

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 96598-6

From Court of Appeals Division I 77016-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

HEADSPACE INTERNATIONAL, LLC,

Appellant,

v.

PODWORKS CORP., and THOMAS WERTH,

Respondent

RESPONDENT'S REPLY TO APPELLANT'S ANSWER TO MOTION
FOR EXTENSION OF TIME TO FILE PETITION FOR
DISCRETIONARY REVIEW

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I. INTRODUCTION

Headspace International, LLC (“Headspace”) elevates form over substance in its answer to the motion filed by Podworks Corp. and Thomas Werth (“Podworks”) seeking an extension of time to file their petition for discretionary review one day late. While Headspace correctly points out that the legal standard for an extension of time under RAP 18.8(b) requires “extraordinary circumstances . . . to prevent a gross miscarriage of justice,” Headspace fails to adequately distinguish cases where this Court has granted an extension of time under circumstances similar to those present here, where an attorney has demonstrated reasonable diligence and a bona fide attempt to timely file but that due to human error of one kind or another, the initial filing was deemed late by this Court.

II. ARGUMENT IN REPLY

Podworks does not dispute the fact that the standard for an extension of time under RAP 18.8(b) is “rarely satisfied,” a fact raised repeatedly by Headspace. Headspace Brf. at 2-3. In those few cases that have granted an extension of time, courts have looked to the relative diligence of the petitioner, the length of the delay, and whether evidence existed showing a

good-faith attempt to timely file. *See, e.g., Scannell v. State*, 128 Wn.2d 829, 833-34, 912 P.2d 489 (1996).

In *Scannell*, this Court determined that extraordinary circumstances existed, and it granted an extension of time for filing a notice of appeal “where the petitioner’s confusion over a change in the appellate rules, his reasonable diligence in carefully following the prior rules, and his good faith attempt to timely file his notice of appeal warranted leniency.” *Shumway v. Payne*, 136 Wn.2d 383, 396, 964 P.2d 349 (1998) (denying extension of time because petitioner failed to “claim reasonable diligence, confusion about the method of seeking review, excusable error in interpreting the rules, or circumstances beyond her control”).

Citing *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988), Headspace argues that “reasonable mistakes made by counsel do not justify extending the time to file a notice of appeal.” Headspace Brf. at 3. In *Reichelt*, approximately ten days after the thirty-day appeal period expired, the Respondent’s attorneys contacted Petitioner’s counsel regarding payment of the judgment. Counsel for Petitioner responded by “immediately serving and filing a notice of appeal.” *Reichelt*, 52 Wn.2d at 764-65. The explanation given for the late filing in *Reichelt*

lacked evidence showing a good-faith attempt to timely file the notice or any credible showing of diligence on the part of the late-filing lawyers. Indeed, “conflicting affidavits” were filed, *see id.* at 764, and the court of appeals noted that “nothing of record suggests that this matter would have resurfaced in counsel’s mind within a ‘reasonable’ time if Reichelt had not contacted counsel for payment of the judgment,” *see id.* at 766.

This case differs in important ways from *Reichelt*. In this case, counsel made a bona fide attempt to timely file the petition for discretionary review, missing the deadline by only one day due to a docketing error of the kind befalling even the most diligent lawyers. No lawyer is immune from the kind of mistake leading to the late filing in this case so long as humans remain involved in docket entry.

To be sure, the mistake in this case is rare given the systems counsel has in place to prevent against docketing errors. That does not change the fact that mistakes in docketing happen despite counsel’s best efforts. Counsel avers that he has not had a similar docketing error in over eighteen years of practice and for that reason, the circumstances leading to this error are “extraordinary” and meet the standard for an extension of time under RAP 18.8(b).

Headspace also relies on *Beckman ex rel. Beckman v. State*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000) arguing that counsel for Podworks was not reasonably diligent. Headspace Brf. at 5. But *Beckman* is also distinguishable on its facts. In *Beckman*, the notice of appeal was filed ten days late and only *after* a demand for payment was made on the judgment. No evidence suggested reasonable diligence on the part of the late-filing lawyer or a bona fide attempt to file within the thirty-day period. *Beckman*, 102 Wn.2d at 695. Indeed, the State in *Beckman* argued that CR 5(a) required service of conformed copies of the judgment before the time for a notice of appeal would begin to run. *Id.* at 691-692. That argument was rejected because it lacked support in the rule. *Id.* at 693. Additionally, the State relied on the declaration of an attorney averring that she had “no recollection” of the documents giving notice of plaintiff’s presentation of the proposed judgment in compliance with CR 52(c) and that she did not “knowingly, intentionally, or recklessly” fail to act. *Id.* at 695. Rejecting this argument, the court of appeals concluded that the State was not reasonably diligent, in part because it lacked a centralized docketing system. *Id.* at 696 n.6 (explaining that an “independent investigator [for the State] concluded that ‘to the extent notices for court hearings are served on the

office, they should be automatically calendared by someone independently assigned the task”).

Here, in contrast to *Beckman*, counsel avers that a centralized docketing system existed, and that counsel also maintained a separate docket kept by his paralegal. *See* Walters Decl. ¶2 (“The intent behind this system is redundancy, so that if the deadlines on each docket do not match, docketing errors can be identified and prevented.”) Thus, counsel here kept two dockets, each was “automatically calendared by someone independently assigned the task” as suggested by the opinion in *Beckman*, 102 Wn.2d at 696 n.2, yet even this system was not immune from human error. Importantly, however, this case is different from *Beckman* because unlike *Beckman*, counsel here diligently maintained not just one, but two dockets each kept by someone assigned to that task.

According to Headspace, no human error “within counsel’s control” leading to a late filing can meet the standard for an extension of time under RAP 18.8(b). Headspace Brf. at 7-8. Yet, extraordinary circumstances caused by controllable human error have met the RAP 18.8(b) standard. *See, e.g., Scannell*, 128 Wn.2d at 833-34.

On this point, Headspace attempts to distinguish cases cited by Podworks in its motion, *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982), *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978), and *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679 (1983) (notice not timely filed within thirty days of the original judgment, but timely filed within 30 days of an amended judgment). According to Headspace, these cases are inapplicable because they each involved a filing within the thirty-day period provided by RAP 13.4(a). Headspace Brf. at 7-8.

Headspace narrowly reads these cases to support its view that no amount of controllable human error can ever lead to “extraordinary circumstances” under RAP 18.8(b). But each case can be read to support a finding of extraordinary circumstances in this case. For example, the late filing in *Weeks* was occasioned by the mistaken filing in the wrong court. 96 Wn.2d at 895-96. That petition was filed late just as the petition was filed late here. And like the late filing in *Weeks*, counsel here made a good-faith attempt to timely file within the thirty-day period but due to human error and despite reasonable diligence, that attempt failed.


Similarly, the late filing in *Ashbaugh* was occasioned by the failure to include the requisite filing fee. *See* 90 Wn.2d at 438. Like the situation in *Ashbaugh*, the late filing here was accompanied by a good-faith attempt by counsel and reasonable diligence to file within the thirty-day period. Finally, the late filing in *Structurals* was caused by a mistaken understanding of the rules leading to a filing outside of the thirty-day period following the original judgment but within the thirty-day period following an amended judgment. *See* 33 Wn. App. at 714. Like the situation in *Structurals*, counsel here made a bona fide attempt to file within the thirty-day period but due to human error and despite reasonable diligence that attempt failed.

III. CONCLUSION

For the foregoing reasons, Podworks respectfully requests an extension of time of one day so that its petition for discretionary review may be considered by the Court.

RESPECTFULLY SUBMITTED this 25th day of January, 2019.

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CERTIFICATE OF SERVICE

I, Rischel Voigt, declare as follows:

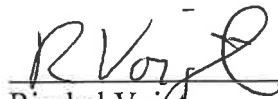
- 1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Lowe Graham Jones PLLC, 701 Fifth Avenue, Suite 4800, Seattle, Washington 98104.
- 2) By the end of business day on Friday, January 25, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Reply to Motion for Extension of Time and,**
- **Certificate of Service.**

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<i>Attorneys for Headspace International LLC</i> Eric J. Harrison, WSBA No. 46129 ATTORNEY WEST SEATTLE 5400 California Ave. SW, Suite E Seattle, WA 98136 Email: eric@attorneywestseattle.com	<input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Supreme Court Efiling Site <input type="checkbox"/> Via E-mail

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

DATED at Seattle, Washington this 25th day of January, 2019.


Rischel Voigt

LOWE GRAHAM JONES PLLC

January 25, 2019 - 2:48 PM

Transmittal Information

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