

2

No. A12-1960

State of Minnesota
In Court of Appeals

Douglas Willey Elbert and Janice Ann Elbert,
Petitioners – Appellants

v.

Dean Arlo Tlam and
Martin County Planning Commission/Board of Adjustment
Respondents.

Brief and Appendix for Appellants Douglas Willey Elbert and
Janice Ann Elbert

Philip J. Elbert (#0293891)
1108 S. State St.
Fairmont, MN 56031
(507) 238-2080
Attorney for Appellants

Scott Anderson (#157405)
Ratwik, Roszak & Malone, P.A.
300 US Trust Bldg.
730 Second Ave. South
Minneapolis, MN 55402
(612) 225-6814
Attorney for Respondents

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

CERTIFICATE OF COMPLIANCE.....iv

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....2

STANDARD OF REVIEW.....5

ARGUMENT

 I. The District Court has Constitutionally prescribed
subject matter jurisdiction.....5

 II. Insufficiency of Process or Insufficiency of Service of Process
does not cause the district court to lose subject matter jurisdiction.....6

 III. Service of process alone does not confer
subject matter jurisdiction.....9

CONCLUSION.....10

ADDENDUM AND ITS INDEX

 MINN. STAT. 394.27.....Add. 1

 ORDER DATED OCTOBER 4, 2012.....Add. 3

APPELLANTS' APPENDIX AND ITS INDEX

TABLE OF AUTHORITIES

Minnesota State Constitution

Minn. Const. Art. IV sec. 3.....	4
----------------------------------	---

Federal Statutes

28 USC § 1334.....	8
--------------------	---

Minnesota State Statutes

Minn. Stat. § 169A.53.....	6
----------------------------	---

Minn. Stat. § 209.021.....	6
----------------------------	---

Minn. Stat. § 394.27.....	1, 2, 3, 4, 6, 8, 9
---------------------------	---------------------

Minn. Stat. § 572.23.....	3, 4
---------------------------	------

Minn. Stat. § 572B.....	4
-------------------------	---

Minn. Stat. § 586.04.....	2, 6
---------------------------	------

Minn. Stat. § 586.05.....	2
---------------------------	---

Minnesota Rules

Minn. R. Civ. Pro. 4.....	3, 5
---------------------------	------

Minn. R. Civ. Pro. 12.....	1, 3, 9
----------------------------	---------

Minn. R. Civ. Pro. 56.....	1
----------------------------	---

Minnesota Cases

Doerr v. Warner,

247 N.W.2d 505 (Minn. 1956).....	7
----------------------------------	---

In re Application of Skyline Materials, Ltd., for Zoning Variance, 819 N.W.2d 183 (Minn. Ct. App. 2012).....	3
Johnson v. Murray, 648 N.W.2d 664 (Minn. 2002).....	4
Leek v. A. Exp. Prop. Cas., 591 N.W.2d 507 (Minn. Ct App. 1999)	
Marzitelli v. City of Little Canada, 582 N.W.2d 904 (Minn. 1998).....	8
Mercer v. Anderson, 715 N.W.2d 114 (Minn. Ct. App. 2006).....	7
Niezner v. St. Paul School Dist. No. 625, 643 N.W.2d 645 (Minn. Ct. App. 2002).....	5
Patterson v. Wu Family Corp., 608 N.W.2d 863 (Minn. 2000).....	8
Turek v. A.S.P. of Moorhead, Inc., 618 N.W.2d 609 (Minn. Ct. App. 2000).....	7, 8
Other Authorities	
1 MNPRAC R 3.01.....	5
14 MNPRAC § 2:28.....	5
Black's Law Dictionary.....	5

CERTIFICATE OF COMPLIANCE

I, Philip J. Elbert, certify that Appellants' Memorandum complies with Rule 132 Minnesota Rules of Appellate procedure. I further certify that I used LibreOffice Writer 3 version 3.5.7.2 to prepare this Memorandum and that the Memorandum contains 2,224 words.

Dated: 11/30, 2012



Philip J. Elbert #0293892
1108 S. State St.
Fairmont, MN 56031
(507) 238-2080
Attorney for Appellants

STATEMENT OF ISSUES

- I. If an aggrieved person commences an appeal pursuant to Minn. Stat 394.27 Subd. 9 and fails to serve the County Attorney with a copy of the appeal, does the District Court then lack subject matter jurisdiction over the appeal?

STATEMENT OF THE CASE

This appeal concerns the distinction between subject matter jurisdiction and personal jurisdiction and the role that service plays relating to these two types of jurisdiction.

In Appellants' case, an application for a variance was filed in Martin County for the purpose of building a hog facility. Appellants objected to the proposed variance. The Martin County Board of Adjustment held a hearing on the application for the variance on March 27, 2012. Appellant, Douglas Elbert, attended this hearing and objected to the variance. After the hearing, Respondent Tlam, Chairperson of the Martin County Board of Adjustment, issued the variance, also on March 27, 2012. On April 20, 2012, Appellants filed their appeal with the District Court.

On May 29, 2012 Respondents served their Answer on Appellants. Appellants then filed a Motion for Summary Judgment. Respondents then filed their Counter-Motion to Dismiss/Motion for Summary Judgment.¹ On July 17, 2012 the District Court

¹ Pursuant to Minn. R. Civ. Pro. 12.02 if a Motion to Dismiss is brought, alleging failure to state a claim upon which relief can be granted, the motion will be treated as a Motion for Summary Judgment and will be disposed of under Rule 56 if matters outside of the pleading are presented to support the Motion. Respondents did bring such a motion and did support their Motion to Dismiss with evidence outside of the pleading.

held a hearing on the motions. On October 4, 2012 the District Court ruled that since Appellants had not served the Martin County Attorney with a copy of their appeal, within the appeal timeline, the District Court was without subject matter jurisdiction and therefore, granted Respondents' motion and dismissed the appeal for lack of subject matter jurisdiction. On October 31, 2012 Appellants filed their Notice of Appeal.

STATEMENT OF THE FACTS

Appellants commenced their appeal of the decision of the Martin County Board of Adjustment's grant of the variance through the use of a Writ of Mandamus. Contained within the Petition for the Writ, in paragraph 18 [Appellants' Appendix p. 3, hereinafter entitled A.A.], Appellants specifically included the reference to the statutory appeal found in Minn. Stat. 394.27 Subd. 9 [Appellants' Addendum p. 1] and through their general request for relief in paragraph 42 and following in paragraph 43 [A.A. 7]. Appellants expected that the District Court would follow the procedure found in Minn. Stat. 586.05 by either issuing the Writ pursuant to Minn. Stat 586.04 or scheduling a hearing and directing service, pursuant to Minn. Stat. 586.05. Neither of these actions were performed by the District Court.

After the filing of the Petition for Writ of Mandamus, Respondents then served upon Appellants their Answer to the Petition [A.A. 9]. In their Answer, Respondents raised certain defenses. Of note for this case, are the following; 1) failure to state a

claim for which relief can be granted, in paragraph 23 [A.A. 16]; 2) insufficiency of service of process, in paragraph 25 [A.A. 17]; and 3) lack of subject matter jurisdiction in paragraph 26 [A.A. 17].

In Respondents' Motion to Dismiss dated June 15, 2012 Respondents raised only two issues; 1) lack of subject matter jurisdiction pursuant to Minn. R. Civ. Pro. 12.02 (a) and 2) failure to state a claim for which relief can be granted pursuant to Minn. R. Civ. Pro. 12.02 (e) [A.A. 46]. Following the hearing on July 17, 2012, in the Order dated August 22, 2012 the District Court found that the Petition for Writ of Mandamus did raise the issue of "...an appeal to the District Court pursuant to Minnesota Statute § 394.27, subdivision 9..." [A.A. 51]. Before addressing Appellants' issues, the Court first addressed the issue of subject matter jurisdiction [A.A. 51]. The District Court determined that since Appellants did not serve a summons and complaint pursuant to Minn. R. Civ. Pro. 3 and 4 "[t]he Court did not obtain jurisdiction over the subject matter because Plaintiffs failed to start the lawsuit" [A.A. 54].

The District Court relied heavily upon the case of Leek v. A. Exp. Prop. Cas., 591 N.W.2d 507 (Minn. Crt App. 1999) as a primary source for the determination that failure to serve results in a lack of subject matter jurisdiction [A.A. 52]. The District Court's reliance on this case is misplaced. The decision in Leek was based upon Minn. Stat. 572.23 and Leek quoted from that provision when addressing the requirements of service. Minn. Stat. 572.23 did contain service requirements for the initial application.

It is questionable if Leek is actually still good law or precedent since Minn. Stat. 572.23 was repealed in 2010 and replaced by Minn. Stat. 572B. In the newly codified 572B, the language of 572.23, which the court in Leek cites and relies upon, is no longer contained in the statute. Even if the service language remained after re-codification, the case actually supports Appellants' argument cited below. Under the previous Minn. Stat. 572.23 there was a statutorily mandated service requirement but under Minn. Stat. 394.27 Subd. 9 [Appellants' Addendum p. 1] there is no service mandate. The analysis of Leek does not apply to Appellants' case.

After the issuance of the August 2, 2012 Order and based upon the case of In Re: Application of Skyline Materials, Ltd. For Zoning Variance, 819 N.W.2d 183 (Minn. Crt. App. 2012), Appellants, by letter dated September 7, 2012, requested permission to file a motion to reconsider [A.A.56]. Respondents objected to this request by letter dated September 11, 2012 [A.A.58]. The District Court did not grant permission for Appellants to file a motion to reconsider but as a result of Skyline, the District Court issued an Amended Order dated October 4, 2012 [Appellants' Addendum p. 3]. The Amended Order stated that there was still a lack of subject matter jurisdiction but this time it was due to the fact that Appellants had not served the Martin County Attorney with notice of the appeal. Appellants then commenced the instant appeal.

STANDARD OF REVIEW

Subject matter jurisdiction and statutory interpretation are questions which are subject to de novo review. Johnson v. Murray, 648 N.W.2d 664 (Minn. 2002).

ARGUMENT

I.

The District Court has constitutionally prescribed subject matter jurisdiction.

The Minnesota Constitution Article IV sec. 3 sets out the following; “[t]he district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law.” Minn. Stat. 294.27 Subd. 9 states that “...an aggrieved person...shall have the right to appeal...to the district court....” Therefore, the district court has subject matter jurisdiction to hear Appellants' appeal of the decision of the Martin County Board of Adjustment.

II.

Insufficiency of Process or Insufficiency of Service of Process does not cause the district court to lose subject matter jurisdiction.

“Subject matter jurisdiction is the court's authority or power to consider an action.” 14 MNPRAC § 2:28. See also Black's Law Dictionary, 6th Ed., pg. 1425 (subject matter jurisdiction is the “...court's power to hear and determine cases of the general class or category to which proceedings in question belong....”)

Personal jurisdiction is “the power of a court over the person of a defendant...” Black's Law Dictionary, 6th Ed., pg. 1144.

Service of process is mandatory to confer personal jurisdiction upon the court. “Service of a complaint without a summons is a nullity under the rule, and the court lacks personal jurisdiction over any party not served with a summons.” 1 MNPRAC R. 3.01. Ineffective service of process results in a lack of personal jurisdiction over the defendant. Id. See also Niezner v. St. Paul School Dist. No. 625, 643 N.W.2d 645, 650 (Minn. Crt. App. 2002) (Failure to serve notice of an appeal, to district court, as required by Minn. R. Civ. Pro. 4 causes a lack of personal jurisdiction.) Niezner and Minnesota Practice both set out the general rule that lack of service does not lead to a lack of subject matter jurisdiction but only to a lack of personal jurisdiction.

There are always exceptions to this general rule. Minn. R. Civ. Pro. 81.01 (a) directs to Appendix A for a list of Special Proceedings which have special requirements to confer subject matter jurisdiction upon the court. Minn. Stat. 209 is one of these listed Special Proceedings. Minn. Stat. 209.021 Subd. 3 sets out that in addition to filing the appeal, "...the notice of contest must be served...." This means that service is required to confer subject matter jurisdiction upon the court. Writs of Mandamus are also listed in Appendix A as a Special Proceeding since they are allowed to be issued without hearing, without service and without notice. Minn. Stat. 586.04.

In addition to the list in Appendix A, the Minnesota Implied Consent law also mandates a special procedure for obtaining judicial review. Pursuant to Minn. Stat. 169A.53 Subd. 2 the petition for judicial review must be filed "...together with proof of service of a copy on the commissioner...." A failure to serve and file that proof leads to a lack of subject matter jurisdiction.

Minn. Stat. 394, the operative statute in appellants' case, is not on the Appendix A list of Special Proceedings nor does it contain any language which requires any special procedures in order to confer subject matter jurisdiction upon the district court. Because Minn. Stat. 394.27 Subd. 9 contains no additional service requirements, filing of the appeal (within the timelines) confers onto the district court subject matter jurisdiction and any failure of service leads only to a lack of personal jurisdiction.

Multiple appellate cases also stand for this proposition. Mercer v. Anderson, 715 N.W.2d 114 (Minn. Ct. App. 2006) (“[i]neffective service on a defendant results in a lack of personal jurisdiction.”)

Although an indispensable party to an action must be joined, and for the failure to join him the action must be dismissed since the adjudication cannot proceed to judgment without him, such defect is not jurisdictional. ... It is well established that, although a court may not proceed to judgment in a case in which an indispensable party is absent, the reason therefore is not that the court does not have jurisdiction but for the broader reason that in the exercise of due process no court, regardless of its jurisdictional structure, may adjudicate directly upon a person's rights without such person being either actually or constructively before the court. Doerr v. Warner, 247 N.W.2d 505, 511 (Minn. 1956).

It is understandable why a court would make an error in determining if lack of service leads to a lack of subject matter jurisdiction since courts sometimes are unclear when they address the subject. In Turek v. A.S.P. of Moorhead, Inc., 618 N.W.2d 609, 613 (Minn. Ct. App. 2000) the court states the following, “[t]he default judgment was void for lack of jurisdiction because Turek failed to effectively serve A.S.P.” The court does not clearly state that the jurisdiction that is lacking is personal jurisdiction. But we know this is what the court meant, since within the decision, the court analyzes the issue of waiver. “A.S.P. did not waive its right to challenge the court's jurisdiction. An improperly served defendant submits to a court's jurisdiction if it has taken an affirmative step to invoke the power of the court to determine the merits of all or part of

a claim.” Id. At 612. Since subject matter jurisdiction cannot be waived and personal jurisdiction can be waived, the court in Turek was addressing personal jurisdiction. See Marzitelli v. City of Little Canada, 582 N.W.2d 904, 907 (Minn. 1998) (“...it is blackletter law that subject matter jurisdiction may not be waived.”)

In the case of Patterson v. Wu Family Corp., 608 N.W.2d 863 (Minn. 2000) the following is said about personal jurisdiction and waiver; “We hold that a defendant waives the defense of insufficient service of process, even though asserted by answer, by affirmatively invoking the jurisdiction of the district court to obtain partial summary judgment without earlier or simultaneously moving to dismiss the complaint for insufficient service of process.”

III.

Service of process alone does not confer subject matter jurisdiction.

It is clear, that a district court does not obtain subject matter jurisdiction simply through service of process. We know this because service of a bankruptcy petition would not confer subject matter jurisdiction upon the state district court. 28 USC § 1334. When it comes to Minnesota's Special Proceedings, one of the reasons they are “special” is that they can include or add, service as a subject matter jurisdictional component. Minn. Stat. 394.27 Subd. 9 has no such service component.

CONCLUSION

An appeal to district court pursuant to Minn. Stat. 294.27 Subd. 9 is not a Special Proceeding nor does it require service to confer subject matter jurisdiction upon the district court. The District Court in Appellants' case found that service was required to confer subject matter jurisdiction upon the court and this determination was error. To sustain this decision would be to render Minn. R. Civ. Pro. 12.02 (c) & (d) moot. Appellants ask that the District Court's Order dated October 4, 2012 be reversed and the matter remanded for further proceedings.

Dated: 11/30, 2012


Philip J. Elbert #0293892
1108 S. State St.
Fairmont, MN 56031
(507) 238-2080
Attorney for Appellants