

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

NO. 95346-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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DEIODE LEA CUNNINGHAM,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**RESPONSE TO APPELLANT'S EMERGENCY MOTIONS**

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## **I. INTRODUCTION**

This is a response to Ms. Cunningham's second Emergency Motion to Supplement Paragraph 6 Discovery Evidence filed on March 21, 2018. Both motions should be denied because neither is appropriate under RAP 9.10 or 9.11 or RCW 34.05.562 as a basis to supplement the record with additional evidence. Further, Ms. Cunningham has not shown that the criteria in RAP 17.4 are met to have these motions decided on an emergent basis. The Court should deny her motions.

## **II. IDENTITY OF RESPONDENT**

The Respondent is the Washington State Department of Social and Health Services.

## **III. COURT OF APPEALS DECISION**

The Unpublished Opinion of the Court of Appeals is attached to Ms. Cunningham's "Petition for Review" and the Department has separately filed its response to that Petition.

## **IV. COUNTERSTATEMENT OF ISSUE ON REVIEW**

Whether the Court should grant Ms. Cunningham's motions to supplement the record on appeal with new evidence on an emergent basis pursuant to RAP 17.4(b).

## V. ARGUMENT WHY MOTIONS SHOULD BE DENIED

This Court should deny Ms. Cunningham's motions to supplement the record with new evidence. The criteria for reviewing an emergency motion pursuant to RAP 17.4(b) are not met in this case. Furthermore, her request to supplement the record is not proper pursuant to RAP 9.10 or 9.11, or RCW 34.05.562, when this case has not yet been accepted for review by this Court, and when the proposed additional evidence (identified as Exhibits H-K to Ms. Cunningham's second emergency motion) are dated 2015, 2014, 2013-14, and 2013, respectively, which predate the motion to vacate the agency's order of dismissal for default that underlies this appeal.

RAP 17.4(b) permits the consideration of an emergency motion if (1) adequate relief cannot be given if the motion is considered in the normal course, and (2) the movant has taken reasonable steps under the circumstances to give notice to persons who would be affected by the ruling sought. The only looming deadline is this Court's review of her Petition for Discretionary Review. The proposed additional evidence goes to the merits of her appeal, not to whether this Court will accept her Petition for Discretionary Review, so Ms. Cunningham cannot show that adequate relief cannot be given if her motions are considered in the normal course.

Furthermore, RAP 9.10 and 9.11 govern when this Court will supplement the record on review with additional evidence. Because this

case is an appeal of a decision of an administrative agency pursuant to RCW 34.05.570, the Administrative Procedure Act governs what constitutes the agency record on review. *See* RCW 34.05.562. At this time, however, only Ms. Cunningham's Petition for Discretionary Review is pending before this Court, which review is based upon consideration of the factors set out in RAP 13.4(b). If this Court accepts review, then her motion to supplement the record with new evidence can be heard in the normal course. There is no need to hear this motion on an emergency basis.

Moreover, Ms. Cunningham provides no justification for why this evidence was not submitted at any prior stage of review, either to the Office of Administrative Hearings in 2014, to the Department's Board of Appeals, to the Superior Court, to the Court of Appeals (which did consider additional evidence submitted by Ms. Cunningham from both Mary Stone and Seth Cowan, *see* Unpublished Opinion 3-4, 8-9), or why these documents were not submitted with Ms. Cunningham's petition for review to this Court.

This new evidence goes only to the issue of whether she had good cause to miss her administrative hearing on May 20, 2014, but it does not provide any additional basis for this Court to accept her Petition for Discretionary Review pursuant to RAP 13.4(b). Her statement that she was experiencing opioid withdrawal in 2014 is not offered to argue that the

decision of the Court of Appeals opinion conflicted with a decision of the Supreme Court or a published decision of the Court of Appeals, or to argue that her case involves a significant question of constitutional law or an issue of substantial public interest. Rather, it is her first effort after almost four years to offer an explanation about why she failed to call in for a hearing in May 2014. Whether such explanation rises to the level of good cause is not currently before the Court, nor has any lower court, or the Department, had an opportunity to review this evidence. What is before the Court is Ms. Cunningham's Petition for Discretionary Review, and two "emergency" motions that do not meet the criteria in RAP 17.4(b). Her motions should be denied and her Petition for Discretionary Review should be considered based on the record of the Court of Appeals.

## **VI. CONCLUSION**

Ms. Cunningham has not shown that there is a need to hear her motions on an emergent basis pursuant to RAP 17.4(b).

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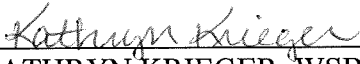
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Furthermore, her motion to supplement the record is not proper at this time when this Court has not yet granted her Petition for Discretionary Review. This Court should deny her motions.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of March, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- Federal Express, 2-Day Delivery
- ABC/Legal Messenger
- State Campus Delivery
- Electronic Mail

TO:  
Deiode Cunningham, Appellant  
Karl I. Olson, Appellant's Representative  
2714 "J" Ave  
Anacortes, WA 98221

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

EXECUTED this 23<sup>rd</sup> day of March, 2018 at Tumwater, Washington.

  
\_\_\_\_\_  
CONNIE WALL, Legal Assistant

**OFFICE OF THE ATTORNEY GENERAL**

**March 23, 2018 - 11:27 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95346-5  
**Appellate Court Case Title:** Deoid'e Lea Cunningham v. State of Washington, Department of Social & Health Services  
**Superior Court Case Number:** 14-2-02007-7

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