71633-6-I

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SUPREME COURT
STATE OF WASHINGTON

JAMES DIDLAKE, et al,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING

Respondent,

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants are Washington State drivers who became subject to administrative license suspensions pursuant to the Washington State Implied Consent law.[1] Each Appellant requested a hearing before a Department of Licensing hearing examiner to contest his or her suspension. To receive this hearing, each Appellant was required to pay a fee of $200.[2]

Appellants filed suit against the Respondent, the Department of Licensing, to recoup these fees for themselves and for all other drivers who have been required to pay this fee to receive a hearing. Appellants also sought injunctive relief. The trial court dismissed the suit, and made no ruling on class certification. Appellants seek reversal of the trial court ruling dismissing their claims, and reinstatement of this cause of action.

The dispositive issue in this case is whether this fee-for-hearing requirement violates the due process clause of the United States and Washington State Constitutions.

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[1] RCW 46.20.308.

[2] As of October 1, 2012, this fee has increased to $375. See Laws of 2012, ch. 80.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Respondent's motion to dismiss under CR 12(b)(6).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. While the trial court made no ruling regarding Appellants standing to bring this suit, do Appellants meet applicable standards to establish standing?

2. Does the State's imposition of a fee-for-hearing requirement to receive a due process hearing under the Implied Consent law violate Appellants' procedural due process rights?

IV. STATEMENT OF THE CASE

1. Facts.

There are no material factual disputes. The Respondent (hereinafter "Department") instituted license suspensions[3] against Appellants, individually, under authority of the Implied Consent law.[4] The facts and issues related to each individual case are not relevant to this appeal.

Appellants each paid a $200 fee to request a hearing to challenge their suspension.[5] Appellants Didlake, Burke, Fischer, and Bennett prevailed at their hearings, and no suspension was imposed.[6] Appellant

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[3] Unless required by context, the term "suspension" will be used to signify all state action against the driving privilege.
[4] CP 2; 9
[5] CP 10-11
[6] CP 2-3; 9

Johnson requested two separate hearings based upon two separate arrests. As a result of one of these hearings the Department affirmed the suspension of his driving privileges.[7]

2. Procedural History.

Appellants filed a class action claim[8] against the Department in King County Superior Court, and filed a motion for class certification under CR 23.[9] The Department filed a motion to dismiss the claim under CR 12(b)(6).[10]

The trial court and parties agreed to address the motion to dismiss first.[12] No argument was heard on the motion for class certification.[13]

In a written order, the trial judge granted the Department's motion to dismiss.[14] Appellants filed this appeal.[15] Appellants have further sought direct review before the State Supreme Court.[16]

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[7] CP 3; 9
[8] CP 1
[9] CP 254
[10] CP 16
[12] RP 4
[13] RP 1-40
[14] CP 238-244
[15] CP 245-246
[16] Statement of Grounds for Direct Review; filed 6/17/13.

3. History Of Fee Requirement And Operation Of Implied Consent Law.

In Washington State, drivers are presumed to have given "implied consent" to breath and blood testing for alcohol and/or drug impairment.[17] A law enforcement officer may invoke the Implied Consent Law where he or she has reasonable grounds to believe a person has been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug.[18] The law imposes a mandatory license suspension on drivers who either submit to a test with a result exceeding a statutory level, or if they refuse a test.[19]

The Implied Consent law came into existence in Washington State in 1968 when voters passed Initiative 242. *Laws of 1969, ch. 1.* Before 1968, Washington law did not provide for non-criminal sanctions to be imposed against a person's driver's license related to an arrest for Driving Under the Influence (DUI). A driver's license was suspended only upon a criminal conviction. *See* RCW 46.61.515 (1967). Washington law at the time did not compel a driver to submit

[17] RCW 46.20.308(1).
[18] RCW 46.20.308(1).
[19] RCW 46.20.3011.

to any breath or blood testing, and a refusal to provide such testing was inadmissible evidence at trial. *See* RCW 46.61.505(3) (1967).

Initiative 242 fundamentally changed Washington law. The law created the concept of "implied consent" to breath or blood alcohol testing, and initially imposed a six month license revocation for any driver who refused a test requested by a law enforcement officer irrespective of criminal sanctions. The Department imposed the revocation "upon receipt" of the officer's sworn report alleging he or she had reasonable grounds to believe the driver was under the influence of intoxicating liquor and refused the test. The Department provided the driver with notice of the revocation and the opportunity to request a hearing to challenge the revocation. No fee was required.

In 1994, the Legislature overhauled the State's DUI laws. *Laws of 1994, ch. 275.* The Legislature expanded the scope of implied consent hearings to include administrative license suspensions in cases where drivers submit to breath or blood alcohol testing with a result

exceeding .10.[20] For the first time, the Legislature adopted the "fee-for-hearing" requirement.[21] ($100.00 at the time)

In 1999, the Legislature amended the fee-for-hearing requirement to allow indigent drivers to waive the fee. *Laws of 1999, ch. 331.* Bill reports for this amendment (SSB 5399) do not provide an explanation for the fee waiver.[22] However, a report on a related bill, SB 5443, implied the fee waiver was based on due process concerns for indigent drivers.[23]

In 2005, the Legislature increased the hearing fee to $200. *Laws of 2005, ch. 314.* This legislation derived from RCW 46.01.360, and authorized the Department to create a bi-annual study to:

> "[Compare] the fees [the Department] charges for services to the cost of the agency to provide the service."[24] *Id* (emphasis added).

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[20] Breath tests are measured in g/210 L of breath. Blood tests are measured in g/100 ml of blood. This level has subsequently been reduced to .08.
[21] Bill reports fail to identify a particular justification for the fee. CP 132-159. A Fiscal Note by the Local Government Department of Community Development on SSB 6047 (dated Feb. 11, 1994), recognized that the license hearing must comport with due process in that the counties might have to pay the fee for "indigent defendants" since the hearing is a "due process right." CP 165. A Fiscal Note by the Department dated Feb. 3, 1994, indicates the Department expected the number of drivers decrease 50% "because of the fee." CP 171.
[22] CP 183-194
[23] CP 196
[24] CP 201

This study found that the previous $100 fee was insufficient to cover the cost of the providing the "service" of a hearing to a driver.[25]

In 2012, the Legislature increased the fee to $375. *Laws of 2012, ch. 80.* Fees were increased for several other "driver services," such as fees for issuance and renewal of a license and several license endorsements.[26] A "DUI hearing", *i.e.*, an Implied Consent hearing, was listed as a "driver service." The Final Bill Report simply referred to the fee increase for a "DUI hearing" as a "document."[27]

Presently, drivers are notified of the fee-for-hearing requirement on the written notice they receive from the arresting officer.[28] After notice is given, the officer submits a "sworn report" to the Department.[29] "Upon receipt" of the sworn report, the Department commences the suspension.[30] The driver then has a twenty (20) day window to submit a request for a hearing.[31] The driver must pay a fee

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[25] CP 201
[26] CP 208
[27] CP 216
[28] RCW 46.20.308(5).
[29] RCW 46.20.308(5).
[30] RCW 46.20.308(6).
[31] RCW 46.20.308(6).

to receive the hearing, or seek a waiver of the fee by establishing indigency as defined by statute.[32]

V. ARGUMENT

1. Appellants Meet Applicable Standards To Establish Standing.

A. Neither The Trial Court Nor The Department Properly Addressed Standing.

The trial court made no ruling on the issue of whether Appellants have standing to bring this action. Instead, the trial court stated, "The [Department] has raised the threshold issue of whether the plaintiffs in this case have standing to bring a lawsuit."[33] While "questioning" whether the Appellants have standing, the trial court proceeded to address the merits of the Appellants' claims.

The Department did not raise standing as an affirmative defense,[34] nor did it raise standing as an issue in its opening brief in support of its Motion to Dismiss.[35] In its reply brief, the Department devoted six lines to its standing argument, citing one Washington and one Sixth Circuit case, and concluding that since the Appellants had paid the fee and obtained a

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[32] RCW 46.20.308(6).
[33] CP 239
[34] CP 8
[35] CP 16

hearing, they lacked standing to bring a claim for others.[36] At oral argument the Department mentioned standing twice, but with no substantial response by the trial court.[37]

Notwithstanding the failure of the Department to raise standing in its opening brief, the trial court noted, "It is difficult to know how the plaintiffs believe they have standing because they did not brief the issue."[38] The failure of the Department to raise, much less brief, the standing issue and the trial court's lack of interest in the issue at oral argument are inconsistent with trial court's comment concerning plaintiffs' failure to brief the issue. Clearly the Appellants were unable to respond, much less analyze, the Department's untimely raised standing argument.

Further, the trial court's purported reasoning for "questioning" whether Appellants have standing is, "They [Appellants] are effectively challenging the statute on behalf of others who did not seek a hearing because of the fee, regardless of the fact it could have been waived."[39] In this regard, the trial court was mistaken. Careful review of the complaint

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[36] CP 233-234
[37] RP 15; 36
[38] CP 239
[39] CP 239

and the pleadings demonstrates unequivocally that Appellants sought to recover fees paid by them and others similarly situated, not to challenge the statute on behalf of persons unlike themselves who did not seek a hearing.

Thus the issue of standing was not properly raised by the Department, nor was it analyzed by either the Department or the trial court. Accordingly, the trial court did not grant the Department's Motion to Dismiss on the grounds that Appellants do not have standing to raise the claims at issue.

B. Appellants Have Standing.

This action is a class action. Appellants have standing to bring the claims on their own behalf, which is not disputed either by the trial court or the Department, and have standing as class representatives to bring the claims for all others similarly situated. Both the trial court and the Department ignored that that this is a class action.

In addition to the Department's Motion to Dismiss, the trial court also had before it Appellants' fully briefed Motion for Class Certification.[40] In its opposition to that Motion, the Department did not

[40] CP 254

question that this case should proceed as a class action.[41] In particular, the Department did not challenge the adequacy of Appellants as class representatives, nor that their claims were not typical of the entire class.[42] Indeed the Department made no arguments that plaintiffs had not met all of the standards for class certification pursuant to CR 23(a) and 23(b)(2).[43] Its standing argument and the trial court's analysis of the same, address a non-issue: The standing of Appellants to bring an action on behalf of persons not alleged to be in the putative class. In effect, both the trial court and the Department have conceded Appellants have standing to bring this case on behalf of the class they seek to represent. Certification under Rule 23(b)(2) is appropriate when injunctive or declaratory relief is sought and defendant "has acted or refused to act on grounds generally applicable to the class." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d

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[41] Department's Response to Motion for Class Certification

[42] As stated in Appellants' Motion for Class Certification, the "central question common to each member of the class [is] – was Defendant permitted to charge a fee ("Fee") to class members which was to be paid before the class member could obtain a hearing as permitted by 46.20.308." CP 254-255

[43] CR 23(a) requires a plaintiff must satisfy four elements for class certification: Numerosity, commonality, typicality and adequacy. Once those elements are met, the plaintiff must then demonstrate the class should be certified under CR 23(b). Here plaintiff argued, and the Department did not oppose, that the class should be certified pursuant to CR 23(b)(2), which provides "An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition...The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

173, 188, 157 P.3d 847 (2007); *Eriks v. Denver*, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992). Here, Appellants seeks a determination that the Department's practice of charging and collecting a fee-for-hearing is illegal and subject to injunctive relief. Moreover, the Department has acted "on grounds generally applicable to the class" by systematically collecting this fee from each class member who sought a hearing under RCW 46.20.308. Appellants seek an injunction ending the Department's wrongful collection of the fees, as well as restitution of fees paid and damages.

Appellants are seeking declaratory and injunctive relief that the fees they paid were improper and should be refunded to them and the class, which is permitted by RCW 7.24.020 which provides:

> A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

This action falls squarely within the provisions of RCW 7.24.020. Appellants are persons whose rights are affected by a statue, and they have

the right to seek a determination of the validity of the statue, as they have done. Furthermore, RCW 7.24.120 provides,

> "This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered."

The rights of tens of thousands of persons are to be settled in this action. Appellants have standing both pursuant to RCW 7.24.020 and CR 23(a) and (b)(2) to vindicate the rights of the putative class.

The Washington Supreme Court has stated the criteria for finding that a plaintiff seeking declaratory relief has standing:

> This court has established a two-part test to determine standing to seek a declaratory judgment under the Uniform Declaratory Judgments Act, chapter 7.24 RCW. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004). First, the interest sought to be protected must be " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Id.* (internal quotation marks omitted) (quoting *Save a Valuable Env't v. City of Bothell,* 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the challenged action must have caused the challenger an injury in fact, economic or otherwise. *Id.*

Washington Ass'n for Substance Abuse & Violence Prevention v. State, 174 Wn. 2d 642, 653, 278 P.3d 632, 638 (2012).

Appellants in this case meet both requirements. Each has an interest in vindicating the rights of all citizens to have a hearing without

the requirement of paying for it, and each was in fact sustained an injury in fact, i.e. payment of the fee in order to obtain the hearing.

While Appellants did not specifically plead their case as a taxpayer's derivative action, the Department was on notice that the relief sought was based the right of a taxpayer to bring an action. In *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011), the Court of Appeals characterized Downey's suit as a "UDJA/taxpayers' derivative action requesting injunctive and/or declaratory relief" *Downey*, at 159. This is precisely the relief sought by Appellants in this action. In *Downey*, the trial court found that Downey had standing (*Id.* at 160) and on appeal the parties did not dispute any standing issues (Id. at 155, fn. 3). *See also Fed. Way Sch. Dist. No. 210 v. State*, 167 Wash. 2d 514, 528, 219 P.3d 941, 948-49 (2009) ("The Uniform Declaratory Judgments Act grants standing to persons 'whose rights ... are affected by a statute.' RCW 7.24.020. This is consistent with the general rule that a party must be directly affected by a statute to challenge its constitutionality.")

Nelson v. Appleway Chevrolet Inc., supra, is also instructive.[44] There Nelson was required by Appleway to pay the business and

[44] The case is also important because it certified the class in question under CR 23(b)(2), as should be done with this case after remand.

occupation tax above the final price for purchasing a used car. Nelson filed a class action claim requesting declaratory relief that Appleway's collection of B & O tax, and the sales tax on the B & O tax, violated Washington law. He also asked the court to enjoin Appleway's future collection of B & O tax from customers and prayed for monetary relief, claiming Appleway was unjustly enriched. *Nelson*, at 178-79.

Appleway argued Nelson did not have standing. The Supreme Court rejected the argument:

> To have standing a party must (1) be within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004). Appleway contends Nelson is a customer and not within the zone of interests protected by RCW 82.04.500 because it is a tax "on ***businesses.***" Suppl. Br. of Pet'rs at 13 (emphasis in original). Therefore, Appleway argues, a customer has no rights under the statute. Appleway is right—the B & O tax is meant to be a tax on businesses. But Nelson paid Appleway's tax for Appleway. This is precisely what RCW 82.04.500 forbids. Therefore, Nelson is within the zone of interest protected by the statute. Appleway also maintains there is no injury in fact because Nelson would have to pay the tax as part of the overhead expense. This is incorrect as the market sets the price, not the overhead. *See* discussion *supra* note 5. Nelson paid $79.23 more than the negotiated price. This is economic injury in fact and Nelson satisfies both standing requirements.

Nelson v. Appleway Chevrolet, Inc., 160 Wash. 2d 173, 186, 157 P.3d 847, 853 (2007)

So long as the class representatives have standing, they may bring the case and seek certification. As stated in *Newberg on Class Actions*, Section 2:1:

> In class actions, as in all suits in federal court, plaintiffs must have standing in order to sue. The doctrine of standing, which has both constitutional and prudential dimensions, arises from the Article III limitation that courts may only decide "cases" or "controversies." The Supreme Court has stated that the purpose of the standing requirement is to ensure that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues[.]" In *Lujan v. Defenders of Wildlife*, the Supreme Court outlined the three-part test for determining whether the constitutional standing requirement is met—a plaintiff must show: 1) that she suffered actual injury; 2) that the injury is traceable to the challenged action of the defendant; and 3) that the injury may be redressed by a favorable decision.

1 *Newberg on Class Actions* § 2:1 (5th ed.)

The question of whether a plaintiff who has standing to bring a claim individually may bring it for a class is not a question of standing but of class action law. In this case, both the Department and the trial court have conflated the issues. Neither the Department nor the trial court questioned whether the Appellants in this case have standing to bring their own claims. Accordingly, they have the right to seek to certify the class so that all similarly situated individuals can be benefit from the rulings in this matter.

2. The State's Imposition Of A Fee-For-Hearing Requirement To Receive A Due Process Hearing Under The Implied Consent Law Violates Appellants' Procedural Due Process Rights.

A. Standards Affecting Review.

Courts review de novo a superior court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6).[45] *San Juan Cty. v. No New Gas Tax,* 160 Wn. 2d 141, 164, 157 P.3d 831, 842 (2007); *Cutler v. Phillips Petroleum Co.*, 124 Wn. 2d 749, 755, 881 P.2d 216, 219-20 (1994). Whether dismissal is appropriate under CR 12(b)(6) is a question of law that Courts review de novo. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 140 Wash.2d 615, 629, 999 P.2d 602 (2000).

Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. *Bravo v. Dolsen Cos.,* 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Such motions should be granted "sparingly and with care," and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar

[45] The Department characterized its motion as one brought under CR 12(b)(6), which was also how the trial court described the motion. While a distinction without importance for purposes of this appeal, the Department's motion was brought after the pleadings were closed (i.e. it had filed its answer) and is more properly considered a motion under CR 12(c). The role of a court of appeal in reviewing a dismissal under either CR 12(b)(6) or 12(c) is the same.

to relief. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) (quoting *Hoffer v. State,* 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

Due process challenges are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

A statute is presumed to be constitutional, and a party challenging a statute bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d. 377 (1998). "Beyond reasonable doubt" refers to a legal conclusion rather than an evidentiary standard: based on the courts' respect for the legislature a court will not strike a duly enacted statute unless it is "fully convinced after a searching legal analysis that the statute violates the constitution." *Island County*, 135 Wn.2d at 147. Appellants must, by argument and research, convince the Court that there is no reasonable doubt that the statute violates the constitution. *Id.* This Court must assume the Legislature considered the constitutionality of the fee-for-hearing requirement, and give "some deference" to its judgment. *Id.* Ultimately, however, a Court must decide, as a matter of law, whether a given statute is within the legislature's power to enact or whether it

violates a constitutional mandate. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167-80, 2 L.Ed. 60 (1803)).[46]

B. Standards for Procedural Due Process.

Due process of law is guaranteed under both the United States[47] and Washington State Constitutions.[48] 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).

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, 47 L.Ed.2d 18 (1976). The purpose of the due process

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[46] Before the trial court the Department claimed Appellants failed to identify whether they were making a "facial" or an "as applied" challenge to the fee-for-hearing requirement. CP 22. A "facial" challenge is one where a party asserts that under no set of circumstances can a statute be constitutionally applied. *Redmond v. Moore*, 151 Wn.2d at 669. A facial challenge must be rejected if there are any circumstances where the statute can be constitutionally applied. *Id.* The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative. *Id.* An "as applied" challenge occurs when a party contends that a statute's application in a specific context is unconstitutional. *Id.* If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. *Id.*

Here, the distinction is meaningless. Should this Court conclude that the fee-for-hearing requirement violates due process under either an "as applied" or a facial theory, the result is the same.

Title 46 contains a savings clause. RCW 46.98.040. A ruling in favor of Appellants does not affect any other portion of the statute. The State would simply be prohibited from collecting the fee from a driver as pre-condition to obtain a hearing.

[47] U.S. Const., Amend. XIV.

[48] Wash. Const., Article I, §3.

clause is to protect the people from the actions of the State. *DeShaney v. Winnebago Cty.*, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). 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, 94 L.Ed.2d 865 (1950); *Olympic Forest Prods., Inc v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973).

The United States Supreme Court has adopted a three-part test to determine the type of "process" which is due to protect certain property rights. In *Mathews v. Eldridge*, supra, the Court held that Courts must consider:[49]

> (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. *Mathews v. Eldridge*, 424 U.S. at 335.

[49] This test has been adopted in Washington State. See *Gourley v. Gourley*, 158 Wn.2d 460, 467-468, 145 P.3d 1185 (2006).

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, 25 L.Ed.2d 287 (1970) (emphasis added). A pre-revocation hearing procedure is required before the State may suspend or revoke the driving privilege. *Redmond v. Moore*, 151 Wn.2d at 668; *Bell v. Burson*, 402 U.S. 535, 539-542, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

The retention of the state sanctioned privilege to drive constitutes a significant property interest. 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. at 539.

> "[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 670-71.

Without question, a driver's license, once issued, represents an important property interest for purposes of review under due process. The Washington Implied Consent law, however, conditions access to a due process hearing upon payment of a fee. Except for indigent drivers,[50] access to due process is based not on the nature of the property rights at issue, but rather by the contents of the driver's bank account.

C. Case Law Addressing States' Ability To Charge Filing Fees To Access Due Process Through Courts Not Applicable To Present Appeal.

Supreme Court decisions, State and Federal, have upheld the States' ability to condition access to court-based judicial review on payment of filing fees. However, as will be discussed below, these cases are distinguishable and fail to address the fundamental issue in the present appeal.

The Supreme Court addressed the issue of payment of filing fees to access the state and federal court systems in three early 1970's cases; *Boddie v. Connecticut*,[52] *United States v. Kras*,[53] and *Ortwein v. Schwab*.[54]

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[50] Specifically, those drivers who meet the statutory criteria for indigency. RCW 46.20.308(7).
[52] 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).
[53] 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973).
[54] 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973).

In *Boddie* the Court addressed whether a state law requiring payment of a court filing fee to seek a court sanctioned divorce violated due process. The Court held a fee requirement violated procedural due process. *Boddie*, 401 U.S. at 381-82. The State's interest in reducing court expenses by requiring a fee did not outweigh the fundamental right of individuals, particularly those who were indigent, to seek a divorce where the court was the only entity with authority to terminate a marriage. *Id.*

In *Kras*, the Court addressed whether a federal court requirement that a person seeking bankruptcy protection must pay a filing fee violated due process. The Court held it did not. *Kras*, at 444. The Court distinguished bankruptcy proceedings from divorce proceedings, concluding the latter was a "fundamental right," requiring access to the courts un-hampered by a filing fee. *Kras*, 409 U.S. at 446-47. Bankruptcy, instead, was a matter of economic and social welfare. *Id.* Whereas only the State could terminate a marriage, Kras had alternatives to bankruptcy to resolve his debts. *Kras*, at 445. The government had a rational basis to require payment of a fee to contain court costs, and the law itself contained provisions wherein a petitioner could delay payment of the fee and receive the immediate protections of bankruptcy. *Kras*, 447-48.

Finally, in *Ortwein* the Court addressed whether requiring payment of a court fee to seek appellate review of a reduction in welfare benefits violated due process. The Court held it did not. *Ortwein*, at 656. *Ortwein* is relevant in that the Court noted the significant procedural distinction with *Boddie* and *Kras* in that Petitioners were challenging a fee requirement to obtain post-hearing appellate review of an administrative action that reduced welfare benefits. The Court was clear that the cases were distinguishable because: (1) Petitioners in *Ortwein* had already received a pre-deprivation hearing where they had the opportunity to seek redress of the administrative action; and (2) No fee was required for the pre-deprivation hearing. *Ortwein,* 410 U.S. at 660. (emphasis added). "Under the facts of this case, appellants were not denied due process." *Id.*

The Washington State Supreme Court addressed a similar issue in *Housing Authority of King County v. Saylors*, 87 Wn.2d 732, 557 P.2d 321 (1977). The Court found that due process was not violated where courts required indigent litigants to pay court filing fees. This case is factually similar to *Ortwein* in that the Housing Authority initiated proceedings to terminate Saylor's subsidized housing benefits. The Housing Authority provided a preliminary hearing, at no cost, to Saylor to challenge the termination of benefits. *Saylors*, at 733. Instead, the appeal addressed

whether Saylors would be required to pay costs to challenge the termination in court. The Washington Supreme Court adopted the reasoning of *Boddie*, *Kras*, and *Ortwein* and held that requiring these fees from indigent parties to access the court system was not a violation of due process. *Saylors*, at 735-744.

These cases, however, are of little relevance to the present appeal. Only *Ortwein* and *Saylors* address government-initiated proceedings to remove a person's property; and in these cases Petitioners received an initial due process hearing at no charge. Appellants are not asking a court to perform an affirmative act, *i.e.,* terminate a marriage (*Boddie*) or provide legal protection such as bankruptcy (*Kras*). Instead, the State initiated the Implied Consent proceeding to suspend a driver's license. Appellants are not seeking protection from the Department in the face of alternative remedies (See *Kras*). Instead, Appellants' only option to retain their driving privileges is to request a hearing. And Appellants are not seeking a post-suspension appellate review (See *Ortwein* and *Saylors*). Without payment of the fee, the State provides no review of a driver's

case to determine if a suspension is merited.[55] *Boddie*, *Kras*, and *Ortwein* do not settle the issue presented here.

D. Court of Appeals' Decisions in *Downey* and *Morrison* Properly Evaluate Constitutionality of State Mandated Fees To Access Due Process Where State Commences Action To Deprive Person of Property.

The issue whether a fee-for-hearing requirement violates due process, where the fee is required to access any due process review of state initiated action against property, has been recently addressed by the Court of Appeals in two cases. These cases provide the framework to evaluate the present issue under the three-part *Mathews* test stated above. These cases properly evaluate the criteria under due process to determine whether the State may impose a fee-for-hearing requirement to secure a pre-deprivation hearing in state-initiated proceedings.

In *Downey v. Pierce County*,[56] Pierce County issued a "Dangerous Animal Declaration" (DAD) alleging Downey's dog bit another dog causing its death. *Downey*, at 157. The declaration advised Downey that under Pierce County code she had three options: (1) Request a hearing to challenge the declaration and pay a $250 "review fee" for review by the

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[55] RCW 46.20.308(7). The Department suspends or revokes the driver's license upon receipt of the sworn report.

[56] 165 Wn. App. 152, 267 P.3d 445 (Div. 2 2011), review denied, 174 Wn.2d 1016 (2012).

county auditor; (2) relinquish her dog; or (3) Pay $500 for a dangerous animal permit. *Id.*

Downey paid the $250 fee and requested a hearing; where she lost. *Id.* She appealed this ruling to another administrative office and paid a $500 fee or a hearing. *Downey*, at 158. She also lost that hearing. *Id.* She then filed a taxpayers' derivative action in Superior Court which was dismissed on the County's summary judgment motion. *Downey*, at 159.

Like Appellants here, Downey argued the fee-for-hearing requirement under the DAD violated procedural due process. *Downey*, at 160-161. Applying the three-part *Mathews* test, the Court agreed.

Under *Mathews*' first criteria, the Court found three reasons why her property interests involved in the case were significant. First, the Court characterized her property, a pet, as "not fungible." *Downey*, at 165. However, while pet owners have an interest in keeping their pets, and the loss of a pet is more than a mere economic loss, under Washington law pets are considered to be nothing more than mere property. *Id.* The Court did not create any heightened property interests for pet ownership. *Id* (emphasis added). Second, Downey had an economic interest involved based on the potential economic consequences associated with imposition of the DAD law. She faced the potential of having to pay a variety of fees

(annual registration, inspection, liability insurance) which would be required in order to keep her dog once it was labeled a dangerous animal. *Downey*, at 165. Third, Downey had an interest in trying to avoid potential criminal liability based on future DAD violations.[57] *Id.*

The Court concluded that while these interests may not rise to the level of liberty interests at stake in a criminal prosecution; i.e. a fundamental right; they were not "negligible." *Id.* This composite of property interests satisfied the first *Mathews* criteria. *Id.*

Under *Mathews*' second criteria, the Court found the risk of erroneous deprivation of property was high where the County required a fee to receive a hearing. *Downey*, at 165-166. If a pet owner did not or could not pay the $250 fee, the DAD "has not been subject to any adversarial or evidentiary testing." *Id* (emphasis added). Since the DAD was automatic absent payment of the hearing fee, the fee-for-hearing requirement was found to run afoul of the due process requirement that "some form of hearing is required" before the government can deprive an individual of property. *Downey*, at 166 (emphasis in original).

[57] The Court noted that violations under DAD could lead to criminal liability under the Pierce County Code.

It is important to note that the Court 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 she was. Because the Court was addressing the issue of access to the sole means of receiving a due process hearing concerning the State taking away a property right, the distinction was irrelevant.

Under *Mathews*' third criteria, the Court found that while the County had a "strong" interest in protecting the public from dangerous animals, its justification for a fee to offset the cost for the DAD hearings was not sufficient to override a property owner's constitutional right to a hearing before property is taken away. *Downey*, at 166. 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).

This statement manifests the intent of the Court's ruling. A fee-for-hearing requirement violates due process where it relates to the issue of property rights. This violation is no more or less significant because of a

person's indigency. The mere fact the fee-for-hearing requirement may dissuade someone from requesting a hearing required under due process was enough to create the constitutional violation. No argument was made that a person's financial ability to pay the fee may render the due process violation any less significant. The Court held the fee-for-hearing requirement violated due process, and Downey was entitled to a refund. *Downey*, at 166-167.[58]

In *Morrison v. State, Dept. of Labor & Industries*,[59] the Department of Labor & Industries cited Morrison for eight electrical law violations pertaining to his business totaling $4,000 in fines. *Morrison*, 168 Wn. App. at 271. Morrison was advised he could seek administrative review of the citations upon payment of a $200 filing fee per citation. *Id.* Morrison sought a hearing, but refused to pay the filing fee. *Id.* Morrison's appeal was rejected, and he sought review in the Superior Court arguing the filing fee violated due process. *Id.* The Court denied his claim, but reduced the filing fee. *Id.*

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[58] The Court actually found the payment of two fees; the $250 initial fee and the subsequent $500 fee to both violate due process. Since the Department requires payment of only a single fee, the second fee in *Downey* is not addressed here.

[59] 168 Wn. App. 269, 277 P.3d 675 (Div. 1 2012), review denied, 175 Wn.2d 1012 (2012).

Like the Court in *Downey*, the Court of Appeals in *Morrison* reviewed the due process violation claim under the *Mathews* three-part test. *Morrison*, at 273. Here, under the *Mathews*' first criteria, the Court found that Morrison's property interest at issue with the Department of Labor & Industries was purely and solely economic; i.e. the potential loss of money. *Id.* Morrison's property interest was categorically different from interests at issue in *Downey*. This point is significant. Citing to *In re Grove*,[60] the Court wrote that;

> "Where the interest at stake is only a financial one, the right which is threatened is not considered fundamental' in a constitutional sense." *Morrison*, at 273.

The *Morrison* Court recognized the factual distinction with *Downey*; stating that Downey's private interests involved were "more expansive." *Morrison*, at 275. The Court listed the exact factors that were addressed above: (1) Pets are not fungible property; (2) Downey faced added costs to maintain her property; and (3) Downey faced potential criminal liability. *Id.* Morrison, by contrast, risked only losing money. *Id.* Morrison faced no loss of property, no added costs to maintain his property, and would not be subject to any criminal liability related the

[60] 127 Wn.2d 221, 238, 897 P.2d 1252 (1995).

citations that were issued. Under the facts of the case, a fee-for-hearing requirement was not unconstitutional. *Id.*

While the distinctions related to property interests explains the different results in *Downey* and *Morrison*, the *Morrison* Court's reliance on *Boddie*, *Kras*, and *Ortwein* exposes a flaw in its reasoning. Correctly, the Court described the "*Boddie*" line of cases as addressing payment of filing fees to receive court access to "vindicate" fundamental rights. *Morrison*, at 273. But only *Ortwein* addressed a filing fee to seek judicial review after a due process hearing had already been held, which resulted in the loss of property. *Morrison*, at 273-274. *Morrison* never addressed the distinction between an initial due process hearing, which was clearly at issue in *Downey*, and appellate review after the initial hearing. *Morrison* can be easily distinguished from *Downey*. *Downey* is a well-reasoned opinion recognizing a due process standard in cases where the State initiates action affecting non-fungible property. *Downey* should be applied to other cases involving government initiated action affecting non-fungible property, such as a driver's license revocation proceeding.

E. Trial Court Erred In Its Analysis of *Downey* In Dismissing Appellants' Claims.

Appellants' suit against the Department was based almost exclusively on the facts and legal issue substantially similar to those in the *Downey* case.[61] The trial court's ruling to dismiss Appellants' suit also evaluated the *Downey* opinion.[62]

1. Trial Court Ruling.

The trial court evaluated the due process claim using the three-part *Mathews* test. Under the *Mathews'* first criteria, the trial court found that Downey's property interest in her dog was distinguishable from the property interest inherent in a driver's license. The trial court acknowledged that the Court's finding in *Downey*, that a pet is non-fungible property, was significant to the ruling.[63] The trial court agreed that a driver's license was also non-fungible property.[64] But the trial court opined it was "unclear" if the property interest in a license was as significant as the interest in a pet.[65]

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[61] CP 110
[62] CP 240
[63] CP 241
[64] CP 241
[65] CP 241

The trial court created a distinction between the property right to possessing a license license and owning a pet two ways. First, the trial court found that Washington appellate cases had established that the special bond between pet owner and pet makes the property interest "especially important."[66] Second, the trial court found that a pet is "unique and irreplaceable."[67] The trial court found that a driver's license, while recognized as a substantial property interest, was more replaceable than a pet.[68] A driver with a suspended license may have alternative transportation sources, but a pet was difficult if not impossible to replace.[69]

Under the second *Mathews'* criteria, the trial court found that the risk of an erroneous loss of property within the Implied Consent hearing process was significantly lower than in the DAD proceedings in *Downey*. The trial court based this ruling on two apparent distinctions between the Implied Consent process and the DAD process. First, indigent drivers could seek a waiver of the fee-for-hearing requirement under the Implied

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[66] CP 242
[67] CP 241
[68] CP 242
[69] CP 242

Consent law.[70] Second, evidence gathering under the Implied Consent process was more objective than the process in *Downey*.[71] The trial court noted that police officers are generally trained to investigate and make DUI arrests, and rely on BAC evidence; whereas the process for gathering evidence under the DAD law was less objective.[72] The trial court was critical of the fact in *Downey* that the investigating officer never personally observed any violations and relied upon eyewitness testimony of the person whose dog was killed to start the DAD process.[73] Citing *Mackey v. Montrym*,[74] the trial court considered the risk of erroneous deprivation under the Implied Consent law to be minimal.[75]

Under the *Mathews'* third criteria, the trial court found that, consistent with the State interests identified in *Downey*, the State's interest in off-setting costs for the Implied Consent hearing process and reducing the number of "meritless" challenges were important interests. However, unlike Downey, these State interests were greater than the individual's property interest in a license or the minimal risk of erroneous deprivation

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[70] CP 242
[71] CP 242-243
[72] CP 243
[73] CP 242-243
[74] 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979).
[75] CP 243

of the license.[76] Based upon this assessment, the trial court granted the Department's motion to dismiss.

2. Trial Court Ruling Erred In Evaluating Property Rights Involved With Pet Ownership (*Downey*) As More Important Than A Driver's Interest In Retaining A License To Drive.

The trial court's analysis was substantially flawed and led to an erroneous result. First, as it relates to the *Mathews'* first criteria, the trial court's legal analysis regarding the importance of pet ownership is incorrect. While a pet is non-fungible property and difficult to replace, Washington Courts have been emphatic in stating there are no "special" property interests in pet ownership. In *Sherman v. Kissinger*,[77] the Court held that in a negligent pet death claim, a pet is considered nothing more than "personal property." *Sherman*, at 861. The pet owner may not claim damages for emotional distress or the loss of any human-animal bond. *Sherman*, at 873. Instead, damages are predicated on the pet's fair market value. *Sherman*, at 871. In *Mansour v. King County*,[78] the Court refused to apply a heightened burden of proof in pet removal proceedings based on an argument that pet ownership created an "invaluable family type

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[76] CP 244
[77] 146 Wn. App. 855, 195 P.3d 539 (2008).
[78] 131 Wn. App. 255, 128 P.3d 1241 (2006).

relationship." *Mansour*, at 264. The Court held that because the nature and importance of the property at issue dictates the level of heightened scrutiny before the property may be removed; *Mansour*, at 264-265; and that a pet is recognized under law as simply "property;" pet removal hearings need only use the lowest burden of proof. *Monsour*, at 266-267.

In contrast, the State Supreme Court has recognized that the interest in the continued possession of a driver's license is a "substantial one." *Redmond v. Moore*, 151 Wn.2d at 151. This is so because;

> "The 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*, at 670-671.

The importance of the driving privilege was recently recognized by the Court of Appeals in *Nielsen v. Dept. of Licensing*.[79] There, the Court found a state law denying drivers the ability to seek post-suspension review of Implied Consent license suspensions if the driver seeks a temporary ignition interlock license unconstitutional on due process grounds. In doing so, the Court reasoned that the need to drive with the ignition interlock license was so great that it forced drivers to forego the right to judicial review of the suspension. The Court wrote;

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[79] --- P.3d --- (Div. 1 2013) (2013 WL 5459628) published Sept. 30, 2013.

> "Indeed, obtaining an [ignition interlock license] is effectively the only means to lawfully operate a motor vehicle during an administrative license revocation. For this reason, any licensee who must *drive in order to get to work or school—or to perform essential family obligations, such as taking children to school*—is strongly discouraged from seeking judicial review of a Department revocation ruling." (Emphasis added)

The manner in which Courts have evaluated the property interests of pet owners and license holders leave no doubt that the interest in a license is more substantial than that in a pet. Whatever degree of companionship a pet provides an owner is no match to the importance the driving privilege provides to the licensee. The need to drive to work, to school, to medical appointments and treatment, or to attend to the needs of the family supersede the need for an animal. And considering the State's monopoly on the field of driver licensing, it cannot be argued that replacement of a pet is more difficult than replacement of a license.

The Appellants' property interest in this case is not limited solely to the non-fungible nature of the license. The Court in *Downey* considered the economic costs to the pet owner based on the DAD finding, and the potential for criminal sanctions to follow the DAD designation. These same concerns are present in Appellants case.

Drivers have an economic interest in keeping their license, and prevent a suspension under the Implied Consent law. A driver is subject to several added costs to retain their license due to a suspension or revocation: (1) Probationary fees;[80] (2) Increased insurance fees;[81] and (3) Ignition interlock license fees.[82]

Drivers also face criminal liability if they drive while their license is suspended or revoked.[83] Drivers will also face an increased length of revocation in the future should they violate the Implied Consent law.[84] Therefore, Appellants property interests are indistinguishable from *Downey*.

Appellants' property rights are also distinguishable from *Morrison*. Morrison's property interests were solely economic. Morrison faced only the payment of fines. He faced no risk of losing non-fungible property. Further, there was no indication from the record that he faced any other economic harm from the citations, such as the harm facing *Downey* and Appellants herein. No concern was raised that the citations affected is business license or that he would have to pay additional costs to maintain

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[80] RCW 46.20.311(2)(b)(ii).
[81] RCW 46.20.311(1)(b).
[82] RCW 46.20.380.
[83] RCW 46.20.342.
[84] RCW 46.20.3101.

a business license. No concern was raised that Morrison may face future criminal liability as a consequence of having to pay the citations. The Court in *Morrison* was correct to distinguish the case from *Downey*. But *Morrison* is inapplicable to Appellants' case.

3. Trial Court Erred In Under-Evaluating The Risk Of Erroneous Deprivation Under the Implied Consent Procedures Based On Fee-For-Hearing Requirement.

The trial court's analysis in regards to the *Mathews'* second criteria was also flawed. The trial court never addressed the fact that in *Downey* the pet owner neither asserted indigency nor claimed an inability to pay the filing fee. Therefore, it is not clear how a fee waiver rule in the DAD proceedings would have affected the risk of erroneous deprivation inherent in the hearing process.

However, the greater concern rests with the trial court's analysis of the adequacy of the Implied Consent proceedings themselves to minimize the risk of an erroneous deprivation of a license. As a general rule, Courts must review due process procedures by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. *Mathews v. Eldridge*, 424 U.S. at 344-345. That being the case, the trial court created a "straw-man" argument out of the unique

facts found in *Downey* to assert that the procedures in the Implied Consent proceedings were adequate.

The trial court claimed that the procedures for the DAD were insufficient in *Downey* as compared to the procedures used in the Implied Consent procedure.[85] In *Downey*, an animal control officer investigated an alleged incident where a dog bit another dog causing its death. *Downey*, at 157. The deceased dog's owner was interviewed, and eventually the officer concluded Downey's dog was responsible, "declared[86]" Downey's dog a "dangerous animal," and issued the DAD citation. *Downey*, at 157-158. It also appears from the record that both written materials and live testimony was presented before the auditor at the first hearing. *Downey*, at 157-158. Nothing in the *Downey* decision suggests the animal control officer was not qualified or trained to investigate the case, or that the investigation was in any unusual.

The trial court's "straw man" argument was to present the DAD investigation from *Downey* as a reason to question the validity of the DAD process itself, when in reality the investigation may be atypical of DAD

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[85] CP 242-243. Ironically, the inadequacy of this investigative process could only be exposed by Downey paying the fee for a hearing.

[86] While it is not stated in the opinion, it must be assumed the Court's use of this word implies the finding was made by a declaration under penalty of perjury.

investigations in general.[87] In general, the investigative process is no different than the process used for DUI investigations for Implied Consent hearings. In the DUI situation, the arresting officer submits his or her sworn report or declaration to the Department, and that submission alone commences a license suspension without any review of the sworn report or declaration by the DOL. RCW 46.20.308(5)(d); (6). This is significant because without any review of the officer's sworn report there is no way to know whether the DUI investigation was based on anything more than third party allegations such as the DAD allegations in *Downey*.

The unacceptable risk of erroneous deprivation of property in *Downey* arose not from the quality of the investigation by the animal control officer, but from the fact that the property deprivation could occur at all unless the pet owner paid a fee. *Downey*, at 165-166. In reality, there was nothing unique about the way the DAD was investigated in *Downey* that makes the case fundamentally different from the way a DUI arrest is investigated and ultimately presented to a DOL hearing examiner to

[87] Under the trial court's analysis, due process would not have been violated in *Downey* if the animal control officer personally observed the dog bite.

review a license suspension.[88] The trial court also cited to *Mackey v. Montrym*[89] to support its position that the truth-finding function of the hearing is satisfied by the arresting officer's personal observation of facts leading to the arrest, as well as the review of BAC evidence.[90] According to *Mackey*, reliance on the truthfulness of the officer's sworn report minimized the risk of error. *Mackey*, 442 U.S. at 14.[91] This argument, however, ignores two points.

First, access to due process is not predicated on a party's assertion they will prevail at a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 87, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The strength of the State's case should not factor into whether a driver should receive due process protections. The flaw in the Implied Consent law, as with the DAD, is the failure to provide any independent review of the asserted facts before instituting the fee-for-hearing requirement. Second, the Washington Supreme Court has rejected a similar argument in *Redmond v. Moore*. Drivers in *Moore* were sent notice of license suspensions based on the failure to pay court fines. The suspension was automatic, with no intervening opportunity for a hearing,

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[88] The hearing examiner reviews the sworn report. RCW 46.20.308(7). A driver may present live testimony, may present evidence, and may subpoena witnesses. RCW 46.20.308(7).
[89] Mackey v. Montrym, 443 U.S. 1, 14.
[90] CP 243
[91] CP 243

if the driver failed to provide the Department with proof of payment of the fines. The Court found that the Department's reliance on court records, and its own internal records, to institute a license suspension created an unacceptable risk that an erroneous deprivation would occur. *Moore*, at 671-676. The Court made this finding without the benefit of any actual empirical data about error rates; relying only on a few illustrative cases describing erroneously imposed license suspensions. *Moore*, at 673. Furthermore, the Court held that due process was not satisfied by having drivers go to the court that instituted the fine to correct any mistakes regarding the case, because this process failed to address how a driver might correct any errors existing within Department records. *Moore*, at 674-675. To comport with due process the Department could not simply rely on court and Department records to institute a suspension, but had to afford the driver a hearing before the suspension could go into effect. *Id.*

Moore is significant because it held that reliance on court and Department records to institute a license suspension does not constitute a sufficient pre-deprivation process to satisfy due process. This decision is striking because one would presume that court and Department records would contain sufficiently accurate information to meet due process

standards. Yet, the Court in *Moore* would not extend any presumption of reliability to these records to meet this standard.

In the present case, the trial court relied on *Mackey* to find there is a general presumption of reliability within an officer's sworn report to satisfy the requirement of pre-deprivation due process.[92] The Supreme Court's reasoning in *Moore* is more persuasive. An officer's sworn report is no different than a court or Department record. It is a representation of certain facts in written form. The Department merely receives the report and institutes a suspension. It is therefore subject to the same degree of error and inaccuracy as the court and Department records described in *Moore* to institute license suspensions.[93] Most significant, the Court's analysis in *Moore* concerning error in court and Department records stands in stark contrast to the Court's rejection of error rate concerns in *Mackey*. See *Mackey*, at 14. Therefore, under *Moore*, reliance on information sent to the Department to institute a suspension is not reliable on its own to satisfy a pre-deprivation due process standard.

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[92] In *Mackey* the Court noted the officer's report was reliable for pre-suspension due process purposes because of his or training, and the officer would be subject to civil and criminal liability for false reporting. *Mackey*, at 14.

[93] One would presume a court clerk or Department staff member would have personal knowledge of the information contained on records relied on by the Department to suspend a license.

However, in the present case, the Department relies on nothing more than the *mere existence* of the sworn report to institute the suspension. RCW 46.20.308(6) It cannot be claimed that the Department relies on the *contents* of the sworn report to institute a suspension, the fact that the report was submitted is enough. When placed in juxtaposition, the trial court's analysis significantly departs from *Downey*. The existence of the animal control officer's report was not sufficient on its own to satisfy due process in *Downey*. It is equally insufficient here.

4. Trial Court Erred In Balancing Competing Interests To Favor State, By Erroneously Evaluating Property Interests and Risks of Deprivation.

Finally, the trial court's analysis in regards to the *Mathews'* third criteria was also flawed. It is recognized that the State has a strong interest in promoting public safety on the highways. But this interest is no different than the State's interest in protecting citizens from dangerous animals. It is clear from the record that the Legislature's intention to impose fees for the Implied Consent hearing was to off-set costs for providing the hearing.[94] The trial court found that the State's interests in imposing the fee-for-hearing requirement in the present case outweighed Appellants' property interests. In doing so, the court had erroneously

[94] CP 19-20

concluded that the property interest in a license was less significant than the property interest in a pet, and thus the risk of erroneous deprivation was minimal. It is clear that this balancing test was flawed.

The balance of competing interests in the present case is no different than in *Downey*. The Court in *Downey* understood that the fee-for-hearing requirement "could prevent many people from obtaining the review they are legally entitled to before deprivation of a property interest." *Downey*, at 166. The Court did not limit this group of affected persons by considering indigency as a factor. The mandated fee compromised the State's obligations, as "some form of hearing is *required* before an individual is finally deprived of a property interest." *Downey*, at 166 (emphasis in original). Instead, citing to *Ortwein*, the *Downey* Court recognized that initial review of a state initiated action to terminate property rights must occur without imposition of a fee. *Downey*, at 166.

Therefore, as in *Downey*, the State's interests do not outweigh the Appellants' property rights or the risk of erroneous deprivation of property.

V. CONCLUSION

The purpose of the due process clause is to protect the people from the actions of the State. *DeShaney v. Winnebago Cty.*, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). The decision in *Downey* refines this protection, preventing the State from charging a fee to obtain a hearing where the State acts to remove property from the individual. As established above, the property rights at issue in the present appeal are no different than the property rights at issue in *Downey*. The trial court erred in dismissing Appellants' claims.

For the reasons stated above, Appellants ask this Court to reverse the trial court's dismissal under CR 12(b)(6), and reinstate Appellants' suit before the trial court.

RESPECTFULLY SUBMITTED this 14th day of October, 2013.

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To: Ryan Robertson; Harris, Leah (ATG); Immel, Roxanne (ATG); Andy Robertson; Rob Williamson; Kim Williams
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Subject: Appellants Brief - Didlake, et al v. Dept of Licensing, No. 88774-8

Dear Clerk,

Attached for filing is the Appellants Opening Brief in *James Didlake et al. v. Washington State and Washington State Department of Licensing*, No. 88774-8.

The attorneys for the Respondent are receiving this email per the parties' e-service agreement.

Hard copies will be served on the Court and Respondent via legal messenger service.

Sincerely,

Ryan B. Robertson
Attorney for Appellants

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