

COURT FILE NO. A05-0310

**STATE OF MINNESOTA
IN SUPREME COURT**

Thomas Carroll Rubey,
Appellant,

v.

Valerie Ann Vannett,
Respondent.

Respondent's Brief and Appendix

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENTS	2
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Celis v. State Farm Mut. Auto. Ins. Co., 580 N.W.2d 64 (Minn.App. 1998)	3
Differt v. Rendahl, 306 N.W.2d 813 (Minn. 1981)	2
Huntsman v. Huntsman, 633 N.W.2d 852, 855 (Minn. 2001)	13
Madson v. Minnesota Mining and Manufacturing, Co., 612 N.W. 2d 168 (Minn. 2000)	13
Petersen v. Petersen, 352 N.W.2d 797 (Minn.App. 1984)	16
Ring v. McPeck, 423 N.W.2d 711 (Minn.App. 1988)	3
Sanders v. Clemco Indus., 862 F.2d 161 (8 th Cir. 1988)	12
Township of Honner v. Redwood County, 518 N.W.2d 639 (Minn.App.1994), rev. denied (Minn. Sept. 16, 1994)	15
United States Leasing Corporation v. Biba Information Processing Et. al, 489 N.W.2d 231, 231 (Minn. 1992)	3

Cases, Other States

Corbit v. Williams, 897 P.2d 1129, 1130-31 (Okla. 1995)	12
Ohio State Medical Bd v. Pla, 538 N.E.2d 125, 126 (Ohio Ct.App. 1988)	12

Minnesota Rules

Minn. R. Civ. App. P. 104.01.....	2, 11, 12, 13, 14, 15, 16
Minn.R.Civ.App. P. 126.02	15, 16
Minn.R.Civ.P. 52.02	11, 12, 13, 14, 15
Minn.R.Civ.P. 59.03	1, 2, 3, 4, 5, 7, 8, 11, 14, 15

Minn. Rule of Practice-Family Court Procedure–Rule 303.014, 14, 15
Minn.R.Civ.App.P. 104.01 Advisory Committe Comment–1998 Amendments....12, 13
Minn.R.Civ.P. 59.03 Advisory Committee Comment–2000 Amendments5

STATEMENT OF THE CASE AND FACTS

The Decree of Dissolution was entered on June 21, 2004. Notice of Filing and Entry of Decree was served by US Mail on June 23, 2004. On July 23, 2004, Appellant served by facsimile a Notice of Motion and Motion for Amended Findings and/or New Trial, with no specified hearing date included in the motion. On July 28th, Appellant's counsel contacted the trial court's scheduling clerk and obtained a hearing date of September 17, 2004, a date beyond the 60-day hearing requirement of Rule 59.03. There is no evidence that Appellant timely notified Respondent of the date for the hearing until after the 60 days had lapsed.

Although Appellant's counsel alleges the clerk stated the judge would issue an extension, which the clerk denied, see A-74, A-76 (Note that A-75 is out of place), nonetheless, on August 20th Appellant's counsel left a voicemail message with the scheduling clerk inquiring about the status of an extension order. The clerk attempted to send a notice to the attorneys for both sides by facsimile that no extension had been ordered. Appellant's counsel never received the facsimile. Appellant's counsel testified that when he did not hear back from the clerk, he assumed the extension had been obtained and did nothing further. The Court never issued an Order granting an extension. The clerk has no authority to issue orders. See A-83. Six days after Respondent's counsel received notice from Appellant of the September 17 hearing date (See R-1), Respondent timely filed a motion to dismiss Appellant's post-trial motions as untimely, alleging the court lacked jurisdiction to hear the matter. The trial

courts granted the Respondent's motion to dismiss on jurisdictional grounds on December 9, 2004.

Appellant served and filed an appeal on February 14, 2005 of both the June 21, 2004 judgment and the December 9, 2004 order disposing of Appellant's post-trial motions. On March 22, 2005, the Court of Appeals ruled that because the Appellant's counsel failed to obtain an Order Extending the Time for the new hearing, the trial court lacked jurisdiction to hear the post-trial motions. The untimely motions then did not extend the time to appeal the judgment per Minn. R. Civ.App. 104.01, Subd. 2 and the appeal was dismissed. The Supreme Court granted review on June 14, 2005.

ARGUMENTS

I. 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 A JURISDICTIONAL DEFECT.

A. Published cases supporting this statement:

Differt v. Rendahl, 306 N.W.2d 813 (Minn. 1981)(failure to comply with 15-day time limitation for service of notice of motion for new trial is a jurisdictional defect which deprives the court of the jurisdiction to hear and rule on the tardy motion).

Ring v. McPeek, 423 N.W.2d 711 (Minn.App. 1988)(Trial court had no jurisdiction to amend original findings of fact and conclusions or to address motion for new trial where motion was not timely filed.)

United States Leasing Corporation v. Biba Information Processing Et. al, 489 N.W.2d 231, 231 (Minn. 1992)(“By its explicit terms Rule 59.03 mandates a hearing within 30 days after general verdict or notice of filing ‘unless the time for hearing be extended by the court within the 30 day period for good cause shown.’ The rule clearly contemplates a judicial determination, not counsel’s unilateral action, prior to the expiration of the 30-day period, that good cause exists for the extension. Failing that here, the trial court properly dismissed the motions as untimely. We again comment that prudent counsel will obtain a written confirmation of any extension issued by the court within the 30-day limitation period.”)

Celis v. State Farm Mut. Auto. Ins. Co., 580 N.W.2d 64 (Minn.App. 1998)(holding that the appellant’s attorney’s failure to obtain an order from the trial court extending the date for hearing in the matter for “good cause shown” within the 30-day period resulted in the court lacking jurisdiction to hear the matter)

B. Appellant never served and filed a proper motion for a new trial/amended findings and the trial court never granted an extension.

1. Minnesota Rule of Practice-Family Court Procedure–Rule 303.01

requires that all motions be accompanied by a notice of motion which shall state, with particularity, the time and place of the hearing.

Appellant served and filed his motion for a new trial on 30th day (the last possible day pursuant to Rule of Civil Procedure 59.03) without providing notice of the date the motion was scheduled to be heard.

There is no evidence that prior to serving the motion, he contacted the clerk to get a date. Appellant's motion was improper.

Without a proper date specified, there was no date to which Respondent's attorney could object. Even after the date was scheduled and notice was given by letter, the appellant could have gotten court approval to extend the time, so again, the Respondent's attorney didn't object 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.

Both attorneys were aware that no Order or consent had been given.

Appellant's attorney stated that he questioned the status of the order and

when he never heard back from the clerk, he assumed that consent was given. This is an unreasonable assumption and completely unsupported by case law.

It is not the providence of the attorneys to decide to disregard the time limitations of Rule 59.03.

2. Rule of Civil Procedure 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 order, a written confirmation or affirmation of a stipulation by the parties.

3. The Minn.R.Civ.P. 59.03 Advisory Committee Comment—2000

Amendments concerning the amendment to extend the deadline from 30 to 60 days specifically states:

The single purpose of the amendment of this Rule 59.03 is to create a longer and more reasonable period in which to hear post-trial motions. At the time this rule was adopted, post-trial motions were often heard in a somewhat perfunctory manner and court assignment practices permitted the scheduling of cases in this manner.

This amendment will also reduce, although not eliminate, the potential consequences of failing to have a post-trial motion heard in a timely manner. (emphasis added).

The legislature left intact the provision that the matter still had to be served and heard within 60 days and that the court had to extend the time-taking the matter out of the hands of the attorneys.

4. Appellant's attorney did not do his job and now seeks to place blame on all but himself. There is no evidence that Appellant's attorney sent a letter or proposed order to the Court. His only defense is that the clerk represented an Order would be forthcoming, a representation that the clerk denied. See A-74, A-76 (Note: A-75 is out of place). The Judge confirmed at the hearing that his clerk does not issue or draft orders. See A-83.

Appellant's attorney is asking the Court to make credibility determinations of support staff and wasting valuable court time sorting through what happened when the question of whether or not there was an order or some other writing from the Judge extending the deadline has a black and white answer—there either is or there is not an extension of the time granted by the Court within 60 days.

Appellant's attorney says things like his fax machine has troubles, he left on vacation, the clerk faxed notification that there was no order to wrong fax number (when he should have known there was no order because he

never moved the court for an order, never prepared an order, and did not have an order in hand) etc. as to why he did not secure an order extending the deadline within 60 days. See A-81. However sympathetic his pleas may be, the rule exists so that it is applied uniformly and the obligations and duties of the parties are clear. Consider how unfair it would be if one court accepts the excuses in one instance and denies them in the next.

5. Appellant's attorney was not entitled to construe lack of response as confirmation that an order had been issued. It was solely his responsibility to ensure that the court had extended the deadline by issuing an order or obtaining confirmation from the Judge in writing. It was his burden to prepare a proposed 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.

Appellant's attorney clearly knew that an Order was necessary or else why would he call to ask if one had been issued?

- C. Only the firm application of Rule of Civil Procedure 59.03 will fulfill the intent of the rule.

1. Rule of Civil Procedure 59.03 was designed so that the motion for a new trial is heard and decided while the matter is fresh in the Court's mind. If the time limit was intended to be extended even further than 60 days, the rule would have been amended accordingly.

2. The value of having the matter heard while still fresh in the Court's mind is SO IMPORTANT that the extension of time to hear the motion can only be extended by the Judge for good cause shown. The Judge must be involved in determining whether good cause has been shown. The rule reflects that. Appellant did not comply with the rule. He makes the argument that he could not talk to the Judge directly and so had to go through the clerk, but it is well known that a motion is a proper way to communicate with a Judge as is arranging for a conference call where all parties are present. Even a letter to the Judge with a copy to the opposing party addressing the issue would have been acceptable.

3. Appellant asks that the rule be interpreted so that if the Judge is not available to hear the motion within 60 days as determined—not by the Judge—but by the Court's Scheduling Clerk, that nothing further be done and that the deadline be automatically extended. This would defeat the purpose behind the Rule.

The Court would be deprived of the opportunity to review and if necessary modify its calendar to hear the matter. The Court would be effectively cut out of the loop. This interpretation of the Rule would create fact issues as to what "available" means. What if the Court had time but one or all of the parties did not? Appellant's attorney rejected an earlier time in this case, the initial proposed date was beyond the 60 days in the first place, but it is indicative of the potential circumvention of the rule which could occur. For example, in this case, Appellant's attorney and the Judge's clerk disagree about the conversations they had. What if there is a disagreement about whether the Clerk actually said that there was no date available before the expiration of the 60 days? What if there was a date available but by the time the attorney called back after checking with his client and his or her schedule, the date was unavailable? As in this case, the attorney wishing to bring a motion for a new trial could wait until the last moment to attempt to get a date and then have the matter automatically extended.

The attorney could wait until the 30th day to serve the motion and always leave the date blank, leaving the opposing attorney to wonder when the hearing will take place. He could then wait until the 59th day to call the clerk for a date, assuring the Judge's unavailability. This will result in

motions heard far beyond 60 days, clearly defeating the intent of the rule.

Indeed, Appellant's request that this court adopt his interpretation of the rule would give the scheduling attorney a great deal of power and manipulation of the rule would become a matter of strategy.

D. The application of the rules can be harsh but they exist for the greater good.

1. Rules of Procedure exist—not to be bent, broken and disregarded as argued by Appellant but so that there is uniformity within the judicial system and practitioners and judges know what to expect and what is expected of them. It takes work, conscientiousness and precision to comply with the Rules. The benefit of compliance is quality work and order within the judicial system.

When rules are ignored with impunity, what results is chaos and uncertainty. Why can one person break the rules and get away with it while another is held to strict compliance. This erodes public trust in the judicial system.

E. The effect on this case of the Court failing to hear a motion for new trial or amended findings within the time limits imposed by or, alternatively,

Appellant failing to secure an extension from the court for good cause shown pursuant to Minn.R.Civ.P. 59.03, is that Appellant's motion must be dismissed because the appeal time ran.

II. 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 A “PROPER” MOTION.

Only a “proper and timely” motion, identified in Minn. R. Civ. App. R. 104.01, extends the time for appeal.

A. Minn. R. Civ. App. R. 104.01 provides only certain matters toll the appeal time. Rule 104.01 states (twice in the same paragraph) that it applies to a proper and timely motion :

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 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;
- (e) for relief under Minn.R.Civ.P. 60 if the motion is filed within the time for a motion for new trial; or
- (f) in proceedings not governed by the Rules of Civil Procedure, a proper and timely motion that seeks the same or equivalent relief as those motions listed in (a)-(e).

Id., Subd. 2. (Emphasis added)

A tolling motion that is not properly made is ineffective to toll the time for appeal. *See Sanders v. Clemco Indus.*, 862 F.2d 161 (8th Cir. 1988).

Numerous other states have practices similar to amended Rule 104.01, subd. 2, and they generally follow the same rule as the federal courts. *See Ohio State Medical Bd v. Pla*, 538 N.E.2d 125, 126 (Ohio Ct.App. 1988) (improperly filed motion for new trial did not extend time to file notice of appeal in court of appeals); *Corbit v. Williams*, 897 P.2d 1129, 1130-31 (Okla. 1995) (motion for a new trial will not extend the time to appeal if not filed per statutory requirements).

The 1998 amendments to Rule 104.01 added a new subdivision that specified post-trial motions that would toll the time for appeal, outlined above. The purpose of Rule 104.01, subd. 2, is to allow a district court to rule on post-decision motions before an appeal is commenced. See

Minn.R.Civ.App.P. 104.01, Advisory Committee Comment – 1998 Amendments; See also *Huntsman v. Huntsman*, 633 N.W.2d 852, 855 (Minn. 2001).

In a decision in 2000 the Supreme Court addressed the specific issue of what constitutes a “proper” post trial motion under Minn.R. Civ. App.P. 104.01, subd 2. In *Madson v. Minnesota Mining and Manufacturing, Co.*, 612 N.W. 2d 168 (Minn. 2000), the Supreme Court held that the party who files a post-trial motion must do so in compliance with the Rules of Civil Procedure. *Id.* 171. If a party’s post-judgment motion is timely, filed within the time for a motion for a new trial, and procedurally in order, then all parties and the court can prepare to promptly respond to it. *Id.* (emphasis added). In the instant case, Respondent had no idea when to prepare our response until we were notified of the date of the hearing and the judge was given the opportunity to extend the time. The jurisdictional argument did not arise until after the 60 days had run. The Appellant’s motion was procedurally deficient and therefore improper.

B. Minn.R.Civ.P. 52.02 expressly provides that a motion for amended findings shall be “served and heard” not later than the times allowed for a motion for

a new trial pursuant to 59.03. Appellant completely disregards Minn.R.Civ.P. 52.02 in his argument.

Appellant's failure to comply with Rule 59.03 (by not serving and filing a proper motion and not obtaining extension of the time limit by the judge if the motion could not be heard within the time limit) is also a failure to comply with Rule 52.02 and only a proper and timely motion under Rule 52.02 will toll the time for appeal pursuant to App.R. 104.01.

Therefore, the time for appeal was not tolled and the court is without jurisdiction to consider the underlying appeal.

- C. Appellant's motion was never proper and timely and therefore the time for appeal of the judgment was not extended. Even if considered as having been, technically, filed in a timely manner (within 30 days) it was never a proper motion.

Appellant ignored Rule of Practice–Family Court Procedure–Rule 303.01 which defines a proper motion. Rule 303.01 requires that all motions be accompanied by a notice of motion “which shall state, with particularity, the time and place of the hearing.” *Id.*

Appellant asserts that Respondent never challenged whether his motion was proper. That is not correct. See A-131, wherein Respondent cited Rule 303.01.

Appellant's post-trial motion was not timely or procedurally in order in that it did not comply with Minn. R. Civ.P. 59.03, Minn. R. Civ. P. 52.02, and Rule 303.01. Thus since Appellant's motion was not a proper motion, ie, procedurally deficient, the time for appeal was not tolled pursuant to App. R. 104.01.

D. Minn.R.Civ.App. Proc. 126.02 expressly states that the appellate court may extend the time for doing any act after the expiration of that time if the failure to act was excusable except that the appellate court "cannot extend the time for filing the Notice of Appeal."

In Township of Honner v. Redwood County, 518 N.W.2d 639 (Minn.App.1994), rev. denied (Minn. Sept. 16, 1994), the township did not obtain a writ from the appellate court within the 60-day deadline, rather it applied for a writ of certiorari from the district court. The township asked the appellate court to accept jurisdiction in the interests of justice because of its confusion over which court had authority to issue the writ. Citing

Minn.R.Civ.App. P. 126.02, the appellate court held it lacked jurisdiction and dismissed the appeal.

Similarly, in Petersen v. Petersen, 352 N.W.2d 797 (Minn.App. 1984), the appellant failed to serve his wife with notice of appeal or file proof of service within the 90 day time limit. The appeal was dismissed outright with no right for discretionary review.

In the instant case, the Appellant's notice of appeal was served on Feb 14 , 2005, far more than 60 days after notice of entry of the Decree. The post-trial motion was not a proper and timely motion of the type specified in Rule 104.01. Thus the appeal time was not tolled.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the decision of the Appellate Court be affirmed.

Dated: _____

Aug 11, 2005



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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).