

CASE NO. A06-0935

**State of Minnesota
In Court of Appeals**

JENNIFER THORSON,

Respondent,

vs.

ZOLLINGER DENTAL, P.A., d/b/a ADVANCE FAMILY DENTAL,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

I. Standard of Review.

II. When service of process is insufficient, can the District Court fashion an equitable remedy to gain personal jurisdiction over Appellant?

Holding: The District Court ruled that even though the parties did not dispute that service of process is incomplete, it could fashion an equitable remedy. The District Court struck Appellant's affirmative defense and denied summary judgment.

STATEMENT OF THE CASE

This appeal arises from an order entered on April 19, 2006, denying Appellant, Zollinger Dental's, P.A., d/b/a/ Advance Family Dental's, motion for summary judgment to dismiss the Complaint on the grounds that there was no personal jurisdiction based upon insufficient service of process, and Respondent's claims were accordingly barred by the statute of limitations.

On February 8, 2006, Respondent advised that she was voluntarily withdrawing a defamation claim. (AA-86.) Respondent responded to Appellant's motion for summary judgment by moving for a motion seeking sanctions under Rules 11, 26 and 37 of the Minnesota Rules of Civil Procedure. (*Id.*) Respondent, subsequently withdrew the motion for sanctions, but argued in her Memorandum of Law in Opposition to Motion for Summary Judgment that the District Court should strike Appellant's affirmative defense of improper service. Respondent argued that the District Court should essentially create jurisdiction even though the Summons and Complaint were never served before the running of the applicable statute of limitations and that Appellant's motion for summary judgment be denied. (AA-42.)

Appellant argued in its reply that it has never been properly served, and that there is accordingly no personal jurisdiction and, as a result, the statute of imitations has run. (AA-87.) At no point in this case did Respondent ever challenge Appellant's discovery responses or bring a motion to compel. (AA-94.)

On February 13, 2006, the District Court issued an Order denying Appellant's motion for summary judgment and striking Appellant's affirmative defense of insufficient service of process on equitable grounds. (AA-2.) The court did not find that "[Appellant] falsified, or intentionally mislead and delayed updating the Answers to Interrogatory No. 2, or intentionally avoided correspondence regarding the insufficient service of process defense." (AA-9.) However, the court then ruled that:

"[I]t is only fair that [Appellant] be responsible for the answers provided to the Interrogatories which did not create a need for [Respondent] to re-serve [Appellant]. Fairness and the general application of the intent and spirit of the Rules of Civil Procedure support this Court's order that the affirmative defense be stricken and summary judgment denied."

(*Id.*)

STATEMENT OF FACTS

On November 16, 2004, Respondent's employment was terminated with Appellant. (AA-3,13.) Respondent claims that her termination was because she disclosed her pregnancy to her superiors, who were employed by Appellant. (AA-13.) Respondent claims after the disclosure of her pregnancy, her supervisors began to criticize her work frequently. (*Id.*) Respondent was issued a number of written reprimands and was told her performance was not up to expectations. (AA-13-14.)

To date, Appellant has never been served with the Summons and Complaint. (AA-14.) Service of the Summons and Complaint in this matter was attempted on April 1, 2005. (AA-3, 14.) The Summons and Complaint was served by the Ramsey County

Sheriff upon Heather Erickson, Appellant's receptionist. (*Id.*) Ms. Erickson is responsible for scheduling appointments, greeting and checking in patients, filing insurances, and updating patient information. (*Id.*) Ms. Erickson is not authorized to accept service of process and had no authority to do so. (*Id.*) Ms. Erickson made no statement that she was authorized to receive service from the Sheriff, nor did the Sheriff ask if she was authorized to receive service. (*Id.*) Ms. Erickson was told by the Sheriff to, "give to whomever should have it." (*Id.*) The Sheriff then left the Summons and Complaint with Ms. Erickson. (*Id.*)

Ms. Erickson put the paperwork she received from the Sheriff in a bin on the office manager's desk, but did not say anything to anyone regarding the paperwork. (*Id.*) The Office Manager of Appellant, found the Summons and Complaint on Monday, April 4, 2005, four days after the attempted service of process. (*Id.*)

Paul Zollinger, D.D.S., has been the owner of Advance Family Dental for approximately twenty-four years and is the only dentist at the dental office. (*Id.*) Other than Paul Zollinger, D.D.S., the Office Manager, Molly Seidl, is the only other person at Advance Family Dental who is authorized to accept service of process. (AA-14-15.) At no time has Paul Zollinger, D.D.S., or Molly Seidl been properly served with the Summons and Complaint in this matter. (AA-15.)

At the time of filing the Answer, Appellant's attorney had not seen a copy of the Affidavit of Service. (AA-87.) Appellant's attorney believed that if he did not allege the

affirmative defense of improper service that it would be deemed waived by Appellant's Answer. (*Id.*) In Appellant's Answer to the Complaint served on April 19, 2005, Appellant specifically pled as its fourth affirmative defense:

14. [Appellant] alleges improper service of the Summons and Complaint, and holds [Respondent] to her strict proof thereof.

(AA-3,87.)

On April 20, 2005, Respondent's attorney Daniel Hintz sent Appellant's attorney Thomas McEllistrem a letter noting Appellant's affirmative defense and enclosing a copy of the Affidavit of Service on Heather Erickson (the receptionist). (*Id.*) Respondent served discovery requests on Appellant on May 17, 2005. (*Id.*)

On June 13, 2005, Mr. Hintz sent Mr. McEllistrem a letter asking whether he was continuing to maintain the improper service defense. (AA-3,88.) On June 15, 2005, Mr. McEllistrem sent a letter to Mr. Hintz acknowledging that he had received an Affidavit of Service on Heather Erickson, requesting that Mr. Hintz provide answers to Appellant's discovery requests dated May 3, 2005, and informing him that Appellant would not provide answers to his discovery requests until Appellant received Respondent's responses to Appellant's discovery. (*Id.*) At no time did Mr. McEllistrem withdraw the improper service defense or amend Appellant's Answer. (AA-88.)

Shortly after sending Mr. Hintz the letter dated June 15, 2005, Mr. McEllistrem contacted Mr. Hintz by telephone to discuss settlement. (AA-3,88.) During the conversation Mr. McEllistrem stated that he did not want to pursue the improper service

issue but rather would rather settle the case for a modest amount. (AA-88.) There is no question that during this phone conversation Mr. Hintz was aware that the insufficient service defense was being maintained by Appellant. (*Id.*) Mr. McEllistrem was very specific about the cost-benefit analysis Appellant was engaging in, the view Appellant had toward the merits and value of the case, and that Appellant did not want to incur expense in litigating the claim and preferred to settle the claim. (*Id.*) Mr. Hintz told Mr. McEllistrem that he would discuss settlement with his client and get back to Mr. McEllistrem regarding the same. This was many months prior to the expiration of the statute of limitations. (*Id.*)

Respondent responded to Appellant's discovery requests on September 15, 2005, and as promised by Mr. McEllistrem, Appellant then responded to Respondent's discovery requests. (*Id.*) On September 23, 2005, Mr. McEllistrem served Mr. Hintz with Appellant's responses to Respondent's discovery requests. (*Id.*) In Appellant's discovery responses, served on September 23, 2005, Appellant responded to question number two relating to the improper service as follows:

INTERROGATORY NO. 2: If you claim insufficiency of service of process and/or lack of personal or subject matter jurisdiction as a defense to all or part of this action, state all facts in support of such defense or defenses.

ANSWER NO. 2: [Respondent] has not pursued a claim with the EEOC or the Minnesota Human Rights Department. Discovery continues. This response will be updated.

(AA-89.) The response “discovery continues” and “this response will be updated” was consistent with Mr. McEllistrem’s representation that his client, Appellant, would not be putting significant effort into discovery while settlement was being pursued. (*Id.*)

Mr. Hintz never responded to, challenged or acknowledged Appellant’s responses to Respondent’s discovery requests. (*Id.*) In fact, there was no discussion at all regarding Appellant’s answers to Respondent’s discovery requests. (*Id.*) The posture of the case was one of settlement and Mr. McEllistrem was still waiting to hear back from Mr. Hintz regarding Respondent’s settlement offer. (*Id.*)

Appellant’s attorneys did very little work on the file from June 2005 through December 2005. (AA-5, 89.) Mr. McEllistrem waited to hear back from Mr. Hintz regarding settling the case. (AA-89.) Mr. McEllistrem and Mr. Hintz had no substantive communication then until shortly before the Holidays in December 2005. (*Id.*) At that time Mr. McEllistrem realized that he had heard nothing from Mr. Hintz and contacted him. (*Id.*) Since Respondent never pursued an administrative complaint, the statute of limitations ran on November 16, 2005. (*Id.*)

On or about December 16, 2005, during a telephone call, Mr. McEllistrem reminded Mr. Hintz that he never made a settlement offer for Respondent and repeated that Appellant would be willing to make a modest settlement proposal. Mr. McEllistrem reminded Respondent that Appellant did not want to pursue the insufficient service defense. (AA-89-90.)

Thereafter, even though the statute of limitations had run, Mr. McEllistrem contacted Appellant and obtained settlement authority and conveyed an offer to Mr. Hintz. (AA-90.) Mr. Hintz gave no response other than to say that his client was considering the proposal. (*Id.*) On January 17, 2006, Appellant served Respondent with Supplemental Answers to Interrogatories, stating:

INTERROGATORY NO. 2: If you claim insufficiency of service of process and/or lack of personal or subject matter jurisdiction as a defense to all or part of this action, state all facts in support of such defense or defenses.

ANSWER NO. 2: See attached Affidavits of Molly Seidl, Paul Zollinger, D.D.S., and Heather Erickson, with exhibits. Discovery continues.

(AA-5.)

Because Respondent never made a response to the settlement proposal, Appellant brought this motion for Summary Judgment. (*Id.*) Appellant's attorneys further investigated the improper service issue, conducted research into the issue of what constitutes proper service on a corporation, and obtained affidavits. (*Id.*) Appellant updated its discovery responses on January 16, 2006 (long before the discovery deadline), and served the same on Mr. Hintz. (*Id.*)

Appellant has never been properly served with the Summons and Complaint. (AA-7,91.) The statute of limitations has expired. (AA-91.) Respondent did not, even informally, challenge Appellant's discovery responses as insufficient let alone bring a motion to compel. (*Id.*) Appellant properly pled the affirmative defense of improper service in its Answer and that Answer was

never withdrawn or amended. (*Id.*) Appellant had not waived its defense by filing motions regarding the merits of the case. (AA-8.) Throughout the proceedings, Respondent was aware that Appellant was maintaining the insufficient service defense. (AA-91.) As a result of these facts, the district lacked jurisdiction over this matter by operation of law and the District Court's order denying Appellant summary judgment must be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

This appeal is from an order denying Appellant's motion for summary judgment asking that the District Court dismiss Respondent's Complaint for lack of personal jurisdiction because Appellant was never properly served. A denial of a motion for summary judgment based on lack of personal jurisdiction is immediately appealable. *Ryan Contracting, Inc. v. JAG Invs., Inc.*, 634 N.W.2d 176, 181 (Minn. 2001); *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995); *see also Miller v. A.N. Webber, Inc.*, 484 N.W.2d 420, 421 (Minn. Ct. App.1992).

On appeal from a grant of summary judgment, the appellate court determines: (1) whether there are any genuine issues of material fact; and (2) whether the trial court erred in its application of the law. Minn. R. Civ. P. 56.03; *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). Summary Judgment is

appropriate when there is no genuine issue of material fact and either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgment is appropriate as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim or when the nonmoving party fails to demonstrate that there is a genuine issue of material fact. *Midwest Sports Marketing, Inc., v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 259 (Minn. Ct. App. 1996); *Winkel v. Eden Rehab. Treatment Facility*, 433 N.W.2d 135, 140 (Minn. Ct. App. 1988). In this case, there are no issues of material fact and the court may decide whether it lacks jurisdiction over Appellant due to ineffective service of process as a matter of law. (AA-6.)

It is well established that whether service of process was proper is a jurisdictional question of law. *Turek v. A.S.P. Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. Ct. App. 2000); *Amdahl v. Stonewall Ins Co.*, 484 N.W.2d 811, 814 (Minn. Ct. App. 1992) *review denied* (Minn. July 16, 1992). Similarly, the question whether an individual has the authority to accept service is a question of law that is reviewed de novo. *Duncan Elec. Co., Inc. v. Trans Data*, 325 N.W.2d 811, 812 (Minn. 1982); *Van Slooten v. Schneider-Janzen*, 623 N.W.2d 269, 270 (Minn. Ct. App. 2001). The determination of whether personal jurisdiction exists

is also a question of law that must be reviewed de novo. *V.H. v. Estate of Birnbaun*, 543 N.W.2d 649, 653 (Minn. 1996); *Galbreath v. Coleman*, 596 N.W.2d 689, 691 (Minn. Ct. App. 1999). As questions of law, these issues were appropriate for the District Court to determine and are appropriate for the Court of Appeals to decide on review. (AA-6.)

II. THE DISTRICT COURT IMPROPERLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT'S ATTEMPTED SERVICE UPON APPELLANT DID NOT COMPLY WITH THE MINNESOTA RULES OF CIVIL PROCEDURE.

“In this case [Respondent] does not argue that the service of process was proper.” (AA-7.) Rather than finding that it lack personal jurisdiction over Appellant because of insufficient service of process, the District Court improperly fashioned an equitable remedy even though it did not have the requisite jurisdiction over Appellant. (*Id.*)

Under Minnesota law, personal jurisdiction has two elements. First, there must be an adequate connection between the defendant and the state, known as a "basis" for the exercise of personal jurisdiction by the district court. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. Ct. App. 2003). Second, the plaintiff must invoke the jurisdiction of the District Court using a "process" that satisfies the Minnesota Rules of Civil Procedure that govern the commencement of civil actions and the personal service of process. *Id.* In this case, Appellant has an adequate connection

with the state because Appellant is a Minnesota corporation. However, without proper service of process, as in this case, there is no personal jurisdiction over Appellant.

Before a “court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied.” *Uthe v. Baker*, 629 N.W.2d 121, 123 (Minn. Ct. App. 2001) (quoting *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409 (1987)). Service of process is “the procedure by which a court having venue and jurisdiction of the subject matter of the suits asserts jurisdiction over the person of the party served.” *Id.* An action must be dismissed where service of process is insufficient. *Id.*

According to Minnesota Rule of Civil Procedure 4.03(c) service of process upon a corporation must be made on an officer, managing agent, or other authorized agent in order to be considered properly served under Rule 4.03. Rule 4 is designed to allow a corporation to be notified of the service in a timely manner, and for this reason, the person served must have actual authority to accept service on behalf of the corporation at the time of service. *Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 312 (Minn. 1997).

“Service of process in a manner not authorized by the rule is ineffective.” *See Duncan Elec. Co., Inc.*, 325 N.W.2d at 813; *Lundgren v. Green*, 592 N.W.2d 888, 890 (Minn. Ct. App. 1999). Service of Process must strictly comply with the

statutory requirements. *Ryan Contracting, Inc.*, 634 N.W.2d at 182; *Berryhill v. Sepp*, 106 Minn. 458, 459, 119 N.W. 2d 404, 404 (Minn. 1909); *Nieszner v. St. Paul School Dist. No. 625*, 643 N.W.2d 645, 648 (Minn. Ct. App. 2002).

When making service under Rule 4.03(c), a process server cannot rely on circumstantial evidence to imply that a person has authority to accept service on behalf of the corporation. See *Tullis*, 570 N.W.2d at 313-314 (stating that service of process was not effective even where the process server relied on the statement of the recipient that they were authorized to receive process); *Larson v. New Richland Care Center*, 520 N.W.2d 480, 482 (Minn. Ct. App. 1994) (“An attorney may not rely on an employee’s claim that she is authorized to accept service; the attorney must examine the law to determine who is authorized to accept service.”); *Winkel v. Eden Rehab. Treatment Facility*, 433 N.W.2d at 139 (“An employee’s willingness to accept service of process is clearly insufficient to establish that she is an agent with implied authority to receive service on behalf of a corporation.”).

Only where the Rules of Civil Procedure are silent on the method of service will the court look to the fundamental principle behind the rules, which is that cases should be decided on the merits rather on technicalities. *Pederson v. Clarkson Lindley Trust*, 519 N.W.2d 234, 235 (Minn. Ct. App. 1994) (finding where the rules are silent on the method for serving trusts, the rules governing

such service should be liberally construed to avoid depriving litigant of his day in court).

In this case, the Summons and Complaint was served on an employee of Appellant, who had no legal authority to receive process on behalf of Appellant. Respondent concedes, based upon the language of Rule 4.03(c), that she failed to effectively serve process upon Appellant. Heather Erickson is not an officer, managing agent, or an agent authorized to accept service of process. Respondent's service did not comport to the statutory requirements and was ineffective. Accordingly, there is no personal jurisdiction over the Appellant.

III. UNDER THE *UTHE* DECISION, THE COURT LACKS JURISDICTION TO APPLY EQUITABLE REMEDIES.

When the court lacks personal jurisdiction over a party because of insufficient service of process, the court can not enter a valid judgment against that party. *Galbreath*, 596 N.W.2d at 691. In *Uthe*, the court considered the plaintiff's claim that the district court had the equitable power to estop the insufficiency of process defense. *Uthe v. Baker*, 629 N.W.2d 121, 123 (Minn. Ct. App. 2001) (quoting *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409 (1987)). The *Uthe* court found that because the district court lacked the requisite personal jurisdiction, the district court could not employ its equitable power to estop the defendant from asserting her insufficiency-of-process defense. *Id.* at 124; *see also Fitzpatrick v. Calvary Baptist Church*, A05-

564, 2006 WL 851929 at *3 (Minn. Ct. App., April 4, 2006) (finding that “the district court lacked personal jurisdiction because appellant did not properly serve respondent, and therefore, use of the estoppel doctrine is inappropriate.”) (unpublished decision attached at AA-108).

Uthe directly supports Appellant’s position. The District Court’s order in this case runs in direct opposition to Minnesota law. Here, despite insufficient service of process, the District Court still fashioned an equitable remedy:

“[I]t is only fair that [Appellant] be responsible for the answers provided to the Interrogatories which did not create a need for [Respondent] to re-serve [Appellant]. ***Fairness and the general application of the intent and spirit of the Rules of Civil Procedure*** support this Court’s order that the affirmative defense be stricken and summary judgment denied.”

(AA-9 (emphasis added).)

Uthe specifically rejected the contention that a court has the equitable power to estop a defendant from asserting such a defense. *Uthe*, 629 N.W.2d at 121. When the district court lacks jurisdiction to hear a matter it also lacks jurisdiction to apply equitable remedies, as it did on this case.

In its order, the District Court fashioned a discovery sanction of sorts when it found that Respondent reasonable relied upon Appellant’s interrogatory answers and struck Appellant’s affirmative defense. Minnesota Rules of Civil Procedure 37.02(b) gives the court authority to strike portions of the pleadings if a party “fails to obey an order to provide or permit discovery, including an order made

pursuant to Rules 35 or 37.01.” Here, Respondent did not, even informally, challenge Appellant’s discovery responses as insufficient let alone bring a motion to compel. In addition, the court did not find that “[Appellant] falsified, or intentionally mislead and delayed updating the Answers to Interrogatory No. 2, or intentionally avoided correspondence regarding the insufficient service of process defense.” (AA-9.)

When the district court lacks jurisdiction to hear a matter it also lacks jurisdiction to apply equitable remedies. This Court should reverse the District Court's denial of summary judgment and dismiss the Complaint for lack of personal jurisdiction over Appellant.

IV. UNDER ANY ANALYSIS HEATHER ERICKSON CAN NOT BE CONSTRUED AS A "MANAGING AGENT" OF APPELLANT BECAUSE ERICKSON DID NOT EXERCISE ANY INDEPENDENT BUSINESS JUDGMENT ON BEHALF OF APPELLANT.

In *Tullis*, the supreme court thoroughly analyzed the requirements for serving process upon a corporation. *Tullis*, 570 N.W.2d at 311. The court found that the term "managing agent" as used in Rule 4.03(c) has a well-settled definition. *Id.* The court stated:

[W]e think the Legislature intended thereby only those agents who possess powers similar in character and importance to those possessed by the officers expressly named; that they intended only those agents who have charge and control of the business activities of the corporation or of some branch or department thereof, and who, in respect to the matters entrusted to them, are vested with powers requiring the exercise of an independent judgment and discretion.

Id. (quoting *Hatinen v. Payne*, 150 Minn. 344, 346, 185 N.W. 386, 387 (1921)).

The rationale behind this definition is that the individual receiving process must be one who reasonably could be expected to inform the corporation of the service.

Id.

Two significant factors have evolved in determining whether a particular individual is a managing agent for service of process: (1) does the individual have the power to exercise independent judgment and discretion to promote the business of the corporation; or (2) is the individual's position of sufficient rank or character to make it reasonably certain the corporation would be apprised of the service. *Id.*

Although Ms. Erickson, the receptionist, was an employee of the Appellant she was not in the type of position deemed sufficient to accept legal service. Similarly, service upon an administrative assistant, a receptionist, and staff counselor have been all deemed insufficient. *See Duncan Elec. Co., Inc.*, 325 N.W.2d at 811; *Winkel*, 433 N.W.2d at 140; *Miller*, 484 N.W.2d at 422.

Accordingly, because Ms. Erickson as a receptionist employed by Appellant, did not possess the rank and character sufficient to notify the corporation of the service, service was invalid.

V. ACTUAL NOTICE OF SERVICE BY APPELLANT IS NOT A FACTOR IN CASES WHERE THE RECIPIENT WAS A CORPORATION.

According to Minnesota Rule of Civil Procedure 4.03(c) Service of Process must be made to an officer, managing agent, or other authorized agent in order to be considered properly served upon a corporation. When the recipient of service is not an individual, Rule 4 is to be taken literally and actual notice will not subject a party to personal jurisdiction "absent substantial compliance with Rule 4." *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988); *Winkel*, 433 N.W.2d at 137.

The courts do not consider the defendant's actual notice to be a factor in cases where the recipient of the service was a corporation. *See Thiele*, 425 N.W.2d at 584 (stating that the actual notice exception is only recognized in cases involving substitute service at defendant's residence). Proof that a defendant knew that a plaintiff attempted personal service or substituted personal service is not valid service of process. *Berryhill*, 106 Minn. at 459, 119 N.W. 2d at 404; *Lundgren v. Green*, 592 N.W.2d 888, 891 (Minn. Ct. App. 1999). "If, for example, a summons were in fact served on the wrong person and that person handed it to the proper defendant, there would be no service." *Berryhill*, 106 Minn. at 459, 119 N.W. 2d at 404; *Lundgren*, 592 N.W.2d at 891. In *Tullis*, the person served was an employee of the party being served, yet because the

recipient was not an officer, managing agent or other authorized agent, the Minnesota Supreme Court reversed the court of appeals and granted summary judgment. *Tullis*, 570 N.W.2d at 314.

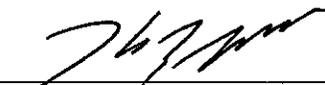
In this case the process was served on an individual who was not an officer or authorized agent to receive process on behalf of the Appellant. As a matter of law, Respondent has failed to effectuate proper service upon Appellant.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the District Court's denial of Appellant's motion for summary to dismiss the Complaint for lack of personal jurisdiction.

Respectfully submitted,
COLLINS, BUCKLEY, SAUNTRY &
HAUGH, P.L.L.P.

Dated: June 16, 2006

BY: 

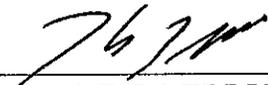
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,221 words. This brief was prepared using Word Perfect 8.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).