**NO. 91039-1**

SUPREME COURT OF
THE STATE OF WASHINGTON

Court of Appeals, Division III, Cause No. 31163-5-III

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WILLIAM HOUK, et ux.,

Petitioners,

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., et al.,

Defendants.

NICHOLS & SHAHAN DEVELOPMENTS, LLC, a Washington Limited Liability Company and JOSEPH K. NICHOLS, individually,

Respondents,

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# PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

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**1. Person Filing the Motion**

This Motion is filed by would-be petitioner for review, respondent and plaintiff below, Janice Houk.

**2. Statement of Relief Sought**

Mrs. Houk seeks an order extending the time file her Petition for Review in this matter, and in the alternative for an Order of the Court permitting her to file her Petition for Review as to the Court of Appeals' award of defense attorney fees against her on November 4, 2014.

**3. Parts of Record Relevant to Motion**

This Motion is based on the Declaration of Leonard Flanagan in Support of Motion to Extend Time and/or Allow Petition, and the Exhibits thereto.

Appellate practice is a small but not insignificant portion of the undersigned's practice. As described in the Declaration of Leonard Flanagan, counsel's familiarity with both written and unwritten procedures and practices on appeal does not rise to the level of great expertise, but by the same token was not completely unfamiliar territory.

Mrs. Houk is a widow of advancing years, and retired. In late 2004, Mrs. Houk and her late husband purchased a new home from the defendant Joe Nichols, who was identified as the "seller" in the Real Estate Purchase and Sale Agreement ("REPSA"). Though not identified

on the REPSA, the property was apparently developed and owned at the time of sale by a Washington limited liability company in which Mr. Nichols was a member, Nichols Shahan Development, LLC ("NSD, LLC"). With the assistance of different trial counsel, after serving a pre-claim notice of suit pursuant to RCW 64.50.020, on December 16, 2010 Mrs. Houk commenced a suit in Spokane County Superior Court against NSD, LLC, its owners (including Mr. Nichols), the general contractor and several subcontractors, alleging serious defects in the construction of the residence. The alleged cost of repairing those defects as stated in the verified Complaint was $167,781.03. *Id.*

Mrs. Houk's suit was litigated for approximately 18 months in the trial court prior to this appeal. During that time, NSD, LLC filed no Answer and raised no affirmative defenses. At some point apparently late in this process, defense counsel learned that NSD, LLC had been administratively dissolved on or about October 2, 2006 for failure to file its annual renewal with Washington's Secretary of State. NSD, LLC brought a motion for summary judgment contending that an alleged three year "limitations" period for claims against dissolved limited liability companies under RCW 25.15.303. The trial court denied that motion, apparently concluding that retroactive amendments to the Limited Liability Company Act in the summer of 2010 established a requirement

that NSD, LLC filed a "certificate of dissolution" before claiming the benefit of RCW 25.15.303's "limitations" period. *Id.*

NSD, LLC and Mr. Nichols sought and were granted discretionary review of the denial of their summary judgment motion by Division III of the Court of Appeals, on the grounds that a "statute of limitations" cannot be retroactively changed by amendatory litigation after it has expired. *Id.*

Following submission of briefs and argument, on March 13, 2014 the Court of Appeals' issued its opinion reversing the trial court and granting NSD, LLC's and Mr. Nichols' motion for summary judgment. The Court of Appeals' opinion did not address a number of substantive arguments made by Mrs. Houk on appeal. In addition, the Court of Appeals granted NSD, LLC its attorney fees pursuant to a REPSA even though NSD, LLC was not a signatory to the REPSA, even though the Court's opinion implicitly acknowledged that NSD, LLC likely has no "continuing legal existence" such that it could not be awarded fees, and even though Mr. Nichols was sued, among other things, as the "seller" under the REPSA irrespective of his status as a member of NSD, LLC such that any "limitations" period based on the date of NSD, LLC's dissolution should have no application to the causes of action against him. *Id.*

Mrs. Houk timely moved for reconsideration of the March 13, 2014 opinion of the Court of Appeals. *Id.*

On April 17, 2014, Mrs. Houk's counse received an email attaching a cover letter and an Order denying Mrs. Houk's Motion for Reconsideration. *Id.* and Exhibit A thereto.

. The standard practice in the office of Mrs. Houk's appellate counsel is that physical or hard copies of correspondence or pleadings arc, immediately upon receipt, routed through an experienced legal assistant for review, calendaring of applicable deadlines on central calendars (both electronic and physical), circulation to all other attorneys in the office, scanning, and filing. Accordingly, when hard copies of documents are delivered to the office, any resulting action dates are calendared as a matter of course. The assistant who performs these calendaring tasks has extensive experience, is a trained and certified paralegal, has worked with counsel for at least 10 years, and recently became licensed as an attorney in the State of California. *Id.*

If, on the other hand, a document is transmitted electronically only to an attorney in counsel's office, the attorney will need to forward the document on to staff for calendaring. Counsel's standard practice, when aware that a document is being sent only electronically, is to forward it on to his legal assistant for calendaring, circulation, and filing. *Id.*

The cover letter sent on April 17, 2014 is addressed to counsels' physical mailing addresses. There is no indication in the letter, or in the accompanying email, that it was being sent only by email transmission. Mrs. Houk's counsel therefore assumed that a hard copy would be transmitted by mail to his office and calendared as a matter of course. *Id.* and Exhibit A thereto.

Mrs. Houk's counsel did not forward the email and attached correspondence on to his assistant for calendaring the deadline for the Petition for Review, as he would ordinarily do when such emails state that they are the only copies that will be transmitted. *Id.*

Counsel's experience has been that the Courts of Appeal will explicitly notify recipients of email correspondence when the court does not intend to send a hard copy of correspondence. Typical notices he has received state, in effect, that "This is the only notice you will receive" or "By Email Only." For example, the email transmission of the hearing notice from Division III in this matter (*Id.* and Exhibit B thereto), states that it is the only copy of the notice that will transmitted. It is counsel's practice therefore, to immediately forward such emails to his assistant, who is responsible for calendaring deadlines and circulating such materials to other attorneys in his office. *Id.*

Assuming that the deadline for a Petition for Review was May 17, 2014 (that is, 30 days after denial of Mrs. Houk's Motion for Reconsideration of the March 13, 2014 opinion), it is likely that counsel would have missed that deadline because he did not forward the court's notice on for calendaring as described above. *Id.*

Counsel's delay in addressing the missed deadline was exacerbated, however, by a misunderstanding on his part of RAP 13.4. Specifically, RAP 13.4 dates the period for seeking review from the time of a "decision terminating review." However, counsel was laboring under the mistaken belief that because the initial review was interlocutory in nature in the Court of Appeals, a request for review by the Supreme Court would not be required until a final order terminating the case was entered in the trial court. See generally RAP 5.1. And, while the clerk's letter identified the period as 30 days following the Order denying reconsideration, counsel believed that the clerk had not taken into account the fact that other defendants remained in the action, such that the Order was not adequately finalized to seek Supreme Court review. *Id.*

Counsel's misunderstanding of RAP 13.4 is confirmed by an email he sent to opposing counsel suggesting that he intended to dismiss the remaining defendants at the trial court level, and pursue further review with the Supreme Court. *Id.*

Several subcontractor defendants remained in the case, though it was unlikely that the case could proceed against them because all other similarly-situated subcontractor defendants had procured dismissals on summary judgment based on lack of privity and the economic loss rule / independent duty doctrine. Accordingly, claims against the remaining defendants were voluntarily dismissed after the Court of Appeals issued its award of defense attorney fees, which had been very vigorously contested. This was a logical choice in order to evaluate whether it made economic sense to proceed. *Id.*

On July 25, 2014, the Court of Appeals commissioner issued her opinion regarding the amount of defense attorney fees. The Court of Appeals commissioner's opinion on attorney fees awarded fees to Best Development, LLC, which was not a party to the appeal and which did not appear or defend at the trial court level. It was therefore clear to all the litigants that the opinion was in error, and would have to be withdrawn and corrected. *Id.*

On August 15, 2014, defendants filed a Motion to Modify, based on the erroneous award to Best Development, and seeking additional fees that were not awarded by the commissioner. *Id.*

On November 4, 2014, the Court of Appeals issued an order withdrawing the mandate. (*Id.* and Exhibit D thereto). Mrs. Houk should

have had until December 4, 2014, to file her petition for review of that order.

On or about November 4, 2014 (following the decision on the defense attorney fee award by Division III's commissioner, and issuance of the mandate), Mrs. Houkd voluntarily dismissed her claims against the remaining subcontractor defendants. (*Id.* and Exhibit E thereto). Counsel's belief at this time that the Petition for Review would have to be filed by December 4, 2014 – which just so happens to coincide with a period of 30 days from issuance of the Order Granting Reconsideration. *Id.*

Given counsel's belief that the Petition for Review would be due no later than December 4, 2014, his plan was to file the Petition by the end of November, 2014. By mid-November, the Petition for Review was complete and ready for filing. (*Id.* and Exhibit F thereto.)

On the morning of November 26, 2014, however, Mrs. Houk's counsel received notice from the Supreme Court that the deadline for filing the petition for review had passed on or about May 19, 2014, and setting December 29, 2014 as the last day to seek an extension of time for filing the petition. *Id.* and Exhibit G thereto.

After receiving the Deputy Clerk's letter, Mrs. Houk's counsel determined that he could not take action by filing a Petition for Review or

a Motion for Extension of Time without discussing issues from the potentially missed deadline with his client and obtaining her informed consent to proceed, after consultation with independent counsel. That process was complete by December 17, 2014. *Id.*

**4. Grounds for Relief Sought**

**a. Law Governing RAP 18.8 Extensions of Time**

Generally, the Rules of Appellate Procedure will be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Under RAP 13.4, a party seeking discretionary review of by the Supreme Court of a "decision terminating review" by the Court of Appeals must file a Petition for Review within 30 days of that filing, or within 30 days of the denial of a timely motion for reconsideration or motion to publish.

A "decision terminating review" is defined as an opinion, order, or judgment of the appellate court or a ruling of the commissioner of that (1) is filed after acceptance of review, and (2) terminates review unconditionally, and (3) is a decision on the merits, or a decision dismissing review, or an order refusing to modify a ruling by the commissioner or clerk dismissing review. RAP 12.3(a).

Under RAP 12.5(a), a "mandate" is the written notification by the clerk of the appellate court to the trial court and the parties of an appellate court decision terminating review.

Where a deadline for filing a Petition for Review is missed, RAP 18.8 provides a mechanism for extending the time for filing, but "only in extraordinary circumstances and to prevent a gross miscarriage of justice." This represents an exception to the usual rule of liberal interpretation to facilitate the decision of cases on the merits under RAP 1.2(a). *Reichelt v. Raymark Indus.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988).

The moving party on a RAP 18.8 motion has the burden to "provide sufficient excuse for [his] failure to file a timely notice of appeal and to demonstrate sound reasons to abandon the [judicial] preference for finality." *State v. Moon*, 130 Wn. App. 256, 260, 122 P.3d 192 (2005). Extraordinary circumstances "include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Reichelt, supra*, 52 Wn. App. at 765-66. Excusable error in this context includes, for example, an "understandable misinterpretation of a recently amended rule" or procedure. *Scannell v. State*, 128 Wn.2d 829, 834, 912 P.2d 489 (1996).

Extraordinary circumstances can also include situations in which a court notice to the litigant of an order from which review is taken is

inadequate. See, for example, *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 486, 334 P.3d 1120 (2014) (Trial court's failure to serve order denying reconsideration resulted in missed appeal deadline) and *Zurich Ins. Co. v. Wheeler,* 838 F.2d 338 (9th Cir. Cal. 1988) (Interpreting similar federal rules to hold that court clerk's failure to give required notice of an order, upon inquiry, is a factor to be considered in determining whether there is excusable neglect.)

**b. Mrs. Houk Should be Granted an Extension of Time To Seek Discretionary Review under RAP 18.8.**

It is well-established that attorney error in missing an appeal deadline as a result of inadequate office procedures does not demonstrate extraordinary circumstances under RAP 18.8. Thus, for example, where in *Beckman v. DSHS*, the record disclosed that the lacked any reasonable procedure for calendaring hearings and maintained no central calendaring system and employed untrained assistants, the court concluded that such inadequate office procedures foreclosed any finding of extraordinary circumstances. 102 Wn. App. 687, 696, 11 P.3d 313 (2000).

Here, in contrast, there was in place a central calendaring system, staff maintaining that system has over a decade of experience and is a recently-licensed attorney in her own right. Petitioner respectfully submits that it is not an inadequate office procedure for counsel to review

an emailed letter that from all appearances was also mailed to his physical address, and to rely on the traditional delivery of a hard copy of the correspondence for purposes of calendaring by staff. That is particularly true where, as here, the appellate courts have typically expressly advised counsel when correspondence is to be delivered exclusively by email.

Counsel's conduct following the issuance of the Court of Appeals' opinion and the failure to calendar the petition deadline demonstrates a diligent, albeit misguided, effort to effectuate a timely request for further review. Indeed, counsel for the defense was specifically advised that petitioner intended to seek further review upon dismissal of the remaining defendants.

The conceded error of Mrs. Houk's undersigned counsel in understanding the applicable rule for further review in cases of interlocutory appeal was not the cause of missing the deadline, but merely exacerbated the delay without prejudice to the defense. In that narrow context, petitioner suggests the record displays reasonable diligence.

Petitioner must also show that the failure to allow her to petition for further review will result in a gross miscarriage of justice. Washington decisions on what constitutes a "gross miscarriage of justice" in this context are few. In *Reichelt,* the court in analyzing prior opinions allowing relief observed that a lost opportunity to appeal in the face of

reasonably diligent effort to obtain review can itself be a gross miscarriage of justice justifying review. 52 Wn.App. at 765-766. Similarly in *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993), this Court observed that "We recognize that Schaefco raises many important issues. . . . However, it would be improper to consider these questions given the procedural failures of this case."

Thus it would appear that the current trend RAP 18.8 analysis is to collapse the analysis of extraordinary circumstances excusing a late filing, and the entire concept of a "gross miscarriage of justice." In short, it appears that under current law if there are extraordinary circumstances there is also *ipso facto* a gross miscarriage of justice and on the other hand, no matter how unjust or egregious the order below may be, it cannot be a gross miscarriage of justice if proper procedures were not followed without adequate excuse.

As an initial matter, petitioner suggests that insofar as the record demonstrates reasonable diligence in light of electronic correspondence practices used by the Court of Appeals, the denial of an opportunity for further review constitutes a gross miscarriage of justice under *Reichelt* and *Schaefco*.

Moreover, petitioner respectfully suggests that collapsing the analysis of "extraordinary circumstances" and "gross miscarriage of

justice" in all cases would be illogical and lead to absurd results. This is so because the court's and the litigants' interests in finality of decisions is or should be of little weight in the face of a truly gross miscarriage of justice on the merits. In *Pybas v. Paolino*, the Court of Appeals acknowledged that the underlying merits of the issues that would be raised on appeal should be considered in deciding whether there is a "gross miscarriage of justice." 73 Wn. App. 393, 404, 869 P.2d 427 (1994) ("[T]here is nothing to suggest that Hill was in any way deprived of his opportunity to present his case to the arbitrator, or that the amount of the award was so disproportionate to Hill's actual damages so as to amount to a gross miscarriage of justice.") Thus, this Court should look to the merits to determine whether there is a danger of a gross miscarriage of justice, and evaluate whether this constitutes "extraordinary circumstances" *in and of itself.*

Here, as demonstrated in the draft Petition for Review, the Court of Appeals' decision does result in a gross miscarriage of justice. Specifically, the Court of Appeals' decision awards attorney fees to a limited liability company that the court implicitly concedes has or may have no legal existence under applicable law. It awards fees under a REPSA to one who was not a party to the REPSA. The upshot of the Court of Appeals' decision, as explained in the Petition, is that a limited

liability company may now secretly allow itself to dissolve, continue to do business as a subsisting company following that dissolution, and fail to make any provisions for its only warranty obligation; yet when sued three years later, the limited liability company and its members automatically escape all liability based on a supposed statute of "limitations" (RCW 25.15.303) that was never written or intended as such, and which contains absolutely no language stating that claims are barred by the passage of time.

As further demonstrated in the draft Petition for Review, the issues of limited liability company dissolution and immunity to suit represent an ongoing and serious issue that has been addressed repeatedly by the Legislature and this Court in recent years. The Legislature's rapid legislative responses to this Court's decision in *Chadwick Farms* were grounded on ensuring that gross miscarriages of justice do not occur when limited liability companies dissolve. Mrs. Houk is a victim of precisely the kind of gross injustice the Legislature was attempting to prevent in responding to *Chadwick Farms*, and this justifies granting her the opportunity to petition for further review.

**3. Even Without an Extension Under RAP 18.8, Mrs. Houk's Petition for Review Should Be Allowed, at a Minimum, as to the Court of Appeals' Attorney Fee Award; That Appeal Would Carry With It The Substantive Errors Mrs. Houk Would Raise on Further Review By This Court.**

Even if the Court concludes that extraordinary circumstances or a gross miscarriage of justice are not shown on the record, it should in the atlernative permit Mrs. Houk to seek review of the award of defense attorney fees against her by the Court of Appeals. That award was only finally decided after reconsideration on November 4, 2014. Mrs. Houk therefore should have been permitted to seek review of that order by December 4, 2014 without seeking an extension under RAP 18.8 as required by the Court.

To be sure, the Court of Appeals' December 4, 2014 order only changes the identity of the recipient of the award and adjusts it amount slightly. Mrs. Houk does not and would not assign error to those specific determinations, but rather would assign error to the entire basis for awarding fees to NSD, LLC and Mr. Nichols at all.

Petitioner acknowledges that under RAP 2.2 and *Bushong v. Wilsbach,* 151 Wn. App. 373, 377, 213 P.3d 42 (2009), an appeal from a ***trial court*** decision awarding fees does not carry with it the right to appeal an earlier decision establishing the basis for awarding those fees. However, in this case there was not and has never been a *trial court* decision awarding fees, so RAP 2.2 and the *Bushong* reasoning do not apply.

Counsel has been unable to locate any Rule of Appellate Procedure or case law establishing that a timely request for review of an attorney fee award by the *Court of Appeals* does not carry with it the right to challenge the basis for the award of those fees. This appears to be a matter of first impression in Washington law.

As a matter of simple logic, in the absence of any rule to the contrary, if review is requested of an attorney fee award that review should be allowed as to the basis of the award as well. In this case, that means Mrs. Houk's challenge to the entire basis of the Court of Appeals' decision should be at issue.

As a matter of which policy is most helpful to litigants, Mrs. Houk should be permitted to await the outcome of the attorney fee decision in the Court of Appeals before deciding whether to attempt to prosecute further appeal of the basis of that award. In this case, the defense sought over $200,000 in attorney fees from the Court of Appeals. Mrs. Houk argued that the amount should be dramatically smaller based on the defendants' failure to raise the issue of the status of NSD, LLC in a timely fashion. A more favorable result from the Court of Appeals might well have resulted in Mrs. Houk voluntarily foregoing the opportunity for further review. Particularly where, as here, there is no marked prejudice to the defendants in allowing the late request for further review, there docs

not appear to be any strong policy reasons of judicial economy for barring Mrs. Houk from attacking the grounds for the attorney fee award.

As noted in the Declaration of Leonard Flanagan, the Deputy Clerk notified Mrs. Houk's counsel on November 26, 2014 that any appeal would be untimely under RAP 13.4. At that point, counsel determined that he could not immediately act because of a potential conflict of interest with Mrs. Houk which would require explanation and a waiver under RPC 1.7(b). That process, including participation of independent counsel for Mrs. Houk, was not complete until December 17, 2014, and it was therefore not possible for counsel to take action to file any Petition for Review by December 5, 2014, and based on the Deputy Clerk's letter, there was no reason to believe such a Petition would be accepted as timely.

These circumstances, in which counsel was unable to proceed consistent with his professional obligations without a conflict waiver, and in which a conflict waiver was rapidly forthcoming after consultation with independent counsel, constitute extraordinary circumstances justifying an extension of time to file a Petition for Review of the Court of Appeals' November 4, 2014 Order with respect to attorney fees. This requested relief is in the alternative to allowing a Petition for Review on the merits of the April 17, 2014 opinion. Such alternative relief is only requested in

the event that the Motion for Extension of Time is not granted to file a Petition for Review on the merits, and only requested in the event that appeal of the final attorney fee order will carry with it the ability to challenge the underlying merits of the April 17, 2014 opinion supporting that final attorney fee order.

RESPECTFULLY SUBMITTED this 22nd day of December, 2014

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

Leonard Flanagan, WSBA # 20966
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of December, 2014, I did serve true and correct copy of the foregoing document with all attachments to be delivered to the following recipient(s) by the method(s) as indicated:

| | |
|---|---|
| **Counsel for Petitioners Nichols & Shahan Developments, LLC and Joseph K. Nichols**<br>Ross P. White<br>Michael J. Kapaun<br>WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.<br>422 West Riverside Avenue, Suite 1100<br>Spokane, Washington 99201 | ☐ US Mail<br>X FedEx overnight delivery<br>☐ Hand Delivery<br>X E-Mail |

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

Dated this 22nd day of December, 2014 at Seattle, Washington.

Mariah Lynge

## OFFICE RECEPTIONIST, CLERK

**To:** Mariah A. Lynge
**Cc:** rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan
**Subject:** RE: 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Received 12-22-2014

Supreme Court Clerk's Office

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:** Mariah A. Lynge [mailto:mariah@condodefects.com]
**Sent:** Monday, December 22, 2014 4:20 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan; Mariah A. Lynge
**Subject:** 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Dear Clerk of the Supreme Court,

Attached for filing is the Petitioners' Motion to for Extension of Time to File Petition for Review, Declaration of Leonard Flanagan, and [proposed] Petition for Review with subjoined Certificates of Service.

Thank you.

Mariah Lynge
Office Manager/ Paralegal

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