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March 15, 2010

Court Administrator
Attn: Civil Filing
Hennepin County Government Center
300 South 6th Street
Minneapolis, MN 55487

Re: *Christopher Roller v. Wagner, Falconer & Judd, Ltd.*
Court File No. 27-CV-09-22812
Our File No. 1-671-0001

Dear Court Administrator:

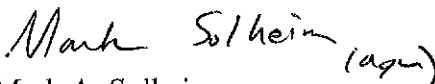
Enclosed for filing in the above referenced matter, please find:

1. Notice of Motion and Motion for Summary Judgment;
2. Memorandum of Law in Support of Motion for Summary Judgment;
3. Affidavit of Mark A. Solheim;
4. Proposed Order granting Wagner, Falconer & Judd Ltd.'s Motion for Summary Judgment; and
5. Motion filing fee in the amount of \$100.00.

By copy of this letter, we are serving *pro se* Plaintiff and counsel for Defendants Bosley, Inc. and Alexander Gese with a copy of the same.

Very truly yours,

LARSON • KING, LLP


Mark A. Solheim

MAS:lab 1276588

Enclosures

cc: Christopher Roller (via email and U.S. mail) (w/ enc)
Richard B. Allyn, Esq. (via fax and U.S. mail) (w/ enc)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Christopher Roller,

Court File No. 27-CV-09-22812

Plaintiff,

v.

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

Wagner, Falconer & Judd, Ltd., (WFJ) via
Prepaid Legal c/o Dan Smith

Honorable Judge Mark Boris via WFJ and
Bosley and State of Minnesota

Attorney Alexander Gese via Bosley,

Defendants.

TO: Plaintiff *pro se*, Christopher Roller, 14806 Quentin Avenue South, Savage, MN 55378:

NOTICE OF MOTION

PLEASE TAKE NOTICE that on April 12, 2010 at 8:30 a.m., or as soon thereafter as the matter can be heard, before the Honorable Susan Burke, Hennepin County Courthouse, Courtroom 757, Defendant Wagner, Falconer & Judd, Ltd. will move the Court as follows:

MOTION

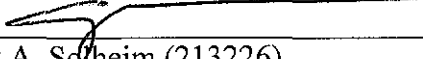
Pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, Defendant Wagner, Falconer & Judd, Ltd. hereby moves the Court for summary judgment and dismissal of all claims asserted against Defendant "Wagner, Falconer & Judd, Ltd., (WFJ) via Prepaid Legal c/o Dan Smith" in this matter.

This Motion will be based upon the argument of counsel as well as the Memorandum of Law and Affidavit of Counsel and the entire file and proceedings herein.

Dated: March 15, 2010

LARSON • KING, LLP

By


Mark A. Scheim (213226)
Anthony J. Novak (351106)
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101
(651) 312-6500

*Attorneys for Defendant Wagner, Falconer &
Judd, Ltd.*

1276580

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Christopher Roller,
Plaintiff,

Court File No. 27-CV-09-22812
Judge: Susan N. Burke

v.

Wagner, Falconer & Judd, Ltd (WFJ) via
Prepaid Legal c/o Dan Smith

**MEMORANDUM OF LAW IN SUPPORT
OF WAGNER, FALCONER & JUDD
LTD.'S MOTION FOR SUMMARY
JUDGMENT**

Honorable Judge Mark Boris via WFJ and
Bosley and State of Minnesota

Attorney Alexander Gese via Bosley,

Defendants.

INTRODUCTION

Defendants Wagner, Falconer & Judd, Ltd. and Dan Smith ("WFJ") submit this Memorandum of Law in Support of their Motion for Summary Judgment. As there are no genuine issues of material fact, WFJ is entitled to summary judgment as a matter of law, and respectfully requests that this Court grant this Motion.

STATEMENT IDENTIFYING ISSUES

1. Whether Plaintiff's failure to properly served Defendant Wagner, Falconer & Judd, Ltd. entitles Defendant to summary judgment as a matter of law.
2. Whether Plaintiff has provided the requisite "substantial evidence" needed to support his speculative accusations and survive summary judgment.

STATEMENT IDENTIFYING DOCUMENTS

1. Plaintiff's Complaint;
2. Plaintiff's Amended Complaint; and
3. Court Order dated March 4, 2010.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff Christopher Roller initiated this frivolous action against WFJ in September 2009. The original Complaint was difficult, if not impossible to decipher, but appeared to allege that WFJ declined to represent Roller in two lawsuits he sought to file due to a conflict of interest. Complaint p. 1-2. In addition, the Complaint simply stated “I’m suing WFJ for \$1 million for fraud and discrimination.” *Id.* at 2. The Complaint failed to plead any facts supporting this claim for damages. In response to Roller’s Complaint, WFJ brought a motion to dismiss. This prompted Roller to amend his Complaint. The Amended Complaint was equally incomprehensible. The Amended Complaint dropped Roller’s initial allegation for discrimination. However, it incorporated two additional allegations: (1) that WFJ molested Roller’s daughter, and (2) that WFJ made several attempts on Roller’s life. Amended Complaint at p. 4. The Amended Complaint also appears to have reasserted Roller’s claim for conflict of interest. From Roller’s rambling, contradictory and incomprehensible pleadings it is unclear what he is in fact claiming, and in particular, what cause of action he is asserting in regards to the conflict of interest. Importantly, neither the Complaint nor the Amended Complaint has ever been properly served on WFJ. Nor has Roller ever provided an Affidavit of Service with evidence to the contrary.

In response to the Amended Complaint, WFJ supplemented its motion to dismiss to respond to Roller’s new allegations. The Court, in its March 4, 2010 Order, dismissed the Complaint with Prejudice. Court Order, March 4, 2010. However, the Court also appears to have denied WFJ’s motion to dismiss, finding that (under the Rule 12 standard) Roller stated claims for (1) breach of fiduciary duty; (2) assault; (3) battery; and (4) intentional infliction of emotional distress. *Id.*

ARGUMENT

A. Legal Standard for Summary Judgment.

Summary judgment is appropriate when the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995).

Consequently, when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law summary judgment is appropriate. Minn. R. Civ. P. 56.03. A nonmoving party may not resist summary judgment by resting on mere allegations, but must instead demonstrate the existence of specific facts which create a genuine issue for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997). There must be evidence on which the jury could reasonably find for the nonmoving party. *Id.*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). A nonmoving party cannot defeat a summary judgment motion with “unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Northern States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (internal quotation omitted).

“Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial.” *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). Instead, a genuine issue of material fact must be established by “substantial evidence.” *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). Based on these standards, WFJ is entitled to summary judgment regarding its

alleged liability for breach of fiduciary duty, assault, battery and intentional infliction of emotional distress.

B. WFJ is Entitled to Summary Judgment as a Matter of Law because Plaintiff Failed to Properly Effectuate Service of Process.

Proper service of process is a fundamental requirement of commencing a lawsuit. *Cedarber v. Astudillo*, No. A09-646, 2009 WL 5092224, *2 (Minn. Ct. App. Dec. 29, 2009) citing *Doerr v. Warner*, 76 N.W.2d 505, 511 (Minn. 1956). If service of process is invalid, the district court lacks jurisdiction to consider the case, and it is properly dismissed. *Leek v. Am. Express Prop. Cas.*, 591 N.W.2d 507, 509 (Minn. Ct. App. 1999).

In Minnesota, a civil action is commenced against a defendant by serving a summons on that defendant. Minn. R. Civ. P. 3.01. To effectuate valid service of process against a partnership or association Plaintiff must serve process pursuant to rule 4.03(b). Service of summons within the state shall be as follows:

(b) Upon Partnerships and Associations. Upon a partnership or association which is subject to suit under a common name, by delivering a copy to a member or the managing agent of the partnership or association. If the partnership or association has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute.

Minn. R. Civ. P. 4.03. Service must be made by a sheriff or any other person not less than 18 years of age who is not a party to the action. Minn. R. Civ. P. 4.02.

Roller failed to properly serve his Summons. In addition, Roller has failed to provide an affidavit with proof of service. In fact, there is nothing in the record or in the Court's file certifying that service of process has ever been perfected on WFJ. Lacking proper service of process, the Court does not have jurisdiction to hear Roller's claims and therefore WFJ is entitled to summary judgment as a matter of law.

C. WFJ is Entitled to Summary Judgment because Roller has not Produced any Facts or Evidence Demonstrating a Genuine Issue of Material Fact

A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of plaintiff's claim. *Lubbers*, 539 N.W.2d at 401. Thus, if there are no facts in the record which give rise to a genuine issue for trial as to any one of the essential elements, WFJ is entitled to summary judgment. *Id.* Roller has failed to establish any facts, or provide any evidence, that suggests there is a genuine issue of material fact as to the four causes of action the Court identified as sufficiently plead: (1) breach of fiduciary duty, (2) assault, (3) battery, or (4) intentional infliction of emotional distress. Rather than providing specific facts or evidence to support his claims, Roller appears to be making a series of unfounded allegations to show his "audience" what "happens in a lawsuit." See Amended Complaint. Roller's unsupported allegations all appear to be an attempt to entertain his online "audience" and force Defendants to produce evidence to prove that these events never took place. This tactic is both an improper use of the court system and ignores the fact that Plaintiff, not Defendants, has the burden of proof.

In order to establish a cause of action for breach of fiduciary duty Roller must establish (1) the existence of a relationship that is fiduciary in nature, (2) breach of that duty, and (3) damages resulting from that breach. Roller has failed to substantiate any claim that a fiduciary relationship was established. To the contrary, it is clear, even from the Complaint, that WFJ declined to represent Roller in his endeavors. Roller's failure to provide any competent evidence of the initial element of the claim—the existence of a fiduciary duty—entitles WFJ to summary judgment as a matter of law.

Furthermore, Roller has failed to substantiate his bald accusations for assault and battery for the molestation of his daughter. First, Roller's daughter is not identified as a plaintiff in the

case caption and Roller provides no basis to establish his own standing to assert a claim on her behalf. This is the first basis upon which this claim fails. Further, in order to survive summary judgment Roller cannot rest on mere allegations, but must instead demonstrate the existence of specific facts which create a genuine issue for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997).

Roller has supplied no affidavits, medical records, or any other competent evidence that demonstrates the existence of a genuine issue for trial. In his Complaint, Roller concedes that he has no evidence to support this serious allegation. He states, “I’m under the impression that my daughter has been molested by Dan Smith, Alexander Gese, and Mark Boris during the past year, sometime, somehow, somewhere.” Complaint at p. 3, ¶ 2. There are simply no specific facts alleged that support this claim nor is there any evidence on the record to show that it is anything more than a baseless and inflammatory charge meant to defame the Defendants. Without more, Roller has simply failed to carry his burden of proof and WFJ is entitled to summary judgment as a matter of law.

Similarly, Roller has provided no evidence demonstrating that WFJ conspired to murder Roller. His accusations simply list highly publicized events which have occurred in the past several years without providing any facts that link these events to WFJ or even Roller himself. Specifically, Roller claims that the events related to “Lisa Nowak from NASA” and the “Virginia Tech shooting” form the basis of his conspiracy claims. See Amended Complaint. Such absurd accusations are a mockery of this court and cannot stand.

Finally, without substantial evidence of either the alleged molestation of Roller’s daughter or the “assassination” attempts against Roller’s life, Roller’s claim for intentional infliction of emotional distress cannot stand. In order to establish a claim for intentional infliction of emotional distress Roller must provide competent evidence of that: (1) the conduct

of the defendant was so extreme and outrageous that it passed the boundaries of decency and is utterly intolerable to the civilized community, (2) the conduct was intentional or reckless, (3) the conduct caused plaintiff emotional distress, and (4) the distress was so severe that no reasonable person can be expected to endure it. *See e.g.* CIVJIG 60.75. Because Roller has failed to provide any evidence tending to show that there is a genuine issue of material fact as to the alleged extreme conduct WFJ is entitled to summary judgment as a matter of law.

CONCLUSION

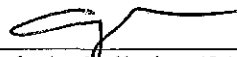
Roller's failure to comply with the Minnesota Rules of Civil Procedure in effecting service on WFJ entitles WFJ to summary judgment. Minnesota law recognizes that absent proper service of process the Court does not have jurisdiction and the claims must be dismissed.

Moreover, absent any facts in the record giving rise to a genuine issue for trial on the essential element of the claims asserted, WFJ is entitled to summary judgment. *Lubbers*, 539 N.W.2d at 402. Roller has failed to provide evidence of the essential elements of the claims recognized by the Court. Roller's speculation and bald assertions are not sufficient to create a genuine issue of material fact for trial. Instead, Minnesota law is clear that a genuine issue of material fact must be established by "substantial evidence." *See e.g. Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). Roller has not, and cannot, provide any evidence to support his serious allegations. As such, WFJ is entitled to summary judgment as a matter of law.

Dated: March 15, 2010

LARSON • KING, LLP

By



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*Attorneys for Defendant Wagner, Falconer &
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LK 1276590

Not Reported in N.W.2d, 2009 WL 5092224 (Minn.App.)
 (Cite as: 2009 WL 5092224 (Minn.App.))

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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS
 UNPUBLISHED AND MAY NOT BE CITED EX-
 CEPT AS PROVIDED BY MINN. ST. SEC.
 480A.08(3).

Court of Appeals of Minnesota.
 Kelly CEDARBERG, Appellant,

v.

Henry ASTUDILLO, Defendant,
 Jesus Salvador Calle, Defendant,
 State Farm Mutual Automobile Insurance Com-
 pany, Respondent.
 No. A09-646.

Dec. 29, 2009.

West KeySummary

Automobiles 48A ⇌ **235**

48A Automobiles

48AV Injuries from Operation, or Use of High-
 way

48AV(B) Actions

48Ak235 k. Process. Most Cited Cases

A victim of an automobile accident was not entitled to bring claims against the driver of a different vehicle that hit the automobile in which the victim was riding due to the other driver's alleged negligence. The victim's affidavit failed to state the jurisdictional facts essential for service because it stated that the driver no longer lived in the victim's state. Further, the affidavit did not state that the driver had departed with the state with intent to avoid service. 48 M.S.A., Rules Civ.Proc., Rule 4.04(a)(1).

Hennepin County District Court, File No.
 27-CV-07-24536.

Timothy T. Sempf, Novitzke, Gust, Sempf, Whitley
 & Bergmanis, Amery, WI, for appellant.

Steven L. Viltoft, Emily A. Curtner-Atkinson, La
 Bore, Giuliani, Cosgriff & Viltoft, Ltd., Hopkins,
 MN, for respondent State Farm.

Considered and decided by LANSING, Presiding
 Judge; STONEBURNER, Judge; and JOHNSON,
 Judge.

UNPUBLISHED OPINION

JOHNSON, Judge.

*1 In January 2002, Kelly Cedarberg was injured in an automobile accident. In late 2007 and early 2008, she attempted to commence a lawsuit against the driver of the other vehicle, the owner of that vehicle, and her own insurer. The district court concluded that service of process on each defendant was insufficient. The district court also denied Cedarberg's motion to amend, which was intended to cure the insufficient service of process on her insurer. The district court ultimately granted summary judgment in favor of the insurer and dismissed the claims against the driver and owner of the other vehicle. We affirm.

FACTS

According to Cedarberg's complaint, she was a passenger in a vehicle that was involved in an accident at the intersection of East 38th Street and Fourth Avenue South in Minneapolis on January 15, 2002. She alleges that Henry Astudillo negligently drove a 1990 Hyundai Sonata that was owned by Jesus Salvador Calle and caused it to collide with the vehicle in which Cedarberg was a passenger, injuring her. Cedarberg alleges that neither Astudillo nor Calle was covered by an automobile liability insurance policy at the time of the accident. Cedarberg also alleges that her own automobile insurer, State Farm Mutual Automobile Insurance Company,

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wrongfully denied her claim for uninsured-motorist benefits.

To commence the action against Astudillo and Calle, Cedarberg attempted to serve process on them by publication. On November 30, 2007, Cedarberg filed with the district court a summons and a complaint along with an affidavit of her attorney, which was intended to fulfill the requirements of service by publication. *See* Minn. R. Civ. P. 4.04(a). Cedarberg later filed an affidavit of an agent of the *Finance and Commerce* weekly newspaper, which stated that the summons was published on three separate occasions in December 2007. Astudillo and Calle did not respond to the summons and have not appeared in this action.

Cedarberg later moved for a default judgment against Astudillo and Calle. At the hearing on the motion, the district court inquired whether Cedarberg had complied with the requirements of service by publication. The district court analyzed the caselaw concerning those requirements and concluded that Cedarberg's attorney's affidavit did not state facts sufficient to satisfy the applicable rule. The district court concluded that it lacked personal jurisdiction over Astudillo and Calle and, accordingly, denied Cedarberg's motion for default judgment and dismissed the claims against Astudillo and Calle *sua sponte*.

To commence the action against State Farm, Cedarberg attempted to serve State Farm in two ways. First, Cedarberg delivered a copy of the summons and complaint to the commissioner of commerce on December 10, 2007. *See* Minn.Stat. § 45.028 (2008). Second, Cedarberg mailed a copy of the summons and complaint to State Farm on January 10, 2008, at an address that her attorney had obtained from the commissioner of commerce, which address turned out to be incorrect. Cedarberg did not include a form for acknowledgment of service of process by mail, and State Farm never returned such an acknowledgment, thus making the mailing to State Farm ineffectual. *See* Minn. R. Civ. P. 4.05. The district court determined that State Farm did not re-

ceive a copy of the summons and complaint until January 23, 2008, which was six years and eight days after Cedarberg's automobile accident. State Farm served an answer to the complaint on February 12, 2008. State Farm alleged the affirmative defenses of insufficiency of service of process and expiration of the statute of limitations, among others.

*2 On April 15, 2008, State Farm moved for dismissal or for summary judgment. On May 5, 2008, Cedarberg filed a motion to amend, seeking either to amend her complaint to comply with the requirements of substituted service in section 45.028 or to cure the insufficient service of process. The district court denied Cedarberg's motion to amend and granted State Farm's motion for summary judgment on the ground that service of process on State Farm was not effected during the six-year limitations period.

Cedarberg appeals from the district court's *sua sponte* dismissal of the claims against Astudillo and Calle and the district court's denial of her motion to amend with respect to State Farm.

DECISION

I. Service of Process on Astudillo and Calle

Cedarberg first argues that the district court erred by dismissing, *sua sponte*, her claims against Astudillo and Calle due to insufficient service of process. We apply a *de novo* standard of review to a district court's determination regarding the sufficiency of service of process. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn.2008).

Proper service of process is a fundamental requirement of commencing a lawsuit. *Doerr v. Warner*, 247 Minn. 98, 103, 76 N.W.2d 505, 511 (1956). A district court cannot exercise personal jurisdiction over a defendant unless the plaintiff has commenced the action by a means that is consistent with the requirements of due process and the Min-

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nesota Rules of Civil Procedure. *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn.App.2003). If a plaintiff fails to follow the proper procedures for service by publication, a judgment thereafter entered is void for lack of personal jurisdiction. *Pugsley v. Magerfleisch*, 161 Minn. 246, 247, 201 N.W. 323, 323-24 (1924).

Service of process by publication is permitted in five enumerated circumstances. Minn. R. Civ. P. 4.04(a). Only one of those circumstances is at issue in this case, the situation in which a "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). To properly effect service by publication, a plaintiff must file with the district court both the complaint and an affidavit stating "the essential jurisdictional facts of one of the enumerated cases" described in rule 4.04(a). *Shamrock*, 754 N.W.2d at 383; see also *Schuett v. Powers*, 288 Minn. 542, 543-44, 180 N.W.2d 253, 254-55 (1970) (holding that service by publication was ineffective, in part because of failure to cite jurisdictional facts). "Because [s]ervice by publication is in derogation of the common law, the prescribed requirements for such service must be strictly complied with." *Shamrock*, 754 N.W.2d at 382 (alteration in original) (quotation omitted).

In this case, the affidavit of Cedarberg's attorney stated only that Astudillo and Calle lived in Minnesota at the time of the accident, that "upon investigation" they no longer were living at the same Minnesota address, and that Cedarberg's attorney was unable to find a forwarding address or any reference to Astudillo and Calle "at any address within the State of Minnesota." The affidavit did not state that Astudillo and Calle had "departed from the state with intent to defraud creditors, or to avoid service" or that Astudillo and Calle "remain[ed] concealed [within the state] with the like intent." Minn. R. Civ. P. 4.04(a)(1). Because the affidavit failed to state the jurisdictional facts essential for service under rule 4.04(a)(1), it did not strictly

comply with the rule, as required by *Shamrock*.

*3 Cedarberg contends that the district court erred by failing to make findings of fact with respect to the requirements of rule 4.04(a)(1). She relies on that part of *Shamrock* in which the supreme court held that the district court "did not make the necessary factual findings as to whether [the defendant had] left the state with the intent to defraud creditors or avoid service of process." 754 N.W.2d at 385. But the issue of the defendant's intent to defraud was in dispute in *Shamrock*, and both plaintiff and defendant had introduced evidence to support their respective positions. *Id.* at 384-85. In this case, however, Cedarberg's attorney's affidavit failed to make a *prima facie* showing that the essential jurisdictional facts existed. See *id.* at 383. The district court properly analyzed the issue by concluding that the affidavit was, on its face, insufficient to justify service by publication.

Cedarberg also contends that the district court erred by raising the issue of her compliance with rule 4.04(a)(1) *sua sponte*, without any appearance or argument by Astudillo and Calle. Cedarberg does not cite any legal authority for the proposition that a district court may not raise and decide that issue *sua sponte*. The alternative would have been to enter a default judgment that is void because the district court did not have jurisdiction over Astudillo and Calle. See *Pugsley*, 161 Minn. at 247, 201 N.W. at 323-24. Even if such a default judgment could be vacated at a later date, see Minn. R. Civ. P. 60.02(d), the district court in this case reasonably concluded that it was preferable not to enter a flawed judgment. In light of the circumstances of this case and Cedarberg's failure to cite any legal authority supporting her argument, we reject the contention that the district court erred by raising and deciding the issue *sua sponte*.

Thus, service of process on Astudillo and Calle was insufficient, and the district court did not err by dismissing Cedarberg's claims against Astudillo and Calle.

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 (Cite as: 2009 WL 5092224 (Minn.App.))

II. Service of Process on State Farm

Cedarberg also argues that the district court erred by denying her motion to amend. We apply an abuse-of-discretion standard of review to a district court's denial of a motion to amend pleadings. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). But we apply a *de novo* standard of review to the construction and application of a rule of civil procedure. *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 786 (Minn.2009).

A. Motion to Amend the Complaint

Cedarberg first challenges the district court's denial of her motion to amend the complaint to specifically allege a violation of the type described in Minn.Stat. § 45.028, so as to remedy her failure to satisfy the requirements for substituted service on the commissioner of commerce. Cedarberg also seeks to have the amendment relate back to an earlier date, before the limitations period expired. See Minn. R. Civ. P. 15.03.

*4 A party may amend a pleading after a responsive pleading has been served "only by leave of court or by written consent of the adverse party." Minn. R. Civ. P. 15.01. Leave to amend "shall be freely given when justice so requires," *id.*, "except where to do so would result in prejudice to the other party." *Fabio*, 504 N.W.2d at 761.

As an initial matter, we question whether Cedarberg may take advantage of the relation-back doctrine contained in rule 15.03, which is necessary if the amendment is to be beneficial to her. If certain requirements are satisfied, the rule allows a "claim or defense asserted in the amended pleading" to "relate[] back to the date of the original pleading." Minn. R. Civ. P. 15.03. Relation back, however, generally is unavailable if an "action has not been properly commenced in the first instance." *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269, 271 (Minn.App.2001). But in *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d

639 (Minn.App.2004), *aff'd*, 699 N.W.2d 307 (Minn.2005), this court allowed an amendment to a complaint to relate back to the earlier service of a defective summons and complaint because the summons and complaint were timely served and the defect in the documents was curable. *Id.* at 641, 646-48. Here, by contrast, the summons and complaint were not timely; State Farm did not receive a copy of Cedarberg's complaint until after the limitations period had expired.

Regardless, Cedarberg's argument fails. As the district court reasoned, State Farm would be substantially prejudiced if Cedarberg were permitted to amend her complaint because the statute of limitations expired. The caselaw supports the district court's reasoning. In *Fabio*, the supreme court affirmed a district court's denial of a motion to amend a complaint to allege additional facts because the amendment would have permitted the plaintiff to revive otherwise time-barred claims. 504 N.W.2d at 761-63. This case presents an even stronger case of prejudice than *Fabio* because State Farm did not have actual notice of Cedarberg's action until after the statute of limitations expired. Thus, the district court did not abuse its discretion by denying Cedarberg's motion to amend the complaint to allege facts that would allow for substituted service on the commissioner of commerce.

B. Motion to Amend Service of Process

Cedarberg also challenges the district court's denial of her motion to "amend service of process." She relies on rule 4.07 of the Minnesota Rules of Civil Procedure. It is necessary to begin by considering whether rule 4.07 authorizes a district court to allow the type of amendment Cedarberg seeks. The text of the rule refers to the amendment of "any summons or other process or proof of service." Minn. R. Civ. P. 4.07. Each of these things is a document. In contrast, service of process is an action or an event, and it is difficult to conceive how such a thing can be amended. It appears that Cedarberg seeks a second opportunity to effect service of pro-

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 (Cite as: 2009 WL 5092224 (Minn.App.))

cess, or a declaration by the district court that service of process is deemed to have been properly performed. Rule 4.07 does not authorize a district court to allow that type of amendment.

*5 In addition, the record amply supports the district court's reasoning that an amendment should not be allowed because it would be prejudicial to State Farm. In *Tharp v. Tharp*, 228 Minn. 23, 36 N.W.2d 1 (1949), the supreme court held that a district court properly denied a motion to amend a defective summons pursuant to rule 4.07 after the statute of limitations had expired. *Id.* at 27, 36 N.W.2d 1, 36 N.W.2d at 3-4. The supreme court reasoned that the defendant "would obviously be prejudiced" by such an amendment because "a defense which would bar the cause of action would be destroyed." *Id.* Here, the statute of limitations expired on January 15, 2008, before State Farm received notice of Cedarberg's action. If Cedarberg were allowed to "amend" service of process after that date, State Farm would be deprived of a meritorious defense to Cedarberg's action. *See id.* The prejudice to State Farm that would result from the sought-after amendment justifies the district court's denial of Cedarberg's motion. Thus, the district court did not abuse its discretion by denying Cedarberg's motion to "amend" her service of process on State Farm.

III. Service of *Kwong* Notice on State Farm

Cedarberg also argues that the district court erred by not allowing her to pursue a claim against State Farm for the recovery of damages that cannot be recovered from Astudillo and Calle, assuming she were able to obtain a default judgment against them. Cedarberg gave notice to State Farm on April 24, 2008, pursuant to *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52 (Minn.2001), of her intent to seek compensation from State Farm for any uncollected damages arising from a judgment against Astudillo and Calle. The parties dispute the effect of the *Kwong* notice in light of the fact that Cedarberg served it after the statute of limitations had expired.

Given our disposition of Cedarberg's first argument, that the district court did not err by dismissing Cedarberg's claims against Astudillo and Calle, the issue of the *Kwong* notice is moot. Therefore, we need not address it.

Affirmed.

Minn.App.,2009.
 Cedarberg v. Astudillo
 Not Reported in N.W.2d, 2009 WL 5092224
 (Minn.App.)

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STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Christopher Roller,

Court File No. 27-CV-09-22812

Plaintiff,

v.

**PROPOSED ORDER GRANTING
WAGNER, FALCONER & JUDD LTD.'S
MOTION FOR SUMMARY JUDGMENT**

Wagner, Falconer & Judd, Ltd., (WFJ) via
Prepaid Legal c/o Dan Smith

Honorable Judge Mark Boris via WFJ and
Bosley and State of Minnesota

Attorney Alexander Gese via Bosley,

Defendants.

The above entitled matter came on for hearing before the undersigned on April 12, 2010, on Defendant Wagner, Falconer & Judd, Ltd.'s motion for summary judgment. Appearances of counsel were duly noted on the record.

The Court, having considered the argument and memoranda of counsel, together with all of the files, records, and proceedings herein, now makes the following:

ORDER

1. That Defendant Wagner, Falconer & Judd, Ltd.'s Motion for Summary Judgment on all counts of Plaintiffs' Complaint is hereby **GRANTED**.

2. That Plaintiff's claims as contained in his Complaint and Amended Complaint against Defendant "Wagner, Falconer & Judd, Ltd., (WFJ) via Prepaid Legal c/o Dan Smith" are hereby dismissed with prejudice.

**THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE
ENTERED ACCORDINGLY.**

BY THE COURT

Dated: _____

The Honorable Susan N. Burke
Judge of District Court