

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/22/2019 11:38 AM  
BY SUSAN L. CARLSON  
CLERK

No. 96598-6

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From Court of Appeals, Division One, Case No. 77016-1-I

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IN THE SUPREME COURT OF THE STATE  
OF WASHINGTON

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HEADSPACE INTERNATIONAL, LLC, a limited liability company  
formed in the State of California,

Appellant,

v.

PODWORKS CORP., a corporation in the State of Washington; and  
THOMAS WERTH, an individual residing in the State of Washington,

Respondents.

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**APPELLANT HEADSPACE INTERNATIONAL, LLC'S  
ANSWER TO MOTION FOR EXTENSION OF TIME TO FILE  
PETITION FOR DISCRETIONARY REVIEW**

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## **I. IDENTIFICATION OF PARTIES**

The moving party is Podworks Corp. and Thomas Werth (“Podworks”), the Respondents in the above-captioned matter. The non-moving party is Headspace International, LLC (“Headspace”), the Appellant in the above-captioned matter.

## **II. STATEMENT OF RELIEF SOUGHT**

Headspace hereby requests that this Court deny Podworks’ motion requesting an extension of time to file its petition for discretionary review after Podworks submitted its petition beyond the 30-day filing deadline provided in RAP 13.4(a).

## **III. RESPONSE TO STATEMENT OF FACTS**

The Court of Appeals, Division One, filed its decision in this matter on October 29, 2018. Op. at 1 (App. A). That same day, the Court Administrator for the Court of Appeals sent a letter notifying both parties of the decision and informing Podworks’ counsel of the deadline for filing a petition for review by this Court in accordance with RAP 13.4(a). *See* Letter to Counsel (App. B). Podworks admits that based on the filing date of the Court of Appeals’ decision and the deadline for filing provided in RAP 13.4(a), its petition for discretionary review was due on November 28, 2018. Mot. for Extension of Time 1. Podworks filed its petition for

discretionary review on November 29, 2018, one day after the filing deadline. *See* Pet. for Discretionary Review (App. C).

#### **IV. ARGUMENT WHY MOTION SHOULD BE DENIED**

RAP 18.8(b) permits an appellate court to permit a late request for an extension of time only “in extraordinary circumstances and to prevent a gross miscarriage of justice. . . .” This means that “ordinarily. . . the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time. . . .” RAP 18.8(b). Podworks incorrectly argues that this Court should permit an extension of time for filing its petition for discretionary review because appellate courts have granted such extensions of time pursuant to RAP 18.8(b) in similar cases involving “excusable neglect.”<sup>1</sup> Mot. for Extension of Time at 3-5. However, “excusable neglect” is not the standard provided in RAP 18.8(b).

RAP 18.8(b) is clear, it permits a late request for an extension of time only in “extraordinary circumstances.” This Court has rarely found

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<sup>1</sup> While “excusable neglect” is the standard in Superior Court Civil Rule 6(b)(2), the Rules of Appellate Procedure impose a different, more difficult standard for parties moving the court for an extension of time. *Compare* CR 6(b)(2) (“the [superior] court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect . . . .”), *with* RAP 18.8(b) (“The 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 . . . a petition for review . . . .”).

that the high standard set forth in RAP 18.8(b) was satisfied. *See State v. Hand*, 177 Wn.2d 1015, 308 P.3d 588, 589 (2013) (citing *Shumway v. Payne*, 136 Wn.2d 383, 395, 963 P.2d 349 (1998); *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988)). Cases involving negligence, or a lack of reasonable diligence, by counsel do not satisfy this standard. *See Hand*, 308 P.3d at 589 (quoting *Beckman ex rel. Beckman v. State*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000)).

While Headspace sympathizes with opposing counsel’s calendaring notation error, reasonable mistakes made by counsel do not justify extending the time to file a notice of appeal. *See Reichelt*, 52 Wn. App. at 766 (law firm representing defendants lost attorney during 30-day notice of appeal period and that firm’s appellate attorney had unusually heavy workload). The burden is on Podworks to show “extraordinary circumstances” for its failure to file a timely petition for discretionary review and to demonstrate “sound reasons to abandon the [judicial] preference for finality.” *Schaeferco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993). Podworks has failed to meet their burden. The following paragraphs provide argument that: (i) Podworks has not shown “extraordinary circumstances”; and (ii) the cases cited by Podworks are factually distinguishable.

**A. Podworks Has Not Presented “Extraordinary Circumstances.”**

“‘Extraordinary circumstances’ include instances in which ‘the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.’” *Hand*, 308 P.3d at 589 (quoting *Shumway*, 136 Wn.2d at 395; *Reichelt*, 52 Wn. App. at 765). Mistake of counsel, together with an absence of prejudice to the other party, does not constitute extraordinary circumstances under this standard. *Reichelt*, 52 Wn. App. at 766; *see also Beckman*, 102 Wn. App. at 695-96.

In both *Reichelt* and *Beckman*, the Court of Appeals refused to extend the time for filing notice of appeal based on arguments similar to Podworks’. In *Reichelt*, the appellant was seeking an extension of time for filing a notice of appeal. 52 Wn. App. at 764-65. To support its motion for extension, the appellant argued that because one of the two trial attorneys on the case left the firm during the 30 days following entry of judgment, and the firm’s appellate attorney had an unusually heavy work load at the time, extraordinary circumstances existed justifying an extension of time to avoid a gross miscarriage of justice. *Id.* at 764. The appellant also admitted that they “made a mistake,” but focused on the lack of prejudice to the responding party since the filing was only a few days late. *Id.* at 766. The court considered a lack of prejudice to the respondent as irrelevant and noted that the prejudice of granting an extension of time would be “to the

appellate system and to litigants generally, who are entitled to an end to their day in court.” *Id.* at 766 n.2. The court ultimately rejected the appellant’s arguments. *Id.* at 766.

In *Beckman*, the State of Washington moved the court to allow a late filing of its notice of appeal after it had filed the notice late. *Beckman*, 102 Wn. App. at 691. To support its motion, the State argued that a state attorney’s intentional failure to act once she received notice documents from opposing counsel amounted to “extraordinary circumstances” for purposes of RAP 18.8(b). *Id.* at 695. However, the court found no evidence of intentional failure to act; rather, the court determined that at best, the evidence showed the attorney was not “‘reasonably diligent’ in ensuring the documents were timely routed to the responsible attorneys.” *Id.* This negligence, or lack of reasonable diligence, the court said, does not demonstrate “extraordinary circumstances.” *Id.* The court added that even if the attorney had acted intentionally, it would not have constituted “extraordinary circumstances” because it was ultimately the Attorney General’s Office’s lack of reasonable procedure for calendaring hearings that caused the untimely filing.<sup>2</sup> *Id.* The court denied the State’s motion to

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<sup>2</sup> In *Beckman*, the State’s own internal investigation had found the following problems: “The attorneys individually managed and calendared their own cases; the office had no central system for calendaring hearings; the staff



extend time for filing the notice of appeal because it failed to “demonstrate ‘extraordinary circumstances’ and ‘a gross miscarriage of justice’ that would allow [the] court to overlook the late filing.” *Id.* at 696.

Podworks’ arguments are similarly insufficient to merit overlooking its late filing. Podworks contends that its counsel was reasonably diligent in maintaining two dockets with the purpose of catching docketing errors and that its counsel made a “bona fide attempt” to timely file its petition. Mot. for Extension of Time 4. However, even if true, these reasons for the late filing fall into the category of attorney mistake and do not constitute extraordinary circumstances. As discussed above, the standard for “extraordinary circumstances” under RAP 18.8(b) requires demonstrating that *despite the reasonable diligence*, the filing was defective due to excusable error in interpreting the rules or circumstances beyond its control. *See Hand*, 308 P.3d at 589 (quoting *Shumway*, 136 Wn.2d at 395; *Reichelt*, 52 Wn. App. at 765).

Podworks’ counsel admits he utilizes his own separate calendaring system, and that it was this separate calendaring system that included the improper deadline. Mot. for Extension of Time 2. Counsel also admits he

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was inexperienced and lacked training; there was no coordination between the responsible attorneys and no system for ‘catching’ administrative errors such as the one [at issue in *Beckman*].” *Id.* at 695-96.

failed to “cross-check the dockets due to a heavy workload following the intervening Thanksgiving holiday.” *Id.* at 2. These were circumstances within counsel’s control and not the type of “extraordinary circumstances” contemplated by RAP 18.8(b). *See Beckman*, 102 Wn. App. at 691 (quoting *State v. One 1977 Blue Ford Pick-up Truck*, 447 A.2d 1226, 1231 (Me. 1982) (“The failure to take necessary steps. . . even during periods of unusual circumstances in an attorney’s office, is not an acceptable excuse for any resulting failure to obtain personal knowledge of the entry of judgment on the part of counsel. . . .”).

To conclude, Podworks has not met its burden of demonstrating “extraordinary circumstances” to justify granting an extension under RAP 18.8(b).

**B. Cases Cited by Podworks are Factually Distinguishable.**

Each of the cases cited by Podworks to support its motion are factually distinguishable from the case at hand. Podworks cites *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (where a petition for discretionary review was *timely* filed, but filed in the wrong court); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (where the notice was *timely* filed but rejected by this Court for lack of filing fee); and *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679 (1983) (where notice was considered

*timely* when filed within 30 days of entry of stipulated amended judgment). In each of these cases the moving party actually filed the notice of appeal within the 30-day appeal period, but some aspect of the filing was challenged. *See Reichelt*, 52 Wn. App. at 765 (distinguishing the same three cases on the same grounds). Unlike in the cases cited by Podworks, Podworks failed to file their notice of appeal within the 30-day appeal period. In addition, Podworks also failed to file a motion for extension of time within the 30-day appeal period. To conclude, the cases cited by Podworks are factually distinguishable from the present case.

#### V. CONCLUSION

For the reasons articulated above, Podworks has failed to establish “extraordinary circumstances” justifying an extension of time to file its petition for discretionary review in accordance with RAP 18.8(b). This case should be returned to the trial court for continued proceedings. Podworks’ Motion for extension of time should be denied and its late-filed petition for review dismissed as untimely.

Dated: January 21, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is 5400 California Ave. SW Ste E, Seattle, WA 98136. On January 21, 2019, I electronically filed the foregoing brief with the Washington State Supreme Court, which will send notifications of such filing to the following persons:

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I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on January 21, 2019, at Seattle, WA.

DATED: January 21, 2019.

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**January 22, 2019 - 11:38 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96598-6  
**Appellate Court Case Title:** Headspace International, LLC v. Podworks Corp., et al.  
**Superior Court Case Number:** 17-2-01751-5

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