71633-6-I

71633-6-I

SUPREME COURT
STATE OF WASHINGTON

JAMES DIDLAKE, et al,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING

Respondent,

APPELLANTS' REPLY BRIEF

RYAN BOYD ROBERTSON
WSBA No. 28245
ROBERTSON LAW PLLC
701 Fifth Avenue Suite 4735
Seattle, Washington 98104
(206) 395-5257
ryan@robertsonlawseattle.com

ANDREA KING ROBERTSON
WSBA No. 28195
ROBERTSON LAW PLLC
701 Fifth Avenue Suite 4735
Seattle, Washington 98104
(206) 395-5257
andy@robertsonlawseattle.com

ROBLIN JOHN WILLIAMSON
WSBA No. 11387
WILLIAMS & WILLIAMSON
2239 West Viewmont Way W.
Seattle, WA 98199
(206) 466-6230
roblin@williamslaw.com

KATHRYN A. WILLIAMS
WSBA No. 9077
WILLIAMS & WILLIAMSON
2239 West Viewmont Way W.
Seattle, WA 98199
(206) 466-6230
kim@williamslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page No.**

Other State Cases **Page No.**

Washington Statutes	**Page No.**
RCW 7.24.020	3
RCW 46.20.308(6)(c)(2012)	10
RCW 46.20.308(7)(2012)	8
RCW 46.20.308(8)	10

Washington Court Rules	**Page No.**
CR 12(b)(6)	19

Laws of Washington	**Page No.**
Laws of 2012, ch. 80	15

I. APPELLANTS' REPLY TO ISSUES RAISED IN RESPONDENT'S BRIEF

1. The Department's standing challenge should be rejected as the Department is conflating issues of standing with class certification and jurisdiction.

2. This Court should decline to address the Department's standing challenge.

3. Department of Licensing engages in no review of sworn report prior to instituting mandatory licensing suspension under implied Consent statute.

4. State imposition of financial burdens as a precondition to due process is unconstitutional regardless of indigency, even with non-fundamental interests.

II. ARGUMENT

1. The Department's standing challenge should be rejected as the Department is conflating issues of standing with class certification and jurisdiction.

Each Appellant had standing to request a refund of the fee they were forced to pay in order to have a hearing on whether their driving privileges should be suspended. The Department is mistaken that because they paid for and received a hearing they were not injured. The Department is also mistaken that Appellants do not have standing to represent other, similarly situated, drivers, confusing class certification standing with the issue of whether the statute violate due process.

"The standing inquiry focuses on whether the plaintiff is the proper party to bring ... suit," not on the merits of plaintiff's claim. *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

> Standing involves whether this plaintiff is a proper party to request an adjudication of the particular issue. This is a separate inquiry from whether the party should prevail. In fact, it is not proper for the court to consider the likelihood of success on the merits in determining the plaintiff's standing...

Hill v. City of Houston, Tex., 764 F.2d 1156, 1159–60 & n. 4 (5th Cir. 1985). *See also McClelland v. Massinga*, 786 F.2d 1205, 1210 (4th Cir. 1986) (taxpayers whose refunds were intercepted to satisfy outstanding child support obligations had standing to claim they were entitled under due process to a pre-intercept hearing, though they might not have prevailed on substantive issue); *Schutz v. Thorne*, 415 F.3d 1128, 1133 (10th Cir. 2005) (nonresident who paid for hunting license had standing to challenge the statute that sets higher fees for nonresidents than residents; "the higher fee ... is an actual, concrete injury"); *Figueroa v. U.S.*, 466 F.3d 1023, 1029 (Fed. Cir. 2006) (patent owner who paid patent application and issuance fees had standing to challenge fees' legality).

"It is axiomatic that inquiry into a plaintiff's standing is independent of the merits of the claim". *Santiago v. Miles,* 774 F. Supp.

775, 789–90 (W.D. N.Y. 1991) (citing *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal")).

The Department, and the trial court, do not comprehend Appellants' claim: requiring a driver to pay for a hearing in order to maintain his or her license violates due process for all the reasons set forth in the Opening Brief. *See Downey v. Pierce County,* 165 Wn. App. 152, 267 P.3d 445 (2011), *review denied.* 174 Wn.2d 1016 (2012). The injury is payment of the fee, without which these drivers would not have had a hearing. The drivers claim injunctive and declaratory relief under the Uniform Declaratory Judgment Act, RCW 7.24.020, which the Department does not address in any fashion..

Interestingly, the Department did not oppose class certification except to argue that, because it would prevail on the merits, class certification should be denied. The Department did not challenge the standing of plaintiffs to bring a claim on behalf of all similar situated persons, i.e. those who paid in order to obtain a hearing and should receive a refund.

"Standing requirements tend to overlap the requirements for justiciability under the UDJA." *City of Longview v. Wallin*, 174 Wn. App.

763, 778, 301 P.3d 45, *review denied,* 178 Wn.2d 1020 (2013) (quoting *Am. Legion Post #149 v. Dep't of Health,* 164 Wn.2d 570, 593, 192 P.3d 306 (2008)).[1]

In *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007). the plaintiff met the test for standing to bring a UDJA claim because as a customer of a car dealership, he should not have paid the statutory Business & Occupation tax, which the dealership (Appleway) was required to pay but had illegally passed on to customers. *Nelson*, 129 Wn. App. 927, 941, 121 P.3d 95 (2005), *aff'd,* 160 Wn. 2d 173, 186, 157 P.3d 847 (2007). Mr. Nelson suffered economic "injury in fact" by paying the tax. Here, the drivers suffered an injury in fact in the amount they were required to pay in order to obtain a hearing. This is "'harm personal to the party' that is 'substantial rather than speculative or abstract.'" *Amalgamated Transit Union Local No. 1576 v. Snohomish Cnty. Pub. Transp. Ben. Area*, 69641-6-I, 2013 WL 6761984, at *2-3 (Wash. Ct. App. Dec. 23, 2013) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004)). *See also Five*

[1] The drivers set forth the two-part test in their Opening Brief, at 13: they must be within the 'zone of interests to be protected or regulated by the statute' in question; and they must have suffered an 'injury in fact.' " *City of Longview,* at 778 (quoting *Am. Legion Post #149,* 164 Wn.2d at 593–94).

Corners Family Farmers v. State, 173 Wn.2d 296, 303-04, 268 P.3d 892 (2011) (in UDJA action, standing requirements are relaxed "[w]here the injury complained of is procedural in nature"). In *Zilba v. City of Port Clinton, Ohio*, 924 F.Supp.2d 867, 875 (N.D. Ohio 2013), the plaintiff suffered an actual injury and had standing to challenge a parking ordinance when he paid the fine rather than subject himself to an additional criminal charge.

Courts routinely address constitutional challenges under the UDJA. *E.g., Downey v. Pierce County,* 165 Wn. App. at 152-67; *Amalgamated Transit Union Local No. 1576 v. Snohomish County Pub. Transp. Ben. Area,* No. 69641-6-I, 2013 WL 6761984, at *3-6 (Wash. Ct. App. Dec. 23, 2013) (equal protection); *City of Longview v. Wallin,* 174 Wn. App. at 789-92 (First Amendment); *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn. 2d 570, 192 P.3d 306 (2008) (equal protection, due process, privileges and immunities); *Arnold v. Department of Retirement Systems,* 74 Wn. App. 654, 669-70, 875 P.2d 665 (1994) (divorced spouse could maintain declaratory judgment action challenging constitutionality (equal protection and due process) of statutes barring her from recovering death benefits of former spouse even before he died), *rev'd on other grounds,* 128 Wn.2d 765, 912 P.2d 463 (1996).

In addition, "[w]here a controversy is of serious public importance the requirements for standing are applied more liberally." *City of Longview,* 174 Wn. App. at 778 (quoting *City of Seattle v. State,* 103 Wn.2d 663, 668, 694 P.2d 641 (1985)).[2]

In Washington (unlike federal courts), "if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits.... Therefore, in Washington, a plaintiff's lack of standing is not a matter of subject matter jurisdiction." *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.,* 176 Wn. App. 185, 312 P.3d 976, 984 (2013), citing *Ullery v. Fulleton,* 162 Wn. App. 596, 604, 256 P.3d 406, *review denied,* 173 Wn.2d 1003 (2011). "Rather, the critical concept in determining whether a court has subject matter jurisdiction is the type of controversy." *Trinity,* at 984 (citing *Cole v. Harveyland, LLC,* 163 Wn.App. 199, 209,

---

[2] Notably, in cases cited by the Department, plaintiffs challenging a fee on constitutional due process grounds had standing. In *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003), cited by the Department, the court certified a class and addressed the constitutional challenge to a fee-for-hearing requirement. Standing was not an issue.

In *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976), the Ninth Circuit held there was no "problem of standing ... with respect to Wiren's challenge to the statutory bond requirement. Absent a constitutional deficiency in the application of that provision here, Wiren's failure timely to post the bond after receiving valid notice of the proceedings would, under the statutory scheme, stand as a waiver of his opportunity for a hearing, thus permitting appellees to proceed with the summary forfeiture and thereby disposing of the case in its entirety. We therefore examine the merits of his claim ... that the $250 bond requirement violates his rights to due process and equal protection".

258 P.3d 70 (2011)).[3] Here, the Department has not properly asserted or briefed the affirmative defense of standing, but even if it had, under Washington law, this Court would still have jurisdiction over the drivers' claims.

2. This Court should decline to address the Department's standing challenge.

In *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203 n.4, 11 P.3d 762 (2000), 27 P.3d 608 (2001) (*"ATU"*), this Court recognized that it is an open question whether standing may be raised for the first time on appeal in a declaratory judgment action such as this. The Court recognized that courts are split on the issue, and left "for a future case, with proper briefing, the question whether we will retain the rule that standing may be raised for the first time on appeal in any, or all, declaratory judgment actions." *Id.* at n.4. In this case, as the trial court observed, there was not proper, complete briefing on the complex question of standing because the Department did not challenge standing in its

[3] Courts at times confuse standing with jurisdiction or sufficiency of proof of an essential element of a claim. *See Whitlock v. Johnson*, 153 F.3d 380, 385 (7th Cir. 1998) (in due process claim, district court's determination that plaintiff was not injured by witness policy did not mean plaintiff lacked standing (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); plaintiff's theory of injury "would have entitled him to relief if the court had taken a different view of the Due Process Clause, and this is enough to confer jurisdiction under Article III").

motion to dismiss but only made a fleeting reference to the issue in its reply.

In *ATU,* the Court cited its prior holdings "that outside the context of the Declaratory Judgments Act, standing is an issue that must be raised in the trial court",[4] and cited several examples of decisions holding "in declaratory judgment actions ... standing will not be considered for the first time on appeal." *Id.* at 203 n.4. As in *ATU,* the Court need not and should not address such a complex issue without full briefing and analysis below.[5]

3. Department of Licensing engages in no review of sworn report prior to instituting mandatory licensing suspension under implied Consent statute.

The Implied Consent statute clearly sets forward the mandatory duty of the Department to initiate the immediate suspension of driving privileges upon receipt of a sworn report. RCW 46.20.308(7)[6]

---

[4] "In addition to constitutional questions, the Declaratory Judgments Act authorizes courts to declare private rights, such as the validity or construction of deeds, wills, and contracts. In such contexts, there is little cause for concern about encroachment on the powers of the other branches of government." *ATU,* at 203 n.4.

[5] Lack of standing means lack of subject matter jurisdiction over the claims, and our courts "use caution in characterizing an issue as jurisdictional ..., because the consequences of a court acting without subject matter jurisdiction 'are draconian and absolute.' " *Trinity,* 312 P.3d at 984 (quoting *Cole v. Harveyland, LLC,* 163 Wn. App. 199, 205, 258 P.3d 70 (2011)). Our courts also avoid " 'drive-by jurisdictional ruling[s]' ". *Trinity,* at 984 n.7 (citations omitted).

[6] The Department correctly notes that the Legislature modified and re-numbered provisions of the statute subsequent to the initiation of these proceedings. See

(emphasis added). The Department's statements to the contrary must be ignored.

The Department writes that,

> "[u]pon receiving the [sworn] report and confirming it satisfies basic statutory requirements, the Department suspends the driver's license ... as required by [statute]."[7] (emphasis added)

To date, the Department has failed put forward any facts supporting any notion that a pre-suspension review of the sworn report may occur.[8] Instead, the statutory language states,

> "The [Department], upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (5)(d) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive ... ." RCW 46.20.308(7) (emphasis added).

The certainty of the license suspension "upon receipt" of the sworn report is made clear by two other provisions in the statute. First, the arresting officer is required to notify the driver that their license status has changed and is "temporary" until the suspension

---

Department's Response Brief, pg. 3, footnote 1. Appellants will likewise refer to the statutory provisions in effect prior to these changes ion law, where appropriate.

[7] Department's Response Brief, pg. 3.

[8] See CP's 8-14.

commences; typically 60 days following the arrest.[9] Second, assuming the driver requests a hearing and a hearing is held, the hearing officer is empowered to only "rescind" or "sustain" the original suspension order.[10] The purpose of the hearing is to attempt to prevent what has already been put into effect.

The statute fails to provide for any procedure by which a pre-suspension review of the sworn report may occur, and the Department may not imply at this juncture of the proceedings that one does in fact occur.

4. State imposition of financial burdens as a precondition to due process is unconstitutional regardless of indigency, even with non-fundamental interests.

The Department cites to several cases where courts have found various fees imposed to secure due process hearings unconstitutional only as applied to indigent persons.[11] These cases fail to conclusively state a rule favorable to Respondent.

Cases such as *Wiren v. Eide*,[12] *Whiteside v. Smith*,[13] *Varilek v. City of Houston*,[14] *Boll v. Dep't of Revenue*,[15] *Neff v. Comm'r of Dep't*

---

[9] RCW 46.20.308(6)(c).
[10] RCW 46.20.308(8).
[11] Department's Response Brief, pg. 30-32.
[12] 542 F.2d 757 (9th Circ. 1976).

of Indus. Accidents,[16] and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. O'Neill*,[17] are of limited relevance to the present appeal. In all cases except the latter, Petitioners made a specific claim of indigency before the Courts.[18] No case involved a Petitioner with the apparent ability to pay, and thus none of these cases raise the precise issue presented herein.[19]

In *Whiteside*, however, a concurring opinion questioned whether Colorado's requirement that injured workers pay for an independent medical exam to challenge a termination of benefits was unconstitutional to all workers regardless of the ability to pay. This opinion was premised on two grounds; both relevant here. First, the opinion cited to court decisions that have held that the imposition of

---

[13] 67 P.2d 1240 (Colo. 2003).
[14] 104 P.3d 849 (Ala. 2004).
[15] 528 N.W.2d 300 (Neb. 1995).
[16] 653 N.E.2d 556 (Mass. 1995).
[17] 561 A.2d 917 (Conn. 1989).
[18] *Wiren*, at 760; *Whiteside*, at 1243; *Varilek*, at 851; *Boll*, at 476; *Neff*, at 557;
[19] *Wiren*, at 764 ("The statutory bond requirement at least as it is applied here denies [court access] to the indigent claimant."); *Whiteside*, at 1252-1253, ("[W]e hold that the fee requirement ... requiring indigent workers to prepay a fee before they can obtain either administrative or judicial review of adverse decisions ... violates the procedural due process guarantee of the Fourteenth Amendment."); *Varilek*, at 855 ("[W]e hold that the borough's refusal to offer any alternative to a $200 filing fee for administrative actions amounts to an unconstitutional denial of due process to indigent claimants."); *Boll*, at 480 ("The Bolls' right to the redetermination hearing was conditioned on requirements so harsh as to effectively deny them access to the courts. ... [W]e find that §77-4312(4) as applied to indigent individuals is unconstitutional.")

financial burdens to access initial due process review of state action to deprive a person of important (but not fundamental) property interests unconstitutional without regard to indegency. Second, the opinion was supported, in part, on the Supreme Court's due process analysis in the *Ortwein*[20] decision.

The *Whiteside* concurrence cited to three cases. In *Calif. Teachers Ass'n v. State of California*,[21] the Court struck a law requiring teachers to agree to pay for half the costs of an administrative law judge overseeing a termination hearing when the teacher unsuccessfully challenges a suspension or termination hearing decision. California (and Washington[22]) recognizes that professional licensing is an important, but not fundamental, right protected by due process. Like driver's licensing, the state operates a monopoly over licensing, and as a property interest it may not be easily replicated. The Court recognized that the effect of the cost provision created a "substantial barrier" to both indigent and non-indigent teachers seeking to protect their interest in a teaching license. Ca*lif. Teachers Ass'n*, 975 P.2d at 640.

---

[20] *Ortwein v. Schwab*, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973).
[21] 975 P.2d 622 (1999).
[22] *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006).

While the Court recognized the practical chilling effect a cost bill of potentially several thousand dollars can have on a teacher's willingness to seek a hearing, the Court ultimately struck the law using the balancing test under *Mathews v. Eldridge.*[23] *Calif. Teachers Ass'n*, at 637. In light of the teacher's interest in maintaining their property interest, the State's interest in conserving limited resources was outweighed by the fact the State was ultimately constitutionally required to provide a hearing process to comport with due process and thus was required to incur the costs for its maintenance. *Calif. Teachers Ass'n*, at 638; 643.

In *Rankin v. Independent School District*,[24] the Court struck a similar law in Oklahoma, requiring teachers to pay for half the cost of a termination hearing regardless who prevailed. *Rankin* is distinguishable in that the Court equated a teacher's property interest in employment the same as the right to divorce in *Boddie.*[25] *Rankin*, at 841. However, the Court noted the distinction that while in *Boddie* the Courts provided the mechanism to seek a divorce; in *Rankin* the State created the need for the due process hearing because it sought to

---

[23] 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
[24] 876 F.2d 838 (10th Circ. 1989).
[25] *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

remove property from the teacher. *Rankin*, at 841. The Court further rejected any grounds for support in *Ortwein*, noting that while the potential costs incurred by the teacher may be substantial, the due process infirmity existed because the State provided no alternative means for the teacher to protect his or her property interest unburdened by substantial cost. *Rankin*, at 841.[26]

Finally, in *Winston v. New York*,[27] the Court struck a law requiring forfeiture of a teacher's pension benefits as a consequence to an unsuccessful challenge to a termination hearing; and conversely, permitting a teacher to retain pension benefits by resigning in lieu of challenging the termination. By tying pension benefits to the assertion of a right to a pre-termination hearing, the law violated procedural due process rights of the teacher. *Winston*, at 247.

Due to the fees and costs at issue in the above cases, the parties faced a substantial chilling effect on the assertion of the right to a due process hearing. The Department argues that Appellants cannot make a similar claim that the fee-for-hearing requirement under the Implied

---

[26] The Court in *Rankin* noted that in *Ortwein*, while the Court upheld the State's ability to require indigents to pay a somewhat a $25 appeal filing fee, the Court affirmed in part on the fact the State provided a "free" initial administrative hearing which provided all affected persons the opportunity to receive due process. *Rankin*, at 841.

[27] 759 F.2d 242 (2nd Circ. 1985).

Consent law creates such a chilling effect.[28] Two facts challenge the State's assumption. First, when the fee was first imposed in 1994, the State was aware that the fee would have a deterrent effect on drivers requesting a hearing.[29] The State assumed that as many as 50% of drivers subject to an implied consent license suspension would be deterred from seeking a hearing because of the fee.[30] Second, the Department's statistic that 36% of hearings from 2009-2011 involved drivers receiving an indigency waiver underscore the fact the fee involved is not a nominal fee but represents a substantial financial impact on drivers. Now that the fee has increased to $375,[31] the impact on drivers similarly situated to Appellants only increases.

The Department fails to address *Ortwein v. Schwab* meaningfully. *Ortwein* is most relevant to the present appeal for three reasons. First, the case involves constitutionally protected, but not fundamental, rights to property. Second, while *Ortwein* addressed the constitutionality of an appeal fee; and held such a fee could be imposed upon the indigent, its ruling was premised on the fact;

---

[28] Department's Response Brief, pg. 16.
[29] CP 164; Financial Impact Statement; SSB 6047.
[30] Id.
[31] Laws of 2012, ch. 80, §12.

> "Each of the present appellants has received an agency hearing at which it was determined that the minimum level of payments authorized by law was being provided." *Ortwein*, 410 U.S. at 659.
>
> "These appellants have had hearings. The hearings provide a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress." *Ortwein*, 410 U.S. at 659.

Third, the *Ortwein* Court distinguished *Kras*,[32] recognizing that in *Kras* the petitioner had alternatives to judicial action to address and protect his financial interests. *Ortwein*, at 659; citing *Kras*, at 446. Conversely, petitioners in *Ortwein* had no alternative, and received due process through a pre-termination hearing without cost. *Id.*

The failure to address *Ortwein* is striking since it represents the major analytical distinction between Division Two's decision in *Downey*[33] and Division One's decision in *Morrison*.[34] While both cases cite to *Ortwein*, only *Downey* recognized the *Ortwein's* analysis regarding a pre-termination hearing without fee. *Downey*, at 166.

The Department's attempts to distinguish *Morrison* and *Downey* are unavailing. While both involved the State's attempt to deprive them of property, neither property interest was "fundamental."

---

[32] *U.S. v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973).
[33] *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011).
[34] *Morrison v. State, Dept. of Labor & Indus.*, 168 Wn. App. 269, 277 P.3d 675 (2012).

Yet, even the *Morrison* Court recognized that the property interests in *Downey* were much more substantial. *Morrison*, at 275. *Morrison* involved the State seeking solely monetary damages. *Morrison*, at 271. Contrary to the Department's argument, Morrison's property interest in a state issued license was never subject to revocation.[35] *Morrison*, at 275.

In an attempt to isolate the *Downey* decision, the Department asks this Court to interpret *Downey* as creating a rare class of uniquely protected property interests in family pets; specifically dogs.[36] But the Court did no such thing in *Downey*.[37] Rather than stating that family dogs were unique sentimental property, the Court actually found the opposite;

> "See *Sherman v. Kissinger*, 146 Wn. App. 855, 861, 195 P.2d 539 (2008) (dogs are, "as a matter of law," "characterized as personal property"); *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006) ("[A]lthough we have recognized the emotional importance of pets to their families, legally they remain in many jurisdictions, including Washington, property.")." *Downey*, at 165, fn. 13.

---

[35] Department's Response Brief, pg. 35-36.
[36] Department's Response Brief, pg. 27.
[37] To accept the Department's reasoning would require future courts to determine whether other animals, such as cats, rabbits, or pigs, would require the same level of protection under due process due to their acceptance within families and the recognition of unique sentimental value.

Instead, *Downey* found, and *Morrison* recognized,[38] that a substantial property interest existed within Downey's dog based on a confluence of factors:

> "Here, the private interests involved include (1) pet owners' interests in keeping their pets, which is arguably more than a mere economic interest because pets are not fungible; (2) economic interests in not having to pay additional annual registration and inspection fees or acquire significant liability insurance in order to retain his or her property; and (3) potentially being subject to criminal liability for later violations of the County's dangerous animal restrictions. Although these private interests are not as significant as the liberty interest at stake in a criminal action, they are not negligible." *Downey*, at 165

Morrison simply is not applicable to the present appeal. Here, Appellants faced (1) the loss of a property interest in a state issued driver's license; (2) the risk of increased financial costs to maintain and restore the license; and (3) the risk of enhanced future criminal liability based upon a license suspension. These factors are indistinguishable from *Downey*.

III. CONCLUSION

Appellants were required to pay for a due process hearing which the State was constitutionally required to provide. The recent *Downey* decision recognized the impact a fee-for-hearing requirement

[38] *Morrison*, at 275.

has on due process rights where without payment of the fee no meaningful review of the state's action to remove property occurs. *Downey* did not distinguish between indigent and non-indigent property holders, correctly citing to *Ortwein*.

For the reasons stated above, and previously provided in Appellants' opening brief, 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 22nd day of January, 2014.

Ryan Boyd Robertson, WSBA #28245
Robertson Law PLLC
Attorney for Plaintiffs

Andrea King Robertson, WSBA #28195
Robertson Law PLLC
Attorney for Plaintiffs

Rob Williamson, WSBA #11387
Williamson & Williams
Attorney for Plaintiffs

Kim Williams, WSBA #9077
Williamson & Williams
Attorney for Plaintiffs

OFFICE RECEPTIONIST, CLERK

To: Andy Robertson
Subject: RE: James Didlake et al. v. Washington State Department of Licensing, No. 88774-8 -- Department's Response Brief

Received 1-22-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Andy Robertson [mailto:andy@robertsonlawseattle.com]
Sent: Wednesday, January 22, 2014 4:40 PM
To: Immel, Roxanne (ATG)
Cc: OFFICE RECEPTIONIST, CLERK; Ryan Robertson (ryan@robertsonlawseattle.com); 'Kim@williamslaw.com' (Kim@williamslaw.com); 'roblin@williamslaw.com' (roblin@williamslaw.com); Harris, Leah (ATG); Glasgow, Rebecca (ATG)
Subject: Re: James Didlake et al. v. Washington State Department of Licensing, No. 88774-8 -- Department's Response Brief

Dear Clerk,

Attached for filing is Appellant's Reply Brief in *James Didlake et al. v. Washington State Department of Licensing*, No. 88774-8.

All attorneys for both sides are receiving this email per the parties' e-service agreement.

Please let us know if there are any problems with this submission coming through as an attachment.

Sincerely,

Andrea Robertson

Attorney for Appellants

--

ROBERTSON

Andrea Robertson

701 5th Ave #4735

Seattle, WA 98104
w (206) 395-5257
f (206) 905-0920