

NO. 43076-2-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

KITSAP COUNTY, a political subdivision of the State of Washington,

Respondent,

vs.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation
registered in the State of Washington, and JOHN DOES and JANE ROES
I-XX, inclusive

Appellants,

and

IN THE MATTER OF NUISANCE AND UNPERMITTED
CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap
County Tax Parcel ID No. 362501-4-002-1006 with street address 4900
Seabeck Highway NW, Bremerton, Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

KITSAP COUNTY'S ANSWER TO MOTION TO ENLARGE
DEADLINE TO FILE MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTIES

The Respondent, KITSAP COUNTY, by and through its attorney, Neil R. Wachter, Senior Deputy Prosecuting Attorney, asks this Court for the relief designated in Part II of this Motion.

II. RELIEF REQUESTED

KITSAP COUNTY respectfully requests pursuant to RAP 18.6(c) and RAP 18.8(b) that this Court deny the Appellant's Motion to Enlarge Deadline to File Appellant's Motion for Reconsideration ("Motion to Enlarge") filed by Appellant KITSAP RIFLE AND REVOLVER CLUB ("KRRC" or the "Club").

III. FACTS RELEVANT TO MOTION

On October 28, 2014, this Court issued its published opinion in this matter (the "Opinion"). On Monday November 17, 2014 – the 20th full day after the Court published the Opinion - the Court's public hours and the Court Clerk's business hours came and went and no motion for reconsideration was filed. As of 5 p.m. on Day 20, no motion to extend time was filed and there were no extenuating or extraordinary circumstances, such as a trip to the ER or a "crash" of the AOC website that enables electronic filing in Washington's appellate courts.

Then, at 6:29 p.m., the Club electronically filed its motion for reconsideration. As with all motions or briefs e-filed at or after 5:00 p.m.

on a court day, that motion was received as filed on the following court day, i.e. Tuesday November 18, 2014. On November 19, 2014, the Clerk of the Court informed the parties by letter that KRRC's motion for reconsideration had been received by the Court on November 18, 2014 and was therefore untimely. KRRC e-filed the instant Motion to Enlarge at 5:02 p.m. on November 20, 2014.

KRRC's Motion to Enlarge relies on its counsel's perceived experience with past deadlines and e-filings.

KRRC suggests that it has previously e-filed documents with this Court after 5 p.m. without "post-dating" on at least three occasions. Motion to Enlarge, at 2. On one such occasion – April 3, 2014 - the Court received an e-filing from KRRC at 9:43 p.m. That date was deadline for filing a response to Kitsap County's motion to strike sections of Appellant's Reply Brief, and KRRC cites the Court's April 22, 2014 order denying that motion as proof of the Court's acceptance of the Club's after-hours April 3rd brief. Motion to Enlarge, at 3. KRRC writes that "The Court issued no communication rejecting the answer or warning the club's counsel it was untimely. The Court considered the answer . . .". *Id.*, at 3 (citing to the Brooks Foster Declaration and Exhibit 2 thereto). KRRC can cite no requirement that the Clerk notify a litigant of its failure to properly e-file. Moreover, the Court's "appellate court case summary"

(“online docket”) demonstrates that the Court regarded KRRC’s April 3rd after-hours filing as having been filed on April 4, 2014. Reproduced in part here, the online docket shows that the “Event Date” for every document referenced by KRRC was the next court day after e-filing, most with the “action” notation stating “Not filed”:

Appellate Court Case Summary

Case Number: 430762
Filing Date: 02-15-2012
Coa, Division II

Event Date	Event Description	Action
03-04-14	Order on Motions	Filed
03-24-14	Answer to Amicus Curiae brief	Not filed
03-25-14	Other brief	Sent by Court
03-31-14	Motion for Amended brief	Filed
03-31-14	Answer to Amicus Curiae brief	Filed
04-01-14	Other brief	Received by Court
04-04-14	Response to motion	Filed
04-10-14	Order on Motions	Filed
04-10-14	Other brief	Sent by Court
04-11-14	Reply to Response	Information - not filed
04-18-14	Other brief	Received by Court
05-01-14	Oral Argument Setting Letter	Sent by Court
05-01-14	Set on a calendar	Status Changed
05-12-14	Motion to Strike	Filed
05-12-14	Response	Received by Court
05-12-14	Response	Not filed

KRRC notes that its counsel received emails from the Court confirming the electronic filing of its documents, without a word from the Court that its post-5 p.m. filings would be post-dated. Motion to Enlarge, at 3. This suggests that the Club’s counsel was oblivious to the online docket. For KRRC’s March 21, 2014 e-filing at 9:28 p.m. (Foster

Declaration, Exhibit 2), the online docket reflects receipt on the following court day, Monday March 24, 2014. For KRRC's May 9, 2014 e-filing at 8:01 p.m. (Foster Declaration, Exhibit 3), the online docket reflects receipt on the following court day, Monday May 12, 2014. Thus, KRRC simply misconstrues the meaning of the Court's confirmation emails.

Of the three cited e-filings, only KRRC's April 3, 2014 transmission, which was stamped received by the court on April 4, 2014, shows that it was "filed". Regardless, this Court's April 22, 2014 order does not state that the Court considered the Club's untimely response, as KRRC contends.

IV. GROUND FOR RELIEF AND ARGUMENT

Pursuant to RAP 12.4(b), any motion for reconsideration must be filed within 20 days, after the filing of the Opinion, no later than Monday, November 17, 2014. Appellant failed to meet that deadline and failed to timely request any extension of that deadline.

RAP 18.8(b) states, in pertinent part:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a ... motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

Thus, RAP 18.8(b) limits the granting of an extension of time for filing a

motion for reconsideration to "extraordinary circumstances" *and* to "prevent a gross miscarriage of justice." This standard is rarely satisfied. *Scannell v. State*, 128 Wn.2d 829, 834, 912 P.3d 489 (1996) (citing *Reichelt v. Raymark Indus.*, 52 Wn. App. 763, 764 P.2d 653 (1988)). By its terms, RAP 18.8(b) distinguishes extensions of time for notices of appeal, notices of and motions for discretionary review, petitions for review and motions for reconsideration.

KRRC asks that its untimely filing be met with leniency, citing to the *Scannell* case. *Scannell*, however, dealt with a pro se litigant who was misled by court rules that contained references to out dated language, "present[ing] a trap for the unwary" that could lead an "unsophisticated pro se litigant" to believe that an earlier rule would apply. *Scannell*, 128 Wn.2d at 834-35. KRRC is neither unsophisticated, nor misled by any confusion in the rules.

KRRC's motion for reconsideration was controlled by clear rules that have remained unchanged for nearly a decade. RAP 18.5(a) and (b) specifically incorporate CR 5(b). See RAP 18.5(a) ("Service must be made as provided in CR 5(b), (f), and (g)."). CR 5(b)(7) expressly advises individuals of the following:

(7) Service by Other Means. Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in

writing by the person served. *Service by facsimile or electronic means is complete on transmission when made prior to 5:00 p.m. on a judicial day. Service made on a Saturday, Sunday, holiday or after 5:00 p.m. on any other day shall be deemed complete at 9:00 a.m. on the first judicial day thereafter;* Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service under this subsection is not effective if the party making service learns that the attempted service did not reach the person to be served.

(emphasis added)

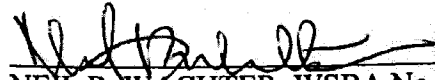
CR 5(b)(7) has been in effect since September 1, 2005. *See* 154 Wn.2d 1113 (2005). GR 30, which specifically governs electronic filing, contains a similar proviso: “(1) An electronic document is filed when it is received by the clerk's designated computer during the clerk's business hours; otherwise the document is considered filed at the beginning of the next business day.” GR 30(c)(1). This language dates to September 1, 2003. *See* 149 Wn.2d 1114 (2003). KRRC cannot claim confusion about these court rules. KRRC claims that its untimely filing should be met with leniency because this Court accepted untimely filings from the Club in the past. Even if this claim should prove to be true, none of the identified pleadings fall within RAP 18.8(b)'s rigid test.

V. CONCLUSION

KITSAP COUNTY respectfully requests that this Court grant the relief identified in Part II of this Motion.

Respectfully submitted this 24th day of November, 2014.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



NEIL R. WACHTER, WSBA No. 23278
Special Deputy Prosecuting Attorney,
Attorney for Respondent Kitsap County

CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, 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 date given below I caused to be served the above document in the manner noted upon the following:

Brian D. Chenoweth	<input checked="" type="checkbox"/>	Via U.S. Mail
Brooks Foster	<input checked="" type="checkbox"/>	Via Email:
The Chenoweth Law Group	<input type="checkbox"/>	Via Hand Delivery
510 SW Fifth Ave., Ste. 500		
Portland, OR 97204		

David S. Mann	<input checked="" type="checkbox"/>	Via U.S. Mail
Gendler & Mann LLP	<input checked="" type="checkbox"/>	Via Email
936 N. 34 th St. Suite 400	<input type="checkbox"/>	Via Hand Delivery
Seattle, WA 98103-8869		


Matthew A. Lind	<input checked="" type="checkbox"/>	Via U.S. Mail
Sherrard McGonagle Tizzano, PS	<input checked="" type="checkbox"/>	Via Email
19717 Front Street NE	<input type="checkbox"/>	Via Hand Delivery
PO Box 400		
Poulsbo, WA 98370-0400		

Richard B. Sanders	<input checked="" type="checkbox"/>	Via U.S. Mail
Goodstein Law Group	<input checked="" type="checkbox"/>	Via Email
501 S G St	<input type="checkbox"/>	Via Hand Delivery
Tacoma, WA 98405-4715		

C.D. Michel
Michel & Associates, P.C.
180 E. Ocean Blvd, Ste 200
Long Beach, CA 90802

☒ Via U.S. Mail
☒ Via Email
☐ Via Hand Delivery

SIGNED in Port Orchard, Washington this 24th day of November, 2014.



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