SUPREME COURT OF WISCONSIN

No. 08-02

In the matter of amendment of Wis. Stat. § (Rule) 809.23(3) regarding citation to unpublished opinions.

FILED

JAN 6, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On January 25, 2008, the Wisconsin Judicial Council petitioned this court for amendment to Wis. Stat. § (Rule) 809.23(3) to allow unpublished opinions to be cited for their persuasive value. The court held a public hearing on October 14, 2008, on the petition. Upon consideration of matters presented at the public hearing and submissions made in response to the proposed amendment, the court adopted the petition, with modifications, on a 6 to 1 vote. Justice Bradley dissented from the adoption of the petition. Further, the court voted the effective date of the amendments adopted herein will be July 1, 2009, and that the court will review the operation of this rule approximately three years from the effective date.

Therefore,

IT IS ORDERED that effective July 1, 2009:

SECTION 1. 809.23 (3) of the statutes is renumbered 809.23 (3) (a) and amended to read:

809.23 (3) ~~UNPUBLISHED~~ CITATION OF UNPUBLISHED OPINIONS ~~NOT CITED~~. (a) An unpublished opinion ~~is of no precedential value and for this reason~~ may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).

SECTION 2. 809.23 (3) (b) of the statutes is created to read:

809.23 (3) (b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

SECTION 3. 809.23 (3) (c) of the statutes is created to read:

809.23 (3) (c) A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

Judicial Council Note, 2008: Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

IT IS FURTHER ORDERED that the court will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stat. § (Rule) 809.23(3) be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 6th day of January, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. *(dissenting).* This court has faced three previous petitions to amend the current citation rule, and has up until now declined to do so. I respectfully dissent for the reasons previously stated. In the Matter of the Amendment of Wis. Stat. § (Rule) 809.23(3), 2003 WI 84, 261 Wis. 2d xiii, ¶¶6-11. No sufficient problem has been identified to warrant the change. I continue to believe that the potential increased cost and time outweigh any benefits gained. Therefore, I would deny the petition.