

A05-0869

STATE OF MINNESOTA
IN COURT OF APPEALS

Denise M. Smith,

Appellant,

vs.

Harold J. Flotterud,

Respondent.

APPELLANT'S BRIEF and APPENDIX

DANIEL J. MOULTON (#136888)	STEVEN L. VILTOFT (#190615)
Moulton Law Office	LaBore, Giuliani, Cosgriff and Viltoft
Attorney for Appellant	Attorney for Respondent
976 14 th Ave. SW	10285 Yellow Circle Drive
Rochester, MN 55902	P.O. Box 70
(507) 288-6334	Hopkins, MN 55343-0070
	(952) 933-3371

MATT C. ROCKNE
Rockne Law Office
Attorney for Estate of Harold Flotterud
385 Main Street
Zumbrota, MN 55992
(507) 732-5191

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	2
Legal Issue.....	3
Statement of the Case.....	4
Statement of the Facts.....	5
Argument.....	7
<u>THE TRIAL COURT ERRED BY GRANTING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT</u>	7
Conclusion.....	10
Appendix	

TABLE OF AUTHORITIES

Page

CASES

Minnesota Cases

<u>Northwest Airlines, Inc. v. Friday</u> , 617 N.W.2d 590 (Minn.App. 2000).....	7
<u>Amdahl v. Stonewall Ins. Co.</u> , 484 N.w.2d 811 (Minn.App. 1992).....	7
<u>Lee v. Skrukud</u> , 42 N.W.2d 544 (Minn. 1950).....	8
<u>Thiele v. Stich</u> , 425 N.W.2d 580 (Minn. 1988).....	9
<u>O'Sell v. Peterson</u> , 595 N.W.2d 870 (Minn.App. 1999).....	9

STATUTES AND OTHER SOURCES

Minn.R.Civ.Pro. 4.02.....	7, 9
Minn.R.Civ.Pro. 4.03(a).....	7
Minn. Stat. Sec. 543.03 (now repealed).....	8, 9
Minn.R.Civ.Pro. 4.....	8, 9

LEGAL ISSUE

Did the Trial Court err by granting Respondent's Motion to dismiss the Appellant's Complaint?

TRIAL COURT HELD: Granted Respondent's motion to dismiss Appellant's Complaint finding there was ineffective service of process.

STATEMENT OF THE CASE

Appellant, Denise M. Smith, commenced this civil action in Goodhue County District Court with a Summons and Complaint, dated March 24, 2004 (Appendix, page A-1) and filed with the trial court an Affidavit of Personal Service, dated April 8, 2004 (Appendix, page A-6).

Respondent, Harold J. Flotterud, filed an Answer in which Respondent raised as an affirmative defense insufficient service of process (Appendix, page A-8). Respondent brought a Motion to Dismiss the Complaint in October of 2004 due to ineffective service of process (Appendix, page A-9).

The trial court (the Honorable Robert R. King) issued an Order, dated February 2, 2005, reserving Respondent's Motion to Dismiss the Complaint and scheduling an evidentiary hearing, which was held on March 7, 2005 (Appendix, page A-37). In an Order and Judgment of Dismissal, dated March 7, 2005, the trial court granted Respondent's Motion to Dismiss the Complaint (Appendix, page A-45).

Appellant served and file a Notice of Appeal, dated May 5, 2005 (Appendix, page A-47).

STATEMENT OF THE FACTS

On September 30, 1998, Appellant, Denise M. Smith, was injured in a motor vehicle accident with Respondent, Harold J. Flotterud. Appellant attempted service of a Summons and Complaint on Respondent on April 7, 2004, when process server James Little of Southern Minnesota Air Freight went to Appellant's last known address in rural Zumbrota, Minnesota. Mr. Little did not find anyone home at that address, but he left the Summons and Complaint with a neighbor, Valerie Leonard, who took the papers and said she would give them to Ron Flotterud, Respondent's son, who also lived in the neighborhood. Mr. Little signed an Affidavit of Personal Service, dated April 8, 2004, in which he indicated that he either personally served the Summons and Complaint upon Harold Flotterud on April 7, 2004, or he left the Summons and Complaint with an adult over the age of 18 at 20915 453rd Street Way, Zumbrota (Appendix, page A-6).

Ms. Leonard took the Summons and Petition and left it at the home of Ron Flotterud with one of Ron Flotterud's daughters. In the Affidavit of Valerie Leonard, dated October 12, 2005, Ms. Leonard testified that the process server left the papers with her and she delivered the papers to the home of Ron Flotterud at 20539 County 10 Blvd, Zumbrota, Minnesota (Appendix, page A-26).

Harold Flotterud did not reside at 20915 453rd Street Way, Zumbrota, MN, on April 7, 2004. At that time, he was a resident of a nursing home. Mr. Flotterud died before he was ever personally served the Summons and Complaint. However, Respondent admits that Ron Flotterud received the Summons and Complaint from one of his family members in April of 2004 and that at that time (prior to the death of his father, Harold Flotterud), he had Power of Attorney from Respondent that, among other things,

authorized him to receive lawsuit papers (see trial court's memorandum, Appendix, page A-38).

Respondent filed an Answer to the Complaint in which Respondent raised as an affirmative defense insufficient service of process (Appendix, page A-8). Respondent brought a Motion to Dismiss the Complaint in October of 2004 due to ineffective service of process (Appendix, page A-9).

The trial court (the Honorable Robert R. King) issued an Order, dated February 2, 2005, reserving Respondent's Motion to Dismiss the Complaint and scheduling an evidentiary hearing, which was held on March 7, 2005 (Appendix, page A-37). Prior to that evidentiary hearing being held, Respondent filed with the trial court the Supplemental Affidavit of Valerie Leonard, dated February 23, 2005, in which Ms. Leonard testified that she did not know that the papers she delivered to the home of Ron Flotterud contained "suit papers" (Appendix, page A-43).

In an Order and Judgment of Dismissal, dated March 7, 2005, the trial court granted Respondent's Motion to Dismiss the Complaint, stating in its memorandum that Ms. Leonard's substituted service of the Summons and Complaint upon Ron Flotterud was ineffective because Ms. Leonard did not know the papers she were delivering intended to initiate a lawsuit (Appendix, page A-46).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTIONS FOR POST-TRIAL RELIEF.

Appellant appeals the trial court's granting Respondent's Motion to Dismiss the Complaint due to ineffective service of process. This issue is a question of law and is subject to de novo review on appeal. Northwest Airlines, Inc. v. Friday, 617 N.W.2d 590, 592 (Minn.App. 2000). When reviewing a pretrial order dismissing for lack of personal jurisdiction, the appellate court takes the plaintiff's allegations and evidence supporting jurisdiction as true. In doubtful cases, the appellate court resolves the jurisdictional question in favor of retaining jurisdiction. A determination of whether service of process was proper also is a question of law. Amdahl v. Stonewall Ins. Co., 484 N.W.2d 811, 814 (Minn.App. 1992).

Minn.R.Civ.Pro. 4.02 states that "Unless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not a party to the action, may make service of a summons or other process." Service of a summons upon an individual shall be by "delivering a copy 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" Minn.R.Civ.Pro. 4.03(a).

Appellant contends that Valerie Leonard performed proper and effective substituted service of the Summons and Complaint upon Ron Flotterud, who had power of attorney from Respondent, Harold Flotterud, and was authorized to receive lawsuit papers on behalf of his father. Respondent has never questioned that he had actual notice of the Summons and Petition, that Ron Flotterud had power of attorney for Respondent, that Valerie Leonard left the Summons and Complaint at Ron Flotterud's

home with a family member who was of suitable age and discretion, and that Ron Flotterud received the Summons and Complaint at his home from a family member.

In Respondent's Memorandum of Law in Support of Motion to Dismiss (Appendix, page A-10), Respondent only argues that there was no personal service upon Harold Flotterud and that the Affidavit of Personal Service by James Little upon Harold Flotterud, either in person or by substituted service, was false. Mr. Little did testify at the evidentiary hearing that he had very little experience serving Summons and Complaints and had little or no knowledge of Minnesota laws and rules concerning personal service. However, the fact remains that Ron Flotterud had power of attorney for Respondent and received the Summons and Petition from a family member after it was left with that family member at Ron Flotterud's home by Valerie Leonard.

The trial court considered whether Valerie Leonard's service upon Ron Flotterud was effective. The trial court determined in its Memorandum attached to its Order of February 2, 2004 (Appendix, page 38), that there is no question that Ron Flotterud received actual notice of the matter as he received the Summons and Complaint from one of his family members. However, it also determined that the Supreme Court held that under the service of process statute, Minn. Stat. Sec. 543.03 (which was repealed after enactment of Minn.R.Civ.Pro. 4), the act of effective service of process requires the process server to **knowing and intentionally** serve the defendant. Lee v. Skrukud, 42 N.W.2d 544 (Minn. 1950). The trial court could not determine from the record whether Ms. Leonard knowingly and intelligently performed substituted service of the Summons and Complaint on Ron Flotterud. As such, the trial court reserved Respondent's Motion to Dismiss and scheduled an evidentiary hearing.

Prior to the evidentiary hearing, Respondent filed the Supplemental Affidavit of Valerie Leonard, in which Ms. Leonard testified that she did not know what the papers were that that left at Ron Flotterud's home. Thereafter, the trial court granted Respondent's motion, finding that Ms. Leonard's substituted service was ineffective because service was not knowingly and intelligently made by Ms. Leonard.

Appellant contends that the trial court was wrong to require that Ms. Leonard's service be knowingly and intelligently made. That requirement was made by the Supreme Court based upon a now repealed service of process statute, Minn. Stat. Sec. 543.03. There is no requirement in Minn.R.Civ.Pro. 4 that the process server knowingly and intelligently serve process. The only requirement is that the service be by a person, not a party to the action, who is not less than 18 years of age. Minn.R.Civ.Pro. 4.02. No one is claiming that Ms. Leonard was a party or that she was less than 18 years of age. The Court should be reminded that in Ms. Leonard's first affidavit it was clear that she understood Mr. Little was a process server and had papers to serve on Harold Flotterud.

Even if there still is a requirement that service of process be knowingly and intelligently made, then Appellant contends that the substituted service of process upon Ron Flotterud is valid as substantial compliance with the service rules was made. Substantial compliance combined with actual notice will subject an individual to personal jurisdiction. Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988). If the only defect to Ms. Leonard's service was that she did not knowingly and intelligently serve Ron Flotterud, then this court should conclude there was substantial compliance with the rules of service. Evidence that the service actually reached the intended person strongly supports a conclusion that service is valid because due process has been afforded. O'Sell

v. Peterson, 595 N.W.2d 870 (Minn.App. 1999). Serving his appointed agent is also conclusive.

Because Ron Flotterud, who had power of attorney for Respondent, Harold Flotterud, received a copy of the Summons and Complaint, Respondent had actual notice of the matter, was afforded due process, and supports a conclusion by this Court that the substituted service by Valerie Leonard's service was valid.

CONCLUSION

For all of the reasons stated herein, this Court should reverse the trial court's granting of Respondent's Motion to Dismiss the Complaint.

Date: August 4, 2005

DANIEL J. MOULTON (#136888)
Moulton Law Office
Attorney for Appellant
976 14th Ave. SW
Rochester, MN 55902
(507) 288-6334

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) (with amendments effective July 1, 2007).