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SUPREME COURT
STATE OF WASHINGTON

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SUPREME COURT
OF THE STATE OF WASHINGTON

In re Marriage of:)
)
RICHARD B. FERGUSON,) No. 89672-1
)
Respondent,) MOTION FOR EXTENSION OF TIME TO
) FILE PETITION FOR DISCRETIONARY
and) REVIEW
)
PAMELA M. FERGUSON,)
)
Petitioner.)
)

1. IDENTITY OF MOVING PARTY

Pamela M. Ferguson (“Pamela”),¹ Petitioner, respectfully requests the relief described in part 2.

2. STATEMENT OF RELIEF SOUGHT

Extension of time to file her petition for review before the Supreme Court of the State of Washington.

3. PORTIONS OF THE RECORD RELEVANT TO MOTION

The portions of the record relevant to this motion are cited in part 4, below, where applicable.

¹ The parties are referred to by their first names for ease of reference only. No disrespect is intended to either party.

4. GROUNDS FOR RELIEF AND ARGUMENT

The Court Should Grant the Petitioner's Motion to Extend The Time For Filing The Petition For Review Because The Filing, Despite Reasonable Diligence, Was Received by This Court One Day Late Due to Excusable Error.

Pamela's petition for review before the Supreme Court of the State of Washington was due for filing on December 9, 2013. Due to an error by her attorney, on that date the petition for review was sent to the court by certified mail, return receipt requested rather than filed in person at the courthouse. RAP 18.6(c) states that "a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing." The rule goes on to state that "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." Pamela's attorney misinterpreted the first section of RAP 18.6(c) and mailed the petition for review. The petition for review was timely served on the respondent by email by agreement on December 9, 2013 and by placement in the U.S. mail on that same day.

The Court received the petition for review on December 10, 2013, one day after the deadline for filing had passed. Ms. Ferguson moves now for an extension of time to file her petition for review. The Rules of Appellate Procedure and

precedent in this Court support the granting of Pamela's request for an extension of time.

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). This Court has discretion to "waive or alter the provisions of any of these rules in order to serve the ends of justice." *Id.* However, these provisions are subject to the requirements of RAP 18.8(b).

RAP 18.8(b) requires the appellate court to grant an extension of time for filing a petition for review only in extraordinary circumstances and to prevent a gross miscarriage of justice. "Extraordinary circumstances" include instances in which the filing, despite reasonable diligence, was defective due to excusable error. *Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 482, 848 P.2d 1337 (1993).

In *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 639 P.2d 732 (1982), an appellant filed the notice of appeal with the wrong court. The notice was filed with the court of appeals, rather than the trial court, in violation of RAP 5.2(a). 96 Wn.2d at 895-96. As a result of this misreading of RAP 5.2(a) by appellant's counsel, the notice of appeal was not timely filed with the correct court. *Id.*

This Court affirmed the Court of Appeals' granting of an extension of time to file the notice of appeal, noting that "[i]t has been 'apparent that the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.'" *Weeks*, 96 Wn.2d at 896 (*quoting First Federal Savings & Loan Ass'n of Walla Walla v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)). The *Weeks* Court also noted that the appellant had made an effort "at timely compliance with the Rule." 96 Wn.2d at 896. The Court concluded that "substance should prevail over form. [Respondents] had notice. Applying strict form would defeat the purpose of the rules to 'promote justice and facilitate the decision of cases on the merits.'" 896 Wn.2d at 896 (*quoting* RAP 1.2(a)).

Similarly, in *State v. Ashbaugh*, an extension was appropriate when the notice of appeal was timely filed, but the appellant failed to pay the required filing fee. This Court reversed the Court of Appeals' dismissal of the appeal, noting:

The record indicates that the failure to timely pay the \$25 filing fee in the instant case was a mere oversight on the part of petitioner's attorney. This oversight was corrected as soon as it was brought to his attention. It is difficult to visualize how "the demands of justice" would be served by dismissing petitioner's appeal under the facts of this case. As we noted in *Neal v. Green*, 68 Wn.2d 415, 416, 413 P.2d 339 (1966), "[We are] hesitant to punish litigants for neglect of their counsel." However, we do not condone willful and unexcusable failure to comply with applicable appellate rules. *State v. Ashbaugh*, 90 Wn.2d 432, 438-39, 583 P.2d 1206 (1978).

Finally, in *Scannell v. State*, the petitioner filed a notice of appeal six weeks late due to confusion over recent changes to the Rules of Appellate Procedure. *Scannell*, 128 Wn.2d 829, 831-32, 912 P.2d 489 (1996). This Court reversed the Court of Appeals' decision dismissing the appeal, due to several factors. The Court found that the petitioner's confusion over recent amendments to the Rules of Appellate Procedure contributed to the delay in filing. 128 Wn.2d at 834. Second, the petitioner's failure to timely file was an "innocent mistake." *Id.* Third, the petitioner made a good faith effort to comply. *Id.* Finally, the "end result [of dismissal] is drastic." *Id.*

Here, as in *Weeks*, *Ashbaugh* and *Scannell*, all of the factors favor this Court granting the requested extension. Pamela's attorney misinterpreted RAP 18.6(c)'s requirement that the petition for review be *received*, rather than *mailed*, within thirty days of the Court of Appeals' decision, just as the appellant in *Weeks* misread RAP 5.2(a)'s requirement that the notice of appeal be filed with the trial court. As in *Weeks*, Pamela made good faith efforts directed at timely compliance with the rule: she served opposing counsel and mailed the petition by the deadline. *See Weeks*, 96 Wn.2d at 896. Absent the mistake in reading RAP 18.6(c), her lawyer clearly would have hand delivered the petition to the Court of Appeals on a timely basis on the morning he mailed the petition instead. In

addition, just as was the case in *Weeks*, “[Richard Ferguson] had notice.

Applying strict form would defeat the purpose of the rules to ‘promote justice and facilitate the decision of cases on the merits.’” 896 Wn.2d at 896 (*quoting* RAP 1.2(a)).

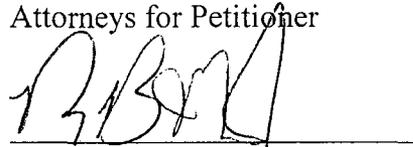
Similarly, as in *Ashbaugh* and *Scannell*, Pamela’s late filing was due to an “oversight” on the part of her attorney, not a “willful” disregard of the Court’s rules. As stated by the *Ashbaugh* Court, “[i]t is difficult to visualize how ‘the demands of justice’ would be served by dismissing petitioner's appeal under the facts of this case....[We are] hesitant to punish litigants for neglect of their counsel." *Ashbaugh*, 90 Wn.2d at 438-39. As in *Scannell*, Pamela’s attorney’s oversight was an “innocent mistake,” 128 Wn.2d at 834, Pamela made a good faith effort to comply, *Id.*, and the end result of dismissal would be drastic. *Id.*

Denying this motion for an extension of time would unnecessarily punish Pamela for an error that did not prejudice the proceedings. In this matter it is clear that the petition for review did not slip Pamela’s counsel’s mind, and was presented to the Court just hours after it was due. The petition was placed in the mail on the due date, was served on opposing counsel on the due date, and was received by the court the next day. Because the petition was received for filing mere hours after the deadline, no prejudice to the system is present. The Court

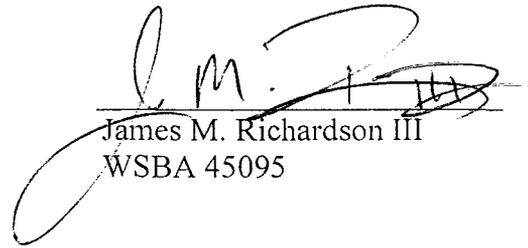
should grant Pamela's motion to for an extension of time to file her petition for review.

Dated this 13th day of January, 2014.

MADISON LAW FIRM, PLLC
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on January 13, 2014, I arranged for service of the foregoing Motion for Extension of Time to File For Discretionary Review, to the Court and counsel for the parties to this action as follows:

Office of Clerk
Supreme Court of Washington
Temple of Justice
Olympia, WA 98504
Via Hand Delivery

Mr. Roger Schweinler, Attorney for Respondent
McCarthy & Causseaux, P.S.
902 S. 10th St.
Tacoma, WA 98405-4537
Via email and ABC Legal Messenger Service

Dated at Olympia, Washington this 13th day of January, 2014.



Roger Madison, WSBA 15338