

COURT FILE NO. A05-0310

***STATE OF MINNESOTA
IN SUPREME COURT***

Thomas Carroll Rubey, *Appellant*,

v.

Valerie Ann Vannett, *Respondent*

Appellant Thomas Carroll Rubey's Brief and Appendix

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STATEMENT OF THE CASE AND FACTS

Appellant Thomas Carroll Rubey (hereinafter "Tom") filed an appeal on February 16, 2005. Said appeal was taken from *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree* dated June 21, 2004, and from the trial court's *Order* dated December 9, 2004.

On February 25, 2005, the Minnesota Court of Appeals issued an *Order* that required the parties to brief the issue of whether, in light of the decision of trial court dated December 9, 2004, the Court of Appeals had jurisdiction to hear this appeal. On March 22, 2005 the Court of Appeals upheld the procedural decision of the trial court. On June 14, 2005, the Minnesota Supreme Court issued an *Order* granting review of the decision of the Minnesota Court of Appeals. In said *Order*, the Minnesota Supreme Court directed briefing on the issues of (1) whether failure to hear a motion for new trial or amended findings within the deadline imposed by Minn.R.Civ.P. 59.03 is a jurisdictional defect, and if so, what effect that has on the resolution of this case; and (2) whether the timeliness requirement of Minn.R.Civ.App.P. 104.01, subd. 1, for post-trial motions to toll the appeal period applies to the timely hearing of a motion governed by Rule 59.03 as well as the timely service and filing of the motion. The following is Tom's memorandum in support of the appeal.

The trial court issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on June 21, 2004. Respondent Valerie Ann Vannett (hereinafter "Valerie") served a *Notice of Filing and Entry of Decree* by United States Mail on June 23,

2004.¹ On July 23, 2005, Tom served Valerie with his *Notice of Motion and Motion for Amended Findings and/or New Trial*. Service of the pleadings was made by facsimile transmission and United States Mail.² Since Tom's attorney was unable to reach the trial court's scheduling clerk, no hearing date was inserted on the pleadings; instead, the motion referenced that counsel was unable to obtain a hearing date and that notification would be provided once a date was obtained.

On July 28, 2005, Tom's counsel was able to reach the trial judge's personal scheduling clerk, Robyn Murphy-Erickson (hereinafter "Robyn"). Robyn had left a message advising Tom's counsel that the soonest available date for hearing was August 30, 2004.³ Tom's counsel had a conflict with that date and was advised by Robyn that the next available date was September 17, 2004. Since both dates were more than 60 days from the date of service of the motion, Tom's counsel asked Robyn whether the trial court would be granting an extension of the time for hearing. Tom's counsel was assured that the court would do so.⁴

¹ Pursuant to Rule 59, a motion for amended findings and/or new trial must be served within 30 days of service of a notice of entry, and heard within 60 days. The last day for service of a motion was July 26, 2004. The last day for hearing, to fall within the 60 days, was August 25, 2004.

² It is undisputed that service of the motion was accomplished within 30 days of the service of the *Notice of Entry* by Valerie.

³ It is undisputed that the earliest date available for hearing was beyond the 60-day requirement of the rule.

⁴ It was learned at the hearing on September 17, 2004, that Robyn keeps an activity summary on all files that she works on for Judge Muehlberg. A copy of that summary is appended hereto as Exhibit [A 59]

On or about August 20, 2004, Tom's counsel left a message with Robyn inquiring about the status of the extension of the time for hearing. On August 23, 2004, Robyn claimed to have left a message with Tom's counsel, and sent a facsimile transmission to both parties, advising that there was no order. Tom's counsel disputed receiving any message (as evidenced by his office's message log for August 23, 2004, which is maintained by an answering service). [A 61]. Furthermore, Tom's counsel disputed having received any facsimile notification.⁵

After the hearing on September 17, 2004, Tom's counsel reviewed the court file, including, the *activity summary* and the facsimile transmission. A review of the file determined that Robyn had sent the following facsimile transmission on August 23, 2004⁶:

"MARK: I HAVE REVIEWED THE FILE AND CANNOT LOCATE THE ORDER FOR EXTENDING THE TIME PERIOD FOR THE MOTION. AT FIRST, I ASSUMED THAT IT WAS ATTACHED AND/OR SENT IN WITH YOUR MOTION SIGNED BY YOU ON 7/23/04 AND FILED BY THE COURT ON 8/2/04. I HAVE LOOKED THROUGH THE ENTIRE FILE AND CANNOT LOCATE A PROPOSED/SIGNED ORDER."

While Robyn asserted through testimony at the September 17, 2004, hearing⁷ that she had sent the facsimile transmission to Tom's attorney and Valerie's attorney, the facsimile listed

⁵ *See*, page 13, line 17, [A 77], Transcript of proceedings from 09/17/04.

⁶ A copy of the facsimile transmission is appended hereto as Exhibit [A 60]

⁷ Judge Muehlberg, without prior notice to Tom or his counsel, called Robyn to the witness stand and questioned her during the September 17, 2004, hearing.

a fax number for Tom's attorney of 952-234-0278. That number does not exist.⁸ Tom's attorney's facsimile number is clearly noted on his cover letters in the file as (952) 894-0878. It is unclear (and was never explained by Robyn) where the incorrect number came from.

While Tom's attorney did not receive the notification from Robyn, Valerie's attorney did.⁹ In fact, since Valerie's attorney was aware that no written order had been issued, she remained in contact with Robyn. She personally spoke with Robyn on August 23, 2004 about the status of a written order. On August 25, 2004, she left Robyn a message inquiring about the status of the order. Robyn returned her call and notified her that there was no written order, but failed to provide Tom's attorney with the same information.¹⁰ In other words, while Valerie's attorney was fully advised that there was no *written* order, and that apparently there was a procedural problem, Tom's attorney was kept in the dark, believing that the trial court had taken care of the matter.

Valerie's attorney simply bided her time and waited for the expiration of the 60 days, having the benefit of having spoken with Robyn, and having the benefit of having her

⁸ Since the number listed does not exist, it would have been impossible for Robyn to have actually sent the fax to that number. To this day, if the number is called, a recorded message comes on that states, "*we're sorry, your call cannot be completed as dialed. Please check the number and dial again.*"

⁹ *See*, page 14, line 23, Transcript of Proceedings 09/17/04. [A 63]

¹⁰ *See*, [A 59]. The activity summary indicates (in Robyn's words) that she advised Valerie's attorney that she hadn't received any response to her fax to Tom's attorney; yet, she failed to follow up on her fax (which had not even been sent to Tom's attorney). *See*, also, pages 10 and 11 of transcript. [A 73-75]

facsimile transmission in her possession. She clearly knew that the date selected for hearing was beyond the 60-day time period required by the rules but she did not object during the 60-day period, instead, waiting for the expiration of the 60 days before filing a motion seeking to dismiss Tom's motion on jurisdictional grounds. At no time did Valerie assert that she was prejudiced by the September 17, 2004 hearing date; merely, she asserted that the court lacked jurisdiction.

In response to Valerie's motion, Tom's attorney filed an affidavit asserting that he had been assured that the trial court would be extending the time for hearing. Robyn testified at the hearing that she did not recall telling Tom's attorney that fact; however, in response to a question from Tom's attorney she admitted that it was possible that it happened.¹¹

Subsequent to the hearing, Tom's attorney discovered the wrong number listed on the fax sheet and submitted a supplemental affidavit. During the hearing, Tom's counsel advised the trial court that had he received the facsimile transmission (that the clerk had sent to a non-existent number), the matter would have been taken care of immediately.¹²

On December 9, 2004, the trial court issued an *Order*, wherein it concluded that pursuant to Rule 59.03, it lacked jurisdiction to hear the matter; however, the trial court (obviously being uncertain about whether its decision was correct) made detailed rulings on

¹¹ *See*, page 13, line 12 Transcript of Proceedings from 09/17/04. [A 77] It is also important to note that if the conversation never took place, why would Tom's counsel have called Robyn on August 20, 2004, and left a message as to the status of an order?

¹² *See*, page 13, lines 17 - 22 Transcript of Proceedings from 09/17/04. [A 77]

all of the issues raised in the parties' respective motions.

In the trial court's decision, it made a number of findings in an effort to distance itself from its personal scheduling clerk by making unfounded assertions and conclusions such as,

*"[Robyn] is not an employee of the Judge; she is an employee of the Court Administrator. She has never been given authority to grant an extension of any deadlines or to say that she would ask the Court to extend any deadlines."*¹³

and

" * * the hearing was scheduled for September 17, 2004 by the **unilateral** request of Petitioner's attorney for his motion for new trial."*¹⁴

The first assertion was clearly made by the trial court to support its ultimate conclusion by circumventing case precedent, which distinguishes between hearing dates being obtained from a specific judge's clerk, and hearing dates obtained from court administration. That is a distinction that will be argued more fully below. The issue of whether Robyn, the trial court's own scheduling clerk, was *personally* employed by Judge Muehlberg, or employed by Washington County, is irrelevant. Clearly, judges do not *employ* their scheduling clerks. Their wages are not paid by a judge. The relevant inquiry is whether or not Robyn was assigned to, and worked for, Judge Muehlberg. The answer to that question is not in dispute. Robyn was assigned to work for Judge Muehlberg. The *Minnesota Attorney's/Paralegal's/Secretary's Handbook*, Mariposa, lists a number for Judge's

¹³ *See*, Finding of Fact No. VIII on p. 2 of *Order*. [A 199]

¹⁴ *See*, ¶2 on p. 4 of *Order*. [A 201]

Muehlberg's personal *scheduling clerk* as 651-430-6327.¹⁵ That number is answered solely by Robyn. Robyn sits in Judge Muehlberg's courtroom during his court proceedings, and Robyn personally handles Judge Muehlberg's calendar, as evidenced by the *activity summary* that she maintains on all of Judge Muehlberg's cases. All hearing dates are scheduled through Robyn and at her direction, not Judge Muehlberg's. A copy of Robyn's title and duties was obtained from Washington County.¹⁶ Among her stated duties are: performs case/record management duties; assist attorneys in identifying legal requirements of matters under District Court's jurisdiction; administratively grants or denies relief sought as an alternative to court or determines other appropriate course of action; performs case file preparation, calendaring and in-court duties; and, performs complex and detailed clerical/technical support to an assigned judge; maintains judge's calendar.

Robyn's involvement is borne out from the transcript of these proceedings from June 25, 2003, which was the originally scheduled date for trial in this file. On the original day of trial, Judge Muehlberg continued the trial. The reason given was this case was behind two other cases for trial. His reliance on Robyn for his scheduling is demonstrated by the following exchange on that date:

JUDGE: "*Robyn, let's give them the next date right now so that we can get them on the calendar and have everybody assured when the case is going to go to trial **
* *"

¹⁵ *See*, copy of handbook page pertaining to Judge Muehlberg. [A 86]

¹⁶ *See*, Ms Murhpy-Erickson's job title and examples of work. [A 87]

ROBYN: “Next date would be August 6 at nine o’clock and they would be number two on the calendar.”¹⁷

The trial court’s assertion that Tom’s counsel *unilaterally* requested September 17, 2004 as the motion date is not consistent with what transpired in this case. It is undisputed that the earliest date that the trial court had available for the hearing was beyond the 60-day period. Tom’s counsel had no control over the trial court’s calendar. All of the scheduling is done by Robyn, who personally maintains his calendar. Tom’s counsel was *given* a date that was beyond the 60-day period - - he did not *unilaterally request* any such thing.

The trial court also made a number of other assertions in its *Order* that were factually inaccurate, or not relevant to the jurisdictional issue. For example, in ¶VI of his decision, the trial court noted that Tom’s counsel had faced *this very issue* in a similar case before him, wherein Tom’s counsel had submitted a proposed order to extend the time. The case referenced, and the procedural posture, were completely different. In the other proceeding, Tom’s counsel was able to speak with Robyn *prior* to serving the motion, and pointed out the fact that the hearing date given was beyond 60 days. Tom’s counsel knew when the motion was served and filed that the date given was beyond the sixty days. In that file, Tom’s counsel *offered* to prepare an order, unlike this file wherein Tom’s counsel was told that the Judge would be extending the time for hearing, after the motion had already been served. When the motion was served and filed in this case, it was not known that it would

¹⁷ *See*, a copy of the transcript dated June 25, 2003, at pps. 6 - 7. [A 94-5]

be heard beyond the 60 days. Of interest is the fact that in the other file, even though an order had been provided, Judge Muehlberg neglected to sign the written order within the 60 days.¹⁸ The motion proceeded. At no time did Judge Muehlberg assert in that proceeding that Robyn did not have the authority to speak for him and schedule the matter beyond 60 days; and, at no time did Judge Muehlberg assert that he did not have jurisdiction to address the motion since it was beyond 60 days. Judge Muehlberg heard the motions, and rendered a decision. The motion was heard on August 13, 2004, approximately a week before Tom's counsel called the court to find out the status of the order in this file. If anything, Judge Muehlberg's treatment of the issue in the other file fortified Tom's counsel's belief, and reliance, that the court had consented to the extension of time. Judge Muehlberg cannot take the position in the one case that it was alright for Robyn to schedule the hearing beyond 60 days, while in this case state that it was not. While Robyn attempts to make it sound as though Judge Muehlberg was unaware of the order in the other file, the fact is, he was personally sent a letter reminding him of the issue prior to the expiration of 60 days in that file. Clearly, Judge Muehlberg's assertion in ¶VIII of his *Order* that Robyn *has never been given authority to grant an extension of deadlines* is entirely inconsistent with the facts of the other case that the Judge had just finished presiding over. Tom's counsel reasonably

¹⁸ A follow-up letter was sent to directly to Judge Muehlberg in that file on July 19, 2004, indicating that a written order had not been received, and reminding him of the 60-day rule. Judge Muehlberg ignored the letter and did not object to the matter being heard beyond sixty days, even though it had also been scheduled solely through his clerk Robyn. [A 207]

believed that in the present case the court had extended the time for hearing within the sixty days.

STANDARD OF REVIEW

Standard of Review. The issue before the Minnesota Supreme Court involves an interpretation of the Minnesota Rules of Civil Procedure. Such review is a question of law, and properly reviewed by the Minnesota Supreme Court *de novo*. Rules are not to be read in isolation, but in light of one another, interpreting them according to their purpose. *Mingen v. Mingen*, 679 N.W.2d 724, 726 (Minn. 2004); *citing*, *Madson v. Minn. Mining & Mfg. Co.* 612 N.W.2d 168, 170 (Minn. 2000).

ISSUES

1. IS THE FAILURE OF THE TRIAL COURT TO HEAR A MOTION FOR NEW TRIAL OR AMENDED FINDINGS WITHIN THE DEADLINE IMPOSED BY MINN.R.CIV.P. 59.03 A JURISDICTIONAL DEFECT? IF IT IS A JURISDICTIONAL DEFECT, WHAT EFFECT DOES THAT HAVE ON THE RESOLUTION OF THIS CASE? The trial court and Minnesota Court of Appeals held that in this case the failure to hear the motion within 60 days deprived the trial court of jurisdiction to hear the motion.

Apposite Cases and Statutes:

Minn.R.Civ. P. 59.03;

***Woodrow v. Tobler*, 269 N.W.2d 910, 914 (Minn. 1978);**

***Texas Commerce Bank v. Olson*, 416 N.W.2d 456, 462 (Minn.App. 1987);**

***Imperial Developers, Casualty Ins., Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 628 (Minn.App. 1994);**

***American Standard Ins. Co. v. Le*, 551 N.W.2d 923, 926 (Minn. 1996)**

2. DOES THE TIMELINESS REQUIREMENT OF MINN.R.CIV.APP.P. 104.01, SUBD. 1 PREVENT THE TOLLING OF THE TIME TO APPEAL AN UNDERLYING

JUDGMENT IF A HEARING IS NOT HELD WITHIN 60 DAYS AS REQUIRED BY RULE 59.03? The trial court and the Court of Appeals both ruled that in order for there to be a tolling of the time to appeal an underlying judgment, the time pertaining to hearing a Rule 59.03 motion must be followed.

Apposite Cases and Statutes:

Minn.R.Civ.App.P. 104.01;

***Madson v. Minnesota Mining & Mfg. Co.*, 612 N.W.2d 168, 171-172 (Minn. 2000);**

***State ex rel Fort Snelling State Park v. Minneapolis Park and Rec. Bd.*, 673 N.W.2d 169, 178 at fn 1 (Minn.App. 2003), *rev. denied* March 16, 2004;**

***Lewis v. Lewis*, 572 N.W.2d 313, 315-16 (Minn.App. 1997)**

ARGUMENT

1. THE FAILURE OF THE TRIAL COURT TO HEAR A MOTION FOR NEW TRIAL OR AMENDED FINDINGS WITHIN THE DEADLINE IMPOSED BY MINN.R.CIV.P. 59.03 IS NOT A JURISDICTIONAL DEFECT?

A. Clarification of the 60-day rule under Minn.R.Civ.P. 59.03 is needed. As argued below, the facts of this case demonstrate the tenuous position that a litigant (and his attorney) are placed in by the language of Rule 59.03. The flood of recent case decisions interpreting the rule point to both ambiguities created by the rule, and the draconian effect that the rule can have on litigants and their counsel. Rule 59.03, provides as follows:

“A notice of motion for a new trial shall be served within 30 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 60 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 60-day period for good cause shown.”

The rule provides a litigant with little, if any, direction. While it directs that if the hearing

cannot be held within 60 days the time for hearing must be extended *by the court* within the 60-day period for good cause, it does not spell out the manner which the extension must take. Specifically, it does not require a written order; it does not require a formal motion; it does not require that the litigant seeking the hearing submit an order; it does not require that the litigant obtain the extension directly from the trial court judge; and, it does not identify what actions (or inaction) by the trial court suffices to extend the time for hearing. Furthermore, the rule does not differentiate between situations wherein a litigant is unable to have the matter heard within 60 days due to conflict, or where the trial court itself is unable to hear the matter within that time frame.¹⁹ In cases wherein the trial court is unable to hear the matter within 60 days, it unfairly places the burden on the litigant, who has no control over the trial court's calendar. The rule is in need of a deep overhaul to insure fairness and consistency in future cases. In fact, the rule is far more severe than similar rules in any of the other 49 states and the District of Columbia. Appended hereto is a chart that outlines the procedures in all of the other jurisdictions pertaining to post-trial motions for amended findings and/or new trials. [A 98]. While all of the other jurisdictions (with the exception of Virginia, which has no restrictions) have a required amount of time within which to bring the motion, in all other jurisdictions there is either no hearing required, or the motion is deemed denied after the passage of a specified period

¹⁹ The one thing that is clear is that the trial court's unavailability to hear the matter constitutes good cause. *See, i.e., Woodrow v. Tobler*, 269 N.W.2d 910, 914 (Minn. 1978)

of time if not heard or ruled on. (I.e., in Oregon, if not heard within 55 days the motion is deemed denied; in South Dakota if the motion is not ruled on within 20 days it is deemed denied). Under Rule 59 of the Federal Rules of Civil Procedure, there is no deadline for hearing, and no deadline for rendering a decision; however, a review of the legislative history pertaining to Minn.R.Civ.P. 59.03 indicates that the rule was amended to bring it into conformity with the federal rule.

In Wisconsin, the motion must be filed within 20 days and heard within 60 days. Contrary to the Minnesota rule, the Wisconsin rule dictates that a *motion* must be brought within the 60 days to extend the time for hearing beyond 60 days. Even though the rule states that the motion must be brought within the 60-day period, exception is made for good cause shown. Wis.Stat. §805.16(2) provides that,

“The time for hearing arguments on motions after verdict shall be not less than 10 nor more than 60 days after the verdict is rendered, unless enlarged pursuant to motion under §801.15(2)(a).”

Wis.Stat. §805.16(3) provides that,

“If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judges written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.”

Wis.Stat. §801.15(2)(a) provides,

*“When an act is required to be done at a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. * * * If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an*

affidavit in the record the grounds for granting the motion." (Emp. added)

Wis.Stat. §801.15(c) provides that the time for *deciding* motions under §805.16(3) (i.e., the 90 days) may not be enlarged; however, there is no prohibition regarding the enlargement of the 60 day period, *after* it has run.

Under Wisconsin law, *excusable neglect* in the context of the enlargement of time, is that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Leonard v. Cattahach*, 571 N.W.2d 444, 214 Wis.2d 236 (Wis. 1997)(Summer vacations and a heavy workload do not provide, in and of themselves, sufficient excuse for missing statutory deadlines). The *neglect* standard is substantially the equivalent of the neglect standard utilized to vacate default judgments. *Hedtcke v. Sentry Ins. Co.*, 326 N.W.2d 727, 109 Wis.2d 461 (Wis. 1982). The court will grant an enlargement of time if it finds reasonable grounds for noncompliance and *if the interests of justice would be served* by the enlargement of time. *Id.* A lack of familiarity with appellate practice rule has been grounds for enlargement. *Hernke v. Northern Ins. Co. of New York*, 120 N.W.2d 123, 19 Wis.2d 189 (Wis. 1963). Furthermore, if the record indicates that a trial court failed to exercise its discretion in granting a motion to enlarge time; and if the facts and record fail to support the trial court's decision; or, if the record indicates that the trial court applied to wrong legal standard, it will be reversed. *Hedtcke*.

A review of similar statutes and rules in other jurisdictions is important not only in determining a consistent standard in Minnesota, but in examining due process arguments

as outlined below. Minnesota should utilize the *excusable neglect* standard in reviewing whether or not a motion was timely. In Minnesota, in the context of default judgments, when attorney neglect is the basis for *excusable neglect*,²⁰ relief should be granted to a litigant where there is a reasonable defense on the merits, a *reasonable excuse* for the failure, action was taken with due diligence, and there is no showing of prejudice to the other party. *Kosloski v. Jones*, 295 Minn. 177, 203 N.W.2d 401 (Minn. 1973). Here, Tom has raised a number of important issues on appeal, including the fact that the trial court *sue sponte* granted sole legal custody, even though the issue was not litigated (as it had been stipulated to prior to trial)²¹; the trial court's refusal to allow Tom to present expert psychological testimony and evidence; the trial court failed to rule on a constitutional challenge²²; and, the award of \$40,000 in attorneys fees. Substantial rights were affected by the trial court's decision. Tom's counsel reasonably relied on representations made by the scheduling clerk, the lack of a response to his follow-up inquiries to the clerk, and past

²⁰ By making this argument, Tom is not suggesting that the situation is the result of neglect. Obviously, in retrospect, knowing where the case is now, a formal motion could have been brought and even a writ of mandamus sought from the Court of Appeals; however, the rule does not require such action. Case citations often use the words "*mistake*" and "*neglect*" synonymously. (*See*, i.e., *Hinz v. Northland Milk and Ice Cream*, 53 Minn. 454, 237 N.W.2d 28 (Minn. 1953).

²¹ There was a great deal of undisputed evidence at trial that Tom was an excellent father who was deeply involved with his daughter. Even the custody evaluator, who recommended sole physical custody, expressed the opinion that he was an excellent, involved father.

²² The trial court ignored the issue when raised in the motion for amended findings and/or new trial as well.

practice with the same judge in a similar situation in the past. The motion was heard within a few weeks of the 60-day period, with both parties given an opportunity to submit written arguments, and to argue their respective positions. Furthermore, the trial court made a ruling on each and every issue (with the exception of the constitutional challenge), as an alternative to finding a lack of jurisdiction. Finally, there is not even an allegation that Valerie suffered any prejudice. In fact, Valerie's counsel waited for the 60-day period to run before making it an issue.

In default situations in Minnesota, attorney neglect is utilized as a basis to allow a case to go forward (if the *Kosloski* factors are present), *in the furtherance of justice*, and the liberal policy of having cases decided on their merits. *Finden v. Klass*, 268 Minn. 268, 128 N.W.2d 748 (Minn. 1964). Tom should not be denied his right of review due to his counsel's mistaken justified belief that an extension had been granted.

Treatment of the rule under a standard similar to the *excusable neglect* or *mistake* standards of Rule 60.02 would not be without precedent. Even though Rule 60.02 specifically does not apply to Rule 59.03 time limits for the *taking of action*, inconsistencies in being able to comply with the intent of a statute or rule can form the basis for meeting the primary purpose of the rules of procedure, to-wit: to try cases on the merits and to seek a just resolution. (*See, i.e., Guillame & Associates, Inc. v. Don-Jon Co.*, 336 N.W.2d 262 (Minn. 1983)) For example, Minn.Stat. 145.682 requires that a party file an expert's affidavit in a medical malpractice case within 60 days or the case is subject

to dismissal with prejudice. In *Parker v. O'Phelan*, 414 N.W.2d 534 (Minn.App. 1987), a litigant failed to file the affidavit within the 60-day period. The statute specifically indicates that failure to file the affidavit will result in dismissal of the action, with prejudice. In *Parker*, the Court of Appeals stated that it must determine whether the statutory purpose was so frustrated by Rule 6.02 as to deem it inconsistent with the statute. While the statute requires mandatory dismissal for untimely affidavits, subd. 4 allows a party, upon a showing of good cause, to extend the time for submission; however, it does not address the issue of whether it may occur after the 60-day period. While 59.03 states that an extension may not be obtained after the 60-day period, it does not identify what is necessary to constitute an extension. We do know that a motion, and a written order, are not necessary. A standard is therefore needed in order to evaluate cases such as this where an attorney, in good faith, relies on representations, and past practice, from the trial court, which end up being contrary to the ultimate position taken by the court. In *Parker*, the court noted that the purpose of the 60-day limitation was to prevent nuisance claims. If the affidavit is submitted, whether late or not, the purpose of the statute is met. In the case of the Rule 59.03, 60-day limitation, the express purpose of the rule is to allow a judge to review a case with the facts fresh in his mind. The trial court was able to do that in this case. It actually ruled on the motion. Furthermore, since the rule is for the benefit of the trial court, if it is the trial court that causes the delay in hearing because of scheduling difficulties, a requirement that a litigant obtain an order extending the time for

hearing does not serve the purpose of the rule. A litigant cannot force a judge to hear a case within 60 days if the judge is not available. While the Minnesota Supreme Court does not have the authority to modify the language of the rule, it certainly has the authority to simplify and clarify its intent.

B. The 60-day rule is not jurisdictional. While the service and filing of a Rule 59.03 motion is unquestionably jurisdictional, the 60-day requirement of the rule is not. *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 628 (Minn.App. 1994); *Texas Commerce Bank v. Olson*, 416 N.W.2d 456, 462 (Minn.App. 1987)(although the Minnesota Supreme Court has held that the service and filing time period is jurisdictional, it has not held that the time for hearing is jurisdictional, and in fact has held that it is not absolute).

C. Valerie waived the right to object to the hearing being held beyond 60 days by initially not objecting to the date. In both the *Imperial Developers* case and the *Texas Commerce* cases, the Minnesota Court of Appeals held that where the non-moving party did not object to the date for hearing being set beyond the time period called for under the rules when it was set, they were deemed to have waived the right to object. In *Texas Commerce*, as in the present case, the respondent knew of the error and failed to object until after the time for hearing under the rule had run. Here, Valerie's counsel clearly was aware of the fact that the hearing date was scheduled beyond the time allowed in the rules because she was in contact with Robyn up until the 60-day period ran to find out if a

written order had been issued. The court in *Texas Commerce* indicated that in light of the fact that the respondent was aware of the *error*, and did not object, it could not insist on strict compliance with the rule. In *Imperial Developers*, the Minnesota Court of Appeals reiterated that by not objecting when the hearing date was set, the respondent waived the right to object.

D. The trial court and the Court of Appeals' reliance on Celis v. State Farm Mut. Auto Ins. Co., 580 N.W.2d 64, 66 (Minn.Ct.App. 1998) is misplaced. The facts in *Celis* are entirely different than the facts present in this case. In *Celis*, the respondent timely served his motion on the appellant; however, *he* scheduled the motion beyond the 30-day period required under the existing version of the rule. After the 30-day period, the appellant brought a motion to dismiss for lack of jurisdiction. Thereafter, the trial court issued an order extending the time for hearing. The Court of Appeals dismissed the appeal. In its ruling, the Court of Appeals indicated that it did not know whether or not the respondent's attorney had made it clear that it was a new trial motion, and it did not know if the clerk that he spoke to was a law clerk or some other type of clerk. The clear implication of the ruling was that had the clerk been advised that the motion had to be heard within 60 days, and had the clerk been a scheduling clerk, it would have made a difference in the outcome of the court's decision.²³ In the present case, there is no dispute

²³ It is unclear whether or not the respondent in *Celis* raised the waiver issue as it does not appear in the decision.

that Robyn knew that the motion had to be heard within 60 days. She was told that by Tom's counsel, and reminded of that fact a few weeks later. Furthermore, Robyn was in fact the trial court's *scheduling* clerk, who had exhibited authority in the prior case that Tom's counsel dealt with to extend the time for hearing on behalf of the trial court. The Court of Appeals' ruling in *Celis* is contrary in many respects to the Supreme Court decision in *American Standard Ins. Co. v. Le*, 551 M.W.2d 923, 925-26 (Minn. 1996) as well as the *Texas Commerce and Imperial Developers* decisions. *Celis* was a 2-1 decision, subject to a strong dissent by Judge Randall, who noted,

*"There needs to be a time when substance and equitable estoppel take precedent over form." Id. p. 66.*²⁴

The trial court relied on a number of unpublished decisions to support its determination that the trial court lacked jurisdiction. A review of those decisions, as well as a number of other unpublished decisions, demonstrates that Tom's suggested reading of *Celis* is correct. For example, in *Kellie v. Kellie*, 1999, WL 486528 (Minn.App.) a motion was heard beyond the 30-day period that was in effect in 1998. The hearing date was set

²⁴ It is undisputed that Valerie's attorney knew that the judge had not issued a written order extending the time for hearing since she actually received the facsimile transmission from the trial court's clerk. In fact, she remained in contact with the clerk until after the time for hearing expired. In order for equitable estoppel to apply, there must be a misrepresentation or concealment of a material fact. *Lunning v. Land-o-Lakes*, 303 N.W.2d 452, 457 (Minn. 1980). Valerie's counsel knew that the 60-day time period was about to expire from talking with the clerk and receiving her facsimile, and did not reveal that fact to Tom's counsel, who was left in the dark. Equitably, Valerie should not be able to benefit from facts concealed from Tom.

by the court administrator beyond the 30-day period because of the retirement of the judge who heard the case. There was no motion brought to extend the time, and there was no order issued extending the time. The Court of Appeals held that the motion was nonetheless timely by noting in part that, “*the unavailability of the trial judge at the time of the motion constitutes ‘good cause’ for extending the time [for hearing].*” *Citing, Woodrow v. Tobler*, 269 N.W.2d 910, 914 (Minn. 1978).

In the *LeTourneau* decision cited by the trial court in support of its claim that it lacked jurisdiction, the Court of Appeals ruled in a manner contrary to the trial court. In *LeTourneau*, as in the present case, the trial court judge was not available to hear the motion within the time frame established by the rule. The Appellant provided an order to the court; however, it was not signed until after the time had expired. As was the case here, the delay in having the motion heard was not the product of Tom’s counsel’s unilateral action. The trial court’s scheduling clerk advised counsel that the earliest date available was beyond the 60-days required by the rule. The Court of Appeals addressed the same argument raised by trial court, to-wit: that Tom’s counsel should have insured that an actual order was signed. While finding that the Appellant in *LeTourneau* had an obligation to verify that the order was signed, it nonetheless declined to find that the court lacked jurisdiction, “*since the delay [to have the matter heard] was not due to counsel’s unilateral action.*” *Id. at p.3.* While Judge Muehlberg’s unavailability was not related to

an illness, he was nonetheless unavailable.²⁵ While Tom's counsel did not verify conclusively that a written order was signed, he understandably relied upon the representation of Judge Muehlberg's scheduling clerk, followed up with a phone call to her, and understandably relied on his prior experience with the trial court wherein an actual written order being signed within 60 days, and direct input from him, was not necessary.

In *Ransom v. L.N.D. Properties*, 2001 WL 682757 (Minn.App.), appellant's counsel contacted the district court administrator and requested a hearing date within 30 days. Counsel was advised that the soonest hearing date was outside the 30-day period. Another date was proposed, that was also outside of the 30-day period. Counsel then asked if the motion could be heard by telephone conference call. The court administrator indicated that she would check with the trial court and call back. The following day, the court administrator called back and told counsel that the court had agreed to hear the matter by conference call. Although there was no specific mention of extending the time for hearing, counsel believed that the time for hearing was extended by the court for good cause. As in this case, the trial court dismissed the motion on the basis that it purportedly had not been consulted about extending the time for hearing, and a written order extending the time for hearing had not been obtained. The Court of Appeals reversed, holding that

²⁵ There was no assertion by the trial court that it *could have* heard the motion prior to 60 days. In Tom's counsel's experience it was very difficult to obtain a prompt hearing date in front of Judge Muehlberg since he only heard motions on Fridays twice a month.

the hearing date was not a “*unilateral action*” by counsel. Furthermore, a miscommunication resulted in counsel concluding that an extension had been granted. Finally, the fact that there was nothing in writing was not controlling since the sequence of events led counsel to believe that the trial court had been involved in the scheduling of the hearing date. In its ruling, the Court of Appeals described counsel’s actions (or inactions) to be *excusable error*, the same standard utilized in Wisconsin in allowing extensions beyond the 60-day time period.

The same can be said here. The hearing date setting was not the *unilateral action* of Tom’s counsel; it was done by the judge’s *scheduling clerk*, who kept the judge’s calendar, and who was advised that the hearing had to be held within 60 days. An obvious miscommunication that the judge would allow the time to be extended, coupled with the scheduling clerk’s error in not getting a hold of counsel to let him know otherwise (by using the wrong fax number and not following up when opposing counsel obviously was advised about what was going on); and prior dealings, resulted in Tom’s counsel concluding that the matter had been taken care of. Such a conclusion was not unreasonable under the circumstances. The totality of the circumstances led Tom’s counsel to believe that a written order was not necessary.²⁶

In *Miller v. Roberts*, 2000 WL 979991, (Minn.App.), by agreement of the parties, the motion was scheduled beyond the 30 days required by the rule. Miller failed to obtain

²⁶ Tom reiterates that the rule does not require a written order.

(or even request), an order from the district court extending the time for hearing. Roberts did not object to the fact that the hearing was held more than 30 days after the time for the motion. On appeal, Roberts raised the issue, asserting that the court lacked jurisdiction to hear the motion. The Court of Appeals noted that the 30-day rule was a timeliness issue, and did not deprive the court of *jurisdiction*, citing, *American Standard Ins. Co. v. Le*, 551 N.W.2d 923 (Minn. 1996).

The *Miller* case also re-enforced the fact that a party can waive the 60-day requirement by failing to object. *Citing, In re Estate of Hore*, 220 Minn. 365, 19 N.W.2d 778 (1945)(stating that court's jurisdiction continues after 30-day limitation period where opposing party consents to late hearing).

Finally, the Court of Appeals made a number of findings of fact that were not consistent with the evidence and the record. At page 3 of the March 22, 2005 decision, the Court of Appeals asserted only that Robyn testified that she had no recollection of any statement to the effect that the trial court would grant an extension and that she would not have made such a representation. It left out the later concession by Robyn that it was possible that the conversation may have occurred.²⁷

E. The trial court's unavailability should have constituted good cause and the trial court's consent. In *Woodrow v. Tobler*, 269 N.W.2d 910 (Minn. 1978), the Appellant originally scheduled a hearing date within the 30-day period. The hearing was

²⁷ Page 13, line 12 of transcript [A 77]

postponed due to unavailability by the trial court judge on the date that the Appellant selected. The Appellant did not seek or obtain any sort of order extending the time for hearing. The Supreme Court noted that Rule 59.03 “*did not prescribe the form an extension for cause is to take.*” *Id.* at 914. The *Woodrow* court specifically held that the unavailability of the trial court judge constituted good cause. The Supreme Court noted that while a written order extending the time is certainly preferable to an “administrative continuance”, there was no indication that either procedure would be substantially different or that it would have affected the opposing party any differently. The Supreme Court went on to note that since the trial court denied the motion anyway, there was no adverse affect on the Respondent. The same can be said here. The trial court judge was clearly unavailable. He could not hear the case within the 60-day period. Valerie, knowing that the 60-day period was about to expire, did not raise any objections to the hearing date until after the 60-day time period expired. Valerie did not allege any prejudice; in fact, as in the *Woodrow* case, the trial court here actually ruled on the motions brought by Tom, and as in *Woodrow*, denied them. In light of the fact that the trial court denied the motions, the Supreme Court stated that, “* * * *we do not believe that the procedure used should be fatal to a consideration of the appeal.*” Since the trial court denied Tom’s motion, there can hardly be said to be any prejudice to Valerie.

The *American Standard* case, which was cited by the trial court and the Minnesota Court of Appeals, supports Tom’s position that the appeal should proceed. In that case,

as in this case, it was undisputed that the post-trial motions were timely served. In *American Standard*, none of the parties requested an extension, and according to the trial judge, he did not grant one. The Appellant in *American Standard* cited the *Woodard* case in support of the appeal not being dismissed. The trial court in *American Standard* tried to distinguish *Woodard* by asserting that it could have heard the motion within the 30-day time.²⁸ The Minnesota Supreme Court opined that there was plenty of fault to spread around; and, emphasized that the hearing was not scheduled by the Appellant's unilateral actions. Furthermore, the Supreme Court made it clear that an attorney ought not to be required to initiate an inquiry that might be disrespectful of the judge. In support of the trial court's decision, it also cited *O'Daniel v. Progressive Northern Insurance Co. v. Prior Lake State Agency, et al.*, 2000 WL 271992 (Minn.App.) The facts of that case are clearly distinguishable from the facts of this case. In *O'Daniel*, the Appellant scheduled its post-trial hearing after the 30-day time for hearing. Unlike the present case, there was no evidence that the Appellant ever sought or even discussed an extension, and there was no evidence that the trial court judge was unavailable.²⁹

Finally, the *United States Leasing Corp.* decision, which was also cited by the trial

²⁸ Contrast that with the present case. The trial court never claimed that it could have heard the motion within the 60-day time period. In *American Standard* there was not a prima facie showing of good cause since the trial court judge was available. In the present case, there was a prima facie showing of good cause since Judge Muehlberg was not available.

²⁹ There is no mention of whether or not the waiver issue was raised.

court, is not applicable to the facts of this case. While the Appellants in that case relied on a clerk's setting of a court date, there was no evidence that the Appellant ever sought an order from the trial court. Here, Tom's counsel was told that the judge would extend the time for hearing, and Tom's counsel followed up by inquiring into the status of the matter. But-for the clerk's failure to notify Tom's counsel that there was a problem (by not sending him the facsimile transmission that went to opposing counsel), and but-for Tom's counsel's reliance on past dealings with the same judge, Tom's counsel would have taken additional steps. In other words, there was much more involved here than simply getting a date beyond the 60-day period.

F. The rule as applied violated Tom's constitutional right to due process.

M.S.A. Const.Art. 1, §7, states in relevant part that,

*"No person shall be deprived of * * * life, liberty or property without due process of law."*

The due process guarantees under the United States Constitution and Minnesota Constitution are identical. *Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456 (Minn.App. 2000). Due process protections include, '*notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decision maker, and the right to a reasonable decision based solely on the record.*' *In re Marriage of Sammons*, 642 N.W.2d 450 (Minn.App. 2002), *citing*, *Humenansky v. Minnesota Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn.App.1994) (*citing*, *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020,

25 L.Ed.2d 287 (1970)), *review denied* (Minn. Feb. 14, 1995). In deciding whether substantive due process has been violated, it is necessary to balance the individual's liberty interests against the state's interest. The basic rights, privileges and immunities of citizens include the rights inherent with having a family. *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 14 N.W.2d 400 (Minn. 1944). The right to parent one's child is one of the most fundamental of all liberty interests. *Troxel v. Granville*, 120 S.Ct. 2054 (2000). The concept of due process of law guarantees substantial justice, and is intended to prevent capricious or arbitrary action which would deprive a litigant of a fair hearing. *Juster Bros v. Christgau*, 214 Minn. 108, 7 N.W.2d 501 (Minn. 1943). A statute or rule is unconstitutionally void for vagueness if its terms are so uncertain and indefinite that it is impossible to ascertain its legislative intent. *Getter v. Travel Lodge*, 260 N.W.2d 177 (Minn. 1977). A law is not unconstitutionally vague if ordinary citizens can understand what actions are prohibited. *Zeman v. City of Mpls.*, 540 N.W.2d 532 (Minn.App. 1995).

The application of Rule 59.03 by the trial court is an unconstitutional application. There are fundamental rights involved here. Specifically, Tom was been deprived, without an opportunity to be heard or present a case, of his statutory right to joint legal custody by the trial court ignoring the stipulation of the parties that had been placed on the record prior to trial. He has been deprived of \$40,000 of his money as a result of the award of attorneys fees, which did not comply with statutory requirements for either a need-based award, or a conduct-based award. He was not allowed to present relevant

evidence from his psychological expert. All of those were rights violated at trial. The record makes it clear that he was not provided with an impartial decision maker, when prior to trial, that decision maker threatened severe sanctions if he tried the case, and then followed through on that threat.

In addition to the due process violations at trial, the application of the Rule 59.03 violates due process. Tom has been deprived of the right to a timely opportunity for hearing his motion. The fact that the motion could not be heard within the 60-days required by the rule was the trial court's doing, not Tom's. By putting the onus on the litigant to extend the time for hearing under these circumstances, Tom's due process rights have been violated. This Court need only review the procedures (and sanctions for failing to comply) imposed in the other 49 states, the District of Columbia and under federal law, to see the drastic and patently unfair manner in which the trial court has applied Rule 59.03. No other state penalizes a litigant with outright dismissal if a motion is timely served. Many states require no hearing, and the most severe sanction is the motion is deemed denied if not heard within a specified period of time. There is no rational basis for the strict and severe interpretation given 59.03 by the trial court. The purpose of the rule is to allow a judge to hear a matter while it is still fresh in his/her mind.³⁰ In order to comply with constitutional muster, a ruling should come out of this case that serves two

³⁰ The appellate courts have repeatedly made it clear that the bringing of a motion for amended findings/new trial, is preferable to taking an immediate appeal.

functions: (1) if a judge cannot hear the matter within 60 days, such failure should not, under any circumstances, prejudice the litigant, or require any further action by the litigant; and (2) under no circumstances should a timely filed motion be outright dismissed. The most severe sanction should be that the motion is deemed denied, which would make the practice consistent with the other jurisdictions.

Tom concedes that the due process issue was not expressly raised at the trial court level; however, not knowing the court's ruling, Tom could hardly have been expected to anticipate that the trial court would argue that its scheduling clerk does not speak for him; and, that the court would take the position that it hadn't granted an extension, even though it allowed the matter to be scheduled beyond 60 days; it did not request a motion; it did not request a written order; and, it did not clarify the status of the matter when it was clear that there was a problem (which was not disclosed to Tom's counsel). The Attorney General's Office was given notice in the district court that a constitutional challenge was being raised pertaining to the custody presumption, and declined to appear. They were also on notice at the Court of Appeals, and have been provided notice in these proceedings. At this time Tom does not challenge the rule on its face. He challenges the application of the rule by the district court in its ruling.

2. TOM'S MOTION, EVEN THOUGH IT WAS NOT HEARD WITHIN 60 DAYS, STAYED THE TIME FOR APPEAL OF THE UNDERLYING JUDGMENT SINCE THE MOTION WAS A PROPER MOTION THAT WAS TIMELY SERVED

AND FILED. Rule 104.01, Subd. 2, of the Minnesota Rules of Civil Appellate Procedure provides as follows:

“Unless otherwise provided by law, if any party serves and files a proper and timely motion of a type specified immediately below, the time for appeal of the order or judgment that is the subject of such motion runs for all parties from the service by any party of notice of filing of the order disposing of the last such motion outstanding. This provision applies to a proper and timely motion:

- (a) for a judgment notwithstanding the verdict under Minn.R.Civ.P. 50.02;*
- (b) to amend or make findings of fact under Minn.R.Civ.P. 52.02 whether or not granting the motion would alter the judgment;*
- (c) to alter or amend the judgment under Minn.R.Civ.P. 52.02;*
- (d) for a new trial under Minn.R.Civ.P. 59”*

The policy behind the amendment of Rule 104 was to clarify when parties can file appeals, and to provide a consistent means for the district court to consider *all* pending motions without losing jurisdiction by a premature appeal. The rule was amended to simplify practice in hopes of creating less confusion about the timing of appeals. *Huntsman v. Huntsman*, 633 N.W.2d 852, 855 (Minn.2001).

The appellate courts have repeatedly stressed the need (and strongly encourage) for litigants to bring post-trial motions, prior to appealing district court decisions, in order to allow reconsideration and clarification of findings and conclusions. The procedure is intended to preserve economic and emotional resources of the parties and the system, which in many cases obviates the need for appeal. *Bliss v. Bliss*, 493 N.W.2d 583, 589 (Minn.App. 1992). Tom could have appealed directly from the judgment and his appeal would not have been dismissed on jurisdictional grounds; instead, he did what he was

supposed to do and brought a post-trial motion before he appealed. Rule 59.03 provides,

“A notice of motion for a new trial shall be served within 30 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 60 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 60-day period for good cause shown.”

It is not disputed that Tom timely *served and filed* his motion for amended findings and/or new trial in a timely fashion. The objection that has been raised is that the motion was not *heard* in a timely fashion. The rule does not condition the stay on such an objection. Technically, the motion did not become objectionable until after the expiration of the 60-day time period. Under Rule 104, the *service and filing* stayed the running of the time for appeal from the judgment and decree. Since the timely *service and filing* of the motion stayed the appeal of the judgment and decree *“until service by any party of notice of filing of the order disposing of the last outstanding motion,”* the time to appeal the judgment and decree did not begin to run until Valerie’s attorney served Notice of Entry of the trial court’s December 9, 2004 order.

Even if the trial court did not have jurisdiction to hear the motion, the Court of Appeals nonetheless should have been able to review the Judgment since Tom appealed it within 60 days of service of entry of the order disposing of the motion. The end result is that review of the Judgment and Decree would be limited to whether the evidence sustained the findings of fact and whether the findings sustained the conclusions of law, instead of an examination of issues arising during the course of the trial. (*See*, i.e.,

O'Daniel at. p.2)

The requirements of Rule 59.03 are not tied solely to Rule 104.01. This is clear since Rule 104.01 also deals with motions to vacate judgments and judgments notwithstanding the verdict. A motion is timely in the district court when it is filed and served within the time allowed by the rules of procedure in the district court. *Madson v. Minnesota Mining & Mfg. Co.*, 612 N.W.2d 168, 171-172 (Minn. 2000). It is not disputed in this case that Tom's motion was timely *filed* and *served* at the district court level. A motion is *proper* in the district court under Rule 104.01 if it is of a kind that is authorized by the rules of court. Whether a motion is proper bears no relationship to the merits of the case. *Id.* at 171. The test to determine whether a motion is proper is whether, on the face of the document, the motion is expressly allowed under Rule 104.01, subd. 2. *Id.* at 172. Since a motion for amended findings is one of those expressly allowed under subd. 2, if a motion for amended findings has the necessary components for such a motion, the motion is proper. *State ex rel Fort Snelling State Park v. Minneapolis Park and Rec. Bd.*, 673 N.W.2d 169, 178 at fn 1 (Minn.App. 2003), *rev. denied* March 16, 2004, *citing*, *Lewis v. Lewis*, 572 N.W.2d 313, 315-16 (Minn.App. 1997)(citations omitted)(the purpose of a motion for amended findings is to permit the trial court a review of its own exercise of discretion.) To have the necessary components for a motion for amended findings, it should specify the objections to the findings and if it is claimed that the record does not support findings, the moving party should address the record evidence, explain why the

record does not support the district court's findings, and explain why the proposed findings are appropriate. *Id.*

At no time here did Valerie allege or assert that Tom's motion failed to contain the necessary components for a motion for amended findings. In fact, a review of the motion demonstrates that all necessary components were present. Therefore, the motion was entirely a *proper* motion under Rule 104.01, as it was one which was *timely served and filed*. In light of those facts, in the very least the Court of Appeals would have had jurisdiction to hear an appeal from the judgment even if the trial court lacked jurisdiction to hear the motion.

The Minnesota Court of Appeals, in its decision dated March 22, 2005, correctly noted that both Rules 52.02 and 59.03 require that they be served and heard within the time limitations specified by the rule;³¹ however, it incorrectly jumped to the conclusion that the motions did not extend the time to appeal the underlying June 21, 2004 judgment by asserting that,

*"[b]ecause [Tom's] posttrial motions were untimely, the motions did not extend the time to appeal the underlying June 21 judgment under Minn.R.Civ.App.P. 104.01, subd. 2."*³²

As noted above, whether or not a motion is *timely heard* has nothing to do with whether it stays the time to appeal the underlying judgment. The only requirements of the rule are

³¹ *See*, p. 2 of decision dated March 22, 2005. [A 6]

³² *See*, p. 5 of the March 22, 2005 decision. [A 9]

that the motion be timely served and filed, and that it be a proper motion. Tom's motion was both timely served and filed, and was by definition, proper.

CONCLUSION

The trial court should not have dismissed Tom's motion as untimely. The appeal should proceed as if the motion was denied (as was done as an alternative in the trial court's ruling). To avoid future occurrences of the problems presented in this case, the Minnesota Supreme Court should hold that in the event that a hearing cannot be held within 60 days due to a judge's unavailability, such unavailability automatically constitutes good cause for an extension, and consent by the court to an extension within the 60-day period.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).