

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.

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

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INTRODUCTION

The Smiths have never been residents of Minnesota or domiciled in Minnesota. This fact is completely undisputed. At best, Shamrock argues the Smiths “used” a residential address in Minnesota. Accordingly, Shamrock cannot satisfy Rule 4.04(a)(1)’s requirements mandating that in order for service by publication to confer jurisdiction on the lower court a defendant must be a “resident individual domiciliary.” Minn. R. Civ. P. 4.04(a)(1) (emphasis added). Reversal of the lower court’s decision is appropriate on this issue.

Significantly, Shamrock does not attempt to distinguish the *McBride v. Bitner* case. In *McBride*, the Minnesota Supreme Court held the common law additional requirement of diligence in attempting to locate a defendant does not supplant the Rule 4.04(a)(1) requirements that a defendant actually be a “resident individual domiciliary” for service by publication to be effective. Shamrock completely ignored this critical legal issue. This issue involves the interpretation and application of the Rules of Civil Procedure. Contrary to Shamrock’s argument, accordingly, the standard of review is *de novo*. The lower court’s ruling that service of process was sufficient should be reversed.

Shamrock’s Summons manifestly failed to comply with the clear mandate of Minn. Stat. § 543.22. This again involves a purely legal issue subject to *de novo* review. The facts are undisputed. Shamrock failed to provide the required statutory notice; consequently the Summons was defective. Because the underlying judgment Shamrock seeks to renew expired, the Smiths would be greatly prejudiced if an amendment to the

Summons were allowed at this late date. Accordingly, the lower court's order denying the Smiths' Motion to Dismiss for insufficiency of process should be reversed.

Shamrock incorrectly argues the Smiths waived any objection to the court's exercise of jurisdiction by bringing a Motion to Strike. This argument is devoid of merit for numerous reasons. For example, Rule 12.02 expressly provides that "[n]o defense or objection is waived by being joined with one or more defenses or objections in a . . . motion." Accordingly, the Smiths did not waive their jurisdictional arguments.

Lastly, Shamrock incorrectly claims the Smiths' Due Process claims were waived because they were not raised below. Shamrock's claim is patently false. The Smiths cited case law in support of their Due Process arguments in their Notices of Motion and Motions to Dismiss. Due Process issues were also raised briefly at oral argument. The lower court expressly addressed the Smiths' Due Process argument in its Order Denying Reconsideration. Under these circumstances, a claim of waiver cannot be maintained.

ARGUMENT

I. STANDARD OF REVIEW.

A. A *De Novo* Standard of Review is Applicable.

The construction of a court rule and the determination of whether service of process is proper are questions of law, which this Court reviews *de novo*. See *Stoebe v. Merastar Ins. Co.*, 554 N.W.2d 733, 735 (Minn. 1996) (examining rule of civil procedure *de novo*); *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (legal questions reviewed *de novo*); *Hoffman v. Limas*, CX-99-455,

1999 WL 1999 WL 486975, at *1 (Minn. Ct. App. July, 13, 1999) (applying *de novo* review to determine whether service was proper under Rule 4.04) *citing McBride v. Bitner*, 310 N.W.2d 558, 561-63 (Minn. 1981); *Little Wagon Co. v. Welander*, No. C3-96-1898, 1997 WL 104575 (Minn. Ct. App. Mar. 11, 1997) (holding determination of whether service of process is valid under Rule 4.04 is a question of law). *See also Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. Ct. App. 2000) (service of process reviewed *de novo*), *review denied* (Minn. Jan. 26, 2001).

Similarly, the question of whether personal jurisdiction exists is a question of law, which is reviewed *de novo*. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000); *V.H. v. Estate of Birnbaum*, 543 N.W.2d 649, 653 (Minn. 1996). This is important because proper service of process is an integral component of personal jurisdiction. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. Ct. App. 2003).¹

¹ Minnesota courts apply a 5-factor test to determine whether sufficient minimum contacts exists supporting personal jurisdiction. These five (5) factors require a determination and weighing of facts. However, personal jurisdiction remains a legal issue reviewed on a *de novo* basis. Although the Smiths are not raising minimum contacts as an issue in deciding the exercise of personal jurisdiction over them, personal jurisdiction issues and service of process issues remain subject to a *de novo* standard of review even if they implicate a determination of fact issues. *See, e.g., Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 569-70 (Minn. 2004).

B. A Clearly Erroneous Standard of Review Does Not Apply to Service of Process Issues.

The authorities cited by Shamrock for the proposition that service of process is determined pursuant to a clearly erroneous standard are inapposite. Nonetheless, the Smiths satisfy that standard as well.

Rule 52.01 cited by Shamrock is inapposite because it is only applicable to (1) “actions tried upon the facts without a jury” and (2) cases involving “interlocutory injunctions.” Minn. R. Civ. P. 52.01 (emphasis added). However the procedural posture of the present case on appeal from denial of a Rule 12 motion does not fit the limited scope and applicability of Rule 52.01.

Fletcher v. St. Paul Pioneer Press cited by Shamrock is likewise inapposite and distinguishable. The *Fletcher* case involved a bench trial of discrimination claims in an employment matter which did not implicate service of process issues. 589 N.W.2d 96, 101. Moreover, the *Fletcher* court based its decision on testimony of witnesses at trial. *Id.* at 102. In the present case, the motion was submitted on the papers without any cross-examination of witnesses that could have impacted credibility determinations.

Shamrock’s authorities cited as support for the standard of review regarding the determination of whether Shamrock was diligent in attempting to locate the Smiths for service of process are similarly inapposite and distinguishable. Shamrock cites two unpublished decisions and one published decision in support of its assertion that a clearly erroneous standard of review is applicable.

The *Duresky v. Hanson* case cited by Shamrock actually supports the Smith's position that Shamrock did not act diligently. 329 N.W.2d 44, 49 (Minn. 1983). It holds that when a plaintiff fails to commence a search to locate a defendant for purposes of service of process until "shortly prior to the expiration of the limitations period, this is a relevant evidence bearing on the issue of whether plaintiffs' search for defendant was "diligent." *Id.* However, the issue of "diligence" discussed in the *Duresky* was an issue controlled by a statute that is not at issue in the present case. Therefore the *Duresky* case is distinguishable on its face and does not control the standard of review.

C. The Unpublished Decisions Cited by Shamrock are Inapposite.

The *Little Wagon* case cited by Shamrock is distinguishable on its face. It holds that "[t]he determination of whether service of process is valid is a question of law" and therefore subject to a *de novo* review." 1997 WL 104575 at *2 and *1 (applying a "weight of the evidence" standard). Any references in the case to the "clearly erroneous" standard are inapplicable to the present case because the court in the *Little Wagon* case received testimony and was obligated to make findings pursuant to Rule 52.01. *Id.* at *1.

The unpublished *Mowers* decision relied upon by Shamrock mistakenly applied a *clearly erroneous* standard of review, but did so improperly based on the *Duresky* and *Fletcher* cases which are clearly distinguishable on their face as discussed above.

D. The Smiths Satisfy Both a *De Novo* and a Clearly Erroneous Standard of Review.

Ultimately, however, the Smiths satisfy both a *de novo* and a clearly erroneous standard of review based in part on Shamrock's:

1. Conducting results oriented pinpoint Accurint database searches for the Smiths exclusively in Minnesota and at the 1520 Hunter Drive address and turning a blind eye towards several documents it possessed listing the last known business and residential addresses for the Smiths in Virginia and Washington D.C. (APP-129 to APP-134, RA70, APP-108 to APP-113);
2. Waiting more than nine years and ten months (*i.e.*, just 49 days before the underlying judgment was set to expire) to initiate attempts to serve process in a case allegedly involving more than \$1.2 million dollars (APP-125);
3. Exclusive reliance only on Accurint database reports stating they “should not be relied upon as definitively accurate” and “should be independently verified” prior to reliance being placed upon them (APP-129 to APP-134);
4. Arguing the Smiths “used” the 1520 Hunter Drive address which Shamrock knew was the residence of Richard Burtness and the registered business address of Dakota Turkey Farms, Limited Partnership, as opposed to claiming the Smiths actually lived at that address (RA46, RA70, APP-108 to APP-113); and
5. Failing to call the Smiths' attorney who spoke with a Shamrock representative, Mary Dreier, who undeniably handled issues relating to the underlying judgment on behalf of Shamrock and irrefutably continued to work for Shamrock well beyond the time period Shamrock claims she was separated from employment (APP-238 to APP-242, APP-246 to APP-249, APP-255 to APP-257, APP-120).

II. SERVICE BY PUBLICATION WAS INVALID.

A. Shamrock Fails to Satisfy the Requirements of Rule 4.04, Among Other Reasons, Because the Smiths Were Neither Residents Nor Domiciliaries of Minnesota.

Service on the Smiths via publication was invalid to confer personal jurisdiction because the Smiths were neither *residents* of Minnesota nor *domiciliaries* of Minnesota.

The heart of the problem appears to be the mistaken legal standard advocated by Shamrock. On page 11 of its responsive brief, Shamrock incorrectly advocates there are only two (2) requirements for valid service by publication: (1) a diligent search to determine the missing defendant's whereabouts; and (2) filing an affidavit that complies with Minn. R. Civ. P. 4.04(a).

This standard set forth by Shamrock and adopted by the lower court omits at least three (3) critical elements: in order for jurisdiction under Rule 4.04(a)(1) to be conferred to the court, a defendant must be both (1) a *resident* of Minnesota and (2) a *domiciliary* of Minnesota, and (3) the defendant must either remain concealed within the state or have departed from the state with intent to defraud creditors or evade service of process. Minn. R. Civ. P. 4.04(a)(1); *see Mowers v. LeCuyer*, C6-01-1250, 2002 WL 47060 at *4 (Minn. Ct. App. Jan. 15, 2002) (explaining that these are "essential jurisdictional facts").²

McBride v. Bitner clearly explains the error of proceeding under Shamrock's mistaken view that a diligent search and filing a Rule 4.04 affidavit are the only requirements for obtaining proper service of process via publication. 310 N.W.2d at 562. Shamrock ignored this case in its responsive brief. *McBride v. Bitner* stands for the proposition that the common law requirement of diligence in attempting to locate the defendants for personal service does not supplant the jurisdictional requirement that the defendants must actually be residents and domiciliaries of Minnesota. *Id.*

² Prior to 1996, Rule 4.04 required only that the defendant be a "resident." However, after the 1996 amendment, Rule 4.04(a)(1) requires that a defendant be both a "resident" and a "domiciliary" of Minnesota in order for service by publication to confer jurisdiction upon the court. Therefore, both of these elements must be satisfied in order to comply with the plain language of Rule 4.04(a)(1).

Rule 4.04(a)(1) itself provides in clear and unmistakable language that these essential jurisdictional facts must exist to confer jurisdiction. Nothing in the Rule obviates the need for these essential jurisdictional facts to exist. The language of Rule 4.04 does not provide that a Rule 4.04 affidavit takes the place of, or otherwise supersedes, the requirement of establishing the essential jurisdictional facts regarding a defendant's status as a current or former resident and domiciliary of Minnesota. The Rule provides that the summons may be published only after one of the "cases enumerated herein" (*i.e.*, the requirements of Rule 4.04(a)(1)) is satisfied and an appropriate affidavit is filed. Minn. R. Civ. P. 4.04(A).

A close reading of the lower court's order denying the Smiths' motions to dismiss and request for reconsideration demonstrates the lower court's findings of fact cannot support a conclusion regarding the issue of whether the Smiths were *residents* of Minnesota or were *domiciliaries* of Minnesota. (APP-301, APP-307.) The closest the lower court came to making relevant findings of fact were as follows:

10. A search of Accurint^[3] revealed that both Smith Defendants had used the address of 1520 Hunter Drive in Wayzata, Minnesota from April 1996 until October 2000. This is also the registered address for service of process of Dakota Turkey Farms.

³ The Smiths object to the use of, and reliance on, the Accurint database reports. On their face, the Accurint reports relied on by the lower court state they are "generally not free from defect," *unreliable* and should have been "independently verified." (*See, e.g.*, APP-130.) Moreover, they constitute classic hearsay which was objected to by the Smiths below. (APP-218.) *See, e.g., Meany v. Newell*, 352 N.W.2d 779, 783 (Minn. Ct. App. 1984) (district court and appellate court could not consider unsworn statements submitted by plaintiff to oppose summary judgment motion), *rev'd on other grounds*, 367 N.W.2d 472 (Minn. 1985).

11. 1520 Hunter Drive is a residential house, and neither the Smith Defendants nor anyone associated with Dakota Turkey Farms is located there.

(APP-302, emphasis added.) Shamrock did not offer any additional evidence satisfying the jurisdictional facts required by Rule 4.04(a)(1).⁴

At best, these findings of fact merely demonstrate the Smiths, as limited partners of Dakota Turkey Farms, Limited Partnership, “used” the 1520 Hunter Drive address for business purposes. They do not establish the Smiths were *residents* of Minnesota or were *domiciliaries* of Minnesota. The Smiths provided un rebutted affidavit testimony neither had been in Minnesota for over ten (10) years. (APP-001, APP-004.) Significantly, these facts also do not support a conclusion that the Smiths remained concealed within the state or departed from the state with intent to defraud creditors or evade service of process.

The unopposed factual record submitted by the Smiths demonstrates the following: (1) Affidavits from Randall Smith, Denison Smith, Richard K. Burtness and Arnold Westerman conclude based upon personal knowledge that the Smiths never resided in Minnesota; and (2) Affidavits from Erica Pierson, Donna Trimble and Edwin C. Hodges reflect numerous database reports showing the current residential addresses of the Smiths in states other than Minnesota. Most notably, the Accurint database reports produced to the lower court by the Smiths demonstrate Accurint reports showing the current residential addresses for the Smiths when historic address information possessed

⁴ Property tax records produced by Shamrock demonstrate the property at 1520 Hunter Drive is homesteaded by Douglas and Judith Hedberg who purchased the house in January of 1998. (RA61.) This information further undermines any conclusion the Smiths resided at this address from 1996 to 2000.

by Shamrock was used to formulate a query. (APP-259 to APP-275.) Shamrock does not dispute it possessed this historical address information. (RA70, APP-108 to APP-111; *see also* Smiths' Opening Br. at 11, ¶¶ 16-17.) Rather, Shamrock argues it was not required to use this last known address information when claiming to "*diligently*" locate the Smiths for purposes of service of process.

B. Shamrock was Not Diligent in Attempting to Locate the Smiths for Service of Process.

Shamrock does not directly dispute the Smiths' position that the common law additional requirement of diligence in attempting to locate defendants for service of process does not supplant Rule 4.04 requiring essential jurisdictional facts mandating that a defendant be a *resident*, a *domiciliary* and attempting to defraud or avoid creditors. Because those essential jurisdictional facts are unsupportable on the record before this Court, it is unnecessary to engage in any analysis of whether or not Shamrock was diligent. However, even if this Court addresses the issue of diligence, the record reveals Shamrock failed to demonstrate the level of diligence required under the circumstances—which involve Shamrock's claim that over \$1.2 million is still owed to it. (APP-016.)

Despite asserting over \$1.2 million was still owed to it, Shamrock failed to initiate any search to locate the Smiths for personal service until March of 2006. (APP-15.) The underlying judgment was set to expire ten (10) years after it was placed on the judgment roll—on or about April 18, 1996. (APP-016.) **This delay in initiating any efforts to locate the Smiths demonstrates a lack of diligence overshadowing every other effort allegedly taken by Shamrock.** In light of the amount at issue, such delay is

unreasonable and lacks diligence as a matter of law. *Cf. Duresky Hanson*, 329 N.W.2d 44, 49 (Minn. 1983).

Appellant Denison Smith was easily located when Shamrock retained a private investigator in “mid-March.” (APP-127.) Denison Smith was then personally served with Shamrock’s defective Summons and accompanying Complaint on March 18, 2006 (RA64). However, if Shamrock had initiated this process approximately two (2) weeks earlier, then there would have been time to serve and receive responses to an initial set of written discovery seeking the current address of Randall Smith for purposes of personal service of process. *See* Minn. R. Civ. P. 33.01(b) (providing responses to interrogatories due 45 days after service if served at the same time as complaint). Notably, by court order, Shamrock could have shortened the time necessary to receive Denison Smith’s current address information to several days if it had been diligent in pursuing its procedural rights to discovery. *Id.*

Shamrock’s manifest lack of diligence is further demonstrated by its inexcusable failure to use the historic address information in its own possession showing where the Smiths previously lived and worked. (*See* Smiths’ Opening Br. at 7, 11-12; APP-078; APP-106 to APP-107; APP-114; APP-208 to APP-209; RA70.) When this information was used by Edwin C. Hodges in formulating appropriate queries submitted to the Accurant database relied upon by Shamrock, the current residential addresses for the Smiths were readily available. (*See* Edwin C. Hodges Aff., APP-259 to APP-262.)

Minnesota appellate courts hold as a matter of law that a plaintiff does not conduct a diligent search if the plaintiff possesses information indicating a defendant likely

resides out-of-state and does nothing to pursue that information before attempting to serve the defendant via publication. *Mercer v. Andersen*, 715 N.W.2d 114, 121 (Minn. Ct. App. 2006) (holding search for defendant was not diligent when no evidence presented that plaintiff attempted to follow up on information that defendant resided outside of Minnesota and instead relied on service by publication); *see also Doe v. Anderson*, C4-99-368, 1999 WL 619009 at *3 (Minn. Ct. App. Aug. 17, 1999) (holding diligent search not conducted for defendant in light of knowledge defendant moved to California, despite attorney retrieving medical records and searching local phone books, Department of Health records, and Department of Motor Vehicle records).

In this case, Shamrock inappropriately limited its search to Minnesota. (APP-125 to APP-126.) Indeed, Shamrock conducted searches using the Accurint database using a pinpoint search for Randall Smith only at 1520 Hunter Drive, Medina, MN. (Smiths' Opening Br. at 24.) Shamrock then relied on the *hearsay* results from its white-washed Accurint search reports despite warnings on the face of those reports indicating they may have "errors" in the data, that they are "generally not free from defect[s]," and that all data should be "independently verified." (*Id.*) Under these facts and the case law cited above, Shamrock's efforts to locate the Smiths were not diligent. The lower court's ruling in this regard should be reversed.

C. The Rule 4.04 Turner Affidavit did Not Satisfy the Requirements of Rule 4.04 and Should have been Stricken.

Shamrock chooses to side-step the issue of whether or not the Rule 4.04 Turner Affidavit should have been stricken. Indirectly, Shamrock argues the Rule 4.04 Turner Affidavit is sufficient to confer jurisdiction on the lower court so long as Mr. Turner made the affidavit in good faith. However, that is not the case. Rule 12.08 and 11.02 provide that the affidavit should have been stricken because it was not based upon an inquiry reasonable under the circumstances and did not set forth the equivocal basis upon which its factual assertions were based. Minn. R. Civ. P. 12.08; Minn. R. Civ. P. 11.02.

The Rule 4.04 Turner Affidavit was not based upon an inquiry that was reasonable on its face. It relied in principal part for its major conclusions on Accurint database reports that stated on their face that they were not reliable, may contain defects in data and should be independently verified before relying on them. (Smiths' Opening Br. at 31.) Moreover, the residential address Shamrock claims was "used" by the Smiths was listed in its Accurint report only as a "Possible Previous Address" for the Smiths. (APP-131, emphasis added.)

Shamrock turned a willfully blind eye on the documents and information in its possession demonstrating the Smiths lived in states other than Minnesota. Additionally, Shamrock's president and chief executive officer, James Stanton, either deliberately concealed, or perhaps Mr. Turner did not inquire of Mr. Stanton, who resided at 1520 Hunter Drive. However, the Affidavit of Richard K. Burtness demonstrates representatives of Shamrock had visited Mr. Burtness at his home located at 1520 Hunter

Drive and therefore implicitly knew and understood that house was a single-family residence for Mr. Burtness and not a shared residence for Mr. Burtness, Dension Smith, Randall Smith and all of their respective family members. (APP- 326, APP-327.)

Shamrock incorrectly argues that so long as the Rule 4.04 affidavit is made in “good faith,” then service by publication must be affirmed. However, the case of *Van Rhee v. Dysert*, 191 N.W. 53, 54 (1922) upon which Shamrock relies did not interpret Rule 4.04 because the modern Minnesota Rules of Civil Procedure would not be enacted for a number of decades following the court’s decision in that case. Further, the *Van Rhee* case bases its finding of “good faith” upon a “diligent” search for the defendants. *Id.* at 54. As argued above, Shamrock’s search was not diligent. Moreover, unlike Shamrock’s search which relied almost exclusively on hearsay database searches, the diligent search in *Van Rhee* relied upon numerous inquiries of people who were calculated to likely possess information regarding the defendant’s location. *Id.* Finally, the reliance on an affiant’s good faith alone in the *Van Rhee* case does not account for the requirement of Rule 4.04 mandating that in order for service by publication to confer jurisdiction, it must be predicated on the essential jurisdiction facts (not good faith belief) that a defendant is a resident and a domiciliary of Minnesota and is attempting either to evade service of process or defraud creditors. Minn. R. Civ. P 4.04; *McBride*, 310 N.W.2d at 562.

Because each of the factual assertions in the Rule 4.04 Turner Affidavit are demonstrably false, the affidavit fails of its essential purpose, should have been stricken from the record, and fails to confer jurisdiction upon the Court under Rule 4.04.

III. SHAMROCK'S DEFECTIVE SUMMONS REQUIRES REVERSAL.

Shamrock and the lower court agree Shamrock's Summons failed to contain the notice of alternative dispute resolution mandated by Minn. Stat. § 543.22. On appeal from undisputed facts requiring the interpretation and application of statutes and rules, this Court applies a *de novo* review. *Stoebe*, 554 N.W.2d at 735; *Frost-Benco Elec. Ass'n*, 358 N.W.2d at 642.

Shamrock argues its total failure to comply with Minn. Stat. § 543.22 results in a "minor defect" to its Summons, but provides no legal authority for its dogmatic assertion that Shamrock's violation of the statute is "minor." Notably, the exclusive topic of Minn. Stat. § 543.22 is the requirement that all summons "must include" the notice regarding alternative dispute resolution required by Minnesota Rules of General Practice—the same notice Shamrock failed to provide. (Minn. Stat. § 543.22, emphasis added; *see also* Minn. R. Gen. Prac. 114.01.) The Legislature does not impose single topic trifling statutes that should be ignored. The Legislature's use of the imperative word "must" *must* be given its generally accepted meaning. To ignore the Legislature's emphasis placed on this mandatory notice and accept Shamrock's argument that failure to provide a mandatory notice is a minor defect ignores not only the express direction of the Legislature, but also runs afoul of the Minnesota Supreme Court's Order dated December 2, 1993 mandating through Minn. R. Gen. Prac. 114.01 that "[a]ll civil cases are subject

to Alternative Dispute Resolution (ADR) processes[.]”⁵ See also Minn. R. Gen. Prac. 1.01 (“These rules shall apply in all courts of the State.”) (emphasis added).

Shamrock argues there is no basis for requiring ADR in an action attempting to renew a disputed judgment. Shamrock is mistaken. ADR is indisputably required in the action Shamrock attempted to initiate pursuant to Minn. R. Gen. Prac. 114.01.

An amendment to Shamrock’s defective Summons may have been procedurally appropriate under Minn. R. Civ. P. 4.07 if the underlying judgment Shamrock sought to enforce had not statutorily expired. However, because an amendment to Shamrock’s defective Summons at this late date would revive an otherwise statutorily expired judgment (see Minn. Stat. §§ 541.04, 548.09, 550.01; see also APP-317 to APP-320), the substantial rights of the Smiths would be prejudiced by such an amendment, and therefore, such an amendment is not permissible under Rule 4.07.

Shamrock argues the statutory ADR notice required in a summons may be unconstitutional, but cites no authoritative bases for this Court to so hold. Shamrock has not pursued its claim of alleged unconstitutionality with any degree of seriousness. Nor could it. Significantly, Shamrock failed to notify the Attorney General it is claiming Minn. Stat. § 543.22 is unconstitutional as required by Minn. R. Civ. P. 24. Because Minn. Stat. § 543.22 is mandatory and because it is constitutional, its provisions must be followed. The ADR notice should have been in Shamrock’s Summons. It was not. Therefore, Shamrock’s Summons is fatally defective as a matter of law.

⁵ Limited exceptions exist which are not applicable to the present case.

IV. THE SMITHS DID NOT WAIVE THEIR JURISDICTIONAL ARGUMENTS.

Shamrock's desperation to avoid dismissal of its claims is manifest in its futile and utterly unsupportable argument that the Smiths waived their personal jurisdiction defenses. Shamrock's argument in this regard is wholly unsupportable for the following eight (8) reasons:

1. In the present case, the motion to strike was directed at the Turner Affidavit which was a jurisdictional prerequisite under Rule 4.04(a). It follows, then, that the motion to strike was aimed at jurisdictional issues and did not invoke the Court's substantive jurisdiction.

2. Pursuant to Rule 12.02 "[n]o defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion." *See* Minn. R. Civ. P. 12.02. The subsequent (or simultaneous) assertion of affirmative claims or the initiation of discovery does not waive defenses properly asserted—including jurisdictional defenses. 1 MINNESOTA PRACTICE SERIES: CIVIL RULES ANNOTATED § 12.08 at 347 (4th ed. West 2002) (citing *Johnson Bros. Corp. v. Arrowhead Co.*, 459 N.W.2d 160, 162-63 (Minn. Ct. App. 1990)).

3. Rule 12.07 entitled "Consolidation of Defenses in Motion" specifically provides the Smiths may join "other motions then available to the party" so that multiple motions may be brought together as a matter of efficiency for the Court and the parties. *See* Minn. R. Civ. P. 12.07. Professors Herr and Haydock explain: "Rule 12.07 permits a party to raise any number of Rule 12 defenses in a single motion, and provides that by

doing so a party will not be waiving any objections.” 1 MINNESOTA PRACTICE SERIES: CIVIL RULES ANNOTATED § 12.16 at 344 (emphasis added).

4. Under Rule 12.08, if the Smith Defendants had not raised the motion to strike, then it would have been waived. *See* Minn. R. Civ. P. 12.08.

Defenses omitted from a Rule 12 motion are waived, and may not be raised at any time. There is no provision in the rules for permitting a party to raise a defense once it is waived by operation of Rule 12.08, and courts are not permitted to allow the amendment of a pleading or motion to add an omitted defense.

1 MINNESOTA PRACTICE SERIES: CIVIL RULES ANNOTATED § 12.08 at 347.

5. Rule 8.05 further undermines Shamrock’s argument. “Under the modern rules of civil procedure . . . a party is allowed to ‘state as many separate claims or defenses as the party has regardless of consistency.’” *Johnson Bros. Corp.*, 459 N.W.2d at 162 (quoting Minn. R. Civ. P. 8.05) (emphasis added).

6. To the extent waiver could ever be a possibility, it would be under circumstances far different from those in the present case where the Smiths raised defenses simultaneously. *See, e.g., Patterson v. Wu*, 608 N.W.2d 863, 864 and 869 (Minn. 2000) (holding a “defendant waives the defense of insufficient service of process, even though asserted by answer, by affirmatively invoking the jurisdiction of the district court to obtain partial summary judgment without earlier or simultaneously moving to dismiss the complaint for insufficient service of process.”) (emphasis added).

7. In both Notices of Motion and Motions, as well as in the briefs supporting those motions, the Smiths repeatedly stated it was not their intention to invoke the Court's substantive jurisdiction.

8. Shamrock's citation to *Kaiser v. Butchart*, 197 Minn. 28, 265 N.W.826 (Minn. 1936) is inapposite; it is clearly distinguishable. Rule 12 of the Minnesota Rules of Civil Procedure did not even exist until over fifteen (15) years after the *Kaiser* case was decided. Additionally, in the *Kaiser* case, the defendant filed an answer, filed a motion seeking to make the plaintiff file an amend complaint, and made a general appearance. *Id.* at 828. The defendant also filed a motion to strike plaintiff's complaint as opposed to a jurisdictional affidavit containing false information as in this case. *Id.* at 827. In this case, because the motion to strike the Rule 4.04 Turner Affidavit was done for the "sole purpose of attacking the jurisdiction," the *Kaiser* case actually supports the Smiths' position rather than Shamrock's position. *Id.* at 829.

V. THE SMITHS' DUE PROCESS ARGUMENT WAS MADE TO THE LOWER COURT AND, THEREFORE, WAS NOT WAIVED.

Shamrock makes a final, last ditch effort to side-step the dismissal of its claims against the Smiths by falsely alleging the Smiths failed to raise their Due Process argument before the lower court. Nothing, however, could be further from the truth. The Smiths have raised their Due Process argument at each step of the proceedings.

The Smiths filed separate Notices of Motion and Motions to Dismiss. Each of those pleadings cited to *Electro-Measure, Inc. v. Ewald Enterprises, Inc.*, 398 N.W.2d 85, 88 (Minn. Ct. App. 1986) and *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 314-15, 70 S.Ct. 652, 657-58 (1950) in support of the Smiths' contention that their Due Process rights were violated. The Due Process issues were raised briefly at oral argument as well. Thereafter, the Smiths further raised the Due Process issue in an August 9, 2006 letter to the lower court specifically asking the lower court to rule on this important issue as well as in paragraph 16 of the Smiths' affirmative defenses to Plaintiff's Complaint. The lower court responded in its Order Denying the Smiths' Request for a Motion to Reconsider—but provided no analysis. (APP-308.)

Shamrock's argument that this issue was waived is mistaken. However, because Shamrock, failed to substantively address the Smith's argument in its responsive brief, this Court should view the Smiths' appeal as unopposed and reverse the lower court.

CONCLUSION

Based upon the foregoing, the Smiths respectfully request their appeal be granted in its entirety.

Respectfully submitted,



Dated: December 26, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify this Appellants' Reply 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 5,261 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.

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