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MAR 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293271

**UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

DAVID J. BROWN

Petitioner/Appellant

v.

WASHINGTON STATE UNIVERSITY

Whitman County

Respondent/Appellee

Appeal from the WHITMAN COUNTY SUPERIOR COURT

No. 102001741

APPELLANT'S OPENING BRIEF

David J Brown

Pro Se

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Redmond, WA 98052

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*Martinez 130 Idaho at 132-33; Abbott, 129.
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| 5 | RCW 34.05.010(19) | 6,9,11 |

Jurisdictional Statement

8 David Brown hired Attorney Roger Sandberg on June 16, 2010 for the
9 Petition for Review in Whitman County Superior Court. Clerk's Papers (CP) at
10 358-359. David Brown did not receive the notice of decision of the University
11 Appeals Board until June 4, 2010. The University Appeals Board sent the
12 decision by mail on June 1, 2010. CP at 458-459.

15 Roger Sandberg hand-served Mr. Brown's Petition for Review on the
16 office of the Attorney General at WSU on July 1, 2010, and mailed to Whitman
17 County Superior Court that same day: Roger Sandberg's receptionist mailed the
18 Petition for Review to Whitman County Superior Court on July 1, 2010 using
19 the United States Postal Service. CP at 475 and at 489. Roger Sandberg sent the
20 Petition for Review to Mr. Brown by e-mail, at 4:59 P.M. on July 1, 2010.
21 Report of Proceedings (RP) (July 30th, 2010) at 3-4. The Whitman County
22 Superior Court had Jurisdiction over the Petition for Review due to *RCW*
23 *34.05.546, 20 U.S.C. 1001, and 28 U.S.C. 1291, and 28 U.S.C. 1331, and 28*
24 *U.S.C. 1391.*

1 That same e-mail was when Mr. Sandberg first notified Mr. Brown that:
2 (1) he had completed Mr. Brown's Petition for Review, (2) he had served the
3 Petition for Review on the office of the Attorney General at WSU on July 1,
4 2010, and (3) that the Petition for Review was mailed to the Whitman County
5 Superior Court on July 1, 2010. The documents were not actually filed until
6 July 6, 2010. RP (July 30th, 2010) at 3-4. The Administrative Procedures Act
7 requires service and filing within 30 days of service of the agency order and
8 WSU's order was mailed on June 1st and under RCW 34.05.010(19) service is
9 complete upon deposit in the mail. RP (July 30th, 2010) at 1. Mr. Brown said, in
10 his response brief to WSU's motion to dismiss, "I did call my attorney within
11 the two weeks after I hired him asking how progress was coming and he
12 reported only good news, and that he was almost finished. He never reported a
13 problem or that he was lagging on the job. He did not give me details or
14 specifics, and then waited until the final day to attempt to do the job I paid him
15 to do two weeks prior (with a 30 day timeline in the attorney's knowledge-
16 base)." CP at 50.

17 Washington State University filed a Motion to Dismiss on July 23rd,
18 2010. CP at 18. Mr. Brown served Mr. Sandberg a Withdraw Notice on July 22,
19 2010. CP at 16-17. The Motion to Dismiss hearing was held on July 30th, 2010,
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1 in Whitman County Superior Court. CP at 18. The Motion to Dismiss was
2 granted. RP (July 30th, 2010) at 9-11.

3 On August 5, 2010, Mr. Brown filed a Motion to Modify Ruling in
4 Whitman County Superior Court to overturn the order that dismissed his
5 petition for review. CP at 508-517. On August 11, 2010, Mr. Brown filed a
6 Motion for Reconsideration in Whitman County Superior Court to overturn the
7 order that dismissed his petition for review. CP at 518-521. Mr. Brown was not
8 present at this hearing or available to appear telephonically because he did not
9 schedule this hearing at that time or agree to have that hearing at that time. CP
10 at 514-515. Both motions were denied. RP (August 27, 2010) at 1-3.

14 I now appeal in the Court of Appeals for Division III in Spokane, WA,
15 pursuant to 28 U.S.C. 1291. On March 1st, 2011, Mr. Brown sent this Appeal
16 Brief to all necessary parties including the trial court.

18 **Statement of the Issues Presented for Review**

19 This appeal focuses on whether the judge erred in four separate and
20 principal ways: (1) the trial court failed to apply equitable tolling, (2) the trial
21 court failed to consider waiver, (3) the trial court failed to consider consent, (4)
22 the trial court failed to consider balance of interests.
23
24

25 **Statement of the Case**

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2 the Petition for Review in Whitman County Superior Court. Clerk's Papers
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24 Summary of the Argument

1 The trial court erred by not applying equitable tolling to Mr. Brown's
2 petition for review. The case should not have been dismissed due to equitable
3 tolling.
4

5 Argument

6 Standard of Review

7 "Subject matter jurisdiction is the authority of a court to hear and
8 determine the class of actions to which a case belongs... A dispute over a trial
9 court's subject matter jurisdiction presents a question of law that is reviewed de
10 novo," *Care Planning Assocs. V. Mayberry (2009) 150 Wn. App. 491-730,*
11 *1030-1039.*
12
13

14 The defense of Lack of Subject Matter Jurisdiction has been asserted by
15 Washington State University. CP at 19-22.
16

17 Subject matter jurisdiction can be granted or denied, based on the
18 circumstances.
19

20 The supreme court held that equitable tolling of time limits may apply to
21 extend deadlines in administrative proceedings where the plaintiff has in some
22 way been misled or lulled into inaction: "the doctrine [of equitable tolling]
23 serves to ameliorate harsh results that sometimes flow from a strict, literalistic
24 construction and application of administrative time limits contained in statutes
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1 and rule, *Id. At 1134 (equating Judge Zehmers dissent in Machules V. Dep't of*
2 *Admin. 502 So. 2d 437 446 (Fla. 1st Dca 1986).*

3 “The equitable tolling court to allow an action to proceed when injustice
4 requires it, even though a statutory time period had nominally elapsed,” *In re*
5 *Carlstad, 50 Wn 2d 583 593 80 P.3d 587 (2003).*

7 The Ninth Circuit has considered the three factors when applying the
8 equitable tolling doctrine. This court must do so also. If this court does, all three
9 factors would pan out in Mr. Brown’s favor. The Ninth Circuit has also
10 balanced the possible injustice to the parties versus the effect upon the public
11 policy expressed by the statute. If this court performs this balancing act, they
12 would find that Mr. Brown’s future is on the line while nothing is on the line for
13 WSU. Due to **Stare Decisis**, other college students would have their futures
14 jeopardized through no fault of their own. The balancing act in this matter
15 would also pan out in Mr. Brown’s favor.
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20 **Issues**

21 1. The Trial Court Failed to Apply Equitable Tolling.

22 The doctrine of equitable tolling is applied when a party has been misled
23 or lulled in inaction, has in some extraordinary way been prevented from,
24 asserting his claim, *Yamile Garcia vs. Department of Business and Professional*
25 *Regulation, Division of real estate. (2008).*
26
27

1 Doctrine of equitable tolling is applicable in administrative proceedings,
2 *Machules vs. Dep't of Admin (1988)*.

3 The supreme court held that equitable tolling of time limits may apply to
4 extend deadlines in administrative proceedings where the plaintiff has in some
5 way been misled or lulled into inaction: "the doctrine [of equitable tolling]
6 serves to ameliorate harsh results that sometimes flow from a strict, literalistic
7 construction and application of administrative time limits contained in statutes
8 and rule, *Id. At 1134 (equating Judge Zehmers dissent in Machules V. Dep't of*
9 *Admin. 502 So. 2d 437 446 (Fla. 1st Dca 1986)*. The supreme court further
10 notified that the equitable tolling doctrine "focuses on the plaintiff's excusable
11 ignorance of the limitations period and on [the] lack of prejudice to the
12 defendant." *523 So. 2d at 1134 (quoting Nation v. Bank of California, 649 F 2d*
13 *691, 696 (9th Cir. 1981) quoted in Cocke v. Merril Lynch & Co. 817 F. 2d 1559,*
14 *15611 (11th Cir 1987)*.

15 The doctrine of equitable tolling applies in certain situations to excuse
16 untimeliness as in filing an appeal See *Williams v. Commision on Human Rights*
17 *and Opportunities, 257 Conn. 257 Comm. 258, 284, 777 A2d. 645 (2001)*
18 ("complaint that is not filed within the mandatory time requirement is
19 dismissable unless waiver, consent, or some other compelling equitable tolling
20
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1 *doctrine applies”), on appeal after remand, 67 Comm App. 316, 786 A.2d 1283*
2 *(2001).*

3 Because Mr. Brown did not waive his right to appeal or give consent to
4 his lawyer to wait so long, this untimeliness must be excused.

6 The doctrine of equitable tolling stops the running of the statute of
7 limitations if, despite all due diligence, plaintiffs are unable to obtain essential
8 information concerning the existence of their claim, *See Cada v. Baxter*
9 *Healthcare Corp. 920 F.2d 446 451 (7th Cir. 1990).* Hence, because WSU did
10 not inform Mr. Brown of his appeal result until days after the appeal occurred
11 and Mr. Brown’s lawyer did not inform Mr. Brown of the tardiness or the
12 required service method (neither did WSU), Mr. Brown should not have my
13 rights infringed upon.
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17 The equitable tolling doctrine has been applied when: the defendant
18 received timely notice regarding the filing of the first claim, the defendant will
19 not be prejudiced in gathering evidence to defend against the second claim, and
20 if reasonably and in good faith when filing the second claim.
21

22 The Ninth Circuit has considered the three factors when applying the
23 equitable tolling doctrine. This court must do so also. If this court does, all three
24 factors would pan out in Mr. Brown’s favor. The Ninth Circuit has also
25 balanced the possible injustice to the parties versus the effect upon the public
26
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1 policy expressed by the statute. If this court performs this balancing act, they
2 would find that Mr. Brown's future is on the line while nothing is on the line for
3 WSU. Due to **Stare Decisis**, other students would have their futures jeopardized
4 through no fault of their own. The balancing act in this matter would also pan
5 out in Mr. Brown's favor.

7 A statutory time limit "operates as an ordinary statute of limitations" and
8 is "subject to the principles of waiver and collateral estoppel, including the
9 doctrine of equitable tolling." *State v. Duvall*, 86. Wn. App. 871, 874,-875, 940
10 P.2d 671(1997).

13 "The equitable tolling court to allow an action to proceed when injustice
14 requires it, even though a statutory time period had nominally elapsed," *In re*
15 *Carlstad*, 50 Wn 2d 583 593 80 P.3d 587 (2003). This court must grant relief
16 based on the equitable tolling doctrine.

18 Equitable tolling applies to circumstances involving "bad faith,
19 deception or false assurances by the defendant, and the exercise of diligence by
20 the plaintiff." *In re Haisington*, 99 Wn. Apr at 430: *state v. little fair*, 2002, app
21 749, 759, 51 P.3d 116. Mr. Brown did everything possible to be timely and just
22 and diligent. Thus, this court must reverse.

25 Equitable tolling is borne of the petitioner's due process right to have a
26 meaningful opportunity to present his or her claims. *See Martinez 130 Idaho at*
27

1 132-33; *Abbott*, 129. *Idaho* at 385, 924 P.2d at 1229. As noted in *Chico-*
2 *rodriguez v. State*, 141 *Idaho* 579, 582, 114 P.3d 137, 140 (Ct App. 2005),
3 American Courts generally have applied equitable tolling only in rare and
4 exceptional circumstances beyond the petitioner's control that prevented him or
5 her from filing a timely petition.
6

7 Equitable Tolling Doctrine under Black's Law Dictionary (Ninth Edition,
8 West, Thomson) tells us that the statute of limitations will not bar a claim if the
9 plaintiff, despite diligent efforts, did not discover the injury until after the
10 limitations period had expired. If Mr. Brown did not discover the injury of the
11 late filing until the time period had passed, then the equitable tolling doctrine
12 *must* protect his right to appeal. Also, because this case would result in justice
13 for generations of university students along with Mr. Brown, equitable tolling
14 and the interests of justice should protect this case and allow it to be heard.
15
16
17

18 Equitable tolling is reserved for those rare instances where – due to
19 circumstances external to the party's own conduct – it would be unconscionable
20 to enforce the limitations period against the party and gross injustice would
21 result." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003).
22
23

24 "Equitable tolling must be grounded and infrequent lest circumstances of
25 individualized hardship supplant the rules of clearly drafted statutes." *Gayle v.*
26 *UPS*. 401 F.3d 222.226(4th Cir. 2005). In order to demonstrate entitlement to
27

1 equitable tolling, one must present (1) extraordinary circumstances, (2) beyond
2 their control or external to their own conduct, (3) that prevented them from
3 filing on time. *United States v. Sosa*, 364 F.3d 507, 512 (4 Cir. 2004). These
4 circumstances are extraordinary, beyond Mr. Brown's own control, external to
5 Mr. Brown's own control, and prevented Mr. Brown from filing on time –
6 Hence, equitable tolling must apply under *United States v. Sosa*, 364 F. 3d 507,
7 512 (4th Cir. 2004).
8
9

10
11 If the 30-day deadline to file is jurisdictional and can only be tolled in
12 limited circumstances, then this is a circumstance in which it must be tolled.
13

14 Under *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), *Pace v.*
15 *Deguglielmo*, 544, U.S. 408 (2005) the petitioner must show (1) he exercised
16 due diligence in pursuing his rights and (2) that some extraordinary
17 circumstance stood in his way. Mr. Brown exercised due diligence and Mr.
18 Brown's attorney's actions are extraordinarily wrongful. Thus, equitable tolling
19 must apply.
20
21

22
23 To receive equitable tolling, a petitioner bears the burden of showing "(1)
24 that he has been pursuing his rights diligently, and (2) that some extraordinary
25 circumstance stood in his way." *Pace* 544 U.S. at 418, 125 S Ct 1807.
26
27

1 Mr. Brown pursued his rights diligently and the only thing that stands in
2 his way is the acts of his former attorney. Hence, equitable tolling must apply.

3 All the elements of equitable tolling were raised at the July 30, 2010,
4 motion to dismiss hearing but the motion was still granted. Thus, the
5 appearance of fairness doctrine has proven this motion to dismiss to be invalid.
6

7 **2. The Trial Court Failed to Consider Waiver.**

8 Mr. Brown never stopped trying to receive justice and did everything that he
9 could to appeal this administrative decision, so he did not waive the right to
10 appeal. Mr. Brown's attorney's actions caused this to happen to me. Black's
11 Law Dictionary (Ninth Edition, West, Thomson) tells us that to waive is to
12 abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a
13 right or claim) voluntarily. Ordinarily, to waive a right, one must do it
14 knowingly – with knowledge of the relevant facts. To refrain from insisting on
15 (a strict rule, formality, etc.); to forgo. Black's Law Dictionary (Ninth Edition,
16 West, Thomson) teaches us that a waiver is a voluntary relinquishment or
17 abandonment – expressed or implied – of a legal right or advantage <waiver or
18 notice>. The party alleged to have waived a right must have had both
19 knowledge of the existing right and the intention of forgoing it. Hence, if Mr.
20 Brown did not have access to his petition within the 30-day timeframe and Mr.
21 Brown's attorney filed it late without his knowledge or approval, while Mr.
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1 Brown did hire Mr. Brown's attorney two weeks beforehand and Mr. Brown
2 was told by Mr. Brown's attorney that he could do it, then Mr. Brown fought
3 for his rights and did not waive them. Hence, the principles of waiver must
4 apply.
5

6 **3. The Trial Court Failed to Consider Consent.**

7 Mr. Brown did not give his consent to Roger Sandberg to wait so long or
8 to serve in that method. Mr. Brown simply wants justice and rights.
9

10 **4. The Trial Court Failed to Consider Balance of Interests.**

11
12 Balance of interests must be considered. If this court affirms, then
13 university students would have their rights jeopardized through deception,
14 unfairness, no fault of their own, bad faith, and without waiver of their rights,
15 due to stare decisis. *42 U.S.C. 1441* entitles all citizens to equal rights under the
16 law. Justice and the right to appeal for university students is a more important
17 interest than the university's right to have an appeal occur with an
18
19 extraordinarily minor technicality on the record: *the right of the individual is of*
20 *far greater importance in this circumstance and in all similar future*
21 *circumstances.*
22
23

24 **CONCLUSION**

25 Mr. Brown submits that he has produced evidence that gives rise to questions of
26 material fact and substantial/relevant issues on his claim that his Petition for Review was
27

1 wrongly dismissed. There is no question that equitable tolling must give this petitioner the
2 right to have his case heard. There is reason to conclude that the trial court judge ignored
3 evidence material to the facts and issues, and ignored the realities of: equitable tolling,
4 consent, waiver, balance of interests, interests of justice, and constitutional rights. For these
5 reasons, Mr. Brown requests that this court reverse the motion to dismiss order, and remand
6 his case for trial on his petition for review of his suspension and trespass from Washington
7 State University. I pray that this appellate court reverse this decision, and remand this case to
8 Spokane County Superior Court or this very Court of Appeals for all future proceedings.
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15 *I hereby certify under Penalty of Perjury under the Laws of the State of Washington*
16 *that all information in this document ~~and appendix~~ is true and correct to the best of my*
17 *knowledge.*

18 Pro Se Petitioner/Appellant
19 David Jesse Brown

20 DATED: This 1 day of March 2011.

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22 By David Brown

23 David Jesse Brown
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**Certificate of Compliance Pursuant to Fed. R. App. P.
32(a)(7)(C) and Circuit Rules for
Case No. 293271**

I certify that

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rules, the attached opening brief is:

a. Proportionally spaced, has a typeface of 14 points or more and contains 4,398 words and 519 lines, in Roman Type.

Pro Se Petitioner/Appellant
David Jesse Brown

DATED: This 1 day of March 2011.

By David Brown

David Jesse Brown

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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STATE OF WASHINGTON

WHITMAN COUNTY SUPERIOR COURT

State of Washington Division III Court of Appeals

DAVID J. BROWN,

Petitioner,

NO. 293271

vs.

PROOF OF SERVICE

WASHINGTON STATE UNIVERSITY,

Respondent.

STATE OF WASHINGTON)
COUNTY OF WHITMAN) ss.

David Jesse Brown, on oath says:

1. I am the petitioner in the above-referenced matter.
2. On March 1, 2011, I served a true copy of David Brown's Opening Brief, by mail delivery to the office of the Respondent's attorney, Danielle Hess, at P.O. Box 641031, Pullman, WA, 99164-1031.

1 3. On March 1, 2011, I served two true copies of David Brown's Opening Brief, by
2 mail delivery to The Court of Appeals of the State of Washington Division III 500
3 N Cedar ST Spokane, WA 99201-1905.
4

5
6 I hereby declare under Penalty of Perjury under the laws of the State of Washington that the
7 foregoing is true and correct to the best of my knowledge. That which is asserted as my belief
8 or my opinion is also true and correct.
9

10 DATED: This 1 day of March 2011.
11

12 Respectfully submitted,

13 By David Brown

14 David Jesse Brown

15
16 David J. Brown

17 18221 NE 21st Street

18 Redmond, WA, 98052

19 (425)221-9816
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