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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMES ENGLE, an individual,

Plaintiff-Respondent,

v.

JAY DEE MILLER and his separate property
only,

Defendant-Appellant.

and

JANIS DEE MILLER, as wife and the marital
community composed thereof,

Defendant.

No. 70609-8-I 91266-1

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

COMES NOW, James Engle, Respondent, by and through his attorney, James V. Hill of
Russell and Hill, PLLC, and submits this response in opposition to the Petitioner's motion for
extension of time to file petition for review.

I. BACKGROUND

On December 22, 2014, the honorable Michael J. Trickey, filed the Order Denying
Appellant's Motion for Reconsideration. The same day, the court administrator/clerk, Richard D.

ANSWER TO APPELLANT'S MOTION FOR
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REVIEW - 1

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1 Johnson, sent notification of the Order Denying Motion for Reconsideration to all attorneys of
2 record. The letter also informed counsel that “Within 30 days after the order is filed, the opinion of
3 the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a
4 petition for review in this court...” Exhibit 1 to the Declaration of James V. Hill. A copy of the
5 Order Denying Motion for Reconsideration was also enclosed with the letter. Exhibit 2 to the
6 Declaration of James V. Hill. The notice was sent to the appellant attorney’s correct e-mail
7 address. Exhibit 3 to the Declaration of James V. Hill.

8
9 On January 28, 2015, thirty-seven days after the December 22, 2014 filing, appellant’s
10 attorney filed a motion for extension of time to file petition for review.

11 **II. ARGUMENT AGAINST GRANTING EXTENSION OF TIME**

12 RAP 13.4 (a) provides that a party seeking discretionary review by the Supreme Court of a
13 Court of Appeals decision terminating review must serve on all other parties and file a petition for
14 review or an answer to the petition that raises new issues. A petition for review should be filed in
15 the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of
16 Appeals decision is timely made, a petition for review must be filed within 30 days after the
17 decision is filed (Emphasis added).

18 Appellant’s attorney did not file a petition for review within 30 days.

19 **A. APPELLANT OFFERS NO ACCEPTABLE EVIDENCE OR PROOF TO**
20 **SUPPORT HIS MOTION FOR EXTENSION OF TIME.**

21 Within appellant’s Motion for Extension of Time to File Petition for Review, Section III -
22 Facts in Support of Motion (6), appellant’s attorney attributes computer “malware” as a possible
23 reason for having not received the December 22, 2014 notice. Appellant’s attorney offered no
24 receipt for new anti-malware software he claimed to have purchased on December 23, 2014. Nor
25 was a declaration under penalty of perjury provided to support these claims. In fact, no evidence or

1 sworn testimony whatsoever was offered to prove the assertion. Exhibit 4 to the Declaration of
2 James V. Hill. In the absence of either, his pleading alone does not constitute evidence.

3 Even if the court does accept Appellant's attorney's unsworn contention that "malware"
4 prevented him from receiving the December 22, 2014 notice, RAP 13.4 clearly states that a
5 petition for review must be filed within 30 days after the order is filed. The timeframe begins when
6 the order is filed, not when counsel becomes aware of that the order was filed.

7
8 **B. APPELLANT'S ARGUMENT FAILS TO MEET THE "EXTRAORDINARY
CIRCUMSTANCES" TEST AS ARTICULATED IN RULE 18.8(b).**

9 While RAP 1.2(a) clearly states the court's desire that rules of appellate procedure be
10 interpreted liberally enough such that the outcome of a case are not determined on the basis of
11 compliance or noncompliance with the rules, this same rule also sets limits to the liberal
12 interpretation by making it subject to the restrictions of RAP 18.8(b) in the area of extensions of
13 deadlines.

14 In contrast to the liberal application to the rules of appellate procedure as envisioned by
15 RAP 1.2(a), the restrictions of RAP 18.8(b) expressly require a narrow application. RAP 18.8(b)
16 requires that the appellate court only grant extensions in deadlines in "extraordinary
17 circumstances and to prevent a gross miscarriage of justice." Beckman ex. rel. Beckman v. State
18 Dept. of Social and Health Services, 102 Wn.App. 687, 693, 11 P.3d 313 (2000).

19
20 Numerous appellate courts have interpreted this rule and reached a consensus that only
21 those "defective filings were upheld due to 'extraordinary circumstances,' i.e., circumstances
22 wherein the filing, despite reasonable diligence, was defective due to excusable error or
23 circumstances beyond the party's control. In such a case, the lost opportunity to appeal would
24 constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct."
25

1 Reichelt v. Raymark Industries, Inc., 52 Wn.App 763, 756-66, 746 P.2d 653 (1988).

2 The burden is on petitioner to provide “sufficient excuse” for its failure to file timely, as
3 well as demonstrate “sound reason” to abandon the court’s preference for finality. Beckman ex.
4 rel. Beckman v. State, Dept. of Social and Health Services, 102 Wash.App 687, 696, 11 P.3d
5 313.

6 This rigorous test has rarely been satisfied in reported caselaw since the effective date of
7 the Rules of Appellate Procedure on July 1, 1976. In each of those cases, the moving party actually
8 filed within the 30-day period but some aspect of the filing was challenged. See Weeks v. Chief of
9 State Patrol, 96 Wash.2d 893, 895-96, 639 P.2d 732 (1982), notice timely filed, but filed in wrong
10 court; State v. Ashbaugh, 90 Wash.2d 432, 438, 583 P.2d 1206 (1978), notice timely filed but
11 rejected by court for lack of filing fee; Structurals N.W., Ltd. v. Fifth & Park Place, Inc., 33
12 Wash.App. 710, 714, 658 P.2d 679 (1983), notice timely when filed within 30 days of entry of
13 stipulated “amended” judgment.

14 In each case, the defective filings were upheld due to “extraordinary circumstances”, i.e.,
15 circumstances wherein the filing, despite reasonable diligence, was defective due to excusable
16 error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal
17 would constitute a gross miscarriage of justice because of the appellant's reasonably diligent
18 conduct. Reichelt v. Raymark Industries, Inc., 52 Wash.App. 763, 764 P.2d 653 (1988).

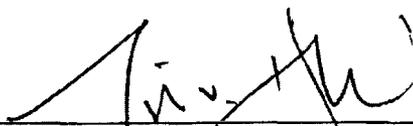
19 In another example of “excusable error,” the court held that the petitioner's confusion
20 over a change in the appellate rules, his reasonable diligence in carefully following the prior
21 rules, and his good faith attempt to timely file his notice of appeal warranted leniency. Scannell
22 v. State, 128 Wash.2d at 834-35, 912 P.2d 489.

1 In the case at bar, appellant does not claim reasonable diligence, confusion about the
2 method of seeking review, excusable error in interpreting the rules, or circumstances beyond his
3 control. Instead, appellant attorney's sole contention is that his computer may have been infected
4 with "malware" which may have prohibited his receipt of an e-mail from the court. Appellant's
5 attorney offers no tangible proof to support this assertion. No sworn testimony, receipts for
6 products, or invoice or opinion from a computer repair professional to diagnose or fix any
7 computer problem has been offered. Moreover, even if appellant's attorney's assertions of his
8 computer being affected by "malware" are deemed credible, there exists no evidence, argument,
9 or opinion that this "malware" affected his e-mail service in any way.

10
11 **III. CONCLUSION**

12 Appellant has made no showing that his motion for extension of time is based on
13 extraordinary circumstances. Accordingly, and pursuant to RAP 18.8(b), petitioner's motion
14 should be denied.

15
16 DATED this 11th day of March, 2015.

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20 _____
21 JAMES V. HILL #31654
22 Attorney for Plaintiff-Respondent
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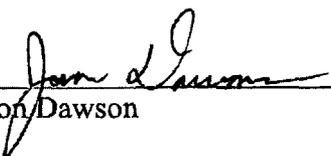
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the date last shown below, I caused a true and correct copy of the foregoing document to be served in the manner indicated to the parties listed below:

John R. Muenster
Muenster & Koenig
1490 Sunrise Drive NE
Bainbridge Island, WA 98110
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- Facsimile
- Email
- First Class Mail, with sufficient postage prepaid

DATED this 11th day of March, 2015, at Everett, Washington.



Jason Dawson

OFFICE RECEPTIONIST, CLERK

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Good Afternoon:

Attached for filing is Respondent's Answer to Appellant's Motion for Extension of Time.

Case Name: Engle v. Miller
Case Number: NO. 70609-8-1
Person filing brief:
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Thank you.

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