

Appellate Cases no. A10-1269, A10-1270

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Peter G. Lonergan (A10-1269) and
Robert A. Kunshier (A10-1270),

Appellants.

REPLY BRIEF OF APPELLANTS

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B. AUTHORITIES

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II. ARGUMENT

THE COURT SHOULD REVERSE AND REMAND BOTH CASES.

A remarkable trait of both briefs thus far is that each side has issues on its wish list, other than the single, basic, and broad issue specified in this Court's orders granting review. The Appellants (as represented by the undersigned counsel) would like the Court to address additional systemic issues underlying the current legal unrest. The Respondent apparently concedes the general applicability of Rule 60.02 in both cases,¹ thus resolving the question the Court posed, but would like the Court to dive into the deep mechanics of comparing Rule 60.02 to the indeterminate commitment statutes. In order to grant either side's wish, the Court would have to restate the issue(s) to be reviewed and establish a new briefing schedule – and possibly to appoint additional or substitute counsel for Appellants, with trial experience in indeterminate commitment cases.

This brief assumes that the Court will confine the parties to the issue it specified.

¹ Respondent's position on the basic applicability of Rule 60.02 is somewhat cryptic. It acknowledges that *Kunshier* was overbroad in denying relief under that rule, Resp. brief at 12, but seeks to minimize the breadth and impact of the *Lonergan* holding. The sole basis for the concededly overbroad *Kunshier* holding was a citation to *Lonergan*. *Kunshier*, slip op. at 3-4. The actual holding as announced in *Lonergan* and applied in *Kunshier*, and not a hypothetically more limited holding, forms the issue that is before the Court on further review. Under any view of the Respondent's position, it appears to have conceded the specified issue, and therefore a *per curiam* disposition may be appropriate.

Because the Respondent concedes that a reversal is required in *Kunshier*, this brief focuses on *Loneragan*. The Respondent requests that the Court affirm the result in *Loneragan* notwithstanding its holding. The Court should reject that request.

1. Despite Respondent's strenuous efforts to sandpaper and dress up *Loneragan*, it must be reversed. *Loneragan's* holding is that, "The statutory framework ... precludes a motion to vacate the [SDP] commitment order under Minn. R. Civ. P. 60.02." Slip op. at 9. En route to that holding, it makes a spurious reference to Minn. Stat. § 253B.17, which defines what a party might do in other cases under that statute, to eliminate what a party can do in the present cases under Rule 60.02. *Loneragan* has been cited at least 12 times by the Court of Appeals for its overbroad Rule 60.02 redline.

Loneragan does not mention Rule 81.01 but makes passing reference to Appendix A.² As Appellants have previously noted, if *Loneragan* had followed the path it began to follow, its holding would have been narrower and it would not be cited for the broad exclusion that so far has been its legacy. Based on its actual holding, it needs to be reversed and remanded.

Careful "attention to text [and an] agreed-upon methodology for creating and interpreting text" assures us that we will remain "a government of laws, not of men." *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring). Unfortunately, in the two decisions below (and apparently several others following them) the Court of

² Counsel for Respondent has pointed out that the undersigned's previous assertion that *Loneragan* ignored Appendix A is incorrect. The error resulted from an electronic search for the full word "Appendix," whereas *Loneragan* used the abbreviation "App.," and despite more general readings of the Court of Appeals opinion. The undersigned appreciates the correction and apologizes for his error.

Appeals has departed from text and failed to follow the prescribed methodology for reconciling the civil procedure rules with the commitment statutes.

2. The mechanics are matters for remand. As to the specific application of Rule 81.01 and Appendix A to the Appellants' motions, the Court should go no farther at this point (if it goes even that far) than providing a definition of the word "inconsistent."³ It is not proper for this Court to be the court of first instance in grappling with the detailed mechanics of the commitment statute in relation to Civil Procedure Rules 1, 60.02, and 81.01/Appendix A. Rule 117 subd. 2 of Civil Appellate Procedure outlines this Court's high-level oversight function regarding Minnesota jurisprudence. For example, if the Court granted the present petitions for review because "the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers," *id.* subd. 2(c), it would not demote itself from supervisor to front-line employee. Instead, it would specify the error, give appropriate direction, and if detailed issues remain to be resolved it would remand for the lower courts to consider them; all subject to its additional further review if necessary.⁴

It is a well-recognized but rarely articulated principle, that allowing multiple judicial levels to distill legal issues is a key to developing a durable body of case law.

³ "Inconsistent. Mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other" Black's Law Dictionary (5th ed. 1979) (examples and citation omitted).

⁴ To assure the proper consideration of these issues, the Court might also mandate the appointment of experienced trial counsel to address these issues on behalf of the Appellants in the remanded proceedings.

The “critical point” is that a court of last resort, such as this Court, should not “pass on [an important legal] question without the requisite fact finding *and legal determinations* having been made in the first instance by the lower tribunals” *Romano v. Retirement Board*, 767 A.2d 35, 41 n.6 (R.I. 2001) (emphasis added); *see also DeBose v. State*, 267 Neb. 116, 120, 672 N.W.2d 426, 430 (Neb. 2003); *City of Huntington v. State Water Commission*, 135 W.Va. 568, 578-79, 64 S.E.2d 225, 230-31 (1951); *Society for Establishing Useful Manufactures v. City of Paterson*, 89 N.J.L. 208, 214, 98 A. 440, 443 (N.J. Err. & App. 1916). The same principle is invoked by intermediate appellate courts in relation to trial court decisions. *Discount Fireworks of Cent. Florida, Inc. v. Sarasota County*, 922 So.2d 433, 434 (Fl. App. 2006); *Maynard v. Dorner*, 53 Mich. App. 568, 574-75, 220 N.W.2d 161, 165 (1974).

III. CONCLUSION

Respondent concedes that *Kunshier* must be reversed, and Appellants agree. *Lonergan* is the source of the *Kunshier* error, and the error has sprouted legs in later Court of Appeals decisions. Therefore, *Lonergan* also should be reversed, and both cases should be remanded to the Court of Appeals (and from there on to the trial courts, if the Court of Appeals deems it appropriate) for consideration of Appellants’ motions under the methods specified in M.R.Civ.P. 81.01 and Appendix A.

Respectfully submitted,



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CERTIFICATION: The foregoing brief complies with R.Civ.App.P. 132.03 Subd. 3. It contains approximately 1,373 words exclusive of tables and statutory and case addenda. It was prepared in 13 point type using Microsoft Word version 14 (Office 2010).