

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TYPE: CIVIL/OTHER

Raymond L. Semler,

Plaintiff,
Appellant,

vs.

Erick Klang, Crow Wing County Sheriff,
Rick Koop, Chief Investigator for Crosby Police Department,
John A. Bolduc, Brainerd Police Chief,
Kyle Huber, Staples Police Chief,

IN THEIR INDIVIDUAL CAPACITIES,

Defendants.

**APPELLANT'S INFORMAL BRIEF UNDER
MINNESOTA RULES OF CIVIL APPELLATE
PROCEDURE § 128.01,subd.1**

**TRIAL COURT NO: C2-05-3067
APPELLATE NO: A06-1852**

Jason M. Hiveley
Attorney for Def.'s Koop, Bolduc, and Huber
9321 Ensign Avenue South
Bloomington, Minnesota 55438

James Andreen
Attorney for Erick Klang, Crow Wing County Sheriff
8009-34th Avenue South
200 Riverview Office Tower
Minneapolis, Minnesota 55425

Raymond L. Semler
Plaintiff/Appellant/ PRO SE
Official Identification #206261
1111 Highway 73
Moose Lake, Minnesota 55767-9452

MINNESOTA CASES

	PAGE
St. Paul Ramsey County Medical Center vs. Pennington County.....	6
Bliss vs. Stevens.....	16,17
Rico, 472 N.W.2d at 107 n. 5	14
Nielson vs. Braland.....	19,20
Care Institute, Inc.-Roseville vs. County of Ramsey	28
Arnold ROSE vs Gerda KOCH, and Christian Research, Inc.,	8
Sharon Y. Bauer,v. State of Minnesota, et al., Appellants, and Roger VanBuren, et al.	14
Richard Ochs vs. Elizabeth W. Kimball, Esq., e.t. a.l.....	20
Blaeser and Johnson vs. Kjellberg	22
Roehrdanz vs. Brill.....	19
McKenzie v. William J. Burns Int'l Detective Agency, Inc.	14
Wayne Hauschildt, et al., Appellants,v. Dennis J. Beckingham.....	18,28
Tullis vs. Federated Mutual Insurance Company.....	21

FEDERAL CASES

	PAGE
Neitzke v. Williams.....	6
United States vs. Wood.....	6
McGuckin vs. Smith.....	6
Platsky vs. C.I.A.....	6
Thomas A. Munz vs. Robert G. Parr,Police Officer of City of Cedar Rapids, e.t.a.l.....	12,26
Smith vs. Bacon.....	12
Wilson vs. Iowa	12
Horsey vs. Asher.....	12
Conley vs. Gibson.....	12
Wilson vs. Geison.....	16
Elliot vs. Thomas.....	16

	PAGE
Chandler vs. Baird.....	16
Richardson vs. McKnight.....	13
Rowley vs. McMillan.....	25
Lederman vs. U.S.	24,25
Engel vs. Wendl.....	13,17
Maggette vs. Dalsheim	26
Chavis vs. Roe	26
Wood vs. Weenig	22
Southbridge Properties, Inc. vs. Jones	21
McCoy vs. Bureau of Unemployment Compensation	21
Spangenberg vs. Chaloupka	21
Borgia vs. Board of Review, Division of Employment Sec.	21
Johnson and Johnson vs. Superior Court	21
Tony R. East vs, Sergeant J. Lemons, e.t.a.l., (8 th Cir. 1985)	27
Chapman vs. Musich	24
Procunier vs. Navarett	15
Wood vs. Strickland	15

MINNESOTA STATUTES

	PAGE
Minnesota Statute §244.052, subdivision 7 (c).....	6,8,9,10,11,13,18,23,26,28
Minnesota Statute §541.06.....	7,8,15
Minnesota Statute §541.07	7,8
Minnesota Rules of Civil Procedure § 4.05.....	16,19,20,21,25,27
Minnesota Rules of Civil Procedure §12.02 (e).....	7,23,24,26

TABLE OF CONTEXT

	PAGE
Legal issues.....	2
Argument.....	6-27
Conclusion.....	28
“M9”.....	Refers to Plaintiff's Mem. Sept. 22 nd , 2006 hearing
“T7”.....	Refers to July 10 th Transcript
“T9”.....	Refers to September 22 nd Transcript
¶¶.....	Refers to paragraph in transcript
“C1”.....	Refers to Original Complaint
“C2”.....	Refers to Amended Complaint on Erick Klang
“RCM”.....	Refers to Plaintiff's Motion to Reconsider Court's August 15 th , 2006 Order
“DI”.....	Refers to Defendant's Bolduc, Huber and Koops Interrogatories to Plaintiff
“PAI”.....	Plaintiff's Answers to Defendant's Bolduc, Huber and Koops Interrogatories
“PMLSM”.....	Refers to Plaintiff's Memorandum of Law in Support of Motion and Appropriate Relief, dated June 23 rd , 2006
Appendixes.....	30- 44, 30A-39A, 32, 32A

LEGAL ISSUES

1. Did the trial court error when it did not take into account that the Defendants knowingly, willfully and maliciously placed the incorrect, erroneous and false information about Appellant to the Community through Community Notification Handouts about Appellant and failed to fix or correct the problem?
2. Did Defendants (Bolduc, Huber, and Koop) violate clearly established law under Minnesota Statute §244.052, subdivision 7 (c) (2005)?
3. Did Defendants Bolduc, Huber, Hoop and Klang knowingly, willfully and maliciously violate clearly established law?
4. Did the trial Court error when it dismissed Appellant's claims against the defendants?

5. Did the trial Court error in it's August 15th, 2006 Order dismissing the suit against defendants Bolduc, Huber and Koop, stating defendants errored in placing false information about appellant in the Community Notifications, which was inconsistent with appellant's conviction history, in violation of Minnesota Statute §244.052, subdivision 7 (c) (2005), but dismissed the suit anyway?
6. Did defendant Sheriff Erick Klang and Attorney James Andreen avoid service of the Amended Complaint plaintiff mailed them on June 15th, 2006?
7. Did defendant Klang and/or his Attorney James Andreen comply with Minnesota Rules of Civil Procedure §4.05?
8. Did the trial Court error in dismissing the suit against Sheriff Klang, without giving appellant the opportunity to have a hearing on his Motion to Amend the Complaint and any Additional Leave of Court?
9. Did defendant Klang violate clearly established law, when he did the Community Notification on appellant in 2002 and 2003, and knew that the information contained therein to be false, and incorrect in violation of Minnesota Statute §244.052, subdivision 7 (c) (2005), and failed to fix the problem?
10. Did Defendant Koop violate appellants rights by giving the D.O.C. false, erroneous and incorrect information about appellant?
11. Did Defendants Bolduc, Huber and Koop violate appellants rights by placing the false, incorrect and erroneous information on appellant, and placing that information in the Community Notification Handouts that were given to people in the community when appellant had moved or was released from prison/jail or any confinement?
12. Was Defendant Klang served before the statute of limitations ran out on the 2003 incident (s)?
13. Did defendant Klang and his Attorney refuse to accept Acknowledgment of Service of the Lawsuit after plaintiff had mailed the proper documents to them on June 15th, 2006?
14. Are Defendants immune from Civil Liabilities for their actions?

FACTUAL HISTORY

Appellant was charged on July 25th, 1996 with One Count of Criminal Sexual Conduct in the Second Degree in violation of Minnesota Law, and One Count of Attempted Kidnapping, also in violation of Minnesota State Law. On March 21st, 1997, a 12-member jury found Appellant guilty of 4th Degree Criminal Sexual Conduct and Kidnapping. On June 16th, 1997, Appellant was sentenced to a Presumptive stayed Prison sentence of 21 months on the Criminal Sexual Conduct Conviction and 21 Months stayed on the Kidnapping Conviction. Appellant appealed his conviction and sentences. Plaintiff/Appellant was given a probationary jail sentence of two (2) 1-year sentences on each conviction and was placed on probation for a number of years.

On July 1st, 2000, Appellant was arrested for a Gross Misdemeanor D.W.I. and was taken to the Crow Wing County Jail. On January 2nd, 2001, the Crow Wing County District Court (*Honorable Judge Frederick J. Casey*) revoked appellant's probation and executed the sentence and sent appellant to the custody of the Minnesota Department of Corrections. On December 31st, 2001, plaintiff was released from the Minnesota Correctional Facility in Moose Lake to his parents home in Deerwood Minnesota, under Intensive Supervised Release (*ISR*). On or about January 7th, 2002, the defendant Erick Klang did a Community Notification on appellant, and gave a Handout to the neighbors around where appellant was living. On August 22nd, 2002, appellant was violated and sent back to the Department of Corrections for failure to stay on house arrest, and unaccountability and was given 120 days of revocation time.

On December 9th, 2002, appellant was re-released from the Minnesota Department of Corrections in Rush City, to his parents home in Deerwood Minnesota, and was again released under Intensive Supervised Release. Once again there was a Community Notification Handout done on appellant after his release on December 9th, 2002.

Appellant was violated on the date of January 24th, 2003, for being in possession of firearms and dangerous weapons. At the violation hearing, (*HRU Officer Gregg Freer*) found appellant to be in violation of the conditions of his ISR/Parole and returned him back to the Minnesota Department of Correction in Lino Lakes for 150 days.

Appellant was re-released to ISR/Parole on June 23rd, 2003. Appellant was released to a friend of his(*Benjamin Bernatsky*), who lives just outside of Brainerd Minnesota. The above-named Defendant(*Erick Klang*) had told Mr. Bernatsky that there would be no Community Notification done on appellant. However, there was a Community Notification done on appellant, and the neighbors within a 5-mile radius of Mr. Bernatsky were notified. *See exhibit number*

On or about the date of June 25th, 2003, Appellant was relocated (*with permission of his ISR/Parole agent*) to a Motel in Downtown Brainerd, Minnesota. On or about July 1st, 2003, the defendant (*John A. Bolduc*) did a community notification on appellant, containing the same information as all of the other community notification handouts. On or about August 20th, 2003, the defendant (*Kyle Huber*) had done yet another community notification on appellant in the town of Staples Minnesota, due to appellant moving to Staples, and obtaining employment at Gold's Turkey Farm just outside of the town of Motley Minnesota. On the date of May 1st, 2004, appellant was arrested by his ISR/Parole agent for violating the terms and conditions of his parole (*using alcohol*), and was given a 365-day revocation with a DOC directive to enter and successfully complete C/D Treatment before being re-released.

On April 22nd, 2005, just days before appellant was to be released, a Petition for Civil Commitment against appellant alleging that he was/is a SPP/SDP was initiated and filed in district Court. On April 25th, 2005, a Hold Order hearing was held, and the District Court granted the Hold.

On May 2nd, 2005, appellant was released from the custody of the Minnesota Department of Corrections in Rush City to the custody of the Crow Wing County Sheriff, and was transferred to the Minnesota Security Hospital in St. Peter Minnesota pending the outcome of the Civil Commitment Petition. On January 6th, 2006, the Honorable Judge David J. TenEyck signed and Ordered that plaintiff be initially committed to the Minnesota Sex Offender Program pending further outcome of the 60-day review hearing in accordance with Minnesota Statute § 253B. On September 26th, 2006, the District court(*the Honorable Judge David J. TenEyck*) signed an Order Committing appellant for the rest of his life.(*Both the January 6th, 2006, order and the September 26th, 2006 Order Committing appellant are currently under appeal with the Minnesota Court of Appeals*). Appellant has been incarcerated since May 1st, 2004, and has not been released back into society.

ARGUMENT

I.

Did the trial Court error in dismissing the Complaint against defendants?

Yes. The above-entitled matter came on before a hearing before the Honorable Judge Frederick J. Casey, Judge of District Court, Crow Wing County, Ninth Judicial District, on a Motion to Dismiss by Defendant/Respondents Attorneys (*Jason M. Hiveley and James Andreen*). The above-named Defendants/Respondents claim that Appellant had not stated a valid cause of action to which relief can be granted.

Appellant pointed out to the Court in the Motion to Reconsider that the ¹Supreme Court has stated that a Plaintiff with an “arguable” claim should be permitted to Amend the Complaint before a pending Motion to ²Dismiss is ruled on. Appellant also argued “that Lower Courts have stated the *pro se* litigants should receive notice of the deficiencies in their complaints as well as an opportunity to amend them before the Complaint (s) are/is dismissed”³.

Appellant argued to the Court in his Motion to Reconsider that was filed on September 18th, 2006, and denied on September 20th, 2006, that normally under the Rules of Civil Procedure, that a ⁴Motion to Dismiss is suppose to be filed before any answer to a Complaint is filed.

Defendants state in their Motion to Dismiss under Minnesota Rules of Civil Procedure §12.02 (e), or in the alternative for Summary Judgment, that they acknowledged that the Community Notifications were made about appellant. ⁵However, they argued that the information contained in the notification handouts were the actions of plaintiff/appellant, and that the defendants were given to the community as a heads up on plaintiff to “protect” the public from appellant.

1 See *Neitzke v. Williams*, 490 U.S. 319, 329 109 S.Ct. 1827 (1989).

2 See *United States vs. Wood*, 925 F. 2 d 1580, 1581 (7th Circ 1991); *St. Paul Ramsey County Medical Center vs. Pennington County*, 857 F. 2 d 1185, 1187 (8th Circ.1988)

3 See *McGuckin vs. Smith*,974 F. 2 d 1050, 1055 (9th Circ 1992); *Platsky vs C.I.A.*,953 F. 2 d 26, 28 (2nd Circ.1991).

4 See Plaintiff Motion to Reconsider the Court's Order dismissing the lawsuit Page 6, ¶¶ 's 2 line 9

5 “T7” page 7, ¶¶ 's 2-11, and ¶¶ 's 12-23 Which state that: With respect to the statute, Minnesota Statute §244 052, this is the statute that Mr. Semler has offered in his complaint, I believe, as the statute that requires the predatory notification and it is our position that those officers have not violated the language of the statute or requirements of the statute and it is-- in fact, the statute requires that we disclose or the officers disclose the information that they have disclosed. ¶¶ 's 12-23, state: There is an end-of-confinement review committee and a report that was prepared by that committee that contains all of the information Mr. Semler is upset with That information is required to be disclosed by officers in the area where an offender will likely be living, so pursuant to that statute these officers have done what they were required to do, which is to notify the public of any information contained in the risk assessment report that is relevant and necessary to protect the public and to counteract the offender's dangerousness.

Appellant also submitted to the Court in the Motion to Reconsider that, the defendants answered the complaint, filed Interrogatories with appellant, and as soon as appellant filed a Motion for Summary Judgment against defendant (*Erick Klang*) for failing to answer or otherwise plead to the complaint against him (*in Jan of 2006*), the remaining defendants(*Bolduc, Huber and Koop*) filed their Motion to Dismiss. Appellant argued that their Motion to dismiss was untimely, and should not have been granted or even considered. ⁶Defendants Bolduc, Huber and Koop, through their attorney, admitted that the claims against them may survive the arguments that the defendant's have made and set forth.

Defendants argued this at the hearing and in their Memorandums in Support of their Motion, that the defendants are basically for executing writs etc. and therefore this statute does not apply to them⁷. However, defendants admitted that the statute did apply to them, but because they were seeking dismissal pursuant to Minnesota Rules of Civil Procedure §12.02, (e), and Minnesota Statute §541.06, and alternatively, for summary judgment pursuant to Minnesota Rules of Civil Procedure §56.

II.

Did the defendants violate clearly established Law?

Yes. Appellant proved through his complaint along with the first set of exhibits that appellant had filed with the District Court, and in the transcripts that the defendant/respondent violated appellant's rights by placing the false, incorrect and erroneous information about him. Appellant argued to the district court, (*as this Court will see by the transcripts*) that appellant had (*submitted evidence, the trial Court*), such as: affidavits from family members, as well as, friends and neighbors of appellant that witnessed the actions of the defendants, and were given a Handout about appellant by the Defendants. Appellant also argued to the District Court the defendants are not and were not ⁸immune from civil liability just because they were police officers or a Sheriff.

⁹Defendants admit that they disclosed this information about appellant to the community, however, stated in their Motion to Dismiss pursuant to Minnesota Rules of Civil Procedure §12.02 (e), or in the alternative for Summary Judgment, that appellant failed to state a claim upon which relief can be granted. The next issue defendants argued in the District Court, was the statute of limitations. The District Court did not rule as to the statute of limitations on appellant's Complaint against defendants¹⁰.

6 "T7" page 7 and page 8, ¶¶ 's 24-25, and page 8 ¶¶ 's 1-2.

7 See Defendants Memorandum in Support of Motion to Dismiss or for Summary Judgment, Introduction

8 "T7" page 9, ¶¶ 's 9-12

9 "T7" page 4, ¶¶ 's 17-24

10 See Court Order of August 15th, 2006.

Appellant argued to the Court that, the defendants are not under Minnesota Statute §541.07, but rather they are under Minnesota Statute §541.06.¹¹ Appellant argued to the District Court that because of the false, incorrect and erroneous information defendants had placed in the Community Notification Handouts about appellant, they were not and are not immune from any civil liability under ¹²Minnesota Statute §244.052, subdivision 7 (c).

¹³Appellant argued to the Court that the defendants knew their statements placed in the community notification handouts were false, and as such, acted in both their individual and official capacities as a matter of law, and are not entitled to immunity. ¹⁴Appellant also instructed the Court, that, because the defendants actions, were willful, malicious and knowingly made by all the above-named defendant's, could not grant the defendant's any kind of immunity, because defendants actions violated State Statute and State Law. Appellant states that defendants provided the public, false, information knowingly, willingly and maliciously on the Community Notification Handouts.

In the case of ¹⁵*Arnold Rose*, the Court of Appeals Reversed and Remanded for a new trial. Appellant's case and *Rose* are almost identical to each other. In *Rose*, the case consisted of statements that were false and defamatory in nature.

The Court of Appeals held: "*Action for civil libel concerning statements in one defendant's circular-type newspaper that plaintiff had collaborated with Communists and Communist fronters in writing book*". The District Court, Hennepin County, Donald T. Barbeau, J., entered judgment against two defendants and denied their post-trial motion for judgment notwithstanding verdict or for new trial, defendants appealed.

The Supreme Court, Peterson, J., held, *inter alia*, that conditional privilege requiring, in order for defamatory and untrue statements to be actionable, clear and convincing proof that statements were made with actual knowledge that statements were false or in reckless disregard of whether or not they were false, existed without limitation of time, on the grounds that for constitutional purposes plaintiff was at all times in issue either a public official or a public figure. Reversed and remanded for new trial.

11 "T7" page 11, ¶¶ 's 1-6 which state that the defendant's fall under Minn. Statute §541.06, which is an action brought against a Sheriff, Coroner, or Constable for any act done in an Official Capacity

12 "T7" page 9, ¶¶ 's 13-23, Stating that a State or local agency or private organization or individual authorized to act on behalf of the state or local agency or official is not civilly liable for disclosing information as permitted by this section. However, this paragraph only applies to disclosure that is consistent with the offender's conviction history. It does not apply to disclosure of information relating to conduct for which the offender was not convicted.

13 "T7" page 11, ¶¶ 's 7-11.

14 "T7" page 11, ¶¶ 's 11-16

15 See *Arnold ROSE v Gerda KOCH, and Christian Research, Inc.*, 154 N W 2d 409,278 Minn. 235 (1967)

Appellant states in order for defamatory and untrue statements to be actionable, clear and convincing proof that statements were made with actual knowledge that statements were false or in reckless disregard of whether or not they were false, existed without limitation of time, on the grounds that for Constitutional purposes, appellant was at all times a citizen on Parole, however, appellant still only had one conviction on his record. Appellant proved the statements in the Community Notification handouts were false, incorrect and erroneous, as these were only allegations.

Defendants argue, as an absolute defense, these publications concerning plaintiff were not defamatory, and were, in any event, the truth. However, appellant has pointed out, and as the trial Court stated in it's order of August 15th, 2006, the defendants erred in violation of Minnesota Statute §244.052, subdivision 7 (c), by placing information about appellant in the Community Notifications, that was not and consistent with his conviction history. Appellant asserts this information about him was made with malice by the defendant's. The defendants knew of the falsity of the information, however, they still kept placing the information in the Community Notification Handouts.

Appellant states, because he was a Level 2, assigned by the End of Confinement Review Committee (ECRC) in 2001, 2002, and 2003, the only people or places that defendant's should have given the community notification handouts to, by law are: *Schools, Day Care Centers and Churches, however, the information still must be consistent with offender's conviction history, and not false information.* Moreover, defendants handed this information to the community, which under state law would be distributed to a third-party.

III.

Did Defendants fail to correct the information Contained in the Community Notifications?

Yes. ¹⁶Appellant argues that, the defendants had knowledge and knew exactly what they were doing when they placed the information on the Community Notification Handouts appellant and knew, the information was false, and intentionally failed to correct and fix the error.

Appellant testified to the Court (*that he would like to point the Court*) the first set of Exhibits he filed with the Court and the Attorneys for the Defendants, ¹⁷(*which is the Community Notification Handouts on appellant, which contained the false, and incorrect information*) that was given to the community whenever appellant moved or was released from prison/jail after December 31st, 2001.

¹⁶ "T7" page 12, ¶ ¶'s 23

¹⁷ "T7" page 10, ¶¶'s 1-6, which state: offender has a history of forced sexual contact with females ranging in age from 14 to adult. The contact includes fondling and penetration. The offender uses physical force to gain compliance. The offender was unknown to the victims.

¹⁸Appellant pointed out to the District Court that, the information was not and is not consistent with his conviction history, as appellant has one and only one (1) conviction on his record. Appellant pointed out to the Court, that he has one (1) and only one (1) conviction on his record, the defendants actions by placing the false, incorrect and erroneous information on the Community Notification Handouts then distributing the handouts to the community, defendants immunity is null and void under Minnesota State Law¹⁹.

However, under ²⁰Minnesota State Law, the information that is disclosed to the public “only” applies to the offender's “conviction history”. Appellant issue here is “that the information that was disclosed to the public, was not consistent with his conviction history”. *Appellant has only one (1) Adult conviction on his record.* He has no Juvenile record, and no other Adult Felony Convictions, as the record proves²¹.

That this information; that is false, was used and placed in the Community Notification Handouts on appellant, the cause for the action and relief. Defendants Bolduc, Huber, and Koop through their Attorney (*Jason M. Hiveley*) stated in the Answer to the Complaint that they are without sufficient knowledge to form a belief as to the truth of appellant alleged damage claim and, therefore, deny the same and demand strict proof thereof, contrary to the evidence.

In Defendants Answer to the Complaint, ²²defendants affirmatively allege at all times material hereto, that they were performing discretionary acts in the scope of their duties with a good faith belief that their conduct was lawful, constitutional, proper and pursuant to probable cause.

²³Defendants also admitted in their answer to the Complaint, that they were acting in their official capacities as Police Officers for their respective departments when the Community Notification Handouts were done on appellant. Defendant Koop, in his Answer to the Complaint, denied that he had sent any information to the Minnesota Department of Corrections in 2001.

18 “T7” page 10, ¶¶ 's 7-10. Also ¶¶ 's 17-22.

19 “T7” page 10, ¶¶ 's 21-23 which state: They handed it (*the community notification*) to the public, therefore, their immunity is null and void under Minnesota Statute §244.052, subdivision 7 (c).

20 See Minnesota Statute §244.052, subdivision 7 (c), (2004) (2005). It does not apply to disclosure of information relating to conduct for which the offender was not convicted.

21 “T7” page 10, ¶¶ 's 8-14: As the Court should be aware, that is definitely not consistent with my conviction history, which would fall under Minnesota Statute §244.052, subdivision 7 (c).

22 See Defendants Answer to Complaint dated December 20th, 2005 First page, II.

23 See Defendants Answer to Complaint, page 2, ¶ V.

²⁴However,contrarily, appellant filed a Memo from defendant Koop to the Chief of Crosby Police Department on July 22nd, 2004, where he clearly admitted that he had sent the information to the Minnesota Department of Corrections.

All evidence used against the defendants in the Complaint were given to the Court and the Attorneys for defendants, (except for the Second set of exhibits), (which are the calls for service), which would have been admitted into evidence at the January 12th, 2007, Motion hearing to Amend the Complaint to include all exhibits. *Appellant had obtained this hearing through the Court Administrator's Office*²⁵.

Appellant argues that defendants allege “the information which was placed in the community notification handouts about him, were the sole actions of appellant, and therefore, defendants are not liable to appellant for his actions”. However, appellant disagrees with defendants, arguing that even if he was even investigated by any Police Officer or Police Department for any conduct, according to the Law, in order for defendants to place this information on the community notification handouts, it must be in accordance with state law. *See also Minnesota Statute §244.052, subdivision 7 (c)*.

Appellant proved with convincing clarity through exhibits and through the complaint, that the defendants knowingly, willingly and maliciously placed the information about appellant in the community notifications, knowing that the information was false. *See also Minnesota Statute §244.052, subdivision 7 (c)* Thus,strengthening appellant's argument that defendants defamed appellant. **Therefore**, defendants should and must be held liable for their actions of: (1); Defamation of Character, (2); Libel and Slander, (3); Emotional Stress and Emotional Trauma upon appellant and his family²⁶.

In order to recover from intentional emotional stress: *Four elements are necessary to sustain a claim for intentional infliction of emotional distress:* 1) the conduct must be extreme and outrageous; 2) the conduct must be intentional or reckless; 3) it must cause emotional distress; and 4) the distress must be severe. *Appellant has met all 4 elements.*

24 See Exhibit Number One.....Page Number 1-046.

25 See Note from The Honorable Judge Casey's calender Clerk (Barb Kulla) Dated October 4th, 2006.

26 See complaint, and amended Complaint, where appellant had stated this at the end of the Complaints

IV.

Are defendants entitled to Immunity?

No. Defendants argued they are entitled to not only statutory immunity, but official immunity as well. “Defendants agreed the false statements that were in the Community Notification Handouts, placed on appellant to protect the public from appellant's dangerousness”²⁷. Defendants argued in their defense, that their acts were discretionary, and therefore were and are entitled to official immunity²⁸. However, immediately after that statement, defendants stated that the information disclosed was supported by police reports and that the statute required them to disclose this information²⁹.

³⁰At the July 10th, 2006, hearing, appellant argued to the Court that, he had stated a claim upon which relief could be granted. ³¹Appellant had requested the Court and Attorney Hiveley, to review page four (4) of appellant's last filing, (*which would be appellant's memorandum*), cited Federal Case Law that coincide and support the pleadings and allegations of appellant's complaint against the defendants.

In an ³²Eight Circuit Court of Appeals decision, the Court held: “Under the liberal rules applicable to *pros se* prisoners, an action is not frivolous unless it appears 'beyond a doubt that petitioner can prove no set of facts in support of his claim which would entitle him to relief’. *Appellant met his burden.*”

³³Appellant stated that in his Motion opposing defendants Bolduc, Huber and Koop's Motion to Dismiss, that he had included Federal Cases that would support his position that defendants are not entitled to immunity.

27 “T7” page 7, ¶¶ 's 12-23, that information is required to be disclosed by officers in the area where an offender will likely be living, so pursuant to that statute these officers have done what they were required to do, which is to notify the public of any information contained in the risk assessment report that is relevant and necessary to protect the public and to counteract the offender's dangerousness.

28 “T7” page 8, ¶¶ 's 1-8.

29 “T7” page 8, ¶¶ 's 8-10

30 “T7” page 11, ¶¶ 's 17-18.

31 “T7” page 11, ¶¶ 's 18-25.

32 “RCM” page 4, ¶ 3. *Thomas A. Munz vs Robert G. Parr, Police Officer of City of Ceadar Rapids, e.t.a.l.*, File No:84-1551 (8th Cir.1985). Affirmed in part and reversed in part and Remanded in Part. Citing: *Smith vs. Bacon*, 669 F. 2 d 434, 436 (8th Circ.1983), (per curiam) (quoting >*Wilson vs. Iowa* 636 F. 2 d 1166, 1168 (8th Circ. 1981)), quoted in >*Horsey vs. Asher*, 741 F. 2 d 209, 211 (8th Circ.1984); see >*Conley vs Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99,101-102, 2 L.Ed 2 d 80 (1957).

33 “T7” page 12, ¶¶ 's 11-13.

³⁴Appellant argues that in determining whether official immunity is available in a given context requires a two-step process and inquiry : “(1) Whether the alleged acts are discretionary or ministerial; and (2) whether the alleged acts, even though of the type covered by official immunity, were malicious or willful and therefore stripped of the immunity of the protection.” Here the acts are neither, discretionary or merely ministerial. Defendants acts are mandated by Minnesota Statute §645.44, subd. 16.

Appellant testified that because of the defendants actions against plaintiff on the Community Notification Handouts, containing the false, information (*and did not fix or attempt to correct the problem*), they stripped themselves of any and all immunity they may have enjoyed under any State or Federal Law/Statute³⁵. Appellant states, if defendant (*Koop*) would not have sent this information to the Department of Corrections, there would have been no suit filed.

Appellant states there is well settled case law that specifically states that a defendant is not immune from civil liability if the defendant (s) has violated clearly established law, whether it is Federal or State Law³⁶. Appellant argues the actions of the defendants, violated clearly established law, when the Community Notification on appellant was done. Appellant has proved a *prima facie* case, and is entitled to recovery of damages.

Defendants argue, as an absolute defense, these publications concerning plaintiff were not defamatory, and were, in any event, the truth. However, appellant has pointed out, and as the trial Court stated in it's order of August 15th, 2006, defendants erred in violation of Minnesota Statute §244.052, subdivision 7 (c), by placing information about appellant in the Community Notifications, that was not and consistent with his conviction history.

Appellant asserts the information about him was made with malice by defendants. Appellant states, defendants knew of the falsity of the information, however, kept the information in the Community Notification Handouts.

34 “PMLSM” page 9, ¶ 2, Line 1-4.

35 “PMLSM” page 9; *Richardson vs. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, L. ed 2 d 540 (1997)

36 See also *Engel vs. Wendl*, 921 F. 2 d 148 (8th Circ.1990); stating: “We find that the record demonstrates that reasonable prison officials would have known they were violating a clearly established and specific right when they punished Engel without having some evidence of a rule infraction.. The right of inmates not to be punished unless officials have evidence establishing a violation is akin to the right not to be punished for committing a lawful act, which this Court has found to be clearly established and specific due process rights.” “Because the specific and clearly established 'some evidence' standard was in place in 1987 when the due process violations occurred, and reasonable officials would have known their actions violated this standard, Wendl and Brim eyer are not entitled to qualified immunity.

Appellant states: **Qualified privilege (immunity)** from liability for defamation for certain statements made in a setting (*such as a community notification*) does not apply where actual malice can be shown³⁷. In the case of ³⁸*Sharon Y. Bauer*, this Court held: *Former public employee brought defamation claim against two supervisors. The District Court, Ramsey County, Michael T. DeCourcy, J., granted in part supervisors' summary judgment motions and the Court of Appeals affirmed. Supervisors petitioned for further review.*

The Supreme Court, Simonett, J., held that: (1) *official immunity did not apply to defamation claim, and (2) whether supervisors acted with actual malice was jury question. Affirmed in part, reversed in part, and remanded. The Court further held: Supervisors of former public employee were not entitled to either official immunity or absolute privilege against defamation claim by employee. Whether supervisors of former public employee made allegedly defamatory statements with actual malice, as needed to defeat qualified privilege for disputed statements, was jury question to be determined on remand.*

Syllabus by the Court

Official immunity does not apply to defamation. Whether there is an issue on actual malice to defeat a qualified privilege for allegedly defamatory statements is to be determined on remand.

To defeat qualified privilege, the plaintiff must prove actual malice. Actual malice: *ill-will and improper motive or wishing want only and without cause to injure the plaintiff. Id. at 257; > McKenzie v. William J. Burns Int'l Detective Agency, Inc., 149 Minn. 311, 312, 183 N.W. 516, 517 (1921). The Rico malice standard, on the other hand, is a different standard. See > Rico, 472 N.W.2d at 107 n. 5 (acknowledging that common law malice "has a distinct definition"). "We conclude, therefore, that defendants are entitled to neither official immunity nor absolute privilege in this defamation action".*

37 See copies of Community Notification Handouts on appellant; See also copy of Memo from defendant Rick Koop to Chief of Police, Kim Caughflin (*dated July 22, 2004*)

38 *Sharon Y. Bauer v. State of Minnesota, et al., Appellants and Roger VanBuren, et al., Petitioners, Appellants.* (1994). holding that official immunity did not apply in defamation claim, and whether supervisors acted with malice was a question for the jury.

Appellant states the defendants are herein precluded from being granted any immunity under State or Federal Law³⁹. Appellant states that the Eight Circuit Court of Appeals has held that immunity is not available to person (s) that have violated clearly established law and the Constitution⁴⁰.

V.

Does the statute of limitations apply to defendants?

Yes. Appellant argues to this Court that the Defendants are the only ones that raised the issue(s) of Statute of Limitations. As previously stated, the trial Court did not rule on this issue against defendants Bolduc, Huber and Koop in it's August 15th, 2006 Order dismissing the Complaint. As defendant's argued at the hearing that in appellant's memo and position and as well as in the Court's May 11th, 2006 order with respect to the defendant Erick Klang, there was a discussion of the three-year statute of limitations of section 541.06⁴¹.

However, appellant has previously pointed out, because defendants Bolduc, Huber and Koop are Constables under Minnesota Statute §541.06⁴², the three-year statute applies. The fact is the trial Court did not dismiss the Complaint for this reason, nor was the issue mentioned in the Court's August 15th, 2006 Order dismissing the Complaint.

In addition to the defendants arguments on the three-year statute of limitations, defendants argued they could not specifically find any ⁴³case law that would apply to the three-year statute of limitations. However, appellant has cited numerous case law in his Motions, Memorandums etc. that would apply to the three-year statute of limitations. ⁴⁴Appellant stated at the hearing, his cause of action in the Complaint is not time-barred by the statute of limitations, as defendants behavior fall under Minnesota Statute §541.06. Appellant in support, included the "*definition of a Constable from Black's Law Dictionary*".

39 See *Procunier vs. Navarett*, 436 U. S. 555, 55 L. Ed 2 d 24, 98 S. Ct. 855 (1977); citing *Wood vs. Strickland*, supra.

40 See *Engel vs. Wendl*, 921 F. 2 d 148 (8th Cir.1990); stating: "We find that the record demonstrates that reasonable prison officials would have known that they were violating a clearly established and specific right when they punished *Engel* without having some evidence of a rule infraction..... The right of inmates not to be punished unless officials have evidence establishing a violation is akin to the right not to be punished for committing a lawful act, which this Court has found to be a clearly established and specific due process right".

41 "T7" page 5, ¶¶'s 2-10, also ¶¶'s 11-15, 16-25

42 See Minnesota Statute §541.06, which states: The following actions must be commenced within three years: *Against a sheriff, coroner, or constable for any act done in an official capacity and in virtue of an office, or for any omission of an official duty, including the nonpayment of money collected or received on a judgment or execution.*

43 "T7" page 5, ¶¶'s 16 -25.

44 "T7" page 12, ¶¶'s 1-10

Appellant also stated that his Complaint fell within the three-year statute of limitations⁴⁵. Appellant argues that in Federal Court, the statute of limitations generally starts to run when the claim “accrues”, i.e., “when the plaintiff knows or has reason to know the injury upon which the action is based”. If the injury takes place over a period of time (*a “continuing wrong”*), the statute may not start to run until the end of that period⁴⁶.

⁴⁷Appellant had also asked the Court about the letter the Court and appellant were given by defendant Klang's Attorney (*July 5th, 2006*), stating that Defendant Klang's Attorney had told Klang to refuse Notice of Acknowledgment and Receipt of Summons and Complaint. Appellant argues that the statute of limitations had not run out, before he re-served defendant Klang and Attorney James Andreen. Appellant cited ⁴⁸*Bliss vs. Stevens*, in which the Minnesota Court of Appeals reversed and opined that it is entirely possible for a plaintiff to commence an action on the last day of limitations period and for the defendant to hear nothing of it until 60 days later. Defendant, in the present case, however, was notified right away, but simply refused to accept or acknowledge the lawsuit against him.

Appellant states, since the 2003 incident was dismissed without prejudice, and plaintiff having re-served defendant Klang and his Attorney with a Summons and Complaint and all other required documents pursuant to the Minnesota Rules of Civil Procedure within the statute of limitations (*mailed to defendant Klang and Attorney Andreen on June 15th, 2006*), and defendant Klang and his Attorney were clearly served before the statute of limitations had ran out, that the Court should not have Granted defendant Klang's Motion to dismiss.

⁴⁹However, appellant argues the statute of limitations had not run out on the remaining claims against defendant Klang, because appellant had re-served Sheriff Klang by U.S. Mail on June 15th, which was 9 days before the statute of limitations were to expire.

45 “PMLSM” page 6, III. See *Elliot vs. Thomas*, 937 F. 2 d 338, 344 (7th Cir. 1991)(*defendants actual knowledge of governing legal standards is irrelevant*) cert. denied, 112 S. Ct. 1242 (1992); *Chandler vs. Baird*, 926 F. 2 d 1057, 1060 (11th Cir. 1991) (*fact that neither defendant “understood” that their actions were illegal did not establish qualified immunity*)

46 “PMLSM” page 6, ¶ 2; *Wilson vs. Geison*, 956 F. 2 d 738, 743 (7th Cir.).

47 “T7” page 15, ¶ ¶ 's 6-17, ¶ ¶ 's 18-23, Wherein the Court acknowledged that it had received the letter that Mr. Andreen had sent to the Court and to Plaintiff. The Court also acknowledged that it had seen the statements in the letter that were made by Mr. Andreen, regarding the fact that he had advised Sheriff Klang not to Acknowledge Service of the Amended Complaint that appellant had filed with both Klang and Mr. Andreen, by United States Mail on June 15th, 2006.

48 “M9” page 5, ¶ 5; *Bliss vs Stevens*, 544 N.W. 2 d 50 (Minn. App. 1996)

49 “T9” page 4, ¶ ¶ 's 20-24; Plaintiff had re-served Sheriff Klang and his Attorney James Andreen by U.S. Mail on June 15th, 2006, with a Summons and Amended Complaint, (2) copies of Notice of Acknowledgment and Receipt of Summons and Complaint, and a self-addressed stamped envelope to be returned to plaintiff with the Notice of Acknowledgment pursuant to Minnesota Rules of Civil Procedure § 4.05.

Defendant Klang's argument on the statute of limitations must fail as a matter of law.⁵⁰ Appellant also served upon Sheriff Klang and his Attorney an Affidavit of Service. Appellant also sent an Affidavit of Service Showing Addresses Served to the District Court. Appellant argues that the statute of limitations had not run out, before he re-served defendant Klang and Attorney James Andreen. Appellant cited⁵¹ *Bliss vs. Stevens*, in which the Minnesota Court of Appeals reversed and opined that it is entirely possible for a plaintiff to commence an action on the last day of limitations period and for the defendant to hear nothing of it until 60 days later.

Defendant, in the present case, however, was notified right away, but simply refused to accept or acknowledge the lawsuit against him.⁵² The Court found by virtue of the failure to serve process in this matter when the defendant declined to acknowledge service by mail, this action has not been commenced and the statute of limitations has now run, regardless of whether it is a two-year or three-year statute of limitations statute. Accordingly, defendant's Motion to dismiss is granted.⁵³ The Court subsequently stated on the record "that the record will reflect that the Court has now signed the Order submitted by the defense counsel".

Appellant states there is well settled case law that specifically states that a defendant is not immune from civil liability if the defendant (s) has violated clearly established law, whether it is Federal or State Law⁵⁴. Appellant argues the actions of the defendants, violated clearly established law, when the Community Notification on appellant was done. Appellant has proved a *prima facie* case, and is entitled to recovery of damages.

The other files were allegations, and were never proven in the Court of Law, Appellant was never charged or convicted of the allegations in a Court of Law (*other than the 1993 incident which was dismissed by the Court, and appellant's current conviction*).

50 "T9" page 4-5, ¶¶ 's 25, 1-3

51 "M9" page 5, ¶ 5; *Bliss vs. Stevens*, 544 N.W. 2d 50 (Minn. App. 1996)

52 "T9" page 11, ¶¶ 's 4-11

53 "T9" page 11, ¶¶ 's 12-14, the dismissing the action and signing the order submitted by the defense counsel, on the record. Therefore, not allowing plaintiff to file his Motion in opposition to defendant Klang's Motion.

54 See also *Engel vs. Wendl*, 921 F. 2d 148 (8th Cir. 1990); stating: "We find that the record demonstrates that reasonable prison officials would have known they were violating a clearly established and specific right when they punished Engel without having some evidence of a rule infraction. The right of inmates not to be punished unless officials have evidence establishing a violation is akin to the right not to be punished for committing a lawful act, which this Court has found to be clearly established and specific due process rights." "Because the specific and clearly established 'some evidence' standard was in place in 1987 when the due process violations occurred, and reasonable officials would have known their actions violated this standard, Wendl and Brim eyer are not entitled to qualified immunity.

Therefore, the information (*which was placed in the community notification handouts,*) was false, and in violation of Minnesota Statute §244.052, subdivision 7 (c). Appellant states that in Attorney Andreen's letters dated July 5th, 2006, and August 28th, 2006, Attorney Andreen admits to the Court that the facts Appellant has alleged in the Complaint, are and is the same, undisputed.

Appellant states he was not barred by *res judicata* or *collateral estoppel* when claims and parties in previous litigation challenging the same issue(s) and present action were similar(*other than the 2002 incident, which the Court had dismissed with prejudice, and the Amened Complaint on Defendant Klang was properly upon him, before the statute of limitations ran out on the 2003 incident*). Appellant argues, when the Court dismissed the suit against defendant Klang on May 11th,2006, the Court did not in it's order state that appellant was barred by the *res judicata* or *collateral estoppel* doctrine,therefore defendant Klang's argument on this issue, that appellant could not bring another lawsuit against him regarding the same issue (s) (*other than the 2002 incident, which the Court had dismissed with prejudice*), must fail as a matter of law.

The Court in *Hauschildt vs Beckingham* held: “*We also held that the employees had no claim of misrepresentation regarding the nature or source of the distributions and, therefore, the doctrine of equitable estoppel did not apply to defeat West and WPSA's statute-of-limitations defense*”. > **Id. at 842.**

VI.

Did defendant Klang and Attorney Andreen avoid service?

Yes. ⁵⁵At the hearing (*September 22nd, 2006*), defendant Klang, through his Attorney, (*James Andreen*) stated that the Court was familiar with this case and that he would not go into to much detail. Plaintiff attempted to serve Sheriff Klang by mail. ⁵⁶However, defendant Klang stated that defendant Klang has never responded to any of these mail service attempts as they were ineffective. *See also copies of the July 5th, 2006 letter and the August 28th, 2006 letter from Mr. Andreen.* ⁵⁷Defendant Klang argued that he had brought a Motion before the Court in the Spring to dismiss the suit. The Court had found that all but one of the counts were barred by the statute of limitations, and dismissed with prejudice, the remaining one was dismissed without prejudice. (*the 2003 incident*)

⁵⁵ “T9” page 3, ¶¶ 's 1-6.

⁵⁶ “T9” page 3, ¶¶ 's 4-6; Sheriff Klang never responded to any mail service, arguing that it was ineffective service of the lawsuit.

⁵⁷ “T9” page 3, ¶¶ 's 7-12. See Court Order of May 11th, 2006.

The Court simply stated that it would reserve any issues raised in the letter, for a future Court hearing, pending a Motion. The Court also stated that it would not rule on any issues raised in the letter until a Motion was filed. ⁵⁸Defendant Klang argued that again plaintiff attempted to serve by U.S. Mail a Summons and Complaint. Defendant Klang also stated that he did not acknowledge service.⁵⁹ Defendant Klang stated that the statute of limitations had now run out on the remaining claims against him, and that there's been no service of the Complaint and Summons.

⁶⁰Appellant stated that Mr. Andreen had placed in his Affidavit, that they are both refusing to accept service by U.S. Mail. The main argument defendant Klang has is that he was never personally served with a summons and complaint by appellant or any other server. ⁶¹However, appellant argued that due to his current situation, (*that being incarcerated*), appellant is not able to personally serve defendant Klang or his Attorney (*James Andreen*). ⁶²

Appellant argued that he had case law, and cited to those ⁶³case law, at the hearing. ⁶⁴Appellant argues that the Minnesota Supreme Court and the Court of Appeals have stated and upheld that Minnesota Rules of Civil Procedure § 4.05, must be construed to have strict compliance. Appellant argued before the Court that neither defendant Klang or his Attorney complied with the Rules of Civil Procedure. Specifically with regards to the Notice of Acknowledgment and Receipt of Summons and Complaint.⁶⁵ Appellant argues that the record, proves he fully complied with the rules of Civil Procedure on the Amended Complaint, and had properly served both Klang and his Attorney with a Summons and Complaint, as required pursuant to Civil Procedure § 4.05. *See also Nielsen*⁶⁶

58 "T9" page 3, ¶¶ 's 13-15.

59 "T9" page 3, ¶¶ 's 15-17

60 "T9" page 5, ¶ 4; whereby appellant states that Attorney Andreen's Affidavit stated that they both were refusing to accept service by U S Mail.

61 "T9" page 5, ¶¶ 's 7-14; whereby stating that under Minnesota Rules of Civil Procedure, appellant has the opportunity to serve a defendant, defendant's, and or their Attorney's by U.S Mail, due to being incarcerated, thus relieving litigants (*especially pro se*) from personally serving someone.

62 "T9" page 5, ¶¶ 's 15-20

63 "M9" page 2, **Argument**, ¶ 2; See also *Roehrdanz vs. Brill*, 668 N.W. 2 d 271 (Minn. App.2003), the Court of Appeals stated that Rules governing service of process by mail require strict compliance to procedure in order to perfect service. 48 M.S.A., Rules of Civil Procedure §4.05

64 "T9" page 5 and 6, ¶¶ 's 21-25, ¶¶ 's 1-2. Appellant argued that clearly in the letter (July 5th, 2006), and in the letter dated August 28th, 2006, reiterated what the July 5th, 2006 letter stated, is that both defendant Klang and Attorney Andreen are refusing to accept service.

65 "T9" page 6-7, ¶¶ 23-25, ¶¶ 1-3. Appellant argued that because he had served both defendant Klang and his Attorney before the statute of limitations ran out, defendant's argument on the statute of limitations must fail as a matter of law.

66 *Neilson vs. Braland*, 264 Minn. 481, 199 N. W. 2 d 737 (1963),The trial Judge properly instructed the jury that if the process server and the defendant were within speaking distance of each other and such action was taken as to convince a reasonable person that personal service was being attempted, service could not be avoided by physically refusing to accept the order.

Appellant states that because defendant Klang and his Attorney both refused to accept service, they waived all claims on insufficiency of process, personal service of Summons and Complaint, and that defendant Klang should now not be allowed to have filed the Motion to Dismiss, as they refused and failed to answer or otherwise plead to the Summons and Complaint within the time allowed by State Law.

⁶⁷Therefore, appellant was not precluded or barred from refileing the 2003 incident on an Amended Complaint. ⁶⁸In defendant Klang's Statement of the Case; #4: **Brief description of claims, defenses, issues litigated and result**, defendant Klang admitted he was re-served with a summons and complaint. However, he further admitted he never returned the Notice of Acknowledgment of Service stating: that he (*Sheriff Klang*) had never been personally served with a copy of the summons and complaint, therefore avoiding service.

Appellant asked the Court to give him enough time to file his Motion in response to Mr. Andreen's Motion, and file it with the Court and Mr. Andreen. However, the Court did not allow that to happen, as the Court dismissed the underlying suit against defendant Klang on the record at the hearing on September 22nd, 2006. ⁶⁹Defendant stated that Rule §4.05 only allows for service if the service is acknowledged. Defendant again argued that there is no service that has been done upon him, and that the case must be dismissed.

Appellant argues that service of process on defendant Klang was effective, even though Defendant Klang refused to accept service⁷⁰. In the case of *Richard Ochs vs. Elizabeth Kimball, Esq., e.t.a.l.*, the Court of Appeals held: "*In this appeal from order denying their motion to dismiss for ineffective service of process, appellants Elizabeth W. Kimball and Kimball Law Office, P.A., argue that respondent Richard Ochs did not effect personal service by leaving the summons and the complaint inside the screen door of Kimball's home after she refused to accept the documents*". "*Because service cannot be avoided by physically refusing to accept a summons where a reasonable person would know that personal service is being attempted*", we affirm.

67 "T9" page 10, ¶¶ 's 1-10

68 See defendant Klang's Statement of the Case

69 "T9" page 10-11, ¶¶ 's 19-25, page 11, ¶¶ 's 1-2. Stating that the case must be dismissed and the statute of limitations had run on the claims against Sheriff Klang.

70 See also *Richard Ochs vs. Elizabeth W. Kimball, Esq., e t. a.l.*, C5-02-1766(Minn. App. 2003)

Appellant states that service in a manner not authorized by a rule or statute is ineffective⁷¹. Appellant stated in his Affidavit to Defendant Klang, and his Attorney Andreen, that appellant was serving both Defendant Klang and Attorney Andreen with a copy of the Summons and Complaint by U.S. Mail with the required documents pursuant to Rule §4.05.

Appellant also filed an Affidavit of Service Showing Addresses Served with the District Court, showing the Court that defendant Klang and Attorney James Andreen were re-served, by appellant through the U.S. Mail, on June 15th, 2006⁷². In *Nielsen*, the Supreme Court determined that the defendant was adequately served where the process server and defendant were in close proximity, the process server touched the defendant with the summons, and laid it in a place where it was easily accessible to the defendant⁷³.

The Court of Appeals concluded that under *Nielsen*, Kimball's refusal to accept the summons did not prevent service of process from being completed. Appellant argues that in the District Court's Order⁷⁴ from August 15th, 2006, the Court admitted that defendant Koop, had sent the information to the department of Corrections for the review of the *ECRC*. It is therefore, the contention and the argument of appellant, that if defendant Koop would have never sent that information to the Department of Corrections, that this lawsuit would not have commenced. Appellant argues to this Court that defendant Koop should not have been allowed to send this information to the Department of Corrections, since only one of the case files was a conviction.

Appellant states that under the American Jurisprudence, Second Edition, Volume 62 B, (*Private Franchise Contacts to Process*), under process section §212: **When Service by mail is deemed complete:** Service of process by mail is deemed complete when the summons or writ is deposited in the post office, properly addresses, with the proper amount of postage⁷⁵.

71 See also *Tullis vs. Federated Mutual Insurance Company*, 570 N.W. 2 d 309, 311 (Minn 1997)[I]t is generally held that if the process server and the defendant are within speaking distance of each other, and such action is taken as to convince a reasonable person that service is being attempted, service cannot be avoided by physically refusing to accept the summons. See also *Nielson vs. Braland*, 264 Minn. 481, 484, 119 N.W. 2 d 737, 739 (1963) (citations omitted)

72 See also Affidavit of Service Showing Addresses Served submitted to the District Court, dated June 16th, 2006.

73 *Nielsen*, 264 Minn. 484, 119 N.W. 2 d 739: The defendant's "refusal to pick [the summon] up or to accept it did not prevent the service from being completed". *Id.*

74 See Court's Oder (dated August 15th, 2006), page 8, ¶ 2.

75 See *Johnson and Johnson vs. Superior Court*, 38 Cal. 3 d 243, 211 Cal. Rptr. 517, 695 P.2 d 1058 (1985); *Allegheny Mut. Cas. Co. vs. State*, 474 N. E. 2 d 1051 (Ind. Ct. App. 4th Dist. 1985); *Borgia vs. Board of Review, Division of Employment Sec.*, N.J. Super. 462, 91 A. 2 d 441 (App.Div. 1952); *Spangenberg vs Chaloupka*, 229 A. D. 2 d 482, 645 N.Y. S. 2 d 514 (2 d Dep't. 1996); *McCoy vs. Bureau of Unemployment Compensation*, 81 Ohio App. 158, 36 Ohio Op. 463, 49 Ohio L. Abs. 310, 77 N.E. 2 d 76 (1st Dist. Hamilton County 1947); *Southbridge Properties, Inc. vs. Jones*, 292 S. C. 198, 355 S.E. 2 d 535 (1987).

This is generally true even where the defendant refuses to accept mail service. (*As in the case at hand with defendant Klang*) Service by mail has been held to be sufficient even where it is deposited in the mail on the last day allowed for service and not received until after that day. Appellant argues that service was completed by service of process through the United States Mail to both defendant Klang and Attorney James Andreen⁷⁶. Appellant argues defendant Klang waived his right to challenge the insufficiency of process in the Amended Complaint which was re-served upon him by U. S. Mail⁷⁷.

Defendant Klang's argument as to the mere fact that he did not receive a copy of the Summons and Complaint until June 26th, 2006, is immaterial and irrelevant and must fail as a matter of law. Appellant showed the Court that he mailed the Summons and the Complaint to defendant Klang and Attorney Andreen on June 15th, 2006, which was 9 days before the statute of limitations were to expire. Therefore, defendant Klang's argument that he was served after the statute of limitations had expired, and that the statute of limitations ran out on appellant's claims against him, fails as a matter of law.

Appellant argues, while personal service of process does not require in hand delivery, it should not become a game of wiles and tricks, and a defendant should not be able to defeat service simply by refusing to accept the papers or by instructing others to reject service⁷⁸. Even though a defendant refuses physical acceptance of a summons, service is complete if a defendant is in close proximity to a process server under such circumstances that a reasonable person would be convinced that personal service of the summons is being attempted⁷⁹.

Appellant argues that due to defendant Klang's refusal to acknowledge and accept service by U.S. Mail, it should not be held against him for not personally serving him or his Attorney before the statute of limitations had run. Specifically when Attorney Andreen told his client to refuse accept service, Attorney Andreen also refused to accept service of the amended Lawsuit.

76 See also *Dunnell Minnesota Digest* (Fourth Edition) An Encyclopedia of Minnesota Law, Volume 38, Pleading §§ 11.00-13.04 to Public Health. § 2.04 (c) By Mail: *In any action service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 in the Minnesota Rules of Civil Procedure and a return envelope, postage prepaid, addressed to the sender*

77 See *Blaeser and Johnson vs. Kjellberg*, 483 N.W. 2 d 98 (Minn. Ct. App. 1992); The court of Appeals held: where defendant received summons and complaint by certified mail, personally signed return, communicated with plaintiff regarding filing of answer, and otherwise led plaintiff to believe effectiveness of service would not be challenged, defendant waived right to later claim insufficiency of process.

78 See letter from Attorney Andreen to appellant and Judge Casey dated July 5th, 2006, and August 28th, 2006; wherein Attorney Andreen stated to the Court that he gave specific instructions to defendant Klang NOT to accept service of any papers he received in the mail by appellant. In addition, Attorney Andreen also stated to the Court that he also refused to accept service of any papers mailed to him by appellant.

79 See also *Wood vs Weenig*, 736 P. 2 d 1053 (Utah Ct. App. 1987); See also *Nielson vs Braland*, 262 Minn 481, 119 N.W 2 d 737 (1963).

Appellant argues that Personal service of process requires only that appellant attempt to serve Summons and Complaint on defendant and that defendant be made aware that documents are being served. 48 > M.S.A., Rules Civ. Proc., Rule 4.03(a). Appellant argues that: "Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt of summons within the time allowed by these rules". Therefore, appellant asserts that because he attempted to serve Sheriff Klang and Attorney Andreen by mail, service was completed, though both Sheriff Klang and Attorney Andreen refused to accept service.

VII.

Did the trial Court Abuse it's discretion?

Yes. On September 21st, 2006, appellant was notified by Deb James (*Social Worker*) at the Minnesota Sex Offender Program in Moose Lake, ("*BTU*" Unit where appellant was residing), that he had a Court hearing on the morning of September 22nd, 2006 at 11:00 a.m. with Judge Frederick J. Casey. Appellant never received a formal notice from the Court or from Attorney Andreen of this hearing. *Appellant had little to no time to prepare for the hearing.*

⁸⁰Appellant states defendants, Koop, Bolduc, and Huber, testified in their Motion to dismiss, appellant had failed to state a claim upon which relief can be granted. Appellant argues given the findings of the trial Court in it's Conclusions of Law, page 8, the Court abused it's discretion in granting the defendant's their Motion under Minn.R. Civ. P. §12.02, (e). Appellant argues that the defendants violated clearly established law, Minnesota Statute §244.052, subdivision 7 (c), which is his cause of action for commencing the lawsuit.

Appellant, at the time of the hearing was unable to file his Motion with the Court and defendant Klang. The reason for this is appellant was never given any notice as to a court hearing set for September 22nd, 2006. Appellant also asked the Court if it would be alright if he could file his Motion, and asked that the Court's decision in the matter not be decided until appellant's motion was filed.

⁸⁰ See also Minnesota Rules of Civil Procedure §12.02 (e); See also Defendant's Koop, Bolduc, and Huber's Motion to Dismiss. See also the Court's Order dated August 15th, 2006, page 9. The Court stated that because conducting a community notification is an "official" duty and cannot be carried out in an "individual capacity", defendant's Motion to dismiss pursuant to Minn. R. Civ. P. 12 02, (e) is GRANTED.

Appellant argues for reversal, the District Court erred in dismissing the Complaint, concluding that appellant had failed to state a claim against defendants, pursuant to Rule §12.02 (e). In reviewing a complaint for failure to state a claim, the allegations in the complaint must be considered to be true. *See letter from Attorney Andreen dated August 28th, 2006. Stating the facts are undisputed⁸¹.*

⁸²Appellant asked a few questions to the Court, which the Court stated that it would not rule on, but rather, hear it after a Motion to the Court has been filed. Appellant stated that the last time he was in Court, (April 17th, 2006, on Defendant Klang's Motion to Dismiss) the Court had asked appellant if it would be alright if the Court hear his Motion to Amend the Complaint to include all Exhibits and his Motion for Summary Judgment at the July 10th, 2006 hearing. Appellant urges this Court, as he did in the District Court, due to defendant Klang and his Attorney refused to accept service of the Amended Complaint, defendant Klang and his Attorney were simply avoiding service of the lawsuit, and thereby denying appellant his right to relief.

⁸³Appellant argued that even though defendant and appellant are not within speaking distance of each other, defendant Klang and his Attorney refused to accept or acknowledge the lawsuit pursuant to State Law. Appellant urges the Court, due to defendants refusal to accept service, the Court should completely dismiss Sheriff Klang's Motion to dismiss and grant appellant's motion, and let appellant proceed through the Court process pursuant to the Minnesota Rules of Civil Procedure.

Appellant argued that in the case of *Lederman*⁸⁴, the United States Supreme Court specifically stated that the defendant had brought the motion to dismiss. ⁸⁵One of the issues that was in the motion, regarded the process of service. The United States Supreme Court stated that in recalling the director of Secret Service who sued an individual in an official capacity argued in response to plaintiff's amended complaint that he had never been personally served with a copy of the summons.

⁸⁶The Fourth Circuit ruled the defendant's had insufficient process because Rule 12 prevents the defense from being revitalized even though plaintiff's had amended their complaint and providing recalling with an opportunity to file a new motion under Rule 12 or answers for the defense which Rule 12 would permit to be presented by a motion.

81 See also *Chapman vs. Musich*, 726 F. 2 d 405, 408 (8th Cir.), Cert. Denied, >469 U.S. 931, 105 S Ct. 325, 83 L.Ed. 2 d 262 (1984).

82 "T7" page 14, ¶ ¶ 's 18-24. ¶ ¶ 25, page 15, ¶ ¶ 's 1-5.

83 "T9" page 7-8, ¶ ¶ 's 21-25, ¶ 1. Asking the Court to Grant appellant's Motion and proceed with the Complaint pursuant to the Minnesota Rules of Civil Procedure.

84 *Lederman vs. U.S.*, 131 F. Supp. 2 d 486-46 (D.D.C. 2001)

85 "T9" page 8, ¶ ¶ 's 10-20

86 "T9" page 8-9, ¶ ¶ 's 21-25, page 9, ¶ ¶ 's 1-3.

⁸⁷The Court went on to say that an amendment to the pleadings permits the respondent, responding pleader to plead only such defenses which may be presented in a motion of Rule 12 as were not available at the time of the response to the initial pleading, and unasserted defense available at the time response to initial pleading may not be asserted to initial pleading of the defendant. The Court further went on to reverse that case stating: “*that to dismiss the defendant's process of service issue, because it was insufficient to uphold*”.

⁸⁸Appellant argued to the Court that, when a Court dismisses a case without prejudice, it usually means that it can be brought up again at a later time, unless the Court orders otherwise. Appellant argued that in the instant case, the Court dismissed the 2002 incident against Defendant Klang with prejudice. However, the Court dismissed the 2003 incident against Defendant Klang “without prejudice”. Appellant argues the trial Court erred by dismissing the claims against defendant Klang.

Appellant cited ⁸⁹Federal case in his Memorandum (*the Court did not let appellant file*), that the United States Supreme Court held: “In *Rowley*, the Director of Secret Service, who was sued in his individual and official capacities, argues in response to plaintiff's Amended Complaint, that he had never been personally served with a copy of the Summons and Complaint”. *Id.* 502 F. 2 d at 1329-30, 32. Defendant Klang argued the same in the very instance. Appellant also argued as the Fourth Circuit held: that defendant had waived his insufficient of process defense, because “Rule 12 (g) prevents the defense from revitalized even though plaintiff amended their complaint and provided Rowley with opportunity to file a new motion under Rule 12, or an answer setting forth a defense which Rule 12 would permit to be presented by Motion”. *Id.* at 1332-33.

Appellant asked the Court to give him enough time to file his Motion in response to Mr. Andreen's Motion, and file it with the Court and Mr. Andreen. However, the Court did not allow this to happen, as the Court dismissed the underlying suit against defendant Klang on the record at the hearing on September 22nd, 2006. ⁹⁰Defendant stated that Rule §4.05 only allows for service if the service is acknowledged. Defendant again argued that there is no service that has been done upon him, and that the case must be dismissed.

87 “T9” page 9, ¶¶ 's 3-12

88 “T9” page 9-10, ¶¶ 's 20-25, page 10, ¶¶ 's 1-4

89 *Lederman vs. U.S.*, 131 F. Supp. 2 d 46 (D.D.C. 2001); See also *Rowley vs. McMillan*, 502 F. 2 d 1326, 1333 (4th Circ.1974).

90 “T9” page 10-11, ¶¶ 's 19-25, page 11, ¶¶ 's 1-2. Stating that the case must be dismissed and the statute of limitations had run on the claims against Sheriff Klang.

The District Court, in the first Court hearing (*upon motion from defendants Bolduc, Huber, and Koop, to dismiss*) July 10th, 2006, clearly erred by stating that the defendants erred in violation of Minnesota Statute §244.052, subdivision 7 (c) (2005), by placing the false, information about appellant to the public. However, the Court, on the very next page Ordered that the defendant's Motion to dismiss pursuant to Minnesota Rules of Civil Procedure §12.02 (e) (*failure to state a claim, upon which relief can be granted*) is hereby Granted.

Appellant argues that the Court abused its discretion in Ordering the defendants Motion to dismiss be granted, knowing that defendants violated appellant's rights, and violated state law that was clearly established at the time the Community Notification Handouts were given to the public, and knowing that the information contained therein, violated Minnesota Statute §244.052, subdivision 7 (c). This information was clearly inconsistent with plaintiff's conviction history. Appellant testified to the Court, and clearly argued, as well as showed through Court records (*especially the transcripts of the proceedings*), that the information contained in the Community Notification handouts were submitted to the public violated clearly established law.

Appellant also filed an Affidavit of Service Showing Addresses Served with the District Court, showing the Court that defendant Klang and Attorney James Andreen were re-served, by appellant through the U.S. Mail, on June 15th, 2006⁹¹. Accordingly, appellant should have been allowed to have the hearing that was originally scheduled for January 12th, 2007, at 9:00 a.m. to amend his Complaint, and to Amend the Complaint to include all exhibits. In addition, appellant should have been allowed to be heard on his Motion for Summary Judgment against defendant Klang, at the January 12th, 2007 hearing.

Appellant argues that defendants Koop, Bolduc, and Huber should never have been allowed to file a Motion to Dismiss⁹², specifically when they answered and pleaded to the complaint, but served appellant with interrogatories. The Eight Circuit Court of Appeals held: "*Munz should have been permitted to amend the complaint and serve the identified defendant*"⁹³. As in *Munz*, appellant argues that it was improper for the District Court to dismiss the suit at such an early stage of the proceedings⁹⁴.

91 See also Affidavit of Service Showing Addresses Served submitted to the District Court, dated June 16th, 2006.

92 See also *Thomas A. Munz vs Robert Parr, Police Officer, City of Cedar Rapids Police Department, et al*, (8th Circ. 1984)(1985)

93 See also *Maggette vs. Dalsheim*, 790 F. 2 d 800, 803 (2nd Cir. 1983)

94 See also *Chavis vs. Roe*, 643 F. 2 d 1281, 1290 n. 9 (7th Circ.), cert. Denied, > 454 U.S. 907, 102 S. Ct. 415, 70 L. Ed. 2 d 225 (1981)

Appellant argues this, especially when defendant Klang through his Attorney stated that the facts that are in the complaint against him are undisputed. The Eighth Circuit also held: "If it appears that the [pro se] complaint could, after discovery, offer facts which would validate the complaint, *sua sponte* dismissal is premature. Appellant argues that, he offered facts which would validate the complaint"⁹⁵.

Appellant argues that defendant Klang (*along with his attorney James Andreen*) refused to accept service of any and all papers that were properly served upon them through the U.S. Mail on June 15th, 2006, and therefore should not be allowed to defeat service, arguing they were never personally served by appellant. Appellant states even though appellant did not personally serve defendant Klang or his Attorney with a copy of the summons and complaint, service was still made and completed, pursuant to Minnesota Rules of Civil Procedure §4.05, which authorizes appellant to serve process by mail.

⁹⁶In an Eighth Circuit Court of Appeals decision, the Court held: "Prison inmate filed complaint under civil rights statute against prison officials alleging cruel and unusual punishment". "The United States District Court for the Eastern District of Arkansas, Garnett Thomas Eisele, Chief Judge, entered judgment dismissing complaint for failure to state a claim, and inmate appealed.

The Court of Appeals, Heaney, Circuit Judge, held: "that prison inmate's civil rights complaint alleging that he was placed in punitive isolation after he complained about muscle cramps suffered on the first day after being transferred from secondary confinement to vigorous labor stated a claim of cruel and unusual punishment cognizable under Eighth and Fourteenth Amendments". Reversed and Remanded.

Appellant argues the distress that defendants has caused towards appellant, as well as his family is severe. Appellant states in order for a statement to be considered defamatory, it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower her estimation in the community⁹⁷. *Appellant has met this burden.*

95 See also copies of the Community Notification Handouts on plaintiff, (*Exhibits 1-14*), and Calls for service that would coincide with the community notification handouts given to the public by defendants. (*Calls for Service Exhibit 1-8*)

96 See *Tony R. East vs, Sergeant J. Lemons, et al.*, (8th Cir 1985) Reversed and Remanded.

97 See copies of Community Notifications, thus appellant has proved were communicated to a third-party, that being the Community. Thus, lowering the reputation of appellant in the community.

Appellant argues that because the Court stated in its order that the 2003 incident (s) regarding defendant Klang applied to appellant's claim and Complaint, dismissed the 2003 incident without prejudice, due to the fact that appellant had inadvertently forgot to include a Summons along with the Complaint when appellant originally filed the Complaint against defendant Klang in October of 2005, appellant was not barred by any Order of the Court to relitigate the 2003 issue, by filing another lawsuit against defendant Klang⁹⁸.

Appellant states the Court did not file a final judgment on the merits on May 11th, 2006. The trial Court filed an order, that Granted defendant Klang's Motion in Part, and Denied his Motion in Part. Appellant argues because the defendants violated a clearly established law, and they knew or should have known of that right (*law*), their conduct violated the constitutional norm.

The Court decisioned : *"Appellants alleged enough to survive a rule 12 motion to dismiss. Neither collateral estoppel nor res judicata bar their claims, at this stage. We reverse the decision of the district court and reinstate the complaint. Appellant argues that there is enough evidence and he has provided most of that evidence to the Court and the Attorney's for the defendant's to survive a Rule 12 Motion to dismiss for failure to state a claim upon which relief can be granted"*.

CONCLUSION

THEREFORE, based on the Files, Records, Proceedings and arguments made herein by appellant, defendants are not immune from Civil Liabilities as they knew at the time they were violating clearly established law when the false information was placed in the Community Notification Handouts. Appellant also states that these incidents were done by the defendants, it therefore constitutes a continuing wrong, therefore defendants are liable to appellant for the information contained in the Community Notification Handouts. This information caused Defamation of Character, Emotional Stress and Emotional Trauma upon appellant and his family. As the Court will clearly see, the defendants clearly violated Minnesota Statute § 244.052, subdivision 7 (c), therefore their immunity is null and void.

⁹⁸ See also *Wayne HAUSCHILDT, et al., Appellants, v Dennis J. Beckingham, et al., Respondents* (2003), *Care Institute, Inc. -Roseville vs. County of Ramsey*, (2000)

PRAYER FOR RELIEF

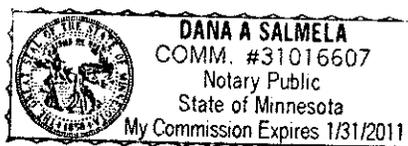
THEREFORE, appellant respectfully requests that this Court reverse the decision of the District Court. Appellant respectfully requests that this Court not Grant defendants any immunity, that they may have enjoyed by State or Federal Law, as they have violated clearly established law.

SWORN AND SUBSCRIBED TO ME ON

THIS 16 DAY OF February 2007

Dana Salmela

NOTARY



RESPECTFULLY SUBMITTED

Raymond L. Semler

PROPER/PER/SONA

Raymond L. Semler

Official Identification # 206261

1111 Highway 73

Moose Lake, Minnesota 55767-9452