

NO. A06-1647

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State of Minnesota  
**In Court of Appeals**

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Shamrock Development, Inc.,

*Respondent,*

vs.

Denison E. Smith, et al.,

*Appellants,*

Dakota Turkey Farms, Limited Partnership,

*Defendant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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## ISSUES

1. **Should this Court affirm the district court's order as to Appellant Denison E. Smith because he does not dispute that personal service of process on him was valid and effective?**

Authority:

*State v. Loebach*, 310 N.W.2d 58 (Minn. 1981).  
*Tharp v. Tharp*, 228 Minn. 23, 36 N.W.2d 1 (1949).

2. **Should this Court affirm the district court because its findings that Respondent's attempt to serve Appellants personally was diligent and Respondent's Rule 4.04(a) Affidavit was made in good faith have evidentiary support in the record and are therefore not clearly erroneous?**

Authority:

*Duresky v. Hanson*, 329 N.W.2d 44 (Minn. 1983).  
*Gill v. Gill*, 277 Minn. 166, 152 N.W.2d 309 (1967).  
*Van Rhee v. Dysert*, 154 Minn. 32, 191 N.W. 53 (1922).  
*Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700 (Minn. App. 1996).

3. **Should this Court affirm the district court's order because Appellants have waived any objection to the district court's exercise of jurisdiction?**

Authority:

*Kaiser v. Butchart*, 197 Minn. 28, 265 N.W. 826 (1936).

4. **Should the Court refuse to consider Appellant's "due process" claim because they failed to present it to the district court and are raising it for the first time on appeal?**

Authority:

*Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

## STATEMENT OF THE CASE

This is an action to renew a judgment entered against Appellants on April 18, 1996. On or about March 16, 2006, Respondent Shamrock Development, Inc. (“Shamrock”) began the process of renewing the judgment by filing the Summons and Complaint with the Hennepin County District Court. APP-012.<sup>1</sup> Appellant Denison E. Smith was personally served with the Summons and Complaint on March 18, 2006. RA 64. Appellant Randall N. Smith<sup>2</sup> was served by publication, which was completed by April 14, 2006. RA 72.

The Smith Defendants made a limited and special appearance for the sole purpose of challenging personal jurisdiction. Accordingly, the Smith Defendants brought motions to dismiss the Complaint for, among other things, lack of service of process as well as a separate motion to strike Shamrock’s Rule 4.04(a) Affidavit (a prerequisite to service by publication) as a “sham pleading.” The district court, Judge William R. Howard presiding, denied the Smith Defendants’ motions in an order dated August 3, 2006. RA 88. The Smith Defendants appeal.

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<sup>1</sup> In this brief, “APP” refers to Appellants’ Appendix and “RA” refers to Respondent’s Appendix.

<sup>2</sup> In this brief, Appellants are collectively referred to as the “Smith Defendants.”

## STATEMENT OF FACTS

This matter is a renewal of a judgment. On April 18, 1996, the Hennepin County District Court entered judgment in the matter of *Farm Credit Leasing Services Corp. v. Richard K. Burtness, et al.*, File No. 96-5309 (“Judgment”). The Judgment was entered in favor of the plaintiff in that case, Farm Credit Leasing Services Corporation (“FCL”), in the amount of \$825,620.79. RA 39-44.

The original joint and several judgment debtors were the Smith Defendants; Defendant Dakota Turkey Farms, Limited Partnership (“Dakota”); and Richard K. Burtness. The judgment debtors, including the Smith Defendants, had confessed judgment and stipulated to its entry. RA 48.

The Judgment arose from a series of transactions that occurred years earlier. A partnership called Wild Rice Farms – in which the Smith Defendants, Burtness, and others were partners – leased agricultural facilities from FCL. The Wild Rice Farms partners personally, and jointly and severally, guaranteed Wild Rice Farms’ obligations under the lease. RA 48. Wild Rice Farms assigned its obligations under the lease to Dakota, another partnership in which the Smith Defendants, Burtness, and others were partners. The Dakota partners personally, and jointly and severally, guaranteed Dakota’s obligations under the lease. *Id.*

In a different transaction, Burtness leased agricultural facilities from FCL. The Wild Rice Farms partners personally, and jointly and severally, guaranteed Burtness’s obligations under the lease. *Id.*

Dakota and Burtness defaulted on their leases. In or about April 1996, FCL, Dakota, and the Wild Rice Farms and Dakota partners – which included the Smith Defendants – entered into a settlement agreement memorialized in a Stipulation for Entry of Judgment (“Stipulation”). *Id.* Under the Stipulation, the Smith Defendants acknowledged that they “are individually and jointly and severally indebted to FCL” in the amount of \$712,615.64 on the Dakota lease and \$170,963.66 on the Burtness lease. In settlement of their debt to FCL, the Smith Defendants agreed to make regular payments to FCL as set forth in the Stipulation.

The Smith Defendants also stipulated to the entry of judgment against them and their co-obligors. The Smith Defendants furthermore agreed that if they or their co-obligors defaulted on their payment obligations to FCL under the Stipulation, FCL could file the Stipulation and cause judgment to be entered against them. *Id.*

The Stipulation, which was personally signed by Denison Smith and Randall Smith, also contained the following:

**Confession of Judgment**

Pursuant to the Agreement as identified above and attached hereto, Plaintiff FCL hereby files on behalf of the Guarantors, Richard K. Burtness, Edward O. Samuelson, Denison E. Smith, Randall N. Smith, Scott Hendrickson, Wild Rice Farms and Dakota Turkey Farms on a joint and several basis, a Confession of Judgment pursuant to Minn. Stat. § 548.22 and §541.09. Based on this statutory authority and its contractual right, FCL demands all delinquent amounts due under the Agreement, including costs, legal fees and interest in the amount of \$542.40 which have accrued through and including the date of filing of this Confession of Judgment.

IT IS UNDERSTOOD BY ALL PARTIES to the Agreement that this Confession of Judgment will have the same force of law as a full, final and complete judgment on the merits had this case gone through trial and final judgment been entered in accordance with the provisions of this Agreement.

IT IS UNDERSTOOD BY THE PARTIES to the Agreement that upon filing of this Confession of Judgment, Plaintiff FCL can take all action necessary to secure the prompt and complete payment and/or satisfaction of this entire Confession of Judgment from whatever assets are available to be garnished or attached under law owned by the Guarantors, Richard K. Burtness, Edward O. Samuelson, Denison E. Smith, Randall N. Smith, Scott Hendrickson, Wild Rice Farms and/or Dakota Turkey Farms.

This Confession of Judgment shall be binding on all parties hereto and have complete force of law.

RA 56.

The Smith Defendants and their co-obligors defaulted on their payment obligations to FCL under the Stipulation. On or about June 2, 1995, FCL sent the Smith Defendants, by both certified and first-class U.S. mail, a Notice of Default which states:

Be advised that FCL hereby gives notice that the Parties [including the Smith Defendants] have failed to make payments due and owing FCL. Provided that the Parties continue to fail to pay such amount for a period of ten (10) days following the mailing of this notice, that such failure shall constitute an event of default pursuant to the Agreement. Following such default, FCL will file the Stipulation for Entry of Judgment with the Fourth Judicial District Court.

RA 70.

In or about the early months of 1996, FCL filed the Stipulation with the Court, and judgment was duly entered against the Smith Defendants, Burtness, and Dakota. RA 42.

FCL assigned the Judgment to David N. Friedges. RA 9. In May 1996, Friedges assigned the Judgment to Shamrock. RA 13. The Smith Defendants and Dakota are the remaining judgment debtors in this matter; Burtness has been released. RA 30.

Shamrock has no record of the Smith Defendants trying to contact the company about satisfying the Judgment. The Smith Defendants claim that their attorney, Arnold R. Westerman, attempted to contact Shamrock about settling their obligations and satisfying the Judgment. But the officers of Shamrock who had authority to settle this dispute – James M. Stanton, its CEO, and Michael J. Kraling, its CFO – were never contacted by the Smith Defendants or Westerman. RA 2, RA 4-5. The Smith Defendants maintain that Westerman contacted a Shamrock employee named Mary Dreier in 2000 about satisfying the Judgment but received no response. A woman by that name was once employed by Shamrock, but only until 1995; she was not an agent or employee of Shamrock in 2000 and has never had any interest in the Judgment or involvement in this matter. RA 5.

The Smith Defendants also never paid money into court, which would have stopped the accrual of interest on the Judgment. RA 33. The amount of the Judgment, including interest, now exceeds \$1,259,818.67. APP-014.

Minn. Stat. § 541.04 provides a 10-year limitation on actions to enforce judgments. Accordingly, the Judgment was set to expire on or about April 18, 2006. However, in Minnesota a judgment may be renewed for an additional 10 years by commencing a new civil action against the judgment debtors before the judgment expires. *See Haas v. Brandvold*, 418 N.W.2d 511 (Minn. App. 1988). Shamrock elected to renew

the Judgment. RA 30. To commence a civil action against Defendants on the Judgment, Shamrock proceeded to accomplish service of process on Defendants before April 18, 2006. *Id.*

Before the Judgment expired, Shamrock made a more-than-diligent effort to serve the Smith Defendants personally with the Summons and Complaint. RA 30-32, RA 15-17. Using Accurint (<http://www.accurint.com>), a reliable Internet database widely used to locate persons for service of process, Shamrock learned that from April 1996 (the month the Judgment was entered) to October 2000, both Denison Smith and Randall Smith used the address 1520 Hunter Drive, Medina, Minnesota. RA 16, RA 20-25, RA 31. The 1520 Hunter Drive address in Medina is the same as the registered address (1520 Hunter Drive in Wayzata) for service of process on Dakota. The 1520 Hunter Drive address is also a private residence, not a commercial office building or place of business. RA 59-62.

Shamrock attempted personal service of process on Dakota on or about March 19, 2006 at 1520 Hunter Drive. RA 59. The owner of the home located at 1520 Hunter Drive told the process server he was the sole occupant and had no connection to Dakota or the Smith Defendants. RA 31. Shamrock later completed personal service of process on Dakota by serving the Summons and Complaint on the secretary of state, as permitted by Minn. Stat. § 5.25. *Id.*

In an attempt to locate Denison and Randall Smith, Shamrock searched U.S. Bankruptcy Court filings. RA 17. The search did not reveal any filings by Denison Smith. *Id.* The search of bankruptcy records did reveal a "Randy N. Smith" living in

Rochester, Minnesota. *Id.* Believing he might be the Defendant Randall N. Smith, Shamrock effected personal service on Randy N. Smith in Rochester, Minnesota on March 20, 2006. RA 66. This Randy N. Smith was not the Defendant Randall Smith. RA 32.

Neither the affidavits of identification of judgment debtor filed by FCL with the district court, APP-108-110, nor the Affidavit of Amounts Owed, RA 68, contains current addresses for the Smith Defendants. Shamrock could not have located the Smith Defendants for service of process using these documents.

By March 2006, Shamrock had tried but was unable to locate Denison Smith in Minnesota. RA 16, RA 31. Using a private investigator, Shamrock learned that Denison Smith was living in Fairfax, Virginia. RA 17. Denison Smith was personally served with the Summons and Complaint at his home in Fairfax, Virginia at 10:33 a.m. on March 18, 2006. RA 64.

By March 2006, Shamrock was unable to locate Randall Smith within or outside of Minnesota. RA 32. Shamrock commenced service by publication according to Minn. R. Civ. P. 4.04(a)(1) as to Randall Smith and the other Defendants. Shamrock's counsel satisfied the requirements of Rule 4.04(a) by first filing with the Court the Summons, Complaint, and Rule 4.04(a) Affidavit (RA 36) which stated, in part, that the Smith Defendants were resident individual domiciliaries who departed from the state with intent to defraud creditors, or to avoid service, or remained concealed within the state with like intent. Pursuant to Rule 4.04(a), the Summons was then published in *Finance and Commerce*, a Minneapolis legal newspaper, for three consecutive weeks. RA 72.

Shamrock's service by publication satisfied all the requirements of Rule 4.04(a) and was completed no later than April 14, 2006. *See id.*

Within 10 days after the completion of service by publication, the Smith Defendants filed a limited and special appearance for purposes of challenging personal jurisdiction. Within 5 days after such appearance, counsel for Shamrock served a copy of the Complaint on the Smith Defendants' attorney, as required by Minn. R. Civ. P. 4.042. RA 74.

The Smith Defendants moved the district court to dismiss the Complaint for defective process and service of process and to strike Shamrock's Rule 4.04(a) Affidavit. The district court denied the motions. RA 88. The Smith Defendants appeal.

## ARGUMENT

**I. DENISON SMITH DOES NOT DISPUTE THAT HE WAS PERSONALLY SERVED WITH THE SUMMONS AND COMPLAINT. BECAUSE DENISON SMITH COULD NOT HAVE BEEN PREJUDICED BY ANY DEFECT IN SERVICE BY PUBLICATION, THIS COURT MUST AFFIRM THE DISTRICT COURT'S ORDER WITH RESPECT TO DENISON SMITH.**

The Smith Defendants have omitted from their brief a fact that is at least partially dispositive of this appeal: Denison Smith was personally served with the Summons and Complaint on March 18, 2006, approximately one month before the Judgment expired. RA 64. On appeal, Denison Smith does not dispute that he was personally served. To prevail on appeal, the appellant must show not only that the district court erred but also that appellant was prejudiced by the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Because Denison Smith does not dispute that he was personally served, he was not prejudiced by any alleged error by the district court with respect to service by publication. The Smith Defendants do claim that the Summons was invalid, but this is not a challenge to process or service of process because a "Summons is not a process." *Tharp v. Tharp*, 228 Minn. 23, 24, 36 N.W.2d 1, 2 (1949). Therefore, the district court's order as to Denison Smith must be affirmed.

**II. THE DISTRICT COURT CORRECTLY FOUND THAT SERVICE BY PUBLICATION WAS VALID AND EFFECTIVE.**

Although the purely legal question of whether a service of process is effective is typically subject to *de novo* review, *see Roehrdanz v. Brill*, 682 N.W.2d 626, 629 (Minn. 2004), here the district court's findings of fact – namely that Shamrock made a diligent effort to locate the Smith Defendants and that its Rule 4.04(a) Affidavit was made in

good faith -- are subject to a “clearly erroneous” standard and must be affirmed if supported by any evidence in the record, *see* Minn. R. Civ. P. 52.01; *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Although personal service of process may be the best means of “acquainting interested parties with the fact that their rights are before the court,” the federal and Minnesota courts have “not hesitated ‘to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.’” *Gill v. Gill*, 277 Minn. 166, 171, 152 N.W.2d 309, 313 (1967) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)); *see also Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700, 703 (Minn. App. 1996). In fact, the Minnesota Supreme Court has readily approved of service by publication when it is “the only service possible” and “is in fact dictated by necessity.” *Gill*, 277 Minn. at 171, 152 N.W.2d at 313; *see also Van Rhee v. Dysert*, 154 Minn. 32, 35, 191 N.W. 53, 54 (1922) (affirming service by publication to renew judgment set to expire ten years after entry). Furthermore, this Court has rejected “hyper technical” readings and applications of the rules governing service by publication. *Mowers v. LeCuyer*, No. C6-01-1250, 2002 WL 47060, at \*3 (Minn. App. Jan. 15, 2002) (copy provided at RA 84).

There are two requirements for valid service by publication in Minnesota: (1) a diligent search to determine the missing defendant’s whereabouts, *Electro-Measure, Inc. v. Ewald Enters.*, 398 N.W.2d 85, 88 (Minn. App. 1986); and, if the search did not reveal the defendant’s whereabouts, (2) commencement of service by publication by filing with the court an affidavit that complies with Minn. R. Civ. P. 4.04(a).

**A. The record supports the district court's finding that Shamrock's search for the Smith Defendants was diligent.**

A plaintiff may attempt service by publication "if, after due diligence, the party's whereabouts cannot be ascertained." *Electro-Measure*, 398 N.W.2d at 88 (Minn. App. 1986); *see also The Little Wagon Co. v. Welander*, No. C3-96-1898, 1997 WL 104575, at \*1 (Minn. App. Mar. 11, 1997) (copy provided at RA 80). Whether a plaintiff's efforts to serve a defendant constitute a diligent effort is a question of fact. *See Duresky v. Hanson*, 329 N.W.2d 44, 49 (Minn. 1983) (stating that whether diligent search has been made is a fact question). This Court "will not reverse the district court's finding that the search was diligent unless that finding is clearly erroneous." *Mowers*, 2002 WL 47060, at \*3 (citing *Fletcher*, 589 N.W.2d at 101).

The district court correctly found that Shamrock's search for the whereabouts of Denison and Randall Smith was diligent. Shamrock's search for the Smith Defendants included the following steps, all of which are supported by the record:

- Searching Accurint (<http://www accurint.com>), which revealed that from April 1996 to October 2000 both Denison and Randall Smith used the residence at 1520 Hunter Drive in Medina, Minnesota. RA 15-16, RA 20-25.
- Serving process on Dakota at 1520 Hunter Drive (which is still the partnership's registered address for service of process), which revealed that the Smith Defendants did not currently reside there. RA 31.
- Searching U.S. Bankruptcy Court filings for Denison and Randall Smith. RA 17.
- Hiring a private investigator to locate Denison and Randall Smith. RA 17.
- Attempting personal service on an individual in Rochester, Minnesota believed to be Randall Smith. RA 32.

The best evidence that Shamrock's search for the Smith Defendants was sufficiently diligent is the fact that Shamrock located and personally and properly served Denison Smith with the Summons and Complaint in Virginia – once again proving that the issue of whether service by publication was effective concerns only Randall Smith. RA 64.

This Court must affirm the district court's finding of diligence unless there is no evidence in the record to support it. *See Fletcher*, 589 N.W.2d at 101. The record shows that Shamrock did not attempt service by publication until it first tried to locate the Smith Defendants through use of personal service of process, a search of the Accurint database, a search of bankruptcy records, and a private investigator. The district court's finding that the search was diligent is therefore not clearly erroneous and must be affirmed.

**B. The record supports the district court's finding that Shamrock properly served the Smith Defendants by publication under Rule 4.04(a).**

Rule 4.04(a) "does not require a plaintiff to state the underlying facts in the affidavit for publication, only the facts required to meet the rule." *Elliott v. Franklin*, No. CX-92-1968, 1993 WL 129633, at \*2 (Minn. App. Apr. 27, 1993) (citing 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 4.16 (1985)) (affirming service by publication), *review denied* (Minn. July 15, 1993) (copy provided at RA 77). If the affidavit can be made in good faith, service by publication must be affirmed. *See Van Rhee*, 154 Minn. at 35, 191 N.W. at 54. Whether a Rule 4.04(a) affidavit was made in good faith is a question of fact, and the district court's determination of good faith must be affirmed unless it is clearly erroneous. *See Cherne Indus., Inc. v. Grounds & Assocs.*,

*Inc.*, 278 N.W.2d 81, 97 (Minn. 1979). For service by publication, “defects in an immaterial clause cannot destroy the affidavit.” *Haney v. Haney*, 163 Minn. 114, 121, 203 N.W. 614, 616 (1925).

A plaintiff may complete service of process by publication in cases when “the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent.” Minn. R. Civ. P. 4.04(a)(1). On the facts Shamrock had gathered through its diligent search, Shamrock reasonably suspected that from the time the Judgment was entered until 2000, the Smith Defendants resided in the State of Minnesota but had left the state, or remained concealed within the state, in order to avoid paying their creditors (as acknowledged in the Stipulation for Entry of Judgment) and avoid paying the Judgment. The Turner Affidavit was factually based, and service by publication was appropriate.

The district court correctly found that service by publication on Randall Smith and Denison Smith under Rule 4.04(a) was proper based on the following facts in the record:

- In the Stipulation for Entry of Judgment and signed Confession of Judgment (RA 48) both Denison and Randall Smith personally acknowledged that they “are individually and jointly and severally indebted” to FCL, the original judgment creditor whose interest in the judgment was ultimately assigned to Shamrock.
- In the Stipulation, the Smith Defendants personally acknowledged that they owed FCL \$712,615.64 – which represented the amount by which Dakota had defaulted on an equipment lease from FCL, an obligation the Smith Defendants had agreed to “unconditionally guarantee” – and \$170,963.66 – which represented the amount by which Burtness had defaulted on a different lease from FCL, an obligation the Smith Defendants had also agreed to “unconditionally guarantee.” RA 48.

- On or about June 2, 1995, FCL sent the Smith Defendants by certified U.S. mail a Notice of Default which stated that if the Smith Defendants failed to satisfy their obligations under the Stipulation, FCL would file the Stipulation with the Hennepin County District Court. RA 70.
- Judgment was entered against the Smith Defendants on April 18, 1996. With the statutory interest, the Judgment now exceeds \$1.2 million.
- Although Affidavits of Identification of Judgment Creditor were filed with the Court indicated that in March 1996, Denison and Randall Smith lived in Virginia and the District of Columbia, respectively, our search indicated that from April 1996 to October 2000, the Smith Defendants used the 1520 Hunter Drive address. RA 16, RA 20-25, RA 31. 1520 Hunter Drive is the address of a private residence in the State of Minnesota. RA 59-62.
- In March and April 2006, Shamrock tried but could not locate Denison or Randall Smith in the State of Minnesota for personal service of process. RA 16, RA 31-32.
- Since entry of the Judgment, the Smith Defendants have failed to satisfy the Judgment in whole or in part. The Smith Defendants, who apparently knew that the Judgment had been assigned to Shamrock, did not contact Shamrock about satisfying the Judgment. RA 2, RA 4. The Smith Defendants also could have paid money into court, which would have stopped interest from accruing on the Judgment, but failed to do so. RA 33.

It requires no leap of logic to suspect that if a person owes an undisputed debt of more than \$800,000 (with interest, more than \$1.2 million) and has failed to pay that debt for 10 years, he is avoiding paying his creditors. Furthermore, it is reasonable to suspect that if a person living in Minnesota owes an undisputed debt of more than \$1.2 million, fails to pay his creditors for years, and then can no longer be found within the state, he has either left the state or remains concealed within with the intent of avoiding paying his creditors. The facts Shamrock had gathered indicated that this was the case with Denison and Randall Smith. Based on these facts, which are all supported by the record, the

district court's finding that the Rule 4.04(a) Affidavit was made in good faith cannot be clearly erroneous and, therefore, must be affirmed.

**C. Shamrock's Summons is valid and effective.**

The Smith Defendants also claim that the Summons was defective because it did not contain the notice of alternative dispute resolution required by Minn. Stat. § 543.22. That statute provides: "When a civil case is commenced against a party, the summons must include a statement that provides the opposing party with information about the alternative dispute resolution processes as set forth in the Minnesota General Rules of Practice." Minn. Stat. § 543.22.

However, the Supreme Court has noted:

A summons is not a process. It is a mere notice to defendant that an action against him has been commenced and that judgment will be taken against him if he fails to answer. . . . [The rules governing summonses have] been given a liberal construction to avoid defeating an action on account of technical and formal defects which could not reasonably have misled or prejudiced the defendant.

*Tharp*, 228 Minn. at 24-25, 36 N.W.2d at 2 (citations omitted) (emphasis added). A summons need only "substantially comply" with the requirements of the rules. *Haas v. Brandvold*, 418 N.W.2d 511, 513 (Minn. App. 1988). Minor defects in a summons will not affect its validity. *See Little Wagon*, 1997 WL 104575, at \*2.

No court has held that Minn. Stat. § 543.22 is jurisdictional or that failure to include a notice of the availability of ADR renders a summons invalid and deprives the court of jurisdiction. In fact, the *Minnesota Practice* treatise states that section 543.22 may be unconstitutional because in enacting it, the legislature created a requirement that

conflicts with the official form for summonses approved by the supreme court and the rules of civil procedure, thus violating the separation-of-powers doctrine. *See* 15 Roger S. Haydock, David F. Herr & Sonja Dunnwald Peterson, *Minnesota Practice* § 4.1 (1995). Moreover, a notice of ADR in Shamrock's Summons would have been mere surplusage: Shamrock was simply renewing an existing and undisputed judgment, and there is no basis or reason for ADR among the parties. The Smith Defendants' claim that the Summons is defective is therefore without merit.

**III. BY MOVING TO STRIKE THE RULE 4.04(a) AFFIDAVIT AND COLLATERALLY ATTACKING THE JUDGMENT, THE SMITH DEFENDANTS HAVE WAIVED ANY OBJECTION TO PERSONAL JURISDICTION.**

On April 18, 2006, the Smith Defendants filed a Notice of Limited and Special Appearance Pursuant to Minn. R. Civ. P 4.042, for the limited purpose of moving to dismiss the Complaint for insufficiency of process and service of process. However, the Smith Defendants have waived any objection to the court's exercise of personal jurisdiction over them, and thus have waived the right to challenge process or service of process, by (1) moving to strike Shamrock's Rule 4.04(a) Affidavit and (2) mounting a collateral attack on the Judgment. Accordingly, the Smith Defendants' motions must be denied.<sup>3</sup>

Minnesota courts and courts of other states have held that a motion to strike serves as a waiver of any personal-jurisdiction defense. *See Kaiser v. Butchart*, 197 Minn. 28,

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<sup>3</sup> Shamrock made this argument to the district court, APP-144, and it is an alternate basis for affirming the district court. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985); see also *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *White v. Moulder*, 30 F.3d 80, 82 (8th Cir. 1994).

33, 265 N.W. 826, 828 (1936) (holding motion that complaint be stricken or that plaintiff be required to make it more certain and particular to be waiver of jurisdictional defense); *see also Trautman v. Higbie*, 89 A.2d 649 (N.J. 1952) (observing that courts have held where a motion to dismiss for lack of jurisdiction is coupled with a motion to strike affidavit, movant has waived all objections to personal jurisdiction). “It is generally held that moving to strike a pleading from the files is asking for such relief that it operates as a waiver of any objections to the court’s lack of jurisdiction.” Annotation, *Asking Relief in Addition to Vacation of Service of Process as Waiver of Special Appearance or of Right to Rely Upon Lack of Jurisdiction*, 111 A.L.R. 925 (1937).

Here, the Smith Defendants do not simply challenge the jurisdiction of the district court, they invoke the power of the court to strike the Rule 4.04(a) Affidavit as a so-called “sham pleading.” But the motions to strike are wholly unnecessary to the motions to dismiss: if the court indeed lacks jurisdiction over the Smith Defendants, the Rule 4.04(a) Affidavit will be legally null. By moving to strike, the Smith Defendants have gone beyond merely challenging jurisdiction; they are asking the court to evaluate and issue a ruling as to whether there are any “facts upon which [Shamrock] could have legitimately caused the [Rule 4.04(a)] Affidavit to be filed.” Motions to Dismiss at 5 (¶ 7). The motion to strike thus operates as a waiver of all objections to personal jurisdiction, and the district court’s denial of the motions to dismiss must be affirmed.

In addition, the Smith Defendants devoted a significant part of their motion papers to attacking the underlying Judgment as invalid because it was issued *ex parte* and

supposedly without proper notice to them.<sup>4</sup> And one need only look at the transcript of the district court hearing (APP-277-300) to see that the Smith Defendants' real objective has not been to challenge jurisdiction but to collaterally attack the Judgment. Counsel for the Smith Defendants devoted the better part of his oral argument to arguing that (1) his clients had been released from the Judgment and (2) as a matter of law judgments cannot be renewed in Minnesota. This prompted the following exchange between the Smith Defendants' counsel and the court:

MR. SCHOENWETTER: Well, I've got a whole lot to say about this confession of judgment.

THE COURT: But if you attack the confession of judgment, to me, you're waiving jurisdiction. I mean, you can't attack the judgment unless you're going to make a general appearance. And I'm going to review what you filed yesterday [i.e., the Notice of Limited and Special Appearance] on that issue, but I'm – to me, if you attack the underlying confession of judgment, we're really here almost on summary judgment rather than jurisdiction.

APP-288 (emphasis added).

A defendant does not waive a jurisdictional defense merely by attending a hearing and offering argument on the merits of the claim. *See Igo v. Chernin*, 540 N.W.2d 913, 914 (Minn. App. 1995). However, a defendant does submit to the court's jurisdiction by "taking some affirmative step invoking the power of the court or implicitly recognizing

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<sup>4</sup> The Smith Defendants' collateral attacks on the Judgment are irrelevant to the issue at hand, which is whether they can show that Shamrock's process and service of process were somehow defective. When the Judgment was entered in 1996, the Smith Defendants could have sought relief from the Judgment under Rule 60 but chose not to. Moreover, the time to appeal from entry of the Judgment has long since passed. The Smith Defendants are therefore precluded from collaterally attacking the Judgment in this proceeding.

its jurisdiction.” *Id.* (quotation omitted). As with the motion to strike the Rule 4.04(a) Affidavit, the question of whether the Judgment is valid is irrelevant to whether Shamrock properly served the Smith Defendants. By making a collateral attack on the Judgment, the Smith Defendants are, however implicitly, asking the court to rule in their favor because, they claim, the Judgment is invalid. They have thus invoked the jurisdiction of the district court, and the court’s denial of their motions to dismiss must be affirmed.

**IV. THE SMITH DEFENDANTS’ NEW “DUE PROCESS” ARGUMENT WAS NOT MADE TO THE DISTRICT COURT AND SHOULD NOT BE CONSIDERED BY THIS COURT.**

For the first time on appeal, the Smith Defendants raise an entirely new argument that their rights to due process were violating by allowing service by publication. Appellants’ Br. at 29. This Court will not consider matters not argued and considered in the court below. *Thiele v. Stich*, 425 N.W.2d 580, 582. The Smith Defendants are raising their due process claim for the first time on appeal. Therefore, this Court should not consider it.

**CONCLUSION**

Because the Smith Defendants cannot show that the district court erred or that its findings are clearly erroneous, Shamrock respectfully requests that the Court affirm the order of the district court.

**ACKNOWLEDGMENT**

Respondent hereby acknowledges that sanctions may be imposed under the circumstances set forth in Minn. Stat. § 549.211.

**BASSFORD REMELE**  
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Dated: 12/13/06

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