

COURT FILE NOS. A05-0310

MAY 16 2006

FILED

*STATE OF MINNESOTA
IN SUPREME COURT*

Thomas Carroll Rubey, *Appellant*,

v.

Valerie Ann Vannett, *Respondent*

APPELLANT THOMAS CARROLL RUBEY'S PETITION FOR REHEARING

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Appellant (hereinafter "Rubey") prefaces this petition by noting that while he is pleased that (based upon the decision of the Minnesota Supreme Court) he will be able to obtain review of the actions of the district court, he nonetheless believes that there are important implications of the underlying decision that are left unresolved. Further, he would submit that the decision of the Minnesota Supreme Court is in conflict with the decision of the trial court, and with established case precedent. Simply stated, this request is made for two reasons: (1) If the Minnesota Supreme Court remands this matter to the trial court to allow the trial court to exercise its discretion and rule on the motion for amended findings that was before it¹, Rubey's appeal could be decided with a broader standard of review, since the appeal would be from a denial of the motion for amended findings and/or new trial, not simply from the underlying judgment;² and, (2) Rubey believes that the Minnesota Supreme Court could have used this as an opportunity to give clarity to a rule that has repeatedly been the subject of confusion.

1. Jurisdiction. The Minnesota Supreme Court determined that the 60-day period set forth in Minn.R.Civ.P 59.03 within which to hear a motion for amended findings and/or new trial was not jurisdictional, noting:

¹ As reflected by the trial court's decision, and argued in more depth herein, the trial court ruled on the motion as an alternative to dismissing for lack of jurisdiction.

² The trial court ruled on the motion for amended findings in the alternative. On the one hand it asserted that it lacked jurisdiction to rule. On the other hand, it went through each and every aspect of Appellant's motion for amended findings/new trial and ruled, in the event that the appellate courts found that it had jurisdiction.

*"We therefore conclude that the 60-day time limit for hearing new trial/amended findings motions is a procedural tool and does not divest the district court of jurisdiction."*³

The only basis given by the trial court for declining to rule on Rubey's motion was that the trial court lacked jurisdiction to hear the motion. In stark contrast to those facts, the Supreme Court noted,

*"Having concluded that the district court did not lose jurisdiction because of the untimely hearing on the motion and that its findings are not clearly erroneous, we must next determine whether the district court's dismissal of Rubey's new trial/amended findings motion was proper. * * * In a blend [of mixed questions of law and fact] the reviewing court reviews [conclusions] under an abuse of discretion standard"*⁴

and

*"The facts before the district court support its decision to dismiss Rubey's motion because the hearing was untimely. * * * Based on the record presented, we cannot say that it was an abuse of discretion for the district court to dismiss Rubey's new trial/amended findings motion as untimely."*⁵

The trial court dismissed Rubey's motion, purely as a matter of law, to-wit: that the trial court lacked jurisdiction to hear the motion outside the 60-day period.⁶ The Court does not, on

³ *See*, page 8, ¶2 of Minnesota Supreme Court decision filed May 4, 2006.

⁴ *See*, page 11, ¶2 of Minnesota Supreme Court decision filed May 4, 2006.

⁵ *See*, page 12, ¶1 of Minnesota Supreme Court decision filed May 4, 2006.

⁶ The following is found at page 4 of the trial court's decision dated December 9, 2004:

*"[Rubey] has failed to schedule the hearing with in [sic] the sixty-day time limit, to obtain an order to extend the sixty-day time limit, and to demonstrate good cause exists to hear his motion. Therefore, the Court lacks jurisdiction to hear [Rubey's] Motion for Amended Findings and/or New Trial and it is dismissed as untimely." * * * "In the alternative, if this Court's jurisdictional determination is in error, the merits of [Rubey's] Motion for*

appeal, consider whether the trial court abused its discretion since the standard of review of a legal issue is *de novo* review. Where the Supreme Court reverses a decision by the lower court on a matter of law, the lower court should be allowed to apply the law as the Supreme Court declares it to be. *Dostal v. Curran*, 679 N.W.2d 192, 195 (Minn.App. 2004). Since the Supreme Court has determined that the 60-day rule is not jurisdictional, the trial court should be allowed, within its discretion, to rule on the motion, (which it already did in the alternative). Based upon the decision of the Supreme Court that the 60-day rule is not jurisdictional, the trial court had jurisdiction to rule on the motion if it so elected. Since the trial court unequivocally dismissed the motion solely on its belief that it lacked jurisdiction, and not as an exercise of its discretion, the trial court's denial of the motion, as an alternative to dismissal for lack of jurisdiction, should stand, making that denial appealable.

2. *Waiver*. Rubey argued that by not objecting to the scheduling of the hearing more than 60 days after the entry of judgment, Respondent (hereinafter "Vannett") should have been deemed to have waived any objection. In dismissing that argument, the Minnesota Supreme Court opined as follows:

*"It stands to reason that, until the 60-day period has passed with no hearing having been held and no extension having been granted, the opposing party has no basis for an objection based on the timeliness of the hearing on the motion."*⁷

The problem with that holding is it either ignores (or eliminates) longstanding case law that

Amended Findings and/or New Trial are also addressed." (Emp added).

⁷ *See*, page 9 of decision of Minnesota Supreme Court filed May 4, 2006.

recognizes waiver as a valid defense, even after the 60-day period has run, as was the case here. In *Texas Commerce Bank v. Olson*, 416 N.W.2d 456, the Appellant scheduled a motion for amended findings and/or new trial 42 days after the entry of judgment.⁸ Even though the Appellant never requested an extension or attempted to bring the hearing date to the court's attention to schedule a hearing within the prescribed time, the Court of Appeals held that the Respondent had waived any objection and could not complain after the 30 days ran. The Court of Appeals further noted in *Texas Commerce* that waiver was appropriate in light of the fact that the Respondent was aware of the error and waited until after the 30-day period ran.⁹

The facts in *Texas Commerce* are virtually identical to Rubey's case. Vannett's counsel knew that the hearing date was outside the 60-day period as evidenced by her calls to the Court in the days before the 60 days ran to see if an order had been filed. It was not until after the 60 days ran that she complained.

In the present case the Minnesota Supreme Court has reasoned that there was no reason to complain until after the 60-day period had run. That runs contrary to the concept of "waiver" and the express holding in *Texas Commerce*. The aggravating factor in Rubey's case is the fact that Vannett's counsel was aware that a problem was brewing since the trial

⁸ At the time the 15-day/30-day rule as opposed to the 30-day/60-day rule was in effect.

⁹ *See*, also, *Imperial Developers, Inc. v. Seaboard Ins. Co.*, 518 N.W.2d 623 (Minn.App. 1994)(where a party does not object to a hearing date outside the time limitations of Rule 59 *when it is scheduled*, it waives any right to object to the timeliness of the hearing.

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court clerk sent her a fax identifying the problem, while on the other hand, erroneously sent a fax to a non-existent number with the result that Rubey's counsel was not notified. This unfair fatal advantage could have been rectified with an application of the "waiver" doctrine. As noted in *Imperial Developers*, the failure to object *when the motion is scheduled* constitutes waiver. Therefore, based on existing case law, waiver can occur prior to the expiration of the 60-day period when the opposing party fails to object *when the motion is scheduled*.

3. Good Cause. The decision of the Minnesota Supreme Court failed to recognize one key component of the 60-day requirement of Rule 59, to-wit: the unavailability of the trial court to hear the matter within 60 days (in and of itself) constitutes *good cause*. *Woodrow v. Tobler*, 269 N.W.2d 910, 914 (Minn. 1978)(it is clear that the unavailability of the trial court judge constitutes good cause to extend the time for hearing). In Rubey's case, there was no claim made by the clerk, or the judge, that the judge was available for hearing within the 60-day period. Such lack of availability (in light of the policy that the trial court be allowed to hear the motion while it is fresh) should not be used as a weapon to defeat the hearing of any otherwise timely motion, or be used to prejudice a litigant who is more than willing to have the matter heard within 60 days. In order to bring clarity to the rule, and take the guess work out of whether an extension has been approved, in light of the fact that very few (if any) judges handle their own calendars, the rule should be interpreted

to allow hearing outside of the 60-day period *anytime* a trial court judge is not available.¹⁰

CONCLUSION

The Minnesota Supreme Court should take into consideration the fact that Rubey has already been granted a victory in this case, that being the right to proceed in the Court of Appeals. Therefore, his right to appeal is not contingent on this Court granting rehearing. It stands to reason that his request is not made out of necessity. The request is made to give the Court an opportunity to take a closer look at its holding; to reconcile that holding with existing case law and the decision of the trial court; and, to give statewide clarity to the application of a rule that continues to be the subject of frustration for many litigants and counsel.¹¹

Rubey respectfully requests that the Court modify its ruling to reflect only that the trial court's decision on the law is reversed, and to remand this matter to the trial court to apply the new rule of law to the facts of the case. Furthermore, with all due respect, the Court's decision in this case fundamentally alters the law regarding the application of the doctrine of "waiver" to the timing provisions of Rule 59 and fails to take advantage of an opportunity to give clarity to the rule.

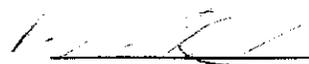
¹⁰ It should be noted that Judge Muehlberg's clerk's job description included the handling of the judge's calendar.

¹¹ Rubey's counsel is aware of a similar case that is currently pending at the Court of Appeals.

Respectfully submitted,

Dated: May 11, 2006

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