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STATE OF WASHINGTON
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Supreme Court No. 92268-3
(Court of Appeals No. 72258-1-I)

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THE SUPREME COURT
OF THE STATE OF WASHINGTON

SAK & ASSOCIATES, INC., a Washington corporation,

Petitioner,

v.

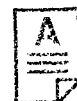
FERGUSON CONSTRUCTION, INC., a Washington corporation,

Respondent.

**RESPONDENT'S ANSWER TO PETITIONER'S MOTION FOR
EXTENSION OF TIME**

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ORIGINAL

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I. IDENTITY OF ANSWERING PARTY (RESPONDENT)

The Answering party is the respondent, Ferguson Construction, Inc., who was the respondent below and Defendant in the initial underlying action.

II. FACTS

Respondent concedes to the facts asserted in Petitioner's Motion for Extension of Time, which are summarized as follows:

1. The Court of Appeals filed a decision terminating review on August 10, 2015;
2. Petition for Review was due on September 9, 2015;
3. The Petition for Review was served via e-mail on Respondent on September 9, 2015; and
4. The Court of Appeals did not receive the Petition for Review until September 11, 2015.

In addition to the above facts, it is relevant here to note that Petitioner chose to file the Petition for Review via certified mail.

III. RESPONDENT'S ANSWER

Petitioner has presented no extraordinary circumstances to justify its failure to comply with the filing deadline in the Rules of Appellate Procedure, nor has Petitioner demonstrated there will be a gross miscarriage of justice should the request for an extension of time be denied. *See* RAP 18.8(b). Accordingly, Petitioner's Motion for Extension

of Time should be denied and, as a consequence, Petitioner's Petition for Review should not be accepted.

IV. AUTHORITY AND ARGUMENT

A. Petitioner Fails to Present any "Extraordinary Circumstances" Justifying Its Failure to Comply with the Filing Deadline

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 petition for review. RAP 18.8(b). 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 under this section. *Id.*

"In contrast to the liberal application [the Court of Appeals] generally gives the Rules of Appellate Procedure, RAP 18.8 expressly requires a narrow application." *Beckman ex rel. Beckman v. State, Dept. of Social and Health Services*, 102 Wn.App. 687, 693-694, 11 P.3d 313 (2000). RAP 18.8 "severely restricts" the authority of the appellate courts to extend the required filing time for a notice of appeal, permitting an extension "only in extraordinary circumstances and to prevent a gross miscarriage of justice." *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 775, 112 P.3d 571, 578 (2005).

The phrase "extraordinary circumstances" was defined in *Reichelt v. Raymark Indus., Inc.*, 52 Wn.App. 763, 765, 764 P.2d 653 (1988). There, the Court of Appeals refused to extend the time for filing a notice of appeal that was filed 10 days late. The appellant argued that "extraordinary circumstances" existed because one of the two trial

attorneys left the firm during the 30 days following entry of judgment, and the firm's appellate attorney had an unusually heavy work load. The Court rejected the argument and summarized the cases allowing late filings:

In each case, the defective filings were upheld due to 'extraordinary circumstances,' i.e., circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. RAP 18.8(b).

Reichelt, 52 Wn.App. at 765–66, 764 P.2d 653; *see also Beckman ex rel. Beckman*, 102 Wn.App. at 695-696, 11 P.3d 313 (2000) (Plaintiff's failure to provide notice of actual entry of judgments to the State did not create an "extraordinary circumstance." The Attorney General's failure to have office calendaring procedures in place was the reason the deadline to file a notice of appeal was missed); *Shumway v. Payne*, 136 Wn.2d 383, 394–97, 964 P.2d 349 (1998) (reiterating and reemphasizing stringent standard of RAP 18.8(b) noted in *Reichelt*); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993) (Court recognized appellant raised many important issues; however, found it would be improper to consider the questions given the procedural failures of missing the deadline to file a notice of appeal).

Here, Petitioner does not even attempt to explain why the filing was late. Instead, Petitioner explains that it mailed the Petition for Review

on the day it was supposed to be filed. This is certainly not excusable error or circumstances beyond the Petitioner's control. Nor does it demonstrate that the Petitioner was reasonably diligent. Indeed, the Petitioner could have simply mailed the Petition sooner, arranged for the Petition to be filed via legal messenger, or arranged for same day delivery through Fed Ex or UPS.

B. Denying Petitioner's Motion Would Not Result in a Gross Miscarriage of Justice

Petitioner also does not attempt to establish that there would be a gross miscarriage of justice if the motion to extend time was denied. In fact, there would be no miscarriage of justice here. Division I Court of Appeals, like the lower trial court, simply enforced terms of a contract to which the Petitioner agreed. In doing so, the Court of Appeals merely followed this Court's precedent that "we hold parties to their contracts." *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn. 2d 816, 826, 881 P.2d 986 (1994).¹ Even if Petitioner were to attempt to provide a reason (possibly now on reply) that there would somehow be a gross miscarriage of justice, the finality of Division I Court of Appeals' decision in this matter should be given preference. "[B]y limiting the extension of time to file [a petition for review under RAP 18.8] to those cases involving 'extraordinary circumstances and to prevent a gross miscarriage of justice,' expresses a public policy preference for the finality

¹ Respondent reserves the right to expound on this response should this Court accept Petitioner's Petition for Review.

of judicial decisions over the competing policy of reaching the merits in every case.” *Pybas v. Paolino*, 73 Wn.App. 393, 401, 869 P.2d 427 (1994).

Particularly in light of the straightforward nature of Division I Court of Appeals’ decision in this matter, Petitioner fails to meet the requirements under RAP 18.8 and, as a result, its motion to extend time should be denied.

C. Mailing the Petition for Review and Timely Serving Respondent Via Email are Irrelevant

As noted above, Petitioner gives no explanation as to why the filing was late. Instead, Petitioner focuses on the fact that it placed the Petition for Review in the mail on the day it was to be filed and served Respondent via email.

With regard to the certified mail, Petitioner simply takes the position that a 2-day extension to match the mail delivery period is warranted to serve the ends of justice. *See* Pet. Mot. Ext. Time, pg. 2. The RAPs provide explicit and specific instructions when filing by mail:

Filing by Mail. Except as provided in GR 3.1, a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing. Except as provided in GR 3.1, any other paper, *including a petition for review, is timely filed only if it is received by the appellate court within the time permitted for filing.*

RAP 18.6(c) (emphasis added). GR 3.1 provides confined inmates exceptions to filing by mail, which obviously does not apply here. Thus, even by mail, Petitioner was required to file its Petition for Review by September 9, 2015. Petitioner instead chose to place the pleading in the mail on September 9, 2015, knowing regular certified U.S. Mail could not possibly get the Petition for Review to the Court of Appeals on the same day.

Petitioner also takes the position that because it timely served Respondent with the Petition for Review and Respondent suffered no prejudice, that somehow an “extraordinary circumstance” was created or its untimely filing is excused. The Court of Appeals has directly addressed this proposition. The lack of prejudice to the respondent is irrelevant and the prejudice of granting an extension of time would be “to the appellate system and to litigants generally, who are entitled to an end to their day in court.” *Reichelt*, 52 Wash.App. at 766 n. 2, 764 P.2d 653. Accordingly, whether or not Respondent has been prejudiced is not a factor in deciding whether the Petitioner’s request for an extension of time should be granted or denied.

Petitioner failed to present any “extraordinary circumstances” for untimely filing its Petition for Review, and denying Petitioner’s motion would not result in a gross miscarriage of justice. Under RAP 18.8(b), Petitioner’s Motion for an Extension of Time should be denied and, as a consequence, its Petition of Review should be rejected.

RESPECTFULLY SUBMITTED this 5th day of November, 2015.

AHLERS & CRESSMAN PLLC

By: 

Douglas R. Roach, WSBA No. 21127
Masaki James Yamada, WSBA No. 36425
Attorneys for Ferguson Construction, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following:

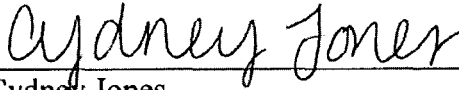
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Attorneys for Appellant

- Via Facsimile
- Via U.S. Mail
- Via Email
- Via Legal Messenger

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

SIGNED this 5th day of November, 2015 at Seattle, Washington.


Cydney Jones

OFFICE RECEPTIONIST, CLERK

To: Douglas R. Roach
Cc: Cydney M. Jones; Masaki Yamada
Subject: RE: SAK/Ferguson Filing

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Sent: Thursday, November 05, 2015 1:01 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Cydney M. Jones <cydney.jones@ac-lawyers.com>; Masaki Yamada <myamada@ac-lawyers.com>
Subject: SAK/Ferguson Filing

Dear Clerk,

Attached to this email please find the Respondent's Answer to Petitioner's Motion for Extension of Time, to be filed with the court in SAK & Associates, Inc. v. Ferguson Construction, Inc., Supreme Court No. 92268-3 (Court of Appeals No. 72258-1-I).

Thank you.

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