STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0607

Tammy Kirkpatrick, et al.,
Appellants,

vs.

Meeker County Board of Commissioners,
Respondent.

Filed January 13, 2020
Affirmed
Jesson, Judge

Meeker County District Court
File No. 47-CV-18-853

John E. Mack, Joel A. Novak, New London Law, P.A., New London, Minnesota (for appellants)

Scott T. Anderson, Abigail R. Kelzer, Rupp, Anderson, Squires & Waldspurger, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Unhappy with respondent Meeker County Board of Commissioners' decision to grant their neighbor a conditional use permit to build a rifle and trap shooting range near their home, appellants Tammy and Richard Kirkpatrick filed a lawsuit. But the

Kirkpatricks failed to properly serve the Meeker County Board Chair, which was required to initiate this civil action under the Minnesota Rules of Civil Procedure. As a result, the district court did not err by dismissing the Kirkpatricks' suit for lack of jurisdiction, and we affirm.

FACTS

In June 2018, the Eden Valley Sportsman's Club applied for a conditional use permit in Meeker County. The Sportsman's Club planned to build a rifle and trap shooting range on property owned by a third party. Appellants Tammy and Richard Kirkpatrick own land near the proposed range and were concerned about the range's impact on their ability to enjoy their property. When the Meeker County Planning and Zoning Commission held a public hearing on the Sportsman's Club's conditional use permit application, the Kirkpatricks and others shared their objections. After the hearing, the commission recommended that respondent Meeker County Board of Commissioners (the board) approve the application with several suggested conditions. The board granted the permit and mailed notices to all interested parties, including the Kirkpatricks.

Seeking to challenge the board's decision, the Kirkpatricks' counsel emailed the board chair a notice of appeal. Two days later, they filed the notice of appeal in district court. The Kirkpatricks also sent the board chair a notice of appeal in the mail.[1]

In response, the board filed an answer to the Kirkpatricks' notice of appeal and raised several affirmative defenses, including a lack of jurisdiction and insufficient service

[1] While the board chair acknowledges he received the emailed notice of appeal, he maintains that he did not receive the mailed notice.

of process. Thereafter, the Kirkpatricks moved to amend their notice of appeal to remedy some of the issues the board raised in its answer. But they did not remedy the service defects. The board then moved to dismiss the action, in relevant part, for insufficient service of process and a resulting lack of jurisdiction. After a hearing on all motions, the district court granted the board's motion to dismiss. The Kirkpatricks appeal.[2]

D E C I S I O N

The central issue in this case is whether the Kirkpatricks properly served the board. Several key facts are undisputed. It is undisputed that the board sent the Kirkpatricks notice that it granted the Sportsman's Club its conditional use permit. The Kirkpatricks were required to appeal within 30 days after that notice.[3] To serve the board, the Kirkpatricks needed to serve either the Meeker County Board Chair or the Meeker County Auditor. *See* Minn. R. Civ. P. 4.03(e)(1) (requiring service of a summons upon the chair of the county board or the county auditor of a defendant county). The Kirkpatricks sent the board chair a notice of appeal by U.S. mail and by email. But the board chair did not consent to service

[2] This appeal comes from district court rather than by writ of certiorari because, under the Meeker County ordinances, an aggrieved party can appeal a grant of a conditional use permit to the district court. Meeker County, Minn., Zoning Ordinance §§ 6A.02.G.7, 8.01 (2018); *see also Toby's of Alexandria, Inc. v. County of Douglas*, 545 N.W.2d 54, 56 (Minn. App. 1996) (holding that the district court has jurisdiction over an appeal of a county's conditional use permit decision, when the county's controlling ordinance, enacted within the powers granted by the enabling statute, directs appeal to the district court), *review denied* (Minn. May 21, 1996).

[3] The parties dispute which laws govern this appeal: the Minnesota Statutes or the Meeker County Land Ordinances. But the Kirkpatricks do not dispute that the time window for the appeal is 30 days, as the board contends. And even if there were a dispute on this point, the timeline to complete service is not determinative because the board was never personally served in this matter. Therefore, we do not need to resolve the issue of which law is proper because it has no bearing on the outcome of this appeal.

by mail or email and did not return any acknowledgement or waiver of service. Yet, the board had actual notice of the Kirkpatricks' appeal.

With these uncontroverted facts in mind, the remaining question is a legal one: whether service of the notice of appeal by mail or email was sufficient. We review this question of law de novo. *Roehrdanz v. Brill*, 682 N.W.2d 626, 629 (Minn. 2004) ("Whether service of process was effective is a question of law that we review de novo."). To answer this question, we first consider Minnesota caselaw. We then turn to the Minnesota Rules of Civil Procedure, the application of which we also review de novo. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). In this context, we finally review the Kirkpatricks' argument that *personal* service is not required under rule 4.03(e) of the Minnesota Rules of Civil Procedure.

We turn first to Minnesota caselaw to address the Kirkpatricks' argument that they properly served the board by mailing and emailing notices to the board chair.[4] Because two recent Minnesota cases held that these methods are insufficient for service of process, we disagree.

Certified mail—which is more formal than the mail process used here—was found to be insufficient service by the Minnesota Supreme Court in *Melillo v. Heitland*, 880 N.W.2d 862, 865 (Minn. 2016). There, the plaintiff attempted to complete service of process on the defendant by sending the defendant certified mail, which includes a delivery

[4] In their briefing, the Kirkpatricks also argued that service on the board was effective because they mailed and emailed notices to the Meeker County Attorney, but the Kirkpatricks conceded this point at oral argument.

receipt. *Melillo*, 880 N.W.2d at 863. But the court concluded that this was not sufficient service because certified mail does not constitute personal service, nor does the certified-delivery receipt satisfy the requirements to waive service by mail, under Minnesota Rule of Civil Procedure 4.05. *Id.* at 865; *see also* Minn. R. Civ. P. 4.05(a) (permitting a plaintiff to request that a defendant waive service if the plaintiff does so by mailing the defendant the notice and waiver request with an appropriate waiver form and prepaid means to return it). And the supreme court made a distinction between personal service—which is governed by rule 4.03—and waiving service by mail—governed by rule 4.05. *Melillo*, 880 N.W.2d at 864. The court rejected service by certified mail as insufficient under rule 4.05 and explained, "[t]o state the obvious: service by mail is not personal service, and personal service is not service by mail." *Id.*

Similarly, this court considered whether service of process by electronic means is sufficient in *Kokosh v. $4657.00 in U.S. Currency*, 898 N.W.2d 284, 287-88 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). There, an individual tried to serve the local county attorney with a complaint by electronic means. *Kokosh*, 898 N.W.2d at 286. And we concluded that "[e]lectronic service is not permitted when serving a complaint to initiate an action unless consented to by the other party." *Id.* at 288. In sum, existing Minnesota precedent establishes that mail and email do not constitute personal service of process, and are insufficient unless a party waives service or consents to these alternatives.

This precedent is grounded in the language of the Minnesota Rules of Civil Procedure. When considering the service-of-process requirements established in rule 4 of the Minnesota Rules of Civil Procedure, we observe that the rule establishes three general

methods for service: personal service, service by publication, and waiver of service by mail. Minn. R. Civ. P. 4.03-.05; *see also Kokosh*, 898 N.W.2d at 288 (concluding that service of process must be completed in one of three ways: "(1) personal service under rule 4.03; (2) publication under rule 4.04; or (3) [waiver by] U.S. mail under rule 4.05"). It is undisputed that none of these three methods occurred here. And rule 4.03, which governs service upon a county board, requires personal service.

Still, according to the Kirkpatricks, personal service was not required. They contend that the omission of the word "personal" from rule 4.03(e), which establishes the procedure for service of process on a county board, permits them to serve the board by mail, email, or other means. This subsection of rule 4.03—which is titled personal service—states the following:

> Service of summons within the state shall be . . . [u]pon a municipal or other public corporation by *delivering* a copy (1) [t]o the chair of the county board or to the county auditor of a defendant county[.]

Minn. R. Civ. P. 4.03(e)-(e)(1) (emphasis added). The Kirkpatricks focus on the word "delivering" in this subsection, pointing out that it is not preceded by the word "personally."[5]

But the Kirkpatricks' broad definition of "delivering" in this context is directly refuted by the recent Minnesota Supreme Court case, *Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540 (Minn. 2018). In *Cox*, the court considered what "delivery" means in the

[5] They contrast this with an earlier subsection governing service of process on an individual, which requires service "by delivering a copy to the individual *personally*." Minn. R. Civ. P. 4.03(a) (emphasis added).

context of the Minnesota Rules of Civil Procedure. 909 N.W.2d at 543-44. At issue there was the meaning of "delivery" in rule 3.01, which governs the commencement of a civil action. *Id.* at 544. Rule 3.01(c) specifically describes the process for having a sheriff complete service of process and references "delivery" without stating whether personal delivery is required. In interpreting "delivery" in that context, the supreme court determined that personal delivery was intended, in part because "*[t]he accepted legal meaning of 'delivery' contemplates personal delivery*." *Id.* (emphasis added). Because the supreme court has already ruled on the meaning of "delivery," we conclude that service under rule 4.03(e) must be completed through personal delivery.

In essence, the Kirkpatricks focus on the word "delivery" as an attempt to argue that *actual* notice of their lawsuit suffices for service of process. But Minnesota caselaw has explicitly rejected this argument and concluded that strict compliance with rule 4.03 is required. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 609 (Minn. 2016).

In sum, the Kirkpatricks did not complete service of process on the board chair by personal service as required under rule 4.03(e). And this service-of-process defect deprived the district court of jurisdiction.[6] *See Schulz v. Town of Duluth*, ___ N.W.2d ___, ___, 2019 WL 6519674, at *6 n.9 (Minn. Dec. 4, 2019) ("Failure to serve [the municipality] within 30 days, however, would have been an incurable jurisdictional

[6] The Kirkpatricks also allege that the board submitted to the district court's jurisdiction when it filed its answer and attended a scheduling conference. But the board affirmatively asserted claims of insufficient service and lack of jurisdiction in its answer, preserving the defense. *See* Minn. R. Civ. P. 12.08(a) (explaining that the defenses of lack of personal jurisdiction and insufficient service of process are waived if omitted from the defendant's answer).

defect."). Accordingly, the district court did not err in dismissing the Kirkpatricks' conditional use permit appeal. *Koski v. Johnson*, 837 N.W.2d 739, 742 (Minn. App. 2013) (noting that without proper service of process, a district court must dismiss an action), *review denied* (Minn. Dec. 17, 2013). Because we affirm the district court's dismissal of the Kirkpatricks' appeal based on the lack of jurisdiction, we do not reach the other issues the Kirkpatricks raised.

Affirmed.