

NO. A06-1647

State of Minnesota
In Supreme Court

Shamrock Development, Inc.,
a Minnesota corporation,

Respondent,

vs.

Randall N. Smith,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

Timothy J. Mattson (#194517)
Charles (CJ) Schoenwetter (#025115X)
BOWMAN AND BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
(612) 339-8682

Attorneys for Appellant

Charles E. Lundberg (#6502X)
Stanford P. Hill (#0174208)
David A. Turner (#0333104)
BASSFORD REMELE,
A Professional Association
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612) 333-3000

Attorneys for Respondent

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

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LEGAL ISSUES

1. **When a plaintiff conducts a diligent search for the defendant both in and outside of Minnesota, complies fully with the requirements of Minn. R. Civ. P. 4.04(a), and makes an evidentiary showing in the district court that the “jurisdictional facts” in Rule 4.04(a) exist, is service by publication on the defendant valid?**

The district court denied Appellant Randall N. Smith’s motion to dismiss for insufficient service of process, and the court of appeals affirmed.

Authority:

Gill v. Gill, 277 Minn. 166, 152 N.W.2d 309 (1967).
Wiik v. Russell, 173 Minn. 580, 218 N.W. 110 (1928).
Van Rhee v. Dysert, 154 Minn. 32, 191 N.W. 53 (1922).

2. **When a plaintiff submits evidence that the defendant is a resident domiciliary of Minnesota who has left the state or remains hidden therein in an attempt to avoid service of process, is service by publication in a Minnesota newspaper consistent with due process?**

Smith did not raise a due process violation in the district court, so the district court did not address this issue. Smith asserted his due process claim for the first time on appeal, and the court of appeals refused to address it.

Authority:

Jacob v. Roberts, 223 U.S. 261 (1912).
Gill v. Gill, 277 Minn. 166, 152 N.W.2d 309 (1967).
Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148 (1917).

STATEMENT OF THE CASE AND FACTS

This matter arises from a renewal of a 1996 judgment against Appellant Randall N. Smith (“Smith”) which was later assigned to Respondent Shamrock Development, Inc. (“Shamrock”).

In the district court, Shamrock produced evidence that Smith was a Minnesota resident from April 1996 (which was shortly after the time the judgment was entered) until October 2000 and that, under the circumstances, Smith appeared to have left the state with the intent of avoiding paying Shamrock, the judgment creditor, and avoiding service of process. App-124.¹ Accordingly, Shamrock effected service of process on Smith under Minn. R. Civ. P. 4.04(a) by publishing the Summons in *Finance and Commerce*, a Minnesota newspaper. Shamrock’s service of process on Co-Defendants Denison E. Smith (“Denison Smith”) and Dakota Turkey Farms, Limited Partnership (“Dakota”) is no longer at issue in this appeal.

Smith entered a limited and special appearance for the purpose of challenging jurisdiction. He moved to dismiss the Complaint under Minn. R. Civ. P. 12.02 for insufficient service of process. The Hennepin County District Court, the Honorable William R. Howard presiding, denied the motion. App-269. The Minnesota Court of Appeals affirmed. *See Shamrock Dev., Inc. v. Smith*, 737 N.W.2d 372 (Minn. App. 2007) (App-289-302). This Court granted Smith’s petition for further review in part.

¹ “App-” denotes Appellant’s Appendix, and “RA” denotes Respondent’s Appendix.

I. The Judgment

On April 18, 1996, the Hennepin County District Court entered judgment in the matter of *Farm Credit Leasing Services Corp. v. Richard K. Burtness, et al.*, File No. 96-5309 (“Judgment”). The Judgment was entered in favor of the plaintiff in that case, Farm Credit Leasing Services Corporation (“FCL”), in the amount of \$825,620.79. App-13-14, 36-37.

The original joint and several judgment debtors were Randall Smith, his brother Denison Smith, Dakota, and Richard K. Burtness. The judgment debtors, including Randall and Denison Smith (collectively “the Smiths”), had confessed judgment and stipulated to its entry.² App-25.

The Judgment arose from a series of transactions that occurred years earlier. A partnership called Wild Rice Farms – in which the Smiths, Burtness, and others were partners – leased agricultural facilities from FCL. *Id.* The Wild Rice Farms partners personally, and jointly and severally, guaranteed Wild Rice Farms’ obligations under the lease. App-26. Wild Rice Farms assigned its obligations under the lease to Dakota, another partnership in which the Smiths, Burtness, and others were partners. *Id.* The Dakota partners personally, and jointly and severally, guaranteed Dakota’s obligations under the lease. *Id.*

² Smith devotes a large portion of his Statement of Facts to a collateral attack on the 1996 Judgment. However, Smith had due notice of the Judgment (App-153), and the time to seek review of or relief from the Judgment has long since passed.

In a different transaction, Burtness leased agricultural facilities from FCL. *Id.* The Wild Rice Farms partners personally, and jointly and severally, guaranteed Burtness's obligations under the lease. App-27.

Dakota and Burtness defaulted on their leases. App-27-28. In or about April 1993, FCL, Dakota, and the Wild Rice Farms and Dakota partners – which included the Smiths – entered into a settlement agreement memorialized in a Stipulation for Entry of Judgment (“Stipulation”). App-29. Under the Stipulation, the Smiths acknowledged that they “are individually and jointly and severally indebted to FCL” in the amount of \$712,615.64 on the Dakota lease and \$170,963.66 on the Burtness lease. App-30. In settlement of their debt to FCL, the Smiths agreed to make regular payments to FCL as set forth in the Stipulation. *Id.*

The Smiths also stipulated to the entry of judgment against them and their co-obligors. App-32. The Smiths furthermore agreed that if they or their co-obligors defaulted on their payment obligations to FCL under the Stipulation, FCL could file the Stipulation and cause judgment to be entered against them. *Id.*

Also in the Stipulation, which was personally signed by both Randall and Denison Smith, the judgment debtors confessed to an entry of judgment against them:

Confession of Judgment

Pursuant to the Agreement as identified above and attached hereto, Plaintiff FCL hereby files on behalf of the Guarantors, Richard K. Burtness, Edward O. Samuelson, Denison E. Smith, Randall N. Smith, Scott Hendrickson, Wild Rice Farms and Dakota Turkey Farms on a joint and several basis, a Confession of Judgment pursuant to Minn. Stat. § 548.22 and §541.09. Based on this statutory authority and its

contractual right, FCL demands all delinquent amounts due under the Agreement, including costs, legal fees and interest in the amount of \$542.40 which have accrued through and including the date of filing of this Confession of Judgment.

IT IS UNDERSTOOD BY ALL PARTIES to the Agreement that this Confession of Judgment will have the same force of law as a full, final and complete judgment on the merits had this case gone through trial and final judgment been entered in accordance with the provisions of this Agreement.

IT IS UNDERSTOOD BY THE PARTIES to the Agreement that upon filing of this Confession of Judgment, Plaintiff FCL can take all action necessary to secure the prompt and complete payment and/or satisfaction of this entire Confession of Judgment from whatever assets are available to be garnished or attached under law owned by the Guarantors, Richard K. Burtness, Edward O. Samuelson, Denison E. Smith, Randall N. Smith, Scott Hendrickson, Wild Rice Farms and/or Dakota Turkey Farms.

This Confession of Judgment shall be binding on all parties hereto and have complete force of law.

App-33.

The Smiths and their co-obligors defaulted on their payment obligations to FCL under the Stipulation. App-153. On or about June 2, 1995, FCL sent the Smiths, by both certified and first-class U.S. mail, a Notice of Default which states:

Be advised that FCL hereby gives notice that the Parties [including the Smiths] have failed to make payments due and owing FCL. Provided that the Parties continue to fail to pay such amount for a period of ten (10) days following the mailing of this notice, that such failure shall constitute an event of default pursuant to the Agreement. Following such default, FCL will file the Stipulation for Entry of Judgment with the Fourth Judicial District Court.

Id.

In or about the early months of 1996, FCL filed the Stipulation with the Court, and judgment was duly entered against the Smiths, Burtness, and Dakota. App-13. FCL assigned the Judgment to David N. Friedges. App-15. In May 1996, Friedges assigned the Judgment to Shamrock. App-15. The Smiths and Dakota are the remaining judgment debtors in this matter; Burtness has been released. App-136.

Shamrock has no record of Smith even trying to contact the company about satisfying the Judgment. Smith claims that his attorney, Arnold R. Westerman, attempted to contact Shamrock about settling their obligations and satisfying the Judgment. But the officers of Shamrock who had authority to settle this dispute – CEO James M. Stanton and CFO Michael J. Kraling – were never contacted by Smith or Westerman. RA 1-2; App-118-119. Smith maintains that Westerman contacted an employee of Shamrock named Mary Dreier in 2000 about satisfying the Judgment but received no response. A woman by that name was once employed by Shamrock, but only until 1995; she was not an agent or employee of Shamrock in 2000 and has never had any interest in the Judgment or involvement in this matter. *Id.*

Smith also never paid money into court, which would have stopped the accrual of interest on the Judgment. App-139. The amount of the Judgment, including interest, now exceeds \$1,259,818.67. App-11.

II. Renewal of the Judgment and Service of Process

Minnesota has a 10-year statute of limitations on actions to enforce judgments. *See* Minn. Stat. § 541.04 (2006). Accordingly, the Judgment was set to expire on or about April 18, 2006. However, in Minnesota a judgment may be renewed for an

additional 10 years by commencing a new civil action against the judgment debtors before the judgment expires. *See, e.g., Van Rhee v. Dysert*, 154 Minn. 32, 35, 191 N.W. 53, 54 (1922) (affirming service by publication to renew judgment set to expire 10 years after entry). Shamrock elected to renew the Judgment. App-136. To commence a civil action against Defendants on the Judgment, Shamrock proceeded to accomplish service of process on Defendants before April 18, 2006. *Id.*

Before the Judgment expired, Shamrock made a more-than-diligent effort to serve the Smiths personally with the Summons and Complaint. App-124-126, 136-139. Using Accurint (<http://www.accurint.com>), a reliable Internet database widely used to locate persons for service of process, Shamrock learned that from April 1996 (the month the Judgment was entered) to October 2000, both Denison Smith and Randall Smith resided at 1520 Hunter Drive, Medina, Minnesota. App-124-125, 130-132, 137. The 1520 Hunter Drive address in Medina is the same as the registered address (1520 Hunter Drive in Wayzata) for service of process on Dakota. App-137. The 1520 Hunter Drive address is also a private residence, not a commercial office building or place of business. App-146-148.

Shamrock attempted personal service of process on Dakota on or about March 19, 2006, at 1520 Hunter Drive. App-146. The owner of the home located at 1520 Hunter Drive told the process server he was the sole occupant and had no connection to Dakota or the Smiths. App-137. Shamrock later completed personal service of process on Dakota by serving the Summons and Complaint on the secretary of state, as permitted by Minn. Stat. § 5.25. *Id.*

In an attempt to locate the Randall Smiths, Shamrock searched U.S. Bankruptcy Court filings. App-126. The search of bankruptcy records did reveal a “Randy N. Smith” living in Rochester, Minnesota. *Id.* Believing he might be the Defendant Randall N. Smith, Shamrock effected personal service on Randy N. Smith in Rochester, Minnesota on March 20, 2006. App-150. This Randy N. Smith was not the Appellant Randall Smith. App-138.

Neither the Affidavit of Identification of Judgment Debtor of Randall N. Smith filed by FCL with the district court (App-109-110) nor the Affidavit of Amounts Owed (App-151) contains a current address for Smith. Smith now claims that he has lived at 1317 Beverly Estate Drive, Los Angeles, California, since January 2001. Therefore, Shamrock could not have located Smith for service of process using these documents.

By March 2006, Shamrock had tried but was unable to locate Denison Smith in Minnesota. App-124-126. Using a private investigator, Shamrock learned that Denison Smith was living in Fairfax, Virginia. App-126. Denison Smith was personally served with the Summons and Complaint at his home in Fairfax, Virginia on March 18, 2006. App-149.

By March 2006, Shamrock was unable to locate Randall Smith within or outside of Minnesota. App-138-139. Shamrock commenced service on Smith by publication under Minn. R. Civ. P. 4.04(a)(1). *Id.* Shamrock’s counsel satisfied the requirements of Rule 4.04(a) by first filing with the Court the Summons, Complaint, and Rule 4.04(a) Affidavit (App-19-20) which stated, in part, that the Smiths were resident individual domiciliaries who departed from the state with intent to defraud creditors, or to avoid

service, or remained concealed within the state with like intent. Pursuant to Rule 4.04(a), the Summons was then published in *Finance and Commerce*, a Minneapolis legal newspaper, for three consecutive weeks. App-23. Shamrock's service by publication satisfied all the requirements of Rule 4.04(a) and was completed no later than April 14, 2006. App-138-139.

Within 10 days after the completion of service by publication, Smith filed a limited and special appearance for purposes of challenging personal jurisdiction. Within five days after such appearance, counsel for Shamrock served a copy of the Complaint on Smith's attorney, as required by Minn. R. Civ. P. 4.042. App-139-140.

III. Smith's Motion to Dismiss

The Smiths moved the district court under Minn. R. Civ. P. 12 to dismiss the Complaint for defective process and service of process and to strike Shamrock's Rule 4.04(a) Affidavit. The court held an evidentiary hearing on Smith's motion on September 11, 2006. App-244-268.

The district court denied the motions in an order filed August 3, 2006, which among other things found that (1) Shamrock had conducted a diligent search for Smith in order to effect personal service before it attempted service by publication; (2) Shamrock commenced service by publication because it "had a good faith and honest reason for believing that Randall Smith was a Minnesota resident who had left the state or was in hiding in the State in an attempt to defraud creditors or avoid service of process"; (3) Shamrock complied with all the requirements of Rule 4.04(a), including the filing of a proper Rule 4.04(a) Affidavit (App-19-20) before commencing service by publication;

and (4) based on Shamrock's timely completion of service by publication, the Judgment had been properly renewed. App-269-274. After the court denied Smith's motion, Smith immediately began petitioning the court to accept new evidence – which Smith did not offer at the September 11, 2006, evidentiary hearing – and reconsider its denial of the motion to dismiss. App-278-288. The district court treated Smith's evidence submitted after the fact as a motion to reconsider and denied the motion in an order filed August 30, 2006. App-275.

IV. Smith's Appeals

Smith filed separate appeals from the August 3 and August 30, 2006, orders. In an order dated November 7, 2006, the court of appeals ruled that it lacked jurisdiction over the appeal from the August 30, 2006, order but that the panel deciding the appeal from the August 3 order could decide whether to consider the August 30 order.

Shamrock moved the court of appeals to strike from the record all evidence Smith submitted after the district court had decided his motion to dismiss. The court of appeals granted the motion, ruling that Smith's late evidence was "outside the record with respect to the merits of this appeal." App-301.

The court of appeals affirmed the August 3, 2006, order in its entirety and held that (1) Shamrock had complied in full with the requirements of Rule 4.04(a) and its affidavit for publication had been made in good faith; (2) Shamrock had conducted a sufficiently diligent search for Smith before attempting service by publication; and (3) the Judgment had been properly renewed. App-293-300.

Smith petitioned this Court for further review on three issues:

1. Whether service by publication is valid if the plaintiff merely alleges the jurisdictional facts in its Rule 4.04 Affidavit or whether the jurisdictional facts “must actually exist”;
2. Whether Shamrock’s search for Smith was diligent if it did not attempt to serve Smith at the Washington, D.C. address contained in the Affidavit of Identification of Judgment Debtor; and
3. Whether due process was satisfied by publishing the Summons in a Minnesota newspaper.

Smith did *not* ask this Court to review other critical rulings in the court of appeals’ decision, including (1) the court of appeals’ holding that the Judgment was properly renewed or (2) its decision granting Shamrock’s motion to strike.

In an order filed November 13, 2007, this Court granted in part and denied in part Smith’s petition for further review and limited review to the first and third of the above issues. This Court specifically refused to review the court of appeals’ holding that Shamrock used due diligence in its attempt to locate Smith for personal service; that part of the court of appeals’ decision is now final.³

Even though Smith did not seek review of the court of appeals’ decision striking from the record evidence Smith offered after the fact, Smith submitted this evidence in its appendix to its brief to this Court. App-278-288. Shamrock has moved the Court to strike this evidence from the record.

³ In his brief, Smith claims that the question of whether Shamrock could renew the Judgment under Minnesota law is preserved for some further proceeding. However, because Smith did not seek review of this issue, the court of appeals’ holding that the Judgment was properly renewed is now final.

ARGUMENT

- I. Shamrock's service by publication established the district court's jurisdiction over Smith because Shamrock both satisfied Rule 4.04(a) and submitted sufficient evidence of the jurisdictional facts.**

Rule 4.04(a) of the Minnesota Rules of Civil Procedure allows service of process by publication in certain circumstances. The issue in this appeal is whether, how, and by what quantum of proof, a party must show the circumstances allowing service by publication under the rule -- also called the jurisdictional facts.

In the district court, Shamrock submitted evidence showing that Smith is "a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent," making service on Smith by publication permissible under Rule 4.04(a)(1). App-124-153. Smith later submitted evidence that disputed Shamrock's proof. The district court held a hearing, weighed the evidence, and was more persuaded by Shamrock's proof. App-270. This appeal is nothing more than an attempt by Smith to re-litigate that fact issue.

The court of appeals correctly held below (App-295) that, while the purely legal question of whether a service of process is effective is typically subject to de novo review, the district court's findings of fact -- namely that Shamrock made a diligent effort to locate Smith and that its Rule 4.04(a) Affidavit was made in good faith -- are subject to a "clearly erroneous" standard and must be affirmed if supported by any evidence in the record. See *Roehrdanz v. Brill*, 682 N.W.2d 626, 629 (Minn. 2004); *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Under the correct standard of review,

the court of appeals properly held that the record supported the district court's evidentiary determinations and that service by publication was valid and effective.

Smith bases his entire appeal to this Court on two critical fallacies. First, Smith mischaracterizes the court of appeals' decision as holding that mere technical compliance with Rule 4.04(a), including filing an affidavit alleging the existence of the jurisdictional facts, makes service by publication appropriate. This is the classic straw man: Shamrock has *never* made such an argument, and nothing in the district court or court of appeals' decisions suggests it was a basis for the decisions below.

Second, Smith argues as if it is a given that everyone in this case is lying but him. Smith has always proceeded in this case as if he has incontrovertible and conclusive proof, to a near-metaphysical certainty, that he was never a resident of Minnesota. But this is not true: Shamrock submitted evidence, above and beyond its Rule 4.04(a) Affidavit, that from April 1996 to October 2000 he *was* living at 1520 Hunter Drive in Medina, Minnesota,⁴ and that under the circumstances of this case, he left the state with the intent of avoiding paying the judgment creditors. App-124-134. Smith submitted an un-notarized affidavit claiming that during this time he was living in the District of Columbia, Florida, and California. App-1. Smith also argued to the district court that Shamrock's proof was unreliable. The district court weighed the evidence and sided with Shamrock, and the court of appeals decided that the record supported the district court's decision.

⁴ The record also contains evidence that Smith lived at 1520 Hunter Drive in Wayzata, Minnesota during the same period. App-131-132. Nothing in the record suggests this is an address different from 1520 Hunter Drive in Medina.

The question of whether the Rule 4.04(a) jurisdictional facts must actually exist may be an important one for future cases, but it is entirely academic as far as this case is concerned because Shamrock made a showing in the district court that the jurisdictional facts exist and the court of appeals held that the record supports a finding that the jurisdictional facts exist. App-298. To now hold that the jurisdictional facts do not exist requires a re-weighing of the evidence and findings of fact for the first time on appeal.

Therefore, even if this Court were to hold that a person who has never lived in Minnesota cannot be served by publication under Rule 4.04(a)(1) – a proposition Shamrock agrees with – such a holding would *not* invalidate service by publication on Smith because here there was a factual dispute as to whether the jurisdictional facts existed, the district court weighed the conflicting evidence, and the court found that the facts do exist.

A. Smith has waived any objection to personal jurisdiction or service of process.

On April 18, 2006, Smiths filed a Notice of Limited and Special Appearance Pursuant to Minn. R. Civ. P 4.042, for the limited purpose of moving to dismiss the Complaint for insufficiency of process and service of process. However, Smith has waived any objection to the court's exercise of personal jurisdiction over him, and thus has waived the right to challenge process or service of process, by (1) moving to strike Shamrock's Rule 4.04(a) Affidavit and (2) mounting a collateral attack on the Judgment. Shamrock made this argument to the district court and court of appeals, and it is an alternate basis for affirmance supported by the record. *See Droege v. Brockmeyer*, 214

Minn. 182, 192, 7 N.W.2d 538, 544 (1943); *Penn Anthracite Min. Co. v. Clarkson Sec. Co.*, 205 Minn. 517, 520, 287 N.W. 15, 17 (1939).

Minnesota courts and courts of other states have held that a motion to strike serves as a waiver of any personal-jurisdiction defense. *See Kaiser v. Butchart*, 197 Minn. 28, 33, 265 N.W. 826, 828 (1936) (holding motion that complaint be stricken or that plaintiff be required to make it more certain and particular to be waiver of jurisdictional defense); *see also Trautman v. Higbie*, 89 A.2d 649 (N.J. 1952) (observing that courts have held where a motion to dismiss for lack of jurisdiction is coupled with a motion to strike affidavit, movant has waived all objections to personal jurisdiction). “It is generally held that moving to strike a pleading from the files is asking for such relief that it operates as a waiver of any objections to the court’s lack of jurisdiction.” Annotation, *Asking Relief in Addition to Vacation of Service of Process as Waiver of Special Appearance or of Right to Rely Upon Lack of Jurisdiction*, 111 A.L.R. 925 (1937).

Smith did not simply challenge the jurisdiction of the district court, he invoked the power of the court to strike Shamrock’s Rule 4.04(a) Affidavit as a so-called “sham pleading.” Motions to strike are wholly unnecessary to the motions to dismiss: if the court indeed lacks jurisdiction over Smith, the Rule 4.04(a) Affidavit will be legally null. By moving to strike, Smith went beyond merely challenging jurisdiction; he asked the court to evaluate and issue a ruling as to whether there are any “facts upon which [Shamrock] could have legitimately caused the [Rule 4.04(a)] Affidavit to be filed.” Mot. to Dismiss at 5 (¶ 7). The motion to strike thus operates as a waiver of all

objections to personal jurisdiction, and the district court's denial of the motions to dismiss must be affirmed.

In addition, Smith devoted a significant part of his motion papers to attacking the underlying Judgment as invalid because it was issued *ex parte* and supposedly without proper notice to him. And one need only look at the transcript of the district court hearing (App-246-264) to see that Smith's real objective has not been to challenge jurisdiction but to collaterally attack the Judgment. In the district court, counsel for Smith devoted the better part of his oral argument to arguing that (1) his clients had been released from the Judgment and (2) as a matter of law judgments cannot be renewed in Minnesota. This prompted the following exchange between Smith's counsel and the court:

[COUNSEL FOR SMITH]: Well, I've got a whole lot to say about this confession of judgment.

THE COURT: But if you attack the confession of judgment, to me, you're waiving jurisdiction. I mean, you can't attack the judgment unless you're going to make a general appearance. And I'm going to review what you filed yesterday [i.e., the Notice of Limited and Special Appearance] on that issue, but I'm – to me, if you attack the underlying confession of judgment, we're really here almost on summary judgment rather than jurisdiction.

App-256.

A defendant does not waive a jurisdictional defense merely by attending a hearing and offering argument on the merits of the claim. *See Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 495-96, 102 N.W.2d 293, 300 (1960). However, a defendant does submit to the court's jurisdiction by taking some affirmative step invoking the power of the court

or implicitly recognizing its jurisdiction. *Peterson v. Eishen*, 512 N.W.2d 338, 340 (Minn. 1994). As with the motion to strike the Rule 4.04(a) Affidavit, the question of whether the Judgment is valid is irrelevant to whether Shamrock properly served Smith. By making a collateral attack on the Judgment, Smith, however implicitly, asked the court to rule in his favor because, he claimed, the Judgment is invalid. Smith thus invoked the jurisdiction of the district court, and the court's denial of the motion to dismiss must be affirmed.

B. Shamrock complied fully with Rule 4.04(a) and with this Court's decisions governing service by publication.

Although personal service of process may be the best means of "acquainting interested parties with the fact that their rights are before the court," this Court has "not hesitated 'to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.'" *Gill v. Gill*, 277 Minn. 166, 171, 152 N.W.2d 309, 313 (1967) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)). In fact, this Court has readily approved of service by publication when it is "the only service possible" and "is in fact dictated by necessity." *Id.*; see also *Van Rhee v. Dysert*, 154 Minn. 32, 35, 191 N.W. 53, 54 (1922) (affirming service by publication to renew judgment set to expire ten years after entry).

Rule 4.04(a) permits service by publication in certain circumstances. This case concerns the first enumerated circumstance:

Service by publication shall be sufficient to confer jurisdiction:

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

....

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. The service of the summons shall be deemed complete 21 days after the first publication.

The rule thus establishes certain requirements before service by publication is valid and effective. Before publication starts, the plaintiff must first file in the district court (1) the complaint and (2) an affidavit which states that (a) the jurisdictional facts exist, (b) the plaintiff believes that the defendant is a non-resident or cannot be found in the state, and (c) the plaintiff has either mailed the summons to the defendant's residence or that the plaintiff does not know the defendant's residence.⁵ There is no dispute that Shamrock complied in full with these requirements.

⁵ For the first time in this case, Smith claims in his brief to this Court that Shamrock conducted the Accurant database search after it had effected service by publication in an attempt to manufacture support for service after the fact. Smith has no proof for this claim, and it is directly contradicted by the affidavits of Shamrock's counsel and the paralegal who conducted the search. App-124-126, App-135-139. It is regrettable that Smith's counsel has to resort to accusing another officer of the Court of lying and manufacturing evidence.

This Court has issued a series of decisions that impose an additional requirement for service by publication to be valid and effective, namely that the affidavit supporting service by publication be made in good faith after a diligent search for the defendant in an attempt to serve him personally:

[A]fter plaintiff and his attorney have used due diligence in making a search for a defendant without being able to locate him in the state and he is not in the county, then the affidavit can be said to be made in good faith that he cannot be found in the state, and jurisdiction of him may be obtained by publication of the summons.

Van Rhee, 154 Minn. at 35, 191 N.W. at 54. The *Van Rhee* decision makes clear that whether the plaintiff used due diligence in attempting to locate the defendant and whether the affidavit was made in good faith are questions of fact, and the district court's findings as to the same, will be affirmed on appeal if supported by the record. *Id.* at 34, 191 N.W. at 53.

Here, it is a given that Shamrock used due diligence in searching for Smith, both in and outside of Minnesota, in an attempt to serve him personally. The district court found that Shamrock's search was diligent, and the court of appeals affirmed. Smith asked this Court to review the court of appeals' decision on due diligence, but this Court declined to do so. The court of appeals' decision affirming the district court's finding of diligence is therefore final.

Moreover, Shamrock's search for Smith included the following steps, all of which are supported by the record:

- Searching the Accurint⁶ database, which revealed that from April 1996 to October 2000 both Denison and Randall Smith used the residence at 1520 Hunter Drive in Medina, Minnesota. App-124-125, 130-132.
- Serving process on 1520 Hunter Drive, which revealed that Smith did not currently reside there. App-137.
- Searching U.S. Bankruptcy Court filings for Smith. App-126.
- Hiring a private investigator to locate Smith. *Id.*
- Attempting personal service on an individual in Rochester, Minnesota believed to be Smith. *Id.*

This Court held in *Van Rhee* that if the plaintiff uses due diligence in searching for the defendant, “then the affidavit [supporting publication] can be said to be made in good faith.” *Id.* at 35, 191 N.W. at 54. This Court has long held that the affidavit need not state all facts that support service by publication; it need only clearly assert a good-faith belief that the jurisdictional facts exist. *E.g., Wiik v. Russell*, 173 Minn. 580, 583, 218 N.W. 110, 112 (1928) (“Our own statute does not require the affidavit to state the facts as to what search and inquiry have been exercised.”); *see also* 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 4.17 (4th ed. 2007) (“The affidavit for service by publication need only include the conclusory statement that one of these fact situations exists; the affidavit need not include all facts supporting the conclusions.”).

⁶ Smith makes much of the fact that the Accurint search result includes a boilerplate disclaimer as to the ultimate reliability of its information. But Shamrock also submitted the affidavit of a paralegal with 20 years’ experience who stated that Accurint searches are regularly used in the industry and reliable. App-124-125. The disclaimer was known to the district court, which weighed the evidence and was persuaded that the information was reliable.

The district court correctly found that Shamrock “had a good faith and honest reason for believing that Randall Smith was a Minnesota resident who had left the State or was hiding in the State in an attempt to defraud creditors or avoid service of process” (App-274) based on the following facts in the record:

- In the Stipulation for Entry of Judgment and signed Confession of Judgment Smith personally acknowledged that they “are individually and jointly and severally indebted” to FCL, the original judgment creditor whose interest in the judgment was ultimately assigned to Shamrock. App-30.
- In the Stipulation, Smith personally acknowledged that they owed FCL \$712,615.64 – which represented the amount by which Dakota had defaulted on an equipment lease from FCL, an obligation Smith had agreed to “unconditionally guarantee” – and \$170,963.66 – which represented the amount by which Burtness had defaulted on a different lease from FCL, an obligation Smith had also agreed to “unconditionally guarantee.” App-29-30.
- On or about June 2, 1995, FCL sent Smith by certified U.S. mail a Notice of Default which stated that if Smith failed to satisfy their obligations under the Stipulation, FCL would file the Stipulation with the Hennepin County District Court. App-153.
- Judgment was entered against Smith on April 18, 1996. With the statutory interest, the Judgment now exceeds \$1.2 million. App-11.
- Although Affidavits of Identification of Judgment Creditor were filed with the Court indicated that as of March 18, 1996, Smith lived at 3239 Ellicot Street in Washington, D.C., Shamrock’s search indicated that from April 1996 to October 2000, Smith lived at 1520 Hunter Drive address. App-125, 130-132, 137. 1520 Hunter Drive is the address of a private *residence* in the State of Minnesota. App-146-148.
- In March and April 2006, Shamrock tried but could not locate Smith for personal service of process. App-125, 137-138.
- Since entry of the Judgment, Smith has failed to satisfy the Judgment in whole or in part. Smith, who apparently knew that the Judgment had been assigned to Shamrock, did not contact Shamrock about satisfying the Judgment. RA 2; App-118-119. Smith also could have paid money into court, which would

have stopped interest from accruing on the Judgment, but failed to do so. App-139.

Based on these facts, which are all supported by the record, the district court's finding that Shamrock's Rule 4.04(a) Affidavit was made in good faith was correctly affirmed by the court of appeals.

Proving that hindsight is always 20/20, Smith continues to assert that Shamrock's Rule 4.04(a) Affidavit was not made in good faith because it could have located Smith for personal service through other information in its possession. This is patently false. Smith claims that at some time before Shamrock commenced the renewal of the Judgment, Shamrock's staff had obtained a copy of the district court file, which included the Affidavit of Identification of Judgment Creditor for Smith. This affidavit states that as of March 18, 1996, Smith was living at 3239 Ellicot Street N.W. in Washington, D.C. However, even if this affidavit were correct, Shamrock's evidence shows that Smith moved to Minnesota shortly after the Judgment was entered and resided at 1520 Hunter Drive from April 1996 to October 2000. Smith now states that from 2001 to May 2006, he lived at 1317 Beverly Estate Drive in Los Angeles, California. Before Smith submitted his affidavit in support of the motion to dismiss (App-1), Shamrock did not have any knowledge or information that Smith was residing in California. Had Shamrock attempted to serve Smith personally at the address in the Affidavit of Identification of Judgment Creditor – the Ellicot Street address in Washington, D.C. – service would have been ineffective because, if Smith is taken at his word, he has not lived there since 1997. App-2. Moreover, Shamrock had no reason to attempt service at Smith's former

Washington, D.C. address because it had more recent information indicated that he had moved to, and then departed from, Minnesota. As the district court correctly found, “[w]hile in hindsight there will always be something that could have been done to locate the defendants, Shamrock’s efforts were diligent based on the information available to them at the time.” App-274.

By the time it commenced service by publication, Shamrock had complied with all requirements for such service, including conducting a diligent search and satisfying all requirements of Rule 4.04(a).

C. Shamrock proved that the jurisdictional facts exist here.

Smith’s brief frequently asserts that the jurisdictional facts must exist but is silent as how, and by what quantum of proof, must the jurisdictional facts be established. Neither Shamrock nor the lower courts in this case have ever suggested that mere technical compliance with Rule 4.04(a) – such as the filing of the complaint and an affidavit that nakedly alleges the existence of the jurisdictional facts – automatically makes service by publication proper in all cases.

In *Wiik v. Russell*, this Court noted that, although the initial affidavit filed with the district court need not state all facts supporting service by publication, the propriety of publication may be challenged in an evidentiary hearing if the defendant brings a timely challenge to jurisdiction: “Our own statute does not require the affidavit to state the facts as to what search and inquiry have been exercised. In this state, therefore, the question of whether or not due search and inquiry have been made arises only when jurisdiction is

properly challenged and the facts presented” *Wiik*, 173 Minn. at. 583-84, 218 N.W. at 112.

In *McBride v. Bitner*, the plaintiff was unable to locate the defendant for service in the state, filed an affidavit that stated only that the diligent effort to locate the defendant was “unsuccessful” and did not allege the existence of the jurisdictional facts. He obtained an ex parte order permitting service by publication, and proceeded to publish the summons. *McBride v. Bitner*, 310 N.W.2d 558, 560 (Minn. 1981). This Court held that service by publication was unavailable because “[i]t is apparent from a reading of the [then-Rule 4.04] that it did not authorize publication merely because plaintiffs’ attorney had made diligent but unsuccessful efforts to locate defendant in this state.” *Id.* at 562.

McBride suggests that there must be some factual basis for an allegation of jurisdictional facts in the first instance, while *Wiik* indicates that a plaintiff’s allegation of the jurisdictional facts may be challenged later in the district court in an evidentiary hearing – which is exactly what happened below. But this, in turn, raises new and more difficult questions, including which party bears the burden of proof and what the quantum of proof is.

The law is unclear as to whether the plaintiff or the defendant bears the burden of proving that the circumstances supporting service by publication do not exist. *Van Rhee* suggests that the defendant bears this burden: “[S]ervice of summons by publication is valid and gives jurisdiction, unless it be shown that plaintiff or his attorney by the use of ordinary diligence could have ascertained where defendant could be found.” *Van Rhee*, 154 Minn. at 34-35, 191 N.W. at 53-54.

Even less clear is the quantum of proof. In interpreting the old service-by-publication statute, this Court noted that filing of the sheriff's return stating that the defendant could not be found was "prima facie" evidence that the defendant was no longer in the state. *Easton v. Childs*, 67 Minn. 242, 243, 69 N.W. 903, 904 (1897).

But if a plaintiff does present prima facie evidence of the jurisdictional facts, what kind of proof is sufficient to overcome that showing, and when must it come in? And what if, as Smith has tried to do here, the defendant continues to submit newly acquired evidence even after the district court has decided in the first instance whether the jurisdictional facts actually exist? If the rule is merely that jurisdictional facts must actually exist, new revelations of residency and domicile months or years after the district court decides a Rule 12.02 motion could give rise to a "springing" jurisdictional defect threatening to divest the court of jurisdiction long after it has made its initial determination. Such a rule would also run counter to the longstanding principle that once the district court determines that it has jurisdiction over the defendant, the court retains that jurisdiction even if the defendant's residency or domicile later changes. *See State ex rel. Larson v. Larson*, 190 Minn. 489, 493, 252 N.W. 329, 330 (1934).

Consider the following scenario: A process server goes to serve a defendant at his Minnesota residence and rings the doorbell. The process server sees the defendant look outside, dash out the back door, and drive away at high speed. The process server follows the defendant and sees him drive across the state line. Thereafter, the process server is unable to find defendant in Minnesota for several weeks. The plaintiff submits an affidavit alleging the jurisdictional facts under Rule 4.04(a)(1) and serves the

defendant by publication shortly before the statute of limitations runs on the claim. Months later, the defendant returns to Minnesota and submits an affidavit falsely stating that the process server had merely seen him leaving the state on a three-month vacation. On these facts, and assuming the plaintiff was diligent in its attempt to serve the defendant and fully complied with Rule 4.04(a), it would be wrong to find that the plaintiff could not serve the defendant by publication.

At the other end of the spectrum is a far different scenario, in which a plaintiff makes a minimal or no attempt to serve the defendant personally and, like an ostrich, remains willfully ignorant of the defendant's whereabouts and then proceeds with service by publication.

Smith tries to argue that this is the "ostrich" case, even though, as the district court correctly found, under the totality of circumstances it was reasonable for Shamrock to believe that Smith had left the state to defraud creditors or avoid process. App-274. But what protection would a plaintiff like Shamrock have against a defendant who flees the state to avoid process and later claims that he only left the state on vacation?

This Court need not undertake an exhaustive epistemological inquiry into the existence of the jurisdictional facts to adequately protect both the interests of plaintiffs and defendants. The "due diligence" and "good faith" requirements that have been grafted on to Rule 4.04(a)(1), as well as the availability of an evidentiary hearing in the district court, adequately protect non-resident defendants from plaintiffs who fail to attempt personal service and then proceed with service by publication.

But even if this Court were to hold that jurisdictional facts must actually exist, someone still must weigh competing evidence, make credibility determinations, and “find” the jurisdictional facts. This has always been done by the district court. *See Wiik*, 173 Minn. at. 583-84, 218 N.W. at 112. That is exactly what happened in this case.

At least five separate jurisdictional “facts” comprise Rule 4.04(a)(1). Service by publication is appropriate if a (1) resident (2) individual (3) domiciliary (4) departed the state (5) with intent to defraud creditors or avoid service or (6) remains concealed in the state with like intent. Shamrock submitted evidence to the district court of each of these elements.

There is no reasonable dispute that Smith is an “individual” and that he could not be found within the State of Minnesota. The disputed elements are whether Smith was a resident/domiciliary and whether he left Minnesota with the intent to defraud creditors or avoid service of process.

Shamrock submitted evidence that Smith lived at 1520 Hunter Drive in Medina, which is a private residence, not a business address. In but one example, Shamrock’s search, which a paralegal with 20 years’ experience testified was reliable, revealed that “possible previous residents” of 1520 Hunter Drive included Smith. App-130. Shamrock’s search revealed that Smith had lived in Minnesota for *more than four years*, from April 1996 (which was shortly after Judgment was entered against him) to October 2000. App-131-132. Smith, of course, later disputed this with his own evidence, but the district court chose to believe Shamrock’s evidence. Shamrock thus submitted sufficient evidence that Smith was a resident domiciliary.

The remaining issue is whether Smith left Minnesota with the intent of defrauding creditors or avoiding service of process. “[B]ecause intent is a state of mind, it is generally proved by inferences from a person’s words or actions in light of all the surrounding circumstances.” *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996). It requires no great leap of logic to conclude that if a person knows that he owes an undisputed debt of more than \$800,000 (with interest, more than \$1.2 million) and has failed to pay that debt for 10 years, he is avoiding paying his creditors. Furthermore, it is reasonable to conclude that if a person living in Minnesota owes an undisputed debt of more than \$1.2 million, fails to pay his creditors for years, and then can no longer be found within the state, he has either left the state or remains concealed within with the intent of avoiding paying his creditors.

Here, both sides disputed the existence of the jurisdictional facts and both sides offered conflicting evidence to the district court. Smith had a full and fair opportunity to challenge the reliability and persuasiveness of Shamrock’s evidence, and vice versa. The district court held an evidentiary hearing and found that the jurisdictional facts existed. This appeal is nothing more than an attempt by Smith to re-litigate the facts. But in the final analysis, there was evidence of the jurisdictional facts, the record on appeal supports the finding that the facts exist, and the district court’s determination must be affirmed.

II. Publication of the Summons in a Minnesota newspaper was consistent with due process.

The final issue is whether, assuming the jurisdictional facts exist, publication of the Summons in *Finance and Commerce*, a Minnesota newspaper, was consistent with due process.

A. Smith failed to preserve any due process argument for appeal.

This Court has held that due process claims not presented to the trial court will not be considered for the first time on appeal. *St. Paul Citizens for Human Rights v. City Council of St. Paul*, 289 N.W.2d 402, 407 (Minn. 1979). Although Smith mentioned, vaguely and in passing, in his notice of motion to dismiss that service on him was not consistent with due process, he failed to brief any due process argument in the district court. App-86-96. Because Smith did not press the argument, the district court did not consider or address it. Smith did not actually make any due process argument until he reached the court of appeals, which properly declined to consider it. Shamrock submits that the due process issue is waived on appeal and respectfully requests that this Court refuse to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

B. With respect to a Minnesota resident who has left the state to avoid process, publication of notice of the action in a Minnesota newspaper comports with due process.

This Court has consistently held that Minnesota's statutes and rules authorizing service by publication in limited circumstances comport with the due process requirements of the United States Constitution. *See Gill*, 277 Minn. at 171, 152 N.W.2d at 313; *Roberts v. Roberts*, 135 Minn. 397, 400-01, 161 N.W. 148, 149 (1917).

This appeal raises the narrower question of whether publication in a Minnesota newspaper constitutes “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections.” *Gill*, 277 Minn. at 171, 152 N.W.2d at 313 (quoting *Mullane*, 339 U.S. at 314). Smith now asserts that publishing notice in *Finance and Commerce* “was not reasonably calculated to provide notice to [him] – a California resident with a last known residential address in Washington, D.C.” Appellant’s Br. at 43.

This is an easy argument for Smith to make because he takes an omniscient view of these proceedings. At the time of commencement of this action, Shamrock tried diligently but could not uncover where Smith was – if it had it would have served Smith personally. Even if Shamrock is deemed to have known that, as of March 18, 1996, Smith was living in the District of Columbia, it had more recent information demonstrating that from 1996 to 2000 Smith was living at 1520 Hunter Drive in Medina, Minnesota. Shamrock did not know that Smith claimed to be a California resident until Smith entered an appearance and brought his motion to dismiss.⁷ In a case in which the plaintiff first diligently searched for the plaintiff in order to effect personal service, and later submitted an affidavit and supporting evidence demonstrating that the defendant could not be found in the state, the U.S. Supreme Court held that service by publication

⁷ Moreover, “the essential element of due process is an opportunity to be heard.” *Jacob*, 223 U.S. at 265. As the court of appeals noted, “[l]ess than ten days after the completion of publication, the Smiths filed a limited and special appearance and challenged personal jurisdiction.” App-291. Thus, shortly after service by publication, Smith requested and received an opportunity to be heard in this case, which makes his point about publication in a national newspaper or magazine purely academic.

afforded the defendant due process. *See Jacob v. Roberts*, 223 U.S. 261, 267 (1912), cited in *Gill*, 277 Minn. at 173, 152 N.W.2d at 314, and *Wiik*, 173 Minn. at 583, 218 N.W. at 111.

Rule 4.04(a)(1) does not specify any particular publication for a summons. Moreover, if under Rule 4.04(a)(1), process is served by publication with respect to a *Minnesota* resident domiciliary who has left the state, or remains secreted within the state, and his or her current whereabouts are unknown, publication in Minnesota is entirely reasonable. After all, when viewed from Shamrock's perspective, Smith may have been hiding somewhere in Minnesota with the intent of defrauding creditors or avoiding service. If that were true in this case – and it may have been – publication in a Minnesota newspaper was no less reasonably calculated to reach Smith than publication outside of Minnesota. Printing the Summons in a national publication would be less reasonably calculated to reach a defendant who has fled the state, given the country's geographical size and population. Accordingly, Smith's brief cites no authority holding that under such circumstances the Summons must be printed in a publication with nationwide circulation.

Smith's citation to *McDonald v. Mabee*, 243 U.S. 90 (1917), is unavailing. There, it was a *given* that the defendant left the forum state with the intent of establishing his domicile elsewhere, and the Supreme Court held that publication "in a local newspaper" was not consistent with due process. *Id.* at 92. Here, however, there was a factual dispute that Smith had either secreted himself within the state or had fled the state to avoid service. Again, Smith argues as if it is simply a given that he never lived in

Minnesota or, if he did, left the state with the intent of becoming domiciled elsewhere. But the district court heard the conflicting evidence and resolved the dispute in favor of Shamrock. Therefore, it's not a given that Smith never lived in Minnesota, making *McDonald* inapplicable.

Service by publication may be a legal fiction, but a necessary one. The United States Supreme Court and federal courts have indicated that service by publication is consistent with due process when it is a last resort and there is no more-effective way of serving the defendant. *See Jacob*, 223 U.S. at 265-66; *Butler v. McKey*, 138 F.2d 373, 376-77 (9th Cir. 1943), *cert. denied*, 321 U.S. 780. Without service by publication, plaintiffs with valid claims who face statutes of limitations could be cheated out of their actions by unscrupulous defendants who flee the jurisdiction until the statutes expire.

Service of process on Smith by publication in a Minnesota newspaper was consistent with due process and should be affirmed.

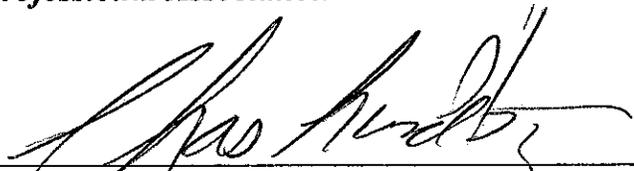
CONCLUSION

Based on the foregoing argument, Shamrock respectfully requests that the Supreme Court affirm the judgment of the court of appeals in its entirety.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: 1/14/08

By 

Stanford P. Hill (License #0174208)

Charles E. Lundberg (License #6502X)

David A. Turner (License #0333104)

Attorneys for Respondent

33 South Sixth Street, Suite 3800

Minneapolis, Minnesota 55402-3707

(612) 333-3000

APPENDIX

Affidavit of James M. Stanton RA 1