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SUPREME COURT OF ARIZONA

FILED
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RACHELLE M. HEDNICK
CLERK SUPREME COURT
BY

In the Matter of)
) Arizona Supreme Court
) No. R-06-0038
)
PETITION FOR CHANGE IN RULE 111,)
ARIZONA RULES OF THE SUPREME COURT,) COMMENT ON PETITION FOR
RELATING TO ISSUANCE OF PUBLISHED) CHANGE IN RULE 111,
OPINIONS AND MEMORANDUM DECISIONS NOT) ARIZONA RULES OF THE
FOR PUBLICATION BY THE SUPREME COURT) SUPREME COURT, RELATING
AND COURT OF APPEALS, AND FOR) TO ISSUANCE OF PUBLISHED
DELETION OF REDUNDANT RULES 28,) OPINIONS AND MEMORANDUM
ARIZONA RULES OF CIVIL APPELLATE) DECISIONS
PROCEDURE, AND 31.26, ARIZONA RULES)
OF CRIMINAL PROCEDURE)
)
)

"Petition for Change in Rule 111" asks the Supreme Court to amend Supreme Court Rule 111 and to delete Arizona Rule of Civil Appellate Procedure 28, and Arizona Rule of Criminal Procedure 31.26, regarding the issuance of opinions and memorandum decisions by the appellate courts of this state. I believe the Petition should be denied; the proposed amendments are unnecessary and unworkable.

The Amendments Are Unnecessary

Distilled, the petition argues the amendments are necessary to ensure judicial accountability. This argument is grounded in the notion that the appellate courts of this state routinely "bury" difficult cases - cases that present controversial or high profile issues - in memorandum decisions, knowing these decisions are not easily available from a commercial legal publisher or online. In my experience - as a lawyer handling appeals for 25 years

before Arizona appellate courts, and now as a judge on the Court of Appeals (Division One) for almost four years - this is not so. Nevertheless, because public confidence in the courts rests on the public's understanding of what the courts do, I fully support the decision of each Division of the Court of Appeals to implement an initiative which will, in my view, put this issue to rest. Specifically, later this year, each Division of the Court of Appeals will begin placing newly issued memorandum decisions on its web site.

The Amendments Are Unworkable

The petition asserts the appellate courts of this state - in particular, the Arizona Court of Appeals - should issue an opinion citable as precedent in every appeal that raises "an issue of first impression" because resolution of that issue necessarily will establish a rule of law.

But, an "issue of first impression" does not invariably establish a rule of law. Lawyers and self-represented parties are creative. They frequently make new or novel arguments that are not addressed by existing Arizona case law. But, not every new or novel argument is a good one; some are utterly without merit; some are unsupported by the facts of the case; and some will conflict with the plain language of a statute, court rule,

or administrative regulation. It is not the presentation of an "issue of first impression" that should determine whether the decision should be published and thus accorded precedential force. That determination should rest on whether the "decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law." Benjamin N. Cardozo, *The Nature of the Judicial Process* 165 (Yale University Press 1921).

Further, almost every appellate case arguably raises an issue of first impression; thus, the proposed amendments would expand the body of precedential law exponentially. The bulk of the work of an appellate court is taken up with cases "where the controversy turns not upon the rule of law, but upon its application to the facts." *Id.* at 163. Precedent is fact-based, and because almost every case rests on a unique set of facts, application of a rule of law to the facts of that particular case will result in a new precedent, and will, in the words of the petition, dispose of an issue of first impression. Yet, not every case that presents a set of facts different from the facts of the case before it has value beyond its own facts. The use of memorandum decisions accommodates this reality.

The petition further asserts that every appellate court decision reversing a "lower court" should be published and become precedent because a reversal, "a fortiori," clarifies a rule of law. But, an appellate court reversal of a trial court does not invariably clarify a rule of law. Cases are reversed for all sorts of routine reasons. An appellate court may reverse a summary judgment because of the existence of an issue of material fact; or because a trial court overlooked an existing precedent or misapplied existing authority; or because the evidence failed to support the verdict. The particular outcome of a decision - reversal or affirmance - has no value in determining whether a decision should become precedent.

Finally, requiring appellate judges to certify that a memorandum decision "does not dispose of any issue of first impression" runs counter to the proper function of the appellate courts. Some cases present an issue of first impression that an appellate court will not decide because of its resolution of another issue in the case. Some cases present an issue of first impression that was never presented to the trial court for resolution, and thus the appellate court will not decide it on appeal. And, some cases present an issue of first impression, but the briefing is so poor that the appellate court should not

decide it. In each situation, the appellate court's decision not to decide the issue would "dispose" of an issue of first impression, and, under the proposed amendments, the court would be required to publish the decision. Such a rule would erode the systematic, thoughtful, reasoned development of the common law - a system that requires a case to "count for the future" if it is to serve as precedent.

Respectfully submitted this 18th day of May, 2007.

Patricia K. Norris

PATRICIA K. NORRIS, Judge
Arizona Court of Appeals, Division One

Original and six copies
of the foregoing
filed with the Clerk of
the Supreme Court on this
18th day of May, 2007

By: Patricia K. Norris

Copy of the foregoing
mailed on this 18th
day of May, 2007 to:

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