

FILED

MAY 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

NO. 305881

ERIC T. ASH dba PAR ONERI CONCRETE

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES

BRIEF OF APPELLANT

JANELLE M. CARMAN, WSBA #31537

CARMAN LAW OFFICE, INC.
6 E. ALDER ST. SUITE 418
WALLA WALLA, WA 99362

Attorneys for Appellant

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I. INTRODUCTION

Appellant Eric T. Ash (hereafter "Mr. Ash" or "Appellant") appeals the Trial Court's dismissal of his administrative appeal of tax assessments which the State of Washington, Department of Labor & Industries (hereafter "State" or "Department") had assessed against him and his business, Par Oneri Concrete. The dismissal was entered on 12/27/11 in the Walla Walla County Superior Court by the Honorable Judge Donald Schacht.

Through this appeal, Mr. Ash asserts that the Order was erroneous as a matter of law and deprived him of due process. Accordingly, he seeks reversal and reinstatement of his administrative appeal.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred as a matter of law in its construction of RCW 51.52.112 when it ruled that the statute mandated a motion and order for waiver of

the prepayment penalties be filed before pursuing the substantive appeal where Mr. Ash brought a motion for waiver of the prepayment before the substantive matters involving his case were heard. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)¹

Assignment of Error No. 2.: The Department should be precluded from arguing that Mr. Ash failed to bring a motion to waive pre-payment of tax assessments before filing his appeal where the Department did not make such a claim below and where Mr. Ash relied on instructions issuing from the Department in pursuing his appeal. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)

Assignment of Error No. 3: The Trial Court erred as a matter of law by dismissing Mr. Ash's administrative appeal where Mr. Ash comported with the requirements of RCW 51.52.112 and the Administrative Procedure Act. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)

¹ Herein, the term "CP" shall refer to the clerk's papers, using the paginated designation identified therein.

Assignment of Error No. 4: Even if Mr. Ash did make some technical errors in pursuing his administrative appeal, the trial court erred by dismissing the case in light of Mr. Ash's substantial compliance. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)

Assignment of Error No. 5: The trial court violated due process protections by dismissing Mr. Ash's administrative appeal on a baseless procedural objection. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)

Assignment of Error No. 6: The trial court erred in failing to find that good cause existed to permit a waiver of prepayment due to economic hardship under RCW 51.52.112. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1: Whether the trial court erred as a matter of law in its construction of RCW 51.52.112 when it ruled that the statute mandated that a motion and order for

waiver of prepayment be filed prior to the administrative appeal? (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.) Assign. of Error Nos. 1,2,3. Here, Mr. Ash brought a motion for waiver of the prepayment prior to the substantive matters involving his administrative appeal were heard. This involves completely different facts than those analyzed in *Probst v. Dep't of Lab. & Indus.*, 155 Wn. App. 908, 916, 230 P.3d 271 (2010). There, Mr. Probst never did request an exemption under RCW 51.52.112. Instead, he argued that he was not bound by RCW 51.52.112. Accordingly, he asked the court to rule substantively on the merits of his appeal without reaching the question of prepayment. Mr. Ash's circumstances are different. As a result, this appeal is not barred by *Probst II*. The lower court's ruling to the contrary was in error. Similarly, the lower court's suggestion - that Mr. Ash petition for an exemption prior to filing his appeal - is procedurally untenable if not impossible. Accordingly, the dismissal should be reversed.

Issue No. 2: Whether the Department should be barred from raising the claim that Mr. Ash failed to prepay the premiums before prosecuting the appeal where he followed instructions set forth by the Department in pursuing an appeal before an Article III court. and where the Department did not argue this matter below. Accordingly, it should be estopped from making a claim that he needed to follow a different procedure in order to prosecute an appeal. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.) Assign. of Error Nos. 2, 3.

Issue No. 3: Whether the trial court erred by dismissing the case in light of Mr. Ash's substantial compliance? (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.) Assignment of Error No. 4. Even if there are small errors, Mr. Ash has acted in substantial compliance with the statute. This is sufficient to permit the appeal to go forward. *See Probst II*, 155 Wn. App. at 915 (citing *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005) and *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wn.2d 227, 230, 643 P.2d 436 (1982)). Here,

because Mr. Ash has acted in accordance with the elements and issues within the statute. His appeal should be permitted to progress.

Issue No. 4: Whether the trial court violated due process protections by dismissing Mr. Ash's administrative appeal on a baseless procedural objection. (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.) Assignment of Error No. 5. Here, while the trial court had inherent authority to regulate the manner of hearings before it, it was not authorized to take actions that violate a party's right to procedural or substantive due process. *In re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.3d 51 (1990). Mr. Ash was deprived of due process, which required a meaningful opportunity to be heard. *See Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Accordingly, the ruling should be reversed. Since the law on which the Department rests its argument is untenable, Mr. Ash should be reimbursed for those attorney's fees incurred in prosecuting this appeal under CR 11.

Issue No. 5: What remedy is appropriate given the substantial evidence of the need of Mr. Ash for an exemption of the prepayment? (CP 1-4, 9-10, 192, CP 193-97, 207-14, 216-42.) Assignment of Error No. 6. Mr. Ash has provided extensive financial information that support his request for a waiver of the prepayment. (CP at 207-14, 216-40.) This Court, which is in the same position as the trial court, has more than adequate bases on which to grant the motion for a waiver under RCW 51.52.112. In the alternative, remand for a factual determination of the motion should occur.

IV. STATEMENT OF THE CASE

Eric Ash used to operate a small concrete company in Walla Walla County called Par Oneri Concrete. (CP 193.)

Mr. Ash's company completed work on a building on Rose Street. (CP 21.)

After the work was completed, the Department developed concerns that Mr. Ash had employed his father without paying certain payroll taxes associated with having

employees. (CP 11-12.) Mr. Ash disputed there existed any employer/employee relationship with the senior Mr. Ash. (CP 11-12.)

Nonetheless, an audit was undertaken, with which Mr. Ash cooperated, resulting in the agency's initial determination that Mr. Ash's father had been an employee whose pay should have been taxed and reported to the Department. (CP 35-38.) The audit assessed premiums, fines, penalties, and interest against the small business at \$15,345.66. (CP 11, 35-38.)

Upon receipt of the audit's findings, Mr. Ash, with the assistance of his accountant, pursued an administrative appeal. (CP 11.) A proposed decision and order issued on January 3, 2011. (CP 28.) The notice contained information as to how to pursue an appeal. (CP 25-26.) Mr. Ash followed the instructions and requested administrative review. (CP 21-22.) Following review, the administrative tribunal affirmed the assessment. (CP 11-15.) A written notice of the administrative decision was provided to Mr. Ash. (CP 15.)

Therein, the agency provided detailed instructions as to how Mr. Ash could pursue an appeal to an Article III court. (CP 9-15.)

Specifically, those instructions indicated as follows: First, a party who disagrees with any portion of the decision may appeal the matter to superior court. (CP 9.) Second, the county in which the appeal must be filed is identified for the types of appeals. (Id.) Third, the instructions specify that copies of the appeal must be delivered to the BIIA and the Department. (Id.) Fourth, the instructions specify that there are not specific forms necessary for the filing because each superior court has its own filing requirements. (CP 10.)

Finally, the Department provided the following information as to the statutes that an appellant should refer to in prosecuting an appeal: As to Workers' Compensation cases, the instructions referenced RCW 51.52.110 and WAC 263-12. (CP 10.) As to Tax Assessment cases, the

instructions referenced RCW 51.48.131² and RCW 34.05.510 through RCW 34.05.598.³ (CP 10.)

Nowhere in those instructions was there any reference to the need for an appellant to pre-pay the tax assessment before pursuing an appeal or to the statutory citation involved with prepayment. (*See* CP 9-10.) Nowhere is there any reference whatsoever to RCW 51.51.112. (*See id.*)

Mr. Ash, acting pro se, followed the instructions provided to him. He timely filed a notice of appeal at the Walla Walla County Superior Court in accordance with the instructions the agency provided. (CP 1-4.) The notice of appeal was handwritten and simple, but enough to open a file at the Walla Walla County Clerk's Office and to initiate the litigation process before an Article III court. (*Id.*) On its face, the notice of appeal comported with the instructions supplied by the administrative agency. (CP 9-10.) It was filed

² This RCW chapter involves Penalties. RCW 51.48.131 involves the need to appeal within 30 days or the assessment becomes final. The statute also involves the process involved: the Department will generate the administrative record and respond to the petition. *Id.* The burden of proof will rest with the employer. *Id.*

³ The Administrative Procedure Act.

in the county where Mr. Ash resided. (CP 9; CP 1-4.) It identified the parties correctly. (Id.) It noted that it was a RALJ appeal. (Id.)

After filing the notice of appeal, Mr. Ash engaged the services of an attorney. (CP 191.) Prior to pursuing the substantive portion of his appeal, Mr. Ash filed a motion under RCW 51.52.112 for a waiver of the requirement to pre-pay taxes as a precondition of pursuing the appeal because of its financial hardship. (CP 192.) The motion was supported by counsel's declaration, a memorandum, by two statements from Mr. Ash, by a number of financial documents, and by two financial declarations. (CP 193-97, 207-14, 216-40.) The original motion was supplemented by leave of the work. The financial data explained that he lacked the financial resources to pre-pay the assessments. (Id.)

In response to Mr. Ash's filings, the State did not challenge the procedural steps Mr. Ash had taken to pursue the appeal. (CP 201-05.) The State did not argue that the

motion for a waiver should have pre-dated the filing of the appeal. (Id.) Instead, the State challenged whether Mr. Ash had factually established good cause for the waiver to issue. (CP Id.)

The lower court took the matter under advisement. (CP 241-42.) A memorandum ruling issued on 11/16/11. (Id.) In issuing its ruling, the superior court refused to consider the factual and substantive nature of the motion: that is, whether Mr. Ash qualified for a waiver of the pre-payment. (Id.) Instead, it determined that it did not have authority to rule on the motion because Mr. Ash did not bring his motion for waiver prior to filing the appeal. (Id.) In making its decision, the lower court relied on *Probst v. Dep't of Labor & Indus*, 155 Wn. App. 908, 230 P.3d 271 (2010). (Id.) As a result, the lower court dismissed the appeal. (Id.) An order memorializing that dismissal was entered on 12/27/11. (CP 243-45.)

Mr. Ash filed a timely notice of appeal to this Tribunal, requesting that his administrative appeal be reinstated. (CP 246-56.)

V. ARGUMENTS & AUTHORITIES

A. STANDARD OF REVIEW

Under RCW 51.48.131, appeals from a final decision of the Board of Industrial Insurance Appeals (hereafter "BIIA") are governed by the provisions of the Administrative Procedures Act. *See* RCW 34.05.510 - .598.

An appellate court sits in the same position as the superior court and reviews the BIIA assessment based on the record before the BIIA. *Probst v. Dep't of Lab. & Indus.*, 155 Wn. App. 908, 916, 230 P.3d 271 (2010).

Within such appeals, questions of law, including construction of statutes, are reviewed *de novo*. *Id.* (citing *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002) and *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 684, 162 P.3d 450

(2007).) However, an appellate court will accord an agency deference in construing the statutes it administers. *Probst*, 155 Wn. App. at 915.

In the case at Bar, the sole issue involves the construction and application of RCW 51.52.112⁴ to the facts at hand.

B. OVERVIEW OF LAW

Chapter 51 RCW deals with the Washington State Industrial Insurance system. Chapter 51.52 RCW addresses in part the steps required for a superior court appeal of the assessment of taxes by the Department. RCW 51.52.112 provides as follows:

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest unless the court determines that there would be an undue hardship to the employer. In the event an employer prevails in a court action, the employer shall be allowed interest on all taxes, penalties, and interest paid by the employer but determined by a final order of the court to not be due, from the date such taxes,

⁴ To save money, Mr. Ash did not prepare a transcript of the arguments submitted to the superior court.

penalties, and interest were paid. Interest shall be at the rate allowed by law as prejudgment interest.

RCW 51.52.112. At issue is whether dismissal is required because Mr. Ash filed his appeal first, followed by a motion for waiver of pre-payment.

C. CONTRARY TO THE RULING OF THE LOWER COURT, MR. ASH'S PLEADINGS WERE ENTIRELY CONSISTENT WITH PUBLIC POLICY, STATUTORY PROVISIONS, AND GOVERNING CASE LAW.

1. Mr. Ash Acted in Accordance with *Probst* Analysis

The lower court erred by determining that *Probst v. Dep't of Lab. & Indus.*, 155 Wn. App. 908, 916, 230 P.3d 271 (2010), precluded Mr. Ash's appeal. (CP 241-42.) In truth, the 2010 Division II case involved different issues entirely. *Probst II* does nothing to preclude Mr. Ash's administrative appeal.

The *Probst II* case was (at least) the second tax assessment case involving Mr. Probst. See *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 289-90, 88 P.3d 413, rev. denied, 152 Wn.2d 1034, 103 P.3d 201 (2004)

("Probst I"). This second appellate case involving Mr. Probst detailed his past and ongoing intransigence. *Probst II*, 155 Wn. App. at 910-12. There, Mr. Probst objected to a second audit, with which he did not cooperate, and filed an appeal within Thurston County Superior Court. *Probst II*, 155 Wn. App. at 914.

In pursuing this appeal, Mr. Probst did not pre-pay the tax assessments, nor did he seek a waiver. *Id.* The trial court reviewed the appeal and ruled that the failure to comply with RCW 51.52.112 required dismissal. *Id.* The trial court additionally reviewed the appeal substantively and ruled that the findings and conclusions should be affirmed. *Id.* at 915.

As is relevant in the case at Bar, Mr. Probst never brought a motion for the waiver of prepayment. *Id.* at 916. Instead, he claimed throughout this appeal that the prepayment requirement did not apply to him. He claimed (without success) that RCW 51.52.112 violated substantive and procedural due process that made it an undue burden to access

the courts. *Id.* at 916. He claimed (without success) that RCW 51.52.110 had repealed RCW 51.52.112 by implication. *Id.* at 917. He offered these arguments in light of contradictory case law. *Id.* at 918. Furthermore, Mr. Probst asked the trial court to review the substantive appeal without bringing a motion for waiver. *Id.* at 915. Accordingly, he pursued his appeal without first addressing whether he had to prepay the penalties. *Id.* In contrast, none of these factors are present in the appeal involving Mr. Ash.

Here, Mr. Ash filed paperwork required to open up a case file at the Walla Walla County Clerk's Office in the superior court consistent with the instructions provided him by the Department. (CP 9-10.) He filed the notice of appeal. (CP 1-4.) He paid the appellate fee. (*Id.*) His next filing was to request waiver of the pre-payment due to financial hardship. (CP 192.) Before he asked the Court to rule on his case substantively or to look at all at the merits of the appeal, he took a procedural step. (*Id.*) He brought a motion under RCW

51.52.111 - for waiver of the prepayment fee. This is a far cry from the steps taken by Mr. Probst. Mr. Probst proclaimed that RCW 51.52.112 did not apply to him. In contrast, Mr. Ash recognized that it did, and asked that it be applied to him. A review of the steps actually taken by Mr. Ash reflects that he acted in accord with the requirements in *Probst II*. The lower court's ruling to the contrary was in error.

Mr. Ash's appeal should not have been dismissed. Through this appeal, he seeks reversal of the dismissal and reinstatement of his appeal.

2. Alternatively, Dismissal Inappropriate Because Mr. Ash Substantially Complied with Procedural Conditions

In the alternative, even if this Court finds deficiencies in Mr. Ash's filings, it should determined that Mr. Ash has acted in substantial compliance with the statute. After all, it is a “well established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of

the procedural requirements before they will exercise jurisdiction over the matter.” *Probst II*, 155 Wn. App. at 915 (citing *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005) and *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wn.2d 227, 230, 643 P.2d 436 (1982)).

Here, Mr. Ash took all the steps mandated by the paperwork provided by the Department. (CP 9-10.) Moreover, he met all standards required by the APA. He then brought a motion specifically requesting the relief expressly contemplated by RCW 51.52.110. Accordingly, he has substantially complied with the procedural conditions set forth in Title 51. He has acted in accordance with the elements and issues within the statute. His appeal should be permitted to progress. The dismissal was issued by the court below in error.

3. Lower Court's Suggested Process Impossible

The lower court erroneously concluded that under the plain words of the statute and through *Probst II*, that Mr. Ash was mandated by RCW 51.52.112 to pre-pay the penalties or

obtain a court-ordered waiver prior to filing his appeal. (CP at 241-42.) The conclusion presents an impossible procedural quandary for appellants. The lower court would require Mr. Ash to petition for, and receive, an order waiving the pre-payment requirement before initiating appellate litigation. This is procedurally impossible.

Where administrative appeals to a superior court are concerned, a case file is opened within the superior court upon filing of the petition for review and the paying of the filing fee. CR 3. Here, Mr. Ash did that.

After filing, a docket number assigned and a litigation file opened, as reflected in the clerk's stamp of a docket number onto the new filing. At that point, a litigation file is opened against the State.

Next, the State must be notified of the lawsuit through proper service, which was accomplished here. An Assistant Attorney General then filed a notice of appearance. (CP 5-6.) The certified administrative record was filed. (CP 9-190.)

Only then were all the pieces in place in order for Mr. Ash to bring a motion for waiver of the prepayment. Until a case file was opened, there was no cause number or litigation file in which to take any action. Second, Until the State appeared through an Assistant Attorney General, the sole method of requesting waiver of prepayment would have been through ex parte (and impermissible) means. Thus, it was only after the appeal was filed, the case file started, and the State appearing through an AAG was it appropriate or possible to file a procedurally valid motion for waiver. Without a case file, it is impossible to file a motion or to schedule a matter for hearing. The lower court's construction of the process involved here was erroneous.

What is required by the plain words of the statute and *Probst II* is that the prepayment waiver must be sought and obtained before the appeal is heard substantively. In *Probst II*, the trial court heard the matter substantively before ever being approached for a waiver. That was not the case here. Here,

Mr. Ash brought a motion for waiver of the prepayment of the taxes before bringing any issue having to do with the merits to the Court.

His actions were in line with the statutory mandates and the procedural analysis set forth in *Probst II*. See *Probst II*, 155 Wn. App. at 914.

The dismissal therefore was in error.

4. Agency Waived Procedural Argument

The Department is precluded from raising this prepayment issue as a jurisdictional prerequisite now because it failed to forward the issue to the trial court and because its instructions to appellants expressly overlook the prepayment requirement. (CP 9-10, 201-05.)

In filings below, the Department's sole focus was whether Mr. Ash's documents demonstrated a sufficiently strong factual basis to provide for the waiver of the prepayment. (CP 201-05.) Questions were raised as to Mr. Ash's true

earnings and debts, and the State repeatedly requested additional documentation involving the financial situation of Mr. Ash and his defunct company. (Id.) Nowhere in the State's responses was there mention that Mr. Ash's failure to request or obtain an order prior to pursuing the appeal somehow prevented the superior court from having jurisdiction over the appeal. Because the Department failed to bring this matter forward, it is precluded now from making the claim. *In re Parentage of L.B.*, 155 Wn.2d 679, n. 29, 122 P.3d 161 (2005) (declining to decide question raised on appeal where no party to the dispute "raised or otherwise addressed this issue at any stage in the proceeding").

Perhaps more importantly, the Department should be estopped from using this technical problem to prevent Mr. Ash from pursuing his appeal because the Department's own papers, which provide appellants with detailed instructions as to how to prosecute the appeal, fail to list the prepayment requirement. (CP 9-10.)

Equitable estoppel requires: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on the faith of such admission, statement, or act; and (3) injury to the other party if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act. *Liebergesell v. Evans*, 93 Wn.2d 881, 888–89, 613 P.2d 1170 (1980). Each of these are present here.

First, the instructions regarding the prosecution of the appeal provided to Mr. Ash by the Department did not contain any mention whatsoever of the requirement in a superior court appeal to pre-pay these tax assessments. (CP 9-10.) Now, the Department seeks to have dismissal affirmed on the failure of Mr. Ash to bring a motion to waive the prepayment requirement before filing his appeal. Thus, the first element is met.

Second, Mr. Ash has already relied upon the materials issuing from the Department which specifically do not list the prepayment requirement in filing his appeal. He completed

papers necessary to file the administrative appeal, but did not mention the motion for waiver of prepayment. He did this because he was following the instructions provided by the Department. Here, the statute on which the Department now seeks dismissal that precludes Mr. Ash's right to a hearing was not even deemed important enough to reference to appellants in the instructions. (CP 10.) Accordingly, the agency should be estopped from raising this issue now. Accordingly, the second element is met.

Third, injury is clear. The matter was dismissed, and the Department presumably will seek to have that dismissal affirmed. IF the Department is permitted to change its position now, it will be to the detriment of Eric Ash. That is the reason that estoppel is necessary.

Of course, “[a]ssertions of equitable estoppel against the government are not favored, and parties must demonstrate that equitable estoppel is necessary to prevent a manifest injustice and that the exercise of governmental functions will not be

impaired as a result of the estoppel.” *City of Seattle v. St. John*, 166 Wn.2d 941, 949, 215 P.3d 194 (2009). In the case at Bar, no governmental functions will be hindered because Mr. Ash merely seeks protection already contemplated by the legislature. Merely because he filed his administrative appeal before filing his motion for a waiver does nothing to impede or impair governmental functioning. Estoppel should apply.

Based on these two separate, but important, bases, the Department has waived the right to claim lack of payment as a basis to preclude Mr. Ash's appeal.

5. Lower Court's Ruling Violated Mr. Ash's Right to Due Process.

The lower court erred by denying Mr. Ash a full and meaningful hearing as to the substance of his appeal.

While a trial court has inherent authority to regulate the manner of hearings before it, it is not authorized to take actions that violate a party's right to procedural or substantive due process. *Giordano*, 57 Wn. App. at 77. Due process requires a

meaningful opportunity to be heard. *Id.*; *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The opportunity required depends on “the nature of the case” and “the limits of practicability.” *Boddie*, 401 U.S. at 378; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 318, 70 S.Ct. 652, 659, 94 L.Ed. 865 (1950).

Here, the trial court's decision to prevent Mr. Ash from forwarding relevant arguments involving his substantive appeal violated his right to due process. As such, the ruling should be reversed. Because the trial court violated Mr. Ash's ability to have a full and meaningful hearing, the decision should be reversed.

**D. RECORD IS SUFFICIENT TO DEMONSTRATE
NEED FOR WAIVER; IN ALTERNATIVE
REMAND FOR DETERMINATION**

Mr. Ash has provided extensive financial information that support his request for a waiver of the prepayment. (CP at 207-14, 216-40.) Since this Tribunal sits in the same position as the trial court, it would be reasonable for any appellate

decision to reach the issue of whether Mr. Ash has forwarded sufficient information for this Court to determine that a waiver should issue. Mr. Ash believes that he has more than adequately addressed the concerns of the Department in his filing and that he has established good cause for the application of the waiver of prepayment.

In the alternative, since the lower court did not reach the question of whether Mr. Ash had sufficiently established good cause in support of his motion for the waiver, this Court could opt to remand to the lower court for a determination of that issue.

E. ATTORNEY'S FEES SHOULD BE AWARDED TO APPELLANT.

In this type of matter, attorney fees and costs should be assessed in favor of Mr. Ash to reimburse him for the costs associated with prosecuting this matter.

After all, the law is clear. RCW 51.52.112 provides a mechanism for seeking relief from the pre-payment

requirement. Mr. Ash sought to obtain that relief through a timely motion served on all parties and heard with proper notice. During the hearing processes, the Department never argued that the order of filing made any difference at all. Instead, the lower court raised the matter sua sponte based on an erroneous reading of *Probst II*.

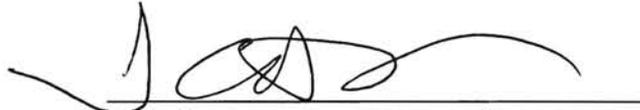
However, the Department now seeks to profit from the mistake of the court below. By forcing this appellant to undertake an appeal merely to seek protections afforded to him by State law is unconscionable. CR 11 sanctions should therefore apply.

VI. CONCLUSION

For the reasons stated herein, the order should be reversed and Mr. Ash should be permitted to pursue the substantive portion of his administrative appeal. Finally, Mr. Ash should receive reimbursement for costs and fees associated with pursuing this appeal.

Respectfully Submitted this 29th day of May, 2012 in

Walla Walla, Washington by

A handwritten signature in black ink, appearing to read 'Janelle Carman', written over a horizontal line.

Janelle Carman, WSBA #31537
Attorney for Appellant Ash