

NO. A06-1647

State of Minnesota
In Supreme Court

Randall N. Smith,

Appellant,

v.

Shamrock Development, Inc., a Minnesota corporation,

Respondent.

APPELLANT RANDALL N. SMITH'S BRIEF AND ADDENDUM
IN SUPPORT OF HIS APPEAL

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ISSUE PRESENTED

1. Whether it is sufficient to satisfy Minn. R. Civ. P. 4.04 to merely allege jurisdictional facts or whether the jurisdictional facts must actually exist.

ANSWER: No, the jurisdictional facts must actually exist.

District Court held: Allegations of jurisdictional facts were sufficient to confer jurisdiction.

Court of Appeals held: Allegations of jurisdictional facts were sufficient to confer jurisdiction.

Apposite Authority: Minn. R. Civ. P. 4.04.

Minn. Stat. § 645.16.

D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N.W. 357 (Minn. 1908).

2. Whether due process was satisfied in a case seeking *in personam* jurisdiction by serving process by publication in a local Minnesota newspaper where the defendant never resided in, and was never domiciled in, the State of Minnesota .

ANSWER: No, due process requires more.

District Court held: Allegations of jurisdictional facts were sufficient to confer jurisdiction.

Court of Appeals held: Allegations of jurisdictional facts were sufficient to confer jurisdiction.

Apposite Authority: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950).

McDonald v. Mabee, 243 U.S. 90, 37 S. Ct. 343 (1917).

U.S. Const., amend. XIV, § 1.

U.S. Const., amend. V

Minn. Const., art. I, § 7.

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 Smith, 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, 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 Randall Smith.

A. Procedural Posture at the Trial Court Level.

The trial court judge, the Honorable William R. Howard of the Fourth Judicial District, denied Randall Smith's Motion to Dismiss. He held Shamrock's service of process complied with applicable rules and standards and, therefore, service of process had been sufficient.

However, Shamrock failed to comply with the fundamental requirements of initiating a civil lawsuit. Fatal defects in the service of the summons require dismissal of Shamrock's action against Randall Smith. Shamrock's attempted service of process via publication was insufficient to confer jurisdiction over Randall Smith. For example, Shamrock failed to establish the jurisdictional prerequisites necessary for service of process by publication to be allowed under Minn. R. Civ. P. 4.04(a)—namely, that

Randall Smith had at some time been “a resident individual domiciliary” of the State of Minnesota, and either attempted to avoid service or intended to defraud creditors.

In a desperate effort to serve its summons prior to the 1996 judgment’s statutory expiration, Shamrock caused an affidavit to be filed as required by Minn. R. Civ. P 4.04. The affidavit incorrectly alleged that: (1) Randall Smith had been a “resident individual domiciliary” of Minnesota; and (2) Randall Smith had 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, Randall Smith has never been a resident of, or domiciled in, Minnesota. Randall Smith has not stepped foot in Minnesota for over ten (10) years. Nor did he attempt to avoid service of process or intend to defraud creditors.

Shamrock turned a blind eye to the documents and information in its possession regarding the last known residence and business address of Randall Smith in Washington, D.C. and Virginia respectively, as well as the critical information in its possession that Randall Smith did not reside (and has never resided) at 1520 Hunter Drive, Medina, Minnesota. Shamrock’s owner, Jim Stanton, concealed from his attorneys the fact he knew former co-judgment debtor Richard K. Burtness (“Burtness”) resided at that address and allowed a last-minute Rule 4.04 affidavit to be filed alleging false jurisdictional facts just days before the judgment was set to expire in an attempt to renew a judgment Shamrock claims now exceeds \$1.2 million.

The plain language of Rule 4.04(a)(1) provides that service by publication “shall be sufficient to confer jurisdiction” if “the defendant is a resident individual domiciliary, having departed from the state with intent to defraud creditors, or to avoid service [of

process], or remains concealed therein with the like intent.” Rule 4.04(a)’s requirement of an affidavit is a separate obligation requiring only that “an affidavit of the plaintiff or the plaintiff’s attorney “be filed with the court “stat[ing] the existence of one of the enumerated cases, and that the affiant believes the defendant is not a resident of the state or cannot be found therein[.]” The trial court and Court of Appeals conflated these separate requirements contrary to the clear language of Rule 4.04(a)(1) providing that: (1) in order for jurisdiction to exist, these facts must actually exist, and (2) the subsequent requirement that an affidavit must merely “state” that the affiant “believes” such facts exist.

Randall Smith’s Notice of Motion and Motion to Dismiss Plaintiff’s Complaint included an argument that his due process rights had been violated because, as a resident of the State of California—who had never resided in Minnesota, publication of Shamrock’s Summons in Finance in Commerce was not “reasonably calculated” under all of the circumstances, to apprise Randall Smith of the pendency of Shamrock’s action. The trial court’s August 2, 2006 Findings of Fact, Conclusions of Law, Order for Judgment & Memorandum denying Randall Smith’s Motion to Dismiss and entering judgment against him did not directly address Randall Smith’s due process arguments.

Randall Smith requested clarification of that Order and filed a two-page request to file a motion for reconsideration pursuant to Minn. R. Gen. Prac. 115.11. The trial court judge issued an “Order Denying Motion to Reconsider” dated August 30, 2006 clarifying that he intended to enter judgment against Randall Smith and explained that because the court concluded service of process by publication was proper under Minn. R. Civ. P.

4.04, due process had been satisfied. In subsequent correspondence to the parties dated September 29, 2006, the trial court acknowledged “it is clear from arguments presented that significant issues remain concerning the parties subject to the judgment and any possible contribution and/or satisfaction of the judgment.”

B. Procedural Posture at the Appellate Level.

On September 1, 2006, Randall Smith filed an interlocutory appeal of the trial court’s order denying his Motion to Dismiss based upon lack of personal jurisdiction (“Appeal No. A06-1647”). On September 26, 2006, after the trial court clarified that it had entered judgment *sua sponte* against Randall Smith, he filed a second appeal addressing the issue of whether the lower court correctly entered a final judgment against him (“Appeal No. A06-1813”).

On November 7, 2006, the Court of Appeals, by Chief Judge Toussaint, dismissed Appeal No. A06-1813 as untimely, finding that a final judgment could not have been entered by the trial court because significant issues remained concerning satisfaction of the underlying judgment. The Court of Appeals further directed that Appeal A06-1647 “is limited to the August 3, 2006 order denying appellants’ motion to dismiss for lack of jurisdiction based upon a defective summons and insufficient service of process.” The Court of Appeals further instructed that Randall Smith may obtain review of the lower court’s partial judgment regarding whether or not a general civil judgment can be renewed “in a proper appeal from a final judgment.”

On August 21, 2007, the Court of Appeals filed its opinion in A06-1647. The appeal was considered and decided by Presiding Judge Stoneburner, Judge Kalitowski and Judge Dietzen who wrote the opinion for the panel.

Contrary to the November 7, 2006 Order signed by Chief Judge Toussaint, the Court of Appeals panel issuing the opinion in this appeal addressed the issue of whether or not a general civil judgment could be renewed—without allowing any briefing from any of the parties—and concluded in section I(A) of its analysis, “that a party may bring an action to renew a judgment[.]”¹

The Court of Appeals opinion in Appeal A06-1647 also addressed issues regarding whether Shamrock had complied with the requirements of service of process by publication under Minn. R. Civ. P. 4.04. It determined “the district court did not clearly err in determining that Shamrock complied with rules regarding service of process.” However, the Court of Appeals never addressed the critical issue of whether the lower court had conflated the separate requirement that the requisite jurisdictional facts actually exist with whether it was sufficient for an affidavit to merely allege the existence of such jurisdictional facts. Further, it appears the Court of Appeals mistakenly viewed the appellate issue as whether or not a Rule 4.04 Affidavit signed by a plaintiff's attorney must be made in good faith by the affiant, as opposed to whether or not the party seeking

¹ This Court denied Appellant Denison E. Smith's petition for review on this critical issue. However, in light of the Court of Appeal's denying any further appeal of this issue in its November 7, 2006 Order, it is understood that this issue is still subject to further review “in a proper appeal from a final judgment” as stated in the Court of Appeal's November 7, 2006 Order.

to serve a summons via publication can withhold from the affiant information in its possession which contradicts allegations made by its attorney (the affiant) in the Rule 4.04 Affidavit.

The Court of Appeals' opinion in Appeal A06-1647 did not directly address Randall Smith's argument that his due process rights had been violated under both the state and federal constitutions. However, the Court of Appeal's opinion indirectly addressed this issue by concluding allegations in Shamrock's Rule 4.04 Affidavit were sufficient to confer jurisdiction so long as they were made in good faith by the affiant. Notably absent from the Court of Appeal's opinion was any analysis of whether public policy is best served by allowing parties to conceal and/or ignore critical information regarding the non-existence of jurisdictional facts, wait until several days before the statute of limitations is about to expire, and then retain legal counsel to file a Rule 4.04 Affidavit and publish the summons in a local Minnesota paper.

C. Relief Requested By Randall Smith.

In light of the lower court's failure to apply Rule 4.04's two separate requirements mandating both the existence of the essential jurisdictional facts and a good faith Rule 4.04 affidavit, Shamrock's claims against Randall Smith should be dismissed because service of process was insufficient to confer personal jurisdiction. Alternatively, Shamrock's claims against Randall Smith should be dismissed because Shamrock's chosen method of attempting to serve process by publication in a local paper did not

provide him with the process that was due. Randall Smith's status as a non-resident of Minnesota dictates this result both as a matter of law and sound policy.

STATEMENT OF FACTS

1. Randall Smith invested in one or more entities that leased farming equipment from Farm Credit Leasing Services Corporation ("Farm Credit Leasing") starting in approximately 1987. (App-25 to App-29.)

2. In connection with those investments, Randall Smith became a guarantor in favor of Farm Credit Leasing for certain debts and/or obligations. (App-25 to App-31.)

3. Farm Credit Leasing and Randall Smith (and others) entered into an amended agreement pursuant to which outstanding amounts allegedly owed to Farm Credit Leasing would be paid (App-30 to App-31.) Randall Smith's name appears on a 1993 "Stipulation for Entry of Judgment" as against Dakota Turkey Farms, Burtness, Samuelson, D. Smith, R. Smith, and Hendrickson. (App-32.) 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-32.) The stipulation failed to address whether notice of the filing of the "Stipulation for Entry of Judgment" was (or was not) required. However, Randall Smith did not explicitly, knowingly, or voluntarily waive such notice. (*Id.*)

4. A document labeled "Confession of Judgment" was attached to the "Stipulation for Entry of Judgment" and was signed by Randall Smith on May 18, 1993, but not verified as required to be effective under Minn. Stat. § 548.22. (App-33.) The

Confession of Judgment also was not for a “specified sum” as required under section 548.22. (*Id.*) (*See also* App-151.) Farm Credit Leasing’s attorney, Jon P. Parrington, signed the “Stipulation for Entry of Judgment” on April 3, 1996 and it was filed with the court the same day. (App-34.)

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 Randall N. Smith and Richard K. Burtness in or about April of 1996. (App-107 to App-112.)

6. The Affidavit of Identification of Randall N. Smith dated March 18, 1996 and filed April 5, 1996 states the “place of residence of the judgment debtor is 3239 Ellicot Street N.W., Washington, D.C. 20008.” (App-109.) The Affidavit of Identification of Randall N. Smith further states that the “[a]ddress of [Randall N. Smith’s] place of business is 2201 Wilson Boulevard, 5th Floor, Arlington Virginia 22201.” (App-110.)

7. The Amended Affidavit of Identification of Richard K. Burtness dated and filed April 18, 1996 states the “place of residence of the judgment debtor is 1520 Hunter Drive, Medina, MN 55341.” (App-111.) The Amended Affidavit of Identification of Richard K. Burtness further states that the “[a]ddress of place of business [of Burtness] is 1520 Hunter Drive, Medina, MN 55341.” (App-112.)

8. Shamrock and its legal counsel possessed these Affidavits of Identification for Randall Smith 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-113.) Shamrock's current attorney admits he possessed these Affidavits of Identification. (App-139.)

9. 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-36 to App-37.) 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-37.) 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-37), a Judgment Roll was not docketed until over two (2) weeks later on April 18, 1996 for \$825,620.79. (App-13.) 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-36.)

10. The Judgment Roll reflects that Farm Credit Leasing assigned the resulting judgment almost immediately to David Friedges on May 6, 1996. (App-14; App-121.) David Friedges assigned the judgment to Shamrock the same day. (App-14 to App-15.)

11. The Judgment Roll further reflects the judgment was "partially satisfied" on April 28, 1997, but does not reflect who made the payment. The Judgment Roll also reflects that the judgment was satisfied "As To: Richard K. Burtness—Only" as of June 9, 1997. (App-14.) Significantly, however, the amount of such satisfaction is not recorded. (App-14.)

12. Unrebutted affidavit testimony reflects the underlying judgment from 1996 had been paid in full by Burtness. Burtness explained:

I understood this transaction provided substantial value to Shamrock that was far in excess of the April 16, 1996 judgment that had been entered against me and the Smiths. The value of what was transferred to Shamrock by me was measured in the millions of dollars at the time the transaction occurred in or about 1996 or 1997. * * * An important part of this transaction with Shamrock was that all of the judgment debtors would be released from the judgment. I understood that I owed fiduciary duties to my partners and getting them released from the judgment was part of my satisfying those duties.

(App-287, emphasis added.) (See also App-157, Minnesota Court of Appeals' decision reflecting Burtness paid-off "\$2.8 million in debt" during pertinent time period; App-216; App-224 to App-225; App-248; App-165, Second Affidavit of Arnold Westerman at Ex. 1, explaining: "Stanton originally agreed to release D + R Smith but did not.")

13. In or about 2000, Randall Smith retained a lawyer, Arnold Westerman ("Westerman"), in Washington D.C. to contact Shamrock in an attempt to resolve issues regarding the 1996 judgment. (App-161 to App-164; App-98.) Westerman contacted and spoke with one or more representatives of Shamrock on at least three (3) separate occasions. (App-161 to App-164; App-99.) Shamrock informed Westerman that Shamrock would "look into the matter and get back to [him]." (App-99; App-162.) But Shamrock never responded to Westerman regarding the 1996 judgment or to determine the location of Randall Smith for purposes of serving him in the current action. (App-100.)

14. One of the representatives from Shamrock that Westerman spoke with was Mary Dreier. (App-161 to App-162.)

15. In connection with Shamrock's attempts to satisfy the underlying judgment, Shamrock's attorney, James M. Neilson, sent six (6) letters to Lieutenant Rodney Nelson of the Hennepin County Sherriff's Office concerning Shamrock's efforts to sell certain property of Richard K. Burtness at a sheriff's sale. The dates of these letters were as follows: May 7, 1996; May 13, 1996; May 15, 1996; May 17, 1996; May 24, 1996; and April 4, 1997. Each of these letters was "cc'd" to "Shamrock Development, Inc., Attn: Mary Dreier." (App-223, App-217; App-216; App-225; App-224; App-214.) (*See also* App-206 to App-210.)

16. Additionally, Shamrock's attorney also authored a letter to the Hennepin County Court Administrator on May 7, 1996 that was also "cc'd" to "Shamrock Development, Inc., Attn: Mary Dreier." (App-215.) The purpose of this May 7, 2006 correspondence was to file with the Court Administrator the assignments of judgment transferring the underlying judgment from Farm Credit Leasing Services Corporation to David N. Friedges and then to Shamrock. (App-215.)

17. Michael J. Kraling, the Chief Financial Officer of Shamrock filed an affidavit in opposition to Randall Smith's Motion to Dismiss. In pertinent part, Mr. Kraling swore under oath as follows:

A person named Mary Dreier was employed by Shamrock until June 1995. Shamrock's employee records establish that Ms. Dreier received her last payroll check on June 15, 1995. After that date she was not an employee or agent of Shamrock. After that date, Ms. Dreier had no office at

Shamrock's offices. At the time Mr. Westerman claims to have spoken with her, Ms. Dreier had not been employed by Shamrock for more than five years.

(App-119, emphasis added.)

18. The sworn affidavit of Shamrock's Chief Financial Officer submitted in this case is contradicted by two separate sworn affidavits by attorney Westerman (App-99; App-161 to App-164) as well as seven (7) separate letters by Shamrock's own attorney that were "cc'd" to "Shamrock Development, Inc., Attn: Mary Dreier" and which directly discussed issues relating to the satisfaction of the underlying judgment Shamrock now seeks to renew. (App-206 to App-210; App-214 to App-217; App-223 to App-225.)

19. Randall Smith has never been personally served by Shamrock. If served at all, Randall Smith was served only via publication. (App-23.)

20. Shamrock caused its attorney, David A. Turner, to file a Rule 4.04 Affidavit on March 22, 2006, bearing the description: "Affidavit of David A. Turner Re: Service by Publication on Defendants" (the "Turner Affidavit"). (App-19.) The Turner Affidavit incorrectly alleges Randall Smith is a resident individual domiciliary who has 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-20.)

21. In a subsequent paragraph, Mr. Turner further alleges: "I believe that Defendant Dakota Turkey Farms, Limited Partnership, Defendant Denison E. Smith, and Defendant Randall N. Smith are not residents of the State of Minnesota or cannot be found therein." (App-20, emphasis added.)

22. Randall Smith has never been a resident of Minnesota. Similarly, Randall Smith has never been domiciled in Minnesota. (App-1; App-161; App-228 to App-229; App-231 to App-236; App-288; App-193; App-200; App-109.) Randall Smith has never set foot in Minnesota for approximately ten (10) years. (App-1.) Randall Smith never concealed himself or attempted to avoid service as alleged in the Turner Affidavit. (App-2.) Randall Smith has lived in California for approximately eight (8) years. (App-2.)

23. At the time Shamrock's attorney filed the Rule 4.04 Turner Affidavit alleging Randall Smith 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 Randall Smith. (App-105 at ¶ 7; App-113.) Accordingly, Shamrock knew prior to attempting service by publication that at the time the underlying judgment had been granted in 1996, Randall Smith was residing outside of Minnesota. (*Id.*; *see also* App-107 to App-112.)

24. Shamrock and its legal counsel knew that the last known residential address of Randall Smith was not 1520 Hunter Drive, Medina, Minnesota 55341. (App-109 to App-110; App-113.) 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 Burtness from which he conducted his business. (App-111 to App-113; App-144.)

25. Representatives of Shamrock, including its owner Jim Stanton, had previously visited Burtness at his home, and therefore possessed first-hand knowledge Burtness, not Randall Smith, lived there after the underlying judgment had been issued.

(App-286.) It appears that Jim Stanton never disclosed to Shamrock's current attorneys that he knew Burtness resided at 1520 Hunter Drive, Medina, Minnesota and, therefore, that Randall Smith did not reside at that address.

26. The Accurint database used by Shamrock in an attempt to locate Randall Smith unequivocally provides Randall Smith's current residential address in California for purposes of service of process when information from his Affidavit of Identification is used to formulate an appropriate query. (App-227 to App-230; App-231 to App-237.)

27. 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-131; App-211 to App-212.)

28. The "Comprehensive Address Report" Shamrock obtained from the Accurint database using 1520 Hunter Drive as the query only lists Randall Smith as a "Possible Previous Resident[]" of 1520 Hunter Drive. (App-130, 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." (App-130, App-131 to App-132.) The Affidavit of Identification for Randall Smith does not contain any such disclaimers or warnings. (App-109 to App-110.)

29. Shamrock did not, and could not, independently verify the equivocal statement of the Accurint database "Comprehensive Address Report" claiming Randall Smith was a "Possible Previous Resident[]" of 1520 Hunter Drive. (App-124 to App-126.) Nonetheless, Shamrock relied on this unconfirmed information and filed the Rule

4.04 Turner Affidavit stating unequivocally and without qualification that Randall Smith was a resident of Minnesota. (App-19 to App-20.)

30. On March 24, 2006, Shamrock caused to be published in *Finance and Commerce* a summons. (App-23.) Shamrock caused to be published the same summons on March 31, 2006, and April 7, 2006. (App-23.)

31. Randall Smith has 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 in California where Randall Smith has resided since approximately 2000-2001. (App-2.)

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. *Rohrdanz 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); *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. Ct. App. 1992), *review denied* (Minn. July 16, 1992); *see also McBride v. Bitner*, 310 N.W.2d 558, 561-63 (Minn. 1981). The interpretation of Minnesota's Rules of Civil Procedure also presents a question of law, which is reviewed *de novo*. *Barrera v. Muir*, 553 N.W.2d 104, 108 (Minn. Ct. App. 1996) (interpreting rules of civil procedure), *review denied* (Oct. 29, 1996). Accordingly, the issue of what is required by Rule 4.04 should be reviewed *de novo*.

A *de novo* standard of review is also applied by this Court to constitutional issues. See, e.g., *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007) (*de novo* review applied to constitutional questions involving application of law to undisputed facts); *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005); *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999) (reviewing procedural due process afforded to a party on a *de novo* basis), *review denied* (Minn. July 28, 1999).

Appellant, Randall Smith, understands the Court may be tempted to apply a clearly erroneous standard of review to the factual issue of whether or not he was a “resident domiciliary” of Minnesota, as well as other essential jurisdictional facts required by Rule 4.04(a). However, the trial court never made a finding of fact that Randall Smith was a resident of Minnesota, attempted to avoid service, or intended to defraud creditors. At best, the trial court concluded Randall Smith “used” a Minnesota address that was the registered address for service of process of Dakota Turkey Farms and a residential address, and was silent on the other essential jurisdictional facts. (App-302.) Similarly, Shamrock never argued before the trial court that Randall Smith was ever a resident or domiciliary of Minnesota; rather, Shamrock argued the Rule 4.04 Turner Affidavit was made in good faith and that the Accurint database report was evidence that Randall Smith “used” the address located at 1520 Hunter Drive.

The factual record on appeal is un rebutted that Randall Smith has never been a resident or domiciliary of the State of Minnesota, did not attempt to avoid service of process and possessed no intent to defraud creditors. Accordingly, a clearly erroneous

standard of review is not applicable. However, even if a clearly erroneous standard is applied, Randall Smith is entitled to dismissal of Shamrock's Complaint.

SUMMARY OF THE ARGUMENT

The lower courts addressing the issues in this case have conflated the two separate requirements in the clear and unambiguous provisions of Rule 4.04 requiring both: (1) that service by publication is sufficient to confer jurisdiction only if the defendant is a resident individual domiciliary having departed the state with the intent to defraud creditors or avoid service, or remains within the state with a like intent, and (2) that an affidavit of the plaintiff or the plaintiff's attorney must be filed with the court stating the essential jurisdictional facts and that the affiant believes the defendant is not a resident of the state or cannot be found therein.

These two separate requirements of Rule 4.04 are manifest on the face of the Rule itself. However, the lower courts mistakenly concluded that a good faith affidavit merely alleging the essential jurisdictional facts is sufficient. Such an interpretation, however, would render superfluous the language in Rule 4.04(a)(1). Instead, the requirements of Rule 4.04(a)(1) requiring the essential jurisdictional facts of a defendant being a "resident individual domiciliary" must be viewed as a separate requirement from the allegation or statement of such circumstances appearing in a Rule 4.04 Affidavit.

Sound policy rationales exist for supporting this application of the clear and unambiguous requirements of Rule 4.04. For example, requiring plaintiffs to demonstrate the actual existence of at least one of the enumerated cases of essential

jurisdictional facts required in Rule 4.04(a)(1) through Rule 4.04(a)(5) prevents plaintiffs from fraudulently obtaining personal jurisdiction—particularly when service by publication is supposed to be the last resort and no better form of service is available. The affidavit required by Rule 4.04 may be filed either by the plaintiff or by the plaintiff's attorney. In the present case, it is irrefutable that Shamrock possessed information that would have prevented its current attorney, David Turner, from signing the Rule 4.04 Turner Affidavit in good faith.

In addition, Shamrock's chosen method of service of process—service by publication—failed to provide Randall Smith with the due process to which he was entitled. Considering all of the circumstances of this case, publishing notice in a local newspaper was not reasonably calculated to provide notice to Randall Smith. Shamrock cannot ignore the fact that its owner knew Burtness (not Randall Smith) lived at 1520 Hunter Drive and that Randall Smith's last known residential address was in Washington, D.C. pursuant to an Affidavit of Identification in Shamrock's possession. Because personal service of process was reasonably available in this *in personam* action, service by publication fails to provide the due process that is required by the state and federal constitutions.

In the event service by publication was necessary, then Shamrock was required to publish the notice in a national publication as that was most likely to provide notice of the instant action to Randall Smith and was both feasible and reasonable in light of the over \$1.2 million dollars Shamrock is attempting to collect in this renewal of judgment action. Additionally, supplemental forms of notice also should have been utilized which include,

but are not limited to, mailing the summons and complaint to Randall Smith' last known addresses, or contacting attorney Westerman who previously represented Randall Smith. These alternative and supplemental actions to provide notice were "the least that ought to [have been] required if substantial justice [was] to be done" and Randall Smith's due process rights not violated.

ARGUMENT

I. SHAMROCK'S COMPLAINT AGAINST RANDALL SMITH SHOULD BE DIMISSED AS A MATTER OF LAW BECAUSE ITS ATTEMPTED SERVICE BY PUBLICATION FAILED TO COMPLY WITH THE STRICT REQUIREMENTS OF RULE 4.04 AND THEREFORE NO JURISDICTION WAS CONERRED UPON THE COURT.

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); *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).

Significant for purposes of this appeal, “[s]ervice by publication is in derogation of the common law, and all statutory requirements must be strictly complied with” under well-settled Minnesota precedent. *Wiik v. Russell*, 218 N.W. 110, 111 (Minn. 1928) citing *D’Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N.W. 357, 358 and 359 (Minn. 1908). Accordingly, service of process by publication, as “a method of acquiring jurisdiction and adjudicating the rights of parties constitutes due process of law only when the statutes providing therefore have been fully and completely complied with.” *D’Autremont*, 116 N.W. at 358 (emphasis added).²

Because Shamrock’s attempted service of Randall Smith failed to strictly comply with the requirements of Rule 4.04, as described more completely below, its complaint against him should be dismissed.

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.”).

II. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF RULE 4.04 REQUIRES BOTH THAT THE ESSENTIAL JURISDICTION FACTS EXIST AND THAT THEY BE ALLEGED IN A RULE 4.04 AFFIDAVIT.

- A. The language of Rule 4.04 is clear and unambiguous in setting forth two separate requirements that must be satisfied in order for service by publication to confer jurisdiction.**

Rule 4.04 contains two distinct provisions that must each be given meaning in order to apply the rule as intended. The first provision is located in Rule 4.04(a)(1). It is one of the five (5) enumerated cases that will allow service by publication to confer jurisdiction on a court. Rule 4.04(a)(1) provides as follows:

Service by publication shall be sufficient to confer jurisdiction . . . (1) [w]hen 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 like the like intent[.]

Minn. R. Civ. P. 4.04(a)(1).

Eight (8) paragraphs later, Rule 4.04(a) provides an additional mandate before a plaintiff may begin to publish the summons. Specifically, Rule 4.04(a) provides:

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 the 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.

Rule 4.04(a) (emphasis added).

The fact that these are two separate requirements is clear on the face of the rule. The first quoted portion of the rule addresses what is required in order for jurisdiction to be conferred on the court—namely that the defendant is a resident of the State of Minnesota concealed somewhere within the state with the intent to avoid service or defraud creditors, or that the Defendant was a resident of Minnesota but has departed with the intent to defraud creditors and has avoided service. The second portion of the quoted rule does not directly address the jurisdictional prerequisites, but rather the procedural prerequisites necessary before the summons is published.

In Minnesota “every law shall be construed, if possible, to give effect to all of its provisions.” Minn. Stat. § 645.16; *Norman v. Housing and Redevelop. Auth.*, 681 N.W.2d 376, 379 (Minn. Ct. App. 2004). This court must give effect to the plain meaning of Rule 4.04’s language which is clear and free from all ambiguity. Minn. Stat. § 645.16. “Whenever possible, no word, phrase, or sentence should be deemed superfluous, void or insignificant.” *Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004) citing *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999); *Owens v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983). 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).

Any construction or application of Rule 4.04 that fails to give meaning the two separate and distinct requirements of Rule 4.04 discussed above violates Minnesota’s

well established law. The interpretation adopted by Shamrock and the lower courts renders the text of Rule 4.04(a)(1) “superfluous, void or insignificant” contrary to the Supreme Courts decisions in *Vlahos*, *Amaral* and *Owens*. Such an interpretation—which holds that a good faith allegation in an affidavit satisfies the requirements of Rule 4.04, renders the provisions of Rule 4.04(a)(1) redundant and unnecessary. Accordingly, Rule 4.04 must be applied in the manner advocated by Randall Smith and the essential jurisdictional facts regarding whether he was an individual resident domiciliary must actually exist in order to confer jurisdiction.

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 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 requires that one of the five enumerated cases set forth in Rule 4.04(a) actually exists.

B. Sound policy requires that the essential jurisdictional facts actually exist independent from mere allegations stated in a Rule 4.04 Affidavit:

Applying the provisions of Rule 4.04 as requiring two independent and separate requirements advances important policy interests. For example, requiring the actual jurisdictional facts to exist prevents plaintiffs from withholding critical information regarding essential jurisdictional facts from their attorneys in order to effectuate last minute service of process by publication—before a statute of limitations expires—on unsuspecting defendants. These defendants are still subject to jurisdiction through Minnesota’s long-arm statute or other more traditional means of effecting personal service. *See, e.g.*, Minn. R. Civ. P. 3.01(a), (b) and (c).

This approach also ensures that would-be plaintiffs do not seek to initiate civil litigation through disfavored service by publication rather than means that provide actual notice to the intended defendants is also achieved. 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 v. LeCuyer*, No. C6-01-1250, 2002 WL 47060, at *3 (Minn. Ct. App., Jan. 15, 2002) (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”). Indeed, with respect to *in personam* actions such as the present case, the United States Supreme Court has held that “[t]here is no dispute that service by publication does not warrant a personal judgment against a nonresident.” *McDonald v. Mabee*, 37 S.Ct. 343, 344, 243 U.S. 90,

92 (1917); *see also* *Milosavljevic v. Brooks*, 55 F.R.D. 543 (N.D. Ind. 1972); *Greene v. Lindsay*, 102. S.Ct. 1874, 1877-78, 456 U.S. 444, 449 (1982).³ Accordingly, in addition to the requirement that “essential jurisdictional facts” exist, Rule 4.04 also requires the filing of an affidavit alleging the existence of the essential jurisdictional facts before the summons is published. A defendant may then challenge the sufficiency of service of process by publication and any alleged personal jurisdiction through a Rule 12 motion to dismiss.

Because service by publication is a disfavored means of affecting service of process, it is only natural that the legislature would intend to curb its use only to the enumerated cases where the jurisdictional facts actually exist. Stated differently, because Rule 4.04(a)(1) requires that a defendant be an individual resident domiciliary that has either departed from the state or remains therein with the intent to defraud creditors—it is reasonable for the legislature to limit access to this acknowledged least preferred method of service only to such egregious cases where those facts actually exist—not where an enterprising plaintiff or his attorney merely allege those circumstances to exist in an affidavit. Only in such enumerated cases has the legislature determined that something

³ Appellant, Randall Smith acknowledges that Rule 4.04 allows service by publication on non-resident in some narrowly defined instances, but those are limited to situations where, for example, the defendant owns property in Minnesota or the unique circumstances requiring service by publication are determined in advance by a court. *See, e.g.*, Minn. R. Civ. P. 4.04(a)(2)(B); *see also* *Abu-Dalbough*, 547 N.W.2d at 702 (service by publication in Chicago and Washington, D.C. newspapers allowed by special court order, likely after the court determined it was reasonable under the unique circumstances of that case).

less than personal service (or a close proximity to personal service such as substitute service at a defendant's abode) should be allowed.

III. THE LOWER COURTS IMPROPERLY DETERMINED RANDALL SMITH HAD BEEN PROPERLY SERVED BY PUBLICATION PURSUANT TO MINNESOTA RULE OF CIVIL PROCEDURE 4.04.

Shamrock's service of process of the Summons via publication was ineffective to initiate an action against Randall Smith 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 facts that allow service by publication—namely, that Randall Smith was a resident individual domiciliary of Minnesota and that he departed from the state with an intent to defraud creditors or to avoid service, or that Randall Smith remained concealed within Minnesota with a like intent. *See* Minn. R. Civ. P. 4.04 (a)(1).

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. Significantly, Rule 4.04 does not permit speculation, conjecture or opinions, but rather insists that the “essential jurisdictional facts” actually exist. *See, e.g.*, Rule 4.04(a)(1). In this case, the essential jurisdictional facts do not exist but are merely alleged in the Rule 4.04 Turner Affidavit. Therefore, service via publication was not effective to confer jurisdiction.

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

Simply put, no jurisdiction was conferred upon the lower court due to Shamrock’s attempted service by publication because none of the conditions set forth in Rule 4.04(a)(1) exists. *See* Minn. R. Civ. P. 4.04(a)(1). 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 alleging in the Rule 4.04 Turner Affidavit that Randall Smith was a resident individual domiciliary 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 and unsupported in the record.

Undisputed evidence establishes Randall Smith was never a resident of, or domiciled in, Minnesota. Randall Smith set forth in his sworn affidavit that he has never been either a resident of, or domiciled in, Minnesota. (App-1.) Randall Smith further explained he never attempted to defraud any creditors or avoid service by leaving Minnesota or by hiding himself within Minnesota. (App-1 to App-2.) Randall Smith’s affidavit is further confirmed by the sworn affidavits of both Westerman and Burtness who unequivocally state Randall Smith has never resided in Minnesota. (App-161; App-288.) Moreover, reports from the Accurint database and other sources also confirm Randall Smith has never lived in Minnesota. (*See, e.g.*, App-227 to App-236; App-109 to App-110; App-193.)

In the present case, the only scintilla of “evidence” supporting a conclusion Randall Smith resided in Minnesota are the hearsay reports of the Accurint database submitted by Shamrock which fail to explain how or why Randall Smith was possibly associated with the Minnesota address identified. (App-130 to App-132.) Significantly, Shamrock does not claim its Accurint database reports demonstrate Randall Smith actually lived in Minnesota. Rather the reports only explain that the Minnesota address is somehow “associated” with Randall Smith (App-200), and Shamrock merely claims this was a sufficient basis for concluding Randall Smith “used” the 1520 Hunter Drive address and may have resided in Minnesota. (App-125 at ¶ 7; App-137 at ¶ 11.) Further, the record is entirely devoid of any evidence supporting the critical jurisdictional fact that Randall Smith allegedly left the state of Minnesota to defraud creditors.

Significantly, there was no legal basis for allowing Shamrock’s Accurint database reports into evidence. They are classic hearsay and no exception to the hearsay rule exists. *See, e.g.*, Minn. R. Evid. 802; Minn. R. Evid. 803. To the extent the lower courts’ determinations rely on these reports, they are not based upon any admissible evidence. Therefore, any determinations regarding Randall Smith’s alleged residency in Minnesota, or alleged intent to defraud creditors, or to avoid service, are clearly erroneous and should be set aside.

The Accurint database reports submitted by Shamrock, if admissible, also do not withstand scrutiny. Shamrock’s Accurint database reports are contradicted by the Accurint database reports submitted by Randall Smith (App-227 to App-230; App-231 to App-236) and a host of other evidence. (*See, e.g.*, App-1; App-161; App-288.)

Additionally, the address identified by Shamrock's Accurant database reports as being associated with and/or used by Randall Smith 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, Randall Smith and others were all members (Dakota Turkey Farms). (App-111 to App-112; App-136 at ¶ 8; App-144; App-125 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 Randall Smith did not live in Minnesota.

Finally, the Accurant database reports submitted by Shamrock lack the elements of trustworthiness and reliability on their face.

1. Shamrock's Accurant Database reports are an unreliable source of information that was not independently verified as require before any reliance was placed on it.

Putting aside the critical issue of whether Shamrock's Accurant database reports were admissible into evidence, these reports should not have been relied upon in determining whether Shamrock satisfied the essential jurisdictional facts required under Rule 4.04(a)(1) because they were not independently verified and un rebutted evidence demonstrated Randall Smith had never been a resident of Minnesota.

The accuracy of the Accurint database reports and the blind reliance placed on them by Shamrock and the lower courts 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-130 to App-132, emphasis added.) There is no indication in the record that Shamrock “independently verified” the information it obtained from the Accurint database. Indeed, all other sources of information demonstrated Randall Smith lived somewhere other than Minnesota. (App-1; App-161; App-228 to App-229; App-231 to App-236; App-288; App-192 to App-193; App-200; App-109.) Accordingly, this Court should assume, as the Accurint warning/disclaimer suggests, that the equivocal Accurint database reports are “generally not free from defect” and “should not be relied upon.” (App-131 to App-132, emphasis added.) Reliance on these unverified, hearsay reports to the exclusion of all other evidence presented on the issue of where Randall Smith lived was clearly erroneous.

The inherent unreliability of the Accurint database (and similar databases) is highlighted by the affidavit testimony of Donna Trimble—the head librarian for Bowman and Brooke LLP. Ms. Trimble tested the Accurint database and found it provided unacceptable results. Specifically, her personal experience using the Accurint database demonstrated it to be unreliable because it provided demonstrably inaccurate and

irrelevant information. (App-200 at ¶¶ 10-11.) For example, when a query was entered using Ms. Trimble's personal information, she found the Accurint database report included "a great deal of information that had absolutely nothing to do with me (e.g., listing cars that I never owned)." (App-200 at ¶ 10.)

Shamrock's Accurint database reports submitted in this case reflect the search terms used, but do not reflect an unbiased attempt to locate Randall Smith's current addresses. (App-130 to App-132; App-212.) 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-130 to App-132; App-211 to App-212.) However, when Randall Smith's last known residential address information as listed on the Affidavit of Identification is entered as a query in the Accurint database, then Randall Smith's current residential address in California is accurately reported. (App-227 to App-229, APP-231 to APP-236.)

Accurint's purported "Comprehensive Address Report" dated April 25, 2006 is not "comprehensive" in any sense of the word. Indeed, it only lists "Possible Previous Residents" of a single address—1520 Hunter Drive. (App-130, emphasis added.) Moreover, this report dated April 25, 2006—was generated long after the March 22, 2006 Rule 4.04 Turner Affidavit, and after Randall Smith filed his April 18, 2006 Notice of Limited and Special Appearance putting Shamrock on notice that challenges to the service of process via publication were imminent. (App-130.) This raises the specter of whether the remaining un-dated Accurint database reports were re-run to whitewash any references to Randall Smith residing at his current residential addresses in California.

Accurint database reports provided to the Court during oral argument on Randall Smith's motion to dismiss unequivocally demonstrate Randall Smith's current residential addresses in California and contain the dates when the searches were performed. (App-231 to App-232; App-266 to App-267.) 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 Randall Smith's current contact information.

B. The lower courts' determination that Randall Smith left Minnesota or remained therein with the intent to defraud creditors, or that he attempted to avoid service, is without any support in the record and therefore cannot be sustained.

The record is entirely devoid of any evidence supporting the critical jurisdictional facts that Randall Smith allegedly possessed an intent to defraud creditors or to avoid service. Again, the sole support for such a conclusion is the Rule 4.04 Turner Affidavit alleging those facts. However, the basis for this naked allegation is nothing more than an attorney complying with the rote requirements of Rule 4.04 mandating that an affidavit must be filed stating one of the enumerated cases before a plaintiff may publish its summons. This once again underscores the critical importance of requiring more than just a Rule 4.04 Affidavit in order for service by publication to confer jurisdiction.

Shamrock's failure to present any record evidence bearing on the issue of whether Randall Smith sought to avoid service of process or defraud creditors is no small matter. These essential facts are specifically required both by the plain language of Rule

4.04(a)(1) and controlling Minnesota case law. Significantly, reported cases demonstrate that where service by publication is allowed pursuant Rule 4.04(a), a defendant has first tried to avoid personal service of process. *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) (plaintiff's 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").

In this case, the affidavit testimony of Randall Smith is un rebutted. He has never been a resident of Minnesota. (App-1) He has "never departed from the State of Minnesota with the intent to defraud creditors, or to avoid service" as alleged in the Turner Affidavit. (App-1 to App-2.) Nor has he "ever 'concealed' [himself] within the State of Minnesota 'with the like intent' as stated in the Turner Affidavit." (*Id.*) In point of fact, Randall Smith testified he has never had the intent to defraud Shamrock, nor has he ever attempted to avoid service by Shamrock. (*Id.*) To the contrary, Randall Smith retained a lawyer, Arnold Westerman, who attempted to contact Shamrock to discuss the

underlying judgment on several occasions—but was largely ignored by Shamrock’s representatives. (*Id.*, see also App-161 to App-164.)

To the extent the lower courts made any determination Shamrock demonstrated the essential jurisdictional fact that Randall Smith had sought to avoid service or defraud his creditors based upon the unsupported allegations of the Turner Affidavit, those determinations are clearly erroneous and must be set aside.

C. The lower courts improperly determined Shamrock’s Rule 4.04 Affidavit supplanted the requirement under Rule 4.04 that essential jurisdictional facts actually exist demonstrating Randall Smith was a resident individual domiciliary of Minnesota.

On public policy grounds alone, this Court should conclude that the essential jurisdictional facts must actually exist for service by publication to confer jurisdiction to the court. Requiring these essential jurisdictional facts to exist prevents plaintiffs, as in this case, from retaining an attorney to file a Rule 4.04 Affidavit alleging jurisdictional facts that are known to be untrue by the plaintiff.

Rule 4.04 requires essential jurisdictional facts to exist—not just to be alleged—in order to safeguard the process by which actions are commenced via publication within the State of Minnesota. Incorrectly alleging jurisdictional facts is not sufficient. Filing a Rule 4.04 Affidavit is only one of the requirements of Rule 4.04; it does not supplant the other requirements of Rule 4.04(a). If filing an affidavit—even a good faith affidavit signed by an attorney—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 sign a Rule 4.04 Affidavit at the last minute before a statute of limitations expired. That is exactly what happened in this case.

Shamrock waited until the last minute (almost 10 years) before the underlying judgment was set to expire, and then turned a blind eye toward facts that would either assist it in locating Randall Smith for personal service or prevent it from filing a Rule 4.04 Affidavit. Specifically:

- The owner of Shamrock had personally visited with Burtness at Burtness' home located at 1520 Hunter Drive, Medina, Minnesota, and therefore knew Burtness lived there, not Randall Smith. (App-285 to App-288.)
- The affidavits of identification for Randall Smith and Burtness demonstrated Randall Smith resided in Washington, D.C. and Burtness resided at 1520 Hunter Drive which was also his business address. (App-109 to App-112.) These affidavits of identification were in the possession of Shamrock as early as October 8, 2002. (App-113.)
- 1520 Hunter Drive was the registered agent address for the limited partnership Burtness owned with Randall Smith and others. (App-136, App-144.)
- Randall Smith's attorney, Arnold Westerman repeatedly called representatives of Shamrock, including Mary Dreier, to discuss the underlying judgment, but Shamrock essentially ignored these calls and never made any effort to contact him when attempting to locate Randall Smith to serve him with process. (App-99 to App-100; App-161 to App-164.)

These un rebutted facts demonstrate Shamrock possessed information that would not have allowed a representative of Shamrock to submit a Rule 4.04 Affidavit in good faith. However, because that information was not shared with Shamrock's current attorney, the Rule 4.04 Turner Affidavit was filed.

The lower courts concluded the Turner Affidavit was signed in good faith. However, the facts of this case demonstrate the importance of maintaining the separate requirements of Rule 4.04 that mandate both a Rule 4.04 Affidavit and that the essential jurisdictional facts actually exist. To hold otherwise would promote service by publication accompanied by an attorney-signed-affidavit when a statute of limitations is about to expire in circumstances where the plaintiff possesses information that would have allowed for personal service. A departure from the preferred mode of personal service of process to service of process by publication should be reserved only for those narrowly proscribed cases where it is absolutely necessary, or involves either a resident or an *in rem* proceeding.

IV. SHAMROCK'S ATTEMPTED SERVICE OF PROCESS BY PUBLICATION VIOLATED RANDALL SMITH'S DUE PROCESS RIGHTS.

The touchstone of due process is that the process utilized provides to the defendant both notice and an opportunity to defend. The present action is an *in personam* proceeding against Randall Smith that seeks to deprive him of property interests based upon a service of process designed to provide only *constructive* notice of the action. The measure of whether this process was "due process" is whether it was reasonably calculated to provide notice, under all the circumstances, to apprise the interested party (Randall Smith) of the pendency of the action and afford him the opportunity to present his objections. *See, generally, Electro-Measure, Inc. v. Ewald Enterprises, Inc.*, 398 N.W.2d 85, 88 (Minn. Ct. App. 1986); *Mullane v. Central Hanover Bank & Trust Co.*,

339 U.S. 306, 314-15, 70 S.Ct. 652, 657-58 (1950).

In circumstances where personal service of a defendant is impossible—as alleged by Shamrock in this case—then “the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.” *McDonald*, 243 U.S. at 92, 37 S.Ct. at 334. However, in the present case, Shamrock possessed all of the information it needed to serve Randall Smith personally—therefore service by publication did not conform to the standards required of due process. Assuming *arguendo* that personal service was not possible, then Shamrock still failed to publish notice in a manner that was reasonably calculated, under all the circumstances, to provide notice to Randall Smith as tested by the existence of feasible and customary alternatives and supplements to the form of notice attempted. *See, e.g., Mullane*, 339 U.S. at 315, 70 S.Ct. at 657.

A. Randall Smith’s utilization of the Rules of Minnesota Procedure to challenge the effectiveness of service of process by publication should not militate against his due process rights.

Appellant understands there may be a temptation to use his limited appearance to contest jurisdiction in this case to show he received notice of the pending action and an opportunity to defend. Such a position overlooks, however, the fact that Minnesota’s Rules of Civil Procedure expressly allow a party to file a motion to dismiss based upon insufficiency of service of process pursuant to Minn. R. Civ. P. 12.02(c). Using a defendant’s lawfully exercised rights under Rule 12.02(c) as a means to undercut his ability to contest insufficient service of process in violation of due process rights would

render an absurd and unreasonable result contrary to Minnesota Statutes section 645.17(1).

Rule 12.02 directly addresses this issue and allows Randall Smith to assert a timely motion to dismiss based on insufficiency of service of process while at the same time preserving and asserting a claim for violation of his due process rights. Specifically, Rule 12.02 states, in pertinent part:

No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion.

Minn. R. Civ. P. 12.02.

“Defendant Randall N. Smith’s Limited & Special Appearance for Purposes of Brining a Notice of Motion and Motion to Dismiss Pursuant to Minn. R. Civ. P. 12.02, et seq.” was filed on May 4, 2006—after the statute of limitations had run on renewing Shamrock’s underlying judgment. Randall Smith raised both the defense of insufficiency of process and violation of his due process rights predicated on Shamrock’s attempt to serve him by publication. He then noted in the final paragraph of his notice of motion that it was his intent “only to invoke the limited jurisdiction of the Court to determine these threshold issues and not to determine issues going to the substantive merits of Plaintiff’s case.” Such a request is proper.

Using Randall Smith’s limited and special appearance in this case as a waiver of the constitutional issues concerning due process raised in his notice of motion would constitute bad policy and be contrary to law. Mr. Smith’s only alternatives would either have been to waive his constitutional challenge, or allow a default judgment to be entered

against him. In either event, the choice does not comply with Minn. R. Civ. P. 1 requiring the Minnesota Rules of Civil Procedure to be “construed and administered to secure the just, speedy and inexpensive determination of every action.” Accordingly, Randall Smith’s appearance in this case should not be used as an indication he waived or otherwise diminished his right to due process.

B. Personal service on Randall Smith was possible, feasible and practical given the information and tools at the disposal of Shamrock; therefore, service by publication did not provide Randall Smith with the due process to which he is entitled.

Allowing service by publication in this case compounds the lack of notice provided to Randall Smith at the time the original *ex parte* judgment was obtained through a confession of judgment instrument that did not satisfy statutory requirements. In light of the fact that this *in personam* action was initiated by a party who possessed both Randall Smith’s last known address (as set forth in an Affidavit of Identification) and access to the Accurint database which provides Randall Smith’s current California residential address when his previous Washington, D.C. address from the Affidavit of Identification is used in a query, Shamrock possessed all that it needed to serve Randall Smith personally. Notably, Randall Smith’s attorney telephoned Shamrock representatives a number of times to discuss the underlying judgment.

In instances where personal service is possible, then service by publication does not afford a party with due process as a matter of law. As explained by the United States Supreme Court in *Mullane v. Hanover Bank & Trust*:

[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S.Ct. 652, 657 (1950) (emphasis added); *Id.* at 318 (“Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties.”).

C. If personal service was not possible, then feasible and practicable alternatives to the notice published in *Finance and Commerce* would have provided notice more reasonably calculated to reach Randall Smith.

The constructive notice published by Shamrock did not provide any notice to Randall Smith. He has never subscribed to, received or read any copy of *Finance and Commerce*, which is a local Minnesota newspaper not generally available in California where he resides. (App-2.) Instead, he was informed by his brother and co-defendant, Denison Smith, (who was personally served by Shamrock at his home in Fairfax, Virginia) regarding the pendency of the suit. However, this second-hand notice does not in any manner conform to the requirements of due process and/or proper service of process. *See, e.g., Smith v. Flotterud*, 716 N.W.2d 379, 382 and 383 (Minn. Ct. App. 2006) (“The requirement that service of process be made knowingly and intentionally

ensures that service be reasonably calculated to reach the intended party.”) citing *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657. Accordingly, Plaintiff cannot rely on the happenstance that some form of notice may have reached Randall Smith through his brother.

Notice satisfying due process standard—considering all of the circumstances at issue in this case—should have been provided through some form of substitute service of process more reasonably calculated to reach Randall Smith. Alternatively, supplemental notice in addition to that published in *Finance and Commerce* should have been attempted. The following alternatives would have been reasonable and more effective, while at the same time remaining cost effective given the magnitude of the over \$1.2 million judgment Shamrock is attempting to renew:

- Sending a copy of the Summons and Complaint with an acknowledgment of service to his last known residential and business addresses listed in the Affidavit of Judgment Debtor.
- Publishing service of process in a national newspaper.
- Contacting Randall Smith’s attorney, Westerman, who had previously contacted Shamrock representatives on multiple occasion in an effort to discuss the underlying judgment. (App-099 to App-100; App-161 to App-164.)

Significantly, Shamrock’s attorney admits Shamrock looked for Randall Smith only in Minnesota although he possessed Randall Smith’s Affidavit of Identification previously filed with the court. (App-138 to App-139 at ¶ 15, bullet point nos. 6 and 7.) The last known home and business address for Randall Smith, Washington, D.C. and Virginia, were not used although Shamrock undisputedly possessed that information.

(*Id.*; App-109 to App-110; App-113.) Nor was a national search conducted for Randall Smith. Shamrock either negligently or purposefully narrowed the parameters of its search which had a corresponding impact on Randall Smith's due process rights.

Shamrock's shortcomings with respect to its attempt to serve Randall Smith with process, and what alternatives and supplemental actions would have been reasonable, must be viewed both in terms of the magnitude of the claim asserted (\$1.2 million) and what a reasonable person would have done if he or she had actually wanted to inform Randall Smith of the pending action. *Mullane*, 339 U.S. at 314-15, 70 S.Ct. at 657. As explained in *Mullane*:

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less.

Id. 339 at 319-20, 70 S.Ct. at 660.

It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Id. 339 at 315, 70 S.Ct. at 658 (emphasis added).

Publishing notice in *Finance and Commerce* was not reasonably calculated to provide notice to Randall Smith—a California resident with a last known residential address in Washington, D.C.—under all of the circumstances attending this case. The

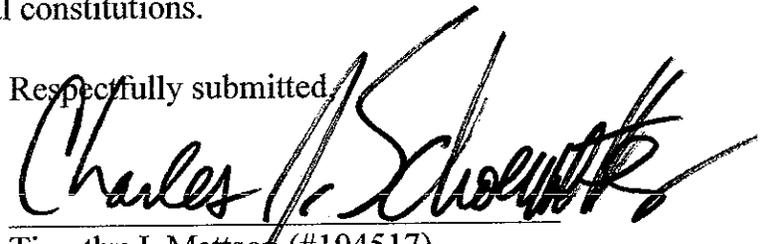
alternative means and additional actions that should reasonably have been implemented, as discussed above, were the most likely to provide notice to Randall Smith and, therefore, “the least that ought to be required if substantial justice is to be done.” *McDonald*, 243 U.S. at 92, 37 S.Ct. at 334.

CONCLUSION

Based upon the facts and arguments presented above, Randall Smith respectfully requests the Minnesota Supreme Court 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. Alternatively, Randall Smith requests that Shamrock’s claims against him be dismissed because Shamrock’s service of process via publication violated his due process rights under the state and federal constitutions.

Dated: 12-13-07

Respectfully submitted,



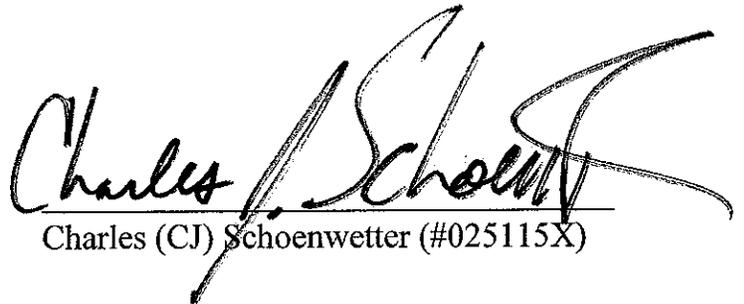
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2003, in Times Roman font, 13 point, and according to the word processing system's word count, is no more than 11,494 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: December 13, 2007.



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