

STATE OF MINNESOTA  
IN COURT OF APPEALS

CASE TYPE: CIVIL

Raymond L. Semler,

Appellant,

vs.

Erick Klang, Crow Wing County Sheriff,

Respondent,

Rick Koop, Chief Investigator for Crosby Police Department, e.t. a.l.,

Respondents.

**APPELLANTS REPLY BRIEF PURSUANT TO  
MINN. RULES OF CIVIL APP. PROCEDURE****§131.01, sub. 3****Trial Court No: C2-05-3067****Appellate No: A06-1852**

Raymond L. Semler

M.L.-Annex

1111 Highway 73

Moose Lake, Minnesota 55767-9452

(218) 485-5300 (Facility Voice)

*Appellant Pro Se (O.I.D. # 206261)*

Kristy Saum (Attorney No: # 0346974)

James R. Andreen (Attorney # 174373)

ERSTAD &amp; RIEMER, P.A.

8009-34<sup>th</sup> Avenue South

200 Riverview Office Tower

Minneapolis, Minnesota 55431

(952) 896-3700

*Attorneys for Respondent Erick Klang*

Jason M. Hiveley (Attorney # 311546)

IVERSON REUVERS, LLC

9321 Ensign Avenue South

Bloomington, Minnesota 55438

(952) 548-7200

*Attorney for Respondents Rick Koop, John A. Bolduc  
and Kyle Huber*

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## STATEMENT OF THE CASE

Appellant commenced an action alleging defamation of character and emotional distress resulting from the Community Notification Handouts provided by various law enforcement personal, including Respondent Erick Klang. Respondent Erick Klang moved for dismissal, stating that the Appellant had failed to properly effect service on Respondent Klang prior to the expiration of the statute of limitations on Appellant's claims. (RA13)

In an Order filed by the District Court on May 11<sup>th</sup>, 2006, the Court Granted in PART and Denied in PART, Respondent Klang's Motion to dismiss. The Court found that while plaintiff attempted service by mail on Sheriff Klang, he did not perfect it because neither Sheriff Klang nor anyone on his behalf acknowledged service pursuant to Minn. R. Civ. P. §4.05. Accordingly the Court dismissed plaintiff's case against Sheriff Klang.

The Court found that the three-year statute of limitations had run out on the January 7<sup>th</sup>, 2002 incident, however applied to the rest of plaintiff's claims. As a result, those claims were dismissed with prejudice. However, the Court found that the June 23<sup>rd</sup>, 2003, claims had not yet been time-barred by the three-year statute of limitations. As a result, the Court dismissed these claims without prejudice. Respondent Klang later moved for dismissal on the grounds that the three-year statute of limitations had expired on the remaining claims, and service had not been properly made. The District Court Granted Respondent Klangs Motion in full on September 22<sup>nd</sup>, 2006.

## STATEMENT OF THE FACTS

Plaintiff's Complaint alleged causes of action as follows:

The above-named Defendant's [sic.] have and continue to violate Mr. Semler's rights by putting the erroneous, incorrect and false statements (*alleged non-proven allegations*) in the *Community Notification Handout* on Mr. Semler. The above-named Defendant's violated Mr. Semler's rights with Slander [sic.], Defamation of Character and Emotional Trauma and Stress, and Emotional Trauma and Stress upon Mr. Semler's family. (RA1)

On October 13<sup>th</sup>, 2005, Appellant contends he mailed a copy of the Complaint and two (2) copies of a Notice and Acknowledgment and Receipt of Summons and Complaint. (RA7) Appellant also provided a "Notice and Acknowledgment of Service by Mail under Minn. Rules of Civil Procedure pursuant to §4.05". Two (2) identical copies of this were received which were not signed by Appellant. Semler did not mail a Summons with the Complaint. Respondent Klang did not return the acknowledgment of service.

Appellant alleged in the Complaint that on January 7<sup>th</sup>, 2002, Erick Klang violated his rights with respect to a Level 2 sex offender "*Community Notification Handout*." It also contented that Defendant Klang did the same thing on June 23<sup>rd</sup>, 2003. *Id.* Appellant further alleged (es) other misdeed by other Law Enforcement personal. *Id.* On June 15<sup>th</sup>, 2006, Appellant attempted to serve a Summons and Complaint again on Sheriff Klang and his Attorney (*James R. Andreen*) by U.S. Mail. Appellant did not personally serve Klang with the Complaint and Summons. *Id.* Once again, neither Sheriff Klang nor anyone on his behalf acknowledged service pursuant to Minn. Rules of Civ. Pr. §4.05 *Id.*

#### STANDARD OF REVIEW

Whether or not service of process was proper is a question of law, subject to *de novo* review. *Amdahl vs. Stonewall Ins. Co.*, 484 N.W. 2 d 811, 814 (Minn. App.1992), review denied (Minn. July 16<sup>th</sup>, 1992). Jurisdiction is also a question of law which is reviewed *de novo*. *Mercer v. Andersen*, 715 N.W. 2 d 114, 118 (Minn. App. 2006); citing *Johnson vs. Murray*, 648 N.W. 2 d 664, 670 (Minn. 2002).

Whether personal jurisdiction exists is a question of law, which this court reviews *de novo*. > *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App.2003). Appellant argues to determine that he failed to properly serve respondent, the district court should have held respondent was estopped from asserting improper service because Klang's Attorney himself is authorized to accept service. But respondent Klang (*R.A. page8, ¶1*) relies on > *Uthe*, 629 N.W.2d at 124, where this court held that courts may not use their equitable powers to estop a defendant from asserting insufficiency of process when the district court lacks personal jurisdiction.

The standard of review on appeal is whether the trial court's findings of fact are clearly erroneous. > *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249, 252 (Minn. App.1986). A court's determination of primary jurisdiction is subject to an abuse of discretion standard of review.

See > Environmental Tech. Council v. Sierra Club, 98 F.3d 774, 789 (4th Cir.1996) (district court's refusal to defer case to environmental protection agency subject to abuse of discretion standard of review), cert. denied, > 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997); > Brumark Corp. v. Samson Resources Corp., 57 F.3d 941, 947-48 (10th Cir.1995) (district court's decision to refer oil and gas leasehold interest owner's action against natural gas well operator to Oklahoma Corporation Commission subject to abuse of discretion standard of review); > Mills v. Davis Oil Co., 11 F.3d 1298, 1304 (5th Cir.1994) (district court's decision that natural gas well rights should be decided by Louisiana Commissioner of Conservation subject to abuse of discretion standard of review). This standard of review derives from the district court's exercise of discretion in structuring and coordinating administrative and judicial proceedings. > Environmental Tech. Council, 98 F.3d at 789, n. 24; see > United States v. Western Pac. R.R. Co., 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956) ("[n]o fixed formula exists for applying the doctrine of primary jurisdiction").

Appellant cites to Doyle, while Doyle ultimately bears the burden of presenting evidence tending to show each element of negligence in order to survive a motion for summary judgment, she need not present evidence to prove her allegations in order survive a > rule 12.02(e) motion to dismiss. On review, we must draw all inferences in favor of Doyle and assume that she can prove her claim that Kuch's negligence continued through her final May 8, 1997 dental appointment. See > Paradise v. City of Minneapolis, 297 N.W.2d 152, 155 (Minn.1980) (explaining that on review of a district court's decision to grant a party's motion for dismissal, all inferences must be drawn in favor of the party against whom the motion was made).

## I.

### ARGUMENT

#### 1. WAS SERVICE OF PROCESS PROPERLY EFFECTED ON RESPONDENT KLANG?

*Yes.* Appellant argues that service of process was properly effected on respondent Klang on June 15<sup>th</sup>, 2006, when plaintiff mailed respondent Klang with a Summons and Complaint. However, appellant did not effect service of process in the first Complaint, as he inadvertently forgot to submit a Summons along with the Complaint. In addition, plaintiff also inadvertently forgot to sign the Notice of Acknowledgment portion. (RA6)

Appellant argues that there is case law stating that once a person has invoked jurisdiction in the District Court by obtaining partial summary judgment without earlier or simultaneously moving to dismiss the complaint for insufficiency of process<sup>1</sup>. *Such as Respondent Klang has done, and argues in his Brief.* Appellant argues that Respondent waived the defense of insufficiency of process as he had obtained a partial or full summary judgment, dismissing the complaint against him. *See also Patterson.*

Once a defendant affirmatively invokes the court's power to determine the merits of all or part of a claim, the defendant cannot then deny the court's jurisdiction over him based on defective service. 48 > M.S.A., Rules Civ.Proc., Rules 12.07, > 12.08(a-c). Under the rules of civil procedure, the defense of insufficient service of process is waived if omitted from an answer or if omitted from a motion to dismiss under Rule 12. See > Minn. R. Civ. P. 12.08(a). > (FN3)

Specifically, > Rule 12.07 provides that if a party moves to dismiss an action under one of the grounds provided in Rule 12, other defenses and objections permitted to be raised by Rule 12 must be raised at that time or they are waived, except as provided in > Rule 12.08(b). See > Minn. R. Civ. P. 12.07. > Rule 12.08(c) provides an additional exception to the "one motion" rule for challenges to the court's subject matter jurisdiction. See > Minn. R. Civ. P. 12.08(c). The rule reflects our goal "to prevent piecemeal assertion of technical defenses." > Minn. R. Civ. P. 12.07 advisory committee note.

The rules of procedure should be construed to discourage unnecessary litigation. See > *Kisch v. Skow*, 305 Minn. 328, 332, 233 N.W.2d 732, 735 (1975). In this case, *Price* obtained partial summary judgment adjudicating part of *Patterson's* claim against him, but later argued successfully that the district court was without jurisdiction over him as to the entire matter because of insufficient service of process. *Price's* strategy in the litigation therefore created needless litigation: if the district court was without jurisdiction because of insufficient service of process, arguably its earlier order adjudicating a portion of the claim by partial summary judgment was invalid. Where the defendant has affirmatively invoked the jurisdiction of the court to rule in its favor in this manner, avoidance of piecemeal and unnecessary litigation weigh in favor of finding a waiver of a jurisdictional defense not asserted by motion.

(FN1.) Personal jurisdiction under the long-arm statute is not an issue in this case and, thus, we do not decide whether waiver by implication of jurisdictional defenses is applicable to a defendant "wishing to contest whether it was obliged to defend in a distant court."

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<sup>1</sup> *Arthur Patterson, vs. WU Family Corporation, d/b/a Nakin Cafe, and John Doe*, 608 N.W. 2d 863 (Minn. 2000). Reversed and Remanded. See also *Mississippi Valley Development Corporation vs. Colonial Enterprises*, 217 N.W. 2d 760, 300 Minn. 66, (Minn. 1974) Affirmed.

See > Datskow v. Teledyne, Inc., 899 F.2d 1298, 1303 (2d Cir.1990). Respondent Klang's argument that the District Court did not have personal jurisdiction over him, simply because he was not *personally served* with the Summons and Complaint, must fail as a matter of law.

Respondent Klang argues that Appellants' basis of *Bliss*<sup>2</sup> is misplaced, because Klang was never properly served, therefore rendering service ineffective on him. However, appellant argues that *Bliss* is relevant in the case at issue. Appellant argues that in *Bliss*, the Court of Appeals stated the following: "A civil action is commenced when a summons is served upon the defendant or when "the summons is delivered to the sheriff in the county where the defendant resides for service." > Minn.R.Civ.P. 3.01. Commencement of an action by delivering the summons to the sheriff "shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made." *Id.* As a result of the sixty-day grace period under > rule 3.01(c),

it is possible for a plaintiff to commence an action on the final day of the limitations period and for the defendant to hear nothing of it until 60 days later. The lateness of notice does not invalidate the lawsuit, so long as the action is commenced within the limitations period. > Carlson v. Hennepin County, 479 N.W.2d 50, 55 (Minn.1992). Therefore, *Bliss* is not misplaced in this case.

Appellant argues defendant Klang avoided service, as well as his Attorney (*James Andreen*). Appellant therefore argues that his lawsuit against defendant Klang on June 15<sup>th</sup>, 2006, was mailed within the statute of limitations, and thus the statute of limitation had not run out.

Appellant argues that *Ochs*, does not lend support to Respondent Klang's arguments for dismissal. In fact, *Ochs*, is just the opposite and lends support to appellants' arguments as to why dismissal of the complaint must be reversed. "When a party attempts mail service pursuant to Minn. R. Civ. P. §4.05, but no acknowledgment of service form is returned, proof that a defendant actually received the summons and complaint and had notice of the lawsuit does not effect service". However, appellant argues that Respondent refused to acknowledge service, as well as his Attorney James Andreen. Thus, waiving the ineffective service of process claims. *See also Patterson*<sup>3</sup>

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2 *Bliss vs. Stevens*, 544 N.W. 2 d 50 (Minn. App. 1996) Reversed and Remanded.

3 *Arthur Patterson vs Wu Family Corporation*, 608 N.W. 2 d 863 (Minn. 2000); citing *Mississippi Valley Development vs. Colonial Enterprises, Inc.* 217 N. W. 2 d 760, Minn. 300 66 (Minn. 1974); also citing *Marjorie Datskow, e.t. a.l., vs. Teledyne Inc. Contental products Division*, 899 F.2 d 1298 (1990) Reversed and Remanded.

Appellant argues that 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 then laid it in a place where it was easily accessible to the defendant. > *Nielsen*, 264 Minn. at 484, 119 N.W.2d at 739.

The defendant's "refusal to pick [the summons] up or to accept it did not prevent the service from being completed." *Id.* While here the server was not able to physically touch Kimball with the summons, Kimball was aware that Hanson was trying to give her papers. And it was not necessary for Kimball to be aware that what Hanson was trying to give her was a summons and complaint; nothing in *Nielsen* indicates that the process server told the defendant that the paper he was holding was a summons. We therefore conclude that under *Nielsen*, Kimball's refusal to accept the summons did not prevent service of process from being completed. > (FN4) Appellant argues under this analogy, defendant Klang's argument that he was not personally served must fail as a matter of law.

## II.

### 2. WAS THERE WAS PERSONAL JURISDICTION OVER RESPONDENT KLANG WHERE SERVICE HAD BEEN MADE?

*Yes.* Appellant argues that the District court had personal jurisdiction over respondent Klang, not only because Appellant had served Klang with a Summons on the Amended Complaint (*See Amended Complaint of June 15<sup>th</sup>, 2006*), but because respondent Klang had obtained a partial or full summary judgment from the District court, he waives that defense. *See also Patterson* Thus, jurisdiction in the District Court was invoked.

Personal jurisdiction under the long-arm statute is not an issue in this case and, thus, we do not decide whether waiver by implication of jurisdictional defenses is applicable to a defendant "wishing to contest whether it was obliged to defend in a distant court."

### III.

#### 3. WAS THE DISMISSAL WITH PREJUDICE IN THIS CASE APPROPRIATE, WHEN THE STATUTE OF LIMITATIONS HAD NOT RUN?

*No.* Appellant argues that dismissal with prejudice in this case was not appropriate, as the statute of limitations had not run<sup>4</sup>. Appellant argues that because respondent Klang through his Attorney refused to accept service, after appellant re-served both with a Summons and Complaint, and that Attorney Andreen received his copy of the Summons and Complaint on Jun 26<sup>th</sup>, 2006, did not run the statute of limitations out. *See also Affidavit of James Andreen*

In Andreens Affidavit, he clearly admitted he received a copy of the Summons and Complaint from respondent Klang on June 26<sup>th</sup>, 2006. Appellant re-served both Andreen and Klang through the United States Mail on Jun 15<sup>th</sup>, 2006. *See also Affidavit of Appellant(RA-46), (RA-54), (RA-56), and Summons (RA-47)* Appellant argues that respondents assertion that the statute of limitations had run is merit less, as there is genuine issues of material fact<sup>5</sup>. *See also letter (s) of James Andreen, dated July 5<sup>th</sup>, 2006, and August 28<sup>th</sup>, 2006.*

Appellant argues in *GronDahl*, Appeal was taken from an order of the District Court, St. Louis County, David S. Bouschor, J., granting summary judgment and dismissing medical malpractice claim. The Supreme Court, Wahl, J., held that summary judgment for physician on basis of statute of limitations was precluded by genuine issue of material fact as to whether the physician had not ceased treating plaintiff until telephone conversation occurring within two years of suit being brought. Reversed and remanded.

In Conclusion to Respondent Klang's Brief, the allegations set forth by appellant against Klang on January 7<sup>th</sup>, 2002 was determined by the District Court to have run by the statute of limitations. However, the District Court stated in it's May 11<sup>th</sup>, 2006 Order that appellant's claims against Klang that occurred on June 23<sup>rd</sup>, 2003, were not time-barred by the statute of limitations, and applied to appellants claims. However, because appellant had inadvertently forgot to serve Klang with a Summons, the District Court dismissed that claim without prejudice.

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<sup>4</sup> *Lila May Azad vs. Hartford Accident and Indemnity Co.*, 1990 WL 178517 (Minn. App. 1990), Reversed and Remanded.

<sup>5</sup> *June A. GronDahl vs. Matthew H. Bulluck, M.D. And the Duluth Clinic*, 318 N.W. 2 d 240 (Minn. Supreme Court 1982) Reversed and Remanded. Citing; *Meyering vs Wessels*, 338 N. W. 2 d 670, 672 (Minn. 1986) Reversed.

**Therefore**, rendering appellant to refile on the June 23<sup>rd</sup>, 2003, claim, so long as the statute of limitations did not run out. *See also (RA-45,46,47,50,52)*. Accordingly, Appellant's claims against respondent Klang were improperly dismissed, as proper service was made over Respondent Klang, and there is reason to reach the merits of Appellants claims. The District Court's judgment must be reversed and remanded for trial.

### III.

#### 4. DID SEMLER FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

*No.* Appellant argues that defendant's Bolduc, Huber and Koops argument is without merit. The District Court concluded in its August 15<sup>th</sup>, 2006 Order that defendant's Bolduc, Huber and Koop erred in disclosing information "inconsistent with offenders conviction history". Minn. Statute §244.052, subd. 7 (c) (2005). The published notifications contained references to plaintiff's alleged prior conduct and behavior which he had not been convicted. Appellant argues that as a matter of law, defendant's Bolduc, Koop and Huber's argument on appellants failure to state a claim must fail.

In reviewing cases dismissed for failure to state a claim on which relief can be granted, "(t)he only question before the reviewing court is whether the complaint sets forth a legally sufficient claim for relief. It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged." > *Royal Realty Co. v. Levin*, 244 Minn. 288, 290, 69 N.W.2d 667, 670 (1955) (emphasis supplied). The limited function served by such a motion to dismiss was reiterated in > *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963): A claim is sufficient against a motion to dismiss based on > Rule 12.02(5) if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.

Appellant argues in *Doyle*<sup>6</sup>, Dentist brought motion to dismiss patient's dental malpractice action after filing his answer to patient's complaint. The District Court, Dakota County, Rex D. Stacey, J., granted dentist's motion on grounds that patient's claims were barred by statute of limitations, and patient appealed.

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<sup>6</sup> *Rosemary Doyle vs. Edward V Kuch, D. M.D.*, 611 N.W. 2 d 28 (Minn. App. 2000) Reversed.

The Court of Appeals, G. Barry Anderson, J., held that: (1) district court retained jurisdiction over dentist's motion to dismiss, and (2) patient's allegations against dentist did not fall within "single act" exception to statute of limitations, and therefore district court should not have granted dentist's motion to dismiss. Reversed. However, Appellant argues that defendant's Bolduc, Huber, Koop, and Klang all do not fall in "single act" exceptions, as their acts were a continuing wrong, as they kept the false information on the community notification handouts of appellant.

When reviewing cases dismissed for failure to state a claim on which relief can be granted, Court of Appeals determines only whether the complaint sets forth a legally sufficient claim for relief; it is immaterial to the Court's consideration whether or not the plaintiff can prove the facts alleged 48 > M.S.A., Rules Civ. Proc., Rule 12.02(e). Appellant met this burden, as the District Court stated in its Order of August 15<sup>th</sup>, 2006, defendant's erred in violation of Minnesota State Law<sup>7</sup>.

In *Doyle*, the Court stated the following: Rule 12.02 governs defensive motions, including motions to dismiss for failure to state a claim upon which relief can be granted. See > Minn. R. Civ. P. 12.02(e). > Rule 12.02 provides in relevant part that: [a] motion for making any of [the defenses under > Rule 12.02] shall be made before pleading if a further pleading is permitted. Appellant argues defendant's Koop, Bolduc, and Huber did not do this. In fact, Bolduc, Huber, and Koop, executed the Notice of Acknowledgment, filed their answer, filed Interrogatories with appellant, then in January of 2006, filed a Motion to dismiss for failure to state a claim. This Motion was filed not long after appellant had filed his Motion for Summary Judgment against respondent Klang, for failing to answer or otherwise plead the complaint.

The Minnesota Supreme Court explained the limited function served by a > rule 12.02(e) motion to dismiss in > *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963):

A claim is sufficient against a motion to dismiss based on > Rule 12.02(5) [current version at 12.02(e) ] if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. **Id.**

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<sup>7</sup> See also Minnesota Statute § 244.052, subd. 7 ( c) (2005): *A State or Local agency or official, or private organization or individual authorized to act on behalf of a State or Local agency or official, is not civilly liable for disclosing information as permitted by this section. However, this paragraph applies only to disclosure of information that is consistent with the offender's conviction history*

While the district court correctly pointed out the challenges Doyle will face with these claims, the problem here is that the complaint alleges continuing negligence through May 8, 1997. We disagree with the district court's conclusion that it appears to a certainty that no facts could be introduced consistent with the general termination of treatment rule.

#### IV.

### 5. ARE SEMLER'S CLAIMS TIME-BARRED BY THE STATUTE OF LIMITATIONS?

*No.* In fact, the district court did not even address this issue on Bolduc, Koop, and Huber's Motion to dismiss for failure to state a claim upon which relief can be granted. *See Court Order of August 15<sup>th</sup>, 2006. See also Bolduc, Huber, and Koops Brief page 10, ¶2*

In *Broek*<sup>8</sup>, the Court of Appeals held: "To balance concerns about potentially harsh effects of limitations statutes, courts and legislatures have developed tolling doctrines that delay the accrual of the statutory period past the normal accrual date".

In *Espinoza*<sup>9</sup>, the Court of Appeals held: Espinoza contends that his claims survive the time-bar by virtue of the "continuing tort theory." Courts occasionally recognize that a continuing wrong may suspend a limitation period. > *Radloff v. First Am. Nat'l Bank*, 455 N.W.2d 490, 492 (Minn.App.1990), pet. for rev. denied (Minn. July 13, 1990); see, e.g., > *Sigurdson v. Isanti County*, 448 N.W.2d 62, 67-68 (Minn.1989) (recognizing the doctrine in a discrimination claim). To suspend the limitation period, the alleged tortious conduct must be "continuous in nature," rather than "separate, unrelated acts, individually motivated." > *Radloff*, 455 N.W.2d at 492-93.

In *Sigurdson v. Isanti County*<sup>10</sup>, the Minnesota Supreme Court held: that (1) doctrine of law of the case did not preclude consideration of the issue of statute of limitations, which was raised but never decided in the first two appeals, and (2) gender discrimination was a continuing violation which extended time of the prescribed statute of limitations. Appellant argues that because of the continuing wrong by the defendant's, it tolled the statute of limitations. Appellant argues that in order to suspend the statute of limitation period, the alleged tortuous conduct must be "continuous in nature" rather than "separate, unrelated acts, individually motivated". *Radloff*, 455 N.W. 2 d at 492-93

<sup>8</sup> *Broek vs. Park Nicollet Health Services*, 660 N.W. 2 d 439 (Minn. App. 2003)

<sup>9</sup> *Joseph Espinoza vs. Joan Feinberg, et. al.*, 1995 WL 351550 (Minn. App. 1995) Affirmed

<sup>10</sup> *Sigurdson vs Isanti County*, 448 N.W. 2 d 62,67-68 ( Minn. 1989)

An inmate brought a §1983 action alleging that prison authorities deprived him of federal constitutional rights. The United States District Court for the Eastern District of Michigan, dismissed the complaint and appeal was taken. The Court of Appeals for the Sixth Circuit, 863 F. 2 d 549, in an unpublished opinion, affirmed. Upon grant of certiorari, the United States Supreme Court, Justice Stevens, held that state statutes suspending limitations periods for those under legal disability, including prisoners, until one year after disability has been removed was consistent with §1983, and thus inmates action was not time barred<sup>11</sup>.

The United States Supreme Court held: Held: A federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the State's provision tolling the limitations period for prisoners. The Court of Appeals' ruling to the contrary conflicts with > Board of Regents, University of New York v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440, which held that limitations periods in > § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules, as long as the state law would not defeat the goals of the federal law at issue. The Michigan tolling statute is consistent with > § 1983's remedial purpose, since some inmates may be loathe to sue adversaries to whose daily supervision and control they remain subject, and even those who do file suit may not have a fair opportunity to establish the validity of their allegations while they are confined. Pp. 2000-2003.

The time of accrual is “that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action<sup>12</sup>”. In other words, the “crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action”. See also *Singleton*, 632 F. 2 d at 192. Appellant has met his burden that defendant's continued to place the false information about him in the community notification handouts, not once, but several times. Therefore, appellants claims are one of a “continuous” matter.

Respondents Bolduc, Huber, and Koop argue that they are not constables under either Minnesota Statute §541.06, or under Minnesota State law at all. (*Res. Br. Page 12 ¶1 and ¶1*) However, appellant argues that defendant's are constables under §541.06, and under State Law<sup>13</sup>.

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11 *Tyrone Victor Hardin vs. Dennis Straub*, 490 U.S. 536, 109 S. Ct. 1998. Reversed

12 *Triestman vs. Probst*, 897 F. Supp. 48 (N.D.N.Y. 1995); citing *Bireline vs. Seagondollar*, 567 F. 2 d 260, 263 (4<sup>th</sup> Cir. 1994)

13 *James Dale Hursh vs. Commissioner of Public Safety*, 2002 WL 1364120 See also *O'Neil vs. Town of Babylon*, 986 F 2 d 646 (C.A. 2 (N.Y.) 1993), Reversed and Remanded with instructions.

Appellant points out that under Minnesota State Statute §367, and §645.44, subd. 12, it states in part: The statute specifically defines “peace officer” as:

(1) a state patrol officer;

(2) University of Minnesota peace officer;

(3) a constable as defined in section §367.40, subd. 3;

(4) police officer of any municipality, including towns having powers under section §368.01, or county; and

(5) for purposes of violations of this chapter in or on an off-road recreational vehicle or motorboat, or for violations of section §97B.065 or §97B.066, a state conservation officer. Therefore, Respondents Bolduc, Huber, and Koop's arguments as them not being constables under state law, must fail as a matter of law.

## VI.

### 6. ARE RESPONDENTS ENTITLED TO ABSOLUTE IMMUNITY?

*No.* Appellant argues that all the above-named respondents in this case are not entitled to absolute immunity. Appellant has pointed out to the District Court, argued in his Brief, and argues in this Reply Brief that respondents are not entitled to absolute immunity. Respondents violated clearly established law, they knew what they were doing, they knew that the information they had on the community notification handouts about appellant were false, and did nothing to correct it. In addition, the District Court did not rule on this issue as to whether or not respondents were or are entitled to absolute immunity<sup>14</sup>. Appellant argues that not only under Minnesota Statute §244.052, subd. 7 (c ), also under a continuing wrong, respondents stripped themselves of any kind of immunity. In addition, respondents knew what they were doing, knew that they were violating clearly established law at the time, however, did not correct the false information about appellant.

In *Mellgren*, the Court of Appeals stated: “In a case alleging assault and false imprisonment, the City of Minneapolis appeals the denial of its motion for summary judgment based on official immunity. Because the city failed to meet its burden to demonstrate that its officer's discretionary actions were legally reasonable, we affirm”.

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<sup>14</sup> *Mellgren vs. City of Minneapolis*, 1999 WL 10239 (Minn. App. 1999) affirmed

Official immunity protects an official's discretionary decisions made at an operational level.> Watson ex rel. Hanson v. Metropolitan Transit Comm'n, 553 N.W.2d 406, 414 (Minn.1996). But official immunity does not extend to legally unreasonable actions that come within the "willful or malicious" exception to an official's discretionary immunity.> State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571-72 (Minn.1994). The application of immunity is a question of law, which an appellate court reviews de novo.> Gleason v. Metropolitan Council Transit Operations, 582 N.W.2d 216, 219 (Minn.1998). The party asserting an immunity defense bears the burden of showing it is entitled to the defense. > Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn.1997).

The starting point for determining whether actions are entitled to immunity is "identification of 'the precise governmental conduct at issue.'"> Gleason, 582 N.W.2d at 219 (quoting> Watson, 553 N.W.2d at 415). We then apply a two-part inquiry to determine, first, "whether the conduct required the exercise of judgment and discretion and is therefore the type of conduct protected by official immunity"; and second, "whether the alleged acts, even though discretionary, were stripped of the immunity's protection because the official acted without legal reasonableness in violating a known right."> Gleason v. Metropolitan Council Transit Operations, 563 N.W.2d 309, 315-16 (Minn.App.1997) (citation omitted), aff'd in part, > 582 N.W.2d 216 (Minn.1998).

1. Police officers may assert official immunity as a defense to a lawsuit under the Minnesota Human Rights Act, > Minn.Stat. §363.03, subd. 4 (1990), alleging officers' execution of felony stop was discriminatory. The official immunity doctrine does not protect officers who commit a willful or malicious wrong.

At issue is whether the common law doctrine of official immunity applies to an action under the Minnesota Human Rights Act against police officers for alleged racial discrimination in stopping people suspected of criminal wrongdoing. The doctrine of official immunity "provides that 'a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.'"> Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn.1988) (quoting > Susla v. State, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976)). The purpose of official immunity is to protect "public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties. > Id. At 678.

We do not believe that allowing public officials to assert the defense of official immunity to a claim under> Minn. Stat. 363.03 will undermine the remedial purpose of the statute. Significantly, the doctrine of official immunity does not protect public officials from personal liability when they commit a malicious or willful wrong. Therefore, official immunity would only bar discrimination claims brought under> Minn. Stat. § 363.03, subd. 4 where there was no showing of willfulness or malice.

If a government employee should commit an act of discrimination during the performance of a ministerial duty, official immunity would not apply. Appellant has clearly shown that defendant's have committed acts that are strictly prohibited by Minnesota State Law, therefore their immunity is null and void, as their actions constituted a willful and malicious act.

## VII.

### 7. WAS THE DISCLOSURE BY RESPONDENTS IN COMPLIANCE

#### WITH MINNESOTA STATUTE §244.052.

*No.* Appellant argues that the disclosure made by respondents did not in any way comply with Minnesota Statute §244.052. In fact, the District Court stated as such in its Order of August 15<sup>th</sup>, 2006, that defendant's erred in violation of the statute. The published information was inconsistent with appellants conviction history. Therefore, respondents are not immune from civil liability under the statute, as the statute says such if it is violated.

Appellant points out that respondents admitted that the information was disclosed, and was relevant and necessary to protect the public from appellant. (*Res. Br. Page 16 ¶2*). Respondents also admit, that the District Court held otherwise, however, still respectfully submitted that they complied fully with the statute. Appellant argues that it was the District Court in June of 1997, that determined he was not a danger to the public and was safe enough to be placed on probation after completing his probationary jail term in April of 1998. Appellant was in the community for 3 ½ years without incident, before he was subsequently sent to prison for violating the terms of his probation. (*use of alcohol, and failure to complete sex offender treatment*)

Appellant argues that respondents argument pertaining to the protection of the public from appellant in the community notification handouts, is without merit, and must be dismissed as a matter of law. **Id.**

## VIII.

### 8. DID THE DISTRICT COURT PROPERLY DETERMINE THAT RESPONDENTS WERE ENTITLED TO OFFICIAL IMMUNITY PROTECTION?

*No.* The District Court erred by stating that respondents were entitled to official immunity. Appellant has shown and proven through his complaint, and exhibits that respondents are not entitled to any kind of immunity, as they violated clearly established law. *Id.* Appellant has shown that respondents knowingly violated the law, and did absolutely nothing to correct it. In fact, respondents kept the information on the community notification handouts, therefore making their argument of any kind of immunity null and void.

Although the District Court determined : *[Respondents] Klang, Bolduc, and Huber are entitled to official immunity for their discretionary acts leading to the disclosure of information pertaining to [Semler]. Moreover, Koop merely provided information to the ECRC was entitled to receive. [Respondents] did not engage in willful or malicious disclosure to injure [Semler's] reputation. [Respondents] disclosed that information, which in their discretion, allowed them to protect the public.*

However, appellant was never charged, convicted or even accused of another sexual type of crime after his release from the county jail in 1998, or from prison in 2001, 2002, 2003. Moreover, appellant does not have a juvenile record. Appellant has never been charged or convicted of anything anywhere near what the notification handouts state about him. Appellant argues that this false information has injured his reputation in the community, as well as his family's reputation. *Id.*

County employee brought Human Rights Act claims against county for sexual harassment allegedly inflicted by co-worker. The District Court, Hennepin County, David Duffy, J., dismissed claims as barred by statutory and official immunity. Employee appealed. The Court of Appeals, Daniel F. Foley, Acting Judge, held that: (1) statutory immunity was unavailable defense to Human Rights Act claim, and (2) material fact question regarding whether employee's managers acted willfully or maliciously in responding to employee's complaints precluded summary judgment on whether county enjoyed official immunity. Reversed and remanded<sup>15</sup>.

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<sup>15</sup> *Susan Davis vs. Hennipen County, e.t. a.l.*, 559 N.W. 2 d 117 (Minn. App 1997) Reversed and Remanded.

Whether individual enjoys official immunity depends on whether alleged discriminatory act was type of conduct covered by official immunity, and whether alleged discriminatory acts were malicious or willful and therefore stripped of immunity's protection.> Minn. Stat. § 466.03, subd. 6.

"Malice," which will strip individual of official immunity, means intentional doing of wrongful act without legal justification or excuse, or willful violation of known right, and contemplates less of subjective inquiry into malice, which was traditionally favored at common law, and more of objective inquiry into legal reasonableness of official's actions. Official's actions are legally unreasonable, and thus unprotected by official immunity, if official has reason to believe her actions are prohibited.

If elements required to sustain underlying claim against individual are substantially similar to those required for proof of malice or willfulness in context of official immunity and plaintiff successfully overcomes motion for summary judgment on underlying claims, doctrine of official immunity cannot operate to bar suit or liability<sup>16</sup>. Where no individual official is responsible for the acts alleged to be negligent or violative of a duty, official immunity will not apply. See > *Janklow*, 552 N.W.2d at 716 (because board acts in joint capacity when deciding to hire or fire executive director, no individual official is responsible and official immunity is inapplicable).

### CONCLUSION

Appellant argues that he has shown proof beyond a reasonable doubt that all the above-named respondents acted willfully and maliciously. Respondents are not entitled to any kind of immunity under State Law, or Federal Law. The District Court has stated in it's order (s) from May 11<sup>th</sup>, 2006, and from August 15<sup>th</sup>, 2006, that appellants claims against Respondent Klang for the 2003 claim applies. In the August 15<sup>th</sup>, 2006, Order, the District Court stated and admitted that defendant's erred and violated Minnesota State Law. Appellant argues that under State Law (*Minn. Stat. §244.052, sub. 7 (c) (2005)*), defendant's waived any and all immunity defenses that they may have enjoyed prior.

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<sup>16</sup> *Gordon ex rel. Gordon vs. Frank*, 454 F. 3 d 858 (C.A. (Minn. )2006) Affirmed. See also *Michael Schroeder vs. St. Louis County*, 708 N. W. 2 d 497 (Minn. 2006) Affirmed in part, reversed in part, and remanded in part. See also *Anderson vs Anoka Hennepin Ind. School Dist. 11*, 655 N.W. 2 d 847(Minn. App. 2003) Affirmed.

Appellant argues that because of the willful and malicious acts of respondents, his reputation and his family's reputation have been seriously impacted in the community. Accordingly, appellant and his family have suffered irreparable harassment and harm on the negligence of respondents, as they kept the false information about appellant in the community notification handouts and continued to hand those notifications out to the public.

Appellant argues that respondent Koop, did in fact provide the Department of Corrections with the false information, and he did this prior to December 31<sup>st</sup>, 2001. *See Resp. Koop, Bolduc, and Huber's Brief, page 11 ¶2, page 15 ¶2, See also Memo from Rick Koop to Chief of Crosby Police, dated July 22<sup>nd</sup>, 2004.* Here, there is enormous evidence that the actions of respondents were anything but discretionary. Appellants allegations contained in his complaint, do not contain bare allegations, but the willful and malicious acts done by all respondents.

Appellant argues that he has met the requirements to prove and establish that the statements contained in the community notification handouts were in fact defamation. In order to establish a claim for defamation, Appellant must prove: (1) the statement (s) was false; (2) it was communicated to another; and (3) it intended to harm his reputation in the community. Appellant has met all the above requirements.

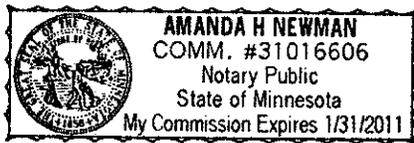
#### **PRAYER FOR RELIEF**

**THEREFORE**, appellant respectfully requests that this Court reverse the Lower Courts decision in dismissing the claim (s) against all the above-named respondents. **MOREOVER**, appellant requests that this Court deny any and all immunity that respondents are asking for, as this Court will clearly see through all the evidence appellant has submitted, that respondents acted willfully and maliciously, and their actions were not in accordance with any State Law.

SWORN AND SUBSCRIBED TO ME ON  
THIS 28<sup>th</sup> DAY OF March 2007

*Amanda Newman*

NOTARY



RESPECTFULLY SUBMITTED

*Raymond L. Semler*

PROPER/PER/SONA

*Raymond L. Semler*

*Official Identification # 206261*

*M.L.-Annex*

*1111 Highway 73*

*Moose Lake, Minnesota 55767-9452*