

No. 92313-2

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IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 72635-8-1)

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife,

Petitioners,

v.

ALCOA, INC.,

Respondent.

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

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I. MOVING PARTY AND RELIEF SOUGHT

Pursuant to RAP 18.8(a), Plaintiff-Petitioner Peggy Kalahar hereby moves, as the Personal Representative of the Estate of John Kalahar, for an extension of time to file her Petition for Review of the Court of Appeals' August 24, 2015 unpublished decision affirming the summary judgment dismissal of the Kalahars' intentional injury claim against Alcoa, Inc. *Kalahar v. Alcoa, Inc.*, No. 72635-8-I, 2015 WL 5012588 (Wn. Ct. App. Aug. 24, 2015). Petitioner respectfully asks that the Court extend the 30-day deadline for filing a petition for review set forth in RAP 13.4(a) by one day, deeming the Petition for Review filed in this matter on September 24, 2015, timely. As set forth herein, it would be exceedingly unjust if the effect of a 24-hour filing delay—precipitated by a docketing error that went undetected by Petitioner's counsel during an ongoing trial in another matter—was the deprivation of Mrs. Kalahar's ability to seek review of a decision ending her case against Alcoa on behalf of her late husband.

II. FACTS RELEVANT TO MOTION

Petitioner filed her Petition for Review on September 24, 2015, one day after the 30-day window for seeking review of the Court of Appeals' August 24th decision terminating review. This Court received Plaintiff's

Petition for Review on September 24, 2015.¹ Pursuant to RAP 13.4(a), a petition for review must be filed and received by the Court within 30 days after a decision terminating review is filed.

Due to a misunderstanding held by Petitioner's counsel's staff, the 30-day deadline for filing a petition for review of the Court of Appeals' unpublished decision was calculated by counting 30 calendar days, but skipping Labor Day, under the mistaken belief that court holidays were not included in the calculation of the deadline. *See* Declaration of Jolie Counts at ¶2-3. Unaware of this miscalculation, Petitioner prepared her Petition for Review with the resultant misapprehension that the deadline for filing was September 24, 2015. Consequently, operating under the mistaken deadline, the Petition for Review was filed and received by this Court on September 24, 2015.

At the time Petitioner was preparing her brief, Petitioner's counsel's firm was engaged in a two-week long trial in another matter in United States District Court in Tacoma. Working within the constraints of the ongoing trial, Petitioner's counsel finalized the Petition for Review and filed it on September 24, 2015. This perfect storm coalescing in the days leading up to Petitioner's one-day late filing, while not justifying the oversight,

¹ *See* Letter dated October 2, 2015, from Ronald R. Carpenter, Supreme Court Clerk.

explains how, what ultimately was the result of a pure docketing error, was not identified and rectified by Petitioner's counsel as it might have been had circumstances been otherwise.

III. GROUNDS FOR RELIEF AND ARGUMENT

Rule of Appellate Procedure 18.8(a) empowers this Court, "on its own initiative or on motion of a party," to "waive or alter the provisions of any of [the Rules of Appellate Procedure]" and to "enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice." Similarly, RAP 1.2(a) provides that the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits..."

Extension of time to file a petition for review, however, is tempered by RAP 18.8(b)'s qualification that such relief will only be granted "in extraordinary circumstances and to prevent a gross miscarriage of justice." While RAP 18.8(b) establishes a rigorous test for extending the time to seek review in an appellate court, the test is satisfied in cases where "the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765-66, 764 P.2d 653, 654 (1988).

In such cases of excusable error, "the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's

reasonably diligent conduct.” *Id.* at 766. Here, Petitioner respectfully and regretfully requests that the Court excuse counsel’s oversight in failing to identify the docketing error that lead to the filing of her Petition for Review one day late because penalizing the one-day delay with dismissal of Petitioner’s appeal would effectuate a gross miscarriage of justice.

Given the circumstances attending the docketing error and counsel’s failure to identify and correct it, the ends of justice will be best served by granting the requested extension of time. This case is distinguishable from cases in which a party has sought extension of time after waiting several days past the expiration of a deadline before filing their appeal. *Cf. Beckman ex rel. Beckman v. State, Dep’t of Soc. & Health Servs.*, 102 Wn. App. 687, 694, 11 P.3d 313, 316 (2000) and *Reichelt*, 52 Wn. App. at 766 (denying extension of time for filing notices of appeal that were filed ten days late).

More analogously, this Court has previously permitted extension of time when inequity would result from harsh application of the rules setting deadlines for seeking appellate review. *Moore v. Burdman*, 84 Wn. 2d 408, 414, 526 P.2d 893, 897 (1974). In the *Moore* case, which pre-dates the adoption of the Rules of Appellate Procedure, this Court “permitted a case to be heard even though the notice of appeal was filed one day late, where

it was not disputed that the delay was attributable to the postal authorities and not to the negligence of the petitioner.” *Id.* at 414.

Likewise, in a different case, when an appellant mistakenly filed a notice of appeal in the Court of Appeals, rather than the trial court as required by the Rules of Appellate Procedure, the appellate court extended time to allow the case to be heard on the merits and this Court affirmed. *Weeks v. Chief of Washington State Patrol*, 96 Wn. 2d 893, 896, 639 P.2d 732, 733 (1982). In *Weeks*, this Court observed that the Rules of Appellate Procedure “were designed to allow some flexibility to avoid harsh results.” *Id.* at 895 (citing Comment, RAP 18.8). In affirming the Court of Appeals’ extension of time, this Court echoed the sentiment that excusing an inadvertent error so that the merits of the controversy would be resolved furthers the interests of justice and dictates that substance prevail over form. 96 Wn. 2d at 896.

While not determinative, it also bears observation that no prejudice will be inflicted upon Respondent Alcoa, Inc. in the granting of an extension of time to countenance a 24-hour delay in receipt of the Petition for Review. In stark contrast, the prejudice to Petitioner is grave: if her Petition for Review is dismissed on the basis of untimeliness, Petitioner will be denied the opportunity to seek appellate review to this Court. Accordingly, justice requires that an extension of time be granted to excuse Petitioner’s

docketing error in order that this case be allowed to proceed on the merits to its resolution.²

The issues raised by the Petition for Review, as elaborated in the Petition itself, are of substantial public interest and importance, highlighting the imperative of facilitating a decision of this case on the merits of those issues. *See* RAP 1.2(a). Petitioner's pursuit of review seeks to present for the Court's adjudication the question of whether the Court of Appeals erroneously interpreted this Court's recent decision in *Walston v. Boeing Co.*, 181 Wn. 2d 391, 334 P.3d 519 (2014), as precluding a diseased worker from ever bringing an intentional injury claim—no matter how culpable an employer's conduct—where the injury at issue is a latent occupational disease. Consideration of Mrs. Kalahar's Petition will resolve the question of whether intentionally-inflicted occupational disease may ever be the subject of an intentional injury claim under RCW 51.24.020 in the wake of *Walston*.

The Petitioner has sought review of the decision below to forestall a legal landscape in which Washington employers who deliberately coerce their employees to sustain toxic exposures will enjoy

² Petitioner's failure to pay the \$200 filing fee at the time of initially filing her Petition for Review was immediately cured. The failure to timely pay a filing fee is not a grounds for dismissal under RAP 18.8(b), particularly where, as here, the omission was a mere oversight that is corrected as soon as it is brought to the petitioner's attention. *State v. Ashbaugh*, 90 Wn. 2d 432, 438, 583 P.2d 1206, 1210 (1978).

blanket immunity because of the unavoidable reality that no disease process is ever 100 percent certain to occur. The perverse incentives of permitting employers to inflict latent-disease causing injuries upon their employees, as permitted by the Court of Appeals' application of *Walston*, is in unequivocal tension with Washington's legislative and judicial policy favoring protection of workers from workplace injury and illness. Yet, Mrs. Kalahar's efforts to clarify this facet of Washington's post-*Walston* intentional injury jurisprudence will be postponed, if not frustrated, by virtue of a 24-hour mistake.

Such a harsh consequence would be disproportionate and inconsistent with RAP 1.2(a)'s dictate that the Rules of Appellate Procedure be implemented to "promote justice and facilitate the decision of cases on the merits." To avoid a gross miscarriage of justice by which Peggy Kalahar is foreclosed from pursuing Mr. Kalahar's intentional injury claim against Alcoa for causing his mesothelioma and death, this Court should grant Petitioner's motion for extension of time and accept review to correct the Court of Appeals' error and clarify Washington law.


IV. CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant her Motion for Extension of Time, and that the Petition for Review, filed on September 24, 2015, be deemed timely.

DATED this 6th day of October, 2015.

Respectfully submitted,

BERGMAN DRAPER LADENBURG

BY: 
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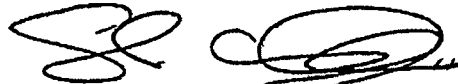
CERTIFICATE OF SERVICE

I certify that on October 6, 2015, I caused to be served a true and correct copy of the foregoing document upon:

Mark B. Tuvim
Kevin J. Craig
GORDON & REES, LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
(Via Electronic Mail and Messenger)

Dated at Seattle, Washington this 6th day of October 2015.

BERGMAN DRAPER LADENBURG

A handwritten signature in black ink, appearing to read 'Shane A. Ishii-Huffer', is written over a horizontal line.

Shane A. Ishii-Huffer