

No. 391694-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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PUGET SOUND MEDICAL SUPPLY, Appellant,

and

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.

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BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION II

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....2

STATEMENT OF THE CASE .....3

ARGUMENT.....7

    I.    BOA erroneously interpreted WAC 388-02-0580(3)(b) when  
          it failed to analogize good reason with good cause. ....9

    II.   The provisions of WAC 388-02-0580 are sufficiently  
          analogous to RCW 50.32.075 to require BOA to consider the  
          good cause standard discussed in unemployment  
          compensation cases.....13

    III.  The good cause definition in WAC 388-02-0020 can be read  
          in conjunction with the good cause standard Courts apply in  
          ESD cases. ....16

CONCLUSION.....19

## TABLE OF AUTHORITIES

### Washington Cases

<i>Aponte v. Dep't of Soc. &amp; Health Servs.</i> , 92 Wn. App. 604, 965 P.2d 626 (1998) .....	7, 8
<i>Devine v. Employment Sec. Dep't</i> , 26 Wn. App. 778, 614 P.2d 231 (1980).....	15
<i>Graves v. Dep't of Employment Sec.</i> , 144 Wn. App. 302, 182 P.3d 1004 (2008).....	8
<i>Hertzke v. Dep't of Ret. Sys.</i> , 104 Wn. App. 920, 18 P.3d 588 (2001).....	7
<i>Mader v. Health Care Auth.</i> , 149 Wn.2d 458, 70 P.3d 931 (2003).....	14
<i>Multicare Med. Ctr. v. Dep't of Soc. &amp; Health Servs.</i> , 114 Wn.2d 572, 790 P.2d 124 (1990) .....	8
<i>Utter v. Dep't of Soc. &amp; Health Servs.</i> , 140 Wn. App. 293, 165 P.3d 399 (2007).....	7
<i>Wells v. Employment Sec. Dep't</i> , 61 Wn. App. 306, 809 P.2d 1386 (1991).....	15, 17

### Statutes, WAC provisions, and Rules

RCW 34.05.570 .....	7
RCW 34.05.570(3)(d).....	7
RCW 50.32.075 .....	13
WAC 388-02-0020(1).....	17, 18
WAC 388-02-0580(3).....	9, 14
WAC 388-406-0045 .....	10

WAC 388-422-0010(7).....	10
WAC 388-422-0020(1).....	10, 11
CR 60(b)(1).....	18

**Cases from Other Jurisdictions**

<i>Community Redevelopment Agency v. Superior Court</i> , 248 Cal. App. 2d 164, 56 Cal. Rptr. 201 (1967).....	11
<i>County of Santa Clara v. Myers</i> , 148 Cal. App. 3d 684, 196 Cal. Rptr. 230 (1983).....	11
<i>Erb v. Commissioner of Economic Sec.</i> , 601 N.W.2d 716 (Minn. Ct. App. 1999).....	12
<i>Gibson v. Unemployment Insurance Appeals Board</i> , 9 Cal.3d 494, 108 Cal. Rpt. 1, 509 P.2d 945 (1973).....	15, 16
<i>Rootes v. Wal-Mart Associates, Inc.</i> , 669 N.W.2d 416 (Minn. Ct. App. 2003).....	12

## **ASSIGNMENTS OF ERROR**

1. The Board of Appeals of the Department of Social and Health Services committed error when it denied Puget Sound Medical Supply's request for review on March 7, 2008.
2. The Board of Appeals of the Department of Social and Health Services committed error when it denied Puget Sound Medical Supply's Motion for Reconsideration, dated April 7, 2008.
3. The trial court erred in affirming the decisions of the Board of Appeals in its order dated March 20, 2009.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Board of Appeals erred in denying PSM's request for review when the request was filed more than 21 but less than 30 days after the initial order was mailed, and where there was good reason for the delay when balanced against the shortness of the delay and the lack of prejudice to DSHS.

2. The Board of Appeals incorrectly interpreted the good reason standard set forth in WAC 388-02-0580(3) when it failed to analogize good reason with good cause.

3. The Board of Appeals incorrectly ignored decisions interpreting the good cause standard in RCW 50.32.075, which require balancing the shortness of the delay, the absence of prejudice to the parties, and the excusability of the error.

4. The Board of Appeals erred in exclusively applying case law interpreting CR 60, where CR 60 is only to be used as a guideline in determining good cause, and where decisions in the unemployment compensation context provide guidance on the interpretation of good cause in a similar context.

## STATEMENT OF THE CASE

Appellant Puget Sound Medical Supply (“PSM”) is in the business of providing durable medical equipment products, including oral medical nutrition and incontinence supplies, to Medicaid patients in the State of Washington. CP 28. Because the medical and incontinence supplies are provided to Medicaid patients, the Washington State Department of Social and Health Services (“DSHS”) reimburses PSM for products it provides to its customers that fall under the Medicaid program. CP 28-29.

On November 17, 2003, DSHS audited PSM’s records for products supplied to its customers from February 12, 2001, to September 29, 2003. CP 29. DSHS conducted a claim-by-claim audit of 372 out of 56,200 procedures, and extrapolated those results to determine that PSM had been overpaid by DSHS, and DSHS demanded repayment. *Id.*

Petitioner timely appealed and requested a hearing to challenge the overpayment assessed by DSHS. *Id.* The Office of Administrative Hearings (OAH) held a hearing November 13-15 & 19-20, in 2007, in response to the Petitioner’s request, before Administrative Law Judge Robert C. Krabill. CP 8.

On December 24, 2007, OAH issued the initial decision (hereinafter the December 24 OAH initial decision will be referenced as the “Initial Order”), supporting the extrapolation method and requesting

overpayment. *Id.* The Initial Order was received by PSM's counsel on December 26, 2007. CP 14. PSM filed a request for review by the DSHS Board of Appeals ("BOA") on January 15, 2008, twenty-two days after receipt of the Initial Order, and one day later than the window for automatic acceptance of a request for review as specified in WAC 388-02-0580(3). CP 8. BOA issued a Notice of Late Request for Review and Deadline to Give Explanation. CP 14

On January 29, 2008, Petitioner timely filed its explanation to BOA, explaining several good reasons why the filing was one day late. CP 14. The Initial Order was made on Christmas Eve and received a day after Christmas, a logical and common period for taking a holiday. *Id.* In fact, the receptionist of PSM's attorney, who receives and docketes incoming mail and pleadings, and the legal assistant for the PSM's attorneys working on the appeal were both on vacation for the holidays. *Id.* Further, and due to the holidays and the timing of the decision, PSM only had 10 business days after receipt before expiration of the 21-day deadline from the date of mailing. CP 16.

Also, the shortened time made it difficult to contact the client and the expert witness to evaluate whether to seek further review. CP 15. The input of the expert witness, Dr. Intriligator, a UCLA professor living in Los Angeles, was difficult to obtain due to scheduling and location issues.

*Id.* In addition, the Initial Order allowed either party to request that the record be reopened within one week of the date of the Initial Order. CP 17.

Further good reason excused the late filing. The administrative law judge stated during the hearing his decision would be mailed after the holidays, sometime on or about January 4. CP 15. Thus, counsel did not believe that the 21-day deadline passed as early as January 14, when counsel was expecting the appeal to be due in later January. *Id.*

Also, as the hearing involved five days of testimony and 750 exhibits, the lead attorney's input was critical in a decision whether or not to appeal the Initial Order. CP 14. However, the lead attorney, (Chris Martson), moved to a different law firm the day after conclusion of the hearing. CP 16.

Upon confirmation of the deadline, PSM's petition for review of the Initial Order was faxed to the Board of Appeals and to counsel for the Department before noon on January 15, 2008. CP 15. A copy was also mailed that day. *Id.*

BOA denied PSM's petition for review on March 7, 2008. CP 14. BOA reasoned that good reason and good cause are not synonymous, but did not articulate a standard for establishing good reason. CP 24-25. PSM's motion for reconsideration was also denied. CP 6-12. BOA again

held that good reason was not the same as good cause, and further stated that if a good cause standard were to be applied, it would apply the case law interpreting CR 60. CP 11.

PSM petitioned for judicial review in Thurston County Superior Court on May 6, 2008. CP 3-5. PSM filed its brief on February 3, 2009. CP 1. The Department filed its response on February 23, 2009. *Id.* PSM filed its Reply on March 4, 2009. *Id.* Argument was made before the Thurston County Superior Court on March 20, 2009. CP. 60. The Honorable Wm. Thomas McPhee affirmed BOA's ruling the same day. CP 60-61. PSM filed its notice of appeal to Division II Court of Appeals on April 17, 2009.

## ARGUMENT

BOA committed error when it refused to review PSM's petition and subsequently denied PSM's motion for reconsideration.

Judicial review of an agency order in an adjudicative proceeding is governed by RCW 34.05.570. When the Court of Appeals reviews administrative action, it sits in the same position as the Superior Court, applying APA standards directly to the record before the agency. *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 299, 165 P.3d 399 (2007).

A court must grant relief from an agency order in an adjudicative proceeding if it determines that "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d). An appellate court reviews an agency's conclusions of law de novo. *Hertzke v. Dep't of Ret. Sys.*, 104 Wn. App. 920, 926, 18 P.3d 588 (2001). An agency's interpretation of statutes and implementation of regulations is reviewed under an error of law standard. *Aponte v. Dep't of Soc. & Health Servs.*, 92 Wn. App. 604, 617, 965 P.2d 626 (1998). Under an error of law standard, the Court may substitute its own judgment for the agency's. *Id.* Although substantial weight is given to an agency's determination when the subject matter involves an agency's expertise, deference is not required for application of the standard of review, for example, because an agency has no special

expertise in resolving such an issue. *Id.* (“Here, to the extent DSHS interprets the regulations at issue as defining a particular standard of review or burden of proof, DSHS’s view is not entitled to special deference.”); *see also Graves v. Dep’t of Employment Sec.*, 144 Wn. App. 302, 310, 182 P.3d 1004 (2008) (“While we agree with ESD that deference is generally due to an administrative agency’s interpretation of its rules when the agency has special knowledge or expertise, we question whether the ‘good cause’ rule requires such specialized knowledge.”)

The court uses statutory canons of construction when it interprets administrative rules and regulations. *Multicare Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990). In doing so, the court sets out to determine what the rule or regulation requires. *Id.* at 591.

BOA erroneously interpreted WAC 388-02-0580(3) when it denied PSM’s petition for review of OAH’s Initial Order. Specifically, BOA erroneously interpreted “good reason” as that term is used in WAC 388-02-0580(3)(b). BOA erroneously held that “good reason” and “good cause” are not analogous and it ignored analogous case law interpreting good cause for late appeal of an administrative decision in the employment security context. BOA further erred when it considered application of a “good cause” standard on the motion for reconsideration,

because WAC 388-02-0020 only suggests use of CR 60 as a guideline. Had BOA applied the correct standard, it should have reviewed PSM's petition of review of the OAH's Initial Order.

**I. BOA erroneously interpreted WAC 388-02-0580(3)(b) when it failed to analogize good reason with good cause.**

BOA erroneously interpreted the standard imposed upon a party who files a petition for review pursuant to WAC 388-02-0580(3). When BOA denied PSM's petition for review it concluded PSM had failed to state a good reason for filing one day late. The right to appeal to BOA beyond a twenty-one day time frame is specifically granted by WAC 388-02-0580(3):

- (3) A review judge may accept a review request after the twenty-one calendar day deadline only if:
  - (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
  - (b) A party shows good reason for missing the deadline.

There is no dispute PSM satisfied the first prong of WAC 388-02-0580(3), having filed on the twenty-second calendar day after the initial order. CP 14. Therefore, the issue is whether PSM satisfied WAC 388-02-0580(3)(b) and whether the reasons stated by PSM for its one day late filing constitute "good reason" under that provision.

Importantly, good reason is not defined in WAC 388-02-0580. Further, a good reason standard is not discussed in any reported

Washington case law. PSM encouraged BOA to adopt the good cause standard Washington courts apply in ESD cases to interpret “good reason.” BOA erred in rejecting this argument because good reason is synonymous with good cause.

BOA’s conclusion that good cause is not synonymous with good reason was error. “Good reason” and “good cause” are synonymous in numerous sections of the Washington Administrative Code. *See* WAC 388-406-0045; 388-422-0010(7), 0020(1). Under WAC 388-406-0045, DSHS must determine if there is “good reason” why an applicant’s request for cash or medical benefits was not timely processed by the department. That code provision provides: “This good reason is also called ‘good cause.’” WAC 388-406-0045.

Under WAC 388-422-0010(7), a recipient of benefits from DSHS is required to pay child support to maintain those benefits, unless “you have good reason for not cooperating.” One of those reasons is stated as follows:

If you are afraid that cooperating with DCS [division of child support] may be dangerous for you or a child in your care, see WAC 388-14A-2045 for a definition of what good reason to not cooperate with DCS is. We also call this **“good cause.”**

WAC 388-422-0010(7) (bold in original).

WAC 388-4222-0020 then enumerates contexts by which a recipient of benefits would not be required to comply with DCS to continue on the program, prior to listing those areas by which non-compliance with DCS is acceptable, the provision states, “You can be excused from cooperating with DCS when you have good reason. A good reason not to cooperate is also called good cause.” 388-4222-0020(1).

Other jurisdictions interpret good reason similarly to good cause. *See Community Redevelopment Agency v. Superior Court*, 248 Cal. App. 2d 164, 174, 56 Cal. Rptr. 201 (1967) (in action against a public agency, if interested person fails to serve and file timely the action may be dismissed unless good cause for such failure is shown, “The good cause which must be shown in such a case as this ‘may be equated to a good reason for a party’s failure to perform that specific requirement [of the statute] from which he seeks to be excused.’”); *County of Santa Clara v. Myers*, 148 Cal. App. 3d 684, 690, 196 Cal. Rptr. 230 (1983) (“The concept of good cause should not be enshrined in legal formalism; it calls for a factual exposition of a reasonable ground for the sought order. The good cause may be equated to a good reason for a party’s failure to perform that specific requirement from which the party seeks to be excused.”)

In a case where a realtor self-terminated her own employment and subsequently applied for reemployment benefits, a Minnesota Appellate

court was faced with the issue of whether self-termination constituted “good reason” to qualify for reemployment insurance benefits. *Erb v. Commissioner of Economic Sec.*, 601 N.W.2d 716, 718 (Minn. Ct. App. 1999). A commissioner held an employee who self-terminates could not receive reemployment benefits. *Id.* The realtor appealed pursuant to Minn. Stat. § 268.09, subd. 1a (1997). That statute allows a person to receive benefits if a “good reason” for unemployment “caused by the employer” exists. *Id.* In defining good reason, the Minnesota court relied on previous cases defining good cause:

The “good reason” language was adopted in 1997, replacing the prior statutory “good cause” requirement. 1997 Minn. Laws ch. 66, §§ 43, 81. Yet, the terminology is similar enough that we look to previous case law interpreting “good cause” to assist us in applying “good reason.”

Subsequent courts found the *Erb* court’s reasoning persuasive. *E.g. Rootes v. Wal-Mart Associates, Inc.*, 669 N.W.2d 416, 419 (Minn. Ct. App. 2003) (“‘good cause’ ... is similar to ‘good reason,’ and therefore we consider it in interpreting good reason.”)

BOA erred when it failed to consider that good reason as used in WAC 388-02-0580(3)(b) could be synonymous with a good cause standard. The Order denying review of the Initial Order did not define a “good reason” standard. CP 20-25. The ALJ simply “presume[d] that

‘good cause’ is [was not] synonymous with ‘good reason’” since “WAC 388-02-0580(2) chose to use the ‘the good reason standard instead of the good cause standard.” CP 25. Similarly, the order on reconsideration refused to find the terms synonymous. CP 10 (“If the drafters of chapter 388-02 WAC intended to adopt a single standard, then the drafters would have used a consistent phrase throughout the chapter.”).

These conclusions constitute error because “good reason” and “good cause” are synonymous in numerous sections of the Washington Administrative. As aforementioned, the terms are often used to define one another. Further, other jurisdictions have recognized the terms as being identical. For this reason, BOA erred when it failed to consider the “good reason” as used in WAC 388-02-0580(3)(b) was analogous to good cause.

**II. The provisions of WAC 388-02-0580 are sufficiently analogous to RCW 50.32.075 to require BOA to consider the good cause standard discussed in unemployment compensation cases.**

BOA erred in applying WAC 388-02-0580(3) because it failed to consider appellate decisions regarding good cause for filing a late petition for review in employment security cases. The provisions of RCW 50.32.075 and WAC 388-02-0580 are very similar. RCW 50.32.075 provides: “For good cause shown the appeal tribunal or the commissioner

may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title.” WAC 388-02-0580(3) provides: “

(3) A review judge may accept a review request after the twenty-one calendar day deadline only if:

- (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
- (b) A party shows good reason for missing the deadline.

Both rules apply to late filings for an administrative appeal and when the appeal tribunal can waive the late filing and accept review. Because of the similarity, BOA should have considered how Washington Courts have analyzed nearly identical provisions in unemployment compensation cases under RCW 50.32.075. *See* Talmage, Phillip A., *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 197 (2001) (Similar statutes should be interpreted similarly). This principle has been recognized in case law as well. *See Mader v. Health Care Auth.*, 149 Wn.2d 458, 473, 70 P.3d 931 (2003) (Health Care Authority erred in finding part time employees ineligible for health benefits under WAC 182-12-115 when legislature recently enacted RCW 49.44.160 expressing an intent that HCA should not exclude part-time employees from benefits).

In those cases discussing late filings under RCW 50.32.075, Washington Courts use a three-part test to determine whether the late-filing will be accepted for review: (1) the shortness of the delay, (2) the

absence of prejudice to the parties, and (3) the excusability of the error. *E.g. Devine v. Employment Sec. Dept.*, 26 Wn. App. 778, 782, 614 P.2d 231 (1980) (citing *Gibson v. Unemployment Insurance Appeals Board*, 9 Cal.3d 494, 108 Cal. Rpt. 1, 509 P.2d 945 (1973)). “The evaluation of the three factors in the good cause analysis is based on a sliding scale in which a short delay requires a less compelling reason for the failure to timely file than does a longer delay.” *Wells v. Employment Sec. Dep’t.*, 61 Wn. App. 306, 314, 809 P.2d 1386 (1991).

In *Devine*, the party was one day late in filing her petition for review. 26 Wn. App. at 780. She claimed that she had not seen the language in the decision giving notice of the deadline. *Id.* Because there was no prejudice to the other party, the court concluded that she had shown good cause for the delay. *Id.* at 782.

In *Wells*, the appellant was also only one day late and there was no showing of prejudice. 61 Wn. App. at 314. The appellant excused his delay by stating that he “lost his determination notice and thought he had a few more days in which to file.” *Id.* This was sufficient to show good cause justifying the delay. *Id.* at 315.

In *Gibson*, the California decision that originated the 3-part test, the party’s attorney filed the notice of appeal three days late due to inadvertent failure to calendar the deadline and to a large caseload. 509

P.2d 945. Again, there was no prejudice, and the court determined that the party had shown sufficient good cause justifying the delay.

BOA erred when it denied PSM's request for review. BOA should grant review because the reason provided for the delay was sufficient in light of the shortness of the delay and the lack of prejudice to the Department. Granting review would be consistent with how courts have interpreted similar appeals in similar contexts.

In addition, where a term is disputed (as "good reason" is here) courts look to other statutes in determining the meaning of the term. The appellate courts have not decided a case interpreting what constitutes "good reason" under WAC 388-02-0580, but have interpreted similar provisions in related statutes in the context of an administrative appeal. Where courts have addressed similar provisions, and in situations nearly identical to the one PSM presents on this appeal, courts have favored granting relief to the late filing party. BOA's decision should be reversed.

**III. The good cause definition in WAC 388-02-0020 can be read in conjunction with the good cause standard Courts apply in ESD cases.**

In denying the motion for reconsideration, BOA considered a good cause standard, but erred in ignoring the employment security case law in favor of case law interpreting CR 60 to determine whether good cause existed. The good cause standard applied in ESD cases to late-filed

appeals can be considered in conjunction with the good cause definition found in 388-02-0020.

As stated above, courts use a three-part test to determine whether a petition for review has established sufficient “good cause” to justify a late filing under RCW 50.32.075: (1) the shortness of the delay, (2) the absence of prejudice to the parties, and (3) the excusability of the error. *Wells*, 61 Wn. App. at 312. Under the definition of WAC 388-02-0020(1), good cause is defined as follows:

(1) Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

The definition of good cause found in WAC 388-02-0020(1) can be harmonized with the good cause standard applied in ESD cases. At a minimum, application of the good cause definition in WAC 388-02-0020(1) should not preclude the good cause standards enunciated in ESD cases.

The good cause standard in WAC 388-02-0020 does not mandate exclusive application of case law applying CR 60. Rather, the provision states: “To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior

Court Civil Rule 60 as a guideline.” WAC 388-02-0020(1). PSM is not aware of any case law applying this WAC provision.

CR 60 is only a guideline. This is not exclusive language, and does not prevent consideration of case law interpreting good cause in employment security cases. Nothing in WAC 388-02-0020(1) prevents BOA from considering the shortness of the delay, the absence of prejudice to the parties, and the excusability of the error, as encouraged by PSM. Failure to consider any alternatives to interpreting good cause under WAC 388-02-0020(1) constitutes error because CR 60 is only to be used a guideline, not as the exclusive means of definition.

Further, WAC 388-02-0020(1) mentions use of the “provisions” of CR 60 as a guideline. The plain language of the rule allows relief from a final judgment or order based on “mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order.” CR 60(b)(1).

Thus, although it seems clear that case law applying good cause in an ESD context reaches different outcomes than case law interpreting CR 60,<sup>1</sup> BOA placed a much too narrow limitation on WAC 388-02-0020(1)

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<sup>1</sup> Contrast *Devine*, 26 Wn. App. at 780 (in an ESD case, one day late in filing accepted for review where claimant did not notice language instructing her to appeal) with *Prest v. AM. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) (under CR 60, no relief from default where party failed to timely answer because summons and complaint were mislaid).

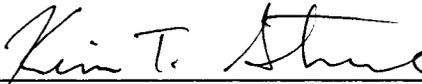
by exclusively considering case law under CR 60. BOA should not have concluded that it was bound by CR 60 or associated case law where the rule is only a guideline. Rather, BOA should have balanced the shortness of the delay, the absence of prejudice to the parties, and the excusability of the error, and determined that sufficient good reason existed to accept PSM's petition for review.

### CONCLUSION

BOA erred in denying PSM's request for review and subsequent motion for reconsideration, and the trial court erred in affirming those decisions. PSM's request for review was filed within the 30-day period allowed for such requests in WAC 388-02-0580. Based on the extreme shortness of the delay balanced against the complete lack of any prejudice to DSHS, there was sufficient good reason to accept the request for review. For the foregoing reasons, PSM respectfully requests that this Court reverse the trial court's order dated March 20, 2009.

Respectfully submitted this 20<sup>th</sup> day of July, 2009.

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**Certificate of Service**

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