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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of PETITION TO) Supreme Court
AMEND RULE 111 ARIZONA) No. R-_____
RULES OF THE SUPREME COURT)
AND RULE 28 ARIZONA RULES OF) Petition to Amend
CIVIL APPELLATE PROCEDURE) Rule 111 of the Arizona Supreme
) Court and Rule 28 of the Arizona
) Rules of Civil Appellate
) Procedure
)
_____)

Pursuant to Rule 28, Rules of the Arizona Supreme Court, Petitioner submits this proposal to amend Rule 111 of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Civil Appellate Procedure (“**ARCAP**”) to permit the citation of *non-Arizona* “unpublished” decisions (more aptly called non-precedential decisions) in more circumstances than currently permitted.¹ As it stands, Arizona’s citation rules have been construed to prohibit the citation of unpublished decisions from any jurisdiction, *regardless of whether the issuing jurisdiction permits citation*. For example, a litigant may cite an unpublished

¹ This Petition makes a more modest proposal concerning citation rules than the one considered by the Court in 2007.

Ninth Circuit decision issued after December 1, 2007 in any federal court, but may not cite such a decision in Arizona's state courts. This limitation serves no purpose, and should be eliminated. A redlined copy of the proposed changes to Supreme Court Rule 111 and ARCAP 28 is attached hereto.

I. Arizona's Citation Rules Have Been Interpreted to Apply to "Any Court," Regardless of the Issuing Jurisdiction's Citation Rules

In Arizona, citation to memorandum decisions has been generally prohibited since 1973 pursuant to Arizona Supreme Court Rules 48 and 111 and ARCAP 28.² Although one could argue that these Arizona rules govern only memorandum decisions issued by the Arizona state courts, in 1985 this Court said that it "will treat memorandum decisions from the federal district court the same as memorandum decisions of our state courts." *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985). In 2000, the Arizona Court of Appeals then said there is "no reason for out-of-state memorandum decisions to be more citable than in-state memorandum decisions," and "h[eld] that

² See Historical Notes to Arizona Supreme Court Rule 111 found in 17A Arizona Revised Statutes at 849 (2004). By order dated November 1, 1977, the Supreme Court abrogated Supreme Court Rule 48 as it applied to civil appeals, substituting ARCAP 28. See Nov. 1, 1977 order found at 17B A.R.S. at 2 (2003) and comment to ARCAP 28 found at 17B A.R.S. at 85 (2003). The Supreme Court renumbered Rule 48 as Rule 111 in 1985. See Historical Notes to Supreme Court Rule 111 at 17A Arizona Revised Statutes at 849 (2004). Thus, Rule 111 presently prohibits the citation of unpublished decisions in all courts except in civil appeals, and ARCAP 28 prohibits such citation in any civil appeal.

ARCAP 28(c) applies to memorandum decisions from *any* court.” *Walden Books Co. v. Ariz. Dept. of Rev.*, 198 Ariz. 584, 589, ¶ 22, 12 P.3d 809, 814 (App. 2000) (emphasis added).

Consequently, under Arizona’s current rules, a party may not cite an unpublished decision in Arizona courts, even though the decision could be cited in the jurisdiction that issues the decision. Although one could argue that non-precedential decisions “published” on Westlaw or Lexis fall outside this prohibition, the current rules do not make this clear. Furthermore, prohibiting the citation of such non-precedential decisions places Arizona among an extreme minority with respect to its citation rules. See Melissa M. Serfass and Jessie Wallace Cranford, *Federal and State Rules Governing Publication and Citation: An Update*, 6 J. of Appellate Practice and Process 349 (2004) (summarizing the circuits’ and states’ rules).

II. The Court Should Modernize Arizona’s Citation Rules with Respect to Unpublished Decisions from Other Jurisdictions

In recent years, due largely to the availability of “unpublished” decisions through electronic means, more and more courts have relaxed their citations rules. General information about this trend is available at www.nonpublication.com . See also Hon. Donn G. Kessler and Thomas L. Hudson, *The “Secret” History of Memoranda Decisions: A Rule’s Evolution*, Arizona Attorney, June 2006, 10 (describing the history of citation rules and recent changes among states and

federal courts). In light of this trend and for other reasons, the case for changing Arizona's extremely restrictive citation rules is strong. Simply put, if an issuing court does not restrict the citation of an unpublished decision, parties should be able to cite such a decision to Arizona's courts. Stated differently, Arizona's courts should not be deprived of potentially relevant information that other courts may consider simply because the issuing jurisdiction chose not to "publish" the case in a hard bound volume. Moreover, courts that have issued such unpublished decisions have no expectation that the decisions will not be cited, and it is odd (if not unfair) to preclude litigants in Arizona courts from citing authority that could be cited in the very jurisdiction that issued the authority.

In fact, because of this disparity between federal and state court practice, there are instances where a body of Arizona state law develops in federal court and cannot be discussed in Arizona state courts. For example, until this Court decided *Flagstaff Affordable Housing Ltd. v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d 664 (2010), most of the case law concerning Arizona's economic loss doctrine (better than a dozen decisions) had come out of the District of Arizona. *See generally* Eddward P. Ballinger, Jr. and Samuel A. Thumma, *The Continuing Evolution of Arizona's Economic Loss Rule*, 39 Ariz. St. L.J. 535 (2007). Most of the federal decisions are not in F.Supp.2d, but are available on Westlaw. These

“unpublished” cases could be cited and discussed by courts and litigants in federal court, but could not be discussed with the Arizona Court of Appeals.

The Petition seeks to remedy this situation by proposing to allow parties to cite non-Arizona unpublished decisions for persuasive value, unless the issuing jurisdiction prohibits such citation. Consideration was given to drafting the rule in terms of jurisdictions that expressly *permit* citation, rather than in terms of jurisdictions that do not otherwise *prohibit* citation of their unpublished decisions. However, because a party may generally cite anything absent a restriction, the better default rule is to permit citation unless prohibited by the issuing jurisdiction. Under the proposed rule, copies of any such unpublished decisions must be provided to the court and other parties unless the decision is available in a publicly accessible electronic database. *Cf.* F.R.A.P. 32.1 (requiring that the party that cites an unpublished disposition to file and serve a copy of the disposition if it “is not available in a publicly accessible electronic database”).

III. CONCLUSION

Parties should generally be permitted to cite non-Arizona unpublished decisions for persuasive value. The Court should amend Arizona’s rules to clarify that citing such non-precedential decisions is permitted.

DATED this 12th day of August, 2010.

s/ Thomas L. Hudson
Thomas L. Hudson

Rule 111. Publication of Opinions of the Supreme Court and Court of Appeals;
[Citation Rules](#); Depublication

(a) Definitions.

1. An opinion is a written disposition of a matter which is intended for publication under (4) below.
2. A memorandum decision is a written disposition [by any court](#) of a matter not intended for publication.
3. An order is any disposition of a matter before the court other than by opinion or memorandum decision.
4. Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § § 12-107, 12-108, and 12-120.07.

(b) When disposition to be by opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or

if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

(c) Dispositions as Precedent [and Citation](#). Memorandum decisions [issued by the Arizona Supreme Court or Arizona Court of Appeals](#) shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing

the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum decisions issued by other jurisdictions may be cited for these purposes. Memorandum decisions issued by other jurisdictions may also be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the issuing jurisdiction. If a party cites a memorandum decision that is not available in a publicly accessible electronic database, the Any party citing such a memorandum decision ~~pursuant to this rule~~ must attach a copy of it to the motion or petition in which such decision is cited.

(d) Designation of written disposition. The written disposition of the case shall contain in the caption thereof the designation "Opinion", "Memorandum Decision", or "Order."

(e) Effective date. This rule shall be effective as of 1 ~~September 1973.~~ December 20.

(f) Publication of dissenting vote on denial of petition for review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(g) Depublication. Notwithstanding the provisions of Rule 111(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

(h) ~~Memorandum Decision.~~ [ENH] Partial publication of decisions. When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

Rule 28. Publication of Opinions of the Supreme Court and the Court of Appeals; [Citation Rules](#)

(a) Opinion; Memorandum Decision; Order; Publication.

- (1) An opinion is written disposition of a matter which is intended for publication under subdivision (4) below.
- (2) A memorandum decision is a written disposition of a matter [by any court](#) not intended for publication.
- (3) An order is any disposition of a matter before the court other than by opinion or memorandum decision.
- (4) Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of [A.R.S. § 12-107](#), [§ 12-108](#) and [§ 12-120.07](#).

(b) When Disposition to Be by Opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. establishes, alters, modifies or clarifies a rule of law, or
2. calls attention to a rule of law which appears to have been generally overlooked, or
3. criticizes existing law, or
4. involves a legal or factual issue of unique interest or substantial public importance, or
5. if the disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

(c) Dispositions as Precedent [and Citation](#). Memorandum decisions [issued by the Arizona Supreme Court or Arizona Court of Appeals](#) shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing

the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum decisions issued by other jurisdictions may be cited for these purposes. Memorandum decisions issued by other jurisdictions may also be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the issuing jurisdiction. If a party cites a memorandum decision that is not available in a publicly accessible electronic database, the ~~Any~~ party citing such a memorandum decision ~~pursuant to this rule~~ must attach a copy of it to the motion or petition in which such decision is cited.

(d) Designation of Written Disposition. The written disposition of the case shall contain in the caption thereof the designation "Opinion," "Memorandum Decision," or "Order."

(e) Publication of Dissenting Vote on Denial of Petition for Review. If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

(f) Depublication. Notwithstanding the provisions of Rule 28(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

(g) Partial Publication of Decisions. When the court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.