

NO. A06-1852

State of Minnesota  
In Court of Appeals

Raymond L. Semler,

*Appellant,*

v.

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

*Respondents.*

**RESPONDENT ERICK KLANG'S BRIEF**

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## **STATEMENT OF THE ISSUES**

- I. Whether or not the trial court correctly dismissed all claims against respondent Erick Klang, with prejudice, as service of process had not been effected upon respondent Erick Klang and the applicable statute of limitations had run?

## STATEMENT OF THE CASE

Appellant commenced an action alleging defamation and emotional distress resulting from community notification handouts provided by various law enforcement personnel. (RA1) 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)

An order was filed on May 11, 2006, by the District Court on Defendant Erick Klang's Motion to Dismiss. (RA34) 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 applied to Plaintiff's claims. Based on the uncontroverted facts, the Court found that the Plaintiff's claims arising from actions that occurred on January 7, 2002, were time-barred by the three-year statute of limitations. As a result, these claims were dismissed with prejudice. However, the Court found that the June 23, 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. (RA38) The District Court granted the motion on September 22, 2006. (RA61)

## STATEMENT OF THE FACTS

The 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 not proven allegations*) in the *Community Notification Handout* on Mr. Semler. The above-named Defendants violated Mr. Semler's rights with Slender [sic.], Defamation of Character and Emotional Trauma and Stress, and Emotional Trauma and Stress upon Mr. Semler's family. (RA1)

On October 13, 2005, Appellant contends he mailed a copy of the Complaint and two copies of a Notice and Acknowledgment and Receipt of Summons and Complaint. (RA7) Semler also provided a "Notice and Acknowledgment of Service by Mail under Minn. Rules of Procedure pursuant to Rule § 4.05." (RA5) Two identical copies of this were received which were not signed by the Appellant. (RA6) Semler did not mail a Summons with the Complaint. (RA7) Respondent Klang did not return the acknowledgment of service. (RA8)

The Complaint alleged that on January 7, 2002, Erick Klang violated Appellant's rights with respect to a Level 2 sex offender "*Community Notification Handout.*" (RA1) It also contended that Defendant Klang did the same thing on June 23, 2003. *Id.* Appellant further alleges other supposed misdeeds by other law enforcement personnel. *Id.*

On June 15, 2006, Appellant attempted to serve a summons and complaint again. (RA42) Appellant served it by mail and not personally on Sheriff Klang. *Id.* Again, neither Sheriff Klang nor anyone on his behalf acknowledged service pursuant to Minn. R. Civ. P. 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 v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. App. 1992), review denied (Minn. July 16, 1992). Jurisdiction is also a question of law which is reviewed *de novo*. *Mercer v. Andersen*, 715 N.W.2d 114, 118 (Minn. App. 2006); citing *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002).

## ARGUMENT

### **I. SERVICE OF PROCESS WAS NOT PROPERLY EFFECTED ON RESPONDENT KLANG.**

Appellant attempted service pursuant to Minn. R. Civ. P. 4.05. It allows service by mail if a Form 22 is completed and signed by the sender. However, for service to be effective, the Notice and Acknowledgment must be signed and returned to the sender. Minn. R. Civ. P. 4.05. "If acknowledgment of service under this rule is not received by the sender within the time Defendant is required by these rules to serve an answer, service shall be ineffectual." *Id.* Appellant contends that he attempted service by mail on October 13, 2005, and again on June 15, 2006. The acknowledgment of service was not signed and returned by Respondent Klang either time. Thus, by the very operation of the rule, service upon Sheriff Klang was not made. Therefore, the Complaint should be dismissed.

In addition, as to the service attempted in October 2005, no Summons was served. A case commences when the summons is served upon the defendant. Minn. R. Civ. P. 3.01. Because no Summons was served, there is no process served. Moreover, Appellant did not sign the notice and acknowledgment as required by Form 22. Because Appellant did not follow Rule 4.05 by properly filling out the service by mail form (Form 22), service is ineffective.

Appellant maintains that service was properly effected on Respondent Klang simply by virtue of Appellant mailing the summons and complaint to Respondent Klang. Appellant fails to recognize that service of a Summons and Complaint by mail is governed by Rule 4.05

of the Minnesota Rules of Civil Procedure, which sets forth the explicit requirements for proper service under that rule. *See* Minn. R. Civ. P. 4.05. Mailing the Summons and Complaint to a defendant is not sufficient. The Rule requires that the defendant return a signed acknowledgment of service for service to be effective. *Id.* If the signed acknowledgment is not returned by the time an answer is due, “service shall be ineffectual.” *Id.* The plaintiff must then make service by some other method authorized by the Rules. Contrary to Appellant’s arguments, there is no requirement that the defendant must return and sign the acknowledgment of service. Moreover, there is no support for Appellant’s position that Respondent waived his claims for insufficiency of process by not returning the acknowledgment of service. If the defendant fails to return the acknowledgment of service, he may simply be responsible for the costs of personal service. Minn. R. Civ. P. 4.05.

When Respondent Klang did not return the executed acknowledgment of service within the time permitted to answer, Appellant was free to personally serve Respondent Klang. It is disingenuous for Appellant to argue that he could not personally serve Klang as he was incarcerated at the time. Personal service can be made by anyone. Appellant was free to have hired a process server or have somebody else serve the documents. Under Rule 4.05, Respondent Klang may have been responsible for the costs of personal service.

Appellant’s reliance on *Bliss v. Stevens*, is misplaced. Appellant cites *Bliss v. Stevens*, in support of his position that service was properly made on respondent Klang. 544 N.W.2d 50 (Minn. App. 1996) *Bliss* reasons that an action can be commenced on the last day of the

limitations period if the summons is delivered to the sheriff on the last day of the limitations period, and personal service is made within sixty days. *Id.* at 54-55. However, *Bliss* is based solely upon delivery of a summons to the local sheriff and does not discuss service by mail where the acknowledgment has not been returned. Unlike in *Bliss*, there was never effective service made upon Respondent Klang.

Similarly, *Rowley v. McMillan*, 502 F.2d 1326 (C.A.N.C. 1974), does not support Appellant's claims. In *Rowley*, the defense of lack of personal jurisdiction as a result of improper service of process was deemed waived as the defendant failed to challenge the court's personal jurisdiction in his Rule 12 motion. *Id.* at 1332-1333. However, in this case, Respondent Klang clearly challenged the personal jurisdiction of the district court in a timely fashion and did not waive this defense.

*Ochs v. Kimball*, 2003 WL 21524857 (Minn. App. 2003), also fails to support Appellant's position. To the contrary, *Ochs* lends support to Respondent Klang's arguments for dismissal. "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 constitute effective service." *Id.* at 1, FN1; citing *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 776 (Minn.App.1992), review denied (Minn. Jul. 16, 1992).

Finally, Appellant's reliance on *American Jurisprudence, Second Edition*, is misplaced. This is not controlling law, and any citation to this treatise cannot supercede the

explicit requirements of the Minnesota Rules of Civil Procedure.

**II. THERE IS NO PERSONAL JURISDICTION OVER RESPONDENT KLANG WHERE SERVICE OF PROCESS HAS NOT BEEN MADE.**

The Court had no jurisdiction over Respondent Klang, and dismissal was appropriate.

“Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied.” *Uthe v. Baker*, 629 N.W.2d 121, 12123 (Minn. App. 2001); *Mercer v. Andersen*, 715 N.W.2d 114, 118 (Minn. App. 2006). Where service of process is insufficient, a district court must dismiss the action. *Id.* As detailed above, Appellant failed to make proper service upon Respondent Klang. Without service of process, the court lacked personal jurisdiction over Klang and properly dismissed the claims against him.

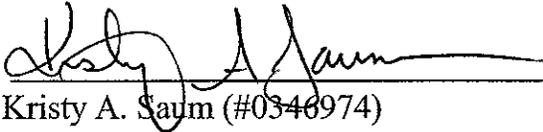
**III. DISMISSAL WITH PREJUDICE WAS APPROPRIATE IN THIS CASE AS THE STATUTE OF LIMITATIONS HAD CLEARLY RUN.**

Appellant’s complaint alleged claims regarding defamation and infliction of emotional distress. Normally, defamation and emotional distress claims must be brought within two years. Minn. Stat. § 541.07(a); *Christenson v. Argonaut Ins. Co.*, 380 N.W.2d 515, 518 (Minn. App. 1986). However, any action against a sheriff “for any act done in an official capacity and in virtue of office, or for any omission of an official duty” must be brought within three years. Minn. Stat. § 541.06. Respondent Klang was a sheriff, and acting in his official capacity with regards to the allegations made in Appellant’s complaint. Accordingly, the three-year statute of limitation applies to Appellant’s claims.

## CERTIFICATION OF BRIEF LENGTH

The undersigned hereby certifies that this Brief complies with the requirements set forth in Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. The brief was prepared using WordPerfect 9 and contains 1802 words.

Dated: March 16, 2007

  
\_\_\_\_\_  
Kristy A. Saum (#0346974)

The allegations against Respondent Klang are for actions that occurred on January 7, 2002, and July 23, 2003. Appellant alleges that he was violated by Respondent Klang's actions regarding a Community Notification Handout. The statute of limitations on Appellant's claims ran on January 7, 2005, and July 23, 2006, respectively. As of these dates, there had not been service made upon Respondent Klang. (See Sect. I) Accordingly, Appellant's claims against Respondent Klang were properly dismissed with prejudice.

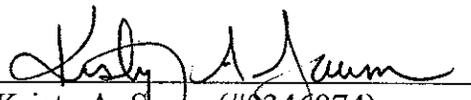
As proper service was never made over Respondent Klang, there is no reason to reach the merits of Appellant's claims.

### CONCLUSION

The district court's dismissal with prejudice of Appellant's claims against Respondent Klang was proper as service was never properly made on Respondent Klang prior to the running of the statute of limitations on Appellant's claims. The district court's judgment should be affirmed.

ERSTAD & RIEMER, P.A.

Dated: March 16, 2007

  
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