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WASHINGTON STATE SUPREME COURT

NO. 101149-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
(COA No. 37448-3-III)

DALTON M, LLC, a Washington limited liability company,

Plaintiff/Respondent,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; NORTH
CASCADE TRUSTEE SERVICES, INC.; and DOES 1 through 10
inclusive,

Defendant/Appellant.

**RESPONDENT'S ANSWER/OBJECTION TO
APPELLANT'S MOTION FOR EXTENSION OF TIME**

On Appeal from Judgment of the Superior Court of Washington,
County of Spokane, Civil Case No. 18-2-00755-5
The Honorable John Cooney

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I. INTRODUCTION

Plaintiff/Respondent Dalton M, LLC (Dalton M) respectfully submits this Answer to Appellant/Petitioner US Bank National Association's (US Bank's) Motion for Extension of Time. As directed by this Court, Dalton M will file its Response to US Bank's Petition for Review in a later filing, on or before September 15, 2022.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.8(b), RAP 18.8(d), and RAP 18.9, as well as applicable case law, Dalton M requests this Court deny US Bank's Motion for Extension of Time, dismiss US Bank's untimely filed Petition for Review, and award fees to Dalton M for responding to US Bank's Motion.

III. LEGAL ARGUMENT

A. US Bank Failed to Timely File Its Petition for Review

RAP 13.4(a) governs the time in which a party seeking discretionary review must file and serve its petition. *RAP 13.4(a)*. Here, the Court of Appeals denied US Bank's Motion for Reconsideration on July 7, 2022.

Therefore, it is undisputed that US Bank's Petition for Review to this Court was due to be filed and served on or before

August 8, 2022¹. *RAP 13.4(a)*. Nevertheless, US Bank failed to timely file its Petition for Review on August 8, 2022. The Petition for Review in this matter was instead filed on August 9, 2022. As set forth in US Bank’s Motion, the untimely submission was wholly as a result of the lack of reasonable diligence of its counsel, who was unprepared to submit the Petition when it was due. As such, the relief requested by US Bank is unavailable and its Motion should be denied.

B. US Bank Misstates the Standard Relative to Prejudice. Untimely Filings Under RAP 18.8(b) are Inherently Prejudicial.

US Bank argues that it should be granted an extension of time due to the lack of prejudice to Dalton M associated with its untimely filing. However, extensive case law suggests US Bank’s position is misplaced. *See generally Beckman v. DSHS*, 102 Wn. App. 687, 11 P.3d 313 (2000), *Reichelt v. Raymark Indus.*, 52 Wn. App. 763, 764 P.2d 653 (1988). As the court in *Reichelt* noted, the application of RAP 18.8(b) “does not turn on prejudice to the responding party. If it did, there would rarely be a denial of a motion to extend time.” *Reichelt*, 52 Wn. App. at 766. Instead, the prejudice is inherent and impacts “the appellate system and litigants generally, who are entitled to an end to their day in court.”

¹ While RAP 13.4(a) requires a petition to be filed within 30 days, as a result of the intervening weekend days and the applicable Computation of Time rules, Appellant actually had the benefit of 32 days to prepare and submit its Petition. *RAP 18.6(a)*.

Id at 766 (*See* Footnote 2). "It must be remembered that one of the most important services the courts provide is to bring legal disputes to an end." *See Genie Industries v. Market Transport*, 158 P.3d 1217, 138 Wn. App. 694, 715 (2007). As such, US Bank's failure to timely submit its Petition for Review is inherently prejudicial, not only to Dalton M, but more broadly, to the appellate system.

C. US Bank, in Its Motion for Extension of Time, Fails to Articulate Any Basis Upon Which the Requested Relief Can be Granted.

The Rules of Appellate Procedure are generally liberally construed, such that issues and cases are determined on their merits; as set forth in RAP 1.2(a). *Reichelt*, 52 Wn. App. at 765. However, one particular and marked exception is RAP 18.8(b); which governs the disposition of untimely appeals. *RAP 1.2(a)*; *RAP 18.8(b)*; *See also, State v. Ashbaugh*, 90 Wash. 2d 432, 438, 583 P.2d 1206 (1978). RAP 18.8(b) severely restricts the availability of extensions of time available for, amongst other things, petitions for discretionary review, such as US Bank has submitted in the instant matter. *RAP 18.8(b)*; *Beckman*, 102 Wn. App. at 693-694. Unlike the majority of the Rules of Appellate Procedure, RAP 18.8(b) "expressly requires a narrow application" and the rule itself provides a "rigorous test [which] has rarely been satisfied in reported case law since the effective date of the Rules

of Appellate Procedure on July 1, 1976.”² *See, e.g. Reichelt*, 52 Wn. App. at 765; *Beckman*, 102 Wn. App. at 694; *State v. Moon*, 122 P.3d 192, 130 Wn. App. 256, 260 (2005).

As such, an extension of time is only permitted “in extraordinary circumstances *and* to prevent a gross miscarriage of justice.” *RAP 18.8(b)*, emphasis added. Notably, “the appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time.” *Id.* This is because of the “public policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case” which is unique to RAP 18.8. *Pybas v. Paolino*, 869 P.2d 427, 73 Wn. App. 393, 401 (1994); *See also, Reichelt*, 52 Wn. App. at 765.

Additionally, the appellant bears the burden to “provide ‘sufficient excuse for [the] failure to file a timely notice of appeal’ and to demonstrate ‘sound reasons to abandon the [judicial] preference for finality.’” *Moon*, 130 Wn. App. at 260 (citing *Schaeferco, Inc. v. Columbia River Gorge Comm'n.*, 849 P.2d 1225, 121 Wn.2d 366, 368 (1993)).

² Even prior to the implementation of the RAPs, the court maintained a similarly strict application of the jurisdictional requirement of timely filing of appeals. *See, e.g. Glass v. Windsor Nav. Co.*, 504 P.2d 1135, 81 Wn.2d 726 (1973); *Malott v. Randall*, 506 P.2d 1296, 8 Wn. App. 418 (1973).

While appellate courts have very occasionally permitted extensions of time pursuant to RAP 18.8(b), they have never done so under the circumstances present in this matter; and in fact, have routinely dismissed cases with similar rationales for untimely filings.³ In short, the inattentiveness or unpreparedness of counsel for an appellant is an untenable basis for an extension under RAP 18.8(b). *Supra*. Perhaps most pointedly, “attorneys ‘must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences.’” *State v. One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226, 1230-1231 (1982) (Reasoning adopted and applied in *Beckman*, 102 Wn. App. at 695-696).

i. No Extraordinary Circumstances Precipitated US Bank’s Untimely Filing.

Extraordinary circumstances have been defined as “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 765-766. It has been consistently held that “negligence, or the lack of ‘reasonable

³ See, for example, *Reichelt*, 52 Wn. App. at 764-766, the court dismissed an untimely appeal where the primary basis for delay was the departure of one of two trial attorneys at the firm, in conjunction with “an unusually heavy workload.” See also *Beckman* 102 Wn. App. at 696, the court dismissed an untimely appeal where careless office management procedures (even in the face of “unusual circumstances”) resulted in the untimely filing. See also *City of Spokane v. Landgren*, 107 P.3d 114, 127 Wn. App. 1001 (2005), an attorney’s misunderstanding of applicable timeframes would not constitute extraordinary circumstances under RAP 18.8(b) and no extension of time was granted.

diligence,’ does not amount to ‘extraordinary circumstances.’”
Beckman, 102 Wn. App. at 694.⁴ In particular, and applicable here,
a “lack of office management procedures that could have
prevented what occurred” and “the failure to take necessary
steps...is not an acceptable excuse” and does not constitute an
extraordinary circumstance under RAP 18.8(b). *Id* at 696. In
contrast, the rare circumstances that *have* been determined
extraordinary by Washington courts are generally unique, instances
of first impression, or are entirely outside of the appellant’s
control.⁵

US Bank attempts to analogize its circumstances to those of
the “unsophisticated pro se litigant” in *Scannell*, arguing that “the
delay was caused by a very desire to attend fully to the Petition.”
See generally, Scannell v. State, 912 P.2d 489, 128 Wash.2d 829,
833 (1996). US Bank’s argument is not compelling. The court in
Scannell highlighted the novel nature of the issue (an amended
court rule, without a corresponding cross reference in another
applicable rule; in conjunction with the inconsistent behavior of

⁴ See also, *Pybas*, 73 Wn. App. at 404 (adoption of analysis of foreign
jurisdictions with parallel rules to RAP 18.8(b) where “counsel is chargeable
with arguably negligent acts of his secretary” and “attorney’s failure to timely
file notice of appeal was not excusable [error].”)

⁵ See *Scannell v. State* 912 P.2d 489, 128 Wash.2d 829 (1996); *Myers v. Harris*,
509 P.2d 656, 82 Wash.2d 152 (1973) (consolidated case addressing
misinterpretation of new jurisdictional pre-requisite filing fee requirement by
several parties. The court cautioned the *Myers* decision would serve as guidance
to future parties and the jurisdictional requirement would not be waived moving
forward.)

the Court of Appeals in accepting a filing fee for an obviously untimely appeal and subsequently dismissing the action) which “presents a trap for the unwary.” *Id* at 833. The court further noted that while the appellant’s confusion was understandable and his actions would have been compliant with the court rules prior to the amendment, “future misinterpretations of the amended rule...will not be treated with equal leniency.” *Id* at 836. For a number of reasons, the circumstances presented by US Bank are wholly dissimilar to those in *Scannell*.

First, as set forth above, attorneys are not provided with the same latitude to commit error such as misinterpretation of the amended court rule in *Scannell*. (See e.g. *Landgren*, 127 Wn. App. 1001 (citing *Reichelt*, 52 Wash.App. at 766, 764 P.2d 653 and *Shumway*, 136 Wash.2d at 396-97, 964 P.2d 349, “Neither a simple mistake of counsel, nor counsel's erroneous legal conclusion...constitute "extraordinary circumstances" required by RAP 18.8(b) to extend the time for filing a notice necessary to obtain review.”)

Here, counsel for US Bank holds herself out as the Appellate Practice Chair of her firm. This is notably distinct from the circumstances in *Scannell*. In particular, an attorney specializing in appellate practice is no doubt expected to be sufficiently familiar with the court rules, procedures, and processes

necessary to properly prosecute an appeal. Therefore, even if, *arguendo*, the issues presented by US Bank could constitute extraordinary circumstances in the case of a diligent, but unsophisticated, pro se litigant, such as *Scannell*, they certainly do not for an experienced appellate attorney.

Perhaps more importantly, US Bank's rationalization relative to its untimely filing consists entirely of routine matters solely and completely within the control of its counsel (i.e.: time management and reasonable office procedures). Preparing quality work product within the known and applicable time constraints, managing a caseload along with a personal life, and having reasonable access to the applicable computer programs necessary to the operation of your law practice are indeed, the antithesis of extraordinary circumstances.

As such, not only is the court's holding in *Scannell* inapplicable here, but further, it is evident that no extraordinary circumstances have affected US Bank's ability to timely file its Petition for Review.

ii. *As a Result of the Lack of Extraordinary Circumstances, No Gross Miscarriage of Justice Will Occur Through the Dismissal of This Matter.*

Finally, US Bank misconstrues the analysis of "gross miscarriage of justice" under RAP 18.8(b) as being directly and primarily related to the import of the issues in the underlying

matter. US Bank then inappropriately attempts to utilize its Motion as a mechanism to present its appeal to this Court. However, in explicit contrast to US Bank’s approach, case law demonstrates that the importance of the issue on appeal is not a factor in the analysis relative to an extension of time under RAP 18.8(b).⁶ *See, e.g., Schaefer* 121 Wn.2d at 368 (The court held that in applying RAP 18.8(b) “Schaefer raises many important issues However, it would be improper to consider these questions given the procedural failures of this case.”) and *Beckman*, 102 Wn. App. at 693-94 (The court dismissed an untimely appeal from a \$17.76 million verdict, holding the impact of the issue does not create the potential for a miscarriage of justice, absent demonstrated extraordinary circumstances by the moving party.) Rather, the gross miscarriage of justice standard, required by the rule, can be satisfied only through a showing that in conjunction with the extraordinary circumstances, which caused the delayed filing, “the lost opportunity to appeal would constitute a gross miscarriage of justice *because of* the appellant’s reasonably diligent conduct.” *Reichert*, 52 Wash.App. at 766. As in *Reichert*, “such diligence has not been demonstrated here.” *Id.*

As discussed above, US Bank has failed to establish that extraordinary circumstances caused the delayed filing. Further, US

⁶ For this reason, Dalton M does not address the factual or legal issues related to the underlying appeal in this Answer.

Bank has failed to identify how its diligent conduct in prosecuting the appeal would result in a gross miscarriage of justice should its Motion be denied and this matter dismissed. To the contrary, US Bank's lack of diligence – and nothing else – was precisely the cause of its untimely filing.

D. The Proper Remedy for Violation of 18.8(b) is Dismissal of the Untimely Petition for Review and an Award of Fees to Dalton M.

Applicable case law, RAP 18.8(d), and RAP 18.9 guide the court with respect to remedies for violations of 18.8(b). *RAP 18.8(d); RAP 18.9; Infra*. In pertinent part, RAP 18.8(d) indicates that the court may “exercise...its authority under this rule by imposing terms or awarding compensatory damages, or both, as provided in rule 18.9.” *Id.*

The only proper remedy relative to an untimely petition for review, where, as here, no extraordinary circumstances exist, is dismissal. *RAP 18.9(b)*. Specifically, RAP 18.9(b) states, “the commissioner or clerk...will dismiss a review proceeding for failure to timely file a...petition for review.” *Id, Emphasis added.*

In addition, where a party knowingly files an untimely appeal, the same is facially frivolous, and thus, the party is subject to sanctions, in the form of fees to the prevailing party. *RAP 18.9(a), In re Marriage of Penry*, 82 P.3d 1231, 119 Wn.App. 799,

804, (2004); *In re Marriage of Tims*, 10 Wn.App.2d 1037 (2019) (citing *Streater v. White*, 613 P.2d 187, 26 Wn.App. 430 (1980).

Based upon the pleadings submitted by US Bank, its Petition for Review was knowingly filed in an untimely fashion, without adequate justification under RAP 18.8(b). Therefore, the only appropriate remedy is dismissal of the untimely Petition for Review and an award of fees to Dalton M, pursuant to RAP 18.9(a) and RAP 18.9(b).

IV. CONCLUSION

For the reasons set forth above, Dalton M respectfully requests this Court deny US Bank's Motion for Extension of Time, dismiss US Bank's untimely Petition for Review, and award Dalton M its fees for responding to US Bank's instant Motion.

I hereby certify the number of words contained in this document, exclusive of the words contained in the title sheet, the certificate of compliance, the certificate of service, and the signature block is 2,454 words.

Dated and signed this 26th day of August 2022 in Spokane, WA.

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CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. My business address is 823 W. 7th Avenue, Spokane, WA 99223.

I certify that on the 26th day of August 2022 I caused to be served a true and correct copy of the attached RESPONDENT'S ANSWER/OBJECTION TO APPELLANT'S MOTION FOR EXTENSION OF TIME by US Mail, electronic filing system, and by sending a copy electronically, to the following addressee:

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Executed this 26th day of August 2022 at Spokane, Washington.

/s/ Kayla Goyette
Kayla Goyette

DENNIS P. THOMPSON, P.S.

August 26, 2022 - 4:33 PM

Transmittal Information

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