No. 90475-8

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBIN EUBANKS, ERIN GRAY,
ANNA DIAMOND, and KATHY HAYES,

Respondents,

v.

DAVID BROWN, individually and on behalf of his marital community,

Petitioner,

and

KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTING ATTORNEY'S OFFICE,

Defendants.

ANSWER TO MOTION BY KLICKITAT COUNTY FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW AND ANSWER TO COUNTY'S PETITION

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A. Introduction

The Klickitat County Prosecutor's Office ("the County") has moved this Court for an extension of time to file its untimely "joinder" in a petition for review before this Court.

The motion should be denied. Not only does the County recite no extraordinary circumstances to justify its request, its "joinder" violates the Rules of Appellate Procedure. The motion is frivolous and presents no facts or law that would warrant granting of the motion. Reasonable attorney fees for responding to the motion should be imposed as a sanction.

B. Facts Relevant to Response

David Brown is accused of sexually harassing Robin Eubanks, Erin Gray, Anna Diamond, and Kathy Hayes ("the harassed women"). He has sought and received interlocutory appeal twice in this case, and has lost both times. In the second matter – his unsuccessful motion to disqualify the harassed women's counsel, Thomas Boothe – he has sought this Court's review.

Brown's employer, the County, also pursued the unsuccessful interlocutory appeal, despite the fact that Boothe never represented the County and it cannot assert any independent attorney-client privilege or grounds for disqualification. The County filed a separate motion for

discretionary review and separate opening and reply briefs from those Brown filed, forcing the harassed women to respond to two sets of briefing on discretionary review of the same order involving the same issues.

The Court of Appeals filed its decision denying the County and Brown's interlocutory appeal and affirming the trial court June 3, 2014. *Eubanks v. Klickitat Cnty.*, ___ Wn. App. ___, 326 P.3d 796, 798 (June 3, 2014). Any petition for review of that decision was due on July 3, 2014. On June 30, Brown timely filed a petition for review of the Court of Appeals decision. On July 9, six days after expiration of the time limitations in RAP 13.4(a), the County filed what it called a "joinder" in Brown's petition for review. The "joinder" offered no independent argument or grounds for review, it simply adopted Brown's petition wholesale.

This Court noted in a letter ruling that the County's "joinder" was untimely, and offered the County the option of moving for an extension of time to file its late document. The County filed its motion for extension of time on August 21, 2014.

In its motion, the County claims that it was "unable to coordinate with Brown or review Brown's petition before it was timely filed." Motion at 3. The County offers no explanation for why it could not

coordinate with Brown, with whom it offered joint briefing at the Court of Appeals. Nor does the County offer any reason why it did not feel obligated to comply with RAP 13.4 and timely file its own petition for review regardless of whether it could "coordinate" with Brown.

C. Argument Why Motion for Extension of Time Should Be Denied

The time limitations for filing a petition for review are "rigidly followed." *Wash. App. Prac. Deskbook*, § 27.6 (2011). The failure to timely file a petition for review, without the request for an extension in advance, extinguishes appeal rights. *See, e.g., Daugert v. Pappas*, 104 Wn.2d 254, 256, 704 P.2d 600 (1985) (petition for review filed one day late barred an appeal).

The County's motion is not a routine request for an extension of time to file a brief. RAP 18.8(a). Rather, it is a request to file a late petition for review, which may be granted only in "extraordinary circumstances." RAP 18.8(b). Failure to timely a document listed in RAP 18.8(b) generally results in dismissal of review. *Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 696, 11 P.3d 313, 318 (2000).

"Extraordinary circumstances" include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. *Shumway v. Payne*, 136 Wn.2d

383, 394–97, 964 P.2d 349 (1998); *Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 482, 848 P.2d 1337 (1993); *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). The standard set forth in the rule is rarely satisfied. *Scannell v. State,* 128 Wn.2d 829, 833–34, 912 P.2d 489 (1996) (citing to *Reichelt*).

The meaning of the phrase 'extraordinary circumstances' was explored by the Court of Appeals in *Reichelt.* There, the Court of Appeals refused to extend the time for filing a notice of appeal that was filed, as here, 10 days late. *Reichelt,* 52 Wn. App. at 765-66. The appellant argued that 'extraordinary circumstances' existed because one of the two trial attorneys left the firm during the 30 days following entry of judgment, and the firm's appellate attorney had an unusually heavy work load. *Id.* The court rejected the argument and summarized the cases allowing late filings:

> In each case, the defective filings were upheld due to 'extraordinary circumstances,' i.e., circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. RAP 18.8(b).

Id. at 766. *See also, Schaefco, Inc. v. Columbia River Gorge Comm'n,* 121 Wn.2d 366, 849 P.2d 1225 (1993); *Pybas v. Paolino,* 73 Wn. App. 393, 401, 869 P.2d 427 (1994).

An example of "extraordinary circumstances" is when a factor outside the petitioner's control prevents timely filing. *Scannell v. State,* 128 Wn.2d 829, 831, 912 P.2d 489 (1996). In *Scannell,* this Court allowed a litigant to file a petition for discretionary review several months after the fact upon a finding of extraordinary circumstances. Those circumstances included the fact the procedural rules recently changed and created a "trap for the unwary." *Id.* at 833. This Court applied the exception, holding the pro se petitioner's failure was reasonable and innocent, reasoning denial of the petition would have caused a drastic result. *Id.* at 833–35.

An example of when extraordinary circumstances do not exist is when the petitioner misunderstands or fails to follow a clear, unambiguous Court rule. In *Schaefco,* the petitioner timely filed a motion for reconsideration of a trial court decision, but failed to timely serve it. *Schaefco,* 121 Wn.2d at 368. After the motion was denied, the petitioner filed a notice of appeal. This Court concluded that the notice of appeal was not timely, even though the trial court had considered the motion. *Id.* The petitioner had violated CR 59's strictures on timely filing of reconsideration motions, and offered no reasonable excuse for doing so. *Id.*

The lack of diligence of a party's counsel – even when the stakes for that party on review are high – does not constitute extraordinary circumstances. *Beckman,* 102 Wn. App. at 696. In *Beckman,* the Court of Appeals refused to accept notice of appeal submitted 10 days too late from a $17.76 million dollar judgment. *Id.* at 694.

Here, the County has misunderstood and failed to follow the clear rules of this Court. The County is under the misimpression that RAP 10.1(g) allowing multiple parties to join in briefs applies to petitions for review. Motion at 3. It does not. RAP 10.1 governs briefing.

Petitions for review are governed by Title 13 of the RAP, not Title 10.[1] There are no provisions for joinder in a petition for review, let alone untimely joinder. RAP 13.1-13.4. In fact, RAP 13.1 makes clear that there is but "one method" of seeking review and that is by filing a petition as described in RAP 13.4.

The County has not demonstrated what extraordinary circumstances apply here, other than its fundamental misunderstanding of the Rules of Appellate Procedure. The County makes the bald assertion, with no explanation, that it was "unable to coordinate" with Brown before

[1] Even if RAP 10.1 applied to the County's filing, it does not allow parties to file late joinders at will. The rules governing briefing deadlines are not waived simply because a party invokes the joinder provision of RAP 10.1. In fact, RAP 10.2(j) provides for sanctions for the late filing of a brief. However, the standard for seeking to file a late petition for review is considerably more stringent. RAP 18.8.

his petition was filed. If the County was aggrieved by the Court of Appeals decision, it had an *independent* duty to petition this Court for review under RAP 13.4 regardless of Brown's actions. The rules do not permit a party to wait for another party to petition, and then file an untimely "joinder."

Nor does the County's statement that it was only six days late, "including a holiday and a weekend," Motion at 3, hold any sway. Again, in *Beckmann* the notice of appeal was filed 10 days late. *Beckman,* 102 Wn. App. at 693. The amount of days a party files late, or whether a holiday occurs, have no bearing on whether extraordinary circumstances exist. RAP 18.8(b).

Granting the County's motion for extension would be prejudicial to the harassed women. Although the County does not raise any separate issues in its pro forma "joiner," granting of the County's late petition would give it full party status in this Court, and allow it to file a separate supplemental brief. The County's strategy at the Court of Appeals was to file separate briefing at every turn, despite the fact that it admitted its claims and arguments were entirely derivative of Brown's. Thus, the County and Brown succeeded in getting "two bites at the apple" in their briefing, dramatically increasing the harassed women's costs and fees on appeal. Should this Court grant the County's untimely "joinder" and

revive its right to proceed before this Court, and should this Court grant Brown's and the County's requests for review, the harassed women will again have to fight on two fronts this appeal over one discrete issue.

The County's motion for extension of time should be denied.

D. Answer to Petition for Review

As the County makes no argument in its joinder, but simply adopts Brown's petition, the harassed women have no additional response to offer beyond their response to Brown's petition.

E. The Harassed Women Should Be Awarded Reasonable Attorney Fees for Responding to the County's Frivolous Motion

RAP 18.9(a) provides that sanctions may be imposed on a party who files a frivolous appeal or fails to follow the rules of this Court. The harassed women respectfully request that such sanctions be imposed on the County in the form of compensatory reasonable attorney fees for having to respond to the County's frivolous motion for extension of time.

The County's motion offers no rationale or substantive justification for why extraordinary circumstances exist here. In fact, the County does not even recite the standard it must meet under RAP 18.8(b), let alone offer any argument as to why the standard is met.

Also, the County does not appear to have closely read this Court's order of August 19, 2014. In that order, this Court clearly explained to the

County that its "joinder" is actually a petition for review, and that the County must comply with RAP 18.8 if it seeks late filing. Yet the County's motion continues to characterize its filing as a "joinder" under RAP 10.1(g), and muses that "RAP 18.8(b) governs extensions of time within which to file certain documents. The designation of documents does not specifically include Joinders." Motion at 3.

The County expresses little interest in understanding or following the RAPs or the orders of this Court, and has violated RAP 10.1, 13.1, 13.4, and 18.8. An award of reasonable attorney fees is warranted here, and the harassed women respectfully request it.

F. Conclusion

This Court should reject the County's untimely "joinder" in Brown's petition for review. The County offers no explanation for its failure to understand and comply with the clear rules of this Court, and its bald assertion that it could not "coordinate" with Brown does not constitute extraordinary circumstances.

DATED this 4th day of September, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Answer to Motion by Klickitat County for Extension of Time to File Petition for Review and Answer to County's Petition in Supreme Court Cause No. 90475-8 to the following parties:

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Original E-filed with:

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

DATED: September 4, 2014, at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Matt Albers
Subject: RE: Eubanks, et al. v. David Brown and Klickitat County, et al., Cause No. 90475-8

Received 9-4-14

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: Matt Albers [mailto:Matt@tal-fitzlaw.com]
Sent: Thursday, September 04, 2014 1:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matt Albers
Subject: Eubanks, et al. v. David Brown and Klickitat County, et al., Cause No. 90475-8

Good afternoon,

Attached please find the following document for filing with the Court:

Document to be filed: Answer to Motion by Klickitat County for Extension of Time to File Petition for Review and Answer to County's Petition
Case Name: Eubanks, et al. v. David Brown and Klickitat County, et al.
Case Cause Number: 90475-8
Attorney Name and WSBA#: Sidney Tribe, WSBA #28820
Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

If you have any questions, please feel free to contact me. Thank you!

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