FILED
SUPREME COURT
STATE OF WASHINGTON
8/31/2022 3:49 PM
BY ERIN L. LENNON
CLERK

WASHINGTON STATE SUPREME COURT

NO. 101149-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
(COA No. 374483-III)

DALTON M, LLC, a Washington limited liability corporation,

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

Defendant/Petitioner.

REPLY IN SUPPORT OF 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

Emilie K. Edling, WSBA # 45042
Robert W. Norman, Jr., WSBA # 37094
Houser LLP
9600 SW Oak Street, Suite 570
Portland, OR 97223
Telephone: (503) 914-1382
Facsimile: (949) 679-1112
Attorneys for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association as Trustee for Morgan Stanley Mortgage Loan Trust 2007-1XS Mortgage Pass-Through Certificates, Series 2007-1XS

The Trust[1] hereby submits this Reply in Support of its Motion for Extension of Time to file a Petition for Review ("Motion") following publication of the opinion in *Dalton M, LLC v. N. Cascade Tr. Servs., Inc*., 20 Wash. App. 2d 914, 504 P.3d 834 (2022) ("*Dalton M*"). This Reply is supported by the Declaration of Emilie K. Edling filed with the Trust's Motion.

I. LEGAL ARGUMENT

A. The Trust's Motion Established "Reasonable Diligence" and "Excusable Error"

The parties agree that the standard for extending time under RAP 18.8(b) is satisfied in cases where "the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765-66, 764 P.2d 653 (1988). Yet, Dalton M argues this standard was not satisfied because the Trust's counsel lacked "office management

[1] The party's complete name is U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association as Trustee for Morgan Stanley Mortgage Loan Trust 2007-1XS Mortgage Pass-Through Certificates, Series 2007-1XS (the "Trust")

procedures" and "fail[ed] to take necessary steps," citing *Beckman ex rel. Beckman v. State, Dep't of Soc & Health Servs.*, 102 Wn. App. 687, 690, 11 P3d 313, 314 (2000) and *Reichelt*, 52 Wn. App at 765. Both cases are markedly different from the instant matter. First, the filings at issue in these cases were both ten days late – not 24 minutes late. *Beckman*, 102 Wn. App. at 694; *Reichelt*, 52 Wn. App. at 765. This fact alone demonstrates that the involved attorneys had not properly calendared the filing deadline, and the *Beckman* Court further noted that counsel lacked reasonable procedures to handle deadlines. 102 Wn. App. at 695.

In contrast, the Trust's counsel explained that the deadline for the Trust's Petition was known to counsel and calendared; and further, that counsel strategized, shortened vacation plans, and obtained extensions in other cases, specifically in order to meet the deadline. (Edling Dec, ¶¶ 3-4, 6.) Counsel also had a plan and reasonable procedures with experienced staff in place to timely file, had login information

and a password that had been previously used with success, and was directly involved in and overseeing the attempt to file by the deadline. (Edling Dec., ¶¶ 3, 8, 9-12.) The Trust's counsel has searched Washington cases for any similar example where a party's attorney exerted so much effort to meet a deadline, and oversaw every step of preparation of a document and its filing in order to ensure the deadline and compliance with other rules were satisfied, and yet was still found by the Court to not have been "reasonably diligent." No such cases appear to exist.

Washington precedent suggests that excusable error is generally found wherever there is an adequate showing of reasonable diligence. *See, e.g., Myers v. Harris*, 82 Wn.2d 152, 154, 509 P.2d 656, 657 (1973). In *Myers*, cited by Dalton M, the Court found excusable neglect where the party was aware of a new court rule requiring payment of a filing fee within thirty days of judgment, analyzed the rule and determined the rule was not jurisdictional, and therefore chose not to comply with the rule. The Court found that the rule was not ambiguous, but

excused the neglect because it found the mistake was "made in good faith" and that strict enforcement "would impose an unduly harsh result." *Id.* at 155. *See also Scannell v. State*, 128 Wn.2d 829, 834, 912 P.2d 489, 491 (1996) (noting "good faith effort to satisfy the rules' requirements"). The circumstances presented here are far more compelling and clearly establish good faith.

B. Courts have Repeatedly Excused Similar Technical Defects in a Filing under RAP 18.8(b)

As Dalton M notes, courts grant extensions under RAP 18.8(b) where the moving party "diligently filed a notice of appeal within the 30-day period, but the filing was partially defective." *Matter of Marriage of Tims*, 10 Wn. App 1037, 2019 WL 4934702 at *2 (2019) (unpublished) (citing *Reichelt*, 52 Wn. App. at 765.) The cases cited as examples by either *Tims* or *Reichelt* are: *Weeks v. Chief of State Patrol*, 96 Wash.2d 893, 895-96, 639 P.2d 732 (1982); *State v. Ashbaugh*, 90 Wash.2d 432, 438, 583 P.2d 1206 (1978); and *Structurals*

N.W., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 714, 658 P.2d 679 (1983). The instant case more closely resembles these examples than any other case discussed by Dalton M.

In *Weeks*, the notice of appeal at issue was filed by the time required by RAP 5.2, but did not comply with RAP 5.1(a), requiring the notice be filed in the trial court; rather, the notice was filed in the Court of Appeals. 96 Wn. 2d at 895 (citing RAP 5.2(a).) The Washington Supreme Court agreed with the Court of Appeals' decision to allow an extension of time, finding that present rules "allow some flexibility in order to avoid harsh results" and that "[a]pplying strict form would defeat the purpose of the rules to 'promote justice and facilitate the decision of cases on the merits,'" quoting RAP 1.2(a). *Id.* at 895-96.

In *Ashbaugh*, the appellant attempted to file the notice of appeal by the deadline prescribed by RAP 5.2 by tendering it to the superior court clerk by the deadline, but the notice of appeal was not actually filed because the clerk returned it due to the

failure to submit it with a filing fee under RAP 5.1(b). 90 Wn. at 433. The notice of appeal was re-filed one day late, with the required fee. *Id.* Citing RAP 1.2(a), the Washington Supreme Court noted that the failure to pay the fee "was a mere oversight on the part of petitioner's attorney," which was "corrected as soon as it was brought to his attention." Notably, RAP 1.2(a) and (c) require liberal interpretation of the rules and waiver of rules as necessary "where justice demands," or "in order to serve the ends of justice," but both rules state within their text that they are "subject to the restrictions in rule 18.8(b)." *See* RAP 1.2(a), (c). Nonetheless, the *Ashbaugh* Court commented that "the demands of justice" would not be served by dismissing the appeal as untimely. *Id.* at 439.

In *Structurals Northwest, Ltd.*, the notice of appeal at issue was filed within 30 days of a stipulated amended judgment, but a stipulated amended judgment was not technically a CR 59 motion extending the time to appeal. 33 Wn. App. at 714. The Court noted however that "in all

practical effect the result [was] the same as if [a CR 59 motion] had been made and granted." *Id.* Citing *Weeks*, the Court noted the rules were designed to "allow some flexibility in order to avoid harsh results," and refused to dismiss as untimely. *Id.*

In each case, as here, the applicable standard for allowing the appeal was RAP 18.8(b). In each case, as here, counsel submitted the required filing to the clerk in compliance with the rule or portion of the rule setting forth *only* the time requirement– *i.e.*, RAP 5.2(a) requiring filing of a notice of appeal "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed" or RAP 13.4, requiring filing of a petition for review "within 30 days after an order is filed denying a timely motion for reconsideration." In each case, as here, the document was considered defective because some other rule also came into play, which had not been satisfied – *i.e.*, RAP 5.1(a) (requiring filing in trial court); RAP 5.1(b) (requiring filing fee), RAP 5.2(e) and CR 59

(allowing notices of appeal later than 30 days but only upon filing of specific timely motions); and (applicable here) GR 30(c) (filing is stamped for next day if filed after clerk's business hours). Further, in *Ashbaugh*, as here, the Court noted the error was corrected as soon as possible, demonstrating diligence. 90 Wn. at 438.

Unlike the above examples, here, the Trust's counsel did *not* fail to know or adequately plan for compliance with the rules. Rather, counsel was aware of the deadline; changed plans and worked to accommodate it; understood the 5:00 p.m. filing requirement and was only working up to the deadline in an effort to comply with other rules; and monitored every step of the document's filing – but was stymied by the unexpected inability to log into an e-filing system that had routinely been used in the past. (Edling Dec., ¶¶ 3-4, 6-12.) Also, unlike the above examples, the filing at issue here did not involve a simple, short, notice of appeal; but rather, a weighty, time-consuming Petition for Review, requiring preparation, review

of previously unbriefed authorities, and then substantial editing to make the document as concise as possible while still covering all the many aspects of the Petition. (Edling Dec., ¶¶ 5, 7-10.) Dismissing the Petition under such circumstances would not satisfy the "demands of justice" adhered to in *Weeks*, *Ashbaugh*, and *Structurals Northwest Ltd.*

C. Dismissal Would Result in a Gross Miscarriage of Justice

Apparently conceding the import of the issues on appeal, Dalton M criticizes the Trust's substantive discussion of the appeal and argues that it is irrelevant to this Court's consideration of whether a "gross miscarriage of justice" would occur under RAP 18.8(b). (Ans. At 10.) The cases cited do not stand for the argued proposition, since they do not discuss the "gross miscarriage of justice" standard in detail. *See Beckman*, 102 Wn. App. at 690, 696; *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn. 2d 366, 368, 849 P.2d 1225, 1226 (1993).

However, the *Reichelt* Court held that under the circumstances described in *Weeks*, *Ashbaugh*, and *Structurals Northwest Ltd.*, "the lost opportunity to appeal would [itself] constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct." 52 Wn. App. 763 at 766. Accordingly, as the Trust demonstrated reasonable diligence similar to those cases, *Reichelt* suggests that no further showing is required.

Further, the Trust's Motion discussed the substance of the *Dalton M* because the unique circumstances both curtailed the Trust's ability to have a fair and full opportunity to defend itself at trial and on appeal (either on the facts or the law) *and* created an additional obstacle to the Trust's ability to prepare a timely Petition for Review. (Edling Dec., ¶¶ 5, 7, 8.) The fact that the *Dalton M* opinion raised numerous issues warranting this Court's attention, discussed case law and facts that the Trust had never had an opportunity to respond to, and was also very lengthy, created an unusually burdensome situation for the

attorney attempting to prepare a concise but thorough Petition for Review. (Edling Dec., ¶¶ 5, 7, 8.) This fact, and others referenced in the Trust's Motion, is relevant to the Court's consideration of whether the Trust established "reasonable diligence."

But the Trust's Petition also raises issues of substantial import to the Trust, to this Court, and to the public. The substance of the appeal can and should be relevant to this Court's consideration of whether there will be a "gross miscarriage of justice" under RAP 18.8(b). *See, e.g., Cole v. Cole*, 9 Wn. App. 2d 1013 (2019), 2019 WL 2357009 at *3 (finding gross miscarriage of justice would result from refusing to extend where court abused its discretion and erred); *Matter of Dependency of A.S.*, 13 Wn. App. 2d 1138, 2020 WL 4284614 at *5 (2020) (unpublished) (holding depriving party of opportunity to appeal order terminating parental rights "in these circumstances would constitute a gross miscarriage of justice"); *In re Custody of Z.C.*, 191 Wn. App. 674, 700, 366 P.3d 439,

451 (2015), as amended (Dec. 17, 2015) (same). Accordingly, this Court's consideration of the prejudicial nature of the proceedings below, and the issues on appeal, is appropriate in deciding the Trust's Motion to Extend.

D. Dalton M is Not Entitled to an Award of Attorney Fees

Dalton M argues that it should be allowed its attorney fees under RAP 18.9(a) because the Trust knowingly and frivolously filed a Petition for Review that was 24 minutes late. (Ans. at 11-12.) The same argument might have been made in *Ashbaugh*, where the appellant filed a defective notice of appeal, it was returned to him by the clerk, and he corrected the defect and re-filed it one day late. 90 Wash.2d 432 (1978). Instead, the Court noted that the defective filing was "corrected as soon as it was brought to [the attorney's] attention," showing diligence. *Id.* at 438. Here, the Trust's 24-minute delay in filing provides further evidence confirming its efforts to file and showing its diligence, and does not give rise to a penalty.

II. CONCLUSION

For the reasons set forth above, the Trust respectfully requests that this Court extend the deadline for filing of the Trust's Opening Brief by 24-minutes or one day.

I hereby certify the number of words contained in this document, exclusive of words contained in appendices, title sheet, the table of contents, the table of authorities, the certificate of compliance, and the certificate of service and signature blocks is 2,106 words.

DATED this 31st day of August, 2022.

By: */s/ Emilie K. Edling*
Emilie Edling, WSBA #45042
Houser LLP
9600 SW Oak Street, Ste 570
Portland, OR 97223
Telephone: (503) 914-1382
Fax: (949) 679-1112
E-Mail: eedling@houser-law.com
Of Attorneys for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association as Trustee for Morgan Stanley Mortgage Loan Trust 2007-1XS Mortgage Pass-Through Certificates, Series 2007-1XS

CERTIFICATE OF SERVICE

I certify that on the 31st day of August 2022, I caused a true and correct copy of this **U.S. BANK AS TRUSTEE's REPLY IN SUPPORT OF MOTION FOR EXTENSION OF TIME** to be served on the following via the identified methods:

Dennis P. Thompson Kayla Goyette T&G Attorneys, A Professional Services Corporation 823 W 7th Ave Ste 101 Spokane, WA 99204-2850 *Counsel for Plaintiff/Respondent*	☑ U.S. Mail, Postage Prepaid ☐ UPS Overnight ☐ UPS 2 Day Shipping ☑ Appellate E-File & Serve & E-MAIL ☐ Courier

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

DATED this 31st day of August, 2022.

By: */s/ Emilie K. Edling*
Emilie Edling, WSBA #45042
Houser LLP
9600 SW Oak Street, Ste 570
Portland, OR 97223
Telephone: (503) 914-1382
Fax: (949) 679-1112
E-Mail: eedling@houser-law.com

HOUSER LLP

August 31, 2022 - 3:49 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,149-1
Appellate Court Case Title:	Dalton M, LLC v. U.S. Bank National Association, et al.
Superior Court Case Number:	18-2-00755-5

The following documents have been uploaded:

- 1011491_Answer_Reply_20220831154741SC734777_7207.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Motion
  The Original File Name was Reply re Motion for Extension.pdf

A copy of the uploaded files will be sent to:

- chershey@houser-law.com
- dt@tandgattorneys.com
- office@tandgattorneys.com
- office@thompsonspokane.com
- rnorman@houser-law.com
- rperez@houser-law.com

Comments:

Sender Name: Emilie Edling - Email: eedling@houser-law.com
Address:
9600 SW OAK ST STE 570
PORTLAND, OR, 97223-6503
Phone: 503-914-1382

Note: The Filing Id is 20220831154741SC734777