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STATE OF WASHINGTON
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NO. 90384-1

SUPREME COURT OF THE STATE OF WASHINGTON

CLARENCE J. FAULKNER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The Washington Department of Corrections is the Respondent in this matter though Respondent was not served in the underlying superior court matter.

II. SUPERIOR COURT DECISION BELOW

Appellant Clarence Jay Faulkner seeks direct review of a May 27, 2014, Grays Harbor Superior Court ruling denying his motion for waiver of civil filing fees and surcharges. In denying this motion, the superior court did not enter a finding of indigency and noted “the proposed lawsuit lacks probable merit and is not brought in good faith.” Motion for Discretionary Review, Appendix A.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 2.3 criteria. However, if the Court were to accept discretionary review, the following issue would be presented: Whether the trial court properly exercised its discretion in denying Faulkner’s motion for expenditure of public funds when it found that the lawsuit lacked probable merit and was not brought in good faith?

IV. STATEMENT OF THE CASE

Faulkner seeks discretionary review of an order by Grays Harbor Superior Court denying his request to waive civil filing fees and

surcharges for a lawsuit he filed. Notice of Appeal dated June 10, 2014. Faulkner filed a motion in the superior court seeking to waive the filing fee for filing a complaint under the Public Records Act (PRA). Although there is no record of the complaint on the superior court docket, Faulkner claims to have submitted the complaint to the superior court for review. The superior court denied the motion to waive civil filing fees and surcharges. Specifically, the court did not enter a finding of indigency and found “the proposed lawsuit lacks probable merit and is not brought in good faith.” Motion for Discretionary Review, Appendix A. Before this Court, Faulkner claims his complaint alleged the Department silently withheld records in violation of the PRA and misused the installment provision of the PRA. Faulkner appealed from the superior court’s order denying waiver of the filing fee. This Court waived the filing fee for this appellate review. Letter from Court dated October 10, 2014. Faulkner subsequently filed a motion for discretionary review. The Department’s answer follows.

V. REASONS WHY REVIEW SHOULD BE DENIED

A party may seek discretionary review by this Court of a superior court decision where the act of the superior court is not appealable as a

matter of right. RAP 2.3(a).¹ However, a party may seek discretionary review of a trial court decision only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

In his motion for discretionary review, Faulkner fails to reference any of the qualifying criteria listed under RAP 2.3(b). As such, it is unclear which criterion Faulkner is arguing applies to this case.

¹ As this Court noted in its October 10, 2014, notation letter, Faulkner's request for review is best suited under RAP 2.3(a). Faulkner has no right to appeal under RAP 2.2(a) because the superior court's ruling is not a final judgment or one which prevents final judgment. Letter from Court dated October 10, 2014; *See* RAP 2.2(a). Instead, Faulkner has the option of paying the filing fee and continuing to pursue his action in the superior court.

Nevertheless, Faulkner's motion for discretionary review should be denied as none of the circumstances outlined in RAP 2.3(b) are applicable.

The trial court has not certified that its order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation, and the parties have not stipulated to that effect. Therefore RAP 2.3(b)(4) does not apply.

Faulkner seeks review of the trial court's discretionary ruling that his complaint "lacked probable merit and was not brought in good faith." To obtain interlocutory review of this issue, Faulkner must show that the superior court judge: 1) committed an obvious error; 2) committed a probable error that substantially altered the status quo; or 3) so far departed from the accepted and usual course of judicial proceedings. The superior court determination, however, is not obvious or probable error. Rather, it appears to have been within the superior court's broad discretion under its inherent power to reject the waiver of fees for cases that it deems frivolous. *See O'Connor v. Matzdorff*, 76 Wn.2d 589, 606, 458 P.2d 154 (1969) (Exercising court's inherent power to waive fees allows for consideration about whether Plaintiff's claim is brought in good faith and with probable merit); *But see Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013) (General Rule 34 requires the trial court to waive all fees

after finding a party is indigent). Without the requisite showing of obvious or probable error in the superior court's ruling, Faulkner has not shown he is entitled to discretionary review under RAP 2.3(b). In the absence of meeting any of the RAP 2.3(b) criteria, this Court should deny discretionary review.

Moreover, even assuming that Faulkner could show a probable error, the extraordinary relief of interlocutory review under RAP 2.3(b) requires a showing that the ruling below significantly altered the status quo. But Faulkner may pursue his case by paying his filing fees—this is not a significant change to his status quo that warrants interlocutory review.

In the absence of meeting any of the RAP 2.3(b) criteria, this Court should deny discretionary review.

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VI. CONCLUSION

Respondent respectfully requests that the Court deny Faulkner's motion for discretionary review because none of the criteria warranting discretionary review under RAP 2.3(b) are satisfied.

RESPECTFULLY SUBMITTED this 31st day of December, 2014.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the ANSWER TO MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

CLARENCE J. FAULKNER, DOC #842107
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 2049
AIRWAY HEIGHTS WA 99001-2049

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

EXECUTED this 31st day of December, 2014, at Olympia, WA.

s/ Tera Linford
TERA LINFORD
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Linford, Tera N (ATG)
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From: Linford, Tera N (ATG) [mailto:TeraL@ATG.WA.GOV]
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Good morning. Please find the attached Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Direct Review for filing in the above referenced case.

Filer – Respondent: Washington State Department of Corrections
Case Name: Clarence J. Faulkner v. Washington State Department of Corrections
Cause No: 90384-1
Attorney: Assistant Attorney General Cassie B. vanRoojen, WSBA #44049
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Thank you and have a happy and safe New Year!

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