

NO. A06-1647

State of Minnesota
In Court of Appeals

Denison E. Smith and Randall N. Smith,
Appellants,

v.

Shamrock Development, Inc., a Minnesota corporation,
Respondent.

**BRIEF OF APPELLANTS
DENISON SMITH AND RANDALL SMITH**

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STATEMENT OF THE ISSUES

- I. Did the lower court improperly determine the Smiths had been properly served by publication pursuant to Minnesota Rule of Civil Procedure 4.04?

The lower court held service of process was proper.

Apposite legal authorities:

- Minn. R. Civ. P. 4.04.
- *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060, (Minn. Ct. App., Jan. 15, 2002).

- A. Did the lower court improperly determine Shamrock had satisfied the essential jurisdictional facts necessary under Rule 4.04 requiring each of the Smiths to be a “resident individual domiciliary”?

The lower court held Shamrock satisfied Rule 4.04 by alleging the necessary facts in the Rule 4.04 Turner Affidavit.

Apposite legal authorities:

- Minn. R. Civ. P. 4.04.
- *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060 (Minn. Ct. App., Jan. 15, 2002).

- B. Did the lower court improperly determine that Shamrock’s purported diligence supplanted the requirement under Rule 4.04 that essential jurisdictional facts exist demonstrating the Smiths were resident individuals domiciliaries of Minnesota?

The lower court held Shamrock was diligent and Rule 4.04 had been satisfied.

Apposite legal authorities:

- Minn. R. Civ. P. 4.04.
- *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060 (Minn. Ct. App., Jan. 15, 2002).
- *McBride v. Bitner*, 310 N.W.2d 558 (Minn. 1981).

- C. Did the lower court improperly determine Shamrock satisfied the additional common law requirement of diligence in spite of ignoring the facts and

information in its possession and conducting results oriented database searches that slanted Shamrock's search results?

The lower court held Shamrock was diligent.

Apposite legal authorities:

- Minn. R. Civ. P. 4.04.
- *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060, (Minn. Ct. App., Jan. 15, 2002).

- II. Were the Smiths' due process rights violated by allowing service of process via publication in a publication not reasonably calculated to apprise the Smiths of the pendency of Shamrock's action?

The lower court held Shamrock's service was proper under Min. R. Civ. P. 4.04.

Apposite legal authorities:

- *Electro-Measure, Inc. v. Ewald Enter. Inc.*, 398 N.W.2d 85 (Minn. Ct. App. 1986).
- *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950).
- *Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700 (Minn. Ct. App. 1996).
- U.S. Const., amend. V.
- U.S. Const., amend. XIV, § 1.
- Minn. Const., art. I, § 7.

- III. Did the lower court err in failing to strike the Rule 4.04 Affidavit of David Turner as a sham when the jurisdictional facts alleged in that affidavit were demonstrably untrue or asserted without an inquiry that was reasonable under the circumstances?

The lower court held service was proper under Minn. R. Civ. P. 4.04 and did not strike the Turner Affidavit.

Apposite legal authorities:

- Minn. R. Civ. P. 4.04.
- Minn. R. Civ. P.12.06.
- *In re Roedell's Estate*, 112 N.W.2d 842 (Iowa 1962).

IV. Was Shamrock's Summons defective as a matter of law because it failed to provide the notice of alternative dispute resolution mandated by the Legislature in Minnesota Statutes section 543.22?

The lower court held in its Order Denying Motion to Reconsider that "lack of such language in a summons to renew judgment is not fatal when the statute of limitations has expired on the time for appeal of the judgment."

Apposite legal authorities:

- Minn. Stat. § 543.22.
- *Tharp v. Tharp*, 228 Minn. 542, 36 N.W.2d 13 (Minn. 1949).
- *Brady v. Burch*, 185 Minn. 440, 241 N.W. 393 (Minn. 1932).
- *Welfare of T.D.*, 631 N.W.2d 806 (Minn. Ct. App. 2001).

STATEMENT OF THE CASE

On its face, this case is about Shamrock Development, Inc.'s ("Shamrock") attempt to renew a 10-year old judgment on the eve of its expiration. Left unspoken in Shamrock's Complaint is the fact that the underlying judgment was obtained in an *ex parte* manner, without a trial, without any notice to Randall or Denison Smith ("the Smiths"), and as a result of a third-party filing a putative confession of judgment that did not comply with the requirements of Minn. Stat. § 548.22. Moreover, the underlying judgment has been entirely paid. A co-judgment debtor, Richard K. Burtness ("Burtness"), transferred to Shamrock controlling interest in two companies that owned property worth millions of dollars in order to satisfy the 1996 judgment against all of the judgment debtors—including the Smiths.

Shamrock failed to comply with the fundamental requirements of initiating a civil lawsuit. Fatal defects in both the Summons and in the service of the Summons and Complaint required dismissal of Shamrock's action. Shamrock's attempted service of process via publication was insufficient to confer jurisdiction over the Smiths. For example, Shamrock failed to establish any of the jurisdictional prerequisites necessary for service of process by publication to be allowed under Minn. R. Civ. P. 4.04(a).

In a desperate effort to serve its Summons and Complaint prior to the 1996 judgment statutorily expiring, Shamrock caused an affidavit to be filed as required by Minn. R. Civ. P 4.04. The affidavit incorrectly represented that: (1) the Smiths had each been a "resident individual domiciliary" of Minnesota; and (2) the Smiths had each departed the state of Minnesota with the intent to defraud creditors or to avoid service, or

remained concealed within the state with like intent. In truth, however, the Smiths have never been residents of, or domiciled in, Minnesota. They have not stepped foot in Minnesota for over ten (10) years.

Shamrock did not satisfy the common law requirement of diligence which is a prerequisite to serving via publication. Shamrock had not diligently attempted to locate the Smiths prior to attempting service of process via publication. Shamrock turned a blind eye to the documents and information in its possession. Given the amount allegedly in controversy (\$1.2 million), Shamrock's belated attempt to locate the Smiths cannot be considered diligent and, therefore, service by publication was insufficient.

Shamrock's Summons was also fatally defective. The Summons omitted the mandatory notice language required by Minn. Stat. § 543.22. Minnesota case law precedent demonstrates that summonses must be strictly construed according to statutory requirements. Because the underlying judgment has expired prior to Shamrock initiating its action with a non-defective summons, Shamrock's case against both the Smiths should have been dismissed in its entirety as an amendment of the Summons would prejudice the substantial rights of the Smiths.

This matter was heard and decided by the Honorable William R. Howard of the Fourth Judicial District. Judge Howard denied the Smiths' Motions to Dismiss. He held that service of process complied with applicable rules and standards. He further held that Shamrock's Summons was not defective and, therefore, process had been sufficient.

STATEMENT OF FACTS

1. The Smiths invested in one or more entities that leased farming equipment from Farm Credit Leasing Services Corporation (“Farm Credit Leasing”) starting in approximately 1987. (APP-028 to APP-032.)

2. In connection with those investments, the Smiths became guarantors in favor of Farm Credit Leasing for certain debts and/or obligations. (APP-028 to APP-034.)

3. Farm Credit Leasing and the Smiths (and others) entered into an amended agreement pursuant to which outstanding amounts allegedly owed to Farm Credit Leasing would be paid (APP-033 to APP-034.) The Smiths’ names appear on a 1993 “stipulation for the entry of judgment as against Dakota Turkey Farms, Burtness, Samuelson, D. Smith, R. Smith, and Hendrickson.” (APP-028.) Pursuant to this “Stipulation for Entry of Judgment,” Farm Credit Leasing could “proceed with the filing of said stipulation and entry of the said judgment as provided by law.” (APP-035.) The stipulation failed to address whether or not notice of the filing of the “Stipulation for Entry of Judgment” was (or was not) required. However, the Smiths did not explicitly, knowingly, or voluntarily waive such notice.

4. A document labeled “Confession of Judgment” was attached to the “Stipulation for Entry of Judgment” and was signed by the Smiths on May 18, 1993, but not verified as required to be effective under Minn. Stat. § 548.22. (APP-036.) The Confession of Judgment also was not for a “specified sum” as required under section 548.22. (*Id.*) (*See also* APP-175.) Farm Credit Leasing’s attorney, Jonn P. Parrington,

signed the “Stipulation for Entry of Judgment” on April 3, 1996 and it was filed with the court the same day. (APP-037.)

5. In connection with filing the “Stipulation for Entry of Judgment” and “Confession of Judgment,” Farm Credit Leasing also caused to be filed Affidavits of Identification of Judgment Debtors relating to Denison E. Smith, Randall N. Smith and Richard K. Burtness in or about April of 1996. (APP-108 to APP-113.) The Affidavit of Identification of Denison E. Smith states the “place of residence of the judgment debtor is 6624 Madison McLean Drive, McLean, Virginia 22101-2901.” (APP-108.) The Affidavit of Identification of Randall N. Smith states the “place of residence of the judgment debtor is 3239 Ellicot Street N.W., Washington, D.C. 20008.” (APP-110.) The Affidavit of Identification of Richard K. Burton states the “place of residence of the judgment debtor is 1520 Hunter Drive, Medina, MN 55341.” (APP-112.)

6. Shamrock and its legal counsel possessed these Affidavits of Identification for the Smiths and Burtness no later than approximately October 8, 2002 as that is the date a complete copy of the underlying court file was mailed to them by the Hennepin County District Court. (APP-114.) Shamrock does not deny it possessed these Affidavits of Identification.

7. Farm Credit Leasing caused an *Ex Parte* Order for Judgment to be signed by Hennepin County District Court Judge Robert Blaeser on April 3, 1996. (APP-039 to APP-40.) This *Ex Parte* Order for Judgment directed the Court Administrator to enter judgment in favor of Farm Credit Leasing for \$823,933.51, and further ordered that “[t]here being no just reason for delay, let judgment be entered immediately.” (APP-

040.) Due to questions by the District Court Administrator's staff manifestly appearing on a blue piece of paper stapled to page two (2) of the *Ex Parte* Order for Judgment, (APP-040), a Judgment Roll was not docketed until over two (2) weeks later on April 18, 1996 for \$825,620.79. (APP-016.) Contrary to the General Rules of Practice, the *Ex Parte* Order did not recite the "reasons supporting *ex parte* relief." Minn. Gen. R. Prac. 3.01 (1992). (APP-039.)

8. The Judgment Roll reflects that Farm Credit Leasing assigned the resulting judgment almost immediately to David Friedges on May 6, 1996. (APP-017; APP-122.) David Friedges assigned the judgment to Shamrock the same day. (APP-017 to APP-018.)

9. The Judgment Roll further reflects the judgment was "partially satisfied" on April 28, 1997, but does not reflect who made the payment.¹ The Judgment Roll also reflects that the judgment was satisfied "As To: Richard K. Burtness—Only" as of June 9, 1997. (APP-017.) Significantly, however, the amount of such satisfaction is not recorded. (APP-017.)

10. Unrebutted evidence reflects the underlying judgment from 1996 had been paid in full by Burtness.

Per Order
to Strike

¹ The number "9460.06" appears in close proximity to the notation that a partial satisfaction occurred on April 28, 1997, but because no dollar sign symbol was used, it is unclear whether this corresponds to the amount of the judgment that was satisfied. (APP-017.)

_____ (See also APP-189, Minnesota Court of Appeals' decision reflecting Burtness paid-off "\$2.8 million in debt" during pertinent time period; APP-248; APP-256 to APP-257; APP-280; APP-197, Second Affidavit of Arnold Westerman at Ex. 1, explaining: "Stanton originally agreed to release D + R Smith but did not.")

11. In or about late 2000, the Smiths retained a lawyer, Arnold Westerman ("Westerman"), in Washington D.C. to contact Shamrock in an attempt to resolve issues regarding the 1996 judgment. (APP-193 to APP-0196; APP-062.) Mr. Westerman contacted and spoke with one or more representatives of Shamrock on at least three (3) separate occasions. (APP-193 to APP-196; APP-063.) Shamrock informed Westerman that Shamrock would "look into the matter and get back to [him]." (APP-063; APP-194.) But Shamrock never attempted to contact Westerman regarding the 1996 judgment or to determine the location of the Smiths for purposes of serving them in the current action. (APP-064.)

12. Personal service of Denison Smith was accomplished, if at all, utilizing a defective summons. Shamrock caused a defective Summons and Complaint to be personally served on Denison Smith at his home in Virginia on March 18, 2006. (APP-173.) Substitute service of process of Denison Smith was accomplished, if at all, via

publication. Randall Smith has never been personally served by Shamrock. If served at all, Randall Smith was served only via publication.

13. Shamrock caused its attorney, David A. Turner, to file an affidavit on March 22, 2006, bearing the description: "Affidavit of David A. Turner Re: Service by Publication on Defendants" (the "Turner Affidavit"). (APP-022.) The Turner Affidavit incorrectly states the Smiths are resident individual domiciliaries who departed from the State of Minnesota with the intent to defraud creditors or to avoid service, or remained concealed within the state with like intent. (APP-023.) The Turner Affidavit also incorrectly stated Shamrock did not know the address of Denison Smith for purposes of serving him. (APP-023.) Mr. Turner, however, subsequently explained that prior to issuing the Rule 4.04 Turner Affidavit, he had already learned Denison Smith's home address and allegedly perfected personal service of process on him. (APP-161 at ¶ 12; APP-173.)

14. Randall Smith has never been a resident of Minnesota. Similarly, Randall Smith has never been domiciled in Minnesota. (APP-001; APP-193; APP-260 to APP-261; APP-263 to APP-268; APP-224 to APP-225; APP-232; APP-110.) Randall Smith has never set foot in Minnesota for approximately ten (10) years. (APP-001.) Randall Smith never concealed himself or attempted to avoid service as alleged in the Turner Affidavit. (APP-002.) Randall Smith has lived in California for approximately five (5) years. (APP-002.)

15. Denison Smith has never been a resident of Minnesota. Similarly, Denison Smith has never been domiciled in Minnesota. (APP-004; APP-193; APP-261 to APP-

262; APP-269 to APP-271 ; APP-224 to APP-229; APP-230 to APP-232; APP-235 to APP-236; and APP-108.) Denison Smith has never set foot in Minnesota for approximately seventeen (17) years except to transfer planes at the Minneapolis-St. Paul airport. (APP-004.) Denison Smith never concealed himself or attempted to avoid service as alleged in the Turner Affidavit. (APP-005.) Denison Smith currently continues to live in Virginia, just a short distance from the address listed in the Affidavit of Identification. (APP-006; APP-108.)

16. At the time Shamrock's attorney filed the Rule 4.04 Turner Affidavit incorrectly stating the Smiths had "departed from the State of Minnesota with the intent to defraud creditors, or to avoid service," Shamrock had already received complete copies of the Court file that had resulted in the underlying 1996 judgment against the Smiths. (APP-106 at ¶ 7; APP-114.) Accordingly, Shamrock knew prior to attempting service by publication that at the time the underlying judgment had been granted in 1996, the Smiths were residing outside of Minnesota. (*Id.*; *see also* APP-108-113.)

17. Shamrock and its legal counsel knew that the last known residential address of Denison Smith and Randall Smith was not 1520 Hunter Drive, Medina, Minnesota 55341. (APP-108 to APP-111.) Shamrock and its legal counsel already knew from their possession and review of the Court file and other documents and information in their possession that 1520 Hunter Drive, Medina, Minnesota 55341 was the residential address of Richard Burtness from which he conducted his business. (APP-112 to APP-113; APP-168; APP-126.)

18. The Accurint database used by Shamrock in an attempt to locate the Smiths unequivocally provides the Smiths' current residential addresses for purposes of service of process when information from the Affidavits of Identification are used to formulate an appropriate query. (APP-259 to APP-262; APP-263 to APP-275.) In an effort to locate Randall Smith, however, Shamrock only searched the Accurint database with a query utilizing the name "Randall N. Smith" and the address "1520 Hunter Drive, Medina, MN." (APP-132; APP-243 to APP-244.) The queries used by Shamrock to locate Denison Smith were similarly limited, and did not attempt to locate Denison Smith outside of Minnesota. (APP-129 to APP-131; APP-243 to APP-244.)

19. The "Comprehensive Address Report" Shamrock obtained from the Accurint database using 1520 Hunter Drive as the query only lists the Smiths as "Possible Previous Residents" of 1520 Hunter Drive. (APP-131, emphasis added.) This report, similar to all Accurint database reports, contains a conspicuous disclaimer/warning advising the reader that the information it contains "should not be relied upon" and that all information in the report "should be independently verified" before any reliance is placed on it.

20. Shamrock did not, and could not, independently verify the equivocal statement of the Accurint database "Comprehensive Address Report" claiming the Smiths were "Possible Previous Residents" of 1520 Hunter Drive. Nonetheless, Shamrock relied on this unconfirmed information and filed the Rule 4.04 Turner Affidavit stating

unequivocally and without qualification that the Smiths were residents of Minnesota. (APP-022 to APP-023.)

21. On March 24, 2006, Shamrock caused to be published in Finance and Commerce a Summons. (APP-026.) Notably, the Summons did not provide notice of the court file number, although there was a blank space left for that information as follows: “Court File No. _____[.]” (*Id.*) Moreover, the Summons specifically and incorrectly stated, in part: “You are hereby summoned and required to serve upon BASSFORD REMELE . . . an Answer to the Complaint which is herewith served upon you[.]” (*Id.*, emphasis added.) The Complaint, however, was not published with the Summons in Finance and Commerce.

22. Significantly, Shamrock’s Summons also did not include the following notice expressly required by Minn. Stat. § 543.22: “[w]hen a civil case is commenced against a party, the summons must include a statement that provides the opposing party with information about the alternative dispute resolution process as set forth in the Minnesota General Rules of Practice.” (APP-026.) In this respect, the published Summons possessed the same fatal defects as the Summons personally served on Denison Smith at his home in Virginia on March 18, 2006. (APP-012.)

23. Shamrock caused to be published the same defective Summons on March 31, 2006, and April 7, 2006. (APP-026.) On each occasion, the Summons was identical to the one published on March 24, 2006. (*Id.*) Significant for purposes of due process and notice concerns, the Smiths have never subscribed to, received, or read any copy of Finance and Commerce which is a publication local to Minnesota and upon

information and belief is not generally available where the Smiths reside. (APP-005;
APP-002.)

Per
Order
to
Strike

ARGUMENT

I. STANDARD OF REVIEW.

On an interlocutory appeal from a decision denying a motion to dismiss based upon a lack of personal jurisdiction, the Court conducts a *de novo* review. *Podovin v. Jamar Co.*, 655 N.W.2d 645, 649 (Minn. Ct. App. 2003) (reversing order of district court denying motion to dismiss for insufficiency of process) (“Jurisdiction is a legal question we review *de novo*.”); *Roehrdanz v. Brill*, 682 N.W.2d 626, 629 (Minn. 2004) (holding whether service of process was effective is a question of law reviewed *de novo*); *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000).

II. THE LOWER COURT IMPROPERLY DETERMINED THE SMITHS HAD BEEN PROPERLY SERVED BY PUBLICATION PURSUANT TO MINNESOTA RULE OF CIVIL PROCEDURE 4.04.

Shamrock’s service of process of the Summons and Complaint via publication was ineffective to initiate an action against the Smiths as a matter of law. Shamrock failed to comply with the requirements of Minn. R. Civ. P. 4.04 necessary to confer jurisdiction on the court. In particular, Shamrock failed to establish the prerequisite and essential jurisdictional fact that allows service by publication—namely, that the Smiths were resident individual domiciliaries of Minnesota and that they departed from the state with an intent to defraud creditors or to avoid service, or that the Smiths remained concealed within Minnesota with a like intent. *See* Minn. R. Civ. P. 4.04(a)(1).

Service of process via publication was also insufficient because the lower court improperly determined that Shamrock’s purported diligence in attempting to locate the Smiths superseded, supplanted or otherwise waived the requirements of Rule 4.04(a)(1).

Diligence, however, is an additional requirement imposed by courts as a matter of common law and does not obviate compliance with Rule 4.04. Nonetheless, Shamrock's attempts to locate the Smiths (whether artificially contrived or genuine) did not satisfy the common law standard of diligence necessary to make service via publication effective.

The issue of whether service of process is proper is a question of law. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. Ct. App. 1992), *rev. denied* (Minn. July 6, 1992). Similarly, the interpretation of the rules of civil procedure relating to service of process is also a question of law. *Barrera v. Muir*, 553 N.W.2d 104, 108 (Minn. Ct. App. 1996), *rev. denied* (Minn. Oct. 29, 1996). Because service of process is a fundamental requirement for initiating a lawsuit, an action must be dismissed when service is insufficient. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350-51, 119 S. Ct. 1322, 1327 (1999); *Doerr v. Warner*, 247 Minn. 98, 103, 76 N.W.2d 505, 511 (Minn. 1956); *Lewis v. Contracting Northwest, Inc.*, 413 N.W.2d 154, 156 (Minn. Ct. App. 1987). "If service of process is invalid, the district court lacks jurisdiction to consider the case, and it is properly dismissed." *Leek v. Am. Express Prop. Cas.*, 591 N.W.2d 507, 509 (Minn. Ct. App. 1999).

In order to qualify for service of process by publication and confer jurisdiction on a lower court, a plaintiff must establish one of the five (5) enumerated circumstances set forth in Rule 4.04(a). Such circumstances include, for example, when . . . "[t]he defendant is a resident individual domiciliary having departed from the state with the intent to defraud creditors, or to avoid service, or remains concealed within with the like

intent[.]” Minn. R. Civ. P. 4.04(a)(1). In such cases, a plaintiff shows the impossibility or impracticability of personal service, and hence eligibility for service by publication, through an affidavit in support of publication that must be filed prior to the summons being published. *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060, at *3 (Minn. Ct. App., Jan. 15, 2002); Minn. R. Civ. P. 4.04.

The facts required by Rule 4.04 to appear in the affidavit for publication are said to be “essential jurisdictional facts.” *Mowers*, 2002 WL 47060, at *3 and *4. “[T]he omission of [such essential jurisdictional facts] will prevent the published service from conferring jurisdiction. *Id.* (citing *Schuett v. Powers*, 288 Minn. 542, 543, 180 N.W.2d 253, 254 (Minn. 1970)). The *Mowers* case and Rule 4.04 aptly describe the required contents of the affidavit:

The statement of facts in the affidavit must show [(1)] that the case fits one of the rule 4.04 categories of allowable service by publication; [(2)] that the defendant cannot be served in Minnesota because he does not live here or cannot be located here; and [(3)] that there has been an effort in addition to the unreliable method of publication, to notify the defendant of the lawsuit by mailing a copy of the summons to his residen[tial] address if the plaintiff knows what it is.

Mowers, 2002 WL 47060, at *3. “If the plaintiff can honestly make that affidavit, [then] service by publication will be sufficient.” *Id.* at *2 (citing *Van Rhee v. Dysert*, 154 Minn. 32, 191 N.W. 53 (Minn. 1922)). Significantly, Rule 4.04 and supporting case law do not permit speculation, conjecture or opinions, but rather insist that the “essential jurisdictional facts” actually exist.

Service of process by publication is not considered to be a reliable means of notifying a defendant that a lawsuit is being brought against him. *Mowers*, 2002 WL 47060, at *3 (citing *Abu-Dalbouh*, 547 N.W.2d 700, 703 (Minn. Ct. App. 1996)). *See also* 1 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED § 4.15 at 95 (West 2002) (service by publication “is not favored by the rules”). Accordingly, in addition to the requirement that “essential jurisdictional facts” exist, the courts also require—as a prerequisite to publishing a summons—that the plaintiff make a diligent effort to serve the defendant personally. *Id.* at *2 (citing *Arnold v. Boggs*, 129 Minn. 270, 271, 152 N.W. 640, 641 (Minn. 1915)).

Because Shamrock’s service of process via publication did not comply with the necessary standards under the Rules of Civil Procedure, it was insufficient to confer jurisdiction to the lower court and, at a minimum, Shamrock’s claims against Randall Smith should be dismissed.

A. The lower court improperly determined Shamrock had satisfied the essential jurisdictional facts necessary under Rule 4.04(a)(1) requiring each of the Smiths to be a “resident individual domiciliary.”

Putting aside the issue that Shamrock caused a sham affidavit to be filed with the Court, no jurisdiction was conferred upon the lower court because none of the five (5) conditions set forth in Rule 4.04(a) exists. *See* Minn. R. Civ. P. 4.04(a). Shamrock has suggested only that the conditions set forth in Rule 4.04(a)(1) were allegedly satisfied. Shamrock’s sole attempt to satisfy this threshold jurisdictional issue was by incorrectly stating in the Turner Affidavit that the Smiths were resident individual domiciliaries who departed Minnesota or remained concealed therein with an intent to defraud creditors or

to avoid service of process. However, these “essential jurisdictional facts” as alleged in the Turner Affidavit are manifestly false.

Undisputed evidence establishes the Smiths were never residents of, or domiciled in, Minnesota. Randall Smith sets forth in his sworn affidavit that he has never been either a resident of, or domiciled in, Minnesota. (APP-001.) Randall Smith further explains he never attempted to defraud any creditors by leaving Minnesota or by hiding himself within Minnesota. (APP-001.) Similarly, Denison Smith sets forth in his sworn affidavit that he has never been either a resident of, or domiciled in, Minnesota. (APP-004.) Denison Smith further explains he never attempted to defraud any creditors by leaving Minnesota or by hiding himself within Minnesota. (APP-005.) The Smiths’ affidavits are further confirmed by the sworn affidavits of both Arnold Westerman and

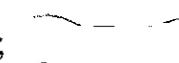
who unequivocally state the Smiths have never resided in Minnesota.

(APP-193; Moreover, reports from the Accurint database and other sources also confirm the Smiths have never lived in Minnesota. (See, e.g., APP-259 to APP-275; APP-108 to APP-111; APP-224 to APP-225.)

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In the present case, the only scintilla of “evidence” supporting a conclusion the Smiths resided in Minnesota are the hearsay reports of the Accurint database submitted by Shamrock which fail to explain how or why the Smiths are possibly associated with the Minnesota address identified. (APP-125 to APP-133.) Significantly, Shamrock does not claim its Accurint database reports demonstrate the Smith Defendants actually lived in Minnesota. Rather the reports only explain that the Minnesota address is associated with the Smiths (APP-232), and Shamrock merely claims this was a sufficient basis for

concluding the Smith Defendants “used” the address and may have resided in Minnesota. (APP-126 at ¶¶ 6 and 7; APP-161 at ¶ 11.)

The Accurint database reports submitted by Shamrock, however, do not withstand scrutiny. First, they are contradicted by the Accurint database reports submitted by the Smiths (APP-259 to APP-262; APP-263 to APP-275) and a host of other evidence. (*See, e.g.*, APP-004; APP-001; APP-193;  Second, the address identified by Shamrock’s Accurint database reports as being associated with and/or used by the Smiths is 1520 Hunter Drive, Medina, Minnesota. Based upon information in Shamrock’s possession, Shamrock knew that address was the residential address of Burtness as well as the registered address of a partnership of which Burtness and the Smiths were all members (Dakota Turkey Farms). (APP-112 to APP-113; APP-160 at ¶ 8; APP-168; APP-126 at ¶ 8.) Under Shamrock’s interpretation of these circumstances, it would have the Court believe three grown men with families lived in a single residential house from which they ran a business—despite possessing Affidavits of Identification filed by the initial judgment creditor demonstrating the Smiths did not live in Minnesota. Third, the Accurint database reports submitted by Shamrock lack the elements of trustworthiness and reliability on their face. (*See infra* at 23-25, 31-32.)

Because the “essential jurisdictional facts” alleged by Shamrock are not supportable, no jurisdiction was conferred to the lower court and service of process via publication was insufficient. Minn. R. Civ. P. 4.04. Accordingly, Shamrock’s case against Randall Smith should have been dismissed in its entirety. *See Peterson v. Eishen*, 512 N.W.2d 338 (Minn. 1994) (overruled on other grounds) (lack of personal jurisdiction

renders judgment void); *Garber v. Bancamerica-Blair Corp.*, 205 Minn. 275, 279, 285 N.W. 723, 726 (Minn. 1939) (judgment rendered without jurisdiction acquired by service of process is void). Shamrock does not argue, let alone present evidence, that the Smiths ever resided in Minnesota as required under Rule 4.04(a)(1) in order for service via publication to confer jurisdiction to the court. *Mowers*, 2002 WL 47060, at *3 and *4 (citing *Schuett*, 288 Minn. at 543, 180 N.W.2d at 254).²

B. The lower court improperly determined Shamrock's purported diligence supplanted the requirement under Rule 4.04 that essential jurisdictional facts exist demonstrating the Smiths were resident individual domiciliaries of Minnesota.

Rule 4.04 requires essential jurisdictional facts to exist, not just to be alleged. Minn. R. Civ. P. 4.04(a). Diligently asserting incorrect jurisdictional facts is not sufficient. "Diligence" is an added requirement not found in the Rule; it does not supplant the Rule. If diligence were the sole criteria for allowing service by publication (and it is not), then a precedent would be set allowing service by publication in any case where a client could convince an attorney to file a Rule 4.04 Affidavit at the last minute before a statute of limitations expired. Willfully waiting almost ten (10) years until the last minute and then turning a blind eye toward facts that would assist a plaintiff in

² See also, e.g., *Bickel v. Jackson*, 530 N.W.2d 318, 320 (N.D. 1995) (when service of process is obtained by publication, there must be strict compliance with the provisions allowing for such service); *In re Lamm's Estate*, 67 N.W.2d 613, 616 (Iowa 1954) (where jurisdiction of court is invoked by published notice, strict compliance with all essential provisions of statutes relating thereto is required to give jurisdiction to court before whom proceedings are had); *Am. Fam. Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 481 N.W.2d 629, 631 (Wis. 1992) ("Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh").

locating a defendant for personal service would become common place. Shamrock admits, “publication is not a reliable means of acquainting interested parties with the fact that their rights are before the court.” (APP-149.) However, advocating “diligence” as the sole, bellwether factor allowing service by publication contradicts Shamrock’s acknowledgment that service by publication is unreliable and disfavored.

The requirements of Rule 4.04(1)(a) are clear; they require a plaintiff such as Shamrock to demonstrate that a defendant is (or was) a resident individual domiciliary of Minnesota. Minn. R. Civ. P. 4.04(a)(1). This is necessary as a matter of law to “confer jurisdiction” on the lower court. *Id.* The lower court was not free to disregard the clear and unambiguous language of the rule. *Stoebe v. Merastar Ins. Co.*, 541 N.W.2d 600, 602 (Minn. Ct. App. 1995) *aff’d* 554 N.W.2d 733 (Minn. 1996); *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. Ct. App. 2000). The Minnesota Supreme Court has addressed this specific issue previously in *McBride v. Bitner*, 310 N.W.2d 558, 562 (Minn. 1981). In that case, the Supreme Court explained:

It is apparent from a reading of the rule [(Rule 4.04)] that it did not authorize publication merely because plaintiffs’ attorney had made diligent but unsuccessful efforts to locate defendant in this state.

McBride, 310 N.W.2d at 562 (interpreting 1981 version of Minn. R. Civ. P. 4.04, emphasis added).

The Rules of Civil Procedure were promulgated so that a uniform and predictable system of justice could be dispensed without fear that judges would arbitrarily apply the rules only in certain cases or in favor of certain parties. *Cf. In re Karger’s Estate*, 93 N.W.2d 137, 142 (Minn. 1958). In short, the Rules of Civil Procedure are the backstop

of our system of justice; if lower courts are not required to follow them, then justice cannot be dispensed quickly, inexpensively or fairly. Minn. R. Civ. P. 1. The lower court inappropriately engrafted a judicial exception into Rule 4.04 that is supported neither by the clear language of the rule nor existing case law. *See, e.g., State v. Thunberg*, 492 N.W.2d 534, 537 (Minn. 1992) (refusing to judicially legislate under separation of powers doctrine). The lower court's decision must therefore be overturned as Rule 4.04 clearly provides no jurisdiction is conferred to the lower court unless one of the five conditions set forth in Rule 4.04(a) exists.

C. The lower court improperly determined Shamrock satisfied the additional common law requirement of diligence in spite of Shamrock ignoring facts and information in its possession and conducting results oriented database searches slanting its search results.

Shamrock's limited attempts to personally serve the Smiths were not diligent. Shamrock cannot and should not be rewarded for turning a blind eye toward information it possessed when "diligently" attempting to locate the Smiths. Nor should Shamrock's total lack of pursuing collection of the judgment against the Smiths for almost a decade be ignored or considered "diligent" in light of the Smiths' repeated attempts to communicate with Shamrock. Shamrock's white-washed Accurint database reports are inconclusive at best and do not support a finding of "diligence." If over \$1.2 million is at issue as claimed by Shamrock, then Shamrock's belated attempt to locate the Smiths was half-hearted.

Shamrock's feigned diligence in locating the Smiths is belied by its proffered evidence. Shamrock's Accurint database reports reflect the search terms used, but do not

reflect either a diligent or unbiased attempt to locate the Smiths' current addresses. (APP-129 to APP-133; APP-242 to APP-243.) Shamrock's report listing Denison Smith as being associated with 1520 Hunter Drive in Medina, Minnesota was based upon a query looking for the name "Denison E. Smith" only in Minnesota, rather than formulating a query based upon his last known addresses in Virginia or conducting a national search. (APP-129 to APP-131; APP-243 to APP-244.) Similarly, Shamrock's Accurint report for Randall Smith amazingly used a search query utilizing the name, Randall N. Smith, and the address 1520 Hunter Drive Medina, MN. (APP-131 to APP-133; APP-243-244.)

The accuracy of the Accurint database reports and Shamrock's blind reliance on them must be seriously questioned as the following warning and disclaimer is conspicuously printed on each report:

Important: The Public Records and commercially available data sources used in this system have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitively accurate. Before relying on any data this system supplies, it should be independently verified.

(APP-129-133, emphasis added; APP-232-233.) There is no indication in the record that Shamrock "independently verified" the information it obtained from the Accurint database. Accordingly, this Court should assume, as the Accurint warning/disclaimer suggests, that the equivocal Accurint data is "generally not free from defect" and "should not be relied upon." (*Id.*)

A portion of Shamrock's Accurint database report is dated April 25, 2006—long after the March 22, 2006 Rule 4.04 Turner Affidavit and after the Smiths filed their April 18, 2006 Notice of Limited and Special Appearance putting Shamrock on notice that challenges to the service of process via publication would likely be made. (APP-131.) This raises the specter of whether the remaining un-dated Accurint database reports were re-run to whitewash any references to the Smiths residing at their current addresses. Accurint database reports provided to the Court by the Smiths unequivocally demonstrate their current residential addresses in California and Virginia and contain the dates when the searches were performed. (APP-263 to APP-275; APP-298 to APP-299.) The fact that Shamrock's Accurint database reports are largely undated and generated using street-address-specific search queries is a very strong indication these documents were generated after the Rule 4.04 Turner Affidavit in order to conceal the Smiths' current contact information.

Based upon the information in the Affidavits of Identification, the Smiths could easily have been located if Shamrock had truly been diligent. A simple search on www.whitepages.com or call to directory assistance was sufficient to provide Denison Smith's current residential address. (APP-224; APP-226.) A similar search of www.switchboard.com and www.superpages.com also revealed the current address for Denison Smith as the sole "Denison Smith" in Virginia. (APP-224; APP-228 to APP-229.) Simple Google searches assisted in locating the Randall Smith against whom Shamrock believes it possesses an enforceable judgment. (APP-044 to APP-058.) Significantly, reports from databases commonly used by law firms definitively show the

Smiths' current respective addresses and demonstrate neither has ever lived in Minnesota. (APP-224 to 225; APP-231 to APP-232 at ¶¶ 7-9; APP-259 to APP-275.)

The most diligent course of action—which Shamrock did not pursue—would have been to contact the Smiths' attorney, Mr. Westerman, who had contacted Mary Dreier of Shamrock at the request of the Smiths on three separate occasions to discuss issues relating to the underlying judgment. (APP-063 to APP-064; APP-193 to APP-196.) Shamrock knew it could contact the Smiths through their attorney, but chose not to do so. Shamrock argues Mary Dreier was no longer employed by Shamrock as of June 15, 1995. (APP-120.) However, that assertion is demonstrably false. (APP-195.) Shamrock's own legal counsel sent at least seven (7) letters to Mary Dreier during the 1996-1997 timeframe. (APP-246 to APP-257; APP-195.) Each of those letters involved the same underlying judgment at issue in this case. (*Id.*) Significantly, Shamrock does not disclose—and perhaps purposely conceals—the fact Mary Dreier is currently a partner in an entity that is very closely related to and/or affiliated with Shamrock.

Shamrock claims its “diligence” is supported by the fact it searched the U.S. Bankruptcy Court records. However, searching the U.S. Bankruptcy Court filings was not reasonably intended to locate the Smiths because it is such a narrow search. Shamrock might just as well have searched death records or wedding notices as those are calculated to have just as much to do with the Smiths as Bankruptcy Court filings.

Shamrock further seeks to demonstrate its alleged “diligence” by touting it retained a private investigator. Yet there is nothing before this Court that would allow it to ascertain whether the private investigator is experienced, trained, licensed or spent

more than five minutes attempting to locate the Smiths. If Shamrock wanted to demonstrate diligence, then it should have demonstrated how much time the investigator billed for his work, when he was retained, and the specific tasks he performed. *See, e.g., Mowers*, 2002 WL 47060 at *1-4 (listing 14 different tasks diligently performed by plaintiff in an attempt to locate defendant, 10 of which the investigator performed). Here Shamrock provided none of that information.

The “diligence” required to satisfy the common law requirement is a high standard. The Court of Appeals discussed and applied the “diligence” requirement in *Mowers v. LeCuyer*. Shamrock’s feigned attempt at diligence does not satisfy the diligence requirement as set forth in that case. *Mowers*, 2002 WL 47060 at *1-2, *4. *See also Arnold v. Boggs*, 152 N.W. 640, 641 (Minn. 1915). Notably, Shamrock does not explain what it did in the intervening nine (9) years and eleventh (11) months that could possibly constitute “diligence.” Shamrock’s actions in the remaining month before the judgment expired were too little, too late. Notably, if Shamrock had initiated suit against Denison Smith in a timely and diligent manner, then the location of Randall Smith would have been provided in discovery—if not sooner.

Significantly, Shamrock’s attorney admits Shamrock looked for the Smiths only in Minnesota although he possessed the Smiths’ Affidavits of Identification previously filed with the court. (APP-163 at ¶ 15, bullet point nos. 5 and 6.) The last known home and business address for the Smiths, Washington, D.C. and Virginia, were not used although Shamrock undisputedly possessed that information. (APP-108 to APP-111; App-114.)

Nor was a national search done. Shamrock purposefully narrowed the parameters of its search to bias the results, and therefore was not diligent as a matter of law.

Significantly, Shamrock has not, and cannot, demonstrate the Smiths tried to avoid service of process which is an essential element found in all reported cases where service of process pursuant to Rule 4.04(a)(1) is allowed. *See, e.g.*, Minn. R. Civ. P. 4.04; *Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700, 702 (Minn. Ct. App. 1996) (defendant would not divulge his address for service of process and his attorney was not authorized to accept service of process); *In re Matter of Condemnation*, C7-97-1851, 1998 WL 372800, at *1 and *3 (Minn. Ct. App., July 7, 1998) (defendant told plaintiff he was aware of the proceeding, but that he intended to avoid personal service of process to stall the proceedings); *Eul v. A&A Liquors of St. Cloud, Inc.*, C6-99-517, 1999 WL 809744, at *1-2 (Minn. Ct. App., Oct. 12, 1999) (plaintiffs attempted service of process on defendants more than thirteen times through service by the sheriff, a process server and by mail, and on each attempt the defendant refused to accept service of process); *Gill v. Gill*, 152 N.W.2d 309, 310 (Minn. Ct. App. 1967) (defendant knew about the lawsuit but refused “to reveal his whereabouts”).

Shamrock turned a blind eye toward information it possessed that would have lead it directly to the Smiths. For example, Shamrock could have called the Smiths’ attorney, Westerman, or it could have used information from the Affidavits of Identification of Judgment Debtors to call directory assistance or properly focus its database searches. If Shamrock had been diligent, Shamrock would have started its search for the Smiths during the intervening nine years and eleven months before the judgment expired. The

Smiths made no attempt to avoid service of process or to defraud creditors; they were not hiding. (APP-002; APP-005.) Simply put, Shamrock was not diligent as a matter of law, and therefore, service by publication was not proper.

III. THE SMITHS DUE PROCESS RIGHTS WERE VIOLATED BY ALLOWING SERVICE OF PROCESS VIA PUBLICATION IN A PUBLICATION NOT REASONABLY CALCULATED TO APPRISE THEM OF THE PENDENCY OF SHAMROCK'S ACTION.

Shamrock published its Summons in Finance and Commerce—a daily Twin Cities business newspaper. (APP-026.) It was not published elsewhere—although the most recent and most reliable information in Shamrock's possession (*i.e.*, the Affidavits of Identification) clearly demonstrated the Smiths did not live in Minnesota. (APP-108 to APP-111; APP-114.)

The burden of proving proper service of process rests on Shamrock. Under established case law precedent, service by publication “must be reasonably calculated to reach the interested party.” *Electro-Measure, Inc. v. Ewald Enter. Inc.*, 398 N.W.2d 85, 88 (Minn. Ct. App. 1986) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 658-59 (1950)).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. (quoting *Mullane*, 339 U.S. at 314 317, 70 S.Ct. at 657).

In the present case, under all of the circumstances—which include Shamrock's knowledge that the Smiths' last known addresses were in Virginia and Washington

D.C.—publication of its Summons in Finance and Commerce did not comport with the fundamental requirements of due process under either the state or federal constitutions. *Id.*; see also *Abu-Dalbouh*, 547 N.W.2d at 703 (“noting service by publication is not a reliable means of notifying interested parties”) (court ordered publication in Chicago and Washington, D.C. news papers as those publications were calculated to provide better notice to the defendant); *Mullane*, 339 U.S. at 315-16, 70 S.Ct. at 657-58. (APP-108 to APP-111; APP-114; APP-002; APP-105-106.)³

IV. THE LOWER COURT ERRED IN FAILING TO STRIKE THE RULE 4.04 TURNER AFFIDAVIT AS A SHAM WHEN THE JURISDICTIONAL FACTS ALLEGED IN THAT AFFIDAVIT WERE DEMONSTRABLY UNTRUE OR ASSERTED WITHOUT AN INQUIRY THAT WAS REASONABLE UNDER THE CIRCUMSTANCES.

The Turner Affidavit states “essential jurisdictional facts” that are untrue. The Turner Affidavit incorrectly alleged the Smiths departed Minnesota, or concealed themselves within the state, with the intent to defraud multiple creditors. (APP-023.) The reference to multiple creditors is gratuitous, false and unsupported by any facts in the record. (APP-001 to APP-002; APP-004 to APP-005.) In fact, each of the statements in the Turner Affidavit relating to the Smiths is untrue and should have been stricken pursuant to Rule 12.06. (See, e.g., APP-001 to APP-002; APP-004 to APP-006; APP-108 to APP-111.) Without such statements in the Turner Affidavit, Shamrock’s attempted

³ “Whether [the Smiths] had actual notice of the lawsuit and [Shamrock] substantially complied with the rules for service of process is irrelevant, because the actual notice exception applies only to cases involving substitute service at a defendant’s usual place of abode.” *Turek*, 618 N.W.2d at 612 (citing *Thiel v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988); *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 775 (Minn. Ct. App. 1992)).

service by publication is not supported as required by Rule 4.04(a) and service of process via publication was necessarily insufficient.

The Turner Affidavit is a sham pleading. Neither of the Smiths ever resided in Minnesota. Shamrock's own documents do not support the statements unequivocally made by Mr. Turner under oath in his affidavit. Specifically, the April 25, 2006 "Comprehensive Address Report" Shamrock obtained from the Accurint database only lists the Smiths as "Possible Previous Residents" of 1520 Hunter Drive. (APP-131, emphasis added.) That report, similar to all Accurint database reports, contains a conspicuous disclaimer/warning advising the reader it "should not be relied upon" and that all information in the report "should be independently verified" before any reliance is placed on it. (*Id.*) If Mr. Turner had disclosed the equivocal and speculative basis of the "facts" alleged in his Rule 4.04 affidavit, then it would not have satisfied the jurisdictional requirements necessary as a prerequisite for serving by publication.

Shamrock, however, was running short on time. The underlying judgment was set to expire in less than a month. Accordingly, the inconvenient detail that Shamrock could not independently confirm the Smiths had ever lived in Minnesota and that the Accurint database—at best—only listed the 1520 Hunter Drive address as a "possible" former address, was omitted from the Rule 4.04 affidavit signed by Mr. Turner. (APP-022 to APP-023.) Notably, Shamrock never argued in its brief to the lower court that the Smiths "lived" at the 1520 Hunter Drive address. Shamrock backed-off that position fairly quickly. Rather, Shamrock merely argued that the Smith's "used" the 1520 Hunter Drive address. That address was the "registered address for service of process on Defendant

Dakota Turkey Farms, Limited Partnership”—a fact readily acknowledged by Shamrock. (APP-126; APP-141; APP-161.) However, the issue of whether or not a co-defendant “used” the address at 1520 Hunter Drive as a business address does not establish the essential jurisdictional facts Shamrock was required to establish pursuant to Rule 4.04(a)(1).

There are no facts supporting Shamrock’s phantasmagorical leap in logic associating a listing of a “possible” residential address in a database to the conclusion that the individuals allegedly associated with that address actually lived at that address or, for that matter, lived anywhere in Minnesota. Contacting the current owner of that property or checking historical property tax records would have confirmed, that neither of the Smiths ever lived at, or owned, the property located at 1520 Hunter Drive. Similarly, a check of Minnesota driver’s licensing records would have indicated neither of the Smiths ever possessed a Minnesota address or driver’s license. However, Shamrock’s legal counsel apparently did not undertake this or any other level of reasonable inquiry before filing the Turner Affidavit incorrectly stating—without any equivocation or qualification—that the Smith were residents of Minnesota.

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Moreover, Shamrock already possessed the Affidavits of Identification demonstrating that (1) neither of the Smiths lived in Minnesota, and (2) that Burtness lived at 1520 Hunter Drive. (APP-106 to APP-114; APP-163 at ¶ 15, bullet point no. 6.) Shamrock,

therefore, turned a blind eye toward the information it already possessed. In this regard, the Iowa Supreme Court's admonishment is particularly instructive:

In furnishing an affidavit upon which a court must rely for jurisdiction, a litigant may not wash from his ears what he has heard, blot from his memory what he has known and direct the service of process down a blind alley. Subterfuge is not looked upon with favor.

In re Roedell's Estate, 112 N.W.2d 842, 844 (Iowa 1962).

Because each of the statements regarding the Smiths in the Turner Affidavit is demonstrably incorrect, and because the sole purpose of the affidavit was to inappropriately attempt to serve the Smiths with process where no jurisdiction could otherwise be conferred by the Court, the Turner Affidavit should have been stricken from the record pursuant to Rule 12.06. Without the Turner Affidavit, Shamrock has not satisfied the prerequisites of Rule 4.04 and service of process by publication was void as a matter of law.

V. SHAMROCK'S SUMMONS WAS DEFECTIVE AS A MATTER OF LAW BECAUSE IT FAILED TO PROVIDE THE NOTICE OF ALTERNATIVE DISPUTE RESOLUTION MANDATED BY THE LEGISLATURE IN MINNESOTA STATUTES SECTION 543.22.

Shamrock's Summons was fatally defective. The Summons did not provide the Smiths with the "process" required under applicable law. Accordingly, Shamrock's Summons was a "nullity." *See Tharp v. Tharp*, 228 Minn. 542, 36 N.W.2d 1, 3 (Minn. 1949). Because the ten (10) year period during which a judgment "survives" and can be enforced has expired, (*see* Minn. Stat. § 548.09, subd. 1 and § 550.01), "it is apparent that

to permit [any] amendment would take away from the defendant[s] a substantial defense[.]” *Tharp*, 36 N.W.2d at 3. *See also* Minn. R. Civ. P. 4.07.

The lower court’s ruling on this issue apparently rests on its misunderstanding that a summons was not required in order to initiate an action to renew the underlying judgment. Specifically, the lower court stated on page two (2) of its Order Denying Motion to Reconsider that lack of the notice language mandated by Minn. Stat. § 543.22 was “not fatal when the statute of limitations has expired on the time for appeal of the judgment.” However, *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N.W.2d 938 (Minn. 1894) cited in the lower court’s August 3, 2006 Memorandum Order specifically provides: “A judgment constitutes . . . a cause of action, and, like other causes of action, a suit may be brought upon it[.]” *Id.* at 940. Under Minn. R. Civ. P. 3.01 an action is commenced against defendants such as the Smiths by serving a summons. Accordingly, a non-defective summons was required to initiate an action against the Smiths. *See Tharp*, 36 N.W.2d at 1-4 (affirming dismissal of case in a renewal of judgment action based upon a defective summons).⁴ The lower court’s determination to the contrary was in err.

Shamrock failed to strictly comply with a statute that governs service of a summons (*i.e.*, Minn. Stat. §543.22). Minnesota Courts readily acknowledge that service

⁴The Smiths do not waive their argument that a general civil judgment cannot be renewed under Minnesota law. The Smiths believe the *Sandwich* case is distinguishable. Pursuant to this Court’s November 7th Order, the Smiths understand that discretionary review of that issue was not granted.

To the extent the lower court’s August 30, 2006 Order Denying Motion to Reconsider assists this Court in understanding the issues presented in this appeal, the Smiths do not object to the panel considering it.

of process by publication is not considered a reliable means of notifying a defendant that a lawsuit is being brought against him. In light of that acknowledged lack of reliability, the onus is on plaintiffs such as Shamrock to strictly comply with all of the requirements under the applicable rules and statutes so that sufficient process is provided as intended by the Legislature. *See, e.g., Berryhill v. Sepp*, 106 Minn. 458, 459, 119 N.W. 404 (Minn. 1909); *In re Welfare of T.D.*, 631 N.W.2d 806, 810 (Minn. Ct. App. 2001).

Minnesota Statutes § 543.22 provides a clear mandate requiring all summons in civil actions to include “a statement that provides the opposing party with information about the alternative dispute resolution process as set forth in the Minnesota General Rules of Practice.” Notably, Shamrock’s Summons was defective because no such notice was provided. (APP-012; APP-026.) This is a clear violation of the statutory requirements.

Our Supreme Court has noted that alternative dispute resolution (“ADR”) is strongly favored in the law and as a matter of public policy. *See, e.g., Eden Land Corp. v. Minn-Kota Excavating, Inc.*, 223 N.W.2d 658 (Minn. 1974). Minnesota courts have historically enforced the Minnesota Legislature’s mandates regarding ADR through such enactments as the Uniform Arbitration Act, and recognized that ADR encourages and facilitates settlement of disputes by providing speedy, informal and relatively inexpensive procedures for resolving controversies. *See, e.g., Eric A. Carlstrom Const. Co. v. Independent Sch. Dist. No. 77*, 256 N.W.2d 479 (Minn. 1977); *see also* Minn. Gen. R. Civ. Prac. 114.

Shamrock argues this defect in its Summons is not fatal. But of course, what else would Shamrock say? In similar cases, courts have dismissed plaintiffs' claims when, as in this case, the summons could have been amended or the procedural irregularities were such that a defendant represented by an attorney more than likely would have understood their rights and obligations regardless of the defects in the summons. *See, e.g., Tharp*, 36 N.W.2d 1 (Minn. 1949) (failed to give precise address of plaintiff's legal counsel and failed to notify defendant of default judgment in event an answer not filed); *Brady v. Burch*, 185 Minn. 440, 241 N.W. 393 (Minn. 1932) (incorrectly designated venue as municipal court in summons, but correctly designated venue as district court in complaint).

Shamrock is not entitled to amend its Summons. For inexplicable reasons, Shamrock waited until just days before the ten-year period during which a judgment "survives" and can be enforced actually expired. Shamrock then caused a sham affidavit to be filed replete with factual inaccuracies in an attempt to serve the Smiths by publication before the judgment expired. Shamrock provided no explanation for its dilatory attempts in trying to locate the Smiths. Shamrock offered no justification for not attempting to contact the Smiths through their attorney, Westerman, who had contacted Shamrock on multiple occasions several years earlier in an effort to discuss the underlying judgment. (APP-193 to APP-202.) Similarly, Shamrock made no excuses for its sham Rule 4.04 Affidavit. Based upon Shamrock's numerous shortcomings, Shamrock should not be granted any equitable leniency for its self-created problems that arise due to its lack of diligence, defective Summons and false affidavit. *See Uthe v.*

Baker, 629 N.W.2d 121, 124 (Minn. Ct. App. 2001) (courts may not use their equitable powers to estop a defendant from asserting insufficiency of process when the court lacks jurisdiction); *see also Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (doctrine of “unclean hands” bars a party who acted inequitably from obtaining equitable relief).

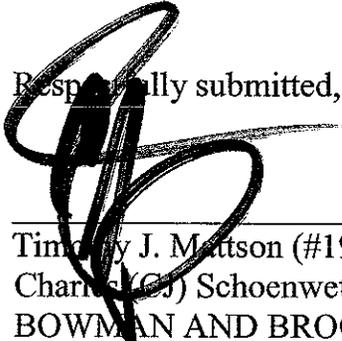
Shamrock may argue the Smiths possessed actual notice of the current lawsuit sufficient to overcome the serious defects in its published Summons. This argument necessarily fails. Actual notice of a lawsuit is an insufficient basis upon which to hold that a suit has been properly initiated. *See, e.g., Thiele*, 425 N.W.2d at 584; *Coons*, 486 N.W.2d at 773-75; *Turek*, 618 N.W.2d at 612. “The ‘actual notice’ exception . . . has been recognized only in cases involving substitute service at [a] defendant’s residence.” *Thiele*, 425 N.W.2d at 584. Accordingly, even when a potential defendant undisputedly receives a defect-free summons and attached complaint in the mail, courts repeatedly hold that actual notice is insufficient. *Coons*, 486 N.W.2d at 773-75. In this case, Shamrock’s defective Summons provides even less of a basis for holding that process and service of process was effective.

Because Shamrock’s Summons failed to contain the statutory notice mandated by the Legislature, its Summons was fatally defective. Accordingly, Shamrock’s claims against both of the Smiths should have been dismissed in their entirety. *See In re Welfare of T.D.*, 631 N.W.2d at 810 (“Service of process must accord strictly with statutory requirements.”) (holding the summons was defective because it did not contain required information and dismissing case based upon lack of personal jurisdiction).

CONCLUSION

Based upon the facts and arguments presented above, the Smiths respectfully request the Court of Appeals to hold that service of process via publication was insufficient to confer jurisdiction to the lower court and to dismiss Shamrock's claims against Randall Smith. Similarly, the Smiths respectfully request the Court of Appeals to hold that Shamrock's failure to include the notice required by Minn. Stat. § 443.22 in its Summons resulted in a defective Summons and insufficiency of process, and therefore a lack of personal jurisdiction requiring dismissal of claims against both Randall Smith and Denison Smith.

Respectfully submitted,



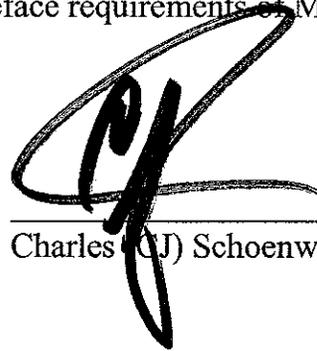
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CERTIFICATE OF COMPLIANCE

I hereby certify this Appellants' Brief was prepared using Microsoft Word, in Times Roman font, 13 point, and according to the word processing system's word count, is no more than 9,764 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn.R.Civ.App.P. 132.01.

Dated: November 13, 2006.



Charles (CJ) Schoenwetter (#025115X)

No. A06-1647

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Denison E. Smith and Randall N. Smith,

Appellants,

v.

Shamrock Development, Inc., a Minnesota corporation,

Respondent.

ADDENDUM TO APPELLANTS' BRIEF

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RULE 1. SCOPE OF RULES

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Adopted June 25, 1951, eff. Jan. 1, 1952. Revised Oct. 18, 1988, eff. Jan. 1, 1989. Amended Nov. 22, 1996, eff. Jan. 1, 1997.

Advisory Committee Comments—1996 Amendments

This change conforms the rule to its federal counterpart. The amendment is intended to make clear that the goals of just, speedy, and inexpensive resolution of litigation are just as important—if not

more important—in questions that do not involve interpretation of the rules. These goals should guide all aspects of judicial administration, and this amendment expressly so states.

Historical Notes

The order of the Minnesota Supreme Court [C6-84-2134] dated November 22, 1996, provides in part that the "(a) amendments shall apply to all actions pending on the effective date [January 1, 1997] and to those filed thereafter" and that "(t)he inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein".

RULE 2. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action."

Adopted June 25, 1951, eff. Jan. 1, 1952. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

II. COMMENCEMENT OF THE ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 3. COMMENCEMENT OF THE ACTION; SERVICE OF THE COMPLAINT

Rule 3.01. Commencement of the Action

A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant, or

(b) at the date of acknowledgement of service if service is made by mail, or

(c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Adopted June 25, 1951, eff. Jan. 1, 1952. Amended March 21, 1985, eff. July 1, 1985. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

Advisory Committee Note—1985

The Rules have permitted service by any non-minor, non-party for a substantial period of time. The changes recommended to Minn.R.Civ.P. 4.02 underscore and clarify the availability of service by any individual.

The most common method for commencing an action is by service of the summons and complaint upon a defendant. A different commencement time may apply to individual defendants based upon the times upon which the summons and complaint are actually served. An alternative method for commencing an action contained in the rule provides that an action may be commenced upon delivery of the summons and complaint to a sheriff in the county where the defendant resides for service. One change to Rule 3.a¹ is intended to clarify who is a "proper officer" for service. The Committee felt this language should be clarified to remove ambiguity or uncertainty. Commencement by delivery to the sheriff is effective only, however, if service is actually made within 60 days thereafter. The amendment to the rule is intended to make it clear that delivery to a private process server is not effective to commence an action on the date of delivery even though service is actually made within 60 days thereafter. In such a case, service will be effective, but the action will be deemed commenced as of the date service is actually made. Similarly, delivery of the summons to the Postal Service for service by mail does not commence an action. The action is commenced by mail when the defendant acknowledges service. If no acknowledgement is signed and returned, the action is not commenced until service is effected by some other authorized means.

¹ Probably was intended to be Rule 3.01(c).

Rule 4.04. Service By Publications; Personal Service out of State

(a) **Service by Publications.** Service by publication shall be sufficient to confer jurisdiction:

(1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent;

(2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and

(A) The defendant is a resident individual who has departed from the state, or cannot be found therein, or

(B) The defendant is a nonresident individual or a foreign corporation, partnership or association;

When quasi in rem jurisdiction has been obtained, a party defending the action thereby submits personally to the jurisdiction of the court. An appearance solely to contest the validity of quasi in rem jurisdiction is not such a submission.

(3) When the action is for marriage dissolution or separate maintenance and the court has ordered service by published notice;

(4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding the defendant from any such interest or lien;

(5) When the action is to foreclose a mortgage or to enforce a lien on real estate within the state.

The summons may be served by three weeks' published notice in any of the cases enumerated herein when the complaint and an affidavit of the plaintiff or the plaintiff's attorney have been filed with the court. The affidavit shall state the existence of one of the enumerated cases, and that affiant believes the defendant is not a resident of the state or cannot be found therein, and either that the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant. The service of the summons shall be deemed complete 21 days after the first publication.

(b) **Personal Service Outside State.** Personal service of such summons outside the state, proved by the affidavit of the person making the same sworn to before a person authorized to administer an oath, shall have the same effect as the published notice provided for herein.

(c) **Service Outside United States.** Unless otherwise provided by law, service upon an individual, other than an infant or an incompetent person, may be effected in a place not within the state:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

Adopted June 25, 1951, eff. Jan. 1, 1952. Amended March 3, 1959, eff. July 1, 1959; Nov. 10, 1967, eff. Feb. 1, 1968; March 21, 1985, eff. July 1, 1985. Revised Oct. 18, 1988, eff. Jan. 1, 1989. Amended Nov. 22, 1996, eff. Jan. 1, 1997

Advisory Committee Note—1968

The amendment to Rule 4.04 prohibits limited appearances in Minnesota in quasi in rem actions. Prior to the amendment it was an open question in Minnesota whether or not a defendant in a quasi in rem action could defend on the merits without submitting generally to the jurisdiction of the court. A limited appearance must be distinguished from a special appearance and a motion to dismiss for lack of jurisdiction over the person. Special appearances were abolished by the rules in 1952. Under existing rule practice the defense of lack of jurisdiction over the person is properly raised by motion or pleading under Rule 12.02. A limited appearance is an appearance in which the defendant in a quasi in rem action is permitted to defend on the merits and submit to the court's jurisdiction only to the extent of the property seized. In the opinion of the Committee, limited appearances are inconsistent with the general philosophy of rule procedure requiring that all litigation be handled with dispatch. Limited appearances merely permit the defendant to litigate the same question more than once. 38 Minn.L.Rev. 676, 679; 51 Columbia L.Rev. 242. A majority of the state and federal courts considering the question have rejected the limited appearance. *Brignall v. Merkle*, 28 N.E.2d 311 (Ill.1940); *Cunningham v. Kansas City Ry.*, 56 P. 502 (Kan.1899); *State ex rel. Methodist Old Peoples' Home v. Crawford*, 80 P.2d 873 (Ore.1938); *Sands v. Lefcourt Realty Corp.*, 117 A.2d 365 (Del.1955); *Burg v. Winquist*, 124 N.Y.S.2d 133 (N.Y.Sup.Ct.1953); *U.S. v. Balanovski*, 131 F.Supp. 898 (S.D.N.Y.1955); *Anderson v. Benson*, 117 F.Supp. 765 (D.Neb.1753); *Grant v. Kellogg*, 3 F.R.D. 229 (1943); *Contra, Cheshire Nat'l v. Jaynes*, 112 N.E. 500 (Mass.1916); *McInnes v. McKay*, 141 A. 699 (Me.1928); *Miller Bros. Co. v. State*, 95 A.2d 286 (Md.1953); *Osborn v. White Eagle Oil Co.*, 355 P.2d 1041 (Okla.1960); *Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co.*, 285 F. 214 (6th Cir.1922); *McQuillan v. Nat'l Cash Register Co.*, 112 F.2d 877 (4th Cir.1940).

The only strong arguments that can be made in favor of limited appearances are: (1) an undue extension of state jurisdiction in personal claims through the fiction of asserting jurisdiction against property located within the state (2) the question of local prejudice or inconvenient forum for defendant. The matter of fictitious exercise of jurisdiction was resolved long ago when the United States Supreme

Court approved of quasi in rem jurisdiction in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (U.S.1877). With regard to local prejudice or an inconvenient forum the defendant may have the possibility of removal to a federal court on diversity jurisdiction in spite of his submission to the personal jurisdiction of the state court. Similarly, the defendant may move to dismiss on the basis of forum non conveniens after submitting to the personal jurisdiction of the court. The court in resolving the forum non conveniens question should decide the issue after personal jurisdiction has attached on the same grounds as would have been applicable were the action commenced by personal service within the state rather than by quasi in rem jurisdiction. The only factor that would distinguish the case from a typical forum non conveniens case is the security the plaintiff acquired to insure partial satisfaction of any resultant judgment, which security would be lost if the action were dismissed. The existence of security is merely a factor to be considered with all the other factors in determining whether or not to dismiss the action.

Under the last sentence of the amendment to Rule 4.04, a motion to dismiss which contests plaintiff's compliance with the statutory and rule requirements for quasi in rem jurisdiction may still be made without submitting to the personal jurisdiction of the court. Such a jurisdictional attack is not a defense going to the merits.

Advisory Committee Comments—1996 Amendments

Rule 4.04 is amended to conform the rule to its federal counterpart, in part. The new provision adopts verbatim the provisions for service of process outside the United States contained in the federal rules. This modification is appropriate because this subject is handled well by the federal rule and because it is advantageous to have the two rules similar. This is particularly valuable given the dearth of state-court authority on foreign service of process. Existing portions of the rule are renumbered for clarity.

Historical Notes

The order of the Minnesota Supreme Court [C6-84-2134] dated November 22, 1996, provides in part that the "(a) amendments shall apply to all actions pending on the effective date [January 1, 1997] and to those filed thereafter" and that "(b) the inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein".

Rule 4.07. Amendments

The court in its discretion and on such terms as it deems just may at any time allow any summons or other process or proof of service thereof to be amended, unless it clearly appears that substantial rights of the person against whom the process issued would be prejudiced thereby.

Adopted June 25, 1951, eff. Jan. 1, 1952. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

Rule 12.06. Motion to Strike

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party, or upon its own initiative at any time, the court may order any pleading not in compliance with Rule 11 stricken as sham and false, or may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Adopted June 25, 1951, eff. Jan. 1, 1952. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

Minnesota Statutes 2005, Table of Chapters

Table of contents for Chapter 543

543.22 Civil action summons notice; alternative dispute resolution process.

When a civil case is commenced against a party, the summons must include a statement that provides the opposing party with information about the alternative dispute resolution process as set forth in the Minnesota General Rules of Practice.

HIST: 1999 c 104 s 2

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Minnesota Statutes 2005, Table of Chapters

Table of contents for Chapter 548

548.22 Confession of judgment.

A judgment for money due or to become due, or to secure any person against a contingent liability on behalf of the defendant, or for both, may be entered in the district court by confession and without action, upon filing with the court administrator a statement, signed and verified by the defendant, authorizing the entry of judgment for a specified sum. If the judgment be for money due or to become due, the writing shall state concisely the facts out of which the debt arose, and show that the sum confessed is justly due or to become due. If the judgment be for the purpose of securing the plaintiff against a contingent liability, the writing shall state concisely the facts constituting the liability, and show that the sum confessed does not exceed the same. The court administrator shall enter judgment for the amount specified, as in other cases, and shall attach the judgment to the statement, which shall constitute the judgment roll. The judgment shall be final, and, unless special provision be made for a stay, execution may issue immediately.

HIST: (9413) RL s 4284; 1981 c 121 s 4; 1Sp1986 c 3 art 1 s 82

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Minnesota Statutes 2005, Table of Chapters

Table of contents for Chapter 548

548.09 Lien of judgment.

Subdivision 1. **Entry and docketing; survival of judgment.** Except as provided in section 548.091, every judgment requiring the payment of money shall be entered by the court administrator when ordered by the court and will be docketed by the court administrator upon the filing of an affidavit as provided in subdivision 2. Upon a transcript of the docket being filed with the court administrator in any other county, the court administrator shall also docket it. From the time of docketing the judgment is a lien, in the amount unpaid, upon all real property in the county then or thereafter owned by the judgment debtor, but it is not a lien upon registered land unless it is also recorded pursuant to sections 508.63 and 508A.63. The judgment survives, and the lien continues, for ten years after its entry. Child support judgments may be renewed pursuant to section 548.091.

Subd. 2. **Judgment creditor's affidavit.** No judgment, except for taxes, shall be docketed until the judgment creditor, or the creditor's agent or attorney, has filed with the court administrator an affidavit, stating the full name, occupation, place of residence, and post office address of the judgment debtor, to the best of affiant's information and belief. If the residence is within an incorporated place having more than 5,000 inhabitants, the street number of both the judgment debtor's place of residence and place of business, if the debtor has one, shall be stated.

Subd. 3. **Violations by court administrator.** If the court administrator violates this provision, neither the judgment nor the docketing is invalid, but the court administrator shall be liable to a person damaged by the violation in the sum of \$5.

HIST: (9400) RL s 4272; 1913 c 112 s 1; 1983 c 308 s 30; 1984 c 547 s 22,23; 1986 c 335 s 1; 1986 c 444; 1Sp1986 c 3 art 1 s 82; 1989 c 209 art 1 s 43; 1993 c 340 s 50; 1999 c 245 art 7 s 12; 2005 c 4 s 129

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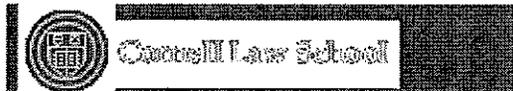
Table of contents for Chapter 550

550.01 Enforcement of judgment.

The party in whose favor a judgment is given, or the assignee of such judgment, may proceed to enforce the same, at any time within ten years after the entry thereof, in the manner provided by law.

HIST: (9416) RL s 4287

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United States Constitution

Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

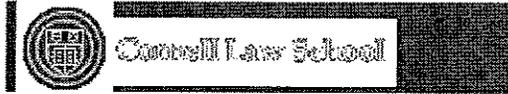
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

ADD-010



LII / Legal Information Institute

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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Minnesota Constitution

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ARTICLE I BILL OF RIGHTS

Section 1. OBJECT OF GOVERNMENT. Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Sec. 2. RIGHTS AND PRIVILEGES. No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Sec. 3. LIBERTY OF THE PRESS. The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Sec. 4. TRIAL BY JURY. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members. [Amended, November 8, 1988]

Sec. 5. NO EXCESSIVE BAIL OR UNUSUAL PUNISHMENTS. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Sec. 6. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense. [Amended, November 8, 1988]

Sec. 7. DUE PROCESS; PROSECUTIONS; DOUBLE JEOPARDY; SELF-INCRIMINATION; BAIL; HABEAS CORPUS. No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion.

Sec. 8. REDRESS OF INJURIES OR WRONGS. Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Sec. 9. TREASON DEFINED. Treason against the state consists only in levying war against the state, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two

witnesses to the same overt act or on confession in open court.

Sec. 10. UNREASONABLE SEARCHES AND SEIZURES PROHIBITED. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Sec. 11. ATTAINDERS, EX POST FACTO LAWS AND LAWS IMPAIRING CONTRACTS PROHIBITED. No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

Sec. 12. IMPRISONMENT FOR DEBT; PROPERTY EXEMPTION. No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

Sec. 13. PRIVATE PROPERTY FOR PUBLIC USE. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Sec. 14. MILITARY POWER SUBORDINATE. The military shall be subordinate to the civil power and no standing army shall be maintained in this state in times of peace.

Sec. 15. LANDS ALLODIAL; VOID AGRICULTURAL LEASES. All lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited. Leases and grants of agricultural lands for a longer period than 21 years reserving rent or service of any kind shall be void.

Sec. 16. FREEDOM OF CONSCIENCE; NO PREFERENCE TO BE GIVEN TO ANY RELIGIOUS ESTABLISHMENT OR MODE OF WORSHIP. The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Sec. 17. RELIGIOUS TESTS AND PROPERTY QUALIFICATIONS PROHIBITED. No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

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