

No. 14-3421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: PORSCHE CARS NORTH AMERICA,)
 INC., PLASTIC COOLANT TUBES PRODUCTS)
 LIABILITY LITIGATION.)
 _____)
 MARY ELLEN KALANGE,)
)
 Interested Party-Appellant,)
)
 v.)
)
 DOUGLAS J. SUTER, et al.,)
)
 Plaintiffs-Appellees,)
)
 PORSCHE CARS NORTH AMERICA, INC.; DR.)
 ING. H.C.F. PORSCHE AG,)
)
 Defendants-Appellees.)

FILED
 Dec 11, 2014
 DEBORAH S. HUNT, Clerk

ORDER

Before: GUY, SUHRHEINRICH, and KETHLDEGE, Circuit Judges.

Mary Ellen Kalange, an objecting class member, appeals the order approving a settlement of this multi-district, products liability class action. Kalange, who is proceeding *pro se*, is an inactive attorney who has not practiced law for about fifteen years. Her appeal was dismissed by the clerk for want of prosecution after she failed to timely file her appellate brief. *See* 6th Cir. R. 45(a)(4). Kalange has now filed her appellate brief and moves to reinstate the appeal.

The defendants and the plaintiffs oppose the motion to reinstate. They argue that Kalange has not demonstrated good cause for her failure to comply with the briefing schedule and that, in any event, her appeal is frivolous because it raises objections that were not raised

before the district court. The plaintiffs also complain that the processing of the claims of the class members will be delayed by the pendency of this appeal.

Federal Rule of Appellate Procedure 26(b) provides that for good cause the court may permit an act to be done after the time to do so has expired. On the other hand, 6th Cir. R. 26(b) authorizes the dismissal of an appeal or other sanctions for the failure to timely file a brief. Kalange's appellate brief was filed four weeks after the due date. The motion to reinstate was filed fifteen days after the appeal was dismissed.

Although we do not condone Kalange's disregard of our deadlines and procedural rules, the loss of her appeal is too harsh a sanction for her failure to comply with the briefing schedule established by the clerk. *See Gross v. Town of Cicero, Ill.*, 528 F.3d 498, 500 (7th Cir. 2008) (noting that the time for filing a brief is a flexible period and "[w]hen judges can decide whether to be strict or lenient, it is important to match the sanction to the offense"). The plaintiffs state that as of October 31, 2014, 7,200 class members have submitted settlement claims in amounts ranging from \$375 to \$1,800. The delay in the payment of the claims of the other class members is unfortunate. That alone, however, is not sufficient to deprive Kalange, an objecting class member, of her right to seek appellate review of the settlement.

Finally, the plaintiffs and defendants assert that Kalange's appeal is frivolous because it raises issues that cannot be reviewed on appeal because they were not raised below. Before the district court and on appeal Kalange argues the settlement is not fair and reasonable because it does not provide for sufficient payments to the class members. Although Kalange's brief asserts other issues that may not have been raised below, the question of whether those issues are before the court on appeal is a merits question that is beyond the scope of a ruling on this motion to reinstate.

No. 14-3421

-3-

The motion to reinstate the appeal is **GRANTED**. Kalange is cautioned that she may be subject to sanctions under Federal Rule of Appellate Procedure 38 if her appeal is found to be frivolous. *See B & H Medical, LLC v. ABP Admin., Inc.*, 526 F.3d 257, 270 (6th Cir. 2008) (concluding that “perhaps the most frivolous and sanction-worthy aspect of th[e] appeal” was the appellant’s raising a new theory of liability on appeal that it never pursued in the district court).

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written above a horizontal line.

Deborah S. Hunt, Clerk

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

Deborah S. Hunt
Clerk

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Filed: December 11, 2014

Ms. Mary Ellen Kalange

Mr. William Francis Kiniry Jr.

Mr. Mark Hayden Troutman

Re: Case No. 14-3421, *Douglas Suter v. Porsche Cars N Amer, Inc, et al*
Originating Case No. : 2:11-md-02233

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin Baker
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Matthew Aaron Goldberg
Mr. John P. Hehman
Mr. Gary Klein
Mr. Mark D. Landes
Mr. Terrance Michael Miller
Mr. Gregory M. Travalio
Mr. Gregory Wayne Wix

Enclosure