

FILED
SUPREME COURT
STATE OF WASHINGTON
1/9/2019 3:12 PM
BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

In re the Marriage of:

JESSICA LEE BODGE,
Appellant,

v.

BRIAN EUGENE BODGE,
Respondent.

NO. 96682-6

APPELLANT'S REPLY
SUPPORTING HER MOTION
TO ACCEPT LATE-FILED
PETITION FOR
DISCRETIONARY REVIEW

(Court of Appeals No. 76954-
5-1)

(Snohomish County Superior
Court No. 12-3-02727-9)

Reply Arguments

- A. The Substantive Merits of Appellant's Petition for Discretionary Review Should not be Considered at this Stage of the Proceedings.

This is a motion requesting this Court accept a late-filed Petition for Review and Amended Petition for Review pursuant to RAP 18.8(a) and 1.2(a). As such, it is a procedural *motion* that will be determined by this Court's Clerk. See December 28, 2018 letter from this Court's Deputy Clerk attached to Father's Answer as Ex. A; and SAR 16(f). This is authorized because this Court's Clerk

may initially decide *motions*. RAP 17.2(a); and SAR 16(f). Unlike motions, however, this Court's Commissioner and Clerk are not authorized to determine *petitions*. To be sure, SAR 15(c) provides, "The commissioner will *screen* petitions for review and direct appeals to the Supreme Court and *recommend* whether Supreme Court Review should be granted." Respondent/Father's substantive arguments on whether review should be accepted should await this Court's Commissioner's screening and recommendations and a decision by a majority of the Justices.

Moreover, for the reasons expressed in Mother's First Amended Petition for Review, Mother disagrees with Father's assertion that the Court of Appeals' Opinion does not conflict with decisions of this Court or other Court of Appeals' decisions or that the Opinion does not involve an issue of substantial public interest. Under these circumstances, this Court should not consider Father's substantive arguments on Page 4 of his Answer.

B. *Schaefco*¹ and *Mount Vernon*² does not Mandate Denial of Mother's Petition for Review.

Father argues that *Schaefco* and *Mount Vernon* mandate a perfunctory procedural denial of Mother's Petition for Review and Amended Petition for Review. See Answer, pps. 3-4. Father's

¹ *Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wash.2d 366. 849 P.2d 1225 (1993)

² *City of Mount Vernon v. Weston*, 68 Wn. App. 411, 844 P.2d 439, *review denied* 121 Wn.2d 1024, 954 P.2d 1085(1992).

argument is based, however, on the conclusory premise that there was simply “no sufficient excuse” for the Petition for Review being filed late (Answer, Pg. 3) and a “failure to identify any extraordinary circumstances.” Those issues, however, are the ultimate issues that this Court’s Clerk must decide or refer to a panel of Justices.

C. The Power Outage was an Extraordinary Circumstance and Mother’s Counsel Exhibited Due Diligence Justifying a one-time 4-hour Extension to file her Amended Petition for Review.

It is this Court’s stated preference to determine matters based on the merits rather than nominal noncompliance with court rules. RAP 1.2(a).³ In this case the power outage was an extraordinary circumstance and Mother’s counsel exhibited sufficient due diligence to justify accepting her Amended Petition for Review and have it decided on the merits. Father argues that the power outage was not an extraordinary circumstance because a storm was forecasted with high winds and possible power outages. He also argues that Mother’s counsel was not diligent enough because he chose to finalize Mother’s Petition for Review on December 26, 2018 (the day after Christmas) rather than finalize it on Christmas

³ Mother and her counsel recognize and respect that the liberal interpretation suggested by RAP 1.2(a) is restricted when late filing involves a Petition for Discretionary Review or a Notice of Appeal. RAP 18.8(b).

Eve or Christmas Day.⁴ Answer, Pg. 2. These are the two ultimate issues this Court needs to decide.

Mother's counsel strongly suggests that the power outage was an extraordinary circumstance. There is no case directly on point regarding power outages, but Mother reiterates that her situation is similar to the attorney that mailed a petition for review to the Supreme Court, but it was not received until the day after the deadline because the USPS did not deliver it as fast as it usually did. See Moore v. Burdman.⁵ There, USPS' failure to deliver the mail as fast as it usually did was considered an extraordinary circumstance that justified allowing the otherwise untimely petition for review to be considered by this Court. It also held that counsel acted with due diligence in depositing the petition in the US Mail for what should have been timely delivery to the Supreme Court.

Father, on the other hand, cites no case with facts even remotely similar to the facts of this case. The closest Father comes to citing cases that shed light on the ultimate issues in this case is *Reichelt v. Raymark Industries, Inc.*, 52 Wn.App. 764, 765 P.2d 653 (1988). There, the Court of Appeals held that the attorneys did not exercise due diligence when filing a notice of appeal of a \$92,000 judgment 10 days after the deadline because one of its two

⁴ Mother's counsel does observe the Christian holiday of Christmas.

⁵ 84 Wn.2d 408, 526 P.2d 893 (1974).

litigation attorneys left the firm during the 30-day filing period and the other attorney had a tremendously heavy workload. *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. at 764–65. This case is distinguishable from *Reichelt*. First, this is not a monetary case involving a \$92,000 judgment; rather, it is a case involves placing what were 3 “thriving” minor children with their father who has engaged in a history of acts of domestic violence and remains untreated without the findings required by RCW 26.09.191(2)(n). Second, this case does not involve solely an attorney’s mistake; but involves an act of Nature or a third party (PSE) over whom Mother’s counsel had no control.

Because this case is similar to *Moore*, this Court should find and conclude: (1) the power outage was an extraordinary circumstance; (2), that Mother’s counsel acted with sufficient due diligence, and (3) a gross miscarriage of justice can only be prevented by extending the time for Mother to file her Petition for Review by 4-plus hours by allowing her Amended Petition for Review to be decided on the merits by a panel of Justices.

D. Failure to Timely Pay the Filing Fee is Governed by RAP 1.2(a), and RAP 1.2(a) does not Authorize an Automatic Denial of a Petition for Review.

The failure to timely pay a filing fee is not mentioned by the terms of RAP 18.8(b) as a ground of dismissal and is, therefore,

subject to the sanction alternatives specified in RAP 1.2(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206, 1210 (1978).

Typical sanctions are a fine or compensatory award. Comment, RAP 18.9; and *Id.* Furthermore, RAP 1.2(a) explicitly states that “Cases . . . will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . .” *Id.*

Here, however, sanctions are not warranted because it is commonplace to pay Supreme Court filing fees directly to the Supreme Court after a Supreme Court case number is assigned. The Court of Appeals accepts petitions for discretionary review that are to be decided by the Supreme Court. It does not accept payments for the Supreme Court’s filing fees; rather, it will accept a hand-delivered check made payable to the Supreme Court and forward the check to the Supreme Court with the file and petition. There is no method to pay the Supreme Court filing fee on-line. Alternatively, a party can pay the Supreme Court directly. If the filing fee is paid directly to the Supreme Court, then it should be paid after the Supreme Court assigns a case number to the new matter so that the payment is properly applied. That is the reason why this Court issued its December 28, 2018 letter stating the filing fee should be paid by January 11, 2019. Answer, Ex. A. Mother paid

the filing fee as directed on January 2, 2019. See letter attached as **Appendix 1** to this Reply. This Court received the filing fee on January 9, 2019. See email from this Court attached as **Appendix**

2. This issue is now moot.

E. Courts are Allowed to Accept Representations from Counsel when Ruling on Motions.

There is ample support that a power outage prevented timely filing of Mother's Amended Petition for Review. While not required, courts are allowed to accept a counsel's representations as to what transpired. *State v. Eguires*, 34651-0-III, 2018 WL 3239307, at *4 (Wash. Ct. App. July 3, 2018), review denied, 191 Wn.2d 1025, 428 P.3d 1184 (2018). This is especially true when it relates to procedural matters that are collateral to the ultimate substantive legal issues that are to be reviewed.

Despite this, the undersigned, under penalty of perjury in and for the State of Washington, declares: (A) There was a power outage at his office on December 26, 2018 at approximately 4:25 p.m.; (B) the power outage caused Mother's counsel to lose unsaved data contained in Mother's original Petition for Review; (C) the power outage caused Mother to be incapable of filing any document with the Court of Appeals prior to 5:03 p.m. on December 26, 2018; (D) after 5:03 p.m. the undersigned continued to replace missing arguments, table of cases, index, and other matter that were lost

when the power outage occurred; (E) at about 9:00 p.m. Mother's counsel completed replacing the lost material in the original Petition for Review and caused it to be filed with this Court and entitled it Mother's First Amended Petition for Review; and (F) but for the power outage Mother's Petition for Review would have been timely filed prior to 5:00 p.m. on December 26, 2018.

Signed at Edmonds, Washington on this 8th day of January 2019.

WESTERN WASHINGTON LAW
GROUP, PLLC

/s/ Dennis J. McGlothin

Dennis J. McGlothin, WSBA No. 28177
7500 212th Street SW, Suite 207
Edmonds, WA 98026
Telephone: (425) 728-7296
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of this APPELLANT’S REPLY SUPPORTING MOTHER’S MOTION TO ACCEPT LATE-FILED PETITION FOR DISCRETIONARY REVIEW

to the following:

Washington State Supreme Court 415 12 th Ave SW Olympia, WA 98501	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Electronic Upload
Karen C. Skantze Mary Joyce McCallum 1721 Hewitt Avenue, Suite 600 Everett, WA 98201	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Eservice or Email <input checked="" type="checkbox"/> Electronic Upload

DATED this 9th day of January 2019 at Edmonds, Washington.

/s/ Lindsey Matter

Lindsey Matter
Paralegal

APPENDIX 1

WESTERN
WASHINGTON
LAW GROUP PLLC

DENNIS J. McGLOTHIN*
ROBERT J. CADRANELL
**also admitted to practice in Florida*

LINDSEY M. MATTER, PARALEGAL
(206) 420.5737
EMAIL: lindsey@westwalaw.com

January 2, 2019

The Supreme Court
State of Washington
Supreme Court Clerk
P.O. Box 40929
Olympia, WA 98504

Re: Bodge v. Bodge; Supreme Court No. 96682-6

Dear Clerk of the Court:

Please find enclosed the filing fee in the amount of \$200 for the above entitled matter.

Please contact me should you have any questions or concerns.

Thank you.

Very truly yours,



Lindsey M. Matter
Paralegal

APPENDIX 2

Lindsey M. Matter

From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Wednesday, January 9, 2019 2:25 PM
To: Lindsey M. Matter
Subject: RE: Supreme Court No. 95379-1

Hello,

This afternoon we received the filing fee for case 96682-6. A letter from the Supreme Court will be sent to all parties.

Thank you,

*Receptionist
Supreme Court Clerk's Office
360-357-2077*

From: Lindsey M. Matter [mailto:Lindsey@WestWaLaw.com]
Sent: Wednesday, January 9, 2019 12:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: RE: Supreme Court No. 95379-1

Thank you for your response.

At the latest, it should have gone out in the mail on the 3rd so I am concerned you have not yet received it. I may need to send a messenger there to make sure it is received by the 11th. Can you let me know if it was in today's mail by any chance? If not, I will send out a new check.

Thank you.

Lindsey M. Matter
Paralegal
Western Washington Law Group, PLLC
Phone: (206) 420-5737
Fax: (425) 955-5300
lindsey@westwalaw.com

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From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Tuesday, January 8, 2019 2:45 PM
To: Lindsey M. Matter <Lindsey@WestWaLaw.com>
Cc: Dennis McGlothlin <Dennis@WestWaLaw.com>
Subject: RE: Supreme Court No. 95379-1

Hello,

We have not yet received your filing fee. The Supreme Court will issue a letter to the parties acknowledging the filing fee once we receive it.

Thank you,

*Receptionist
Supreme Court Clerk's Office
360-357-2077*

From: Lindsey M. Matter [<mailto:Lindsey@WestWaLaw.com>]
Sent: Tuesday, January 8, 2019 2:33 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Dennis McGlothin <Dennis@WestWaLaw.com>
Subject: Supreme Court No. 95379-1

This email is sent to confirm that you have received the filing fee for the above matter. Our office mailed the filing fee on January 2, 2019. See letter attached.

Can you please confirm receipt of the filing fee?

Thank you for your assistance.

Lindsey M. Matter
Paralegal
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Phone: (206) 420-5737
Fax: (425) 955-5300
lindsey@westwalaw.com

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WESTERN WASHINGTON LAW GROUP, PLLC

January 09, 2019 - 3:12 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96682-6
Appellate Court Case Title: Marriage of Jessica Bodge and Brian Bodge
Superior Court Case Number: 12-3-02727-9

The following documents have been uploaded:

- 966826_Answer_Reply_20190109151051SC118025_9748.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion
The Original File Name was PLDG.2019.01.09.Appellants Reply Supporting her Motion to Accept Late Filed Petition.pdf

A copy of the uploaded files will be sent to:

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- mj@jaycareylaw.com
- robert@westwalaw.com

Comments:

Sender Name: Lindsey Matter - Email: lindsey@westwalaw.com

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