

FILED
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STATE OF WASHINGTON
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NO. 97835-2

SUPREME COURT OF THE STATE OF WASHINGTON

SAID FARZAD,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH-MEDICAL
QUALITY ASSURANCE COMMISSION; WASHINGTON
PHYSICIANS HEALTH PROGRAM, a Washington non-profit
Corporation doing business in Washington State; LARRY BERG AND
“JANE DOE” BERG, and the marital community composed thereof;
CHRIS BUNDY AND “JANE DOE” BUNDY, and the marital
community composed thereof; MOLINA HEALTHCARE OF
WASHINGTON, A Washington Corporation, JOHN AND JANE DOES
1-10,

Respondents.

**STATE RESPONDENTS’ ANSWER TO PETITIONER’S
REQUEST FOR EXTENSION OF TIME**

ROBERT W. FERGUSON
Attorney General

PATRICIA D. TODD, WSBA #38074
SARA CASSIDEY, WSBA #48646
Assistant Attorney General
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300
OID #91023

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I. INTRODUCTION

After the administrative appeal of the order suspending his medical license, Petitioner Said Farzad has pursued a civil lawsuit against Respondents State of Washington, Department of Health-Medical Quality Assurance Commission, and Larry and “Jane Doe” Berg (collectively the State Respondents or State Defendants). During this time, he has failed to comply with the procedural rules that exist to provide litigants with notice, fairness, and a timely resolution. Before the Court of Appeals, Mr. Farzad failed to serve State Respondents with various court filings, he failed to meet numerous filing deadlines, and he failed to comply with the content requirements for briefs under the Rules of Appellate Procedure, thereby providing that court with no argument or citation to authority in support of the issues on review.

Mr. Farzad now continues his pattern of noncompliance before this Court. His request for an extension of time related to the filing of his petition for review should be denied because Mr. Farzad has failed to demonstrate that extraordinary circumstances exist requiring an extension of time so as to prevent a gross miscarriage of justice. *See* RAP 18.8(b).

II. PROCEDURAL HISTORY

State Defendants hereby incorporate and adopt by reference the Procedural History section set forth in Respondents Chris Bundy, M.D., and

Washington Physicians Health Program's (WPHP) Answer to Petitioner Said Farzad's Request for Extension of Time in Which to File Petition for Review. *See* WPHP Respondents' Answer to Req. for Ext. of Time at 1-3. Because Mr. Farzad's prior pattern of noncompliance is relevant context for analyzing his request for an extension of time, State Defendants provide the following additional procedural history related to this litigation.

A. After Mr. Farzad's Medical License is Suspended, He Unsuccessfully Seeks Judicial Review and Files This Civil Lawsuit

In July 2014, the Medical Quality Assurance Commission suspended Mr. Farzad's medical license because he was "unable to practice with reasonable skill and safety to consumers" due to an impairing mental condition. CP 601, 633-45. Mr. Farzad sought judicial review of that order in Pierce County Superior Court. CP 738, 743-44. In March 2016, that court denied his petition for judicial review. CP 738, 743-44. Mr. Farzad did not pursue any further administrative appeal related to the Commission's order.

In June 2017, Mr. Farzad filed this separate civil action. CP 12-21. On December 15, 2017, the trial court granted the State Defendants summary judgment and dismissed Mr. Farzad's suit. CP 758-60.

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B. Mr. Farzad's Initial Brief before the Court of Appeals Failed to Conform with the Appellate Rules

On January 4, 2018, Mr. Farzad filed his Notice of Appeal from the Order Granting State Defendants' Motion for Summary Judgment. CP 108-10. On March 30, 2018, the Report of Proceedings was filed with the Court of Appeals, making Mr. Farzad's brief due on May 14, 2018. *See* RAP 10.2(a). On that day, Mr. Farzad submitted his brief to the court but did not serve State Respondents; rather it was forwarded to counsel by the court. On May 24, 2018, the Court of Appeals notified Mr. Farzad it had rejected his brief because the brief did not conform to the content and form requirements set out in the Rules of Appellate Procedure; the court required him to submit and serve all parties with a corrected brief by June 13, 2018. Letter from Court Clerk to Farzad, Case No. 51340-4-II (May 24, 2018).

C. Mr. Farzad Failed to Timely Submit a Corrected Brief to the Court of Appeals and Was Sanctioned

No timely corrected brief was forthcoming. On July 3, 2018, the Court of Appeals notified Mr. Farzad that he had failed to timely perfect his appeal by filing the corrected brief. Letter from Court Clerk to Farzad, Case No. 51340-4-II (July 3, 2018). The court gave him 15 days to file the corrected brief, or he would be sanctioned \$200.00. *Id.* The court also scheduled a motion for dismissal and/or further sanctions, which would be considered unless Mr. Farzad filed his brief by July 23, 2018. *Id.* On

July 24, 2018, Mr. Farzad emailed the court with a letter asking for an extension of time to file his brief so that he could find an attorney to represent him. *See* Motion to Extend Time, Case No. 51340-4-II (July 24, 2018). He did not serve that letter on State Respondents; rather, the court forwarded that letter to counsel. On July 27, 2018, the court granted Mr. Farzad a further extension, until August 31, 2018, to file his corrected brief. Ruling by Court Clerk, Case No. 51340-4-II (July 27, 2018).

Again, no timely corrected brief was forthcoming. On September 7, 2018, the Court of Appeals entered a Conditional Ruling of Dismissal because Mr. Farzad had failed to file his corrected brief. Conditional Ruling of Dismissal, Case No. 51340-4-II (Sept. 7, 2018). The court indicated the appeal would be dismissed without further notice on September 17, 2018, unless the \$200.00 sanction was paid and the corrected brief filed. *Id.*

On September 17, 2018, the sanction was paid, but no brief was filed. Nonetheless, on October 5, 2018, the Court of Appeals extended Mr. Farzad's filing deadline to October 31, 2018, and indicated no further extensions would be considered. Letter from Court Clerk to Farzad, Case No. 51340-4-II (Oct. 5, 2018).

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D. Mr. Farzad Submitted a Second Non-Conforming Brief to the Court of Appeals

On October 29, 2018, Mr. Farzad submitted a corrected brief to the Court of Appeals and emailed a copy to counsel for State Respondents. He remained unrepresented. The court rejected that brief because it lacked citations to the record. On October 31, 2018, Mr. Farzad requested a 15-day extension to file a second amended brief; he did not serve State Respondents with that request. On November 5, 2018, the court granted him one further extension, until November 21, 2018, to file a brief in compliance with the appellate rules. Ruling by the Court Clerk, Case No. 51340-4-II (Nov. 5, 2018).

E. Mr. Farzad Submitted an Untimely, Third Non-Conforming Brief to the Court of Appeals

On November 27, 2018, Mr. Farzad submitted a second corrected brief to the Court of Appeals; he did not serve State Defendants with that brief. The court rejected that brief because it too lacked citations to the record, proof of service, and Mr. Farzad's dated signature. On November 28, 2018, the court granted Mr. Farzad another extension, until December 14, 2018, to file a fully compliant, referenced and cited brief, or his case would be dismissed. Ruling by the Court Clerk, Case No. 51340-4-II (Nov. 28, 2018).

F. The Court of Appeals Accepted Mr. Farzad's Fourth Submitted Brief

On December 17, 2018, Mr. Farzad untimely submitted his third corrected brief to the Court of Appeals. On December 20, 2018, he requested an extension of time within which to have filed his brief. Neither the brief nor the request for more time were served on State Respondents. On December 21, 2018, the court granted Mr. Farzad's motion for more time and accepted his brief for filing, despite its continuing deficiencies that were later recognized by the court in its unpublished opinion. Ruling by the Court Clerk, Case No. 51340-4-II (Dec. 21, 2018); *Farzad v. Wash. Dep't of Health, et al.*, No. 51340-4-II, 10 Wn. App. 2d 1028, 2019 WL 4667963 (Sept. 24, 2019) (unpublished).

Mr. Farzad now makes an untimely petition for review to this Court and requests that this Court extend the time within which he could file his petition. State Defendants oppose that request.

III. ARGUMENT AND AUTHORITY

RAP 13.4(a) requires a petition for review to be filed within 30 days after the underlying decision for which review is sought. Here, the Court of Appeals issued its opinion on September 24, 2019, making any petition for review of that decision due by October 24, 2019. It is undisputed that

Mr. Farzad missed that deadline, as well as a subsequent filing deadline set by the Deputy Clerk of this Court.

The issue now before this Court is whether it should grant an extension of time and allow Mr. Farzad leeway to file a late petition for review to this Court. As discussed below, it should not.

A. Mr. Farzad Fails to Demonstrate Either Extraordinary Circumstances or a Gross Miscarriage of Justice in Support of His Requested Extension of Time

RAP 18.8(b) provides in relevant part that “[t]he appellate court will only in *extraordinary circumstances and to prevent a gross miscarriage of justice* extend the time within which a party must file . . . a petition for review. . . .” (Emphasis added.) Unlike with requests for extension under RAP 18.8(a), for which a litigant need only show that an enlargement of time will “serve the ends of justice,” requests under RAP 18.8(b) must meet a heightened and exacting standard. In addition, “[t]he appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time” to file a petition for review. RAP 18.8(b). These rules of appellate procedure apply equally to pro se litigants and those represented by counsel. *See State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Mr. Farzad meets neither requirement of RAP 18.8(b). First, he demonstrates no extraordinary circumstances supporting his request. And second, no gross miscarriage of justice will result if he is denied his request for more time. State Defendants address each requirement in turn.

1. There is no evidence before this Court showing any extraordinary circumstances requiring an extension of time

The heightened standard of RAP 18.8(b) and its requirement that a movant show “extraordinary circumstances” was most recently discussed by Justice Madsen in dissent in *In re Fero*, 190 Wn.2d 1, 27, 409 P.3d 214 (2018) (Madsen, J., dissenting). There, she recognized that extraordinary circumstances include “instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Id.* (quoting *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998)). As an example, she noted that this Court had held that the RAP 18.8(b) standard was met, and an extension of time granted, in *Scannell v. State*, 128 Wn.2d 829, 835, 912 P.2d 489 (1996). *Shumway*, 136 Wn.2d at 395. In *Scannell*, a pro se litigant had misinterpreted a recently amended Rule of Appellate Procedure and was late in filing his notice of appeal as a result. 128 Wn.2d at 834-35.

In contrast, an oft cited and illustrative case for denying an extension under RAP 18.8(b) is *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763,

764 P.2d 653 (1988). In that case, the defendant missed the deadline for filing its notice of appeal. *Id.* at 765. The Court of Appeals denied the defendant’s motion for extension of time based on the lack of reasonable diligence of the late party. *Id.* at 765-66. The *Reichelt* court explained, “[Defendant’s] counsel admit that they ‘made a mistake,’ but focus upon the lack of prejudice to [Plaintiff] since the filing was only ten days late. RAP 18.8(b), however, does not turn on prejudice to the responding party.” *Id.* at 766. Further, the court noted, “[m]ost respondents would be hard-pressed to show prejudice where the notice of appeal is filed late. Rather, the prejudice of granting such motions would be to the appellate system and to litigants generally, who are entitled to an end to their day in court.” *Id.* at 776 n.2; *see also Adeyemi v. King-Smith*, No. 79478-7-I, 2020 WL 1156940 (Wash. Ct. App. Mar. 9, 2020) (unpublished) (denying motion for extension under RAP 18.8(b) because the movant’s “inability to face his legal situation does not amount to extraordinary circumstances supporting an extension of time for his appeal”).¹

Here, Mr. Farzad failed to timely file his petition for review twice. He missed both the initial deadline of October 24, 2019, as well as the subsequent deadline set by the Deputy Clerk.

¹ GR 14.1(a). The decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

Mr. Farzad fails to support his latest request for extension of time with competent evidence demonstrating the existence of extraordinary circumstances. Under the appellate rules, “[a] person should serve and file with the motion all affidavits and other papers in support of the motion.” RAP 17.4(f); *see also In re Custody of Z.C.*, 191 Wn. App. 674, 699, 366 P.3d 439 (2015) (referring to the movant’s testimony by declaration when analyzing whether to grant the motion for more time under RAP 18.8(b)). Here, Mr. Farzad provides an unsworn statement within his request – which constitutes neither an affidavit nor a declaration made on penalty of perjury – that indicates he purportedly has been in Southern Turkey, attempting to treat refugee children, and has been without access to the internet and “proper court papers.” *See generally* Req. for Ext. of Time. That unsworn statement is not evidence and should not be considered by this Court.

Further, even if this Court considers Mr. Farzad’s proffered excuse, it fails to demonstrate that he acted with reasonable diligence and that the untimely filing of his petition was due to excusable error or circumstances beyond his control. *See Reichelt*, 52 Wn. App. at 765-66. Unlike in *Scannell*, there has been no recent rule change related to the filing deadline for petitions of review that could confuse or mislead a pro se litigant. *See* 128 Wn.2d at 834-35. Mr. Farzad offers no reason to explain why he was

delayed fifteen days in his efforts to pursue review by this Court. For this reason alone, his request for more time should be denied.

2. Denying Mr. Farzad an extension of time to pursue discretionary review before this court will not result in a gross miscarriage of justice

In addition, no gross miscarriage of justice will result in this appeal, should this Court deny Mr. Farzad his requested extension. In *Reichelt*, which involved the late filing of a notice of appeal as of right, the Court of Appeals explained that, where an appellant is reasonably diligent yet the filing is nonetheless defective, “the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant’s reasonably diligent conduct.” 52 Wn. App. at 766. Thus, in *In re Custody of Z.C.*, the court extended the time for the appellant to file her notice of appeal because the case presented “a potential for a gross miscarriage of justice” where the appellant had a significant interest in her parental rights, had asked her counsel to file an appeal of a non-parental custody decree, and her counsel, who was subject to disciplinary proceedings, had not done so. 191 Wn. App. at 699-700.

The Court of Appeals reached a different conclusion, however, in *In re Matter of Marriage of Orate*, ___ Wn. App. 2d ___, 455 P.3d 1158, 1162 (Jan. 21, 2020). There, the court held the dismissal of an untimely appeal by a father, related to an order allowing relocation of his child by the child’s

mother, would not cause a gross miscarriage of justice. *Id.* Rather, “[t]he result of dismissal is to cause [the father] to keep the agreement he made in 2015, which allowed [the mother] and [child] to relocate within 75 miles of Sunnyside.” *Id.*

Finally, whether circumstances presented a gross miscarriage of justice was also addressed in *Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 427 (1994). There, the court held that the trial court’s authority to vacate a judgment on an arbitration award was limited to those cases “that involve such extraordinary circumstances that a vacation is necessary in order to prevent a gross miscarriage of justice.” *Id.* at 394. Under the facts of that case, the court found the latter requirement lacking because “there is nothing to suggest that [the co-plaintiff who sought to vacate the judgment] 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 [his] actual damages so as to amount to a gross miscarriage of justice.” *Id.* at 404.

Here, Mr. Farzad has offered this Court no explanation as to why a denial of his request for more time will result in a gross miscarriage of justice. Nor will it. Mr. Farzad seeks *discretionary review* of the Court of Appeals’ opinion affirming the dismissal of his civil suit. He has already had his appeal as of right and was provided his opportunity to make his arguments to the Court of Appeals. *See Pybas*, 73 Wn. App. at 404. Having

had the process he was entitled to before the Court of Appeals on his civil appeal, and having foregone any further administrative appeal of the order suspending his license, Mr. Farzad falls far short of establishing a gross miscarriage of justice in this matter. *See Orate*, 455 P.3d at 1162.

Just as was recognized in *Reichelt*, this Court should uphold the finality of the decision of the Court of Appeals and deny Mr. Farzad the privilege of an extension of time. *See* RAP 18.8(b). He has not met the requirements of RAP 18.8(b) nor case law which interprets it.

IV. CONCLUSION

The State Respondents are entitled to an end to their day in court. Mr. Farzad's Request for Extension of Time should be denied for all the reasons explained above.

RESPECTFULLY SUBMITTED this 25th day of March, 2020.

ROBERT W. FERGUSON
Attorney General

s/ Patricia Todd

PATRICIA TODD, WSBA #38074
Assistant Attorney General

DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the state of Washington that on the below date the original of the preceding **STATE DEFENDANTS' ANSWER TO PETITIONER'S REQUEST FOR EXTENSION OF TIME** was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Said Farzad, Plaintiff *pro se*
sfarzad1950@gmail.com

Chris Bundy, Co-Defendant
c/o Justin A. Steiner
Mullin, Allen & Steiner PLLC
jsteiner@masattorneys.com

Molina Healthcare, Co-Defendant
c/o Timothy J. Parker
Carney Badley Spellman
parker@carneylaw.com
awilliams@carneylaw.com
doyle@carneylaw.com
anderson@carneylaw.com
saiden@carneylaw.com

I further declare that I electronically mailed the preceding document to the addresses listed above.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of March, 2020, at Tumwater, Washington.

s/ Erika Summers

ERIKA SUMMERS, Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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- saiden@carneylaw.com
- sara.cassidey@atg.wa.gov
- sfarzad1950@gmail.com
- tduany@masattorneys.com

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Sender Name: Erika Summers - Email: erikas2@atg.wa.gov

Filing on Behalf of: Patricia D Todd - Email: Patricia.Todd@atg.wa.gov (Alternate Email:)

Address:
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Olympia, WA, 98504-0126
Phone: (360) 586-6300

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