

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 01, 2013, 4:14 pm
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 87009-8

E *RF*
RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

Abeda Jafar,

Petitioner,

v.

William Douglass Webb,

Respondent.

**PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE BY
WASHINGTON ASSOCIATION OF COUNTY OFFICIALS**

Brian D. Buckley, WSBA No. 26423
Bradley T. Meissner, WSBA No. 39592
FENWICK & WEST LLP
1191 Second Avenue, 10th Floor
Seattle, WA 98101
Telephone: 206.389.4510
Facsimile: 206.389.4511

Janet Chung, WSBA No. 28535
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101-1818
Telephone: 206.682.9552
Facsimile: 206.682.9556

Attorneys for Petitioner Abeda Jafar

 ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. Ms. Jafar’s Petition Is Ripe for Review.	3
B. GR 34 Requires Trial Courts to Waive All Mandatory Fees and Surcharges for Indigent Litigants.....	8
1. GR 34 Was Not Intended to Preserve Trial Courts’ Discretion to Deny Fee Waivers to Indigent Litigants.	9
a. The Comment’s Use of the Word “May” Does Not Demonstrate that GR 34 Is Discretionary.	10
b. The Comment’s “Case by Case” Reference Does Not Demonstrate that GR 34 Is Discretionary.	13
2. WACO’s Interpretation of GR 34 Conflicts with the Rule’s Purpose.	15
C. Ms. Jafar Is Entitled to a Full Fee Waiver Under the U.S. and Washington Constitutions.	18
III. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>Bullock v. Superior Court</i> , 84 Wn.2d 101, 524 P.2d 385 (1974).....	6
<i>First Covenant Church v. City of Seattle</i> , 114 Wn.2d 392, 787 P.2d 1352 (1990), <i>vacated and remanded</i> <i>on other grounds</i> , 499 U.S. 901 (1991).....	3
<i>O'Connor v. Matzdorff</i> , 76 Wn.2d 589, 458 P.2d 154 (1969).....	8
<i>State ex rel. Dep't of Public Serv. v. Northern Pac. Ry.</i> , 200 Wash. 663, 94 P.2d 502 (1939).....	11
<i>State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.</i> , 55 Wash. 1, 107 P. 196 (1909).....	11
<i>State v. Massey</i> , 81 Wn. App. 198, 913 P.2d 424 (1996).....	8
FEDERAL CASES	
<i>Bd. of Supervisors of Rock Island County v. United States ex rel. State Bank</i> , 71 U.S. 435 (1866).....	12
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971).....	6, 19
<i>Johnson v. Wells Fargo Home Mortgage, Inc.</i> , 635 F.3d 401 (9th Cir. 2011)	10, 13

OTHER STATE CASES

Brownell v. Brownell,
799 So. 2d 587 (La. Ct. App. 2001).....7

Earls v. Superior Court,
490 P.2d 814 (Cal. 1971)7

Humphrey v. Mauzy,
181 S.E. 2d 329 (W. Va. 1971).....6

In re Marriage of Reese,
140 Cal. Rptr. 589 (Cal. Ct. App. 1977)6

Nagy v. Oakley,
309 S.E.2d 68 (W. Va. 1983).....7

State ex rel. Rowe v. Emanuel,
7 N.W.2d 156 (Neb. 1942).....12

Strain v. Southerton,
74 N.E.2d 69 (Ohio 1947)12

WASHINGTON STATUTES

RCW 10.101.01017

WASHINGTON COURT RULES

GR 34..... *passim*

RAP 2.3.....6

RAP 4.2.....6

RAP 7.2.....5

RAP 10.2(g)1

RAP 15.2.....15

OTHER AUTHORITIES

Black’s Law Dictionary (9th ed. 2009).....17

Pursuant to RAP 10.2(g), Petitioner Abeda Jafar respectfully submits this Answer to the Brief of Amicus Curiae filed by the Washington Association of County Officials (“WACO”).

I. INTRODUCTION

At the Court’s request, WACO submitted an amicus curiae brief (the “WACO Brief”) urging this Court to affirm the Snohomish County Superior Court’s January 2012 order requiring Ms. Jafar to pay \$50 in mandatory fees and surcharges within 90 days (the “Fee Order”).

WACO makes three primary arguments with respect to the issues raised by Ms. Jafar’s petition. The Court should reject each of those arguments. First, WACO argues that Ms. Jafar’s petition is not ripe for review by this Court. WACO contends that an indigent litigant cannot challenge a fee order unless and until the court dismisses the litigant’s case for nonpayment. If that were so, an indigent litigant could be forced to proceed in a state of perpetual uncertainty: unable to pay court fees, litigating under the constant threat of dismissal, but with no remedy until the lawsuit is in fact dismissed for nonpayment and she is affirmatively denied relief. Nothing in this Court’s ripeness jurisprudence compels or permits such a perverse and unjust result.

Second, WACO asserts that the Superior Court did not err in its application of GR 34 because the rule does not require courts to waive all

mandatory fees and surcharges for litigants who are found to be indigent (as defined in the rule), but instead reserves to the courts discretion to grant partial waivers or to deny waivers outright. But WACO's argument finds no support in the text, history, or purpose of GR 34. WACO's narrow interpretation of GR 34 would reduce the rule, at best, to an ineffectual guideline that neither promotes access to justice nor improves the fee waiver process in any meaningful way. At worst, WACO's interpretation renders GR 34 a dead letter that only creates additional court bureaucracy and gives false hope to the poor. As explained below and in Ms. Jafar's opening brief, to give effect to the purpose and intent behind GR 34, the Court should clarify that GR 34 *requires* Washington trial courts to waive *all* mandatory fees and surcharges once a litigant is determined to be indigent under the rule.¹

Third, WACO argues that the Superior Court's Fee Order does not deprive Ms. Jafar of her constitutional right of access to the courts, because the Fee Order does not prevent Ms. Jafar from pursuing her action for a parenting plan. There is no merit to WACO's position that an indigent litigant's constitutional right of access to the courts encompasses

¹ It is not surprising that WACO advocates a narrow interpretation of GR 34, as WACO strongly and publicly opposed the adoption of the rule. *See* Letter from Debbie Wilke, WACO Executive Director, et al., to Hon. Chief Justice Barbara Madsen & Hon. Charles W. Johnson, Washington State Supreme Court (Apr. 28, 2010) (Appendix Tab A).

only the right to *file* a lawsuit without the payment of fees. Ms. Jafar has a constitutional right to timely and complete access to the courts to pursue her parenting plan action. The Superior Court's Fee Order impairs that right by requiring Ms. Jafar to pay mandatory surcharges that she cannot afford. On the record before the Superior Court, and in light of the Superior Court's finding that Ms. Jafar is indigent, Ms. Jafar is entitled to a waiver of all mandatory fees and surcharges.

II. ARGUMENT

A. Ms. Jafar's Petition Is Ripe for Review.

Whether an issue is ripe for review “requires an evaluation of ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 400, 787 P.2d 1352 (1990), *vacated and remanded on other grounds*, 499 U.S. 901 (1991) (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A claim is fit for judicial decision “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Id.* (quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)). Ms. Jafar's claims easily satisfy the ripeness standard.

Both issues raised by Ms. Jafar's petition are plainly legal issues. The first presents a pure question of law concerning the proper

construction of GR 34. The second presents a constitutional question concerning the application of GR 34 to undisputed facts.² The Court can fully resolve the issues raised by Ms. Jafar's petition based on the existing record, so there is no need for any further factual development. Finally, the Superior Court's Fee Order is indisputably a final determination of Ms. Jafar's request for a waiver of all mandatory fees and surcharges.

In addition, a refusal to consider Ms. Jafar's petition for lack of ripeness would work considerable hardship on Ms. Jafar. Because she cannot afford to pay the \$50 in mandatory surcharges ordered by the Superior Court, a finding that Ms. Jafar's claims are unripe would force her to proceed with her lawsuit while in violation of the Superior Court's Fee Order, with the knowledge that the Court can at any time dismiss her lawsuit for nonpayment or simply refuse to enter final judgment in her case. Accordingly, because the issues presented in Ms. Jafar's petition are fit for decision and the denial of review would impose substantial hardship on Ms. Jafar, her petition is ripe for review.

² It is unclear whether WACO contends that all of the issues raised by Ms. Jafar's petition are unripe, or whether the ripeness challenge is limited to Ms. Jafar's alternative argument that GR 34 is unconstitutional as applied to her case. *Compare* WACO Brief at 5 (asserting that *constitutional* challenge to statute is not ripe for review unless petitioner is "harmfully affected" by the law), *with* WACO Brief at 5 (requesting that Court deny Ms. Jafar's petition in its entirety on ripeness grounds). As such, Ms. Jafar here addresses the ripeness of both issues raised by her petition.

WACO argues that, because the Superior Court did not dismiss or threaten to dismiss Ms. Jafar's lawsuit for nonpayment of fees, Ms. Jafar has not been "harmfully affected" by the Fee Order and her petition is therefore unripe. *See* WACO Brief at 5 ("There is nothing to suggest ... that the Court intimated that she would necessarily be denied access."). As a preliminary matter, WACO's factual premise is incorrect. As explained in Ms. Jafar's opening brief, the Snohomish County Superior Court categorically informs *all* poor litigants that their cases may be dismissed if they fail to pay any deferred fees or surcharges within the time ordered by the Court. *See* Snohomish County Fee Waiver Application Packet (Opening Brief, Appendix Tab A), at 5 ("If the Court defers payment of your fees to a later date, *make your payment as ordered or your action may be dismissed for nonpayment of these fees.*") (emphasis added). Fortunately, Ms. Jafar did not have to test the Superior Court's threat to dismiss her case for nonpayment after 90 days. This Court accepted Ms. Jafar's petition for review on March 27, 2012, 76 days after entry of the Fee Order, and the Superior Court thereafter lacked jurisdiction to act on her case. *See* RAP 7.2.

In any event, no authority supports the proposition that a litigant must suffer dismissal of her lawsuit before she can challenge an order denying her request for a waiver of fees on the basis of indigency. Indeed,

in *Bullock v. Superior Court*, 84 Wn.2d 101, 102, 524 P.2d 385 (1974), this Court considered, and decided on the merits, a challenge to a Superior Court’s fee waiver order, despite the fact that the petitioners “were actually permitted to file their actions without payment of filing fees.” Moreover, this Court’s decision to grant direct, discretionary review of Ms. Jafar’s petition itself strongly suggests that the Court too believes Ms. Jafar’s challenge to the Superior Court’s Fee Order is ripe for judicial decision. *See* RAP 2.3, 4.2.

In addition, numerous courts have recognized that an indigent litigant’s constitutional right of access to the courts includes not only the right to commence a case without prepaying the filing fee, but also the right to litigate the case to judgment.³ *See, e.g., In re Marriage of Reese*, 140 Cal. Rptr. 589, 591-92 (Cal. Ct. App. 1977) (reversing order requiring indigent petitioner to pay filing fees as part of divorce judgment; holding that constitutional right of “access to the courts is not limited to prepayment of filing fees but includes proceeding to final judgment”); *Humphrey v. Mauzy*, 181 S.E. 2d 329, 333-34 (W. Va. 1971) (court clerk could not, consistent with *Boddie v. Connecticut*, 401 U.S. 371 (1971),

³ As set forth in her opening brief, Ms. Jafar has a constitutional right of access to the courts to obtain a parenting plan, under both the Due Process Clause and Article I, Section 10 of the Washington Constitution. *See* Opening Brief at 9-16. WACO does not appear to dispute this fact. *See* WACO Brief at 6-7. Accordingly, for ease of reference, Ms. Jafar refers throughout this brief to her undisputed constitutional “right of access.”

condition entry of final judgment in divorce action on payment of filing fee by indigent litigants: “[T]he trial court was without legal authority to direct the respondent clerk to withhold the divorce orders from proper recordation merely because the plaintiffs in the divorce actions were financially unable to pay the \$10 fees prescribed by [statute].”⁴ Notably, GR 34 itself expressly recognizes the same principle, as it provides for waiver of any fee or surcharge “the payment of which is a condition precedent to a litigant’s ability *to secure judicial relief*” (emphasis added).

An indigent litigant who is ordered to pay a mandatory fee that she cannot afford — whether immediately, within 90 days (as in Ms. Jafar’s case), or as a condition to the entry of final orders — suffers an injury that is ripe for judicial review once the fee order is entered. At that moment, the litigant’s access to judicial relief becomes impermissibly conditioned on the payment of the fee. Moreover, that harm exists even if the litigant finds a way to pay the fee, such as by borrowing money or not paying her utility bill. “[I]t would be a rare case in which a litigant could not deny himself the necessities of life” to pay a deferred fee in order to avoid dismissal or to secure a final order. *Earls v. Superior Court*, 490 P.2d

⁴ See also *Nagy v. Oakley*, 309 S.E.2d 68, 70-71 (W. Va. 1983) (statute authorizing special commissioner to withhold report pending litigants’ payment of fees was unconstitutional as applied to indigent litigant in divorce action, as it improperly “conditions the rendition of justice upon the financial capacity of litigants”); *Brownell v. Brownell*, 799 So. 2d 587, 589 (La. Ct. App. 2001) (trial court could not condition entry of judgment on indigent litigant’s payment of \$10 per month).

814, 818 (Cal. 1971). But that is not the standard by which a poor litigant’s right of access is measured: Indigency “does not and cannot, in keeping with the concept of equal justice to every man, mean absolute destitution or total insolvency.” *O’Connor v. Matzdorff*, 76 Wn.2d 589, 594, 458 P.2d 154 (1969). Accordingly, any fee order that has the effect of impairing an indigent litigant’s right to obtain final relief necessarily constitutes a cognizable harm that is ripe for judicial remedy.⁵

B. GR 34 Requires Trial Courts to Waive All Mandatory Fees and Surcharges for Indigent Litigants.

WACO argues that the Superior Court did not misapply GR 34 when it ordered Ms. Jafar to pay \$50 in mandatory surcharges within 90 days because, in WACO’s view, “GR 34 does not require the court to grant any waiver application.” WACO Brief at 14. According to WACO, even after the court determines that a litigant is indigent under GR 34, the court has discretion — bounded only by “constitutional principles and stare decisis” — to waive all or some portion of the mandatory fees and surcharges, to defer payment of those fees, or even to deny a waiver

⁵ WACO’s reliance on *State v. Massey*, 81 Wn. App. 198, 913 P.2d 424 (1996), is misplaced. In *Massey*, a convicted criminal defendant appealed a portion of his sentence that ordered him to submit to searches of his person as a condition of his supervised release. *Id.* at 199. The court of appeals held that the defendant’s challenge to that condition was unripe, because the defendant was still incarcerated and therefore had not yet been subjected to any search that might violate his constitutional rights. *Id.* Here, by contrast, as explained above, the Superior Court’s Fee Order itself violates Ms. Jafar’s rights under GR 34 and the U.S. and Washington Constitutions. No further action by the Superior Court is required to render Ms. Jafar’s petition ripe for review.

altogether. WACO Brief at 14. But WACO’s narrow interpretation of GR 34 is unsupported by the text and structure of the rule, and it directly conflicts with GR 34’s stated purposes and the drafters’ intent. GR 34 does not reserve to courts the discretion to refuse, limit, or condition the waiver of mandatory fees and surcharges for litigants who qualify as indigent under the rule.⁶

1. **GR 34 Was Not Intended to Preserve Trial Courts’ Discretion to Deny Fee Waivers to Indigent Litigants.**

WACO’s primary argument concerning the interpretation of GR 34 is that two isolated statements in the comments accompanying the rule “unquestionably demonstrate” that GR 34 gives trial courts the discretion to decide whether to waive mandatory fees and surcharges for indigent litigants. *See* WACO Brief at 9, 14. In fact, neither of the statements upon which WACO relies provides any evidence that GR 34 was intended as a discretionary rule. As explained in detail in Ms. Jafar’s opening brief, the available evidence of the drafters’ intent overwhelmingly demonstrates that GR 34 was intended to require trial courts to grant complete waivers

⁶ WACO devotes considerable space in its brief to a discussion of *which* fees and surcharges are subject to waiver under GR 34. *See* WACO Brief at 9-10. But there is no serious dispute on that point. The text of GR 34 and the official comment to the rule both state unambiguously that GR 34 contemplates waiver of *any* fee or surcharge “the payment of which is a condition precedent to a litigant’s access to secure judicial relief” — *i.e.*, *all* mandatory fees and surcharges are subject to waiver. Nor does WACO appear to dispute that the surcharges the Superior Court ordered Ms. Jafar to pay in this case — a \$20 “facilitator surcharge” and a \$30 “judicial stabilization” surcharge — are subject to the waiver provisions of GR 34.

of all mandatory fees and surcharges to litigants who fall within GR 34's definition of "indigent." *See* Opening Brief at 18-24, 35-42.

a. **The Comment's Use of the Word "May" Does Not Demonstrate that GR 34 Is Discretionary.**

WACO first highlights the opening sentence of the comment accompanying GR 34: "This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver." GR 34 cmt. According to WACO, the comment's use of the word "may" confirms that "the court's authority in this area is discretionary." WACO Brief at 9.

Not so. The comment's statement that GR 34 "*establishes the process by which*" judicial officers may waive fees does not speak to whether fee waivers are mandatory or discretionary under GR 34. Rather, a straightforward reading demonstrates that the sentence was intended only to clarify that GR 34 provides the exclusive mechanism for Washington trial courts to process, consider, and act on civil indigent fee waiver requests. In other words, the statement simply explains that courts "may" waive fees in accordance with the provisions of GR 34, but not in other circumstances. *See Johnson v. Wells Fargo Home Mortgage, Inc.*, 635 F.3d 401, 412 n.7 (9th Cir. 2011) (noting that statute's use of the word "may," in context, did not evidence intent to provide courts with

discretion; “[M]ay make an order vacating,’ followed by the list of permissible bases for such an order, could portend only that an order vacating ‘may’ be made in the circumstances specified, but not in any other.”) (alteration in original).

Even if the language quoted above was relevant to the Court’s inquiry, given the overall context of GR 34, the drafters’ use of the word “may” does not indicate any intent to provide for discretionary fee waivers. *See State ex rel. Dep’t of Public Serv. v. Northern Pac. Ry.*, 200 Wash. 663, 666, 94 P.2d 502 (1939) (“It will be admitted that, when the word ‘may’ is used in a statute, it may be used in the sense of being permissive, or in the sense of being mandatory. Whether it is the latter, of course, depends upon the intention of the legislature, to be collected from the terms of the act.”). As early as 1909, this Court recognized that the meaning of “may” depends on context, and that, in some situations, the word “may” signals not discretion but a mandatory duty to act:

[I]ts meaning is to be determined in each case from the apparent intent of the statute in which it is employed; so that in all remedial statutes or *whenever the rights of the public or of third persons depend on the exercise of the power of a court or public officer*, or the performance of a duty, and a claim de jure that the power may be exercised exists, it should be construed to mean “shall.”

State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 9, 107 P. 196 (1909) (civil contempt statute providing that court

“may give judgment” to aggrieved party imposed mandatory duty to act where facts proven established contempt) (emphasis added). In one of the cases cited by the *Nicomien Boom* court, the U.S. Supreme Court similarly held that when the validation of an individual’s rights depends on some power or duty that “may” be exercised by a government official, the word “may” creates a mandatory obligation to act:

[W]here power is given to public officers, in the language of the act before us, or in equivalent language — whenever the public interest or individual rights call for its exercise — the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice.

Bd. of Supervisors of Rock Island County v. United States ex rel. State Bank, 71 U.S. 435, 446-47 (1866).⁷

GR 34 falls squarely within the rule of those cases. GR 34 was adopted to give structure to indigent Washingtonians’ constitutional rights of access to the courts by creating uniform standards and procedures to govern fee waiver motions. *See* Opening Brief at 16-24, 35-42. An

⁷ *See also Strain v. Southerton*, 74 N.E.2d 69, 71 (Ohio 1947) (interpreting statute stating that wage board “may” take into account various factors in determining fair wage to mean that board “shall” take such factors into account, in order to carry out statutory purpose); *State ex rel. Rowe v. Emanuel*, 7 N.W.2d 156, 158 (Neb. 1942) (“The word ‘may,’ when used in a statute to delegate a power, the performance of which involves the protection of public or private interests, is mandatory, and it will be so construed whenever it becomes necessary to do so to carry out the legislative intent.”).

indigent litigant's right of access to the courts thus depends entirely on the trial court's exercise of the authority granted under GR 34. Therefore, just as in *Nicomien Boom* and *Rock Island County*, the nature of the rights implicated and the duty conferred by GR 34 compel trial courts applying the rule to waive all mandatory fees and surcharges for indigent litigants.

Moreover, the comment's isolated use of the word "may" is insufficient to override the numerous structural features of GR 34 that demonstrate the drafters' intent that GR 34 provide for mandatory waivers. *See* Opening Brief at 22-24, 35-40; *Johnson*, 635 F.3d at 412 (holding that statutory provision stating that court "may" vacate arbitration award in enumerated circumstances does not grant court discretion because "the statute as a whole defeats any notion that district courts may decline to consider motions to vacate, modify, or correct arbitration awards filed in response to a motion to confirm"; stating that "only sensible" interpretation of statute is that court "must" rule on motion according to statutory standards).

b. **The Comment's "Case by Case" Reference Does Not Demonstrate that GR 34 Is Discretionary.**

WACO also relies on a second statement from the comments to GR 34: "The adoption of this rule is rooted in the constitutional premise that every level of court has the inherent authority to waive payment of

filing fees and surcharges on a case by case basis.” GR 34 cmt. WACO contends that the “case by case basis” language somehow demonstrates that trial courts have discretion in granting waivers under GR 34. *See* WACO Brief at 9-10, 14. But nothing in that comment either expressly or implicitly suggests that GR 34 permits trial courts to deny fee waivers to litigants determined to be indigent under the rule.

As a preliminary matter, WACO’s reliance on that particular language is misplaced because it discusses the “constitutional premise” underlying the adoption of GR 34, *not* the process for ruling on waiver requests under GR 34. More fundamentally, decision-making on a “case by case basis” is hardly synonymous with the exercise of discretion. GR 34 does require trial courts to consider fee waiver requests on a “case by case basis” to determine whether the facts of each applicant’s financial situation qualify her as “indigent” under any of the definitions set forth in the rule.⁸ Once the court makes its indigency determination, however, GR 34 prescribes the legal consequences of that determination. If the trial court determines that the litigant is indigent, then GR 34 requires a waiver of all mandatory fees and surcharges. Conversely, if the court determines that the litigant is not indigent, then she is not eligible for a waiver of fees

⁸ It is also true that, under GR 34(a)(3)(C) and (D), a trial court may exercise discretion in determining whether recurring monthly expenses or “other compelling circumstances” render a litigant indigent. *See* Opening Brief at 23-24; 38-40.

and surcharges. But in either case, the court's indigency determination is necessarily made based on a "case by case" application of GR 34's definition of "indigent" to the litigant's individual circumstances.

In summary, the isolated and (at best) ambiguous statements on which WACO relies are not evidence that GR 34 was intended to give Washington trial courts the discretion to deny, limit, or condition fee waivers to indigent litigants.⁹

2. WACO's Interpretation of GR 34 Conflicts with the Rule's Purpose.

WACO's brief contains only a single paragraph discussing GR 34's underlying purpose. *See* WACO Brief at 15. But even that cursory treatment demonstrates that WACO's interpretation of GR 34 would render the rule incapable of fulfilling its intended purposes.¹⁰

WACO acknowledges that GR 34 was intended "to bring consistency, predictability and efficiency to the fee-waiver process." WACO Brief at 15. WACO asserts that its interpretation of GR 34 furthers those goals because it establishes "a framework of what questions to ask," as well as "the general process of fee waiver," while "allowing for

⁹ As noted in Ms. Jafar's opening brief, had the drafters intended GR 34 to provide for discretionary fee waivers, they could easily have modeled GR 34 on existing rules, such as RAP 15.2. *See* Opening Brief at 36-37 & nn.18-19.

¹⁰ Ms. Jafar's opening brief contains a thorough discussion of the purposes that motivated GR 34 and the history of the rule's adoption. Opening Brief at 16-24, 35-42.

local courts to tailor their own forms and rulings to their particular circumstances.” WACO Brief at 15.

On its face, WACO’s own explanation highlights how its interpretation of GR 34 in fact *conflicts with* the rule’s undisputed purposes. Any interpretation of GR 34 that allows every local court to “tailor their own forms and rulings to their particular circumstances” necessarily undermines GR 34’s stated objective to establish “a statewide, uniform approach to presentation, consideration, and approval of requests for waiver of fees and costs for low civil income litigants.” *See* Board of Governors of Wash. State Bar Ass’n, GR 9 Cover Sheet, Suggested Amendment, General Rules: GR 34 – Waiver of Court and Clerk’s Fees and Charges in Civil Matters (New Rule; Rev’d Dec. 2008) (Opening Brief, Appendix Tab F), at 2. If (as WACO urges) courts in different locations, or even different judges of the same court, may treat fee waiver requests differently based on a consideration of *the court’s* “particular circumstances,” then poor litigants are denied any consistency, uniformity, or predictability whatsoever in the fee waiver process.¹¹

¹¹ In Ms. Jafar’s opening brief, to highlight that her fee-waiver experience is not unique or isolated, Ms. Jafar gave examples of various local practices from across Washington that thwart the goals of GR 34. Opening Brief at 24-30. WACO spends considerable time defending those practices. But even if this Court were to determine that GR 34 is discretionary rather than mandatory, the Court should nevertheless condemn any court policy or process that categorically refuses to waive particular fees or charges for indigent litigants or otherwise intimidates or discourages the poor from seeking relief.

In addition, WACO's interpretation of GR 34 renders meaningless the rule's carefully calibrated definition of the term "indigent." In its ordinary legal usage, the term "indigent" specifically means a person who has been found unable to pay and has been granted a waiver of mandatory fees and surcharges. *See* Black's Law Dictionary 842 (9th ed. 2009) (defining "indigent" as "[a] person who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*"); *see also* RCW 10.101.010 (distinguishing between "indigent" and "indigent and able to contribute"). Under WACO's interpretation of GR 34, however, the trial court's discretion to grant or deny a waiver is not limited by the court's determination that a litigant is "indigent" (*i.e.*, unable to pay). Under that conception, GR 34's detailed definition of "indigent" serves no discernible end.

In sum, WACO's interpretation of GR 34 leaves both courts and litigants in the worst of all worlds: GR 34 continues unchanged the localized, ad hoc, standard-less decision-making processes that prompted the adoption of rule. *See* Opening Brief at 16-19. At the same time, GR 34 burdens courts, judges, and litigants with additional layers of process and paperwork that lead to no determined or predictable result. And perhaps worst of all, GR 34 gives the poor false hope that they will be granted access to justice despite their financial circumstances, when in fact

court administrators or judges may (and very often do) impose financial conditions on such access that poor litigants simply cannot satisfy. This Court should not sanction any interpretation of GR 34 that so directly conflicts with the critical goals the rule set out to accomplish.

C. Ms. Jafar Is Entitled to a Full Fee Waiver Under the U.S. and Washington Constitutions.

WACO's brief contains virtually no substantive discussion of Ms. Jafar's alternative argument that, insofar as GR 34 permits trial courts to deny full fee waivers to indigent litigants, GR 34 is unconstitutional as applied to Ms. Jafar's particular case. Instead, WACO essentially restates its ripeness argument that, because Ms. Jafar was permitted to file her parenting plan action without immediately paying any mandatory fees, she has not been deprived of any right of access to the courts. *See* WACO Brief at 16 ("Jafar was not denied access to the court or by the court. The court's order waived or deferred all fees. It was in Jafar's power to proceed with her action.").

Insofar as WACO contends that the Superior Court's Fee Order is constitutionally permissible based solely on the fact that the Superior Court did not prevent Ms. Jafar from filing her action for a parenting plan, WACO's argument fails as a matter of law. As explained above, the constitutional right of access to the courts requires not only that a court

permit an indigent litigant to *file* a lawsuit without the prepayment of fees, but also that the litigant be permitted to litigate the case to judgment. A court thus may not circumvent the protections of *Boddie v. Connecticut*, 401 U.S. 371 (1971), and similar cases by merely deferring payment of mandatory fees and surcharges that would otherwise deprive a litigant of access to the courts. *See* Section II.A, *supra*.

Moreover, although a fee deferral or partial fee waiver may not necessarily violate a litigant's constitutional rights in every case, the record plainly demonstrates that Ms. Jafar is entitled to a full waiver of mandatory fees and surcharges in this case, based on her financial affidavit, the Superior Court's finding that Ms. Jafar's income is below 125% of the federal poverty guideline (in fact, it is less than 32% of the federal poverty guideline), and the lack of any contrary finding concerning Ms. Jafar's ability to pay. *See* Opening Brief at 6-7, 46-47.

III. CONCLUSION

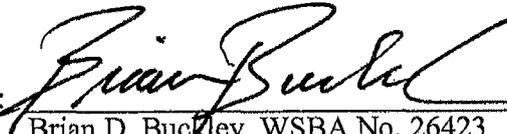
None of the arguments in WACO's amicus brief establish any defensible justification for the Superior Court's Fee Order in this case. If anything, WACO's assertions — which effectively represent the position of superior court clerks throughout Washington — provide further compelling evidence of the need for an unambiguous statement from this Court explaining the trial courts' obligations under GR 34.

Absent such a clear statement, local courts will continue to engage in the myriad inconsistent and troubling practices highlighted both in Ms. Jafar's opening brief and in the amicus curiae brief filed with the Court by the Northwest Justice Project.

For all of the reasons set forth above and in her opening brief, Petitioner Abeda Jafar respectfully requests that the Court vacate the Superior Court's Fee Order and remand this case with instructions to grant Ms. Jafar a waiver of all mandatory fees and surcharges.

RESPECTFULLY SUBMITTED: March 1, 2013.

FENWICK & WEST LLP

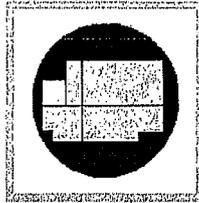
By: 

Brian D. Buckley, WSBA No. 26423
Bradley T. Meissner, WSBA No. 39592
1191 Second Avenue, 10th Floor
Seattle, WA 98101
Phone: 206.389.4521
Fax: 206.389.4511
Email: bbuckley@fenwick.com
bmeissner@fenwick.com

Janet Chung, WSBA 28535
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101-1818
Phone: 206.682.9552
Fax: 206.682.9556
Email: jchung@LegalVoice.org

Attorneys for Petitioner Abeda Jafar

APPENDIX A



April 28, 2010

The Honorable Chief Justice Barbara Madsen
The Honorable Charles W. Johnson, Chair, Rules Committee
Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

RE: Objection to Proposed Court Rule GR 34

Dear Chief Justice Madsen and Justice Johnson:

On behalf of the members of the Washington Association of County Officials (WACO), the Washington State Association of Counties (WSAC) and the Washington Association of Prosecuting Attorneys (WAPA), we are writing to object to Proposed GR 34.

Both determination of indigency and the waiver of fees are more than adequately addressed in current law. RCW 10.101.010 and RCW 36.18.022 are very clear in defining who is indigent and when fees may be waived. We believe each should be applied on a case by case basis rather than to a group of individuals. RCW 10.101.010 provides a simple consistent method of determining a person's financial status, whether he/she is charged with a crime or is a civil litigant. Under those circumstances, RCW 36.18.022 removes the obstruction to access to justice that indigency would otherwise create and fees are waived.

Costs should not be waived. They are a small percentage of the overall expense associated with the administration of justice but they do assist cities and counties that are already struggling to provide the services the public is seeking. We believe any determination or waiver of costs properly belongs with the local legislative authority that is charged with providing the service. A waiver of costs further erodes the infrastructure that must be maintained for the public and the parties who seek justice. It also raises the question of who will bear those costs.

Please consider our objection to the adoption of GR 34.

Respectfully,

Debbie Wilke
WACO Executive Director

Eric Johnson
WSAC Executive Director

Tom McBride
WAPA Executive Secretary

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 01, 2013, 4:14 pm
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 87009-8

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

Abeda Jafar,

Petitioner,

v.

William Douglass Webb,

Respondent.

CERTIFICATE OF SERVICE

Brian D. Buckley, WSBA No. 26423
Bradley T. Meissner, WSBA No. 39592
FENWICK & WEST LLP
1191 Second Avenue, 10th Floor
Seattle, WA 98101
Telephone: 206.389.4510
Facsimile: 206.389.4511

Janet Chung, WSBA No. 28535
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101-1818
Telephone: 206.682.9552
Facsimile: 206.682.9556

Attorneys for Petitioner Abeda Jafar

 ORIGINAL

I hereby certify that on March 1, 2013, I caused the following documents:

- **PETITIONER’S ANSWER TO BRIEF OF AMICUS CURIAE BY WASHINGTON ASSOCIATION OF COUNTY OFFICIALS; and**
- **CERTIFICATE OF SERVICE**

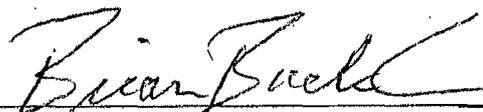
to be served on counsel as follows:

<p>Emily S. Schlesinger Wilson Sonsini Goodrich & Rosati 701 Fifth Avenue, Suite 5100 Seattle, WA 98104 eschlesinger@wsgr.com</p> <p>Attorneys for <i>Amicus Curiae</i> Sargent Shriver National Center for Poverty Law, the Statewide Poverty Action Network, and Solid Ground</p>	<p><input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input checked="" type="checkbox"/> By Email</p>
<p>Monty D. Cobb WA Association of County Officials 206 Tenth Ave. SE Olympia, WA 98501 mcobb@wacounties.org</p> <p>Attorneys for <i>Amicus Curiae</i> Washington Association of County Officials</p>	<p><input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input checked="" type="checkbox"/> By Email</p>

<p>Karla Camac Carlisle Michelle Denise Raiford Leslie J. Savina Northwest Justice Project 401 2nd Ave. S., Suite 407 Seattle, WA 98104 karlac@nwjustice.org micheller@nwjustice.org lsavina@nwjustice.org</p> <p>Attorneys for <i>Amicus Curiae</i> Northwest Justice Project, Benton Franklin Legal Aid Society and Snohomish County Legal Services</p>	<p><input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input checked="" type="checkbox"/> By Email</p>
<p>Sarah A. Dunne Nancy L. Talner ACLU-WA Foundation 91 Fifth Avenue, Suite 630 Seattle, WA 98168 dunne@aclu-wa.org talner@aclu-wa.org</p> <p>Molly A. Terwilliger Summit Law Group, PLLC 315 Fifth Ave. S., Suite 1000 Seattle, WA 98104 mollyt@summitlaw.com</p> <p>Attorneys for <i>Amicus Curiae</i> ACLU OF WASHINGTON</p>	<p><input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input checked="" type="checkbox"/> By Email</p>

Donna J. Campbell Attorney at Law PO Box 1163 North Bend, WA 98045 Attorneys for Respondent	<input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input type="checkbox"/> By Email
Jeanette Heard 3228 Broadway Avenue Everett, WA 98201-3456 Guardian Ad Litem	<input checked="" type="checkbox"/> United States Mail, First Class, postage prepaid <input type="checkbox"/> By Messenger <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Overnight Courier <input type="checkbox"/> By Email

Executed at Seattle, Washington this 1st day of March, 2013.



BRIAN D. BUCKLEY, WSBA No. 26423
FENWICK & WEST LLP
1191 Second Avenue, 10th Floor
Seattle, WA 98101
Telephone: 206.389.4510
Facsimile: 206.389.4511

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, March 01, 2013 4:16 PM
To: 'Sharie Parks'
Cc: Brian Buckley; Bradley Meissner
Subject: RE: Abeda Jafar v. William Douglass Webb, No. 87009-8

Received 3/1/13

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: Sharie Parks [<mailto:sparks@fenwick.com>]
Sent: Friday, March 01, 2013 4:14 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Brian Buckley; Bradley Meissner
Subject: Abeda Jafar v. William Douglass Webb, No. 87009-8

Dear Clerk of the Court:

Please accept the two attached documents for filing in the case of *Jafar v. Webb*, Supreme Court No. 87009-8:

1. Petitioner's Answer To Brief Of Amicus Curiae By Washington Association Of County Officials, with attached Appendix A; and
2. Certificate of Service.

Respectfully submitted,

Fenwick
FENWICK & WEST LLP

SHARIE L. PARKS, PLS

Fenwick & West LLP
Litigation Group

Assistant to David K. Tellekson,
Jeffrey A. Ware, and Lawrence A. Gallwas

☎ (206) 389-4566

☎ (206) 389-4511

✉ sparks@fenwick.com



Please consider the environment before printing this email

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice in this communication (including attachments) is not intended or written by Fenwick & West LLP to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

ATTENTION:

The information contained in this message may be legally privileged and confidential. It is intended to be read only by the individual or entity to whom it is

addressed or by their designee. If the reader of this message is not the intended recipient, you are on notice that any distribution of this message, in any form, is strictly prohibited.

If you have received this message in error, please immediately notify the sender and/or Fenwick & West LLP by telephone at (650) 988-8500 and delete or destroy any copy of this message.