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SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN CHRISS JOHNSON,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING and PAT KOHLER, in her official capacity,

Respondents.

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Stephen Chriss Johnson's driver's license is currently suspended for failing to comply with monetary obligations related to two traffic offenses. Despite the ability to pay these obligations, Johnson continues to refuse to do so. Instead, Johnson argues that his first suspension is no longer valid because 2013 legislative amendments limiting new suspensions also reinstated pre-existing suspensions, despite the absence of any statutory language supporting this theory. The legislature has directed the Department of Licensing (Department) to only reinstate a driver's license based on a condition not present here: the receipt of notice from a court that the case has been adjudicated. The legislature has not directed – or expressed any intention – that the Department reinstate pre-existing non-moving suspensions.

Johnson also challenges the second suspension by seeking the release of all suspensions related to criminal traffic matters where the underlying suspension was for a person's failure to pay. Johnson seeks re-litigation of substantially similar issues that were previously decided by this Court in a matter that also involved him, *State v. Johnson,* 179 Wn.2d 534, 315 P.3d 1090 (2014). In this case Johnson seeks a completely different construction for the phrase "failure to comply" in the context of more serious traffic citations as opposed to traffic infractions. The

outcome Johnson requests here would be contrary to this Court's holding in *Johnson* and the suspension scheme established by the legislature.

Johnson has not met the requirements for the issuance of an extraordinary remedy – a writ of prohibition. First, he has not shown that the Department has acted in excess of its jurisdiction because the Department continues to have regulatory authority over driver's license cases generally. In reality, Johnson is seeking review of the interpretation of a statute, which is not an appropriate use of the writ procedure. Second, Johnson has not shown that he lacked a plain, speedy or adequate remedy despite an administrative review procedure and the availability of declaratory relief or other relief from the court that issued the initial suspension; thus, a writ cannot issue.

II. COUNTERSTATEMENT OF ISSUES

1. Is Johnson entitled to a writ of prohibition for an alleged erroneous interpretation of law even though the Department's general authority to regulate drivers' licenses has not changed?

2. In the alternative, is the Department acting in excess of its jurisdiction by failing to release pre-existing suspensions for failure to pay non-moving violations, where there is no evidence that the legislature intended that result?

3. Did the Department act in excess of its jurisdiction when it initiated a suspension in 2009 based on Johnson's failure to pay a misdemeanor fine when the statutory scheme contemplates a suspension for failing to comply with monetary obligations related to all traffic offenses?

4. Has Johnson shown that he lacks a plain, speedy, or adequate remedy when he could have requested declaratory relief, an administrative review before the Department, or applied for a certificate of adjudication in his existing Lewis County District Court cases?

III. STATEMENT OF THE CASE

In 2007, law enforcement cited Johnson for driving without a valid license. Clerk's Papers (CP) at 26, 32. The Lewis County District Court found Johnson committed the traffic infraction and imposed a $260 penalty. CP at 32. When Johnson failed to pay the penalty, the district court notified the Department that Johnson had failed to make a required payment of a fine or court cost. CP at 26. The Department issued a Notice of Suspension indicating that Johnson's driver's license would be suspended absent a request for an administrative review. CP at 35. The record does not indicate that Johnson requested an administrative review or paid the penalty. The suspension went into effect on November 1, 2007. CP at 29.

Despite the suspension of his driver's license, Johnson did not pay the penalty and continued driving. He was criminally cited in 2009 for driving while license suspended in the third degree. CP at 33 (copy of citation sent to Department), CP at 93–94 (copy of citation issued to Johnson). Johnson was convicted of the crime and did not pay the $805.50 fine imposed by Lewis County District Court. CP at 26–27, 36.

The district court notified the Department that Johnson had failed to make a required payment of a fine or court cost. CP at 26. In 2009, the Department issued another notice of suspension to Johnson for his failure to pay the fine for this crime, indicating that this separate suspension would go into effect absent a request for administrative review. CP at 36. The record does not indicate that he requested an administrative review of his driver's license suspension, as was his right under RCW 46.20.245. The suspension subsequently went into effect on November 12, 2009. CP at 26, 27, 29.

Johnson appealed the driving while license suspended conviction to this Court, arguing his conduct did not constitute a crime under the driving while license suspended statute, RCW 46.20.342(1)(c)(iv). *Johnson*, 179 Wn.2d at 542. He argued that he was not guilty of the crime because a suspension for a failure to comply with the terms of a notice of traffic infraction did not include a suspension for a failure to pay the penalty. *Id.* at 542–44. The Court upheld the conviction, reasoning that a failure to pay a fine was a failure to comply with the terms of a notice of traffic infraction. *Id.* at 558. This Court declined to find Johnson constitutionally indigent because he had property valued at $300,000. *Id.* at 555. The Court noted that the "equity in his home would have allowed Johnson to 'borrow or otherwise legally acquire resources' necessary to

pay the $260 fine." *Id.* Despite the loss in that case and the Court's finding that Johnson had the ability to pay his fine. The record does not indicate that Johnson has paid either fine.

In 2012, the legislature amended RCW 46.20.289 and RCW 46.63.110(6). Laws of 2012, ch. 82, § 3 (amending RCW 46.20.289). Prior to the legislation the Department was directed to suspend a driver's license upon notice from a court of failure to pay a traffic infraction of any kind, but the new legislation directed the Department to suspend a driver's license upon notice from a court of failure to pay an fine or penalty for a moving violation. *Id.* The amendments to RCW 46.20.289 took effect on June 1, 2013. Laws of 2012, ch. 82, § 6. The legislation also required the Department to define a moving violation by rule. RCW 46.20.289; Laws of 2012, ch. 82, § 4.[1] The Department defined a moving violation to not include the infraction of driving without a valid driver's license. *See* WAC 308-104-160. However, the rule defined driving with a suspended license under RCW 46.20.342 (Johnson's 2009 offense) as a moving violation. WAC 308-104-160(10).

Johnson did not request any relief from Lewis County District Court, including any type of request that the court issue a notice of

[1] For ease of reference, the Department refers in this brief to the amendments as the 2013 amendments, as this is when they went into effect.

adjudication or correct the driving record. Instead, Johnson filed a petition for a writ of prohibition directing the Department and its director (collectively, Defendants) to terminate all current driver's license suspensions for failure to pay traffic fines and seeking an award of damages for himself and similarly situated drivers. CP at 5. Johnson also sought certification of a class action made up of drivers suspended for failure to pay a fine. CP at 109. Johnson alleged that 300,000 drivers were wrongfully suspended for failure to pay, estimating damages of 1.5 billion dollars as of September 13, 2013. Report of Proceedings (RP) (Sept. 13, 2013) at 5. Prior to disposition of the motion to certify the class action, the case was stayed pending this Court's decision in *Johnson*. RP (Sept. 13, 2013) at 9.

The Department moved for summary judgment after a decision was issued in *Johnson*. CP at 41. The Department argued that Johnson was not entitled to a writ of prohibition because Johnson had a plain, speedy and adequate remedy, and that Johnson's driver's license was properly suspended under both the 2007 and 2009 notices from district court. CP at 41, RP (April 4, 2014) at 3–14.

In response, Johnson requested that the court "order that a writ be issued prohibiting the Department from suspending or continuing to suspend any driver's license for failure to pay traffic fines for non-moving

violations, prohibiting the Department from suspending or continuing to suspend any driver's license for failure to pay a criminal sentence, and requiring the Department to terminate all such suspensions effective immediately." CP at 109.

The superior court granted the Department's motion for summary judgment. CP at 246–250, RP (April 4, 2014) at 29–31. With respect to whether there was an adequate remedy, the court observed that "there is not another plain, speedy and adequate remedy available to Mr. Johnson to raise this type of challenge, and the challenge is that the Department of Licensing is acting in excess of its jurisdiction by suspending driver's licenses." RP (April 4, 2014) at 29. In tension with that statement, the court also found with respect to the 2009 suspension:

> On the issue of the driving with license suspended third degree, I am granting summary judgment in the [Department's] favor. I am finding that the statutes in the way they were applied to Mr. Johnson are appropriate and *that if he had a challenge to that suspension, it needed to be brought prior to June of 2013.*

RP (April 4, 2014) at 30 (emphasis added).

The court reserved ruling on the issue of the 2007 non-moving suspension and requested supplemental briefing on legislative intent. RP (April 4, 2014) at 30. After supplemental briefing, the Court found that:

> I find that this case is more similar to the case of *St. v McClendon,* which is 131 Wn.2d 853 – it's a 1997 case –

> rather than the *State v. Heath* case, which is what was argued by Mr. Johnson. Like the *McClendon* case, in this case there's no legislative indication in the language or history of the statue that it be applied retroactively. Also, the language, like in *McClendon* of the current amendments were present in [sic] future tense in wording.

RP (June 27, 2014) at 35. The superior court dismissed the petition. CP at 246-250.

IV. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Washington courts have also reviewed the denial of a writ of prohibition under an abuse of discretion standard. *County of Spokane v. Local No. 1553, American Fed'n of State, County and Mun. Employees, AFL-CIO*, 76 Wn. App. 765, 768, 888 P.2d 735 (1995). It must be clear and inarguable that the body to which a writ of prohibition is directed entirely lacks jurisdiction. *In re King County Hearing Exam'r*, 135 Wn. App. 312, 318, 144 P.3d 345 (2006). However, an error of law is an abuse of discretion. *See e.g. Noble v. Safe Harbor Family Pres. Trust*, 167

Wn.2d 11, 17, 216 P.3d 1007 (2009)("a trial court abuses its discretion when its decision or order is . . . exercised for untenable reasons. Untenable reasons include errors of law").

In this case, there are no material facts in dispute and the parties disagree on issues of law, which should be reviewed de novo.

V. ARGUMENT

Johnson sought a writ of prohibition from the superior court on behalf of himself and all similarly situated people. Appellant's Brief at 5, CP at 4. A statutory writ is an extraordinary remedy. See *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996). A party seeking a writ of prohibition must show that there is an (1) absence or excess of jurisdiction, and (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure. RCW 7.16.290; *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 722–23, 305 P.3d 1079 (2013). The absence of either one precludes the issuance of the writ. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989).

This case can be resolved if either suspension is appropriate because the relief Johnson ultimately requests is reinstatement of his driving privilege and damages. CP at 5. Johnson will not be entitled to reinstatement or damages if either suspension is appropriate. Generally, a

court should not decide issues that are not necessary to dispose of a case. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007). Accordingly, if either the 2007 or 2009 suspension is proper, the Court need not reach the issue of the other suspension.

A. The Department is Not Acting in Excess of Its General Jurisdiction to Regulate the Driving Privilege Because Johnson's Challenge Goes to the Department's Interpretation of a Law, Not the Department's Jurisdiction

To be entitled to a writ Johnson must ultimately show that the Department is acting in excess of its jurisdiction. *See Skagit County Pub. Hosp. Dist. No. 304*, 177 Wn.2d at 722–23. Johnson argues that the Department is acting in excess of its jurisdiction because the amendments to RCW 46.20.289 "change the "very *power* of the Department, the Act affects *all suspensions*, no matter when initiated." Appellant's Brief at 15.

Even assuming that the Department has incorrectly interpreted RCW 46.20.289 and the 2013 amendments to it, the Department has not acted in excess of its jurisdiction. A statutory writ of prohibition only arrests an action in excess of a state actor's jurisdiction but it is "not a proper remedy, however, where the only allegation is that the actor is exercising jurisdiction in an erroneous manner." *Brower v. Charles*, 82 Wn. App. 53, 59, 914 P.2d 1202 (1996). The Court's jurisprudence on subject matter jurisdiction is helpful in defining jurisdiction for the

purpose of obtaining a writ: "[a] tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). "'[T]he focus must be on the words 'type of controversy.' If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Id.* (citing Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 28 (1988)). "Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously." *Marley*, 125 Wn.2d at 539.

Generally, the Department has jurisdiction to take actions against driver's license by virtue of RCW 46.01.040. That section provides that the Department is "vested with all powers, functions, and duties with respect to and including . . . [d]rivers' licenses as provided in chapter 46.20 RCW." RCW 46.01.040. The amendments to RCW 46.20.289 did not alter the type of controversies the Department may adjudicate, i.e., license suspensions. The defects alleged by Johnson go to something other than jurisdiction – they go to the statutory interpretation of RCW 46.20.289. The Department's decision to not adopt Johnson's interpretation of RCW 46.20.289, whether erroneous or not, is not an

action that exceeds the Department's general authority to administer the driving privilege. The amendments to RCW 46.20.289 are not jurisdictional, because it does not change the type of controversy the Department decides. For example, under *Marley*, if the Department suspended a person's license for non-payment of a fine from a non-moving violation after June 1, 2013, this would be legal error that must be timely challenged. It would not be a jurisdictional defect.

Neither has Johnson identified an action taken by the Department since the 2013 amendments to RCW 46.20.289 that would be in excess of its jurisdiction. As further described in Section V. B, the plain language of RCW 46.20.289, Johnson's suspension is final until the Department receives notice from a district court that the matter is resolved and he pays the reissue fee required by RCW 46.20.311(1)(e)(i). The Department has taken no action on either case and awaits a certificate of adjudication from the district court indicating that Johnson has resolved his obligations.

While a writ or prohibition is not the correct action to clarify the interpretation of RCW 46.20.289, the Department's lack of action is reviewable under other procedures available to Johnson, as further described below in Section V. D. Johnson could have requested a certificate of adjudication in his district court matter or sought declaratory relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24

RCW, or administrative relief based on his statutory interpretation arguments.

B. The Amendments to RCW 46.20.289 Do Not Apply to Release Johnson's 2007 Suspension for a Non-Moving Infraction

Even assuming that a writ of prohibition is an appropriate procedure to challenge the Department's interpretation of RCW 46.20.289, the Department has correctly interpreted the amendments to RCW 46.20.289. The amendments – by their own language – only prevent new suspensions for non-moving violations after the effective date of the amendments. They do not release pre-existing suspensions for non-moving violations, like Johnson's 2007 suspension at issue in this case.

While the legislature intended to end new suspensions for failing to meet obligations, the legislature did not provide the Department with the necessary authority to reinstate pre-existing suspensions. The amendments ended the requirement that the Department initiate suspension actions against persons who failed to pay fines associated with non-moving violations. RCW 46.20.289; Laws of 2012, ch. 82, § 3. Consistent with the amendments, the Department has initiated no new suspensions for non-payment of non-moving violations after the effective date of the amendments.

1. The 2013 amendments to RCW 46.20.289 limit new suspensions to failure to pay penalties or fines from moving violations but did not change the process for releasing existing suspensions for failure to pay penalties or fines from non-moving violations

The Department receives notices from courts regarding events that occurred in a court proceeding that require a mandatory license consequence under the provisions of chapter 46.20 RCW. The two notices at issue in this case – a 2007 and 2009 notice of non-compliance on underlying traffic offenses – were subject to the provisions of RCW 46.20.289 that provided as follows:

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court for a notice of infraction, or has failed to comply with the terms of a notice of traffic infraction or citation. . . . . *A suspension under this section takes effect pursuant to the provisions of RCW 46.20.245, and remains in effect until the department has received a certificate from the court showing that the case has been adjudicated, and until the person meets the requirements of RCW 46.20.311.*

Former RCW 46.20.289 (2005)(emphasis added).

The statute sets forth a two-step process. First, the suspension is triggered when the Department receives notice from a court. Because the suspension is mandated by law, the Department sends a notice of

suspension and a notice of the right to request an administrative review of the suspension. *See* RCW 46.20.245(1); CP at 35, 36. The suspension cannot go into effect until 45 days after notice is given. RCW 46.20.245(1). A person has 15 days after the notice has been given to request an administrative review. *Id.* If uncontested, the suspension takes effect on the date provided in the notice. *Id.* The driver has the right to appeal an adverse determination to superior court. *See* RCW 46.20.245(2)(e).

Second, the statute governs the release of the suspension. A suspension may only be released when the department receives further notice from the original issuing court that the suspension has been adjudicated. RCW 46.20.289. The person is eligible for reinstatement of the driving privilege after meeting the reinstatement requirements in RCW 46.20.311. A $75 reissue fee is required after a suspension under RCW 46.20.289. RCW 46.20.311(1)(e)(i).

The 2013 amendments to RCW 46.20.289 did not change the two-step process for restricting and releasing the driving privilege. Instead, the statute limited the first step – suspensions – to issues of non-compliance related to *moving* traffic offenses:

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that

> the person has failed to respond to a notice of traffic infraction for a moving violation, failed to appear at a requested hearing for a moving violation, violated a written promise to appear in court for a notice of infraction for a moving violation, or has failed to comply with the terms of a notice of traffic infraction or citation for a moving violation. . . . . A suspension under this section takes effect pursuant to the provisions of RCW 46.20.245, and remains in effect until the department has received a certificate from the court showing that the case has been adjudicated, and until the person meets the requirements of RCW 46.20.311.

RCW 46.20.289; Laws of 2012, ch. 82, § 3. On the effective date of the new law, June 1, 2013, courts stopped sending notices to the Department for non-compliance with non-moving violations. After June 1, 2013, the Department only initiated new suspensions for non-compliance with moving violations.

2. A prospective application of RCW 46.20.289 and the 2013 amendments does not rescind prior license suspensions

The Department has applied the amendment to RCW 46.20.289 prospectively by ending new suspensions for non-moving violations on the date the amendments became effective. The superior court did not rule on Johnson's argument that the amendments could be applied prospectively to release his suspension. In any event, the amendments to RCW 46.20.289 cannot be read to apply prospectively to release Johnson's pre-existing suspensions.

Ignoring the plain language of RCW 46.20.289, Johnson argues that the amendments to RCW 46.20.289 are prospective *and* release his suspension for failure to pay a non-moving violation. Appellant's Brief at 17 ("Johnson's suspension today is not based on the fact that he failed to pay in 2007; it is based on the fact that he failed to pay *yesterday*"). In aid of this argument, Johnson relies on the fiction that his suspension is continually renewing. Appellant's Brief at 16 ("Every day – in fact, every moment – the driver has a new opportunity to comply by paying the fine. The driver holds the key to the 'prison' of suspension").

Johnson's argument is at odds with the unambiguous statutory language. The statute unambiguously directs the Department *not* to reinstate a license unless specific events occur. Under RCW 46.20.289, there are – and have always been – two triggering events: one to commence the suspension, and one to end the suspension. The first triggering event is the Department's receipt of a notice from a court that a person has failed to take an action required by statute. RCW 46.20.289 ("The department shall suspend all driving privileges of a person when the department receives notice from a court"). The second triggering event is receipt of notice from a court that the case has been resolved. RCW 46.20.289 (the suspension remains in effect "until the department has received a certificate from the court showing that the case has been

adjudicated"). The suspension was triggered in 2009 when the Department received notice from Lewis County District Court of non-compliance. The 2013 amendments do not alter the initiating event or change the manner in which a license is reinstated. The Department has not received notice from the court that the case is resolved. Thus, the Department cannot under the plain language of the statute release the suspension.

Johnson's argument is not supported by cases he cites addressing the prospective application of new legislation. Johnson cites to *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992) in support of the proposition that RCW 46.20.289 can prospectively release his suspension. Appellant's Brief at 17. The basic rule of that case is that a statute operates prospectively if the triggering event in the statute occurred *after* the enactment of the statute, even if the triggering event had its origin in a situation existing prior to the enactment of the statute. *See Belgarde* at 711. That rule cannot be applied in the present situation when the triggering event in this case – receipt of a notice from a court – took place *prior* to the 2013 amendments, not after.

Johnson relies on *Heidgerken v. State, Dep't of Natural Res.*, 99 Wn. App. 380, 382, 993 P.2d 934 (2000). *Heidgerken* does not support Johnson's position, and in fact reinforces reliance on statutorily explicit

triggering events. In *Heidgerken*, the legislature authorized a $10,000 penalty for "every person who violates any provision of RCW 76.09.010 through 76.09.280" effective January 1, 1994. *Id.* at 387. Prior to the effective date of the amendment, Heidgerken had failed to reforest land he had harvested. *Id.* at 383 Pursuant to RCW 76.09.090, the Department of Natural Resources issued a notice to comply that ordered Heidgerken to reforest the property by a specific date that fell after the effective date of the new penalty provision. *Id.* at 385. The Court held that the violation that triggered the penalty under the statute was the failure to comply with the order by the specific date provided in the order, not the underlying failure to reforest the property in the preceding years. *Id.* at 388. Accordingly, the amendments applied prospectively. *Id.*

Similarly here, the triggering event for a suspension was explicitly set forth in statute. In *Heidgerken*, the triggering event for the penalty was the failure to comply with an order by the date provided in the notice. In this case, the triggering event is notice from a court that a person has failed to take some action under RCW 46.20.289, not continued non-compliance. The triggering notice that the Department received for Johnson occurred in 2007 prior to the 2013 amendments. CP at 26.

Johnson's reliance on Heidgerken does not make sense when the case is taken to its logical conclusion. If Heidgerken's failure to comply

with the order was complete prior to the effective date of the new fine, then the Department of Natural Resources could not have prospectively imposed the larger fine by waiting until after the effective date to issue a penalty. That result would ignore the triggering event under the statute. In this case, if Johnson had failed to pay his non-moving traffic infraction prior to the amendments but the Department had received notice of that failure *after* the amendments were effective, the Department could not have suspended his license. To read a different triggering event into RCW 46.20.289 ignores the plain language of the provision. Applying the 2013 amendment prospectively does not release Johnson's suspensions.

3. The text of the amendments to RCW 46.20.289 is the best legislative indication that the amendments were not intended to apply retroactively

Retroactivity is disfavored. *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). The superior court determined that it was not the legislature's intent to "remove these thousands and thousands of license suspensions that already existed." RP (June 27, 2014) at 35. The superior court also found that "there's no legislative indication in the language or history of the statute that it be applied retroactively." RP (June 27, 2014) at 35. The superior court correctly concluded the amendments to RCW 46.20.289 were not retroactive. The superior court's ruling on this issue should not be set aside on appeal.

The superior court's approach is sound because relying on the language of the amendment and non-amended existing statutes is the best method in this case for ascertaining legislative intent with respect to whether the amendments should be applied retroactively. In *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997), the Court considered whether a newly enacted statutory provision that discontinued enhanced DUI penalties for holders of probationary driver's licenses would retroactively apply to holders of probationary licenses arrested for DUI prior to the enactment of the new provision. *McClendon*, 131 Wn.2d at 861. The Court held that there was no language in the new statutory provision that suggested it was to be applied retroactively, and that analysis was bolstered by the legislature's use of only present and future tense wording. *Id.* The Court favored a plain language analysis, and did not discuss whether the statute provided new remedies for DUI. *Id.*

Similarly, other cases have also held that language expressed in the present and future tense manifests an intent that the act shall apply prospectively only. *See, e.g., Wash. State Sch. Dirs. Ass'n v. Dep't of Labor & Indus.*, 82 Wn.2d 367, 379, 510 P.2d 818 (1973) (the "language of the statute itself does not convey an intent to impose a retroactive tax"); *Anderson v. City of Seattle*, 78 Wn.2d 201, 203, 471 P.2d 87 (1970) (present and future tense language was "strong indication that [pension

statutes] were not intended to apply retrospectively"); *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641; 538 P.2d 510 (1975) (consumer protection act amendment authorizing a civil action did not apply to transactions before the effective date of the law because the language was expressed in the present and future tense).

The amendment to RCW 46.20.289 only added the words "for a moving violation" with respect to notices of traffic infractions or citations that can trigger drivers' license suspension. RCW 46.20.289; Laws of 2012, ch. 82, § 3. It did not change how suspensions were reinstated. By its own terms, the amendments to RCW 46.20.289 can only apply to notices of non-compliance received after the effective date of the amendments on June 1, 2013. Thus, the newly amended statute has always been forward looking. The statute provides that the Department *shall* suspend a person's driving privileges. RCW 46.20.289. With the amendments to RCW 46.20.289, the Department shall only suspend with respect to notices received for moving violations. There is no past tense used in the statute and no express provision to reinstate licenses for drivers already suspended for non-moving violations.

The legislature also did not change the manner in which suspensions are reinstated. Both before and after the amendments, a suspension only ends when the Department receives a certificate of

adjudication from the court. RCW 46.20.289. Further, a person suspended under RCW 46.20.289 must meet the statutory requirements for reissuance, including payment of a license reissue fee. RCW 46.20.311(3)(a).

Here, there is no textual indication – much less an express statement – that the amendment to RCW 46.20.289 was to apply retroactively. RCW 46.20.289; Laws of 2012, ch. 82, § 3. To the contrary, retaining unchanged the statutory language directing the Department to reinstate a license only upon certain conditions shows that the legislature intended just the opposite. Absent such an express desire by the legislature that pre-existing suspensions should be released, the amendments should apply prospectively. The superior court's determination that the amendments were not intended to be retroactive is correct.

4. There is no new remedy created by the amendment that benefits Johnson; further a remedial purpose was to alleviate the burden on law enforcement, not to release pre-existing suspensions

This Court has said that "[i]n the absence of a clear declaration by the legislature regarding retroactivity of an amendment, it may be helpful to characterize changes to a statute as 'clarifying' or 'restorative' or 'curative' or 'remedial' to assist in determining legislative intent."

Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 508, 198 P.3d 1021 (2009). The principle that the legislative intent is the primary consideration comports with the familiar maxim that "the court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal citations omitted). As noted above, the statute's plain language does include a "clear declaration by the legislature regarding retroactivity" – namely, that the statute should not apply retroactively. But even if the Court were to consider the statute's purpose, it should conclude that the statute does not operate retroactively.

An amendment is deemed remedial and applies retroactively when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). Johnson does not contend that the amendment relates to practice or procedure. Importantly, the amendment only limits the necessary conditions for a new suspension. That change does not affect the procedure or practice for transmitting notices to the Department from the court or change the Department's practices for implementing and releasing suspensions.

The general rule is that a remedial statute is retroactive when it relates to practice, procedure, and remedies but a remedy has not been so loosely defined as to include any legislative attempt to fix a problem in a former law. Rather, when specifically examining whether a statute is remedial, Washington courts have said that "remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976).

Generally, there are aspects of RCW 46.20.289 itself that can be considered remedial because it affords counties a coercive mechanism for enforcing the payment of a penalty or fine. However, the *amendment* to RCW 46.20.289 is not remedial because it does not provide a process or procedure for drivers to remediate an existing suspension. As the superior court properly ruled, major factor of reform provided by the *amendments* to RCW 46.20.289 was to alleviate the burden on law-enforcement on pursuing driving while license suspended cases. *Superior Court's Ruling,* RP (June 27, 2014) at 35, *See also* Senate Bill Report on S.B. 6284, 62nd Leg., Reg. Sess. (Wash. Feb. 1. 2012), CP at 139; and Judicial Impact Fiscal Note to P S S.B. 6284, 62nd Leg., Reg. Sess. (Wash. 2012) published on February 3, 2012 (prepared by Admin. Office of the Courts), CP at 185.

Johnson relies on *State v. Heath*, 85 Wn.2d 196, 532 P.2d 621 (1975). Appellant's Brief at 22. However, the superior court correctly concluded that *State v. Heath* does not require a remedial classification of the amendments to RCW 46.20.289. *See* RP (June 27, 2014) at 35 ("I find that this case is more similar to the case of *St. v McClendon,* which is 131 Wn.2d 853 – it's a 1997 case – rather than the *State v. Heath* case, which is what was argued by Mr. Johnson.")

In *State v. Heath*, the Court considered whether a driver whose license was revoked could benefit from a new law permitting a court to issue a stay of the revocation, if the driver could demonstrate that he was obtaining treatment for alcoholism. *Heath*, 85 Wn.2d at 197. The Court determined that the purpose was remedial because it allowed alcoholics to receive treatment rather than deprive them of their driving privileges. *Id.* at 198.

While the statute in *Heath* was silent with respect to whether a currently revoked driver could benefit from a stay, the legislature explicitly made a stay available to drivers facing a revocation: "[a] proviso was added permitting 'a judge' to stay a revocation order where the offenses were the result of alcoholism for which the offender is obtaining treatment." *McLendon*, 85 Wn.2d at 197.

Unlike *Heath*, there was no new remedy established in the amendments to RCW 46.20.289 by which Johnson can avoid his suspension. There is no new avenue – like the stay in *Heath* – through which Johnson could have asked the Department to set aside the suspension. If the legislature had intended to remediate failure to pay suspensions already in existence, it would have either provided a mechanism for releasing such suspensions or would have provided explicit direction on releasing existing non-moving failure to pay suspensions.

In support of Johnson's claim of a broad, remedial purpose of "termination of all suspensions" related to non-moving violations, Johnson offers the comments of an individual legislator. Appellant's Brief at 23 (quoting Senator Kline). However, a court cannot rely on affidavits or comments of individual legislators to establish legislative intent because the intent of an individual legislator may not have been the intent of the legislative body that passed the Act. *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 560–61, 663 P.2d 482 (1983). Even if the court wanted to rely on the statements of Senator Kline cited by Johnson, none of his statements explicitly address what would happen to pre-existing suspensions.

This history suggests that a primary reason for the passage of the bill was the goal to save local governments money in prosecuting driving while licenses suspended offenses while continuing to ensure that drivers

faced suspensions for safety-related offenses. *See, e.g.,* Senate Bill Report on S.B. 6284, 62nd Leg., Reg. Sess. (Wash. Feb. 1. 2012), CP at 139 (summary of public testimony in favor of the bill: "this is about whether the department suspends for non-safety related actions"); Judicial Impact Fiscal Note to P S S.B. 6284, 62nd Leg., Reg. Sess. (Wash. 2012) published on February 3, 2012 (prepared by Admin. Office of the Courts) CP at 185 (assuming savings to the State based on a reduction in driving while license suspended filings). That legislative intent is supported by the ultimate language of the bill which reduced the number of new suspension but continued to include moving violations as offenses requiring suspension.

While the legislative history shows some motivation for the bill to assist those who cannot pay, the primary intent seemed to be saving money and conserving law enforcement resources while preserving public safety. In any event, Johnson has failed to show any legislative history supporting intent to reinstate already-suspended licenses, and the language of the statute shows that this was not the intent.

C. A Continued Suspension for Non-Compliance With the 2009 Misdemeanor Fine Is Warranted Based on *State v. Johnson* Because Johnson has Failed to Comply With the Terms of a Citation

As addressed below in Section V. D, the Court should not even consider Johnson's argument that his second license suspension was improper because he failed to challenge his suspension when it occurred. But even if the Court did consider that issue, a continued suspension for non-compliance with the 2009 misdemeanor fine is warranted based on *State v. Johnson*, 179 Wn.2d at 546–47, because Johnson has failed to comply with the terms of a citation.

The superior court correctly determined that Johnson was not entitled to a writ of prohibition releasing his 2009 criminal suspension for failure to pay. Johnson's license was appropriately suspended based on the Department's receipt of a 2009 notice from Lewis County District Court that he had failed to make required payment of fines and court costs. CP at 26. The amendments to RCW 46.20.289 do not apply to this suspension because the suspension arose from a moving violation – a driving while license suspended conviction. WAC 308-104-160. Johnson argues that "the Department's authority to suspend for failure to pay extends only to failure to pay a fine imposed by a court for an *infraction.*" Appellant's Brief at 25. In essence, he urges the Court to define the same

phrase in RCW 46.20.289 – "failed to comply with the terms of a notice of traffic infraction or citation" – in two different manners, one way for notices of infractions and another for citations. That would be an absurd result.

The Johnson court held that a failure to pay a penalty is a failure to comply with the terms of a notice of traffic infraction based on the entire statutory scheme and the fact that a notice of traffic infraction is not a document that is "frozen in time." *Johnson*, 179 Wn. 2d at 546–47.

The *Johnson* court emphasized two canons of statutory construction in construing the plain meaning of the phrase "failure to comply with the terms of a notice of traffic infraction." First, a court should not "interpret [a] statute in a way that would render any statutory language superfluous or nonsensical." *Id.* Second, in ascertaining plain meaning, the court looks to "all that the legislature has said in the statute and related statutes." *Id.* at 542.

Those canons are of particular use in this case. The *Johnson* court sought to avoid rendering superfluous the cross-references contained within RCW 46.20.289 and the statute criminalizing driving while license suspended, RCW 46.20.342(1)(c)(iv). In *Johnson*, the cross-reference contained in RCW 46.20.289 to RCW 46.63.110 evinced an intent that

suspensions were warranted for monetary obligations arising from traffic infractions.

At the time Johnson's 2009 suspension went into effect, former RCW 46.20.289[2] provided that:

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court for a notice of infraction, or has failed to comply with the terms of a notice of traffic infraction or citation. . . . .

The phrase "failed to comply with the terms of a citation" was intended as a catch-all provision requiring a person to resolve all obligations attendant to a violation of the traffic laws. The cross-reference to the infraction provisions found in RCW 46.63.110(6) – while not directly applicable to a criminal citation – is a related statute that provides important context to the legislature's meaning of the phrase. Based on that statute, the legislative scheme demonstrates the intent with respect to criminal traffic citations that a person fulfills both appearance *and* monetary obligations connected with any traffic violation to avoid a license suspension.

Johnson narrowly construes a failure to comply with a citation to not include a person's failure to pay a fine, but only a failure to appear

[2] The 2013 amendments have no substantive effect because driving while license suspended is a moving violation. WAC 308-104-160(10).

based exclusively on the cross-reference to RCW 46.64.025. Appellant's Brief at 29. Johnson's interpretation of the statutory scheme reaches absurd results. According to his interpretation, the legislature intended suspensions for non-payment of obligations for less serious infractions but did not intend suspensions for non-payment of more serious offenses like DUIs and reckless driving. Courts avoid constructions of statutes that yield unlikely or absurd results. *State v. Huffman*, __ Wn. App. __, 340 P.3d 903, 905 (2014) (citation omitted).

Johnson's interpretation also renders the failure to comply phrase superfluous for citations. Former RCW 46.20.289 provides a separate basis for suspension for a person who has "failed to appear at a requested hearing." The citation itself provided Johnson with two options. He could either pay the bail forfeiture amount or appear in court. CP at 94. Without receipt of bail forfeiture payment, the court would have required an appearance. Without an appearance, Johnson would have "failed to appear at a requested hearing." Accordingly, the phrase "failed to comply with the terms of a citation" would be superfluous because a failure to comply would also always be a failure to appear. But, the failure to comply language has separate meaning that must be given effect and was intended as a catch-all to capture a person's failure to pay a fine. All

statutory language must be given effect with no part rendered superfluous. *State v. Rodriguez*, 183 Wn. App. 947, 955, 335 P.3d 448 (2014).

Johnson points to differences in the legal proceedings governing the disposition of misdemeanor citations in an effort to distinguish it from a notice of traffic infraction. Appellant's Brief at 28 ("[t]he numerous and significant differences between a notice of infraction and a criminal traffic citation, including the full panoply of constitutional protections afforded to a criminal defendant, bar any application of the Johnson court's reasoning to the terms of a citation.").

In considering the effect of the notice of traffic infraction, the *Johnson* court noted that the notice of traffic infraction is "not frozen in time." *Johnson*, 179 Wn.2d at 547. The *Johnson* court recognized that on the face of a notice of traffic infraction a penalty is imposed and a person can request a hearing to challenge the penalty or simply resolve the case by remitting payment. *Id.* at 547–48. Traffic citations issued pursuant to RCW 46.64.010 do not simply initiate a case. Like infractions, citations are not static documents and continue to have a legally significant life even after service upon a defendant. For example, the face of the uniform citation issued to Johnson contained a bail forfeiture amount that could have been remitted by him to resolve his case rather than contesting the matter. CP at 93, 94. The copy of the uniform citation that was delivered

to the Department contains the amount of the fine imposed after trial at the bottom of the citation. CP at 33. Citation booklets are provided to law enforcement agencies in quadruplicate. RCW 46.64.010(1). Like a notice of traffic infraction, a citation does not cease to have legal effect based solely on an appearance of the defendant.

> . . . the original or copy of such traffic citation may be disposed of only by trial in the court or other official action by a judge of the court, including forfeiture of the bail or by the deposit of sufficient bail with or payment of a fine to the traffic violations bureau by the person to whom such traffic citation has been issued by the traffic enforcement officer."

RCW 46.64.010(1) (emphasis added).

The ultimate disposition of a citation cannot occur prior to the payment of a fine and – according to this provision – can continue to govern the case until after trial. More importantly, the provision provides that the disposition of the citation is often measured, not by a person's appearance, but by compliance with a monetary obligation.

In this case, there is no evidence that the Lewis County District Court has made a decision to ultimately dispose of the citation. There is no evidence that Johnson has remitted the fine amount contained on Department's copy of the citation. Additionally, the Lewis County District Court has not notified the Department that the case has been

adjudicated per the requirements of RCW 46.20.289. Johnson has failed to comply with the terms of a citation and thus is not entitled to have his license reinstated.

D. Johnson is Not Entitled to a Writ Because He Could Have Raised The Issues in this Lawsuit at an Administrative Review and in the Lewis County District Court

In order to obtain a writ of prohibition, Johnson must show that he lacks a plain, speedy and adequate procedure to contest his failure to pay suspensions. See *Skagit County Pub. Hosp. Dist. No. 304*, 177 Wn.2d at 722–23. Johnson had multiple remedies available to him prior to this suit and his writ should be denied on this separate basis. Johnson argues that the Court cannot consider this issue because the Department did not cross-appeal the superior court's ruling with respect to the superior court's determination that an adequate remedy did not exist to challenge the suspensions. Appellant's Brief at 31. However, the Court can affirm on any basis supported in the record below. *See, e.g., State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); *Ensberg v. Nelson*, 178 Wn. App. 879, 890 n. 7, 320 P.3d 97 (2013). Johnson's failure to exhaust remedies was raised to the superior court by the Department in briefing and at oral argument and is supported by the record. CP at 41, RP (April 4, 2014) at 3–5.

1. Johnson had a plain, speedy or adequate remedy to contest his 2009 suspension because he could have asserted that the notice received from the court did not accurately describe that he had failed to comply with a citation

With respect to the 2009 suspension the superior court found that "the statutes the way they were applied to Mr. Johnson are appropriate and that if he had a challenge to that suspension, it needed to be brought prior to June of 2013." RP (April 4, 2014) at 29.

The action that Johnson could have brought prior to the filing of the present lawsuit was an administrative review offered in 2009. CP at 35. While the issues are limited, the administrative review was an appropriate mechanism to challenge the suspension. Under RCW 46.20.245, the issues to be addressed are:

> (i) Whether the records relied on by the department identify the correct person; and
>
> (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.

Here, the action taken by the court was transmittal of a notice to the Department that there had been a failure to make a required payment of fine and costs in a traffic matter. CP at 26, 30. Based on that information, the Department proposed suspending Johnson's driving privilege. CP at 35. In the present suit, Johnson asserts that the information the

Department received from the Lewis County District Court does not show that he failed to comply with terms of citation. See Appellant's Brief at 24-31. Accordingly, Johnson had the opportunity to argue that the information the Department received from the court was inaccurate because it did not contain a factual description that matched the exact statutory language i.e. that his failure to pay the fine was a "failure to comply with the terms of a citation." Johnson could have submitted records in support of his legal argument that he had appeared at a trial but had not paid a fine after the trial. *See* RCW 46.20.245(2)(a) (administrative review is limited to "an internal review of documents and records *submitted* or available to the department" (emphasis added)). Johnson would have been entitled to judicial review of an adverse determination. *See* RCW 46.20.245(2)(e).

There is nothing about the 2013 amendments to RCW 46.20.289 that altered the Department's authority to suspend Johnson's license because driving while license suspended is categorized as a moving violation. WAC 308-104-160(10). All of Johnson's arguments could have been raised in 2009. Johnson is not entitled to a writ for his 2009 suspension because he had an administrative remedy.

2. Johnson has a plain, speedy or adequate procedure in a declaratory action in superior court seeking a construction of RCW 46.20.289 or in Lewis County District Court

Johnson could also have sought relief in the district court traffic matters from which the notice of non-payment had been issued or in a declaratory action in superior court seeking a construction of RCW 46.20.289.

Under the UDJA "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020, *see State ex rel. Lyon v. Bd. of County Comm'rs of Pierce County*, 31 Wn.2d 366, 373, 196 P.2d 997 (1948) (declaratory relief is available when the parties seek construction of a statute). Accordingly, Johnson could have sought injunctive relief in an action under the UDJA regarding his interpretation of RCW 46.20.289.

Johnson also has an adequate remedy at law because he could contest issues regarding non-payment in the underlying Lewis County District Court traffic matters. The Department's role in taking a suspension action is limited and proscribed by statute. *See* RCW 46.20.289 ("the Department shall suspend when it receives notice

from a court"). The Department's role is reflexive based on a triggering notice from the convicting court. Additionally, the Department statutorily may not release his suspension until the convicting court sends a notice that the case has been adjudicated. RCW 46.20.289.

However, the district court in which the non-payment arose has broader authority to provide relief from judgment under CrLJ 7.8(5). Johnson already has a cause number and a district court judge who could make a determination about whether the case should be considered adjudicated. Johnson could have sought judicial review from an adverse decision in that matter. Accordingly, Johnson is not entitled to a writ because he has an adequate remedy.

E. Johnson is Not Entitled to a Writ on Behalf of Third Persons

Johnson cannot seek relief for the rights of third parties. A court only has the authority to issue a writ that provides relief for Johnson, not for similarly situated parties. There is a "general prohibition on a litigant's raising another person's legal rights." *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Generally a litigant does not have standing to challenge a statute in order to vindicate the constitutional rights of a third party. *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000). The rights of third persons who are not parties to a mandamus proceeding will not be determined in the

proceeding. *Prince v. Auditor Gen. of Michigan*, 297 Mich. 157, 297 N.W. 223, 225 (Mich. 1941); *Ryals v. Canales*, 748 S.W.2d 601, 603 (Tex. App. Dallas 1988).

Johnson is not entitled to a writ on behalf of similarly situated drivers. Furthermore, Johnson distorts the number of drivers with suspensions for failure to pay non-moving violations that were in effect prior to the amendments. Appellant's Brief at 1 ("[as] a result, tens or hundreds of thousands of Washington drivers are suffering under the burden of suspension when they should be free to drive"). The record before the superior court indicated there were approximately 300,000 drivers suspended for one of the reasons listed in RCW 46.20.289, either failing to respond, appear, violating a written promise to appear, or failing to comply with the terms of a notice of traffic infraction or citation. CP at 27. Drivers with suspensions for failure to pay non-moving violations are only one subset of the 300,000, and the record does not show the size of this subset. The number of such drivers continues to get smaller as unpaid fines for non-moving violations are satisfied.

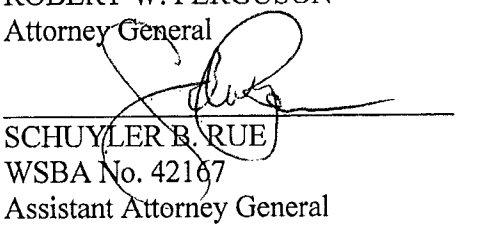
VI. CONCLUSION

The superior court did not abuse its discretion in denying a writ of prohibition directing the Department to release Johnson's suspensions. The Defendants respectfully request that the superior court order granting

Department's motion for summary judgment and dismissing the petition be affirmed.

RESPECTFULLY SUBMITTED this 20th day of February, 2015.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Bibi Shairulla, certify that I electronically filed **Respondent's Brief** with Washington State Supreme Court at: Supreme@courts.wa.gov, and that I caused a copy of the same to be served on all parties or their counsel of record by hand delivery on the date below to:

Kevin Hochhalter
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924 Capitol Way South
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I also certify that on the date below that I emailed a courtesy copy to counsel named above at the following email address:

kevinhochhalter@cushmanlaw.com

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

DATED this 20th day of February, 2015, at Olympia, WA.

Bibi Shairulla
BIBI SHAIRULLA, Legal Assistant

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Dear Clerk,

Attached please find Respondent's Brief for filing in the above-referenced case.

Mr. Rue will hand deliver a copy of this Brief to Mr. Hochhalter's office today.

Respectfully,

Bibi Shairulla
Legal Assistant to
Schuyler B. Rue

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