

CASE NO. A06-0935

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**State of Minnesota**  
**In Court of Appeals**

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JENNIFER THORSON,

*Respondent,*

vs.

ZOLLINGER DENTAL, P.A., d/b/a ADVANCE FAMILY DENTAL,

*Appellant.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. STANDARD OF REVIEW IS DE NOVO.**

Respondent argues that the basis for the denial of Appellant's motion for summary judgment is because the trial court struck Appellant's defense of insufficient service of process. As a matter of clarification, it was Appellant's motion for summary judgment to determine whether there was personal jurisdiction, as a result of Respondent's insufficient service of process, that brought this matter before the trial court. (AA-6.) The trial court denied Appellant's motion for summary judgment and fashioned an equitable remedy. (AA-2, 9.)

Whether summary judgment was properly granted is a question of law, which the court of appeals reviews de novo. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). Therefore, to determine whether the trial court properly Appellant's motion for summary judgment, the proper standard of review is de novo. *Id.* The threshold question in this case is whether the trial court had jurisdiction to fashion an equitable remedy where it is undisputed that service of process was never properly completed.

### **II. THE TRIAL COURT DOES NOT HAVE THE REQUISITE PERSONAL JURISDICTION OVER APPELLANT TO FASHION AN EQUITABLE REMEDY UNDER THE *UTHE* DECISION.**

Respondent fails to address the holding set forth in *Uthe v. Baker*, 629 N.W.2d 121 (Minn. Ct. App. 2001), which instructs that where the trial court lacks the requisite personal jurisdiction over a defendant, the trial court cannot employ its equitable power to

estop the defendant from asserting an insufficiency-of- process defense. Instead, Respondent argues that a discovery sanction should be considered by this Court.

Respondent correctly recites the law with respect to the trial court's powers to fashion a remedy for discovery violations with one exception--she fails to address the requirement set forth in the Minnesota Rules of Civil Procedure Rule 37.02(b), which states:

If a party or an officer, director, employee, or managing agent of a party or a person designated in Rules 30.02(f) or 31.01 to testify on behalf of a party fails to obey an *order to provide or permit discovery*, including an order made pursuant to Rules 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, . . .

(emphasis added). Respondent did not bring a motion to compel discovery and there was no order from the trial court compelling discovery, which is needed by the court to fashion a remedy under 37.02(b).

Appellant did not mislead Respondent when it submitted its answers to interrogatories. As stated in its initial Brief, Appellant maintains that the response "discovery continues" and "this response will be updated" was consistent with Appellant's attorney's representation that Appellant would not be putting significant effort into discovery while settlement was being pursued. (AA-89.) The trial court did not find that "[Appellant] falsified, or intentionally mislead [sic] and delayed updating the Answers to Interrogatory No. 2, or intentionally avoided correspondence regarding the insufficient service of process defense." (AA-9.)

Respondent acknowledges that in July 2005, Appellant, through its attorney, informed Respondent's attorney that Appellant viewed the claim as without merit, and Appellant was interested in reaching a settlement. (Respondent's Brief at p. 15.) Respondent claims that she reasonably assumed that the next step would be to receive an offer from Appellant. *Id.*<sup>1</sup>

Respondent then goes on to characterize the nature of the parties' communication that occurred between July and December 2005. (Respondent's Brief at p. 15-16.) Yet, in none of her letters does Respondent request or reference the offer from Appellant that she claims was the logical next step. *Id.* In addition, this correspondence demonstrates that Respondent knew Appellant had not withdrawn its defense of insufficient service of process. *Id.*

Respondent does not provide any case law, statute or rule to support the claim that "there are multiple legal bases for the court to strike Appellant's insufficient service defense." (Respondent's Brief at p. 18.)

Respondent concedes she did not properly serve Appellant. (AA-7.) Without proper service of process, the trial court lacks jurisdiction over the defendant. *Uthe*, 629 N.W.2d at 123. While the remedy created by the trial court seems to resemble a discovery sanction, as discussed in Appellant's Brief, the trial court lacked the requisite personal

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<sup>1</sup>Despite the fact that Appellant's attorney was waiting on Respondent's attorney to make a settlement proposal, as discussed in the July, 2005 conversation between the attorneys.

jurisdiction to fashion an equitable remedy, or, in the alternative, even a discovery sanction. *Id.* at 124.

**III. UNDER *PATTERSON*, APPELLANT DID NOT WAIVE THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS.**

Respondent argues that under *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 865-66 (Minn. 2000), Appellant waived its defense of insufficient service of process because Appellant waited nine months before bringing a motion to dismiss on the insufficient service issue. Respondent's reliance on *Patterson* for this proposition is misplaced.

Respondent accurately describes the court's ruling in *Patterson* with one exception. During the seven and a half months the defendant waited before bringing a motion to dismiss for insufficient service of process, the defendant had brought a motion on the merits of the case without asserting or raising the defense of insufficient service of process. The *Patterson* court held that as a result of bringing a summary judgment motion on the merits of the case, the defendant waived the defense of insufficient service of process. *Id.* at 869.

Here, Appellant brought a motion for summary judgment, in which it asked the trial court to determine whether, as a result of insufficient service of process, it had personal jurisdiction over Appellant. (AA-6.) This was Appellant's first motion before the court. (Respondent's Brief at p. 15.) Under *Patterson*, participation in discovery is not enough to waive the defense of lack of personal jurisdiction. *Patterson*, 608 N.W.2d

at 869. Therefore, under *Patterson*, Appellant has not waived its defense of insufficient service of process.

Respondent fails to distinguish *Uthe* from the facts of this case. (Respondent's Brief at p. 17 n.4.) In *Uthe*, the Court of Appeals stated thus:

[Defendant] Baker asserted her insufficiency-of-process defense in a timely manner in her answer. *See Minn. R. Civ. P. 12.02*. And Baker also moved to dismiss [Plaintiff] Uthe's case for lack of personal jurisdiction before affirmatively invoking the court's jurisdiction on the merits of the claim. At the time that she made her motion, Baker had only participated in discovery and had not proceeded on the merits of Uthe's case. Thus, because Baker properly preserved her defense by asserting it in her answer and did not affirmatively invoke the court's jurisdiction before asking the court to rule on the merits of that defense, Baker did not waive her right to assert it.

*Uthe*, 629 N.W.2d at 123-24 (footnote omitted).

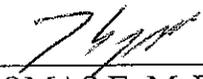
Similarly, Appellant preserved the insufficient service of process defense in its Answer, and affirmatively invoked the court's jurisdiction in its motion for summary judgment. Appellant made no prior request for a decision on the merits. Therefore under *Patterson* and *Uthe*, Appellant did not waive its defense of insufficient service of process.

**CONCLUSION**

For the reasons set forth above, Appellant respectfully requests that this Court reverse the District Court's denial of Appellant's motion for summary to dismiss the Complaint for lack of personal jurisdiction.

Respectfully submitted,  
COLLINS, BUCKLEY, SAUNTRY & HAUGH,  
P.L.L.P.

Dated: August 1, 2006

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