

COURT FILE NOS. A05-0310

STATE OF MINNESOTA
IN SUPREME COURT

Thomas Carroll Rubey, *Appellant*,

v.

Valerie Ann Vannett, *Respondent*

APPELLANT THOMAS CARROLL RUBEY'S REPLY BRIEF

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CORRECTED STATEMENT OF THE CASE AND FACTS

Appellant Thomas Carroll Rubey (hereinafter “Tom”) disputes a number of assertions made by Respondent Valerie Ann Vannett (hereinafter “Valerie”) in her *Statement of the Case and Facts*. Apparently, in light of not having a legal response to Tom’s Supreme Court brief, Valerie has decided to create an entirely new objection to Tom’s motion, one that was never raised before. Valerie asserts for the first time at the Minnesota Supreme Court that Tom’s motion for amended findings/new trial was not proper since it allegedly did not comply with Rule 303.01 of the Minnesota General Rules of Practice. The issue is clearly a red-herring and without merit. Specifically, Valerie alleges that since the *Notice of Motion and Motion* did not identify a date and time for hearing, the motion was not proper.

In support of that position Valerie falsely asserts that there is no evidence that Tom contacted the scheduling clerk prior to serving his motion. That is simply not true. At paragraph 5 of the *Affidavit of Petitioner’s Attorney* dated September 10, 2004, Tom’s counsel made the following statement under oath,

“I was unable to reach the Judge’s clerk to obtain a hearing date prior to serving the motion papers. After going on vacation and trading phone calls, I was able to speak to Judge Muehlberg’s scheduling clerk and obtain a hearing date of September 17, 2004.”

The pleadings were sent out on Friday, July 25, 2004. Tom’s attorney asserted that he left a message to attempt to obtain a court date prior to leaving on a short vacation. He was unable to reach the clerk. The clerk’s notes (a copy of which is appended at p. 59 of Tom’s

appendix to his principle brief)¹ reflect that she got the message the following Monday, July 26, 2004, and that she left a message that the next available date was August 30, 2004, which was beyond the 60-day limit. Upon his return from his vacation, Tom's attorney called the clerk back on July 28, 2004, and the hearing was instead scheduled for September 17, 2004. It is therefore clear that Tom's counsel attempted to obtain a hearing date prior to serving the motion.

Valerie further falsely alleges that there is no evidence that Tom notified Valerie of the date for hearing until the 60-day period had lapsed. That is a rather odd statement considering that Valerie's attorney was aware of the court date as evidenced by her phone call to the clerk on August 23, 2004; [A 59] her receipt of Tom's attorney's letter dated August 20, 2004, confirming that the motion had been scheduled for September 17, 2004; [A 207] and, her admission in her brief. Since the 60-day period expired on August 25, 2005, it is undisputed that Valerie had notice within the 60-day period.

Valerie alleges that the judge's clerk denied that she indicated that the trial court judge would extend the time for hearing the motion. That ignores the fact that she also did not dispute the fact that it was possible that the conversation may have occurred.² She repeats that unsupported claim at p. 6 of her argument.

¹ A copy is appended to the appendix to this brief at RA-1.

² *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?

Valerie asserts that the clerk had no authority to issue orders, citing p. 18 of the transcript of the proceedings. [A 83] That statement is irrelevant and not consistent with the transcript. As repeatedly argued, no formal *order* is required. The representation made by the clerk was that the trial court would extend the time for hearing. Included in her described duties is the fact that she maintains the judge's calendar and, "*provides complex and detailed clerical/technical support to an assigned judge.*" [A 88] Tom's counsel relied on that statement based upon prior dealings with the same judge and clerk in another case.

Valerie asserts at p. 4 of her brief that both attorneys were aware that no Order or consent had been given to the extension of time. Valerie makes no reference to the record for that assertion. Tom's attorney never conceded such a fact and the record doesn't support that contention.³

Valerie asserts at p. 5 of her brief that Rule 59.03, "*has been repeatedly interpreted by the Court to require affirmative action by the party asking the court to extend the deadline to hear a motion for a new trial and an affirmative action by the court to extend it – i.e., an*

³ This is a classic reason why a more objective interpretation to the rule must be made. Everyone is left to speculate as to subjective intent and understanding. Tom's counsel has made it clear that he believed that consent had been obtained when he spoke with the trial court's scheduling clerk. The follow-up phone call to the court was to check to see if the court was going to issue a written order, something not required by the rules. Tom's counsel made it clear that in prior cases with the same trial court judge the judge had requested that one attorney or the other prepare an order. He was also aware of situations where the judge had prepared orders. When there was no return call, it was assumed that the court did not require that Tom's counsel prepare an order. (*See*, ¶7, p. 6 to Attorney Affidavit dated September 20, 2004).

order, a written confirmation or affirmation of a stipulation by the parties.” (Emp. added).

Valerie does not cite any authority for that assertion because none exists. The rule does not prescribe the form in which the extension must take. While a written order is *preferable*, it is not required, nor are the other means cited by Valerie. *Woodrow v. Tobler*, 269 N.W.2d 910, 914 (Minn. 1978).

Contrary to Valerie’s assertion, the issue is not *black and white*. If it were, it would not be constantly a point of contention with attorneys. The issue has come up well more than a dozen times on appeal in the last ten years.

Valerie asserts that Tom’s attorney blames part of the problem on the clerk using the wrong fax number. It is unclear why Tom’s attorney is to blame for the clerk’s error.⁴ As noted by Tom’s counsel, had the clerk properly faxed her letter to him, he would have immediately taken action to insure compliance with the 60-day period, which to that point he believed had been resolved.

Valerie states in her brief at p. 7, ¶4, “*Consider how unfair it would be if one court accepts the excuses in one instance and denies them in the next.*” That is precisely what has occurred in the appellate courts. The 2-1 *Celis* decision is not reconcilable with the *American Standard*, *Woodrow* and *Texas Commerce* cases.

Valerie argues in her brief at p. 7, ¶5, “*It was [Tom’s] burden to prepare a proposed*

⁴ This is a clear example of the fact that the judge’s clerk does and did make mistakes.

order, to prepare a proper motion to have the order signed or to at least schedule a conference call with the Judge to have the issue addressed.” As noted in *Woodrow*, the rule neither contains nor mandates such requirements. Furthermore, there was no issue to address until Valerie objected, *after the fact*.

Valerie argues at p. 8, ¶1 of her brief that if the time limit under Rule 59.03 was intended to be extended beyond 60 days, the rule would have to be amended. That is entirely contrary to the clear language of the rule and precedent. The rule contemplates cases being heard beyond 60 days. A judge’s unavailability constitutes good cause to do so. *Woodrow* at p. 914.

Valerie asserts at p. 8, ¶2 of her brief that it is proper to communicate with the court by letter in lieu of a motion. While such practice is arguably *ex parte communications*, Valerie ignores the key factor in this case – Tom’s counsel was unaware that there was a problem based upon prior dealings with the same judge, representations made by his clerk, the lack of a response to his inquiry, and lack of objection by Valerie’s counsel.

Valerie asserts at p. 8, ¶3 of her brief that Tom’s suggestion that a judge’s unavailability should be sufficient cause in all cases for an extension of time would defeat the purpose of the rule. That is hardly true. Litigants do not have control over judges’ availability. Only a judge has control over his calendar, which in turn is managed by his scheduling clerk.

Valerie asks the question, “what if an attorney is unavailable for a court date that falls

within the 60-day period?” The answer is clear – there is no prima facie showing of good cause and the attorney would have to take affirmative steps.

Valerie’s suggestion that an attorney arguably *could* file a motion without a hearing date, and wait 59 days to obtain one is ridiculous. It would serve no purpose. Furthermore, Tom’s attorney did not wait 59 days to obtain a hearing date – he made the request within the 30-day period.

Valerie argues at p. 10, ¶1D of her brief that there must be uniformity within the judicial system. Tom agrees; however, the procedures and consequences also need uniformity, something that has not occurred with Rule 59.03.

REPLY ARGUMENT

1. ***THE AUTHORITY CITED BY VALERIE DOES NOT SUPPORT THE CONTENTION THAT THE FAILURE TO HEAR A MOTION FOR AMENDED FINDINGS/NEW TRIAL WITHIN 60 DAYS IS A JURISDICTIONAL DEFECT.***

Valerie cites *Differt v. Rendahl*, 306 N.W.2d 813 (Minn. 1981) as purported authority for the proposition that the failure to hear the motion within 60 days is a jurisdictional defect. That case does not support her position. *Differt* involved a litigant who served notice of entry on the opposing party, and later filed a motion for amended findings/new trial after the 15-day period specified under the then version of the rules. The appellant in *Differt* asserted that since he had not been served with notice of entry, the time for his bringing the motion

had not commenced. The Court of Appeals ruled that his service on the opposing party commenced his time to bring a motion as well. The case had nothing to do with hearing the matter within 30 days, which was the time specified under the old rule.

Valerie cites *Ring v. McPeck*, 423 N.W.2d 711 (Minn.App. 1988) as purported authority for the proposition that the failure to hear the motion within 60 days is a jurisdictional defect. That case does not support her position. In *Ring*, notice of entry was made on May 19, 1987. The Appellant did not bring her motion for amended findings/new trial until August 3, 1987. The Court of Appeals correctly held that the motion itself was untimely. The case had nothing to do with the timeliness of when the motion was heard.

Valerie cites *United States Leasing Corporation v. Biba Information Processing, et al.*, 489 N.W.2d 231 (Minn. 1992) as purported authority for the proposition that the failure to hear the motion within 60 days is a jurisdictional defect. That case does not support her position. *United States Leasing Corporation* did not discuss whether the failure to hear the matter within the time frame set by the rule was a jurisdictional defect. The Court in *United States Leasing* stands for the proposition that unilateral action of counsel cannot create good cause for an extension.⁵

Finally, Valerie cites *Celis v. State Farm Mutual Auto Ins. Co.*, 580 N.W.2d 64 (Minn.App. 1998). *Celis* was a split 2-1 decision of the Court of Appeals wherein it opined

⁵ One fact that seem to be lost in mix here is that the trial court judge never asserted that he could have heard the motion within the 60-day period. He was clearly unavailable and under extensive precedent, his unavailability constituted good cause.

that the court lacks jurisdiction to hear a motion beyond the time specified in the rule, *unless* certain steps are taken; although, even the *Celis* Court determined that unlike the requirement that a motion be timely brought, the requirement that it be heard within the time set by the rule, “*is not absolute.*” *Id.* at 65. The loose use of the term “*jurisdictional*” in *Celis* is not consistent with its plain meaning and prior rulings, and conflicts with its own determination that it is *not absolute.* *See, i.e., Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 628 (Minn.App. 1994)(unlike the jurisdictional time limit for service and filing, the hearing date requirement is not absolute); and *Texas Commerce Bank v. Olson*, 416 N.W.2d 456, 462 (Minn.App. 1987)(a post-trial motion’s hearing time limitation is not jurisdictional and may be waived by failing to timely object). Contrast that with the jurisdictional requirement that a motion be brought within the time limits of the rule. Under those circumstances, the court does not have the power to act. *Bowman v. Pamida, Inc.*, 261 N.W.2d 594, 597 (Minn. 1977).

2. **THE FAILURE TO NOTE THE DATE AND TIME FOR HEARING ON APPELLANT’S MOTION DOES NOT RENDER IT “IMPROPER AND PREVENT TOLLING OF THE TIME TO APPEAL THE UNDERLYING JUDGMENT AND DECREE.”**

a. *Valerie cannot raise the issue for the first time on appeal.* Valerie did not raise this issue at the trial court level and cannot raise it for the first time at the Minnesota Supreme Court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Valerie’s motion to

dismiss merely stated that Tom's motion for amended findings and/or new trial should be denied, "** * * for lack of jurisdiction and the Court should dismiss the Motion as untimely, on the basis that the [Appellant] failed to obtain an Order, within the 60-day period, extending the date for the hearing in the matter, and no good cause has been presented.*"

(Emp. added) [A 183] In the alternative to that request, Valerie requested that the trial court deny the motion on its merits. There was no mention of any objection on the basis that the original motion did not state a date and time for hearing and as such, the issue is not properly before this Court.⁶

b. An alleged technical violation of Rule 303.01 is not a jurisdictional flaw. Rule 303.01(a)(1) states as follows:

"All motions shall be accompanied by either an order to show cause or by a notice of motion which shall state, with particularity, the time and place of the hearing and the name of the judge, referee, or judicial officer, as assigned by the local assignment clerk."

Valerie's current objection does not go to the form or substance of the motion – it goes to the form and substance of the *notice* that accompanies the motion. From a practical standpoint, it is often impossible to comply with the requirements of the rule. In many jurisdictions, such as the First District, cases are not blocked to a particular judge. If a motion is brought in a file, the name of the judge is not available and oftentimes is not known until the date of the hearing. If a motion were deemed improper without naming the judge, virtually all motions

⁶ Valerie argues in her brief at p. 15, ¶C, that she previously challenged compliance with Rule 303.01, citing page 4 of her arguments to the Court of Appeals. [A 131] That argument is irrelevant since she did not raise it at the trial court level.

in the First District (and elsewhere) would be deemed improper. It is certainly not unheard of to not be able to obtain a hearing time and date prior to serving a motion for amended findings and/or new trial.

In the present case Tom's motion was timely served on July 23, 2004. While it was not possible to obtain the hearing date and time on that date, Valerie did not object to the lack of a hearing date and time being stated, either within the 30-day period, or anytime thereafter. Tom's *motion* was entirely appropriate. The purpose of a motion for amended findings is to allow the trial court an opportunity to review its own exercise of discretion. A *proper* motion for amended findings must identify the alleged defect and the reason why it is defective. *Lewis v. Lewis*, 572 N.W.2d 313, 315 (Minn.App. 1997). Likewise, the purpose of a motion for new trial is to allow the trial court to correct its own errors without having to resort to the appellate courts. *Waldner v. Peterson*, 447 N.W.2d 217, 219 (Minn.App. 1989) A *proper* motion identifies the specific grounds that support a request for a new trial. *Id.* Tom's motion identified, with specificity, all of the grounds that supported a request for a new trial. Furthermore, it specifically identified the findings and conclusions that were deemed deficient and/or contrary to the facts and the law.

Tom's failure to identify the date and time on his motion was not a *violation* of the rule since it was not possible to comply with the requirement of the rule when the motion was served. Since the motion was proper in form, and the *notice* was not objected to at the time, it can hardly be claimed to be *improper* for failing to initially note the date and time for

hearing after the fact. Tom's motion was clearly *procedurally in order*. (See, *Madson v. Minnesota Mining and Manufacturing Co.*, 612 N.W.2d 168 (Minn. 2000). Valerie speciously asserts that without the time and date for hearing stated, she had no idea when to prepare her response. She was served with the motion nearly two months before the matter was heard. Nothing prevented her from preparing her response. Furthermore, she was on notice of the hearing date before the expiration of the 60-day period and could have objected during the 60-day period but chose not to.

Valerie asserts that since Tom's motion did not state the date and time for hearing, it was *improper* and procedurally defective. That position is specious. The motion clearly indicated on its face that Tom was unable to obtain a hearing date prior to serving the motion. Since the 30-day period for bringing a motion is jurisdictional (and Rule 303.01 is not), Tom's counsel did what *any* attorney would do – timely serve the motion to preserve post-trial motions and argument and notify the other party of the date when it is obtained.

c. Failing to follow the letter of the Rule does not render Tom's motion "improper." Valerie equates a "*proper*" motion with whether procedural requirements are followed to the letter. That is not a correct interpretation of the word "*proper*" under Minn.R.Civ.App.P. 104.01. The term "*proper*" refers to whether or not the motion is of a *kind*⁷ authorized by the rule. *Madson* at p. 171. Tom's motion was a "*proper*" motion under

⁷ Valerie later argues that Tom ignores Minn.R.Civ.P. 52.02 which requires that a motion of that type be served and heard not later than the time allowed in the rules. That argument fails on two counts: (1) it begs the question. It is in dispute whether it was

the rule since it was a motion for amended findings and/or new trial. Minn.R.Civ.P. 59.03(b) (c)(d).

3. **VALERIE HAS NOT STATED A PROPER OBJECTION TO THE WAIVER ARGUMENT.**

Valerie argues in her brief that she didn't object to the fact that the hearing date was beyond the 60-day period, "*because the time was still running for Appellant to get consent for the extension. Respondent's attorney did make timely objection to the motion after no consent had been obtained from the Judge.*"⁸ (Emp. added). As noted in prior arguments, the only *timely* objection would have had to have been made prior to the expiration of the 60-day period.⁹ Therefore, Valerie's argument is without merit.

CONCLUSION

The record supports Appellant's request that the decision of the trial court and the Court of Appeals be reversed.

timely heard; (2) whether it was served and heard in a timely fashion is not relevant – the relevant issue is whether it is of the *kind* identified under the rule. Furthermore, a party who *files* a post-trial motion must do so in compliance with the Rules of Civil Procedure. *Madson* at p. 171. There is no question that Tom *filed* his motion in compliance with the rules.

⁸ *See*, ¶B1, second paragraph on p. 4 of arguments.

⁹ Both the *Imperial Developers* and *Texas Commerce* cases cited in Appellant principle brief make it clear that the time for obligation is when notice is given. Therefore, objection cannot be timely if made after the 60-day period has expired.

Respectfully submitted,

Dated: August 23, 2005

OLSON LAW OFFICE

A handwritten signature in black ink, appearing to read 'Mark A. Olson', is written over a horizontal line.

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