

NO. A12-1960

State of Minnesota
In Court of Appeals

Douglas Willey Elbert, and Janice Ann Elbert,
Appellants,

v.

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

RESPONDENTS' BRIEF, ADDENDUM AND APPENDIX

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

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STATEMENT OF THE ISSUE

Issue: *Whether a person seeking review of a County variance decision made pursuant to Minnesota Statute Section 394.27 must serve the Defendants with “process” in order to commence the case and vest the District Court with subject matter jurisdiction?*

Ruling: Process must be served in accordance with the Rules of Civil Procedure. Since process was never served in the matter, the District Court held that it lacked subject matter jurisdiction.

Apposite Authorities:

In re Skyline Materials, Ltd., 819 N.W.2d 183 (Minn. App. 2012)

Leek v. American Express Property Casualty, 591 N.W.2d 507 (Minn. App. 1999)

Nieszner v. St. Paul School District No. 625, 643 N.W.2d 645 (Minn. App. 2002)

STATEMENT OF THE CASE

On February 27, 2012, Dustyn Hartung and then owner John Skrepak applied for a variance on property located _____ in Lake Fremont Township in Martin County. Resp. App.-25, 27. Appellants' property is about one-half mile away. A.A. 1; Aerial Map, Petition Ex. 1.¹ At the time of the application, Hartung had entered into a purchase agreement for the property with John Skrepak. Resp. App.-27. Hartung had also formed a partnership with Kevin and Ryan Kahler named Lake Fremont Pork, LLP. Id. The property was purchased by the partnership prior to the hearing date on the variance request. Warranty Deed, Petition Ex. 3.

The property in question is a five-acre lot with a private ditch or flow way meandering along the northeastern edge of the property, but outside the property lines. A.A. 37. The western side of the property fronts 20th Street, a township road, and the southern edge of the property fronts 30th Street, another township road. Id. The setback distance required under the Zoning Ordinance was 130 feet from the middle of the road because the property was a building site in existence prior to February of 2004. Id. at 26. The setback requirement from the ditch/flow way was 300 feet. Id. at 32. Hartung requested a variance to allow the building to be 100 feet from the road and 245 feet from the ditch/flow way. Variance Request Application, Petition Ex. 2. The Board of Adjustment granted the variance on March 27, and the County issued Lake Fremont Pork, LLP, a feedlot permit in April. Resp. App.-28-30.

¹ References to "A.A." refer to Appellants' Appendix.

On April 20, 2012, Appellants filed a petition for writ of mandamus, seeking a peremptory writ, alleging that the variance was granted in error. A.A. 1-8. No writ was ever issued by the District Court. See District Court Record. Appellants never served Respondents with the petition for writ of mandamus. Resp. App.-16-20, 95-96. Respondents only learned of the lawsuit when the District Court sent a notice of case filing to Dean Tlam and the Martin County Attorney Terry Viesselman. Id. at 21, 95. Respondents filed their joint answer on May 30. A.A. 9-44. The answer affirmatively alleged, among other things, insufficiency of process, lack of subject matter jurisdiction, failure to properly commence the action within 30 days after notice of the decision on the variance request, an adequate remedy at law making the extraordinary relief of mandamus inappropriate, immunity, failure to state a claim upon which relief could be granted, as well as failure to join an indispensable party to the litigation. Id.

On May 15, Appellants filed an ex parte motion for a temporary restraining order. See District Court Record. The motion sought to restrain Lake Fremont Pork, LLP, an entity not a party to the litigation, from continuing their construction on the hog facility. Id. The District Court issued an ex parte temporary restraining order on May 24, with a hearing on the matter set for June 1, 2012. Id.

Respondents filed a memorandum opposing the continuation of the temporary restraining order. See District Court Record. In the memorandum and at the hearing Respondents argued that the Court lacked subject matter jurisdiction because Respondents had never been properly served with any process, that the requirements for a writ of mandamus were not met, that the court lacked jurisdiction to grant the requested

relief against a person/entity not a party to the litigation, and that Appellants failed to meet the requirements necessary for the issuance of a temporary injunction, specifically that the balance of harms favored Respondents and that Appellants had no likelihood of success on the merits. Id. At the end of the hearing, the District Court orally dissolved the temporary restraining order. Id. The Court issued a written order on June 4 memorializing its oral decision. Resp.-Add.-1-3. The Court agreed that because Lake Fremont Pork, LLP was not a party to the action, the Court lacked jurisdiction to enjoin the partnership from further construction. Id.

Appellants filed a motion for summary judgment on June 13, arguing that they were entitled to judgment as a matter of law either through what they claimed was an appeal of the variance decision under Minnesota Statute Section 394.27, or their writ of mandamus, because Hartung had failed to demonstrate all the elements necessary for a variance to be granted. A.A. 45; see also District Court Record. On June 18 Respondents filed a motion to dismiss for lack of subject matter jurisdiction, and, as to Respondent Tlam, failure to state a claim upon which relief could be granted. A.A. 46; Resp. App.-1-54.

On June 19, the District Court issued an order denying Appellants' petition for writ of mandamus. Resp. Add.-4-5. The basis for the Court's decision was that there was an adequate remedy at law, so the extraordinary remedy of mandamus was inappropriate. Id. Although it was questionable whether Appellants' petition requested any relief other than the writ, the District Court Judge, Judge Richards, liberally

construed the petition as also appealing the variance decision under Minnesota Statute Section 394.27, subdivision 9. A.A. 51.

Respondents filed a memorandum opposing Appellants' motion for summary judgment on July 5. Resp. App.-55-85. Appellants did not file any response to Respondents' motion to dismiss or a reply memorandum supporting their motion for summary judgment. See District Court Record. A hearing on the motions was held July 17. Id.

The District Court issued an order granting Respondents' motion to dismiss for lack of subject matter jurisdiction on August 22, and judgment was entered on August 23. A.A. 48-55. The Court held that Appellants did not properly commence the lawsuit because Respondents were not properly served within 30 days of receiving notice of the decision of the Martin County Board of Adjustment. Id.

Counsel for Respondents received the order for judgment and judgment on August 27, and sent a letter to Judge Richards on August 29 to advise him of a then recent decision of the Court of Appeals. Resp. App.-86-93. The case was In re Skyline Materials, Ltd., 819 N.W. 2d 183 (Minn. App. 2012), decided after the motion hearing and after Respondents' filed the memorandum supporting their motion to dismiss. Id. Respondents' counsel advised the Court that he believed the decision did not change the outcome of the case or the dismissal of Appellants' claims, but did affect some of the rationale and reasoning Judge Richards' used in his order. Id.

On September 7, Appellants requested permission from the Court to file a motion to reconsider the order granting Respondents' motion to dismiss. A.A. 56-57. Counsel

for Respondents opposed the request by letter dated September 11, arguing that Appellants failed to show any compelling circumstances that would require reconsideration of the Court's order. A.A. 58-59. Specifically, Appellants' arguments supporting the request were inaccurate -- citing inapplicable cases and arguing positions contrary to black letter law. Id.

On September 24, Respondents filed their notice and application for taxation of costs and disbursements. See District Court Record. Appellants did not file any objection, and judgment for costs was entered on October 3. Id.

On October 4, the Court denied Appellants' request to file a motion to reconsider, and on October 5 an amended order for judgment and judgment was issued. Appellants' Addendum, pp. 3-6. The purpose of the amended order was "to restate [Judge Richards'] reasoning in light of the Skyline Materials decision." Id. Judge Richards agreed that the holding of Skyline Materials did not change the result, but changed some of his reasoning. Id. The amended order again granted Respondents' motion to dismiss for lack of subject matter jurisdiction due to Appellants' failure to properly commence the case. Id.

Appellants filed their notice of appeal with the District Court on October 19. See District Court Record. Respondent's counsel received said notice on October 19. Resp. App.-94. Appellants apparently filed their Notice of Appeal with the Clerk of Appellate Courts on October 31, 2012, as that is the date they say it was filed in their Appellant's Brief. Appellants' Brief, p. 2. Similarly, this Court's Notice of Case Filing indicates the appeal was filed on October 31, 2012. However, in a memorandum and affidavit

received by Respondents' attorney on December 26, counsel for the Appellants claims the Notice of Appeal was mailed on October 19, and that filing is complete upon mailing. According to Appellants' statement of the case, it is the October 5 amended order for judgment and judgment that they are appealing.

STATEMENT OF THE FACTS

After the County granted a variance from two setbacks for the property located at _____, Dunnell, County of Martin, State of Minnesota, a notice of decision was prepared on March 28, 2012. Resp. App.-30; Petition Ex. 7. The notice indicated that the variance was granted with conditions. Id. Appellant Douglas Elbert was one of those mailed notice of the decision. Id. The notice of decision would have been received on or about March 29, 2012. Resp. App.-30.

Appellants sought to initiate litigation against Respondents challenging the March 27, 2012, grant of Dustyn Hartung's variance request. A.A. 1-8. Appellants filed their petition for writ of mandamus on April 20, 2012 in Martin County District Court. Id.; see also District Court Record. The petition, although not entirely clear in what it asked, challenged the grant of the variance, alleging that it was improperly granted. Id. It set forth nine counts, alleging in the first count that ownership was not in a person associated with the variance, and therefore the variance could not be granted. Id. Count II alleged there was no proper plan submitted with the variance, and therefore the variance could not be granted. Id. Count III alleged that the setback requirements were misrepresented by the applicant, and therefore it was error to grant the variance. Id. Counts IV thru VII alleged the variance was improperly granted because various factors that the Board of

Adjustment was to look at were in some way not properly analyzed—in short arguing that the County acted in an arbitrary and capricious manner. Id. And the last two counts stated a damage claim and ask for an alternative writ. Id. No actual relief was requested. There was a request for a writ—but as to what that writ would say or do, the petition was silent. No proposed writ was included with the petition. No writ was granted.

The caption of the petition named as a Defendant Dean Tlam. Respondent Tlam was the chair of the Martin County Board of Adjustment that issued the variance in question. A.A. 1. However, nowhere in the 43 paragraphs of the petition was there any reference to Dean Tlam. Id. at 1-8.

On May 15, 2012, Appellants filed an ex parte motion for a temporary restraining order, together with two supporting affidavits. See District Court Record. After the case was reassigned to Judge Douglas L. Richards, the Court issued a temporary restraining order on May 24, 2012. Id. Respondents filed their answer and response to the petition on May 30, 2012. Id.; see also A.A. 9-44. On June 1, 2012, a hearing was held on the May 24 temporary restraining order issued upon the ex parte application of Appellants. See District Court Record. Respondents filed a memorandum and six affidavits in opposition to the injunction. Id. On June 4, Judge Richards issued an order memorializing his oral ruling at the conclusion of the hearing that dissolved the injunction. Resp. Add.-1-3.

Neither the Chair of the Martin County Board of Commissioners nor the County Auditor/Treasurer were ever served with any process by Appellants in this case. Resp. App.-16-19. Similarly, Appellants never served Respondent Dean Tlam with any process

in this case. Id. at 20-22. Nor was the Martin County Attorney ever served with any process, even though the Appellants' certificate of representation and parties, dated April 20, 2012, indicates the Martin County Attorney was representing the Respondents. Id. at 95-96; District Court Record. No affidavits of service for the petition were ever filed. See District Court Record. Further, the petition itself was only addressed to "[t]he honorable District Court for the Fifth Judicial District, City of Fairmont, County of Martin, State of Minnesota." A.A. 1.

ARGUMENT

An appeal of a variance decision to district court must be taken within 30 days after receipt of notice of the decision. Minn. Stat. § 394.27, subd. 9. Appellants did not, within 30 days of their receipt of the written notice of the County's decision, properly serve their petition for writ of mandamus on Respondents, as required by the Minnesota Rules of Civil Procedure. Minn. R. Civ. P. 3.01.

Appellant's brief to this Court is striking in its lack of legal argument or citation to any authority addressing the issue decided by the District Court, that being, that the failure to properly commence the case within the time limits set forth by statute led to a lack of subject matter jurisdiction. Appellants cite to the Minnesota Constitution. But that citation does not address the issue. They talk about personal jurisdiction, and cite cases concerning waiver of the issue. But this case was not decided, or argued, on the basis of personal jurisdiction. They claim that failing to properly commence a case within the time limits set forth by a statute does not result in a lack of subject matter jurisdiction, only a lack of personal jurisdiction. But they cite no authority for that claim.

And they either misstate or completely misread what Rule 81 of the Minnesota Rules of Civil Procedure stands for. In short, they offer this Court nothing by way of argument, authority, or logic.

I. STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law. State v. Ali, 806 N.W.2d 45, 51 (Minn. 2011). Questions of subject matter jurisdiction are reviewed de novo. Johnson v. Murray, 648 N.W.2d 664, 670 (Minn. 2002).

A. Rule 12.02(a) – Lack of Subject Matter Jurisdiction

Rule 12.02(a) of the Minnesota Rules of Civil Procedure requires that the court dismiss an action whenever it appears that the court lacks jurisdiction over the subject matter. In considering a Rule 12.02(a) motion to dismiss for lack of jurisdiction over the subject matter, the district court takes the facts alleged in the complaint as true.

Hardrives, Inc. v. City of LaCrosse, Wisconsin, 240 N.W.2d 814, 818 (Minn. 1976).

However, even with that, “the plaintiff has the burden of proving a prima facie case supporting jurisdiction.” S.B. Schmidt Paper Co. v. A to Z Paper Co., 452 N.W.2d 485, 487 (Minn. App. 1990).

Subject matter jurisdiction involves a court’s authority to decide a particular class of actions and its authority to decide the particular questions before it. State ex rel. Swan Lake Area Wildlife Ass’n v. Nicollet County Bd. of County Comm’rs, 711 N.W.2d 522, 525 (Minn. App. 2006). Subject matter jurisdiction can be raised at any time in the proceeding, cannot be conferred by consent of the parties, and cannot be waived. In re Rosckes v. County of Carver, 783 N.W.2d 220, 223 (Minn. App. 2010).

Subject matter jurisdiction goes to the very heart of a court's authority to consider a claim. Absent subject matter jurisdiction, the court has no power to consider a matter. Courts do not obtain jurisdiction over the subject matter of a dispute until and unless the proper defendant is properly served. Leek v. Am. Express Prop. Cas., 591 N.W.2d 507, 509 (Minn. App. 1999) ("If service of process is invalid, the district court lacks jurisdiction to consider the case, and it is properly dismissed.").

B. Rule 12.02(e) – Failure to State a Claim

Under Minnesota Rule of Civil Procedure Rule 8.01, pleadings "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." The United States Supreme Court, interpreting the exact same language, has stated that a pleading must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679.

A motion to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure "raises the single question of whether the [pleading] states a claim upon which relief can be granted." Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 739 (Minn. 2000). In considering the Rule 12 motion, the court accepts the facts alleged as true. Radke v. Freeborn County, 694 N.W.2d 788 (Minn. 2005). A pleading will be

dismissed where it appears that no facts exist that could be introduced consistent with the pleading that would support granting the relief demanded, Northern States Power Co. v. Franklin, 122 N.W.2d 26 (Minn. 1963), and/or where the pleading does not set forth a legally sufficient claim. Elzie v. Comm'r of Pub. Safety, 298 N.W.2d 29 (Minn. 1980). Where a pleading fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. Martens, 616 N.W.2d at 748. When reviewing a case which was dismissed for a failure to state a claim upon which relief can be granted, the only question before the reviewing Court is whether the complaint sets forth a legally sufficient claim for relief. See Elzie v. Commissioner of Public Safety, 298 N.W.2d 29 (Minn. 1980); Royal Realty Co. v. Levin, 69 N.W.2d 667 (Minn. 1955).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION BECAUSE RESPONDENTS WERE NEVER PROPERLY SERVED WITH ANY PROCESS

In order to seek review of a variance decision, an action must be properly commenced within 30 days of notice of the decision. Minn. Stat. § 394.27, subd. 9. Although Appellants initiated this case as a mandamus action, nothing in Chapter 586 changes the requisite 30-day appeal period for variance decisions. See generally Minn. Stat. Ch. 586.

Proper commencement of an action is crucial. Minnesota courts have consistently held that where an appeal of some action must be filed within a specified time period, failure to do so within that time period will result in a lack of jurisdiction over the subject matter. See, e.g., Leek, 591 N.W.2d at 509; Marzitelli v. City of Little Canada, 582 N.W.2d 904, 906 (Minn. 1998); Judd v. State by Humphrey, 488 N.W.2d 843, 844-45

(Minn. App. 1992); Hansing v. McGroarty, 433 N.W.2d 441, 442 (Minn. App. 1988); Fish Hook Ass'n v. Grover Bros. P'ship, 417 N.W.2d 692, 696 (Minn. App. 1988).

Furthermore, when the action is not commenced within the specified time frame, a person is not entitled to review by way of some other remedy—like in this instance, attempting to bring the claim as a writ of mandamus. See Matter of Haymes, 444 N.W.2d 257, 258-259 (Minn. 1989). Dismissal is appropriate when it is clear that the action has not been brought in a timely fashion. Jacobson v. Bd. of Trs. of the Teachers Retirement Ass'n, 627 N.W.2d 106, 108 (Minn. App. 2001).

Rule 2 of the Minnesota Rules of Civil Procedure states that there is only one form of action in district courts and this is a “civil action.” Rule 1 of the Minnesota Rules of Civil Procedure states that the Rules govern the procedure in all Minnesota district courts in all civil suits, except those that are specifically exempted in Rule 81.² Under the Rule 81 exemption, the Rules of Procedure still apply, unless there is some statutory procedure set forth that is inconsistent with the Rules. Then the statutory procedure would apply. See Minn. R. Civ. P. 81.01. Thus, exclusion per Rule 81.01 is merely partial, if at all. Minn. R. Civ. P. 81.01(a); see also, Leek, 591 N.W.2d 507; Stransky v. Indep. Sch. Dist. 761, 439 N.W.2d 408 (Minn. App. 1989) review denied (Minn. July 12, 1989); State by Humphrey v. Baillon Co., 503 N.W.2d 799 (Minn. App. 1993); Petition of Brainerd Nat'l Bank, 383 N.W.2d 284 (Minn. 1986).

² Contrary to the statements of Appellants in their brief to this Court, Rule 81 deals with what procedure applies to actions. It does not, as they allege, make special rules concerning subject matter jurisdiction, as an exception to some general rule.

Rule 81.01 refers to a list of statutory actions in Appendix A called “special proceedings,” to which the Rules of Procedure do not wholly apply. A writ of mandamus is listed in Appendix A, but an appeal of a variance decision pursuant to Minnesota Statute Section 394.27, subdivision 9 is not. Thus any appeal of a variance decision, in all instances, is subject to the Rules of Civil Procedure. This was decided recently in the case of In re Skyline Materials, Ltd., 819 N.W.2d 183 (Minn. App. 2012). Even if the variance statute were listed in Rule 81.01, the Rules of Civil Procedure regarding service would apply. Id. This is because the governing statute (Minn. Stat. § 394.27, subd.9) merely gives a time frame to seek review (30 days) and specifies the court in which judicial review is to take place (the district court) – it does not include the means, manner or method of initiating such an action in district court. See generally Minn. Stat. § 394.27, subd. 9. Thus there is no inconsistency between the statute and the Rules.

The County and Respondent Tlam acknowledge that a mandamus action is listed in Rule 81. But that does not change the analysis or result in this case. Chapter 586 of Minnesota Statutes governs mandamus actions. There is a reference to service of process in Section 586.05. That provision states that a court, after issuing a writ, may direct the manner of service of the writ, order, and petition. Thus an order pursuant to Section 586.05 could be inconsistent with the Rules of Civil Procedure in a given case, and the order, and not the Rules of Procedure, would then govern. But that would require that a writ be issued that directs service in a manner other than that required by the Rules. There is nothing in the statute mandating that service be ordered in any manner inconsistent with the Rules. In this case however, there has not even been a writ issued,

and the Court has not directed service in a particular manner that conflicts with or is inconsistent with the Minnesota Rules of Civil Procedure. Therefore the Rules apply.

Furthermore, when a statute does not specify how a pleading should be served to commence an action, the general rule is that the rules of civil procedure apply. Nieszner v. St. Paul Sch. Dist. No. 625, 643 N.W.2d 645 (Minn. App. 2002). In Lebens v. Harbeck, 243 N.W.2d 128 (Minn. 1976), an election contest case, the Minnesota Supreme Court held that notice of the contest must be made within seven days as required by the statute, and since the statute was silent on the manner of service, it must be in the same manner as service of summons in a civil action. Id. Because there has been no writ or order issued governing service in this particular case, and the statute governing appeals from board of adjustment decisions does not specify the manner for service of the initial pleading, service must be in accordance with the Rules of Civil Procedure.

Under Rule 3.01 of the Minnesota Rules of Civil Procedure, a civil action is commenced through personal service on the defendant, or on the date of acknowledgement of service if service is made by mail, or when process is delivered to the sheriff in the county where the defendant resides for service. Thus, service of process is what commences an action. Nothing else. Case law is quite clear that courts do not obtain jurisdiction over the subject matter of a dispute unless and until the proper defendant is properly served. See Leek, 591 N.W.2d at 509.

The Minnesota Court of Appeals has also considered service rules and subject matter jurisdiction in the context of appeals from county decisions and actions. For

instance, this Court ruled that the Minnesota Rules of Civil Procedure apply to lawsuits against counties that are appealing budget decisions. Year 2001 Budget Appeal of Landgren v. Pipestone County Bd. of Comm'rs, 633 N.W.2d 875 (Minn. App. 2001). In Landgren, the sheriff personally served the county auditor in an effort to commence an appeal of the county board's resolution regarding the sheriff's budget. Id. at 876. This Court affirmed the district court's dismissal of the action for lack of jurisdiction. Id. at 879. The district court dismissed the action because, even though he was a party to the action, the sheriff served the notice of appeal himself, and under the Minnesota Rules of Civil Procedure, a party to an action may not affect personal service. Id. at 876-77. This Court upheld the district court's determination that the Minnesota Rules of Civil Procedure applied to the action against the county board and that the failure to effect proper service was a failure to commence the action. Id. at 879.

More recently, this Court decided the manner of service for a notice of appeal when an aggrieved party appeals a decision of a county board of adjustment to a district court pursuant to Minnesota Statute Section 394.27, subdivision 9. See In re Skyline Materials, Ltd., 819 N.W.2d 183 (Minn. App. 2012) (review granted, Minn. Oct. 16, 2012). The Skyline court first did an analysis under Rule 81.01 of the Minnesota Rules of Civil Procedure and concluded that because Section 394.27, subdivision 9 did not specify the procedure or manner of service, the Rules of Civil Procedure applied. Id. at 185. The question was then what Rule applied. In Skyline, Houston County contended that Rule 4.03(e)(1) applied. The aggrieved party claimed that Rule 5.01 applied. Ruling that the appeal was the continuation of an ongoing matter rather than the commencement

of some new proceeding, the Court held that proper service of a notice of appeal was pursuant to Rule 5.01, which requires service of papers on the attorney for the party. Because Skyline had served the County Attorney within 30 days of the notice of the decision, the appeal was held to be timely commenced and the Court acquired subject matter jurisdiction. Id.

Here we do not have that. The papers commencing this petition for a writ of mandamus were never served by the Appellants on the Martin County Attorney. Nor were they ever served on Respondent Tlam. As such, if we analyze this as an appeal of a variance decision under Section 394.27, subdivision 9, the case was not commenced in a timely fashion. Therefore the District Court lacked subject matter jurisdiction.

Even if one were to contend that Skyline does not apply under the procedural posture of this case, the result in this case is the same. Skyline involved an appeal of a variance decision by way of a notice of appeal. It involved the actual applicant for a variance. Under those facts this Court concluded the appeal was a “continuation” of an ongoing action. But this case is significantly different. First, the Appellants were not the applicants for the variance in this case. They were simply neighbors. Thus, even if one says that when an applicant for a permit seeks district court review of the decision the applicant is merely continuing the already begun action between it and the County, here we do not have a “continuation” of anything between these parties. It is brand new. Second, this case was not brought as a notice of appeal. It was pled as a petition for a writ of mandamus. It asserts new matters, has different procedural and legal requirements, and involved a new party (Respondent Tlam). It could easily be said to be

a fiction stretched beyond the breaking point to say this case “continued” a process between the parties that began in front of the Board of Adjustment. So one could conclude that the Skyline ruling that Rule 5.01 applies to require service by mail on the attorney does not apply in this case. Under those circumstances one needs to look to Rule 4.03(e)(1) to see the required method of service.

First, it should be noted that even though this case named as a defendant the Martin County Planning Commission/Board of Adjustment (which are actually two bodies, performing distinct functions, with the same members), those bodies are merely instruments through which the County performs certain zoning functions. County boards of adjustment and planning commissions do not have the independent authority to sue or be sued. See Minn. Stat. §§ 394.27, subd. 5 and 394.30, subd.4 (omitting the power to sue and be sued from powers of board of adjustment). The Planning Commission and Board of Adjustment are divisions of Martin County’s government, not independent entities subject to suit. See Galob v. Sanborn, 160 N.W.2d 262, 265 (Minn. 1968). Therefore, in order to properly commence this action, Appellants were required to properly serve Martin County.

Rule 4.03(e) of the Minnesota Rules of Civil Procedure governs how a county is to be served. To properly serve a county with process, a party must serve the chair of the county board or the county auditor. See Minn. R. Civ. P. 4.03(e)(1). It is undisputed that neither was served in this case. See Resp. App.-16-19. Rule 4.03(a) directs service upon an individual. Proper service of a named individual requires delivery to the individual personally or by leaving a copy at the individual’s usual place of abode with some person

of suitable age and discretion then residing therein. See Minn. R. Civ. P. 4.03(a). It is similarly undisputed that Appellants never properly served Mr. Tlam in this case. See Resp. App.-20-22.

Rule 4 of the Minnesota Rules of Civil Procedure applies to “process,” not just to summonses, and not just to complaints. See, e.g., Pierce v. Huddleston, 10 Minn. 131 (Minn. 1865). In other words, it applies to the original papers that commence a judicial proceeding, because not every civil action is commenced by service of a summons and complaint. Accordingly, in order to properly commence a civil action, the original pleading, regardless of what it is, must be properly served according to the requirements of Rule 4.03.

Requiring delivery of the summons and complaint, or initial pleading, for commencing a civil action provides a single, uniform course of procedure that applies to all civil actions. Singelman v. St. Francis Med. Ctr., 777 N.W.2d 540, 543 (Minn. App. 2010). The Minnesota Supreme Court reaffirmed the importance of following these rules of procedure in In re Welfare of J.R., Jr., 655 N.W.2d 1, 4-5 (Minn. 2003), noting that refusing to follow them eviscerates the uniform, impartial application of the rules, and would strip the rules of their important function of providing litigants clear guidelines in which to operate.

Regardless of whether the action is called an appeal, a complaint or a petition for writ of mandamus, the Minnesota Rules of Civil Procedure apply uniformly, and process must be served in accordance with the Rules in order to commence the action. Simply filing a petition for writ of mandamus with the district court does not comply with the

Rules. Service of process in a manner not authorized by a rule or statute is ineffective. O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. App. 1999). It is undisputed that Appellants have never served Respondents with the petition, a proposed writ, or any order granting the writ. They never served the County Attorney with any such papers. Whether we look at Rule 5.01 or Rule 4.03, the result is the same. Therefore, because service of process as required by the Rules was not done within the 30-day appeal period, the District Court lacked jurisdiction and the case must be dismissed.

III. THERE IS NO PERSONAL JURISDICTION/WAIVER ISSUE IN THIS CASE

Appellants seem to contend that somehow this case does not involve subject matter jurisdiction, but rather personal jurisdiction. They seem to argue or imply there is some waiver involved, or that failure to properly commence a case does not and cannot result in a failure to confer subject matter jurisdiction, but instead, only personal jurisdiction. The legal support Appellants cited for this contention is simply not applicable. Patterson v. Wu Family Corporation, 608 N.W.2d 863 (Minn. 2000), is a case about involuntary waiver, not an issue in this case. Mercer v. Andersen, 715 N.W.2d 114 (Minn. App. 2006), is a case dealing with a court's authority to decide whether it has jurisdiction to determine whether it has jurisdiction. Turek v. A.S.P. of Moorhead, Inc., 618 N.W.2d 609 (Minn. App. 2000), deals with the doctrine of mailed notice and substitute service, and in fact the Court concluded that it had no jurisdiction to enter a judgment in default when there had never been proper service. Appellants fail to understand that a failure to properly serve process in a case can and does lead to both a

lack of subject matter jurisdiction and a lack of personal jurisdiction. Either can be raised. In this case only subject matter jurisdiction was raised by the Respondents.

It bears stating that it is black letter law that subject matter jurisdiction may not be waived. Marzitelli, 582 N.W.2d at 907 (citing Minn. R. Civ. P. 12.08(c); 1 D. Herr and R. Haydock, Minn. Practice § 12.16 (3d ed. 1998)). Since subject matter jurisdiction is a fundamental question going to the very right of a court to adjudicate the dispute between the parties, it may not be conferred on the court by the agreement of the parties nor by their waiver of the right to object. Parties cannot waive lack of subject matter jurisdiction and cannot consent to a court acting when the court lacks subject matter jurisdiction. Gummow v. Gummow, 356 N.W.2d 426, 428 (Minn. App. 1984). Because subject matter jurisdiction goes to the authority of the court to hear a particular class of actions, lack of subject matter jurisdiction may be raised at any time, including for the first time on appeal. Cochrane v. Tudor Oaks Condo. Project, 529 N.W.2d 429, 432 (Minn. App. 1995).

Second, even if we were dealing with a personal jurisdiction issue, which can be waived, our Supreme Court has stated on many occasions that simple participation in a lawsuit does not amount to waiver of a jurisdictional defense. Rather, it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court's jurisdiction on the merits of the claim that leads to a waiver. See Patterson, 608 N.W.2d at 868. Here, all Respondents did was raise the subject matter jurisdiction defense in its answer and response to the petition, and then, within 3 weeks after the hearing on the temporary restraining order, moved the District Court to dismiss the case

based on lack of subject matter jurisdiction. In short, Respondents did nothing to waive its arguments. A party can certainly bandy about a waiver argument. But there are no facts or circumstances to support it in this case.

IV. APPELLANTS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST RESPONDENT TLAM

Appellants' petition for writ of mandamus did not contain a single allegation regarding Respondent Tlam. Respondent Tlam was therefore properly dismissed with prejudice for failure to state a claim upon which relief can be granted.

A. No Pleadings State a Claim against Respondent Tlam

The petition failed to allege that Respondent Tlam ever did anything or that he failed to do something required. Respondent Tlam's name only appears on the case caption at the top of the first page – it appears nowhere else in the 43 paragraphs that make up the document. See generally A.A 1-8. No cause of action is asserted against Mr. Tlam. No relief against him is sought. The petition complains of “error by the Martin County Board of Adjustment,” and alleges that “the Board of Adjustment acted improperly,” but makes no mention whatsoever of Respondent Tlam, his actions, or the lack thereof. Therefore, even if all the allegations in the petition are taken as true, there was no relief that could be granted against Respondent Tlam because Appellants failed to plead a single fact regarding him. No relief can be granted if no relief has been sought. There cannot be a clearer example of a failure to state a claim upon which relief can be granted than in this case. Because there can be no claim against Respondent Tlam, he was properly dismissed with prejudice from the action.

CONCLUSION

The District Court properly granted Respondents' motion to dismiss for a lack of subject matter jurisdiction. Respondent Tlam was properly dismissed for the same reason, and for the independent ground that the petition failed to state a claim against him. The Respondents respectfully request that the District Court's decision be affirmed.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: December 28, 2012

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