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**DISTRICT II/IV**

December 7, 2015

To:

Hon. Charles H. Constantine  
Circuit Court Judge  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

Samuel A. Christensen  
Clerk of Circuit Court  
Racine County Courthouse  
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John Doe  
7501 W. Wind Lake Rd., Unit 7  
Wind Lake, WI 53185-2277

You are hereby notified that the Court has entered the following opinion and order:

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2015AP67                      Otter Creek Farms LLC v. John Doe (L.C. # 2011SC5624,  
2014CV940)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

John Doe, also known as Arthur D., appeals an order denying his petition for a waiver of fees and costs under WIS. STAT. § 814.29 (2013-14).<sup>1</sup> Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reverse.

One of Doe's arguments in this appeal is that he qualifies for a fee waiver because he receives means-tested public assistance, in the form of medical assistance and energy assistance. As Doe correctly argues, the relevant statute provides that the receipt of means-tested public

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

assistance is sufficient, by itself, to prove poverty. WIS. STAT. § 814.29(1)(d)1. That provision also states that “medical assistance” qualifies as means-tested public assistance.

Doe used the standard fee-waiver affidavit form. The first section of that form has pre-printed material in which the affiant can check various boxes to say they “currently receive” various government benefits. One of the boxes is “medical assistance.” Doe checked that box.

The circuit court’s denials of Doe’s fee waiver request do not address the medical assistance portion of the form. The circuit court did not acknowledge or reject Doe’s averment that he receives means-tested public assistance in the form of medical assistance, even though Doe noted this ground for indigency in his first motion for reconsideration there. In addition, although this medical assistance argument is in Doe’s opening brief on appeal, the brief of the respondents does not address it. We conclude that Doe’s affidavit, taken at face value, is sufficient evidence by itself to establish poverty.

That said, poverty is not the only issue involved in a decision on whether to grant a waiver of fees and costs. Even if the person is indigent, the circuit court can deny the fee-waiver petition if it finds that the “affidavit states no ... appeal upon which the court may grant relief.” WIS. STAT. § 814.29(1)(c). Case law holds that the test for this determination is whether the case is “arguably meritorious.” *See State ex rel. Rilla v. Circuit Court for Dodge Cnty.*, 76 Wis. 2d 429, 433, 251 N.W.2d 476 (1977).

It is not entirely clear to us how the circuit court viewed this part of the analysis. In its first denial order, there is a sentence saying Doe’s “submission is not sufficient for this Court to adequately analyze whether or not Mr. Dyer’s claims are meritorious.” However, the rest of that decision discusses only financial issues. Then, when Doe submitted another affidavit, the court’s

denial order said nothing about whether his claims for appeal were arguably meritorious. That silence could mean that after reviewing the second affidavit the court concluded that the appeal *is* arguably meritorious, or perhaps instead the court was satisfied that denial for lack of poverty was enough to resolve the matter, and made no decision on whether the appeal is arguably meritorious.

In light of the uncertainty about the circuit court's view on that issue, after remittitur the circuit court may consider whether the appeal would be arguably meritorious, if it has not done that already. The court may also hold a hearing on whether Doe actually receives medical assistance, if the court or other parties question that assertion.

IT IS ORDERED that the order appealed is summarily reversed under WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*