

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
REPLY BRIEF AND ADDENDUM IN SUPPORT OF HIS APPEAL

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INTRODUCTION

Minnesota Rule of Civil Procedure 4.04(a) is intended to comport with the procedural due process safeguards contained in both Minnesota's Constitution and the United States Constitution. As a disfavored substitute for personal service, *in personam* jurisdiction obtained by publication under Rule 4.04(a) must meet strict standards set forth in Rule 4.04 and *Mullane v. Central Hanover Bank & Trust Co.* These standards, in order to do substantial justice, require more than a party's mere recitation of the statutory language of 4.04(a) and a court's rubber stamped approval.

Shamrock Development, Inc. ("Shamrock") dedicated a majority of its brief to addressing its alleged diligence and good faith. However, these issues are not before the Court on this appeal. Instead, this Court certified whether Rule 4.04(a) requires the underlying jurisdictional facts necessary to permit service by publication to actually exist in order to confer personal jurisdiction over Randall N. Smith ("Smith"). Including, for example, whether residency and domicile are independent elements distinct from Shamrock's alleged diligence and good faith.

In its response brief, Shamrock concedes for the first time that 4.04(a)(1) includes these and other separate elements. Smith and Shamrock are in agreement on this point. The disagreement, according to Shamrock, relates to "whether, how, and by what quantum of proof, a party must show the circumstances allowing service by publication under the rule." Shamrock incorrectly asserts the court held an evidentiary hearing to

determine the essential jurisdictional facts, and this appeal is an attempt to re-litigate the trial court's factual findings. This is simply not so.

The trial court never made any findings of fact or conclusions of law that Smith was either a resident or domiciliary of Minnesota. Nor did the trial court hold an evidentiary hearing. At best, it may have concluded, based on inadmissible Accurint database reports, that Smith "used" a Minnesota address—an address for which his only connection is a financial interest in a limited partnership using 1520 Hunter Drive as its registered address.

Where the burden is on Shamrock to prove Smith is a resident and domiciliary of Minnesota, no matter the required "quantum of proof," the trial court committed reversible error by denying Smith's challenges to personal jurisdiction. The trial court failed to weigh the competing evidence, or lack thereof, related to Smith's residence and domicile—instead relying solely on Shamrock's "good faith" 4.04(a) Affidavit and "diligence." If Rule 4.04(a) merely requires a rubber stamp of the underlying jurisdictional facts stated in a party's affidavit, it does not comport with procedural due process safeguards contained in the United States Constitution for *in personam* cases.

Despite admitting it must prove either Smith intended to avoid service of process or intended to defraud creditors, Shamrock puts forth no evidence on these critical elements of the essential jurisdictional facts. What Shamrock does offer, however, is inadmissible database reports requiring an impermissible inference, upon an inference upon an inference, in an attempt to satisfy Rule 4.04(a)(1). This stacking of inferences, based upon inadmissible evidence, is not allowed. Moreover, the trial court once again

did not make any findings of fact or conclusions of law regarding these critical elements necessary to satisfy Rule 4.04(a)(1).

This Court also accepted Smith's petition to review whether service by publication on a nonresident satisfies constitutional due process. In *McDonald v. Mabee*, the United States Supreme Court decided "service by publication does not warrant a personal judgment against a nonresident." Minnesota too recognizes that service by publication does not confer personal jurisdiction over a nonresident. Thus, in order to resolve the certified questions, there is a threshold issue before this Court: whether Smith is or was ever a Minnesota resident. Smith has never lived in Minnesota, and he has never had an evidentiary hearing to demonstrate this critical fact. At best, Shamrock uses inadmissible "evidence" to show Smith "lived" in Minnesota until 2000. However, the record is devoid of any evidence Smith was ever a Minnesota resident or domiciliary—or that such essential jurisdictional facts continued to exist until 2006, when Shamrock attempted service by publication.

In this case the 10-year statute of limitations expired on Shamrock's underlying judgment. It expired only days after Shamrock filed its 4.04(a) Affidavit prior to publishing notice in *Finance and Commerce*. However, if the goal of service by publication is as Shamrock states, Smith should not be subject to personal jurisdiction in Minnesota because, having never lived in Minnesota, Smith could not flee. Moreover, Shamrock possessed all the information and tools necessary to locate Smith using reasonable efforts under the circumstances. The record before this Court demonstrates that during the 10-years when Shamrock could have personally served Smith, Smith had

contacted Shamrock, through his attorney, to discuss the underlying judgment and remained living in his California residence for over half that time. Shamrock's unreasonable refusal to use the information and tools in its possession cannot be ignored when due process issues involving personal jurisdiction are at stake.

I. THE TRIAL COURT DID NOT MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW ADDRESSING THE ESSENTIAL JURISDICTIONAL FACTS.

The trial court committed reversible error. It failed to make any findings of fact or conclusions of law regarding the essential jurisdictional facts and whether they exist. Instead, the trial court held Rule 4.04 was satisfied so long as Shamrock was diligent in attempting to locate Smith and filed a Rule 4.04 Affidavit. (*See* App-271, "Service by publication on Randall Smith was valid under Minn. R. Civ. P. 4.04 because Shamrock met the requirements for the affidavit as well as the due diligence requirement.") Indeed, the trial court erroneously concluded the law "do[es] not require the plaintiff to actually prove the underlying [jurisdictional] facts in order for service by publication to be valid." (App-273.)

Although Shamrock previously disputed it was necessary to prove the essential jurisdictional facts contemplated by Rule 4.04(a)(1)¹, it now acquiesces to this requirement. Rule 4.04(a)(1) allows service by publication only if the following essential jurisdictional facts exist:

¹ *See* Shamrock's Court of Appeals Brief at page 11. Shamrock claimed only two (2) requirements existed for valid service by publication: (1) a diligent search for the defendant; and (2) filing an affidavit pursuant to Rule 4.04(a). (*Id.*)

1. Defendant is an individual resident of Minnesota;
2. Defendant is an individual domiciliary of Minnesota; and either
3. Defendant departed from the State of Minnesota;
 - A. With the intent to defraud creditors, or
 - B. To avoid service;

OR

4. Defendant remains concealed within in the State of Minnesota:
 - A. With the intent to defraud creditors, or
 - B. To avoid service.

Minn. R. Civ. P. 4.04(a)(1). The lower court's memorandum order does not offer any findings of fact or conclusions of law supporting any of these essential elements.

For example, with respect to elements 1 and 2, the lower court found that "Shamrock's search of Accurint . . . revealed a Minnesota address for both the Smith Defendants. This address was also the registered address for a defendant partnership of which the Smith Defendants are members." (App-273 to App-274.) The lower court further concluded Smith "used" the 1520 Hunter Drive address, which is a residential address as well as the registered address for Dakota Turkey Farms. (App-270.) The court stopped short, however, of making any factual finding or legal conclusion that Smith was a resident or domiciliary of Minnesota. Rather, the court simply concluded Shamrock possessed a good faith and honest reason for believing Smith was a Minnesota

resident. (App-274.) A good faith and honest belief—which is nonetheless mistaken—does not establish the essential jurisdictional facts necessary to confer jurisdiction.²

The lower court similarly found Shamrock possessed a good faith and honest belief Smith departed from the state, or remained therein, with the intent to defraud creditors or avoid service, and erroneously concluded that was sufficient to satisfy Rule 4.04(a)(1). (App-274.) While it remains Smith’s contention no facts existed to support Shamrock’s alleged good faith belief—other than Shamrock’s disputed claims that it could not locate Smith and that it had not been paid the full amount of the underlying judgment—we emphasize again that a good faith belief does not supplant the need to provide evidence on these critical issues.

Because the lower court clearly did not apply the law—which requires Shamrock to prove by a preponderance of the evidence the essential jurisdictional facts actually exist—the lower court committed clear error. Notably, the lower court’s only reference to burden of proof allocates the burden to Smith. (App-273.) However, as discussed *infra*, Shamrock bears the burden of proving the essential jurisdictional facts required by Rule 4.04.

II. THERE WAS NO EVIDENTIARY HEARING.

Shamrock argues for the first time ever that the lower court held an “evidentiary hearing” on Smith’s motion to dismiss. There is nothing in the record to support this.

² Smith notes the lower court’s memorandum order is wholly devoid of any references regarding the necessary element Smith was a Minnesota domiciliary. (App-269 to App-274.)

Shamrock's mischaracterization of the July 28, 2006 motion hearing is an attempt by Shamrock to deprive Smith from providing the true facts relating to his residency and domicile and should not be accepted. At least four unequivocal facts demonstrate no "evidentiary hearing" occurred.

First, Smith did not request an "evidentiary hearing." Specifically, Smith's notice of motion did not contain any request for an evidentiary hearing. (App-59 to App-64.) Nor did Smith's proposed order recite the fact that the court's order would be based upon an evidentiary hearing. Rather, Smith brought a motion that was to be determined as a typical motion—without an evidentiary hearing. In Smith's reply brief, however, he indirectly suggested an evidentiary hearing was a possible alternative, stating:

If for any reason the Court believes it needs additional information or evidence, or that testimony must be taken in order to determine the essential jurisdictional fact of where . . . Smith . . . resided, then . . . Smith . . . respectfully request[s] the opportunity to submit such evidence and do[es] not oppose a limited deposition expressly for the purpose of establishing jurisdictional facts.

(App-187.) Neither the court, nor Shamrock, addressed Smith's suggestion that testimony be taken or other procedures be invoked to make Smith's motion to dismiss anything other than a typical motion conducted without an evidentiary hearing.

Second, the lower court never provided any advanced notice of an "evidentiary hearing." Accordingly, Smith was deprived of an opportunity to present testimony and additional evidence that would have been presented at such a hearing. Failure to provide advance notice deprived Smith of an effective opportunity to be heard in a meaningful manner in further violation of his due process rights.

Third, there was no indication during the hearing on Smith's motion to dismiss that an "evidentiary hearing" was being conducted. (App- 245 to App-268.) Indeed, the whole hearing lasted approximately half-an-hour. (App-247.) No testimony was taken. (App- 245 to App-268.) No motions were made to admit exhibits into evidence. (*Id.*) And most importantly, the judge did not state an evidentiary hearing was being held. (*Id.*) Accordingly, no notice was provided that would alert Smith he may be prohibited from producing additional evidence later at an evidentiary hearing in support of his jurisdiction defense.

Finally, the lower court's memorandum order does not refer to any "evidentiary hearing." (App-269 to App-274.) To the contrary, the court premised its order with the comment that it was based "[u]pon a review of the file" not upon an evidentiary hearing. (App-269.)

Under Minnesota practice and procedure, a motion brought pursuant to Rule 12.02 involving jurisdictional issues such as a defendant's residence and domicile are typically not subject to an evidentiary hearing unless some form of notice is provided. Additionally, well-established Minnesota precedent dictates that Smith's appeal on this jurisdictional issue does not foreclose further motion practice and/or an evidentiary hearing as to whether the essential jurisdictional facts exist. *See, e.g., Hunt v. Nevada State Bank*, 172 N.W.2d 292, 312, n.33 (Minn. 1969). Where it appears the underlying jurisdictional facts are in dispute, then a defendant like Smith is permitted to file a

“renewed motion to dismiss.” *Id.*³ Rule 12 does not require an evidentiary hearing in the first instance. Minn. R. Civ. P. 12.02 (entitled “Preliminary Hearing”).

If Smith had been properly informed an evidentiary hearing was being held, he would have presented additional evidence and testimony such as certified tax returns for the past 20-years demonstrating he was never a Minnesota resident. The court’s failure to notify Smith deprived him of a fair and meaningful opportunity to be heard on critical jurisdictional issues in violation of his due process rights.

III. SHAMROCK MUST PROVE THE ESSENTIAL JURISDICTIONAL FACTS BY A PREPONDERANCE OF THE EVIDENCE AND THIS BURDEN NEVER SHIFTS TO SMITH.

In making its jurisdictional determinations, the lower court was uninformed regarding who bore the burden of proving the essential jurisdictional facts and what level of evidence was required to establish those facts.⁴ Applying these legal standards, which are set forth below, demonstrates Shamrock cannot satisfy its burden.

³ Smith does not concede this matter should be remanded for an evidentiary hearing in order to grant his motion to dismiss. In the event this Court believes a remand is necessary in order to conduct an evidentiary hearing, however, then Smith respectfully requests this Court to order an evidentiary hearing on jurisdictional issues within 60-days of remand. *See Braley v. Horton*, 432 So.2d 463, 466 (Ala. 1983) (remanding with instructions to conduct evidentiary hearing on service via publication within 56-days).

⁴ Personal jurisdiction is comprised of two components: (1) minimum contacts; and (2) sufficient service of process. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. Ct. App. 2003). In this case, Shamrock attempted service of process pursuant to Minn. R. Civ. P. 4.04(a)(1) which requires Shamrock to establish both Smith was a resident of, and domiciled in, Minnesota at the time service was attempted. Accordingly, applying a legal standard for burden of proof and quantum of evidence necessary to establish personal jurisdiction is entirely appropriate.

In Minnesota, when a nonresident challenges jurisdiction, the burden is on the plaintiff to prove not only jurisdiction is authorized by the terms of the statute or rule, but also the exercise of jurisdiction is consistent with due process. *Sausser v. Republic Mtg. Investors*, 269 N.W.2d 758, 761 (Minn. 1978). Significantly, the party seeking to establish the court's *in personam* jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction. *Gorton v. Nordlund*, A04-2516, 2005 WL 3289426 at *4 (Minn. Ct. App. Dec. 6, 2005) citing *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 647 (8th Cir. 2003) (citing numerous cases). To defeat a motion to dismiss, a plaintiff need only make a *prima facie* showing, however, the plaintiff bears the ultimate burden of proof regarding jurisdiction, which must be established by a preponderance of the evidence at trial or an evidentiary hearing. *Id.*

Shamrock's reliance on *Van Rhee v. Dysert*, 191 N.W. 53 (Minn. 1922) is misplaced. First, *Van Rhee* was an *in rem* action, not an *in personam* action—where courts take greater strides to protect due process interests of nonresident defendants. *Cf.* Minn. R. Civ. P. 4.04(a) (requiring residency as a condition for *in personam* actions but not for *in rem* actions). Second, the defendant in *Van Rhee* claimed he was a resident of Minnesota at all times. In this case, Smith claims he was never a resident. Third, *Van Rhee* on its face only addressed the issue of diligence not the issue of whether the essential jurisdictional facts actually exist. Fourth, *Van Rhee* was decided before the modern rules of civil procedure were enacted and, therefore, provides little guidance on how Rule 4.04(a)(1) should be interpreted. And last, *Van Rhee*, never addressed the

significant due process issues implicated by any allocation of burden of proof to a defendant in cases involving nonresidents.

In the present case, the court denied Smith's motion to dismiss after concluding only that Shamrock was diligent and filed its Rule 4.04 Affidavit in good faith. The lower court never concluded Shamrock satisfied the burden of proof necessary to establish Rule 4.04(a)(1)'s essential jurisdictional facts. (App-271 at ¶ 3.) Instead, the court labored under the erroneous view that proving the jurisdictional facts was unnecessary. (App-273.) Failing to hold Shamrock to its burden of proof is reversible error.

Further, even if the lower court had, *arguendo*, made findings with respect to the essential jurisdictional facts, it erroneously allocated the ultimate burden of proof to Smith rather than to Shamrock. (App-273.) Moreover, because no evidentiary hearing was held, it appears the lower court only required Shamrock to provide *prima facie* evidence that it satisfied Rule 4.04(a)(1). This too is reversible error.

IV. SHAMROCK DID NOT PROVIDE EVIDENCE TO SATISFY ITS BURDEN OF PROOF REGARDING THE ESSENTIAL FACTS NECESSARY TO CONFER JURISDICTION TO THE COURT.

Remanding this case back to the trial court for an evidentiary hearing is unnecessary. Shamrock has not provided, and cannot provide, any evidence supporting the essential jurisdictional facts. Accordingly, a remand would be futile because Shamrock could not carry its burden of proof.

A. Shamrock Did Not Present Any Competent Or Admissible Evidence At The Purported “Evidentiary” Hearing.

The only affirmative “evidence” Shamrock advanced to support the essential jurisdictional facts are Accurint database reports. However, these were not admitted into evidence at the hearing; nor are they admissible under the rules of evidence.

Shamrock’s Accurint database reports are not record-evidence because they were not properly authenticated as required by Minn. R. Evid. 901(b) (7) and (9). *See In re Minnesota Asbestos Litig.*, 552 N.W.2d 242, 245-46 (Minn. 1996) (no personal jurisdiction and due process violated because plaintiff’s affidavit exhibits not authenticated). Indeed, Shamrock laid no foundation for admitting these documents into evidence or demonstrating they were the best evidence pursuant to Minn. R. Evid. 1002. Nor could any acceptable foundation be laid for admitting such database records. On their face, the Accurint reports explain they are unreliable, “generally not free from defects,” and need to be “independently verified.” (App-131.)

Further, the Accurint database reports are unattested and unverified hearsay within hearsay that possess no evidentiary value and are, therefore, inadmissible. *Sausser*, 269 N.W.2d at 760; Minn. R. Evid. 802. Significantly, Smith raised a hearsay objection to these reports. (App-186.) The lower court, however, never ruled on that objection.

B. Shamrock Failed To Provide Any Admissible Evidence On The Issues Of Residence And Domicile.

Shamrock’s sole support for the jurisdictional facts relating to the residence and domicile of Smith emanate from its Accurint database reports. As argued above, those

Accurint reports are inadmissible hearsay that have not been authenticated or verified. No foundation was laid demonstrating they are reliable. Indeed, on the face of each report there is a disclaimer stating they are unreliable and must be independently verified. The Affidavit of Donna Trimble demonstrates the inherent “real life” unreliability of these database reports. (App-200.) Accordingly these documents are substantially more prejudicial than probative and should have been excluded pursuant to Minn. R. Evid. 403.

Even if these reports were admissible and deemed reliable, the Accurint reports demonstrate, at best, a connection between Smith and the 1520 Hunter Drive address only from April 1996 to October 2000. Rule 4.04(a)(1) requires a showing that Smith “is a resident individual domiciliary” of Minnesota—regardless of whether he “remains concealed therein” or has departed from the state. Minn. R. Civ. P. 4.04(a)(1). Because Shamrock cannot provide any admissible evidence demonstrating Smith was a current Minnesota resident and domiciliary in April 2006 when it attempted to serve him via publication, the essential jurisdictional facts remain unsatisfied.⁵

The connection between 1520 Hunter Drive and Smith is tenuous at best. It is limited in time from April 1996 to October 2000. The lower court found this address was the registered address for a partnership of which Smith was a limited partner. The lower

⁵ This interpretation is consistent with Minnesota’s Long-Arm Statute:

“Nonresident individual,” as used in this section, means any individual, or the individual's personal representative, who is not domiciled or residing in the state when suit is commenced.”

Minn. Stat. § 543.19, subd. 5 (emphasis added).

court therefore concluded Smith “used” that address. Until its most recent brief, Shamrock never argued anything other than Smith “used” the 1520 Hunter Drive address. Given the connection between Smith and the registered address of 1520 Hunter Drive for a limited partnership of which Smith was a member, there should be no inference Smith was a resident or domiciliary of Minnesota 6-years after the inadmissible Accurint database reported some unspecified connection between Smith and 1520 Hunter Drive. To the extent Shamrock argues such an inference is permissible, Smith disagrees and asserts that such an inference cannot satisfy Shamrock’s burden of proof in light of the substantial evidence offered by Smith demonstrating he was never a resident or domiciliary of Minnesota.

The inherent unreliability of the Accurint database is highlighted when one focuses on the Shamrock’s suggested conclusion that Smith “used”/“lived” at 1520 Hunter Drive from April 1996 to October 2000. (App-131.) Using the same logic relied on by Shamrock, the Accurint reports submitted by Smith demonstrate he resided in Washington D.C.—at the same address as set forth in his affidavit of identification—from May 1981 to October 2001. (App-231; App-109; App-153.) Obviously, Smith could not have resided at these two locations simultaneously. The Accurint report submitted by Smith further shows—consistent with Smith’s Affidavit—that he lived in his current residence in California from January 2001 to the present. (App-231; App-2.) Accordingly, the Accurint database reports should not have been used as “evidence” to support Shamrock’s claim it satisfied Rule 4.04’s essential jurisdictional facts.

Minnesota Rules, Rule 8001.0300, subdivision 3 provides a non-exhaustive list of 26 factors “considered in determining whether or not a person is domiciled in [Minnesota].” (Add-001.) Although the list is too lengthy to quote in this brief, reference to this list demonstrates the futility of Shamrock’s claim that Smith was ever domiciled in Minnesota. Shamrock cannot, and has not, provided a prima facie showing on any of the Rule 8001.0300, subdivision 3 factors. Accordingly, Shamrock cannot satisfy its burden of proving the essential jurisdictional facts necessary to confer jurisdiction.

C. Shamrock Failed To Provide Any Admissible Evidence On The Issues Of Intent To Defraud Creditors Or Avoid Service.

Shamrock argues it satisfied its burden of proof on the critical issue of whether Smith intended to defraud creditors or avoid service by relying only on a mere inference. However, an inference is insufficient to satisfy Shamrock’s burden of proof. If an inference was sufficient, then it would effectively nullify half the essential jurisdictional facts required by Rule 4.04(a)(1).

The plain language of Rule 4.04(a)(1) demonstrates an inference cannot be used by a single plaintiff/creditor to prove the requirement that a defendant possessed an intent to defraud creditors. Specifically, the rule uses the plural of creditor, “creditors,” and therefore, requires Shamrock to prove Smith possessed an intent to defraud multiple creditors. Minn. Stat. § 645.16 (“the letter of the law shall not be disregarded under the pretext of pursuing the spirit”). Assuming, arguendo, any inference can be drawn based

upon Shamrock's allegation the underlying judgment has not been paid in full, it still only relates to the non-payment of one creditor—not two or more as required.

Significantly, Shamrock agrees that intent must be determined “in light of all the surrounding circumstances.” (Shamrock's br. at 28.) The circumstances in this case include:

- Smith stated he never intended to defraud Shamrock or avoid service (App-1 to App-2.);
- Smith's attorney, Arnold Westerman, spoke with Shamrock's representative, Mary Dreier, on three occasions to discuss the judgment and resolve issues surrounding the judgment, but Shamrock never responded to these overtures (App-2; App-99 at ¶¶5-8; App-161 to App-163); and
- Smith understood the underlying judgment had been paid in full by co-judgment debtor Richard K. Burtness. (App-247 to App-248; App-285 to App-287.).

An inference, contrary to Shamrock's assertion, does not supplant the need for evidence. Moreover, an inference does not satisfy the “strict” compliance with the requirements of service by publication mandated by Minnesota law. *See, e.g., Wiik v. Russell*, 218 N.W. 110, 111 (Minn. 1928). When a defendant moves to dismiss a plaintiff's complaint, the plaintiff must demonstrate “evidence” supports each element of its claim. Minn. R. Civ. P. 56.05 (“an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial”).

Here, Shamrock has no evidence supporting the essential jurisdictional requirements of intent to defraud creditors and/or an intent to avoid service of process. Shamrock merely possesses an impermissible inference upon an inference, upon an

inference. *Cf.* Minn. R. Evid. 104(b). Because the first inference (i.e., Shamrock's claim Smith was a Minnesota resident) is based upon an inadmissible database report, and the second inference (i.e., that Smith resided in Minnesota after October 2000) directly conflicts with additional information supplied by the Accurint database, the third inference (i.e., that Smith had an intent to defraud creditors or avoid service) is an impermissible stacking of inferences. *See, e.g., State v. Doyle*, 201 Kan. 469, 488, 441 P.2d 846 (Kan. 1968); *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *U.S. v. Shahane*, 517 F.2d 1173, 1178 (8th Cir. 1975). See also Minn. R. Evid. 403. Under Minnesota law, a fact inference may not depend on the existence of unproved facts. *Johnson v. Lorraine Park Apartments, Inc.*, 128 N.W.2d 758, 762 (Minn. 1964).

Cases reciting the actual evidence (not inferences) used to support the requirement of an intent to avoid service of process were discussed at page 34 of Smith's opening brief and will not be reiterated here. There do not appear to be any published cases where service by publication was permitted based upon a defendant's alleged attempt to defraud creditors. In this case, Shamrock relies exclusively on an impermissible stacking of inferences and offers no evidence multiple creditors were at issue. Accordingly, Shamrock does not satisfy its burden of proof on these essential jurisdictional facts.

V. SMITH DID NOT WAIVE HIS JURISDICTIONAL OBJECTIONS.

Shamrock's argument that Smith waived his jurisdictional defenses is wholly unsupportable for the following reasons:

1. 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.” 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. *See* 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 12.08 (4th ed. 2002) (hereinafter “*Minnesota Practice*”).

2. Rule 12.07 entitled “Consolidation of Defenses in Motion” specifically provides Smith may join “other motions then available to the party” so multiple motions may be brought together as a matter of efficiency for the Court and the parties. Minn. R. Civ. P. 12.07.

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.

Minnesota Practice § 12.16 at 344 (emphasis added).

3. Under Rule 12.08, if Smith had not raised the motion to strike, then it would have been waived. 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.

Minnesota Practice § 12.08 at 347.

4. 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. v. Arrowhead Corp.*, 459 N.W.2d 160, 162 (Minn. Ct. App. 1990) (quoting Minn. R. Civ. P. 8.05) (emphasis added).

5. To the extent waiver is even possible, it would be under circumstances far different from those in the present case where, at best, the Smith raised defenses simultaneously. For example, in *Patterson v. Wu*, 608 N.W.2d 863 (Minn. 2000) the court held 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.” *Id.* at 864 and 869 (emphasis added).

6. Smith’s 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.

7. In both his Notice of Motion and Motion, as well as in his briefs, Smith repeatedly stated it was not his intention to invoke the Court’s substantive jurisdiction. (App-59; App-63 to App-64; App-91 at n.5; App-180 at ¶ 7.)

8. Plaintiff’s citation to case law is inapposite and clearly distinguishable. Cases cited by Shamrock, with two exceptions, were all decided before the Minnesota Rules of Civil Procedure existed or are cases from foreign jurisdictions. None addressed the applicable Rules of Civil Procedure discussed above.

Anderson v. Mike Drilling Co., 102 N.W.2d 293 (Minn. 1963), cited by Shamrock, actually supports Smith’s position. *Anderson* stands for the proposition that by attending

a hearing and offering arguments on the merits of the claim, a defendant does not waive a jurisdictional defense. *Id.* at 300.

Peterson v. Eishen, 512 N.W.2d 338 (Minn. 1994), also cited by Shamrock, is inapposite because the Court found defendant had not taken any steps that would affirmatively invoke the jurisdiction of the court. *Id.* at 340. *See also Galbreath v. Coleman*, 596 N.W.2d 689, 691 (Minn. Ct. App. 1999) (distinguishing *Peterson* and holding that a party does not waive jurisdictional objections by simultaneously challenging the grounds for the judgment against him).

The *Slayton Gun Club v. Town of Shetek* case, cited in *Peterson*, also cannot serve as support for Shamrock's position. In *Slayton*, the defendant raised the lack of jurisdiction issue only on appeal after he had "been physically present and represented by counsel at every hearing in [the lower] court." 176 N.W.2d 544, 548 (Minn. 1970). In contrast, Smith was never physically present at any hearing and objected on jurisdictional grounds from the beginning.

VI. SMITH'S DUE PROCESS RIGHTS WERE VIOLATED.

A. Smith Preserved His Due Process Argument.

Shamrock unfairly—or perhaps desperately—argues Smith did not present his due process argument to the trial court and, therefore, it should not be heard on appeal. Smith, however, asserted his due process rights at every turn.

First, Smith expressly preserved his due process rights for appeal in his motion to dismiss. Smith specifically invoked the United States Constitution and cited relevant case law:

By way of further example, the insufficiency of service of process against Defendant Randall N. Smith, a resident of the State of California who had never resided in Minnesota, is demonstrated by the fact that the publication of Plaintiff's Summons in Finance and Commerce was not "reasonably calculated" under all of the circumstances, to apprise Defendant Randall N. Smith of the pendency of the Plaintiff's action and to afford him a reasonable opportunity to present his objections, all in violation of his due process rights under the U.S. Constitution. *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).

(App-61 at ¶4.)

Second, Smith's brief in support of his motion to dismiss discussed at length the fact that he was never a Minnesota resident and again cited case law in support of his due process argument. (See, generally App-67 to App-97; App-84 at n.3; App-88.) Residency, of course, is a material underpinning to Smith's due process argument.

Third, legal counsel for Smith specifically argued due process at the oral argument on Smith's Motion to dismiss. (See, e.g., App-256, "[A]nd now we're treading on May ice because we're talking about due process and jurisdictional issues.") The trial judge, however, immediately raised other issues and then cut-short any further direct discussion regarding due process. (App-258, "I do have to cut you off in about 30 seconds.) Smith's counsel asked for an additional two minutes to respond, but the judge only

allowed an additional “30 seconds.” (App-266.) Accordingly, Smith unequivocally raised due process issues at oral argument.

Last, because the due process issue was vitally important, Smith submitted a request pursuant to Minn. R. Gen. Prac. 115.11 to file a motion for reconsideration specifically asking for the opportunity to address the due process issue. The lower court acknowledged Smith’s due process arguments, but nonetheless denied Smith’s request. (App-276.)

Under these circumstances, where Smith cited case law, argued due process issues at the hearing, and then attempted to raise the argument again by way of a motion for reconsideration, it would be improper to conclude Smith failed to preserve his due process argument. The record demonstrates Smith presented the due process issue to the trial court. (App-276.) This is sufficient to preserve the issues. *Thompson v. Barnes*, 200 N.W.2d 921, 926 (Minn. 1972).

B. Shamrock’s Arguments Are Based Upon A Faulty Foundation.

Shamrock’s sole bases for claiming service of process via publication in *Finance and Commerce* did not violate due process are its incorrect assertion that: (1) Smith was a resident of Minnesota between April 1996 to October 2000; and (2) service by publication was a last resort because there was no more effective way of effecting service. As set forth above, Smith was never either a resident or a domiciliary of Minnesota. Smith will not repeat that argument here, but rather emphasizes service by

publication was not a “last resort” because Shamrock chose not to use the tools and information it possessed which would have allowed it to serve Smith personally.

Shamrock’s Accurint database reports are its sole support Smith had any connection to a Minnesota address. At best, these show a connection to a residential address. However, they do not provide even *prima facie* evidence Smith was a *resident* at 1520 Hunter Drive or any other address within Minnesota—particularly after October 2000. Based upon the Accurint reports and Shamrock’s arguments, Shamrock would have this Court believe three grown men—each with their own families—all resided at 1520 Hunter Drive in Medina, Minnesota, a single family house serving as the registered business address of Dakota Turkey Farms Limited Partnership. Clearly, the “connection” between Smith and 1520 Hunter Drive is that he was a limited partner of Dakota Turkey Farms Limited Partnership. Shamrock’s hearsay Accurint database report establishes nothing more than this limited connection.

In addition to being inadmissible hearsay, Shamrock’s Accurint database reports also only show a connection between Smith and 1520 Hunter Drive until October 2000. Amazingly, the only Accurint database search conducted by Shamrock to locate Smith used a query looking for Randall Smith at 1520 Hunter Drive in Medina, Minnesota. Shamrock never used the Accurint database to look for Smith anywhere else in Minnesota—or for that matter anywhere else in the United States. But how could that be? If Shamrock truly intended to locate Smith for purposes of personal service of process, then why would Shamrock not have searched all of Minnesota using its Accurint database? Even better, once Shamrock had what it believed to be a confirmed address for

Smith at 1520 Hunter Drive, why did Shamrock choose not to use this address and Smith's name to search for him throughout the United States?

Notably, when Smith's name and last known address in Washington, D.C. from the affidavit of identification were used as search criteria in the Accurint database, they provided the current residential address of Smith in California and the entire search took less than 15 minutes. (App-109; App-228 to App-229; App-231 to App-232.)

Shamrock possessed the tools (*i.e.*, the Accurint database and a paralegal with 20-years experience) and the information (*i.e.*, Smith's work and residential addresses from the affidavit of identification and the 1520 Hunter Drive address information from an Accurint database report), but chose not to use either in an attempt to locate Smith after his alleged connection with 1520 Hunter Drive ended in October 2000. In a case which Shamrock alleges it is owed over \$1.2 million, is this reasonable?

Defendants submit Shamrock's failures in this regard were not reasonable under the circumstances. *Mullane*, 339 U.S. at 315, 70 S.Ct. at 657. Shamrock possessed all of the information and resources at its disposal to locate Smith during the 10-years before the underlying judgment statutorily expired. Service by publication was not necessary as a last resort. Therefore, service by publication does not comport with due process.⁶

⁶ It is undisputed Smith never received actual notice during the statute of limitations period. Smith never subscribed to or read *Finance and Commerce*. (App-2.) His special and limited appearance for purposes of contesting due process and service of process pursuant to the Minnesota Rules of Civil Procedure cannot be used to eviscerate his constitutional rights. (*See* Smith's opening br. at 37-42.)

Shamrock argues nothing in the rules require it to publish its summons outside Minnesota. Shamrock is only partially correct. Nothing in the rules provides any direction on whether the summons should be published in a Minnesota newspaper, a national publication, or a newspaper published in a state other than Minnesota. The standard is simply that the summons must be published such that it provides notice reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of the action. *Mullane*, 339 U.S. at 314-15 70 S.Ct. at 657; *McDonald v. Mabee*, 243 U.S. 90 (1917) (service should be “reasonably calculated to give actual notice of the proceedings”).

In this case, Shamrock possessed documents demonstrating Smith both lived and worked outside of Minnesota. (App-109 to App-110; App-153.) Shamrock further knew that some of Smith’s co-judgment debtors, family and business partners also lived outside of Minnesota. (App-107 to App-108; App-115; App-153; App-25.) Shamrock itself claims it possessed a good faith basis for believing Smith had “departed” from Minnesota (where he had, in fact, never lived or been domiciled). Under those circumstances, when over \$1.2 million is at issue, publishing Shamrock’s summons in a local newspaper such as *Finance and Commerce* was not reasonably calculated to apprise Smith of the pendency of this action.

[P]rocess 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.

Mullane, 339 U.S. at 315, 70 S.Ct. at 657; see also *Electro-Measure*, 398 N.W.2d at 89 (service by publication in Wisconsin newspaper ineffective when plaintiff had reason to believe defendant lived and worked in Minnesota).

C. Service By Publication Was Insufficient To Confer Jurisdiction Consistent With Due Process of Law.

Shamrock ignores the holdings of *McDonald v. Mabee*, 37 S.Ct. 343, 344, 243 U.S. 90, 92 (1917) and *Roberts v. Roberts*, 161 N.W. 148 (Minn. 1917) and their progeny which instruct that a resident who has left the state without intent to return cannot be served by publication in an in personam suit. See also *Gill v. Gill*, 152 N.W.2d 309, 311 (Minn. 1967) (“[I]t is well settled that a personal judgment . . . against a *nonresident* where the only service is by publication is void everywhere and the rule is the same in any action *in personam* where the defendant is a nonresident.”) (citing *Roberts*, 161 N.W. at 149); *Accord Wise v. Siegel*, 527 So.2d 1281, 1282 (Ala. 1988) (service via publication not available on nonresident who left Alabama during plaintiff’s attempts to serve defendant). Shamrock offers nothing other than naked speculation that Smith remained in Minnesota following October 2000. Indeed, Smith never resided in Minnesota, and never visited Minnesota for over 10 years before the present action. (App-1.) Accordingly, service via publication was not available to commence this action even if it is determined—contrary to the overwhelming weight of the evidence—that Smith lived in Minnesota from April 1996 to October 2000. There is no evidence Smith was either a Minnesota resident or a domiciliary after October 2000. The lower courts’ holdings to

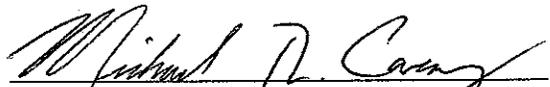
the contrary (assuming any were made) were clearly erroneous and violate Smith's due process rights.

CONCLUSION

Based upon the facts and arguments presented above, Smith respectfully requests the Court to hold service of process via publication was insufficient to confer jurisdiction and to dismiss Shamrock's claims against Smith. Alternatively, Smith requests 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. If this Court believes it is necessary to remand this case for an evidentiary hearing, then Smith respectfully requests the evidentiary hearing be conducted within 60-days of remand.

Respectfully submitted,

Dated: January 28, 2003



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CERTIFICATE OF BRIEF LENGTH

I hereby certify this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,992 words exclusive of the Table of Contents, Table of Authorities, and Appendix. This brief was prepared using Microsoft Word version 11.0.

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