SUPREME COURT
FILED
AUG 21 1981
JOHN McCARTHY
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

No. 47193

HEARING ON PROPOSED AMENDMENTS TO RULES OF CIVIL APPELLATE PROCEDURE.

O R D E R

IT IS HEREBY ORDERED that a hearing on proposed amendments to the Rules of Civil Appellate Procedure shall be held in the Supreme Court Chambers in the State Capitol, St. Paul, Minnesota, at 9 a.m. on Thursday, October 15, 1981.

It is proposed to amend Rules 133.01(1), 139.02, 139.04, and 140 as follows:

Rule 133.01. Summary Action

(1) The Supreme Court, on its own motion or on motion of any party, may summarily affirm, may summarily reverse with directions, may remand or dismiss an appeal or other request for relief upon grounds proper for remand or dismissal, or may limit the issues to be considered on appeal. Summary dispositions have no precedential value and shall not be cited.

Rule 139.02. Disbursements

Unless otherwise ordered by the Supreme Court, the prevailing party shall be allowed his disbursements necessarily paid or incurred. ~~The prevailing party will not be allowed to tax as a disbursement the cost of preparing facsimile briefs.~~

Rule 139.04. Objections; Appeal

Written objections to the taxation of costs and disbursements may be served and filed on or before the time set for the taxation thereof. A party may appeal to the Supreme Court from the clerk's taxation by serving and filing a notice of appeal within

6 days from the date of taxation by the clerk. Failure to serve and file written objections on or before the time set for the taxation of costs and disbursements shall constitute a waiver of objections and shall preclude the right to appeal.

Rule 140. Petition For Rehearing.

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days therafter. Oral argument in support of the petition will not be permitted. Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs. If the petition is denied, the party responding to the petition may be awarded attorneys fees to be allowed by the court in the amount not to exceed $500.

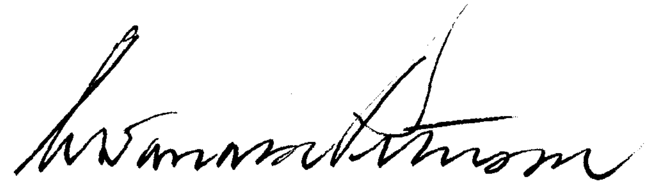
IT IS FURTHER ORDERED, that advance notice of the hearing be given by the publication of this order once in the Supreme Court edition of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER, and BENCH AND BAR.

IT IS FURTHER ORDERED that members of the bench and bar desiring to be heard shall file briefs or petitions setting forth their position and shall also notify the Clerk of the Supreme Court, in writing, on or before October 8, 1981, of

their desire to be heard on the matter. Ten copies of each brief, petition, or letter should be supplied to the Clerk.

DATED: August 21 , 1981.

BY THE COURT



Associate Justice

(14)

DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

2200 FIRST BANK PLACE EAST
MINNEAPOLIS, MINNESOTA 55402
(612) 340-2600
CABLE: DOROW
TELEX: 29-0605
TELECOPIER: (612) 340-2868

880 W-FIRST NATIONAL BANK BUILDING
ST. PAUL, MINNESOTA 55101
(612) 227-8017

P.O. BOX 848
340 FIRST NATIONAL BANK BUILDING
ROCHESTER, MINNESOTA 55903
(507) 288-3156

201 DAVIDSON BUILDING
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GREAT FALLS, MONTANA 59401
(406) 727-3632

1150 RING BUILDING
1200 18TH STREET N.W.
WASHINGTON, D.C. 20036
(202) 296-2780
(800) 424-2942

312 FIRST NATIONAL BANK BUILDING
WAYZATA, MINNESOTA 55391
(612) 475-0373

30 RUE LA BOÉTIE
75008 PARIS, FRANCE
TEL: (1) 562 32 50

HENRY HALLADAY
ARTHUR B. WHITNEY
RUSSELL W. LINDQUIST
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ROY A. GINSBURG

OF COUNSEL
WALDO F. MARQUART
JOHN F. FINN
LEWIS L. ANDERSON
RUDOLPH E. LOW

*ADMITTED IN MONTANA

October 6, 1981

The Honorable John C. McCarthy
Clerk, Minnesota Supreme Court
123 State Capitol
Saint Paul, Minnesota 55155

Re: Proposed Revision of Rule 140, Minnesota Rules of Civil Appellate Procedure

Dear Mr. McCarthy: 47193

I am submitting this letter, together with ten copies, in response to the Supreme Court's Order dated August 21, 1981 regarding a hearing on proposed amendments to the Rules of Civil Appellate Procedure. Rule 140 of the Rules of Civil Appellate Procedure deals with petitions for rehearing. The proposed revision would add the following language to Rule 140:

> "If the petition is denied, the party responding to the petition may be awarded attorneys fees to be allowed by the court in the amount not to exceed $500."

It is my view, and that of a number of my partners and associates, that the Court should not add the language in question to Rule 140.*/ I would appreciate the opportunity

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*/ The views expressed in this letter also reflect the views of a number of members of the Dorsey Firm's Litigation Department. The firm itself, however, has not taken a formal position regarding the proposed revision.

SUPREME COURT
FILED
OCT 12 1981
JOHN McCARTHY
CLERK

to be heard on this matter at the hearing scheduled for 9:00 a.m. on Thursday, October 15, 1981.

At present, no provision of the Rules of Civil Appellate Procedure provides for the allowance of attorneys' fees. Only by statute are attorneys' fees currently awarded by the Supreme Court. See Minn. Stat. § 176.511, subd. 5 (allowing attorneys' fees upon certiorari in workers' compensation cases). Even "double costs" are not imposed as a sanction except where it has been determined that a writ of certiorari was "brought for the purpose of delay or vexation," Minn. R. Civ. App. P. 115.05, or where an appeal "appears to have been taken merely for delay . . .." Minn. R. Civ. App. P. 138.

The sanction of awarding attorneys' fees is not presently provided for by the Rules of Civil Appellate Procedure. I do not contend that the Court has no authority for awarding attorneys' fees, although reasonable minds could disagree on that issue.*/ Rather, since the proposal to permit an award of attorneys' fees against a party filing a petition for rehearing is extraordinary, the need for the change should be exceptional. There does not appear to be an exceptional need for the proposed revision.

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*/ The "American Rule," and the general rule followed by this Court, is that attorneys' fees may not be awarded unless authorized by statute or contract. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Fownes v. Hubbard Broadcasting, Inc., 310 Minn. 540, 543-47, 246 N.W.2d 700, 702-04 (1976); Dewey v. Henry's Drive-Ins of Minnesota, Inc., 301 Minn. 366, 372, 222 N.W.2d 553, 556 (1974); Midway Nat'l Bank v. Gustafson, 282 Minn. 73, 82, 165 N.W.2d 218, 224 (1968); Benson Cooperative Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 530, 151 N.W.2d 422, 428 (1967). See also Minn. Stat. § 480.051 (Supreme Court may promulgate rules "to regulate the pleadings, practice, procedure and the forms thereof," but the rules "shall not abridge enlarge, or modify the substantive rights of any litigant.").

The Purpose and Objective of the Proposed Revision.

It seems apparent that the purpose of the proposed revision to Rule 140 is to discourage the filing of petitions for rehearing. It also appears that the two objectives to be served by discouraging petitions for rehearing are (1) reducing the time burden imposed on this Court by petitions for rehearing, and (2) reducing the financial burden imposed on prevailing parties by petitions for rehearing. Neither of these objectives warrants the revision now proposed, although a different proposal (discussed hereinafter) will promote both objectives without specifically discouraging petitions for rehearing via the threat of imposing attorneys' fees.

1. Reducing the burdens on this Court.

Many cases are decided by this Court without either full briefing or a complete review of the record below. In an understandable and admirable quest to reduce costs and expedite the disposition of many appeals, the Court may simply review briefs submitted to the trial court, as supplemented by additional letters or memoranda from counsel requested by the Justice handling the Prehearing Conference.

When an appeal is decided in this manner, this Court will not have had the benefit of any brief or memorandum addressed specifically to errors allegedly committed by the District Court or to matters in the record supporting reversal (or affirmance). In a case that has been summarily affirmed by this Court without briefs or a complete record, nor any oral argument, it is only by a petition for rehearing that counsel may bring to the Court's attention significant points he believes the Court may have overlooked or misapprehended. A petition for rehearing may be, in short, the last and only manner that a party (and this Court) may bring into focus the implications of decisions in the large number of cases decided summarily. That summary affirmances will have no precedential value in later cases (<u>see</u> proposed revision to Rule 133.01) does not diminish the potential for injustice in a particular case. It is, therefore, unwise and inappropriate to build a "disincentive" into the Rules that discourages the use of petitions for rehearing upon pain of being assessed for attorneys' fees.

2. Reducing the burdens on the prevailing party.

Rule 140 currently provides that a petition for rehearing "shall be served upon the opposing party who may answer within 5 days thereafter." Since the proposed revision would allow attorneys' fees to "the party responding to the petition," perhaps the primary objective of the proposal is to reduce the burdens imposed upon prevailing parties who are obliged to file a response to a petition for rehearing. However, that goal may be served without penalizing a party who files a petition for rehearing.

Rule 40(a) of the Federal Rules of Appellate Procedure provides, in part, as follows:

> "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Under this Rule, prevailing parties are not required to submit responses to petitions for rehearing unless the Court determines that the matters presented are so substantial as to necessitate a response. The Notes of the Federal Advisory Committee on Appellate Rules set forth the following rationale for this language of Rule 40(a):

> "It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it."

The Preliminary Comment to the Rules of Civil Appellate procedure states, in part, as follows:

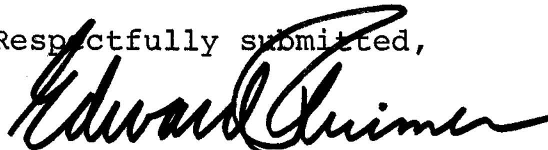
> "The general plan of the Minnesota Rules of Civil Appellate Procedure is patterned upon the Federal Rules of Appellate Procedure. The object of the Minnesota Supreme Court Advisory Committee has been to follow the federal rules in order that procedure in the Minnesota Supreme Court may come as near to that prescribed for the U.S. Court of Appeals as is feasible."

This Court can change its rules relating to petitions for rehearing in a way that avoids imposing burdens upon prevailing parties without imposing sanctions upon parties filing petitions for rehearing, and that promotes the "general plan" to have procedure in this Court be consistent with that in federal courts simply by adopting language currently contained in Rule 40 of the Federal Rules of Civil Appellate Procedure. Attached to this letter is a proposed revision of Rule 140 that incorporates the provisions of Fed. R. App. P. 40(a).

Conclusion

I respectfully suggest to the Court that it would be inappropriate to impose sanctions on parties seeking one last effort to call attention to a possible error or omission in a particular case. There can be no doubt that petitions for rehearing do impose upon the limited resources of this Court, but certain burdens must be accepted as the price of fair and effective decisionmaking. However, by altering Rule 140 to conform with Fed. R. App. P. 40(a), this Court will be able to reduce the time involved in considering most petitions for rehearing because it will not need to await nor consider a response to the petition. Moreover, the federal rule would also reduce the potential burdens that petitions for rehearing impose on most parties who have been victorious on appeal. Perhaps more significantly, those results can be achieved without considering the difficult question of whether this Court can or should impose attorneys' fees on unsuccessful parties, and without "chilling" the right to file petitions for rehearing.

Respectfully submitted,



Edward J. Pluimer

/ck
Attachment

PROPOSED REVISION OF RULE 140
INCORPORATING FED. R. APP. P. 40(a)

RULE 140. PETITION FOR REHEARING

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party ~~who-may-answer-within-5-days-thereafter~~. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. Oral argument in support of the petition will not be permitted. Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs.

Submitted by

Edward J. Pluimer

(17)

patrick mcguire
attorney at law

mcguire law office

rush city, minnesota 55069

telephones
rush city 358-4702
twin cities 464-5921

secretaries
Marion Erickson
M. Jean Hoffman
Jacqueline Just
Lael Kosloski
Margaret G. Mold
Verona Ordner
Mary Walsten

Sept. 10, 1981

Supreme Court
State Capitol
St. Paul, MN

Attn: Clerk

Re: Proposed Amendment to Rule 133.01

Dear Sir:

Enclosed please find 10 copies of a letter expressing my thoughts on the proposed rule change of 133.01.

Sincerely,

Patrick McGuire
PM:vo
Enc.

patrick mcguire
attorney at law

mcguire law office

rush city, minnesota 55069

telephones
rush city 358-4702
twin cities 464-5921

secretaries
Marion Erickson
M. Jean Hoffman
Jacqueline Just
Lael Kosloski
Margaret G. Mold
Verona Ordner
Mary Walsten

Sept. 10, 1981

Supreme Court
State Capitol
St. Paul, MN

Attn: Clerk

Re: Proposed Amendments to Rules of Civil Appellate Procedure

Dear Sir:

In the August 28, 1981 edition of Finance and Commerce, I read the proposed rules, specifically the proposal to amend Rule 133.01, wherein it is stated that the summary dispositions shall have no precedential value and shall not be cited.

It is my thought that a summary disposition is an order of the Supreme Court, and does in fact, have precedential value.

Take, for example, workers compensation cases which are summarily affirmed. I could guarantee you that the workers compensation court of appeals is going to consider those appeals which are affirmed as having precedential value when one appears in front of the Workers Compensation Court of Appeals. Also, the judges in the Workers Compensation Division will consider that opinion as a precedent.

Without being able to argue that the Supreme Court has reviewed the specific opinion in question, and that the Supreme Court has summarily affirmed, or summarily disposed of that case, would make the whole procedure of summary affirmance and summary reversal foolish.

I think it is essential that those orders of the Supreme Court based under 133.01 are to have precedential value.

I think that the rule, if amended so that the case does not have any precedential value, would result in utter chaos.

The case was brought to the Supreme Court to have a decision made by the Supreme Court. If the Supreme Court makes a decision and then at the same time the rules say that one can't cite the decision, then it appears to me that that is a very very poor rule.

Sincerely,

Patrick McGuire
PM:vo
Enc.

(12)

WILLIAM MITCHELL
College of Law

875 SUMMIT AVENUE ☐ ST. PAUL, MINNESOTA 55105 ☐ (612) 227-9171

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RUSSEL T. LUND
LEE H. SLATER

September 9, 1981

Mr. John McCarthy, Clerk
Minnesota Supreme Court
State Capitol Building
St. Paul, MN 55155

Re: Hearing on Proposed Amendments to Rules of
Civil Appellate Procedure
No. 47193

Dear Mr. McCarthy:

Enclosed please find ten copies of "Statement of Kenneth F. Kirwin" in the above matter.

I do not request to be heard orally at the October 15 hearing.

Thank you.

Sincerely,

Kenneth F. Kirwin

Encl.

STATE OF MINNESOTA

IN SUPREME COURT

No. 47193

SUPREME COURT
FILED
SEP 15 1981
JOHN McCARTHY
CLERK

HEARING ON PROPOSED AMENDMENTS TO RULES OF CIVIL APPELLATE PROCEDURE

STATEMENT OF KENNETH F. KIRWIN

This statement is submitted in opposition to the proposal to add to Minn. R. Civ. App. P. 133.01(1) a sentence stating, "Summary dispositions have no precedential value and shall not be cited."

Statements in this Court's rules should be true. It would not be true to state that summary dispositions have no precedential value.

A prohibition on citing summary dispositions would unconstitutionally abridge freedom of speech and of the press.

The proposed provision would be particularly troublesome in the area of workers' compensation, where Court of Appeals decisions are disseminated both in slip opinion form and in W.C.D., published by the State. W.C.D. takes note of this Court's summary dispositions, *see*, *e.g.*, 35 W.C.D. 65, 260, 303, 484, 530, and Court of Appeals opinions refer to them, *see*, *e.g.*, *Huck v. A.B.I. Contracting, Inc.*, No. 330-14-8529 (Minn. Workers' Comp. Ct. App. May 12, 1981), slip op. at 3; *Server v. State*, 33 W.C.D. 331, 333 (1981). A litigant is entitled to know if it is not worthwhile to seek review because this Court has summarily decided a similar case.

Respectfully submitted,

September 9, 1981

Kenneth F. Kirwin
875 Summit Avenue
St. Paul, MN 55105
227-9171