inc v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973).

The United States Supreme Court, and subsequently this Court, has adopted a three-part test to determine the type of "process" which is due to protect certain property rights. See *Mathews v. Eldridge*, 424 U.S. at 335; *City of Bremerton v. Hawkins*, 155 Wn.2d 107, 110, 117 P.3d 1132 (2005). A Court must consider:

> (1) The private interest that will be affected by the official action;
>
> (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

While the form of a due process hearing may vary under this test, the Supreme Court has consistently held that regardless of its form, the due process hearing must be afforded to the individual before the individual is finally deprived of a property interest. See *Mathews v. Eldridge*, 424 U.S. at 333; *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) (emphasis added). A pre-revocation hearing procedure is required before the State may suspend or revoke the driving privilege. *Bell v. Burson*, 402 U.S. at 539-542; *Redmond v. Moore*, 151 Wn.2d at 668.

Throughout these proceedings the Respondent and courts have evaluated Didlake's claim by applying case law addressing the issue of "access" to courts. As will be explained below, Didlake does not raise an "access" issue. Rather, Didlake (and others) must respond to the Department's action to initiate a license suspension. As the responding party, Didlake claims he should not be compelled to pay a fee to receive any due process protection of his driving privilege.

The United States Supreme Court first addressed the issue of payment of fees to obtain access to the courts in the early 1970's in three cases. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971), *v. Connecticut*, the Court addressed whether a state could compel indigent persons to pay a court filing fee to access the courts to obtain a divorce.

The Court held that the fee requirement under these limited circumstances violated due process. At 382. The Court's ruling was limited; it did not decide whether states were barred from imposing any fee requirements to access the courts. At 382. Instead, the Court focused solely on the states' monopoly over the regulation of marital relationships and the need to preserve access to the courts to alter this "fundamental human relationship." At 383.

In *United States v. United States v. Kras*, 410 U.S. 656, 93 S.Ct. 1172 (1973), the Court addressed whether an indigent petitioner could be compelled to pay a filing fee to access the courts for bankruptcy protection. Distinguishing *Boddie*, the Court held the fee did not violate due process as applied to indigent persons. At 450. To the Court the distinction was that bankruptcy was an issue of economic and social welfare; not a fundamental human relationship. At 447.[19] Thus, a fee requirement could be placed on all petitioners to access the courts. *Id.*

Finally, in *Ortwein v. Schwab* 410 U.S. 656, 93 S.Ct. 1172 (1973), the Court addressed whether state courts could compel indigent petitioners to pay a filing fee to access appellate review of a reduction in welfare

[19] The Court also noted that unlike marriage which is monopolized by the State; a bankruptcy petitioner has other options to resolve legal debts short of accessing the courts. At 445.

benefits. The Court ruled the appeal fee did not violate due process. At 660. The Court relied on two distinctions with *Boddie*. First, like *Kras* the issue of reduction in welfare benefits was a matter of social and economic welfare, not a fundamental right. At 658-659. Second, the petitioners received an initial pre-termination hearing where no fee was imposed. At 659-660. Under these facts petitioners were not denied due process. *Id.*

This Court has addressed a similar issue in *Housing Authority of King County v. Saylors*, 87 Wn.2d 732, 557 P.2d 321 (1977), where the issue was whether an indigent petitioner should be required to pay an appeal fee to <u>access</u> appellate review of an eviction order. This Court adopted the reasoning in *Boddie*, *Kras*, and *Ortwein*;

> "The United States Supreme Court, construing the Fourteenth Amendment, has held that it does not require a waiver of court fees for indigents, if the interest involved in the indigent's claim is not a fundamental one <u>and there is another procedure available, not requiring the payment of fees, through which redress can be sought</u>."
>
> *Saylors*, at 739 (emphasis added).

Noting the similarity to *Ortwein* in that the asserted interest fell in the classification of social and economic welfare and the existence of a pre-termination hearing without fee, the Court held that requiring an

appeal fee from indigent parties to access appellate review was not a violation of due process. At 735-744.

These cases share the common thread of indigent petitioners seeking "access" to the courts. Whether addressing a fundamental interest (marriage) or an economic one (bankruptcy) the indigent petitioners sought access to the courts as a means to resolve a legal dispute. Where access to the courts is at issue, courts have protected indigent petitioners from payment of fees only in cases involving a fundamental right.

This present petition is fundamentally different. Didlake neither claims indigency nor seeks access to the courts to resolve a dispute; he was forced to respond to a State initiated action to take his property. Division Two, in *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011); review denied 174 Wn.2d 1016 (2012), has observed that;

> "Requiring the responding party to pay a fee to access any review of a government initiated action could prevent many people from obtaining the review they are legally entitled to before deprivation of a property interest. See *Ortwein v. Schwab*, 410 U.S. 656, 659–60, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973) (although requiring welfare recipients to pay filing fees to obtain further review of a state welfare decision reducing their benefits did not violate due process, the welfare recipients in question had already received predetermination evidentiary hearings that were not conditioned on the payment of any fee; noting that these preliminary hearings, "not conditioned on payment of any fee," were required under due process) … ."

Downey, at 166.

Didlake falls into this category of case. Therefore, *Boddie*, *Kras*, *Ortwein*, and *Saylors* fail to resolve this issue.

This Court should accept review to determine whether Respondent may compel drivers to pay a fee to receive due process where the State initiates action to take their property.

2. This petition demonstrates there is a conflict between decisions of Division One and Two of the Court of Appeals that must be resolved by this Court.

In recent years Divisions One and Two of the Court of Appeals have addressed the issue presented herein; whether a responding party must pay a fee to receive a due process hearing after the state has initiated action to take their property. These cases, in conjunction with the present case demonstrate a clear conflict within the Court of Appeals on this issue.

A. Downey v. Pierce County.

In *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (Div. 2 2011), review denied, 174 Wn.2d 1016 (2012), Division Two reviewed a law requiring pet owners to pay a fee to receive an evidentiary hearing after the county declared the pet "dangerous" under the "Dangerous Animal Declaration" (DAD) code; finding the fee violated

due process.[20] *Downey*, at 163. Once the declaration had been issued the pet owner had to respond in one of three ways: (1) Request a hearing and pay a $250 "review fee" before the county auditor; (2) relinquish the animal; or (3) Pay $500 for a dangerous animal permit. At 157.

Evaluating Downey's claim under *Mathews* the Court agreed that a pet owner's interest in possession of a pet was "arguably more than mere economic interest because pets are not fungible." At 165. But the Court stopped well short of calling the property interest fundamental. Pets, as a matter of law, are "personal property." At 165.[21] The Court recognized economic factors that relate to pet ownership under the DAD; such as paying higher registration fees and insurance, and potentially facing criminal liability. *Id.* "Although these private interests are not as significant as the liberty interest ... they are not negligible." *Id.*

Division Two found the risk of erroneous deprivation of property was high. "[I]f a pet owner does not or cannot pay the administrative fee

[20] "We agree that due process requires access to an initial evidentiary hearing without charge." Note: the county code created a two level review system. The first level of review before the auditor cost the pet owner $250. The second level, an "appeal," before a county hearing examiner cost $500. Due to deficiencies in the first hearing process Division Two refused to consider the second hearing an appeal, but rather was also an evidentiary hearing. The Court found that the fee requirement for both hearings violated due process and was unconstitutional.

[21] Citing *Sherman v. Kissinger*, 146 Wn. App. 855, 861, 195 P.3d 539 (2008); *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006).

… at that point, the pet owner has had no opportunity to be heard." At 165-166 (emphasis added). This ran afoul of the requirement that before the government can deprive an individual of property, it is *required* to afford her "some form of hearing." *Id.* (emphasis in original).[22]

Of paramount concern to the Court was the direct impact a fee-for-hearing requirement has on access to due process and the ability to protect property from State action:

> "Requiring the responding party to pay a fee to access *any* review of a government initiated action could prevent many people from obtaining the review they are legally entitled to before deprivation of a property interest."
>
> *Downey,* at 166 (emphasis in original); citing *Ortwein,* supra.

B. Morrison v. State, Dept. of Labor & Industries.

Several months later Division One issued its decision in *Morrison v. State, Dept. of Labor & Industries*, 168 Wn. App. 269, 277 P.3d 675 (Div. 1 2012), review denied, 175 Wn.2d 1012 (2012). There, the Court

[22] It is important to note that Division Two did not distinguish between property owners who are indigent and those who are not. Nor did the Court address whether Downey was indigent; as she made no claim that she was. Because the Court was addressing the issue of access to the sole means of receiving a due process hearing concerning a property right, the distinction was meaningless.

reviewed a law requiring Morrison to pay a $200 "appeal fee"[23] to contest several electrical law citations issued against him and his employer.[24] Morrison claimed the appeal fee violated due process. *Morrison*, at 272.

Division One first evaluated Morrison's property interest finding it was solely economic; i.e. the potential loss of money, and therefore not a "fundamental interest." At 273. Relying on the "*Boddie* line of cases," the Court found the fee did not violate due process.

> "... monetary prerequisites to court access (e.g., filing fees) are permissible unless the right attempted to be vindicated is fundamental and the courts provide the only means through which vindication of such right may be obtained."
>
> *Morrison, Id.* (emphasis added).

Division One attempted to distinguish *Morrison* from *Downey* by focusing on what it considered to be distinctly different property interests; calling pet ownership in *Downey* a "much more expansive" property interest. At 275. Yet, *Downey* never held that pet ownership invoked a fundamental interest; it was "arguably more than a mere economic

[23] The decision referred to the fee as an appeal fee. However, the facts of the case establish the fee was really for an evidentiary hearing to challenge the issuance of the violation citations. At 270.
[24] The penalties associated with the citations totaled $4,000.00 in fines.

interest." Thus, Division One failed to provide an adequate explanation for its departure from *Downey*.

Curiously, and perhaps exposing a misunderstanding of the case, Division One further argued that *Downey* held there was no constitutional right to "appeal" civil cases that did not involve fundamental interests.

> "The Downey opinion expressly acknowledged that "there is no constitutional due process right to appeal civil cases involving "only property or financial interests." *Id.* at 167, 267 P.3d 445 (quoting *Grove*, 127 Wash.2d at 240, 897 P.2d 1252).
>
> *Morrison*, at 275 (emphasis added)

This citation to *Downey* appears without context and creates confusion regarding how to define "appeal" in *Morrison*. *Downey* clearly referred to an "appeal" as review of a prior proceeding. *Downey*, at 167; citing *In re Grove*, at 239-240. *Downey* cited *In re Grove* merely to help distinguish the first and second hearings under DAD. *Downey*, at 167. Division Two refused to consider the second hearing an "appeal" – or review – of the first. At 167. In *Morrison*, however, the "appeal" was an initial hearing. Without this understanding *Morrison* could be read to imply that Morrison had no right at all to an initial hearing. Neither *Morrison* nor *Downey* should support such a conclusion.

C. Didlake v. Wash. State, Dept. of Licensing.

The present petition (Didlake) represents Division One's second attempt to distinguish its analysis from Division Two. In *Didlake*, Division One characterized its interpretation of the first *Mathews'* factor.

> "In cases involving due process challenges to filing fees, both the United States and Washington Supreme Courts have held that if a fundamental interest is not involved, requiring a fee for <u>access</u> to court or an administrative hearing, even from indigent persons, does not violate due process."
>
> *Didlake*, pg. 9 (emphasis added)

In subsequent paragraphs the Court reviewed *Boddie*, supra; *Kras*, supra; *Ortwein*, supra; *MLB v. SLJ*, 519 U.S. 102, 117 S.Ct. 555 (1996); *Bowman v. Waldt*, 9 Wn. App. 562, 513 P.2d 559 (1973); *Saylors*, supra; *Downey*, supra; and *Morrison*, supra. With the exception of *Downey* and *Morrison*, none of these cases addressed the issue of requiring payment of a fee to respond to state initiated action against to take property.

Division One attempted to further isolate Division Two's *Downey* analysis, this time alleging that the Court's ruling was premised on the DAD laws "inadequate procedures."

> "The court also found that the county's procedures to issue and review a DAD were insufficient under the *Mathews* factors, especially because the initial fee did not cover a constitutionally adequate evidentiary review. Given this more substantial interest and the county's inadequate

> procedures, the court held that "charging a fee to obtain an initial evidentiary review of a DAD violates due process."
>
> *Didlake*, at 12.

Division One conflated the analysis for the two hearings in *Downey*. *Downey* never found the fee for the first hearing violated due process because of inadequate procedures.[25] Downey concluded the fee for the second hearing violated due process in part because of "inadequate procedures" in the first hearing. *Downey*, at 167. *Downey* is clear in holding that the fee requirement for both the first and second hearings violated due process because due process "requires access to an initial evidentiary hearing without charge." *Downey*, at 163; 166-167.

Not surprisingly, Division One cited *Morrison* as properly evaluating *Didlake*. Here, however, Division One merely re-stated the two flaws in *Morrison*. First, it referenced *Morrison's* conclusion that it was permissible to require payment of a fee to file an "appeal" where no fundamental right was involved. *Didlake*, at 13. While Division One stated "appeal" meant "initial hearing,"[26] this point was never made clear in *Morrison*. Case law cited in *Morrison* used the term "appeal" to mean

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[25] While *Didlake* cites to *Downey* at pages 166 and 167; see *Didlake*, at 12-13 fn.'s 55, 56; at these pages *Downey* is discussing the second hearing not the first.
[26] See Fn. 58.

review of a prior decision. *Morrison*, at 274-275. Second, Division One again referred to *Downey's* interest in her pet as "much more expansive" than *Morrison's* interest in money without acknowledging that Downey's property interest was never a fundamental interest. *Didlake*, at 13.

Division One correctly noted that Didlake presented an issue which was different than the issues presented in the *Boddie* cases. *Didlake*, at 13-14. Division One also correctly noted that even in *Ortwein* and *Saylors* the petitioners received an initial pre-termination hearing without cost where the state initiated action to remove their property. *Id.* Yet, Division One held that this was irrelevant. *Id.*

> "But his arguments ignore the distinction that the United States Supreme Court and Washington courts have repeatedly found to be dispositive in filing fee challenges. Courts have consistently distinguished between fundamental interests and interests that are "solely monetary," involving "economics and social welfare," or even "important" or "substantial.""

This distinction is non-sensical. Courts cannot possibly distinguish what they have not been asked to distinguish. *Downey* is the only case that evaluates the issue presented in *Didlake*, and it found the fee-for-hearing requirement violated due process.

In a final attempt to minimize *Downey*, Division One called the holding in *Downey* "unfortunate dicta." *Didlake*, at 14. Division One's use of this word is contrary to this Court's recognized definition.

> "The word is generally used as an abbreviated form of *obiter dictum*, 'a remark by the way;' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion."
>
> S*tate ex. rel. Lemon v. Langlie*, 45 Wn.2d 82, 89-90, 273 P.2d 464 (1954); citing Black's Law Dictionary, 4th ed., p. 541.

Downey's holding is unambiguous; "We agree that due process requires access to an initial evidentiary hearing without charge." At 163. The entire discussion of due process in *Downey* centered on the issue of whether a fee was required to receive a pre-termination hearing after the county initiated the DAD action. Therefore, the *Downey* holding was the foundation of its analysis and conclusion. It cannot be dismissed as dicta.

Finally, Division One speculates that the ruling in *Downey* may have been different had the DAD law contained a fee waiver provision. *Didlake*, at 14. However, *Downey* answered that question.

> "... the risk of erroneous deprivation of these interests under the current procedures if a pet owner *does not or cannot pay* the administrative fee for auditor's review is high because, at that point, the pet owner has had no opportunity to be heard ..."
>
> *Downey*, at 165-166 (emphasis added)

Downey's ability to pay the fee was not relevant to whether she should be required to pay the fee. An indigency fee waiver fails to protect the due process rights of those who, like Downey, must pay a fee to respond to a state initiated action to take their property. A fee waiver for indigency is only relevant in cases addressing "access" to the courts. This is not the issue here.

VI. CONCLUSION

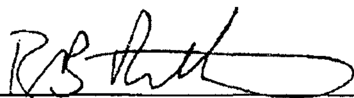
The opinion of Division One in this matter is clearly contrary to the holding in *Downey*. The Court's dismissal of the central holding of Downey as "unfortunate dicta" represents an indefensible effort to avoid the central issue of this case, and shows that the Court did not, in fact, understand *Downey* or the arguments of Didlake.

The privilege to drive is a significant privilege which can only be exercised with the permission of the State. A driver's license is not fungible, it is the unique property of each license holder who's need for

that license, to travel, to work, to obtain medical care, purchase groceries, or transport children to soccer, are equally unique.

This case is not about "access" to the courts. The state is initiating action to take away the privilege to drive and in doing so requires the driver to pay a fee to have any chance of meaningful review of the reasons supporting the suspension. The Court in *Downey* understood this distinction and held that in context of taking away a person's property right of pet ownership the government must provide a pre-deprivation hearing without cost. Didlake asks for the same holding under the Implied Consent law. His right to a license should receive the same due process protections as the property interest in a pet.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.



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<u>Appendix</u>

Didlake, et al, v. Washington State, and Washington State Department of Licensing, Case No. 71633-6-I; filed March 16, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES DIDLAKE, DUSTIN JOHNSON, SHELLY BURKE, MONICA FISCHER, MICHAEL BENNETT, individually and on behalf of all classes of similarly situated persons,

Appellants,

v.

WASHINGTON STATE, and WASHINGTON STATE DEPARTMENT OF LICENSING

Respondents.

No. 71633-6-I

DIVISION ONE

PUBLISHED OPINION

FILED: March 16, 2015

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 16 AM 9: 55

LEACH, J. — Washington's implied consent statute, RCW 46.20.308, requires that a driver arrested for driving under the influence of an intoxicant (DUI) pay a filing fee to obtain an administrative review hearing to prevent a driver's license suspension or revocation. James Didlake, Dustin Johnson, Shelly Burke, Monica Fischer, and Michael Bennett (collectively Didlake) appeal a trial court decision that this fee for hearing requirement does not violate procedural due process. Because the driving privilege is not a fundamental right and the Department of Licensing (Department) waives the fee for indigent drivers, Didlake does not establish a constitutional due process violation. And

because he received notice and a hearing, Didlake does not show that the fee requirement violated due process in his case. Therefore, he cannot prove any set of facts that would justify recovery for a procedural due process violation. We affirm.

FACTS

At various times and places in 2010 or 2011, police arrested James Didlake, Dustin Johnson, Shelly Burke, Monica Fischer, and Michael Bennett for DUI. As required by Washington's implied consent law, the Department initiated license suspension proceedings against them. Didlake, Burke, Fischer, and Bennett each paid a $200 fee for an administrative review hearing. After they prevailed at their hearings, the Department rescinded their license suspensions. Johnson paid two fees and prevailed at one of his two hearings related to two separate arrests.

Didlake filed a class action lawsuit against the Department, asking for injunctive and declaratory relief, plus a refund and damages. He alleged that the statutory fee for an administrative hearing violates due process.[1] Didlake filed a motion for class certification under CR 23. After filing its answer, the Department filed a motion to dismiss Didlake's lawsuit under CR 12(b)(6).

[1] While the complaint alleged both substantive and procedural due process violations, Didlake has abandoned any substantive due process argument on appeal.

At a hearing on November 16, 2012, the trial court heard the Department's 12(b)(6) motion. The court did not hear argument on Didlake's motion for class certification.

In a memorandum opinion and order entered April 5, 2013, the trial court granted the Department's motion to dismiss. Didlake asked the Washington Supreme Court for direct review. On March 5, 2014, the Supreme Court transferred the case to this court.

STANDARD OF REVIEW

When a party files an answer before filing a motion to dismiss under CR 12(b)(6), a court should consider the motion as one for judgment on the pleadings under CR 12(c).[2] Motions under CR 12(b)(6) and 12(c) raise identical issues, whether a request for relief states a claim for which a court can grant relief, and this court reviews decisions under either rule de novo.[3] A court may dismiss a complaint under CR 12 only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery."[4] The court must assume the truth of facts alleged in the complaint, as well as hypothetical facts,

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[2] Blenheim v. Dawson & Hall, Ltd., 35 Wn. App. 435, 437, 667 P.2d 125 (1983).

[3] Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 634-35, 128 P.3d 627 (2006).

[4] Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

viewing both in the light most favorable to the nonmoving party.[5] If the trial court considered matters outside the pleadings, the reviewing court treats a CR 12 motion as a motion for summary judgment under CR 56(c).[6] Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[7] Here, the trial court considered matters outside the pleadings: a declaration and fee study about administrative costs, which the Department filed to support its motion to dismiss. Therefore, the summary judgment standard applies. Because the parties agree that no disputes of material fact exist, our de novo review under CR 56(c) is the same as it would be under CR 12.

A constitutional challenge to a statute presents a question of law that this court also reviews de novo.[8] A reviewing court presumes that a statute is constitutional, and the party challenging it bears the burden of proving otherwise beyond a reasonable doubt.[9] A party may bring a facial or an as-applied challenge.[10] To prevail in a facial challenge, a party must show that "no set of

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[5] M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 189, 252 P.3d 914 (2011) (citing Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 122-23, 11 P.3d 726 (2000)).

[6] CR 12(c); P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203-04, 289 P.3d 638 (2012); Blenheim, 35 Wn. App. at 438.

[7] CR 56(c).

[8] City of Bothell v. Barnhart, 172 Wn.2d 223, 229, 257 P.3d 648 (2011).

[9] Morrison v. Dep't of Labor & Indus., 168 Wn. App. 269, 272, 277 P.3d 675 (2012) (citing State v. Shultz, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999)).

[10] City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

circumstances exists in which the statute, as currently written, can be constitutionally applied."[11] By contrast, a party succeeds in an as-applied challenge by proving that an otherwise valid statute is unconstitutional as applied to that party.[12]

ANALYSIS

Implied Consent Statute

Under Washington law, drivers in the state have given "implied consent" to testing for alcohol or drug impairment.[13] This law "'provides law enforcement officers with an effective means of obtaining physical evidence of intoxication since any person operating a motor vehicle on the roads of this state is deemed to have consented to the administration of a blood alcohol test.'"[14]

The arresting law enforcement officer must immediately notify the Department of the arrest and transmit a sworn report within 72 hours.[15] This sworn report must state that the officer had reasonable grounds to believe that the arrestee drove a motor vehicle under the influence of intoxicating liquor or

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[11] Moore, 151 Wn.2d at 669.

[12] Moore, 151 Wn.2d at 668-69.

[13] Former RCW 46.20.308(1) (2008). In 2013, Engrossed Second Substitute Senate Bill 5912 amended RCW 46.20.308. The amendments renumbered several subsections and eliminated statutory implied consent to tests of a driver's blood. LAWS OF 2013, ch. 35, § 36. The citations here refer to the law in effect at the time the appellants requested administrative hearings.

[14] Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 49, 309 P.3d 1221 (2013) (quoting State v. Bartels, 112 Wn.2d 882, 885, 774 P.2d 1183 (1989)).

[15] Former RCW 46.20.308(6)(e).

drugs.[16] The report must further state that either the driver refused to take a test or took a test that revealed a blood alcohol concentration (BAC) of 0.08 or higher.[17] Upon receipt of the officer's report, the Department "shall suspend, revoke, or deny" the driver's license effective 60 days from the date of arrest or when the suspension is sustained at a hearing, whichever comes first.[18]

The implied consent law provides certain procedural protections to drivers. The Department must give the driver written notice that it intends to suspend or revoke the driver's license.[19] The Department must also notify the driver of the right to a hearing and specify the steps to obtain one.[20] Within 20 days of this notice, the driver may request in writing a formal hearing before the Department.[21] As part of the request, the driver must pay a mandatory fee. The Department may waive the fee, however, for drivers who are indigent.[22]

At the hearing, the driver may have assistance of counsel, question witnesses, present evidence, and testify.[23] The hearing officer determines if the officer had reasonable grounds to believe the driver was driving under the

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[16] Former RCW 46.20.308(6)(e)(i).

[17] Former RCW 46.20.308(6)(e)(ii).

[18] Former RCW 46.20.308(7).

[19] Former RCW 46.20.308(6)(a).

[20] Former RCW 46.20.308(6)(b).

[21] Former RCW 46.20.308(8).

[22] Former RCW 46.20.308(8); RCW 10.101.010(3) (definition of "indigent"). As of October 1, 2012, the fee was $375. LAWS OF 2012, ch. 80, § 12.

[23] Former RCW 46.20.308(8).

influence and if the driver refused to take a test or took a test that revealed a BAC of 0.08 or higher. After the hearing, the Department "shall order that the suspension, revocation, or denial either be rescinded or sustained."[24]

Standing

The parties each argue the issue of standing at some length. Most of the discussion concerns Didlake's standing to bring claims related to a putative class. Because the trial court dismissed Didlake's own claims, which he had standing to bring, without ruling on his motion for class certification, we do not address this issue.

Procedural Due Process

Didlake contends that the implied consent statute's required fee for hearing violated his right to procedural due process. He appears to raise both facial and as-applied challenges, arguing that due process requires an initial hearing at no cost and that he and other members of the putative class should receive refunds of the fees they paid to obtain hearings. Both the United States and Washington State Constitutions declare that no person may be deprived of life, liberty, or property without due process of law.[25] Didlake has a protected property interest in his driver's license that Washington courts have recognized

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[24] Former RCW 46.20.308(8).

[25] U.S. CONST. amend. V, XIV, § 1; WASH. CONST. art. I, § 3.

as "'important'" and "'substantial.'"[26] In any proceeding to deprive him of this property interest, the State must afford him procedural due process.[27] Procedural due process imposes limits on governmental decisions that deprive a person of "liberty" or "property" interests within the meaning of a constitution's due process clause.[28]

Essential elements of procedural due process include notice and a meaningful opportunity to be heard.[29] "A meaningful opportunity to be heard means 'at a meaningful time and in a meaningful manner.'"[30] To determine what procedural protections due process requires in a particular situation, a court must consider three factors: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved.[31]

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[26] Moore, 151 Wn.2d at 670-71 (quoting State v. Dolson, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999); Mackey v. Montrym, 443 U.S. 1, 11, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979)).

[27] Moore, 151 Wn.2d at 670; State v. Storhoff, 133 Wn.2d 523, 527, 946 P.2d 783 (1997) (citing Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)).

[28] Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[29] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

[30] Morrison, 168 Wn. App. at 273 (internal quotation marks omitted) (quoting Downey v. Pierce County, 165 Wn. App. 152, 165, 267 P.3d 445 (2011)).

[31] Mathews, 424 U.S. at 334-35.

The first factor requires a court to consider the nature of the private interest affected. In cases involving due process challenges to filing fees, both the United States and Washington Supreme Courts have held that if a fundamental interest is not involved, requiring a fee for access to court or an administrative hearing, even from indigent persons, does not violate due process.

Boddie v. Connecticut[32] involved a class action lawsuit brought by litigants who could not pay the fees and costs required to obtain a divorce. There, the United States Supreme Court noted the state's monopolization of divorce proceedings and held that due process prohibits a state from denying indigent persons access to courts for purposes of dissolving a marriage solely because of their inability to pay fees.[33] The Court emphasized that it did not decide "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual."[34] Rather, the Court limited its holding to such cases where access is "the exclusive precondition to the adjustment of a fundamental human relationship."[35]

Two years later, in United States v. Kras,[36] the Court considered a constitutional challenge to the filing fees required for a no-asset bankruptcy

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[32] 401 U.S. 371, 372-73, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
[33] Boddie, 401 U.S. at 374.
[34] Boddie, 401 U.S. at 382.
[35] Boddie, 401 U.S. at 383.
[36] 409 U.S. 434, 435, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

proceeding. The Court noted that bankruptcy discharge involves no "fundamental interest" and "does not rise to the same constitutional level" as the interest in establishing or dissolving a marriage.[37] The Court recognized Boddie "obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees" and declined to extend Boddie to proceedings not involving a fundamental interest.[38]

The same year, in Ortwein v. Schwab,[39] the Court rejected the argument that because the State waived fees for certain types of proceedings, due process required a fee waiver for all civil appeals. The Court concluded that as in Kras, the Ortwein appellants' challenge to the reduction in their welfare benefits was in the "'area of economics and social welfare'" and not a fundamental interest.[40] The Court held that the government's interest in offsetting costs rationally justified the filing fee and that the fee did not violate due process.[41]

More than 20 years later, the Court reviewed the Boddie line of cases. In M.L.B. v. S.L.J.,[42] the Court held that requiring an indigent parent to pay a record preparation fee to appeal the termination of her parental rights violated due process. Discussing its holdings in Kras and Ortwein, the Court reiterated that "a

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[37] Kras, 409 U.S. at 445.
[38] Kras, 409 U.S. at 450.
[39] 410 U.S. 656, 661, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973).
[40] Ortwein, 410 U.S. at 660 (quoting Kras, 409 U.S. at 446).
[41] Ortwein, 410 U.S. at 660-61.
[42] 519 U.S. 102, 106-07, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996).

constitutional requirement to waive court fees in civil cases is the exception, not the general rule."[43] But the Court noted, "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society' that the Fourteenth Amendment protects."[44] As in Boddie, due process prohibited a financial barrier to court access to protect a fundamental interest like parental rights.

Washington courts have conducted a similar analysis and almost always have upheld the constitutionality of filing fees, distinguishing between fundamental and other interests. In Bowman v. Waldt,[45] this court held that due process did not require King County to waive the fees necessary for an indigent judgment creditor to secure the execution of a sheriff's levy. Adopting the rationale of Kras and Ortwein, this court refused to recognize "a constitutional right of access to the courts if the case is one 'in the area of economics and social welfare.'"[46] Where the right involved is not fundamental, reasoned the court, an indigent individual does not have a constitutional right to a fee waiver.[47]

In Housing Authority v. Saylors,[48] an indigent appellant challenged the filing fee required to appeal her eviction from public housing. The Washington

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[43] M.L.B., 519 U.S. at 114.
[44] M.L.B., 519 U.S. at 116 (quoting Boddie, 401 U.S. at 376).
[45] 9 Wn. App. 562, 570, 513 P.2d 559 (1973).
[46] Bowman, 9 Wn. App. at 570 (quoting Ortwein, 410 U.S. at 660).
[47] Bowman, 9 Wn. App. at 570.
[48] 87 Wn.2d 732, 733, 557 P.2d 321 (1976).

Supreme Court held that because "the interest involved lies in the area of economics and social welfare," the filing fee did not violate due process.[49]

In Downey v. Pierce County,[50] however, Division Two of this court struck down a fee requirement in a county ordinance about dangerous animal declarations (DADs). The ordinance required a cited dog owner to pay $250 to obtain an informal, unrecorded auditor's review.[51] If the auditor upheld the DAD, a dog owner who wished to appeal had to pay an additional $500 to obtain a full evidentiary review before a hearing officer.[52] The court found that pet owners have "arguably more than a mere economic interest because pets are not fungible."[53] The court also found that the county's procedures to issue and review a DAD were insufficient under the Mathews factors, especially because the initial fee did not cover a constitutionally adequate evidentiary review.[54] Given this more substantial interest and the county's inadequate procedures, the court held that "charging a fee to obtain an initial evidentiary review of a DAD violates due process."[55] However, the Downey opinion also expressly

[49] Saylors, 87 Wn.2d at 739, 744.
[50] 165 Wn. App. 152, 156, 267 P.3d 445 (2011).
[51] Downey, 165 Wn. App. at 157.
[52] Downey, 165 Wn. App. at 158.
[53] Downey, 165 Wn. App. at 165.
[54] Downey, 165 Wn. App. at 167.
[55] Downey, 165 Wn. App. at 166.

acknowledged that "'there is no constitutional due process right to appeal civil cases involving 'only property or financial interests.'"[56]

In Morrison v. Department of Labor & Industries,[57] Morrison challenged on due process grounds the filing fees required to obtain administrative review of eight electrical law citations. Citing Boddie, Kras, Ortwein, and Bowman, this court concluded that "where there is no fundamental right involved but only a financial one, it is permissible to impose a monetary prerequisite to file an appeal."[58] The court distinguished the dog owner's private interests in Downey as "much more expansive" than Morrison's, including the interest in keeping a pet, economic interests in not having to pay additional inspection or insurance fees, and the interest in not being subject to criminal liability for later violations.[59] "Morrison's interest, by contrast, is solely monetary."[60]

Didlake attempts to distinguish Ortwein and Saylors. He correctly notes the appellants in those cases received initial hearings at no cost. He asserts that Boddie and Kras do not control because they involved citizens seeking access to courts. By contrast, he argues, his case involves the government initiating proceedings to take away a property interest. But his arguments ignore the

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[56] Downey, 165 Wn. App. at 167 (quoting In re Dependency of Grove, 127 Wn.2d 221, 240, 897 P.2d 1252 (1995)).

[57] 168 Wn. App. 269, 271, 277 P.3d 675 (2012).

[58] Morrison, 168 Wn. App. at 273-74. By "appeal," the court refers to an initial evidentiary review of the citations. Morrison, 168 Wn. App. at 271.

[59] Morrison, 168 Wn. App. at 275.

[60] Morrison, 168 Wn. App. at 275.

distinction that the United States Supreme Court and Washington courts have repeatedly found to be dispositive in filing fee challenges. Courts have consistently distinguished between fundamental interests and interests that are "solely monetary," involving "economics and social welfare," or even "important" or "substantial." If the interest involved is fundamental, due process requires access for all. A fee waiver for indigent litigants accomplishes this mandate. If the interest is not fundamental, "a monetary prerequisite to an appeal is thus permissible,"[61] even for indigent appellants.

Downey involved an interest that was "arguably more than a mere economic interest" but still a property interest under the law.[62] The Downey court's unfortunate dicta that "due process requires access to an initial evidentiary hearing without charge"[63] diverges from this well settled rule. But the DAD ordinance in Downey had no fee waiver provision, and the court did not address whether such a waiver for indigent dog owners would cure any due process violation. And as this court noted in Morrison, Downey acknowledged the general rule that there is no constitutional right to appeal civil cases where only financial or property rights are at stake.[64] Even in the case of fundamental

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[61] Morrison, 168 Wn. App. at 275.

[62] As Division Two observed in Downey, even the unique nonfungible interest in a family pet is classified as a property interest under Washington law. Downey, 165 Wn. App. at 165 n.13.

[63] Downey, 165 Wn. App. at 163.

[64] Morrison, 168 Wn. App. at 275 (quoting Downey, 165 Wn. App. at 167).

rights like marriage or parenting, the United States Supreme Court has not struck down filing fees as unconstitutional per se. Rather, the Court has mandated access to all regardless of ability to pay, which the government may accomplish via a fee waiver.[65]

Courts have identified the driving privilege as an "important" and "substantial" but not fundamental right. Therefore, federal and state cases decided after Boddie support the constitutionality of a filing fee for access to a suspension or revocation hearing, even for indigent appellants. By providing a fee waiver for indigent licensees, Washington's implied consent law does more than the constitution requires, and between 2009 and 2011, the State waived the fee for 36 percent of drivers who obtained a hearing.[66] This contradicts Didlake's assertion that the filing fee has a "chilling effect" on drivers' exercise of their due process rights. Thus, he fails to establish a facial challenge on due process grounds. And because he paid the fee and received a hearing that complied with due process, he does not show that the fee requirement is unconstitutional as applied to him. Whether facial or as-applied, Didlake's due process challenges fail.

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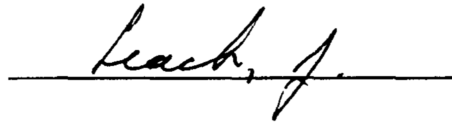
[65] This is consistent with the holdings of numerous cases from other jurisdictions that the Department cites in its brief.

[66] Of 28,405 DUI hearings conducted in the 2009-2011 biennium, the Department waived fees for 10,260.

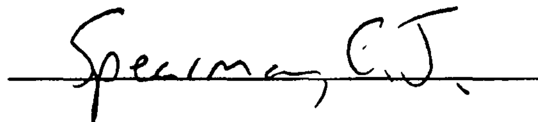
Because the interest involved here is not fundamental and therefore no constitutional right of access to a hearing exists, we do not analyze the two remaining Mathews factors.[67]

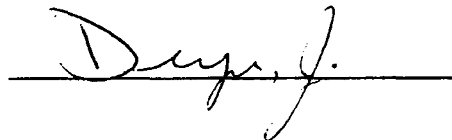
CONCLUSION

Because Didlake fails to establish that the implied consent statute's fee requirement violates procedural due process, we affirm the trial court's order dismissing Didlake's class action claim.



WE CONCUR:





[67] See Morrison, 168 Wn. App. at 275.

Sanders, Laurie

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