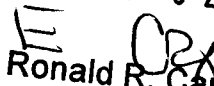


Received
Washington State Supreme Court

JUN - 8 2015


Ronald R. Carpenter
Clerk

No. 91737-0
SUPREME COURT
OF THE STATE OF WASHINGTON

VIRGINIA E. BURNETT,)	
)	
Plaintiff,)	
and)	MOTION FOR
)	EXTENSION OF TIME
STATE OF WASHINGTON,)	
DEPARTMENT OF CORRECTIONS, and)	
JOHN DOE GUARD,)	
)	
Defendants.)	
)	

1. IDENTITY OF MOVING PARTY

Virginia Burnett, Petitioner, asks for the relief designated in Part 2 of this motion.

2. STATEMENT OF RELIEF SOUGHT

Ms. Burnett requests that the Court grant her an extension of time for purposes of filing her Petition for Review with this Court.

3. FACTS RELEVANT TO MOTION¹

Rule of Appellate Procedure (RAP) 18.6(c) states that “a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing.” The rule then goes on to state

¹ See Declarations of Counsel, filed herewith.

that “any other paper, including a petition for review is timely filed only if it is received by the appellate court within the time permitted for filing.”

The Court of Appeals’ decision terminating review was filed April 16, 2015. Unfortunately, Mr. Julian, co-counsel for Ms. Burnett, lost his mother to cancer April 22, 2015, and was unable to focus on the petition for the next two weeks owing to a variety of reasons associated with this loss – all of which resulted in his working part-time at best.

Given the part-time status of Mr. Julian during this time, Ms. Carman was necessarily required to shoulder an extremely heavy case load, and was also unable to devote the time and attention necessary to properly draft the petition. Mr. Julian returned to full-time work status on May 11, 2015, and immediately focused upon drafting the petition for timely filing.

During the week prior to the filing deadline, Ms. Carman contacted the both this Court and the Court of Appeals to ensure the correctness of the filing deadline, as well as the appropriate mechanism for filing. At that time, she was informed by a Court of Appeals clerk that if the petition was placed in the U.S. Mail on the filing deadline, the petition would be considered timely filed for purposes of the applicable RAPs. Despite this information, counsel intended to hire a process server to file the petition in person at the Court so as to ensure timely filing should the necessity arise.

Unfortunately, on May 18, 2015, counsel's all-in-one machine (fax, copy, scan) was experiencing unusual technical difficulties, and so the option of timely sending the petition to a process server was made virtually impossible.

Relying upon the information provided by the clerk, counsel placed in the U.S. Mail Ms. Burnett's Petition for Review on May 18, 2015, the date it was to be filed with the Court pursuant to RAP 13.4(a). It was received by the Court of Appeals on May 19, 2015.

On May 28, 2015, counsel for Petitioner received a letter from this Court drawing attention to the fact that, pursuant to RAP 13.4(a) and RAP 18.6(c), the Petition for Review filed in this matter was *received* one day later than was required by those rules. This Court granted leave to file a motion for an extension of time for purposes of remedying the procedural deficiency, which is hereby respectfully submitted.

4. GROUNDS FOR RELIEF AND ARGUMENT

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). This Court has the discretion to "waive or alter the provisions of any of these rules in order to serve the ends of justice." *Id.* Moreover, RAP 18.8 authorizes an extension of time in order to serve the ends of justice, subject to those restrictions in RAP 18.8(b).

RAP 18.8(b) provides that an appellate court will only grant an extension of time in “extraordinary circumstances.” However, “extraordinary circumstances” include those instances where filings with the Court, despite reasonable diligence, were defective due to excusable error. *Hoirup v. Empire Airways Inc.*, 69 Wn. App. 479, 482, 848 P.2d 1337 (1993) (overruled on other grounds by *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997)).

In *Weeks v. Chief of Washington State Patrol*, counsel filed the notice of appeal with the incorrect court in violation of RAP 5.2(a), thereby causing the notice to be late when properly filed. 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). The Court of Appeals granted an extension of time, and that extension was affirmed by this Court on review. *Id.*

In its opinion, this Court noted that “it has been ‘apparent that the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.’” *Id.* at 896 (quoting *First Federal Savings & Loan Ass’n of Walla Walla v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)). Also pertinent to this Court’s decision was the fact that the appellant had made a good-faith effort “at timely compliance with the Rule” and that a strict application of form would defeat the purpose of the rules, which is to “promote justice and facilitate the decision of cases on the merits.” *Id.*

This Court has made exceptions for similar reasons in other matters. *See State v. Ashbaugh*, 90 Wn.2d 432, 438-39, 583 P.2d 1206 (1978) (holding that failure to timely pay a filing fee was a “mere oversight” on the part of counsel, and that it was timely corrected once brought to his attention, and that the ends of justice are not served by dismissing an appeal); *Scannel v. State*, 128 Wn.2d 829, 912 P.2d 489 (1996) (reversing a Court of Appeals’ “drastic” decision dismissing an appeal that did not comply with the RAPs owing to an “innocent mistake,” where a good-faith effort to comply was made).

Moreover, this Court has historically been unwilling to punish litigants for the neglect of their counsel, choosing instead to impose terms upon counsel. *See Beagle v. Beagle*, 55 Wn.2d 908, 349 P.2d 241 (1966); *Neal v. Green*, 68 Wn.2d 415, 413 P.2d 339 (1966). This is also contemplated by RAP 18.9(a). To the extent that counsel for Ms. Burnett could be considered neglectful, it was excusable, and certainly did not occur as a result of bad faith, but rather, as a result of extraordinary circumstances. Accordingly, Ms. Burnett should not be punished for the actions of her counsel by having her petition dismissed. Should a penalty issue, it should rest against the counsel undersigned.

While it cannot be disputed that the petition was received by the Court the day following the applicable deadline, the instant case involves


not only extraordinary circumstances, but also a good-faith effort to fully comply with the applicable rules. Counsel for Ms. Burnett found themselves in a difficult situation owing both to Mr. Julian's personal tragedy and the unfortunate timing of the machine failure. Despite this, counsel attempted to comply with the applicable rules by previously checking matters with both appellate courts, and subsequently relying upon the statements made to them by the clerk at the Court of Appeals when filing by mail.

It would be an unduly harsh penalty for Ms. Burnett if this Court were to dismiss the petition owing to the excusable neglect of counsel, particularly given that this situation differs greatly from those which have historically not been condoned by this Court, owing to "willful and unexcusable failure to comply with applicable appellate rules." *Ashbaugh*, 90 Wn.2d at 39.


In keeping with these considerations, and in light of the extraordinary situation in the instant case, Ms. Burnett respectfully requests that the Court grant her an extension of time to cure the procedural issue at hand, and reach the merits of her petition, as the issues raised therein are matters of public import with regard to injured workers.

RESPECTFULLY SUBMITTED this 3rd day of June, 2015 in

Walla Walla, Washington by:



John C. Julian, WSBA #43214
Attorney for Petitioner



Janelle M. Carman, WSBA #31537
Attorney for Petitioner