

FILED
SUPREME COURT
STATE OF WASHINGTON
12/13/2019 12:10 PM
BY SUSAN L. CARLSON
CLERK

NO. 97830-1

SUPREME COURT OF THE STATE OF WASHINGTON

LESA SAMUELS,

Petitioner,

v.

MULTICARE HEALTH SYSTEM, GLORIA LEM, and CITY OF
TACOMA,

Respondent.

CITY OF TACOMA'S RESPONSE TO PETITIONER'S MOTION FOR
EXTENSION OF TIME TO FILE PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent, City of Tacoma, asks for the relief sought in Part II.

II. RELIEF SOUGHT BY RESPONDENT

Denial of Appellant Lesa Samuels' motion for extension of time to file her petition for review. She has not shown "extraordinary circumstances" or that an extension of time is necessary to prevent a "gross miscarriage of justice."

III. RELEVANT FACTS

In May 2016, Pierce County Superior Court Judge Jack Nevin granted summary judgment dismissing Ms. Samuels' medical malpractice claims against the City of Tacoma. After settling and dismissing her remaining claims against MultiCare and Gloria Lem, ARNP, in January 2018, Ms. Samuels appealed from the summary judgment order dismissing her claims against the City. On October 1, 2019, the Court of Appeals issued its unpublished decision affirming the summary judgment. *Samuels v. MultiCare Health System, et. al.*, No. 51827-9-II, (Oct. 1, 2019). Although, under RAP 13.4(a), any petition for review should have been filed no later than October 31, 2019, Ms. Samuels' petition for review was not filed until after 5:00 p.m. on November 5, 2019.

According to Ms. Samuels' attorney, Hunter MacDonald, after he received the Court of Appeals' October 1, 2019 decision, he contacted Ms.

Samuels and informed her of her option to petition for review, and she expressed her desire to do so. *See Mot. for Ext. at 2.* Although Mr. MacDonald does not account for what transpired between October 1 and October 11, or state what, if any, steps were taken to prepare the petition for review during that time, he states that on October 11, 2019, the owner of the law firm where he had been employed (the law firm that was counsel of record for Ms. Samuels until the firm withdrew on November 1, 2019) advised him that he would be terminated from his employment. *Mot. for Ext. at 2.* Mr. MacDonald's last day at the firm was October 25, 2019. *Mot. for Ext. at 4.*

Mr. MacDonald acknowledges that the date of his termination was delayed in part to allow for "the designation of someone to finish the briefing and/or appearances required between October 11, 2019 and November 1, 2019" in various cases, including "the October 31, 2019 petition for review" in this case, *Mot. for Ext. at 2-3*, but then states that he completed those tasks in all of the other listed cases, except for preparing Ms. Samuels' petition for review in this case. *Mot. for Ext. at 3-4.*

Mr. MacDonald admits that he called Ms. Samuels a second time on October 22, 2019 to confirm again that she wanted to file a petition for review, and she indicated that she did. *See Mot. for Ext. at 2.* Nonetheless, Mr. MacDonald still did not draft the petition for review.

On November 1, 2019, the day after the deadline for filing the petition for review, Mr. MacDonald's former law firm withdrew, and Mr. MacDonald and his new firm, Fife Law, P.S., substituted in, as counsel of record for Ms. Samuels in this matter. Mr. MacDonald claims, however, that it was not until November 4, 2019, that he reviewed Ms. Samuels' file and realized that the deadline for filing the petition for review had passed. *Mot. for Ext. at 4.* He then prepared and, after hours on November 5, 2019, filed the petition for review.

IV. ARGUMENT WHY THE MOTION FOR EXTENSION OF TIME TO FILE THE PETITION FOR REVIEW SHOULD BE DENIED

RAP 13.4(a) provides that where, as here, no motion to publish or to reconsider the Court of Appeals' decision was made, any petition for review had to be filed within 30 days after the Court of Appeals' decision was filed. Thus, any petition for review from the Court of Appeals' October 1, 2019 decision in this case needed to be filed no later than October 31, 2019. RAP 18.8(b) sets forth what must be shown before this Court will extend the time for filing a petition for review. It provides:

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 notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension under this section.

“‘Extraordinary circumstances’ include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998); *see also Reichelt v. Raymark Indus.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). The “extraordinary circumstances” standard of RAP 18.8(b) “is rarely satisfied.” *Shumway*, 136 Wn.2d at 395; *see also Reichelt*, 52 Wn. App. at 765. “Negligence, or the lack of ‘reasonable diligence,’ does not amount to ‘extraordinary circumstances.’” *Beckman v. Dep’t of Soc. & Health Servs.*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000). And, application of RAP 18.8(b) does not turn on prejudice to the opposing party. *Reichelt*, 52 Wn. App. at 766.

Reichelt is particularly instructive. In *Reichelt*, the appellant filed a notice of appeal ten days after the deadline and argued that extraordinary circumstances existed because one of the two trial attorneys left the firm during the thirty days between the entry of judgment and the deadline for filing any notice of appeal, and the firm’s appellate attorney had a heavy workload. The *Reichelt* court rejected the argument that this amounted to extraordinary circumstances under RAP 18.8(b), and emphasized that “extraordinary circumstances,” require a showing of “circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” *Reichelt*, 52

Wn. App. at 765-66; *see also*, *Shumway*, 136 Wn.2d at 394-97.

Like the appellant in *Reichelt*, Ms. Samuels has not shown extraordinary circumstances as required by RAP 18.8(b), but rather has demonstrated only a lack of reasonable diligence on the part of her counsel. Nor has she shown that an extension of time is necessary to prevent a gross miscarriage of justice as is also required by RAP 18.8(b).

Indeed, in her motion for extension of time to file her petition, Ms. Samuels neither cites, nor attempts to argue that she has met the stringent requirements of, RAP 18.8(b). Instead, she argues, *Mot. for Ext. at 5*, that her attorney's failure to realize until November 4, 2019, that he had missed the October 31, 2019 deadline for filing a petition for review, and his quickness in correcting that "oversight," "presents no prejudice" to the City and "should be considered excusable neglect," such that "good cause should be found" for granting her requested extension. But, even if her attorney's lack of reasonable diligence could be considered excusable neglect or good cause, which is not and should not be the case, her argument ignores that RAP 18.8(b) requires a showing not of excusable neglect or good cause, but of "extraordinary circumstances" and that an extension is needed to prevent "a gross miscarriage of justice." And, as was true of the "no prejudice" claim made in *Reichelt*, Ms. Samuels' claim, *Mot. for Ext. at 5*, that her attorney's "oversight" or lack of

reasonable diligence “presents no prejudice” to the City is irrelevant, as application of the stringent requirements of RAP 18.8(b) does not turn on the absence of prejudice to the opposing party. *See Reichelt*, 52 Wn. App. at 766 and n.2.

V. CONCLUSION

Ms. Samuels has not demonstrated “extraordinary circumstances” or that an extension of time is needed to prevent a gross miscarriage of justice as required by RAP 18.8(b). Her motion for extension of time to file her petition for review should be denied.

RESPECTFULLY SUBMITTED December 13, 2019.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 13th day of December, 2019, I caused a true and correct copy of the foregoing document, "City of Tacoma's Response to Petitioner's Motion for Extension of Time to File Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
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DATED this 13th day of December, 2019, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

December 13, 2019 - 12:10 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97830-1
Appellate Court Case Title: Lesa Samuels v. City of Tacoma
Superior Court Case Number: 16-2-07199-1

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- 978301_Answer_Reply_20191213120443SC401214_0952.pdf
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City of Tacoma's Response to Motion for Ext of Time

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