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Division II  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**Awot Zeru**, Appellant

v.

**DSHS**, Respondent.

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Thurston County Cause No. 17-2-02466-7

The Honorable Judge Carol A. Murphy

## **Appellant's Opening Brief**

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## ISSUES AND ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted the Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction for failure to strictly comply with the service requirements of RCW 34.05.542(2).

**ISSUE 1:** Failure to timely serve parties is a procedural defect and does not affect whether a superior court has subject matter jurisdiction. Did the lower court judge's dismissal for lack of *subject matter jurisdiction* of a petition for judicial review governed by the Administrative Procedure Act misstate the defective procedural requirements at issue?

2. The Superior Court erred when it dismissed Appellant's petition for judicial review without considering whether a good cause exception applies for failure to strictly comply with the service requirements of RCW 34.05.542(2).

**ISSUE 2:** An appellate court has the discretion to determine whether failure to timely serve the parties by a *pro se* petitioner is an excusable error and *may* dismiss without a showing of good cause. Is dismissal of a petition for judicial review governed by the Administrative Procedure Act based on failure to timely serve the parties mandatory or

may the lower court judge consider whether a good cause exception apply in the case of a *pro se* litigant?

### **STATEMENTS OF FACTS AND PRIOR PROCEEDINGS**

This appeals stems out of a Petition for Judicial Review under the Administrative Procedure Act. The facts are simple and undisputed.

The Appellant, Awot Zeru, acting *pro se*, filed an appeal of a with the Thurston County Superior Court on May 1, 2017, stating that “please,” he needed “more time to get help.” CP 2-3. Appellant Zeru was eventually able to locate counsel to take his case, and a Notice of Appearance was filed on August 25, 2017. CP 8-9. Upon reviewing the record and realizing the defect in service, Appellant Zeru’s new counsel served the parties on August 28, 2017. CP 10-11.

The Department of Social and Health Services (the department) filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on October 18, 2017. CP 21-24. On January 12, 2018, Appellant Zeru filed a Response to the Motion to Dismiss arguing that the case law is harmful and outdated, and that the vehicle by which the department asked the court to dismiss his case, a motion for lack of *subject matter jurisdiction*, was inherently flawed. CP 36-39. Appellant Zeru requested that the Superior Court hear his case on the merits because of his *pro se* status when the defect occurred rather than dismiss an otherwise meritorious case on a procedural ground. CP 36-39. The department shortly

thereafter filed with the Superior Court a Reply in Support on January 22, 2018. CP 40-43.

Oral arguments were had on January 26, 2018 at the Thurston County Superior Court before the Honorable Judge Carol A. Murphy. CP 19-20.

An Order granting the Motion to Dismiss was issued on January 26, 2018 because Mr. Zeru failed to strictly comply with the service requirements in RCW 34.05.542. CP 45-46.

On February 23, 2018, Appellant Zeru filed a Notice of Appeal to the Court of Appeals, Division II. CP 47-49.

## ARGUMENT

### **I. THE LOWER COURT JUDGE IMPROPERLY GRANTED THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.**

Provisions of the Administrative Procedure Act (APA) apply to Appellant Zeru's effort to obtain judicial review of the department's final agency order issuing a founded finding of child abuse. Under the APA, a petition for judicial review shall be filed with the court and served "on the agency, the office of the attorney general, and all parties of record...after service of the final order." RCW 34.05.542(2). According to case precedent, a petition shall comply with RCW 34.05.542(2) in order "[t]o invoke the superior court's jurisdiction over his petition for review." *Diehl v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004).

- A. Failure to strictly comply with the non-jurisdictional procedural requirements of RCW 34.05.542(2) does not deprive the Superior Court of subject matter jurisdiction.

Mr. Zeru, acting *pro se*, concedes he did not serve the proper parties within 30 days and accordingly failed to strictly comply with the procedures for service as dictated by RCW 34.05.542(2). According to the department, the consequence of Appellant Zeru's untimely service is that his rightful petition for judicial review must be dismissed for lack of subject matter jurisdiction. The controlling authorities in support of this position are "outdated and harmful" because the untimely service of process of a petition for judicial review is a procedural error, not a

jurisdictional error. *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 856, 235 P.3d 849 (2010), (J. Becker, concurring.)

Petitions for judicial review are routinely dismissed because “[a]cting in its appellate capacity, the superior court is of limited statutory jurisdiction, and all statutory procedural requirements must be met *before* jurisdiction is properly invoked.” *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (emphasis added).

However, the Washington State Supreme Court has more recently begun recognizing that the underlying problem with this principle is that it has the tendency of transforming what are inherently procedural elements into subject matter jurisdiction-invoking requirements. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003).

The critical concept when determining whether a court has subject matter jurisdiction is the “type of controversy.” *Marley v. Dep't of Labor & Indust.*, 125 Wash.2d 533, 539, 886 P.2d 189 (1994). If the type of controversy is the subject matter that invokes the court’s jurisdiction, other defects must be characterized as something other than subject matter jurisdiction. *Dougherty*, 150 Wn.2d at 316. There is no dispute that the petition for judicial review of the final agency decision in Mr. Zeru’s underlying case is the type of controversy that a superior court, acting in its appellate capacity, was empowered by the Legislature to

resolve. Thus, any defect by Mr. Zeru in compliance with the statutory service requirements must go to something other than the superior court's subject matter jurisdiction.

In general, subject matter jurisdiction is an “elementary prerequisite to the exercise of judicial power.” *In re the Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Where a court has no subject matter jurisdiction, the proceeding is void. *In re the Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 843 (1987). A court's lack of subject matter jurisdiction may be raised by a party or the court at any time in a legal proceeding. *Bour v. Johnson*, 80 Wn. App. 643, 646-47, 910 P.2d 548 (1996) (citing CR 12(h)(3)).

Relying on the rationale that the Legislature may limit or condition a grant of limited jurisdiction, a line of Washington cases has held that compliance with statutory procedures is one of the conditions affecting appellate jurisdiction.<sup>1</sup> This approach is “overly formulaic and ill advised.” *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 743, 947 P.2d 732 (1997) (Durham, C.J., concurring).

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<sup>1</sup> See, e.g., *City of Seattle v. Public Employment Relations Comm'n*, 116 Wn.2d 923, 809 P.2d 1377 (1991) (service of process on all parties within 30 days necessary for jurisdiction); *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 796 P.2d 412 (1990) (party must both file and serve notice within 30 days); *Wiles v. Department of Labor & Indus.*, 34 Wash.2d 714, 209 P.2d 462 (1949) (existence of final order is a prerequisite to the Superior Court's jurisdiction); *MacVeigh v. Division of Unemployment Compensation*, 19 Wn.2d 383, 142 P.2d 900 (1943) (failure to file notice of appeal with the superior court clerk considered jurisdictionally fatal); *Nafus v. Department of Labor & Indus.*, 142 Wn. 48, 251 P. 877, 255 P. 148 (1927) (untimely appeal from a decision of the Department of Labor and Industries divests the court of jurisdiction).

Unfortunately, the courts have found that the requirements for invoking jurisdiction refers to compliance with procedural rules.<sup>2</sup> Normally, failure to comply with mandatory procedures *may* be grounds for dismissal if raised in time. But where procedural requirements are equated with jurisdictional necessities, a party's technical failure to comply with a statutory procedure can be raised at any stage in the proceedings, even after a final judgment has been entered. A party's ability to raise procedural defects at any time could result in abuse and waste judicial resources.

“Elevating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice.” *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 791, 947 P.2d 732 (1997) (Durham, C.J., concurring). Technical non-compliance with mandatory procedures *may* be grounds for dismissal if raised at the proper time. However, non-compliance does not affect the court's subject matter jurisdiction.

To think of subject matter jurisdiction as something that depends on what the parties to an action do or fail to do undermines the fixed nature of a tribunal's power. “Jurisdiction exists because of a

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<sup>2</sup> Academic treatises clearly reject this approach: Subject matter jurisdiction “is not dependent on the existence of a good cause of action in [the] plaintiff in a cause pending before the court, or upon the sufficiency of the pleadings, the validity of the demand set forth in the complaint, or [the] plaintiff's right to the relief demanded, the regularity of the proceedings, or the correctness of the decision rendered.” 21 C.J.S. Courts § 18 (1990) (footnotes omitted).

constitutional or statutory provision. A party cannot confer jurisdiction; all that a party does is invoke it.” *Dougherty*, 150 Wn.2d at 319. Thus, if Mr. Zeru could not confer jurisdiction on the Superior Court by properly serving the correct entities, then he could not also deprive the Superior Court of jurisdiction by failing to serve the correct entities. Treating subject matter jurisdiction as though it were a fleeting and fragile attribute of a court diminishes the authority of the court, creates a trap for the unwary, and prevents worthy cases from being heard on the merits.

It should be a matter of institutional concern to the courts when the casual and imprecise use of the term “subject matter jurisdiction” leads to an increase in the number of decisions that are subject to attack indefinitely. In this case, the department raised a prompt challenge to Mr. Zeru’s failure to timely serve the proper parties. But if that failure truly deprived the superior court of jurisdiction, the department could have waited to see what happened in the Superior Court and then raised its jurisdictional challenge if it did not like the result. Thus, classifying procedural errors as jurisdictional flaws has “serious implications for the finality of judgments.”<sup>3</sup> *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 856, 235 P.3d 849 (2010), (Becker, J. concurring).

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<sup>3</sup> *Sprint Spectrum, LP v. Dep’t of Revenue*, 156 Wn. App. 949, 856, 235 P.3d 849 (2010), (Becker, J. concurring) (stating “[i]t appears likely that the Supreme Court will in due course recognize that a failure to comply with the service requirements of the Administrative Procedures Act is a defect that goes to something other than subject matter jurisdiction. What consequences will then flow from a failure to comply with the statutory service requirements is a question that will have to await further briefing and analysis.”)

RCW 34.05.542 does not, on its face, explicitly require dismissal for failing to serve the parties within 30 days. The statute in its entirety provides as follows:

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

Reading the statute in way that does not explicitly require a dismissal for lack of subject matter jurisdiction is consistent with the appellate authority that repeatedly instructs superior courts to allow cases to be heard on the merits because once a party files a meritorious case, subject matter jurisdiction is invoked. Here, Mr. Zeru timely filed his

case. CP 2-3. Therefore, a superior court should have discretion to fashion remedies short of dismissal when consistent with notions of fairness and justice.

**II. BECAUSE APPELLANT’S UNTIMELY SERVICE IS A PROCEDURAL ERROR, THE LOWER COURT JUDGE SHOULD HAVE ALLOWED APPELLANT TO DEMONSTRATE GOOD CAUSE TO EXCUSE THE UNTIMELY SERVICE.**

In this case, there is no dispute that the Legislature intended superior courts to have subject matter jurisdiction over the general class of actions at issue. Because the defect in this case is procedural and stemmed from issues unique to *pro se* civil litigants, the lower court judge should have exercised discretion in determining whether good cause exists to allow the matter to be heard on the merits rather than dismissing purely on procedural grounds.

The state and federal constitutions prohibit the government from “deprivin[ing] any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. The “touchstone” of this provision “is the protection of the individual against arbitrary government actions, whether in denying fundamental procedural fairness (procedural due process) or in exercising power arbitrarily, without any reasonable justification in the service of a legitimate government interest (substantive due process).” *Cradduck v. Yakima County*, 166 Wash. App. 435, 442, 271 P.3d 289 (2012).

Due Process is the judicial safeguard of people’s fundamental rights. The Legislature, in enacting RCW 34.05, intended that “[n]othing in this chapter may be held to diminish the constitutional rights of any person...” RCW 34.05.020. Simply put, the statute contemplated an instance when a hearing cannot be fair by constitutional due process standards when one of the parties is uneducated in the complicated and complex procedures of the law.

Without assistance from attorneys, *pro se* civil litigants make it difficult for judges to fulfill the purpose of our judicial system, which is to correct and make just rulings. *Brief of Retired Trial Judges as Amici Curiae, King v. King*, 162 Wash.2d 378 (2007). If the purpose of our system is to provide equal justice for all, and the arbitrators of justice, our judges, cannot adequately determine the law and make rulings in situations where a *pro se* litigants fail to adequately maintain a case, there can be no equal justice for all.

Rather than being “wholly indifferent” to *pro se* civil litigants who lack of formal legal training,<sup>4</sup> numerous decisions direct judges to treat people like Mr. Zeru with an “understanding of the difficulties encountered by a self-represented litigant.”<sup>5</sup> Across jurisdictions, the type of treatment afforded is typically described as providing reasonable

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<sup>4</sup> *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 445 (California 4th District Court of Appeal 2001).

<sup>5</sup> *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tennessee Court of Appeals 1989).

accommodations,<sup>6</sup> affording latitude<sup>7</sup> or even great latitude,<sup>8</sup> being lenient<sup>9</sup> and solicitous,<sup>10</sup> making allowances,<sup>11</sup> applying less stringent standards,<sup>12</sup> and giving self-represented litigants leeway<sup>13</sup> and every consideration.<sup>14</sup>

Providing reasonable accommodations for self-represented litigants is consistent with the principle that the “rules of procedure do not require sacrifice of the rules of fundamental justice.”<sup>15</sup> The fundamental tenet that the rules of procedure should work to do substantial justice commands that judges painstakingly strive to insure that no person’s cause or defense is defeated solely by reason of their unfamiliarity with procedural rules. Cases should be decided on the

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<sup>6</sup> *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minnesota Court of Appeals 2001); *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minnesota Court of Appeals 1987); *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

<sup>7</sup> *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minnesota Court of Appeals 1983); *Black v. City of Tupelo*, 853 So. 2d 1221, 1226 (Mississippi 2003); *In re Mosso*, 6 A.D.3d 872, 776 N.Y.S.2d 599 (New York Supreme Court, Appellate Division, 3rd Department 2004); *Conservation Commission v. Price*, 479 A.2d 187, 192 n.4 (Connecticut 1984).

<sup>8</sup> *Bitoni v. Tucker*, 295 A.2d 545, 546 (Connecticut 1972).

<sup>9</sup> *Lundahl v. Quinn*, 67 P.3d 1000, 1002 (Utah 2003).

<sup>10</sup> *Macriocostas v. Kovacs*, 787 A.2d 64 (Connecticut Appellate Court 2001); *Borzeka v. Heckler*, 739 F.2d 444, 447 n.2 (9th Circuit 1984).

<sup>11</sup> *Kelley v. Watson*, 77 P.3d 691, 692 (Wyoming 2003).

<sup>12</sup> *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Madyun v. Thompson*, 657 F.2d 868, 876 (7th Circuit 1981); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Circuit 1984); *United States v. Sanchez*, 88 F.3d 1243, 1247 (D.C. Circuit 1996).

<sup>13</sup> *In the Matter of Bales*, 461 N.Y.S.2d 365, 367 (New York Supreme Court, Appellate Division, 2nd Department 1983); *Gomes v. Avco Corp.*, 964 F.2d 1330, 1335-36 (4th Circuit 1991).

<sup>14</sup> *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962).

<sup>15</sup> *United States v. Sanchez*, 88 F.3d 1243, 1248 (D.C. Circuit 1996), quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This “reasonable accommodation” is purposed upon protecting the meaningful exercise of a litigant’s constitutional right of access to the courts.<sup>16</sup> Moreover, intervening to ensure that a *pro se* litigant gets at least a fair chance to present his or her case is consistent with the proper role of a judge.

As discussed above, the statute does not require dismissal based on Appellant Zeru’s untimely service. Absent an express statutory limitation, the Superior Court, exercising its jurisdiction, should have discretion to do as justice requires and fashion remedies for non-compliance with a procedural step.

### CONCLUSION

For the foregoing reasons, Appellant Zeru herein requests that the court hear his case on the merits to conform to the spirit of judicial review and its goal of providing fair and just relief. *Dougherty* is precedential, where, despite the clear violation of the procedural directive under the relevant statute, the Supreme Court held that rather than dismissing the claim, “[i]t is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits...” *Dougherty*, 150 Wn.2d at 219-320. Here, the Superior Court, per *Dougherty*, retains its jurisdiction. Thus, the matter should be reversed to allow Mr. Zeru the opportunity to present evidence of various obstacles he faced as a *pro*

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<sup>16</sup> *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

se litigant which could provide the court with a good cause reason for allowing his untimely service of process.

Respectfully submitted on May 29, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on today's date:

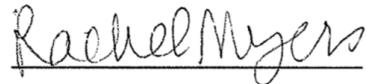
I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORECT.

Signed at Olympia, Washington on May 29, 2018.



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## Transmittal Information

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