

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

No. 95701-1

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC,
Petitioner, Appellants/Cross-Respondents

v.

LAW OFFICE OF BRIAN J. WAID; BRIAN J. WAID and JANE DOE
WAID, and their marital community,
Respondents/Cross-Appellants.

RESPONDENTS/CROSS-APPELLANTS' ANSWER OBJECTING TO
APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND RELIEF REQUESTED

As the party petitioning for discretionary review, Sandra Ferguson and The Ferguson Firm (“Ferguson”) bear the burden of demonstrating that the Court of Appeals erred in denying Ferguson’s Motion to Modify the Clerk’s Notation Ruling -- thus terminating her appeal -- and showing that the aforementioned decision meets one of the applicable standards for accepting a petition under RAP 13.4(b).¹ Ferguson cannot meet her burden. Rather, the Petition for Review is nothing more than an additional stall tactic in Ferguson’s strategy of delaying any resolution to this case she initially filed in October 2014.

Instead, Ferguson merely rehashes the same points previously raised and rejected by the court, and again argues the merits of her underlying dispute with the Law Office Of Brian J. Waid, Brian J. Waid, and Jane Doe Waid (“Waid”). The Court of Appeals correctly denied Ferguson’s Motion to Modify the Court Clerk’s Ruling. This Court should therefore deny Ferguson’s petition for discretionary review.

¹ To avoid confusion, Waid uses the same designations Ferguson uses in her Petition: Ferguson is referred to as Petitioners or Appellants and Waid as Respondents/Cross-Appellants. However, Waid notes based on Ferguson’s appeal being dismissed, the Court of Appeals has re-designated the parties to appropriately reflect their posture in the case: Waid as Appellant and Ferguson as Respondent.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Waid suggests the issue before this Court is more appropriately formulated as follows:

1. Should the Court deny discretionary review because the petitioner fails to meet any of the RAP 13.4(b) standards?

III. COUNTERSTATEMENT OF THE FACTS

A detailed history of Ferguson's failure to pursue her appeal may be necessary to fully understand the Court of Appeals' decision to terminate Ferguson's appeal upon the untimely filing of her brief.

Trial in Ferguson's case against Waid was scheduled to begin November 30, 2015.² The parties appeared in court, and Waid was prepared to proceed, at which time the trial court dismissed Ferguson's remaining claims against Waid for failure to comply with numerous court orders.³

² This action is referred to as *Ferguson I*.

³ Sandra Ferguson, who had only just withdrawn as attorney of record in the case, appeared in court 15 minutes late and unprepared to proceed with trial. Waid only that morning received a 59 page trial brief from Ferguson and had not received any exhibits or a witness list. Those untimely submissions were the latest in a long history of Ferguson's disregard for the court rules and court orders. Ferguson's counsel, Emily Rains, appeared telephonically from Utah. After unsuccessfully moving for a continuance of 180 days in the months leading up to trial, rather than prepare for trial Ferguson sought emergency discretionary review of the continuance denial (Court of Appeals No. 74159-4-I). Review was denied on November 13, 2015. On the first day of trial, Ferguson stated she could not proceed with trial due health reasons (although she had not sought any accommodations). Waid opposed a truncated trial. The trial court decided to dismiss the case without prejudice due to "Plaintiffs' repeated violations of Court orders in preparation for trial, pursuant to RCW 4.56.120(7) and CR 41. . ."

Ferguson filed a notice of appeal on December 30, 2015. Accordingly, her designation of clerk's papers and statement of arrangements were due by January 29, 2016. Ferguson did not perfect the record by that date.

The Court of Appeals notified Ferguson on February 4, 2016 that her designation of clerk's papers and statement of arrangements were not of record and gave her until February 14, 2016 to perfect the record.⁴ Ferguson, again, did not perfect the record as that court instructed and did not move for an extension of time as allowed in the notation ruling.

On March 4, 2016, the Court of Appeals held a hearing to consider whether to impose sanctions or to dismiss Ferguson's appeal for non-compliance. Ferguson did not appear or respond. Waid appeared.

On March 8, 2016, the Court of Appeals instructed Ferguson, in a notation ruling, to designate her record by March 18, 2016 or risk dismissal of her appeal without further notice for continuing non-compliance with the appellate court's February 4, 2016 notation ruling on the same subject.

Despite being given more time to comply, Ferguson still did not perfect her appeal by March 18, 2016. She also failed to file her opening

⁴ The Court of Appeals warned Ferguson, if she failed to comply, the Court would set a motion to impose sanctions and/or dismiss in accordance with RAP 18.9 on March 4, 2016. The Court has never imposed sanctions despite Ferguson's delays.

brief on May 16, 2016. Instead, Ferguson filed a motion for voluntary withdrawal of review and to reverse and remand to the trial court for further proceedings.

The Court of Appeals considered Ferguson's motion without oral argument and issued a notation ruling on June 9, 2016. The court ruled: "Ferguson's motion's is denied." Ferguson was *again* instructed to file her clerk's papers and opening brief, this time by July 1, 2016, or "her appeal . . . will be dismissed as abandoned, without further notice of this Court."⁵ Ferguson filed a motion to modify the June 9, 2016 ruling rather than comply with it. While that motion was pending, Ferguson filed, and the court granted, a Motion to Extend the deadline for her to file her opening brief until August 15, 2016. She filed an additional motion to extend that deadline on August 9, 2016. On August 16, 2016, more than eight months after initially filing her notice of appeal, she filed her designation of clerk's papers.⁶

A three judge panel of the Court of Appeals denied Ferguson's motion to modify the ruling denying a remand to the trial court for further proceedings on October 5, 2016. The Court of Appeals gave Ferguson her *third warning* to prosecute the appeal or face dismissal, directing her to

⁵ She was also instructed to pay the required filing fee and to file a motion for discretionary review in *Ferguson II* by June 24, 2016.

⁶ The designation, however, is signed with a date in June 2016.

file an opening brief within 30 days of the court's order. Having given Ferguson nearly a year to complete her opening brief, the Court of Appeals specifically noted, "[n]o further extensions of time will be permitted." Not surprisingly, Ferguson did not file her brief but instead sought discretionary review by the Supreme Court of the Commissioner's order.

The Supreme Court Commissioner denied review of Ferguson's motion to dismiss/remand on March 21, 2017. The Commissioner echoed what the Court of Appeals Commissioner told Ferguson nearly a year prior, on June 9, 2016--- either pursue the appeal or dismiss the appeal. Once again, Ferguson chose to delay any substantive consideration of the appeal on its merits by filing a motion to modify the Supreme Court Commissioner's Ruling on April 24, 2017.

A three judge panel of this Court denied Ferguson's motion to modify on June 28, 2017. On July 20, 2017, the Court of Appeals informed Ferguson that her clerk's papers were not in the record of the appellate court and instructed her to contact the trial court by July 31 to transmit the material—which she did. On August 8, 2017, the Court of Appeals issued a notation ruling setting September 7, 2017 as the deadline for Ferguson to file her initial brief—nearly two years from the time her notice of appeal was filed. The ruling once again warned, “[i]f the

Appellant does not file an opening brief by September 7, 2017 in compliance with the terms of the October 5, 2016 order, the case will be accordingly dismissed without further notice.” This was the third time the Court of Appeals gave Ferguson a deadline to file her opening brief--along with a warning that a failure to do so would result in dismissal of her appeal without further notice.⁷

September 7, 2017 passed, and as Ferguson noted in her petition, she did not file her brief. On September 11, 2017, the Court dismissed Ferguson’s appeal for failure to file her brief. Waid’s appeal remains to be heard and was not dismissed, and therefore, the Court of Appeals issued a ruling containing a briefing schedule for Waid to file his opening brief by October 16, 2017. Waid’s opening brief has now been filed.

On September 25, 2017, 18 days after Ferguson’s brief was due and 14 days after her appeal was dismissed, Ferguson finally filed her brief as an exhibit to two motions: (1) a Motion for Extension of Time to File; and (2) a Motion to Modify the Court Clerk’s Dismissal of the Appeal. On September 26, 2017, 19 days after Ferguson’s brief was due, and 15 days after her appeal was dismissed, Waid received the motion to extend the deadline for Ferguson to file her opening brief, along with a motion to modify the dismissal and a copy of her opening brief.

⁷ Prior instances, discussed *supra*, were the July 1, 2016 notation ruling and the October 5, 2016 ruling.

On March 6, 2018, the Court of Appeals denied Ferguson's Motion for Extension of Time and Motion to Modify, thus terminating the appeal. This order followed consideration of Ferguson's motions, Waid's Answer indicating Ferguson had been given multiple chances to file her brief and simply failed to do so, and a Reply by Ferguson.

On April 5, 2018, Ferguson filed this Petition for Discretionary Review, asking this court to review the Court of Appeals decision to terminate her appeal. Quite simply, Ferguson boldly requests this Court to disregard the three previous warnings and the September 11 dismissal itself, and accept Ferguson's untimely brief.

IV. ARGUMENT IN SUPPORT OF ANSWER

RAP 13.4(b) sets forth the limited circumstances under which this Court will accept discretionary review of a decision terminating review by the Court of Appeals. A petition for review will be accepted by the Supreme Court only if: (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) the decision is in conflict with a published decision of the Court of Appeals; or (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court RAP 13(b)(1) – (4).

The Court of Appeals' denial of modification does not conflict with prior Court of Appeals or Supreme Court decisions. Nor does it raise a significant constitutional question of law or involve an issue of substantial public interest. Moreover, Ferguson's petition scarcely discusses these standards for accepting review under RAP 13.4, and instead merely claims that the Court of Appeals erred because Ferguson's appeal cannot now be decided on its merits. Ferguson requests leniency from this Court - yet again - in order to hear the merits of her case. However, Ferguson was already given multiple prior warnings to meet deadlines or face immediate dismissal of the appeal. Ferguson repeatedly failed to file on time, and the Court of Appeals correctly denied her motion to modify, effectively terminating her appeal. Therefore, this court should deny Ferguson's petition for discretionary review.

A. **The Court Should Deny Ferguson's Petition Because There is No Conflict of Law between the Court of Appeals Decision and Past Washington Supreme Court and Appellate Decisions.**

This court will only grant review under RAP 13.4(b)(1) or (2) if Ferguson demonstrates that there is a conflict of law between the Court of Appeals decision and past Washington Supreme Court or Appellate decisions. RAP 13.4(b)(1) and (2). Here, Ferguson fails to identify any

conflict of law. Instead, she merely lists cases⁸ – regardless of the field of law - in which the court chose to exercise discretion and hear a case on the merits. For example, Ferguson cites *State v. Johnson*, 96 Wash. 2d 926 (1982) (whether concurrent sentences violated double jeopardy) simply because this Court disagreed with the Court of Appeals, even though the nature of the law in *Johnson* (criminal) is completely unrelated to this matter.

Ferguson’s argument does not demonstrate any conflict of law; rather, she advocates for continued leniency from this Court, which is not a basis for discretionary review under RAP 13.4. The Court of Appeals denied Ferguson’s motions following her failure to file her brief on time, even though the court repeatedly warned that tardiness would result in dismissal of her appeal, and even after the court granted her multiple extensions to file. These circumstances do not apply to the requirements of RAP 13.4(b)(1) and (2), and neither does the authority that Ferguson provided. The Court of Appeals order does not conflict with its own law or decision from this Court. Ferguson’s petition for review should be denied.

⁸ Ferguson cites *State v. Calle*, 125 Wash. 2d 769 (1995) (whether multiple convictions for a single act of intercourse violated double jeopardy protections), even though the Court of Appeals decision in this case is unrelated in law to *Calle*. Further, the other cases Ferguson lists are taken directly from the RAP 13.4 Washington Practice Series without any additional argument.

B. This Court Should Deny Ferguson’s Petition Because No Question of Law under the Constitution of the State of Washington or of the United States is Involved.

This court will only grant discretionary review of a Court of Appeals decision under RAP 13.4(b)(3) if it involves a significant Washington or United States constitutional question. RAP 13.4(b)(3). Clearly, no constitutional question is involved.

The Court of Appeals properly denied Ferguson’s motions because of repeated tardiness and blatant disregard of court orders, a decision that did not infringe on Ferguson’s rights or implicate any constitutional questions. While Ferguson does not identify any specific constitutional issues, the arguments imply that the Court of Appeals decision violated her opportunity to be heard. Ferguson contends, “...there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or the issue”. Pet. 25. Here, the Court of Appeals did not violate Ferguson’s right to be heard.

This Court reserves discretionary review due to violations of due process for circumstances where the petitioner has not received notice of or the opportunity to be heard. For example, in *State v. Pence*, a 17 year-old defendant was not offered notice of and an opportunity to be heard by the juvenile court, and was required to appear in Lincoln County Superior Court as an adult, once turning 18. *State v. Pence*, 172 Wn. App. 1001

(2012). Following appeal, the Washington State Supreme Court Commissioner granted discretionary review on the grounds that due process may have been violated. *Id.* at 1001. This case is unlike *State v. Pence* because Ferguson received plenty of notice and opportunity to present her appeal. On December 30, 2015, Ferguson submitted her original notice of appeal. In the two and a half years following, the court has given Ferguson several extensions and notifications regarding her brief, yet she still fails to comply. Ferguson contends that she could not comply, because of the “extensive procedural history and factual record...” involving this matter, because of her inability to find a malpractice attorney, and because she did not realize the amount of work necessary to write a brief. Pet. 18-19. Ferguson has had plenty of time to file her brief, and was consistently reminded of that fact. Therefore, the circumstances of this case do not apply to RAP 13.4(b)(3), and Ferguson’s petition for review should be denied.

C. **This Court Should Deny Ferguson’s Petition Because the Petition Does Not Involve an Issue of Substantial Public Interest.**

This court will only grant discretionary review of a Court of Appeals decision under RAP 13.4(b)(4) if the petition for review involves an issue of substantial public interest.

An issue is of substantial interest to the public when evidence

indicates a high likelihood that it would affect a substantial portion of the public beyond the parties to the proceeding. *State v. Watson*, 155 Wn.2d 574 (2005). For example, in *State v. Watson*, the Supreme Court granted discretionary review of a Court of Appeals decision under RAP 13.4(b)(4) because the decision had the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a drug offender sentencing alternative was at issue. *Watson*, at 577. The *Watson* Court of Appeals decision changed the way in which sentences were offered for drug offenders. That magnitude of significance is not present in the Court of Appeals decision for this case.

Ferguson asserts that there is a public interest in determining when a lien for attorneys fees “authorized by law” violates the Rules of Professional Conduct that would apply to “Washington lawyers who require clear guidance from the appellate courts interpreting RPC 1.8(a) and 1.8(i)”. Pet. 20 – 23. Ferguson argues there is ambiguity related to liens for attorney’s fees within the RPCs, but fails to identify how a review of this issue by the Supreme Court would clarify. Unlike in *Watson*, where the decision in question objectively altered sentencing for specific types of offenders which necessitated review; Ferguson asks this Court to merely assume that a review of this issue would bring resolution. Further, even if Ferguson’s argument had merit, that is not why Ferguson’s appeal was

dismissed. Rather, it was dismissed due to her procedural failures—not the merits of any argument. The circumstances surrounding the dismissal of Ferguson’s appeal do not reach the level of a “substantial public interest” and, therefore, this court should deny Ferguson’s petition for review under RAP 13.4(b)(4).

V. CONCLUSION

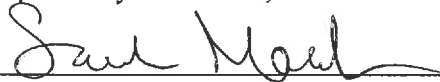
The Court simply did not err when it denied Ferguson’s motion to modify, effectively terminating her appeal. The Court provided Ferguson with multiple opportunities to submit her brief, yet she failed to comply, and the Court of Appeals was correct to terminate her appeal. The Supreme Court will only grant discretionary review of the Court of Appeals decision to terminate if one of the four factors provided in RAP 13.4(b) is satisfied. Ferguson’s petition for review scarcely mentions these factors and instead rehashes prior arguments that go directly to the merits of this case.

Ferguson’s ‘explanation’ for the missed deadline and untimely brief is nothing more than an inexcusable and self-serving statement that she was simply unable to meet her deadline. At no time in the 30 days following the August 8, 2017 notation ruling did Ferguson indicate to Waid or the Court of Appeals that she was working diligently on her brief but was not going to be able to meet the deadline. Further, in the 19 days

between the deadline and Ferguson's motions and apparent filing of her brief, she did not file anything with the Court of Appeals or the alert Waid that she still intended to file her brief. There is only one reason for that: she knew that if she requested yet more time to file her brief, she would be denied. Ferguson's pattern of callous disregard for deadlines must stop. The Court of Appeals correctly decided that Ferguson was at a dead end. Her excuses and attempted justification to prolong review of her appeal should not be considered. This Court should deny Ferguson's petition for discretionary review.

DATED this 7th day of May, 2018.

Respectfully submitted,



Kathleen A. Nelson, WSBA#22826

Sarah D. Macklin, WSBA #49624

LEWIS BRISBOIS BISGAARD & SMITH LLP

Attorneys for Respondents/Cross-Appellants

DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of the foregoing document in the manner set forth below:

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- via Overnight Mail
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Original e-filed with:

Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

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.

EXECUTED this 24th day of May, 2018.



Vicki Milbrad

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

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September 11, 2017

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CASE #: 74512-3-I

Sandra L. Ferguson, App/Cross-Res. v. Law Office of Brian J. Waid, Res/Cross-App.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on September 11, 2017, regarding appellant's failure to file appellant's opening brief by September 7, 2017:

As the conditions of the October 5, 2016 order and August 8, 2017 ruling have not been met, the appeal is accordingly dismissed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SANDRA L. FERGUSON and
THE FERGUSON FIRM, PLLC,

Appellants,

v.

LAW OFFICE OF BRIAN J. WAID,
BRIAN J. WAID and JANE DOE WAID,
and their marital community,

Respondents.

No. 74512-3-1

ORDER DENYING EXTENSION
OF TIME AND DENYING
MOTION TO MODIFY

Appellants Sandra Ferguson and the Ferguson Law Firm, PLLC, have moved to modify the court administrator/clerk's September 11, 2017 ruling dismissing the appeal for failure to file the opening brief. Appellants have also filed a motion to extend the time to file the opening brief. Respondents/Cross-Appellants have filed an answer, and appellants have filed a reply. We have considered the motions under RAP 18.8(a) and RAP 17.7 and have determined that both motions should be denied. Respondents' request for sanctions is denied without prejudice. Now, therefore, it is hereby

ORDERED that the motion for extension of time and the motion to modify are both denied. It is further

ORDERED that the appeal remains dismissed, and respondents' cross-appeal shall proceed.

Dated this 6th day of March, 2018.

Cox, J.

Spencer, J.

Schubert, J.

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STATE OF WASHINGTON
2018 MAR -6 PM 11:46

LEWIS BRISBOIS BISGAARD & SMITH LLP

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Transmittal Information

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Appellate Court Case Title: Sandra L. Ferguson, et al. v. Law Office of Brian J. Waid, et al.
Superior Court Case Number: 14-2-29265-1

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- mail@emilyrains.com
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