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IN THE SUPREME COURT
STATE OF WASHINGTON

Washington State
Supreme Court

Case No. 97200-1

LORI JONES JORDAN
Respondent

v.

STEPHEN E. WHITTED
Petitioner

**PETITIONER'S REPLY TO RESPONDENT'S
RESPONSE TO MOTION TO ENLARGE TIME TO
FILE PETITION FOR REVIEW**

COMES NOW Petitioner, Stephen E. Whitted, proceeding *pro se*, and pursuant to Rule of Appellate Procedure 18.8(b), and hereby files this his Reply to Respondents response to petitioner's motion to enlarge time to file petition for review. In support of this Reply, Petitioner respectfully states the following:

I. FACTS AND PROCEDURAL POSTURE

1. Division I of the Court of Appels decided Case No. 77967 – 2 – 1 and issued an unpublished opinion in that matter on April 22,

2019.

2. Pursuant to RAP 13.4(a), a Petition for Discretionary Review was due within 30 days after the decision terminating review was filed. In this case, the Petition for Discretionary Review was due to be filed on May 22, 2013.

3. Thereafter, on May 1, 2019, the undersigned mistakenly filed a Notice of Appeal of the April 22, 2019 decision with the Court of Appeals. This was done 21 days before the deadline.

4. On May 15, 2019, the undersigned received correspondence from the Supreme Court Deputy Clerk informing of the mistaken filing. That correspondence informed that the Petition for Review was due to be filed in the Supreme Court by close of business on May 22, 2019.

5. The undersigned prepared a formal Petition for Review in full compliance with the requirements of RAP 13.4. The undersigned attempted to file the Petition electronically before the deadline, on May 21, 2019, but was unable to do so. Also, on the morning of May 21, 2019 at 10:49 a. m. (EST), the undersigned forwarded the Petition for Discretionary Review to the Clerk of the Supreme Court with a second copy via Priority Mail Express. (See, Exhibit "A"). The undersigned paid the priority mailing express fee of \$25.50. (See, Exhibit "B"). The

undersigned included the \$200.00 filing fee in the express mailing. (See, Exhibit “C”). Significantly, the postal clerk informed that the priority mail express package would be delivered in Olympia, Washington on the following day, May 22, 2019. Priority Mail Express is guaranteed for next – day delivery.

6. On May 22, 2019, Lori Jordan was served with a copy of the Petition for Discretionary Review via electronic mail.

7. The undersigned forwarded the Petition for Discretionary Review through the U. S. Postal Service because the only address provided for mailing of the Petition for Discretionary Review to the Supreme Court is a post office box located within a U. S. Post Office.

8. On May 28, 2019, the Supreme Court Clerk informed that the Petition for Discretionary Review was not received on May 22, 2019, as the U. S. Postal Service promised, but, rather, was received on May 23, 2019, one day later.

9. On May 30, 2019, the undersigned visited the post office of origin of the priority express mailing to determine the reason for the late delivery of the package. Mr. Terry Moore, Customer Service Supervisor, investigated the matter. (See, Exhibit “D”). He learned that a Window Clerk failed to properly put the correct destination for the Priority Mail

Express package in their system. Specifically, the Clerk did not complete the entire right side of the shipping label. (See, Exhibit “A”). Without this information on the shipping label, the package was not processed as a Priority Mail Express package, consequently, it was not delivered as guaranteed on May 22, 2019, but, rather, one day late.

10. The undersigned has never experienced this type of error with a Priority Mail Express package.

II. LEGAL STANDARD

The U. S. Court of Appeals for the Ninth Circuit currently holds that a court may excuse the untimely filing of a pleading based upon “excusable neglect.” *Bateman v. United States Postal Serv.*, 231 F. 3d 1220, 1223 (9th Cir. July 26, 2000); *Briones v. Rivera Hotel & Casino*, 116 F. 3d 379, (9th Cir. November 8, 1996). Courts apply a four-factor equitable test in analyzing whether excusable neglect has occurred and the pleading may be accepted after the filing deadline. *Bateman*, 231 F. 3d at 1223: 1) the danger of prejudice to the opposing party, 2) the length of the delay, 3) the reason for the delay, and 4) whether the movant acted in good faith. *Id.* In sum, a party’s failure to file on time is not neglect if the cause is beyond his control. *Id.* This Court has adopted a similar equitable standard. *Shumway v. Payne*, 136 Wn. 2d 383, 395, (1998).

The U. S. Supreme Court has held that “excusable neglect” in failing to submit a timely filing even applies to attorneys. *Pioneer Investment Services Co., Brunswick Assocs. Ltd. Partnership*, 507 U. S. 380, 395 (1993).

III. ARGUMENT AND CITATION TO AUTHORITY

A. The factors preventing timely filing were beyond Petitioner’s control.

The U. S. Postal Service has taken total responsibility for their failure to deliver Petitioner’s Petition for Review on May 22, 2019 as had been promised. (See, Exhibit “D). In his letter to Ms. Erin Lennon, Mr. Terry Moore, U. S. Postal Service Customer Service Supervisor, states, “Due to a mistake on my Window Clerk (sic) behalf, we failed to properly put the correct destination in the system and **this was the reason** for this Package Tracking: EL 75616959US to become delayed and not reach your PO Box on 5/22/2019.” *Id.* (emphasis added). Mr. Terry then emphasizes that, “[t]he service was **guaranteed** for Delivery on 5/22/2019, which is why Mr. Whitted used our agency to deliver the item.” *Id.* (emphasis added).

Clearly, Petitioner could not have foreseen that the U. S. Postal Service would have failed to act as described in the preceding paragraph. Petitioner had never experienced this type of failure before. That is the reason why U. S. Priority Mail Express service, which is very reliable, was used in this instance. Here, the Postal Service “guaranteed” next day delivery. *Id.* Moreover, Petitioner had no control over the admittedly neglectful manner in which his Priority Mail Express Mail package was processed, from its shipping point to its destination. Critically, Respondent does not refute these truths. In sum, the U. S. Postal Service has stated that it was the sole cause for the Petition for Review not arriving at its destination on May 22, 2019. But for the failure of the U. S. Postal Service, the Priority Mail Express package would have arrived in a timely manner. Because this circumstance was completely beyond Petitioner’s control it is “extraordinary” and, therefore, excusable, as a matter of law. *See, Shumway v. Payne*, 136 Wn. 2d 383, 395. (1998).

In her Response, Respondent argues that Petitioner, “did not use the tracking number to monitor the delivery progress of the Petition.” However, Mr. Terry stated in his letter that, “we failed to properly put the correct destination in the system...” *Id.* In that regard, the Window Clerk did not complete the entire right side of the shipping label where the

tracking number is located. (See, Exhibit "A"). Thus, the package could not have been tracked, as it was not placed in the system. Not knowing that the package had not been properly put in the system, Petitioner attempted to track the package; however, he was unable to do so because, again, the U. S. Postal Service did not process the package properly, from the shipping point through its destination. (See, Exhibit "D"). Therefore, Petitioner could not have known at any time that the package would not arrive at the physical offices of the Supreme Court on May 22, 2019. Petitioner, like every person who places mail in the postal system, reasonably relied upon the promise that the U. S. Postal Service would fulfill on its "guarantee" to deliver his Priority Mail Express package on the next day, as it fulfills on that promise made to thousands upon thousands of consumers each day across this country. Thus, Petitioner had no reason to call busy court administrators for technical assistance.

B. The length of the delay is but one day

This Court has acknowledged that it received Petitioner's Priority Express Mail package and Petitioner's Petition for Review on May 23, 2019, one day after the filing deadline. Thus, Petitioner is requesting an extension of but one day so that his Petition can be accepted as timely in accordance with the Rules of Appellate Procedure. A request to extend a

deadline by one day is not a great length of time, but a request for a very short extension.

C. Respondent is not prejudiced

Respondent is not prejudiced by the filing of the Petition for Discretionary Review one day after the deadline, as she 1) received a copy of the Petition electronically in a timely manner on May 22, 2019, 2) she has been aware of the appellate issues discussed in the Petition for many months, and 3) presumably, she has not, and will not, incur any additional costs as a consequence of this Court accepting the filing one day after the deadline. On the other hand, the undersigned will be greatly prejudiced if the Petition for Discretionary Review is not accepted one day after the deadline, as he will have no other recourse for the proper determination of his legal rights.

D. Technical issues with filing and good faith

On May 21, 2019, Petitioner experienced technical issues with attempting to file the Petition electronically. Petitioner had not experienced these issues before, as he had never attempted to file any pleading with this Court. Facing these technical issues, Petitioner then sought an alternative means to assure the timely filing of the Petition. Petitioner sought overnight express mail delivery service from the U. S.

Postal Service. Over-night express mail service was sought from the U. S. Postal Service because the address for delivery of the Petition is a U. S. P. O. Box, not a physical street address. Petitioner acted in a “reasonably diligent” manner in this circumstance because he had never experienced a failure of the kind that occurred in this circumstance with the U. S. Postal Service. *Shumway v. Payne*, 136 Wn. 2d 383, 395 (1998) (when one acts with reasonable diligence, circumstance beyond his control should not prevent late filing).

Attempting to file the Petition electronically on May 21, 2019, -- one day early -- was not dilatory, but, rather, exhibited “reasonable diligence.” Petitioner reasonably believed filing could be accomplished one day early by electronic means, as he had not experienced any technical issues with filing before May 21, 2019. Unfortunately, he was unable to do so and resorted to an alternative and reliable means. In sum, Petitioner always acted in a good faith manner in attempting to abide by the filing deadline.

E. Meritorious Appeal

The Petitioner has not filed a frivolous, but, rather, a meritorious appeal. The issues raised in the Petition for Discretionary Review and the good faith arguments based upon those issues have legal merit, as they are

based upon law decided by this Supreme Court and the Court of Appeals. Petitioner argues that the Court of Appeals decision in Case No. 77967-2-1 is in conflict with legal authority decided by this Supreme Court and an unpublished opinion of the Court of Appeals. *See*, RAP 13.4 (petition for review will be accepted if decision of the Court of Appeals is in conflict with a decision of the Supreme Court).

CONCLUSION

WHEREFORE, for the grounds set forth more fully in the Petitioner's Motion, and the Exhibits incorporated therein and attached thereto, and the instant Reply, the undersigned requests that this Court enlarge the time and accept the Petition for Discretionary Review, which was received by this Court on May 23, 2019, as filed on May 22, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this 15th day of June 2019, a copy of
the foregoing Motion was electronically forwarded to:

Lori Jones Jordan
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Suite B- 1, Box 381
Bellevue, WA 98008
Lorijordan@outlook.com



Stephen E. Whitted