

102 Wn. App. 687, \*; 11 P.3d 313, \*\*;  
2000 Wash. App. LEXIS 1915, \*\*\*

DAMON R. BECKMAN, by and through his legal guardian David L. Beckman; DAVID L. BECKMAN; JUDITH L. BECKMAN; and WILLIAM G. COALTER, by and through his legal guardian, Marjorie Coalter, and ERIC C. BUSCH, by and through his legal guardian, Joseph Busch, Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, including but not limited to, Division of Developmental Disabilities, Adult Protective Services and Residential Care Services; ELIZABETH STREMEL, individually and in her official capacity acting under color of state law; MARTHA GOODLOE, individually and in her official capacity acting under color of state law; KAREN KAUFFMAN, individually and in her official capacity acting under color of state law, Appellants.

No. 25982-6-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

102 Wn. App. 687; 11 P.3d 313; 2000 Wash. App. LEXIS 1915

September 12, 2000, Decided

**SUBSEQUENT HISTORY:** [\*\*\*1] Order to Publish Order Denying Appellants' Motion to Extend Time to File Notice of Appeal and Granting Respondents' Motion to Dismiss Appeal September 12, 2000, Reported at: 2000 Wash. App. LEXIS 2095.

**PRIOR HISTORY:** Superior Court of Pierce County. Superior Court Docket No. 98-2-05579-6. Date Filed In Superior Court: April 14, 2000. Superior Court Judge Signing: Brian Tollefson.

**DISPOSITION:** State's motion to extend time to file its notice of appeal DENIED; Respondents' motion to dismiss the appeal GRANTED.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Defendant State filed a motion to extend time to file its notice of appeal from the judgment of the Superior Court of Pierce County (Washington) which awarded a money judgment in favor of plaintiffs in an action for damages arising from injuries suffered by plaintiffs while living in a state-licensed adult care facility. Plaintiffs filed a motion to dismiss the appeal.

**OVERVIEW:** The trial court awarded a money judgment to plaintiffs in an action for damages arising from injuries suffered by plaintiffs while living in a state-licensed adult care facility. Defendant State filed a notice of appeal from the judgment, 10 days late, and moved to allow the late filing under Wash. Super. Ct. Civ. R. 5(a), and Wash. R. App. P. 18.8. Plaintiffs responded with a motion to dismiss the appeal. The court denied defendant's motion to extend time to file its notice of appeal, determining that Wash. Super. Ct. Civ. R. 5(a) did not afford the relief defendant sought because the rule did not require service of conformed copies of the final entered judgment on the non-prevailing party. Further, the court found that plaintiffs' failure to give defendant notice beyond that required by Wash. Super. Ct. Civ. R. 52(c) did not demonstrate extraordinary circumstances under Wash. R. App. P. 18.8. Additionally, the court concluded defendant was not reasonably diligent in attempting to file a timely appeal. Accordingly, the court granted plaintiffs' motion to dismiss the appeal.

**OUTCOME:** The court denied defendant State's motion to extend time to file its notice of appeal because defendant failed to demonstrate extraordinary circumstances and a gross miscarriage of justice that would allow the court to overlook the late filing. In addition, the court granted plaintiffs' motion to dismiss the appeal; the desirability of finality of decisions outweighed the privilege of a litigant to obtain an extension of time.

**CORE TERMS:** extraordinary circumstances, notice, final judgment, notice of appeal, conformed, late filing, presentation, extension of time, miscarriage, finality, intentionally, diligent, opposing counsel, written notice, designation, appearance, reasonable diligence, entry of judgment, conjunction, comparable, drafted, clerk, motion to dismiss, proposed judgment, days late, non-prevailing, desirability, calendaring, calendared, construe

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**HN1** ⚡ See Wash. Super. Ct. Civ. R. 5(a).

[Civil Procedure](#) > [Entry of Judgments](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Service of Process](#)

**HN2** ⚡ Wash. Super. Ct. Civ. R. 5(a) does not require service of conformed copies of the final judgment. [More Like This Headnote](#)

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**HN3** ⚡ Courts construe court rules in accord with their purpose as though they were drafted by the legislature, and courts interpret court rules by reference to rules of statutory construction. [More Like This Headnote](#)


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**HN4** ⚡ A final judgment is not a "pleading" requiring service under Wash. Super. Ct. Civ. R. 5(a). [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#)

**HN5** ⚡ The term "pleadings" has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties. [More Like This Headnote](#)

[Governments](#) > [Legislation](#) > [Interpretation](#) 

**HN6** ⚡ The rule of statutory construction ejusdem generis provides that general terms, when used in conjunction with specific terms, should be deemed to incorporate only those things similar in nature or "comparable to" the specific terms. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN7** ⚡ Notice of presentation of findings of fact and conclusions of law, including copies of the proposed findings and conclusions, must be served on the opposing party five days before their presentation to the court. Wash. Super. Ct. Civ. R. 54 (f). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Notice of Appeal](#) 

**HN8** ⚡ Wash. R. App. P. 5.2(a) requires that notice of appeal be filed within 30 days of entry of the judgment in the trial court. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN9** ⚡ Wash. Super. Ct. Civ. R. 58 states that a judgment is "entered" when it is delivered

to the clerk for filing. [More Like This Headnote](#)

[Civil Procedure](#) > [Entry of Judgments](#)

**HN10** See Wash. Super. Ct. Civ. R. 54(f).

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Time Limitations](#)

**HN11** Wash. R. App. P. 18.8 expressly requires a narrow application. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Time Limitations](#)

**HN12** See Wash. R. App. P. 18.8.

[Civil Procedure](#) > [Appeals](#) > [Reviewability](#) > [Time Limitations](#)

**HN13** In cases allowing late filings of notice of appeal, the defective filings are upheld due to extraordinary circumstances, that is, circumstances wherein the filing, despite reasonable diligence, is defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. Wash. R. App. P. 18.8(b). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN14** Wash. R. App. P. 18.8(b), by limiting the extension of time to file a notice of appeal to those cases involving extraordinary circumstances and to prevent a gross miscarriage of justice, expresses a public policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN15** Negligence, or the lack of "reasonable diligence," does not amount to "extraordinary circumstances," for purposes of granting an extension of time to file a notice of appeal under Wash. R. App. P. 18.8. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Entry of Judgments](#)

**HN16** It is incumbent upon any attorney to institute internal office procedures sufficient to assure that judgments are properly dealt with once they are delivered into the custody of office personnel subject to the control of counsel. The failure to take necessary steps, to that end, even during periods of unusual circumstances in an attorney's office, is not an acceptable excuse for any resulting failure to obtain personal knowledge of the entry of judgment on the part of counsel. [More Like This Headnote](#)

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**JUDGES:** ARMSTRONG, C.J., BRIDGEWATER, J., HUNT, J.

**OPINION:** **[\*\*314]** **[\*690]** ORDER DENYING APPELLANTS' MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL **[\*\*\*2]** AND GRANTING RESPONDENTS' MOTION TO DISMISS APPEAL

#### BACKGROUND

Damon Beckman, William Coalter, and Eric Busch (Plaintiffs) are developmentally disabled adults who claim they suffered injuries while living in a state-licensed adult care facility. They sued the State of Washington, Department of Social and Health Services, its caseworker-employees, and the operator of the facility. On March 23, 2000, a jury awarded them \$ 17.76 million in damages, including substantial punitive damages.

Sometime before April 4, 2000, Plaintiffs' counsel spoke to the trial judge's assistant to schedule a time for presentation of the judgment documents for each Plaintiff. The hearing was scheduled for April 14, 2000.

On April 4, 2000, Plaintiffs' counsel sent a confirming letter to the trial court judge with a copy to "Opposing Counsel." At the same time, Plaintiffs' counsel prepared a "Note for Motion Docket," with proposed judgment attached for each Plaintiff's case and with each addressed to "Janet L. Capps, Loretta M. Lamb" at the Attorney General's Office in Seattle. See CR 54 (f). All of these documents were sent by courier to the Attorney General's Office and all bear a "Received" **[\*\*315]** filing **[\*\*\*3]** stamp of April 4, 2000, from the Attorney General's Office.

No one from the Attorney General's Office appeared at the April 14 hearing. The trial court entered the judgments, and they were filed on the same day. However, neither the court nor Plaintiffs' counsel sent conformed copies of the final judgment documents to the Attorney General's Office.

On May 24, Plaintiffs' counsel wrote the Attorney General's Office, asking that the State pay the judgments. The **[\*691]** next day, 10 days late, the State filed a Notice of Appeal. At the same time, the State moved to allow the late filing; Plaintiffs responded with a motion to dismiss the appeal.

The State contends CR 5(a) and RAP 18.8 allow such a late filing under the circumstances presented here. They do not.

#### DISCUSSION

##### I. CR 5(a)

CR 5(a) describes the documents that a party must serve:

*HN1*

[E]very order required by its terms to be served, *every pleading* subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other **[\*\*\*4]** than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and *similar paper* shall be served upon each of the parties.

(Emphasis added.)

The State asks us to broadly construe the language of CR 5(a) and hold that the rule requires service of conformed copies of the final judgment on the non-prevailing party. n1 The State argues that because it was not served with conformed copies of the final judgment, its appeal is timely. However, the language of CR 5 and the related civil rules are plain. <sup>HN2</sup> CR 5(a) does not require service of conformed copies of the final judgment.

----- Footnotes -----

n1 <sup>HN3</sup> We construe court rules in accord with their purpose "as though they were drafted by the Legislature." *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997) (citation omitted). And we interpret court rules by reference to rules of statutory construction. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) (citation omitted); *Heaney v. Seattle Mun. Ct.*, 35 Wn. App. 150, 154, 665 P.2d 918 (1983), review denied, 101 Wn.2d 1004 (1994) (citing 3 J. SANDS SUTHERLAND, STATUTORY CONSTRUCTION § 67.10 (4th ed. 1974)).

----- End Footnotes----- **\*\*\*5**

Here, the terms "pleading" and "similar paper" do not include final judgments. <sup>HN4</sup> A final judgment is not a "pleading" requiring service under CR 5(a). CR 7(a) defines **\*692** "pleadings," and that definition does not include judgments. See also *Tiffin v. Hendricks*, 44 Wn.2d 837, 843, 271 P.2d 683 (1954). n2 Rather, the civil rules treat judgments differently than pleadings. Compare CR 7-16 (pleadings or motions), with CR 54-63 (judgments).

----- Footnotes -----

n2 <sup>HN5</sup> "The term 'pleadings' has a technical and well-defined meaning. Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties." *Tiffin*, 44 Wn.2d at 843 (quoting BLACK'S LAW DICTIONARY (4th ed.) 1312).

----- End Footnotes-----

A final judgment is not a "similar paper." Even assuming ambiguity in CR 5(a), the rule of statutory construction *ejusdem generis* dictates this conclusion. <sup>HN6</sup> That rule provides that general **\*\*\*6** terms, when used in conjunction with specific terms, should be deemed to incorporate only those things similar in nature or "comparable to" the specific terms. *John H. Sellen Constr. Co. v. Department of Revenue*, 87 Wn.2d 878, 883-84, 558 P.2d 1342 (1976); *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 970, 977 P.2d 554 (1999); *Port of Seattle v. Department of Revenue*, 101 Wn. App. 106, 113, 1 P.3d 607 (2000). In CR 5(a), the generic phrase "similar paper" must be read in conjunction with the terms "every written notice, appearance, demand, offer of judgment, designation of record on appeal." Only those "papers" that are "comparable to" written notice, appearance, demand, offer of judgment, or designation of record on appeal **\*\*\*316** fall within the category of "similar paper." The specifically listed "papers" in CR 5(a) are documents prepared by a party that generally state a party's claim or allegation. On the other hand, a final judgment, although it may be drafted by a party, is the formal record of a jury's verdict or judge's decision. A judgment does not state a party's claim or allegation. It is not, therefore, **\*\*\*7** a "similar paper" as that phrase is used in CR 5(a). n3

----- Footnotes -----

n3 The civil rules do provide for notice of the proposed findings, which are generated by the prevailing party. <sup>HN7</sup> Notice of presentation of findings of fact and conclusions of law, including copies of the proposed findings and conclusions, must be served on the opposing party five days before their presentation to the court. CR 54(f). Plaintiffs' counsel provided such notice here.

----- End Footnotes-----

This reading of CR 5(a) is strengthened by reference **[\*693]** to the rules regarding actual filing of the judgment. <sup>HNS</sup> RAP 5.2(a) requires that notice of appeal be filed within 30 days of *entry* of the judgment in the trial court. <sup>HN9</sup> CR 58 states that a judgment is "entered" when it is delivered to the clerk for filing. See *Malott v. Randall*, 83 Wn.2d 259, 517 P.2d 605 (1974). Requiring service of the judgment before the start of the running of the 30-day appeal period would effectively amend CR 58 and RAP 5.2(a) to require both the filing of the judgment with the clerk **[\*\*\*8]** and service of conformed copies of the judgment before the 30 days begin to run. This is not what the rules say, nor what the rules contemplate.

Finally, <sup>HN10</sup> CR 54(f) provides in part: "No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment . . . ." Thus, the rule specific to judgments requires only that the proposed judgment, not a conformed copy of the entered judgment, be served on opposing counsel.

The plain meaning of CR 5(a) is clear; its terms do not require service of conformed copies of the final entered judgment on the non-prevailing party. CR 5(a) does not afford the State the relief it seeks.

## II. RAP 18.8

In contrast to the liberal application we generally give the Rules of Appellate Procedure (RAP), <sup>HN11</sup> RAP 18.8 expressly requires a narrow application:  
<sup>HN12</sup>

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 notice of appeal . . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege **[\*\*\*9]** of a litigant to obtain an extension of time under this section. . . .

(Emphasis added.)

The phrase "extraordinary circumstances" was defined in *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). There, the Court of Appeals refused to extend the time for filing a notice of appeal that **[\*694]** was filed, as here, 10 days late. The appellant argued that "extraordinary circumstances" existed because one of the two trial attorneys left the firm during the 30 days following entry of judgment, and the firm's appellate attorney had an unusually heavy work load. The court rejected the argument and summarized the cases allowing late filings:

<sup>HN13</sup>

In each case, the defective filings were upheld due to "extraordinary circumstances," *i.e.*, circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the

appellant's reasonably diligent conduct. RAP 18.8(b).

*Reichelt*, 52 Wn. App. at 765-66; see also *Shumway v. Payne*, 136 Wn.2d 383, 394-97, 964 P.2d 349 (1998) [\*\*\*10] (reiterating and reemphasizing stringent standard of RAP 18.8(b) noted in *Reichelt*); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993). n4

----- Footnotes -----

n4 In *Schaefco*, 121 Wn.2d at 368, the court said:

Schaefco has not provided sufficient excuse for its failure to file a timely notice of appeal, nor has it demonstrated sound reasons to abandon the preference for finality.

We recognize that Schaefco raises many important issues. . . . However, it would be improper to consider these questions given the procedural failures of this case. See RAP 18.8 (b); RAP 18.9(b) . . . . Schaefco's appeal is dismissed.

----- End Footnotes-----

*Pybas v. Paolino*, 73 Wn. App. 393, 401, [\*\*\*317] 869 P.2d 427 (1994). n5 The court found the lack of prejudice to the respondent irrelevant and noted that the prejudice of granting an extension of time would be "to the appellate system and to litigants generally, who are entitled to an end to their day in court." *Reichelt*, 52 Wn. App. at 766 n.2. [\*\*\*11]

----- Footnotes -----

n5 In *Pybas* the court stated:

HN14\*

RAP 18.8(b), by limiting the extension of time to file a notice of appeal to those cases involving "extraordinary circumstances and to prevent a gross miscarriage of justice," expresses a public policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case.

See also *State v. One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226 (Me. 1982) (State's negligent office procedures, which resulted in late filing of appeal of adverse civil judgment, were insufficient grounds upon which to allow a late filing).

----- End Footnotes----- [\*695]

The State first contends "extraordinary circumstances" are present here because Plaintiffs' counsel failed to give it notice that the judgments had been entered. However, as noted above, Plaintiffs' counsel gave the State notice of presentation of the proposed judgments. See CR 52(c). This was all Plaintiffs' counsel was required to do; the State was then obligated to monitor the actual entry of [\*\*\*12] the judgments. Plaintiffs' counsel was not legally obligated to bring the State's mistake, if any, to the State's attention. Thus, Plaintiffs' failure to give the State notice beyond that required by CR 52(c) does not demonstrate "extraordinary circumstances."

The State next contends that Janet Capps' intentional failure to protect the State's interests amounts to "extraordinary circumstances." However, in her declaration, Capps states that she has "no recollection" of the notice documents and asserts that she did not "knowingly,

intentionally or recklessly fail to act" on the same. Further, there is no reasonable inference from the evidence before this court that Capps acted "intentionally" by ignoring the notice documents or failing to bring them to the attention of others. Rather, at best, the evidence was that Capps was not "reasonably diligent" in ensuring that the documents were timely routed to the responsible attorneys in the Attorney General's Office. <sup>HN15</sup> Negligence, or the lack of "reasonable diligence," does not amount to "extraordinary circumstances." *Shumway*, 136 Wn.2d 383, 964 P.2d 349; *Reichelt*, 52 Wn. App. 763, 764 P.2d 653; *One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226. **\*\*\*13** Thus, Capps' conduct does not demonstrate "extraordinary circumstances."

But even if Capps intentionally failed to respond to the April 14 notice, this would not constitute "extraordinary circumstances." Capps' conduct impaired the State's timely filing of an appeal only because the Attorney General's Office lacked any reasonable procedure for calendaring hearings. The State's own internal investigation, which it asked us to consider, details the problems: The attorneys individually managed and calendared their own cases; the **696** office had no central system for calendaring hearings; n6 the staff was inexperienced and lacked training; there was no coordination between the responsible attorneys and no system for "catching" administrative errors such as the one here. As noted in *One 1977 Blue Ford Pick-Up Truck*:

We find nothing in the nature of an event or circumstance so extraordinary in this case as to excuse the neglect of appellant's counsel to provide suitable office procedures to cause the judgment to be brought to counsel's attention once it was delivered into the custody and control of counsel's office. <sup>HN16</sup> It is incumbent upon any attorney to institute internal office procedures **14** sufficient to assure that judgments are properly dealt with once they are delivered into the custody of office personnel subject to the control of counsel. The failure to take necessary steps, to that end, even during periods of unusual circumstances in an attorney's office, is not an acceptable excuse for any resulting failure to obtain personal **318** knowledge of the entry of judgment on the part of counsel. . . .

447 A.2d at 1231. This language aptly describes the problem here. The Attorney General's office lacked office management procedures that could have prevented what occurred here.

----- Footnotes -----

n6 The independent investigator concluded that "[t]o the extent notices for court hearings are served on the office, they should be automatically calendared by someone independently assigned the task."

----- End Footnotes -----

The State was not "reasonably diligent" in attempting to file a timely appeal. *Reichelt*, 52 Wn. App. at 765-66. It fails to demonstrate "extraordinary circumstances" **15** and "a gross miscarriage of justice" that would allow this court to overlook the late filing. RAP 18.8. Therefore, "the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time." The State's motion to extend time to file its notice of appeal is DENIED, and Respondents' motion to dismiss the appeal is GRANTED.

IT IS SO ORDERED.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2000.

ARMSTRONG, C.J.

BRIDGEWATER, J.

HUNT, J.

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