

OFFICE OF
APPELLATE COURTS

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FILED

APPELLATE COURT CASE NO. A08-1295

State of Minnesota
In Supreme Court

T.A. Schifsky & Sons, Inc.,

Plaintiff,

vs.

Bahr Construction, L.L.C., et al.,

Defendants,

Consolidated Lumber Company,
d/b/a Arrow Building Center,

Respondent,

Premier Bank,

Appellant,

Larson Contracting, Inc., et al,

Intervening Defendants,

and

Premier Bank,

Appellant,

vs.

Bahr Construction & Contracting, LLC,
d/b/a/ Bahr Construction, LLC, et al,

Defendants,

Consolidated Lumber Company,
d/b/a Arrow Building Center, Inc.

Respondent.

**MEMORANDUM OF CONSOLIDATED
LUMBER COMPANY IN SUPPORT
OF DENIAL OF PETITION FOR REHEARING
OF PREMIER BANK**

INTRODUCTION

Appellant Premier Bank (hereinafter “**Premier**”) has failed to show, under Minn. R. Civ. App. P 140.01, that the Supreme Court has overlooked or failed to consider the time allowed for the taxation of attorney fees. Premier incorrectly cites the holdings of 3 mechanic’s lien cases in attempting to persuade this Court that attorney fees must be fixed at the time of the trial. Furthermore, Premier did not raise this issue on appeal and is precluded from raising it now in its Petition for Rehearing.

ARGUMENT

A petition for rehearing will be granted only when some controlling law or statute, or material fact or issue has been overlooked, misapplied or misconceived by the Supreme Court. See *Chafoulias v. Peterson*, No. C2-01-1617 (Minn. Sept. 17, 2003). Premier has not shown that there is inconsistency and conflict between Minn. Stat. § 514.14 (2008) and Minn. R. Civ. P. 54.04 and 58.01.

None of the three cases cited by Premier support its argument that attorney fees in a mechanic's lien action must be fixed at trial are controlling law. Premier cited dicta in two of the cases and incorrectly cited the holding in the third case. All three of these cases cited by Premier are clearly distinguishable and have no application to the Court's holding in this case.

In *Schmoll v. Lucht*, 118 N.W. 555 (1908), the Supreme Court did not hold that attorney fees must be fixed at the trial. The court held that "the provision here in question authorizes the court to allow reasonable attorney costs to the lien holder, and in fixing the amount thereof it **may** include therein, in its discretion, reasonable attorney fees." (emphasis added). Premier only stated that the court "noted" certain language. The cited language was dicta, not the holding of the Supreme Court.

In *Barrett v. Hampe*, 53 N.W. 2d 803 (1952), Premier once again cites dicta of the court, not the court's holding. The court held that "Since M.S.A. § 514.14 does not expressly provide for attorney fees on appeal in a mechanic's lien case, held that such fees are not to be allowed." *Barrett* dealt with the issue of attorney fees that were incurred at the appellate court and not with attorney fees that were incurred as a result of the mechanic's lien action at the trial court level.

In Obraske v. Woody, 199 N.W. 2d 429 (Minn. 1972), Premier only cites the court's recitation of the facts as presented by the testimony. There was no holding that attorney fees must be fixed at the time of trial. The court stated that "The only question before this court is whether the trial court's awards of attorney fees to plaintiff...were excessive." See *Id* at 430. The court held that "reasonable attorney fees may be awarded within the discretion of the trial judge, exercised after due consideration of the evidence presented on the question and of his own observation of services rendered." (emphasis added).

Notwithstanding the above, Premier's Petition for Rehearing should be denied because Premier did not raise the issue at either the Court of Appeals or in its Petition for Review to the Minnesota Supreme Court of when costs (including attorney fees) must be taxed. Minn. R. Civ. App. P. 117, Subd 3 (a) specifically requires that the petitioner request a review of all issue in its petition for review. Premier made no request in its Petition for Review. Furthermore, when review is granted, the court will ordinarily only review the issues raised in the petition for further review. See Hapka v. Paquin Farms, 458 N.W. 2d 683 (Minn. 1990); Hoyt Inv. Co. v. Bloomington Commerce & Trade Center Associates, 418 N.W. 2d 173 (Minn. 1988). It was up to Premier to bring up the issue to both the Court of Appeals and the Minnesota Supreme Court of when costs and attorney fees must be taxed. It is irrelevant that Premier did not bring up this issue before this Honorable Court until oral argument on its Petition for Review.

There was no conflict between Minn. Stat. § 514.14 and Minn. R. Civ. P. 54.04 as Rue 54.04 allows costs and disbursements to be provided pursuant to statute. This Court, in its Opinion of Oct. 22, 2009 cited Obraske v. Woody , supra at 432 in support of this

by stating “We have specifically held that attorney fees in mechanics’ lien cases, are, pursuant to statute and our case law, costs that may be awarded by the court. (See Supreme Court Opinion at pg. 10).

Premier argues that Minn. R. Civ. P. 58.01 (providing that entry of judgment shall not be delayed for the taxation of costs and the omission of costs shall not affect the finality of the judgment) does not apply to this case because Minn. R. Civ. P. 81.01 precludes the application of the Rules of Civil Procedure to a mechanics lien action because it is inconsistent and in conflict with Minn. Stat. § 514.14. The Supreme Court, in its Opinion of Oct. 22, 2009, did not find that there was any inconsistency between Minn. Stat. § 514.14 and Rules 54.04 and 58.01. Furthermore, Premier does not cite any controlling authority or case law supporting such an argument. The general rule is that the rules are applicable unless the statutory proceedings are inconsistent. The court will find inconsistency only if a specific provision of the statute conflicts with the rules.

Tischendorf v. Tischendorf, 321 N.W. 2d 405 (Minn. 1982). Even if, *arguendo*, there was a conflict between Minn. Stat. § 514.14 and Rules 54.04 and 58.01, Premier would be precluded from raising this issue because Premier did not raise this issue either on appeal to the Court of Appeals or to the Minnesota Supreme Court on its Petition for Review. By allowing Premier to raise such an issue now would be inconsistent with the rules of civil appellate procedure, in that it would allow Premier to have a third opportunity to raise this issue. (Once at the Court of Appeals where it failed to raise the issue; a second time at the Minnesota Supreme Court where it failed to raise the issue again; and now a third time at the Minnesota Supreme Court with its Petition for Review).

CONCLUSION

Premier's Petition for Rehearing should be denied because it has failed to prove that there was any inconsistency between Minn. Stat. § 514.14 and Rules 54.04 and 58.01, and, in the alternative, because Premier failed to raise the issue of when costs must be taxed at either the appeal to the Court of Appeals or to the Minnesota Supreme Court with its Petition for Review.

Respectfully submitted,

HARVEY N. JONES, P.A.

Dated: November 10, 2009



Harvey N. Jones (#052498)
1350 South Frontage Road
Hastings, Minnesota 55033
(651) 437-1818
Attorney for Respondent Consolidated Lumber Co.