STATE OF MINNESOTA

IN SUPREME COURT

A16-0712

Court of Appeals — Lillehaug, J.
Dissenting, Anderson, J., Gildea, C.J., Chutich, J.

Nichole Cox,

Appellant,

vs.

Filed: January 24, 2018
Office of Appellate Courts

Mid-Minnesota Mutual Insurance Company and
North Star Mutual Insurance Company,

Respondents.

Charles J. Lloyd, Brian F. Murn, Livgard & Lloyd PLLP, Minneapolis, Minnesota, for appellant.

Boe M. Piras, Paul Wocken, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring, Minnesota, for respondents.

S Y L L A B U S

1. The court of appeals had subject-matter jurisdiction over an interlocutory appeal from the denial of a motion to dismiss for insufficient services of process.

2. The word "delivery," as used in Minnesota Rule of Civil Procedure 3.01(c), has acquired a special meaning that requires personal delivery of the summons to the sheriff's office before an action is commenced. Transmission by facsimile is not personal delivery.

3. An action that is not properly commenced under Rule 3.01(c) can nevertheless be commenced by service under Rule 3.01(a) or (b).

Affirmed in part, reversed in part, and remanded.

O P I N I O N

LILLEHAUG, Justice.

Appellant Nichole Cox attempted to commence a breach of contract action against respondents Mid-Minnesota Mutual Insurance Company and North Star Mutual Insurance Company by faxing the summons and complaint to the sheriff's offices in the insurers' home counties. We granted review to decide whether a facsimile transmission satisfies Rule 3.01(c) of the Minnesota Rules of Civil Procedure, which requires that a summons be "delivered" to the sheriff before an action is commenced. Because Rule 3.01(c) contemplates personal delivery to the office of the sheriff, we hold that a facsimile transmission is not a "delivery." But because the sheriffs completed service of process on each of the respondents, we hold that appellant's action was nevertheless commenced under Rule 3.01(a), thus giving the district court personal jurisdiction over the respondents. We therefore affirm the court of appeals in part, reverse in part, and remand to the district court for further proceedings.

FACTS

On January 9, 2014, appellant Nichole Cox's home was destroyed by a fire. The home was insured by respondents Mid-Minnesota Mutual Insurance Company ("Mid-Minnesota") and North Star Mutual Insurance Company ("North Star"), whose respective principal places of business are in Benton and Lyon Counties. Cox submitted a damage claim to Mid-Minnesota, but the claim was denied. Cox's insurance policy provides that "[n]o suit . . . to recover for any property claim may be initiated or brought . . . unless . . . the suit is commenced . . . within two (2) years after the loss."

On December 21, 2015, Cox unsuccessfully attempted to commence a breach of contract action against the insurers by serving a summons and complaint on the Minnesota Commissioner of Commerce. On January 11, 2016, Cox again attempted to commence the action, this time by faxing the summons and complaint to the sheriffs in Benton and Lyon Counties. Both offices confirmed that they received the fax. On January 14, 2016, the Lyon County deputy sheriff personally served North Star. On January 19, 2016, the Benton County deputy sheriff personally served Mid-Minnesota.

The insurers moved to dismiss the action. They argued that facsimile transmission did not constitute "delivery" of the summons under Rule 3.01(c),[1] so that even if the

[1] Rule 3.01(c) provides as follows: "A civil action is commenced against each defendant . . . when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made." Minn. R. Civ. P. 3.01(c).

policy's statute of limitations expired on January 11, 2016,[2] the attempted commencement of the action on that date failed. The district court denied the motion, concluding that facsimile transmission constituted "delivery" under Rule 3.01(c). The insurers appealed.

The court of appeals reversed the district court, holding that, by sending a facsimile transmission, Cox had failed to personally deliver the summons and complaint to the sheriff. As a result, the court said, the action was never commenced under Rule 3.01(c), and the district court lacked jurisdiction. We granted Cox's petition for review.

ANALYSIS

This case poses three questions for us to answer. First, did the court of appeals have appellate jurisdiction over the insurers' appeal? Second, what do the words "delivered" and "delivery" mean in Minn. R. Civ. P. 3.01(c)? Third, notwithstanding our interpretation of the word "delivery," was the action nevertheless commenced?

I.

We must first address whether the court of appeals had appellate jurisdiction over the insurers' interlocutory appeal from the district court order denying their motion to dismiss for insufficient service of process. We review questions of subject-matter jurisdiction de novo. *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 608 (Minn. 2016).

Cox argues that the court of appeals lacked subject-matter jurisdiction to hear the immediate appeal. She contends that the appealed issue relates to the statute of limitations

[2] A separate issue raised in the insurers' motion was whether the statute of limitations expired on January 9, 2016 (a Saturday), or January 11, 2016 (a Monday). The district court held that the statute of limitations period expired on January 11. This determination has not been appealed.

governing the action, not whether the action was, in fact, commenced. Denials of motions to dismiss or for summary judgment on statute of limitations grounds are not immediately appealable, she notes.

We conclude that the denial of the insurers' motion was immediately appealable. The insurers brought a motion to dismiss under Rule 12.02(b) (personal jurisdiction), (d) (insufficiency of service of process), and (e) (failure to state a claim). The ruling on the Rule 12.02(e) component of the motion—whether the statute of limitations expired on January 9 or January 11—was not appealed. The insurers have only "challenge[d] the district court's denial of [the] motion to dismiss for insufficiency of service of process." *Cox v. Mid-Minnesota Mutual Ins. Co.*, No. A16-0712, 2017 WL 164428, at *1 (Minn. App. Jan. 17, 2017).

Our case law is clear that the denial of a motion to dismiss for lack of personal jurisdiction is immediately appealable. *See McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995) ("[I]mmediate appeal is permitted where a motion to dismiss for lack of personal jurisdiction is denied."); *Hunt v. Nev. State Bank*, 172 N.W.2d 292, 300 (Minn. 1969) ("[A]n order denying a motion to quash service of summons is appealable." (quoting *Dieseth v. Calder Mfg. Co.*, 147 N.W.2d 100, 102 (Minn. 1966)). We also permit immediate appeals from the denial of a motion to dismiss for insufficient service of process. *See, e.g.*, *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 264 (Minn. 2016) (considering an "appeal from the denial of a motion to dismiss for insufficiency of process"); *Plano Mfg. Co. v. Kaufert*, 89 N.W. 1124, 1125 (Minn. 1902) ("[A]n order which denies the motion of a defendant . . . to set aside the service of the

summons . . . determines his positive legal rights . . . [;] such an order is appealable."). We allow an immediate appeal from the denial of a motion to dismiss for lack of personal jurisdiction or insufficient service of process because "[i]t is more realistic to view such . . . order[s] not merely as a retention of an action for trial, but as a determination of right, for a defendant is compelled thereby to take up the burden of litigation . . . that might otherwise be avoided." *Hunt*, 172 N.W.2d at 300.

This same rationale applies here. Rule 3.01(c) contains two requirements to commence an action: (1) delivery to the sheriff, and (2) actual service upon the defendant (or first publication) within 60 days of that delivery. If the delivery-to-the-sheriff requirement is not satisfied, that necessarily means the action has not been commenced under Rule 3.01(c). If an action has not commenced, the courts lack personal jurisdiction. It follows that the denial of the insurers' motion served to determine a right, compelling them "to take up the burden of litigation . . . that might otherwise be avoided." *Hunt*, 172 N.W.2d at 300. Such determinations are immediately appealable. *Id.*

II.

We next turn to the meaning of the words "delivered" and "delivery" in Rule 3.01(c). The rules of civil procedure are interpreted de novo. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 601 (Minn. 2014).

"We generally interpret words and phrases according to their common and ordinary meaning, but we interpret technical words and phrases according to their special, technical meaning." *State v. Schouweiler*, 887 N.W.2d 22, 25 (Minn. 2016) (citing *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72 (Minn. 2012)). A word has a special meaning if "courts

have ascribed a well-established and long-accepted meaning to [it]." *State v. Nelson*, 842 N.W.2d 433, 445 (Minn. 2014) (Dietzen, J. dissenting) (citing *In re Stisser Grantor Trust*, 818 N.W.2d 495, 504 (Minn. 2012)). "Whether a phrase should be ascribed its technical or special meaning depends in part upon the context in which the phrase appears." *Id.* (citing *State v. Rick*, 835 N.W.2d 478, 484 (Minn. 2013)).

We may also consider a rule's purpose, history, and procedural context. *See Walsh*, 851 N.W.2d at 603–06. We read the rules "in light of one another." *Mingen v. Mingen*, 679 N.W.2d 724, 727 (Minn. 2004). And we consider federal cases "instructive" where our rule is similar to a Federal Rule of Civil Procedure. *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 n.3 (Minn. 2009).

In our view, "delivery" and "delivered" have a special meaning within the context of Rule 3.01(c) that requires personal delivery. This conclusion is confirmed by the legal definition of "delivery," along with the history and the procedural context of the rule.

A.

In the context of commencing a civil action, the word "delivery" has a special meaning. The accepted legal meaning of "delivery" contemplates personal delivery. *Black's Law Dictionary* defines "delivery" as "[t]he formal act of voluntarily transferring something; esp., *the act of bringing goods*, letters, etc. *to a particular person or place*."[3] *Delivery*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). For example,

[3] In quoting *Black's Law Dictionary*, the dissent overlooks the second half of this definition to conclude that it "does not necessitate the sender to physically hand the document to the recipient." But the second half of the definition does precisely that.

"delivery in escrow" is defined as "[t]he *physical transfer* of something to an escrow agent." *Id.* at 522 (emphasis added). Similarly, the classic "delivery of deed" occurs "when the grantor *physically hands* the deed to the grantee." *Id.* (emphasis added). In each of these definitions, delivery requires physically handing off an item to a particular person or place. Plainly, "delivery" has a special meaning; it requires personal delivery.

Facsimile transmission is not a personal delivery. Rather, a fax is "[a] method of transmitting over telephone lines an exact copy of a printing." *Fax*, *Black's Law Dictionary* (10th ed. 2014); *see also The American Heritage Dictionary* 645 (5th ed. 2011) (defining fax as "[a] document transmitted or received by a fax machine"). The actual document being faxed is not brought to a particular person or place. There is no physical transfer or hand-off.

B.

The history of Minnesota's delivery-to-the-sheriff rule also shows that, in this context, "delivery" has a well-established special meaning requiring a physical hand-off.

The practice of commencing a civil action by delivering a summons to the sheriff is older than the state itself. The Territory of Minnesota's first laws, passed in 1851, included a statute permitting commencement of a lawsuit against a corporation or individual by delivery of a summons to the sheriff. *See* Minn. Rev. Stat. (Terr.), ch. 70, § 15 (1851). After recodifications in 1858 and 1866, the law "remained unchanged until the revision of 1905." *Bond v. Penn. R.R. Co.*, 144 N.W. 942, 944 (Minn. 1914). This revision consolidated the statutes governing commencement, with no substantive change to the delivery-to-the-sheriff rule. Minn. Rev. Laws § 4081 (1905).

In 1914 we were asked to identify the exact moment of commencement under section 4081—the precursor to Rule 3.01. In *Bond*, we held that an action commences "when the summons . . . is *placed in hands* [sic] of the proper officer for such service, if this be followed by actual or constructive service within the prescribed time." 144 N.W. at 944 (emphasis added).

Section 4081 remained unchanged until 1952, when the Minnesota Rules of Civil Procedure became effective. Rule 3.01 continued the traditional delivery-to-the-sheriff rule:

> A civil action is commenced against each defendant when the summons is served upon him *or is delivered to the proper officer* for such service; but such delivery shall be ineffectual unless within 60 days thereafter the summons be actually served on him or the first publication thereof be made.

Minn. R. Civ. P. 3.01 (1952) (emphasis added).

In 1985, Rule 3.01 was broken into three subsections, but the substance of the delivery-to-the-sheriff requirement remained unchanged, substituting "the sheriff" for "the proper officer" to "remove ambiguity or uncertainty." Minn. R. Civ. P. 3.01 advisory comm. cmt.—1985. Rule 3.01(c) has thereafter remained the same for more than 30 years.

In short, the rule permitting commencement of a civil action by delivery of the summons to the sheriff has existed in Minnesota since 1851. To satisfy this rule, we have a well-established and long-accepted practice of requiring personal delivery of the summons and complaint to the sheriff.[4]

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[4] Presumably that is why our cases have historically mentioned *personal* delivery to the sheriff. *See, e.g.*, *Bellows v. Ericson*, 46 N.W.2d 654, 656 (Minn. 1951) ("The original action . . . was commenced . . . by placing the summons and complaint in the hands of the

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Interpreting the word "delivery" to include faxing[5] would be inconsistent with the rest of Rule 3.01 and the other procedural rules. We have a "policy to construe the rules concerning the commencement of an action to provide a single, uniform course of procedure that applies alike to all civil actions." *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 478 (Minn. 2013) (citation omitted) (internal quotation marks omitted).

Rule 3.01(a) allows an action to commence "when the summons is served upon th[e] defendant." Minn. R. Civ. P. 3.01(a). Rule 3.01(b) commences an action "at the date of acknowledgement of service if service is made by mail or other means consented to by the defendant." Minn. R. Civ. P. 3.01(b). Rule 3.01(a) does not mention facsimile transmission. Neither does Rule 3.01(c). Unlike Rules 3.01(a) and (c), Rule 3.01(b) contains a narrow exception authorizing commencement by facsimile transmission, but only if "consented to by the defendant." Minn. R. Civ. P. 3.01(b). That Rule 3.01 limits delivery by facsimile transmission to cases in which a plaintiff has obtained the defendant's consent prior to the transmission suggests that Rule 3.01(a) and (c) does not permit faxing.

Hennepin county sheriff . . . ."); *Thompson Yards, Inc. v. Standard Home Bldg. Co.*, 201 N.W. 300, 301 (Minn. 1924) ("The original summons, placed in the hands of the sheriff of Hennepin county . . . was without defect . . . .").

[5] The invention of facsimile machines pre-dates our decision in *Bond* by more than 70 years. *See* Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 70, 75 n.16 (2011) ("The world's first facsimile machine . . . capable of transmitting text across an electrical wire—was patented . . . in 1843. The first commercial fax system . . . was set up in 1863 . . . . As early as 1902 . . . users [could] send and receive photographs. By 1906, this device was commercially available and widely used, especially in the newspaper industry." (citations omitted)).

Minnesota Rule of Civil Procedure 4, governing service of process, also supports the special meaning of "delivery." Just like Rule 3.01, Rule 4 uses the word "delivery" without defining the term. *See* Minn. R. Civ. P. 4.03. In 2006 we limited the meaning of "delivery" when we concluded that "Rule 4 . . . does not include any provision for service by facsimile." *Kmart Corp. v. County of Clay*, 711 N.W.2d 485, 490 (Minn. 2006). If "delivery" under Rule 4 does not permit delivery by facsimile transmission, it would be inconsistent to interpret Rule 3.01(c) to allow it.[6]

Rule 5.02(c), which governs service of pleadings in lawsuits already commenced, was amended in 1996 to expressly provide for facsimile service. *See* Minn. R. Civ. P. 5.02(c) advisory comm. cmt.—1996. If we had intended to permit facsimile transmission to satisfy Rule 3.01(c)'s "delivery" requirement, we could have amended the rule to so provide, as we have amended Rule 5.02(c) and other rules.[7] *Cf. Melillo v. Heitland*, 880 N.W.2d 862, 865 (Minn. 2016) ("In 1996, our amendment to Rule 4.04 . . . allow[ed] service by certified mail to constitute personal service . . . but only on defendants located outside the United States. Had we intended to allow [service by certified mail] for domestic or in-state service, we would have amended Rule 4.05 to say so." (citation omitted)).

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[6] The dissent argues that *Kmart*'s guidance is limited specifically to Rule 4.03(a), which requires the service of the summons to be "[u]pon an individual 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. P. 4.03(a). The dissent reads "personally" to modify "delivering." Regardless how we interpret Rule 4.03(a), though, the *Kmart* holding applies to Rule 4 in its entirety. 711 N.W.2d at 490.

[7] *See, e.g.*, Minn. R. Civ. P. 5.05; Minn. R. Civ. App. P. 125.01; Minn. R. Civ. App. P. 125.03; Minn. R. Crim. P. 33.04(a); Minn. R. Crim. P. 36.01; Minn. R. Crim. P. 36.03.

Finally, it is instructive that the federal courts have interpreted the term "delivery" in the Federal Rules of Civil Procedure the same way we have here. *See Walsh*, 851 N.W.2d at 603. Like our Rule 3.01(c), Rule 4 of the federal rules requires "delivery" of the summons and complaint to the defendant to accomplish effective service. *See, e.g.*, Fed. R. Civ. P. 4(h)(1)(B) ("[A] domestic or foreign corporation . . . must be served . . . by delivering a copy of the summons and of the complaint . . . ."). Federal courts have consistently interpreted this "delivery" requirement to exclude facsimile transmission. *See, e.g., United States v. Flowers*, 464 F.3d 1127, 1131 (10th Cir. 2006) ("The Federal Rules . . . allow service by fax only when the party being served by fax has consented to it in writing . . . ."); *United States v. Galiczynski*, 44 F. Supp.2d 707, 713 (E.D. Penn. 1999) ("The result reached here, that the Federal Rules . . . do not authorize service by fax, is consistent with the unanimous decisions rendered by courts that have considered the issue.").

To summarize, the word "delivery" in Rule 3.01(c) has a well-established special meaning: *personal delivery*. This special meaning is confirmed by the history of the delivery-to-the-sheriff rule, the surrounding rules, and federal cases. Because Rule 3.01(c) requires personal delivery of the summons, Cox's facsimile transmissions to the sheriffs did not commence the action.

III.

Having concluded that "delivery" under Rule 3.01(c) requires personal delivery and that facsimile transmission is not that, we now consider whether Cox's action nevertheless was properly commenced. We consider this issue because the court of appeals concluded

that "the district court lacked jurisdiction." *Cox*, 2017 WL 164428, at *3. Cox argues that this conclusion was erroneous because there were two separate times that her action could have commenced: (1) upon delivery to the sheriff, or (2) when the sheriffs actually served the insurers.[8]

"Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). But we "must apply the facts as found by the district court unless those factual findings are clearly erroneous." *Id.*

Plainly, Cox did not commence her lawsuit under Rule 3.01(c), which requires delivery to the sheriff *and* actual service (or publication) within 60 days. Only then is the action deemed to have commenced as of the date of delivery to the sheriff. It follows, then, that the failure to personally deliver the summons and complaint to the sheriff necessarily means that the action did not commence under Rule 3.01(c).

By contrast, an action commences under Rule 3.01(a) "when the summons is served upon th[e] defendant." Under Rule 4.02, the sheriff "may make service of a summons." It follows that commencement under Rule 3.01(a) may occur regardless of how the sheriff

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[8] The insurers argue that Cox failed to preserve the issue of what impact, if any, the sheriffs' subsequent service had on the commencement of Cox's lawsuit. Cox contends that there was no opportunity to raise this issue because the court of appeals raised it sua sponte.

The court of appeals broadly concluded that "the district court lacked jurisdiction," although the question of whether the district court had personal jurisdiction in general—possibly from a source other than Rule 3.01(c)—was never raised. We have previously reviewed issues that the court of appeals raised sua sponte, and will do so here. *See, e.g.*, *State v. Cottew*, 746 N.W.2d 632, 639–40 (Minn. 2008).

came to possess the summons—whether by delivery, facsimile transmission, mail, or another method. Therefore, an action not properly commenced under Rule 3.01(c) can be saved by Rule 3.01(a).

In this case, the district court found that the insurers were personally served by the deputy sheriffs on January 14 and 19, thereby commencing Cox's action under Rule 3.01(a). The court of appeals thus erred when it concluded that the district court lacked jurisdiction.

Our conclusion may be cold comfort to Cox. Given that the district court determined that the statute of limitations expired on January 11, 2016, Cox still may not have a remedy. Regardless, the post-script must be written in the district court, to which we remand this case for further proceedings consistent with this opinion.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision in part, reverse in part, and remand to the district court.

Affirmed in part, reversed in part, and remanded.

D I S S E N T

ANDERSON, Justice (dissenting).

Because I do not believe that Rule 3.01(c) has a special meaning that requires personal delivery, I respectfully dissent from the court's opinion. I would hold that the meanings of "deliver" and "delivery" in Rule 3.01(c), as it currently is written, include facsimile transmission. Put another way, the actions of Cox in delivering the summons and complaint to the sheriff, in a manner that ensured that the sheriff received the documents, were consistent with the requirements of the rule.

The court's opinion creates a clear rule, which is helpful and needed. But because Cox is certainly not the only practitioner to have read Rule 3.01(c) and logically concluded that "delivery" did not preclude faxing—or even mailing—the summons and complaint to the sheriff, I believe that the court's rule is misguided.

First, I take issue with the conclusion that "delivery" has a special legal meaning. It is true that some of the dictionary definitions that the court cites suggest that "delivery" involves a personal handoff. But "the formal act of voluntarily transferring something," *Delivery*, *Black's Law Dictionary* (10th ed. 2014), does not necessitate the sender to physically hand the document to the recipient.[1] Moreover, the definition of "delivery" in

[1] The court relies on definitions of "delivery" in *Black's Law Dictionary* because it concludes that "delivery" has an accepted legal meaning requiring personal delivery. Nontechnical dictionary definitions also do not definitely answer whether "delivery" requires a personal handoff. The *Webster's Third New International Dictionary* 597 (3d ed. 2002) defines "deliver" as "give, transfer: yield possession or control of: make or hand over." *The American Heritage Dictionary* 480 (5th ed. 2011) defines "deliver" as "[t]o bring or transport to the proper place or recipient; distribute" and "delivery" as "[t]he act

Black's Law Dictionary is followed by specific forms of delivery, including "absolute delivery," "actual delivery," and "constructive delivery," which shows that, in its basic form, "delivery" is simply a transfer. *Id.* at 521–22.[2] The forms of delivery that require a personal handoff require a modifier like "actual" or "absolute." The rules use "delivery" in a broader sense, which allows for more than just "hand delivery"; certainly there is no language in the rule excluding a broader interpretation than the narrow view adopted by the court.

My next concern is with the court's reliance on three cases to conclude that " 'delivery' has a well-established special meaning requiring a physical hand-off." *See Bellows v. Ericson*, 46 N.W.2d 654, 656 (Minn. 1951); *Thompson Yards, Inc. v. Standard Home Bldg. Co.*, 201 N.W. 300, 301 (Minn. 1924); *Bond v. Penn. R.R. Co.*, 144 N.W. 942, 944 (Minn. 1914). The three cases cited by the court do little more than state in a conclusory fashion whether a summons was or was not placed in the hands of the sheriff. They hardly show that this meaning was well established or that personal delivery to the sheriff was required.

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of conveying or delivering," "[s]omething delivered, as a shipment or package," and "the act of transferring to another."

[2] According to *Black's Law Dictionary*, "absolute delivery" is defined as "[a] delivery that is complete upon the actual transfer of the instrument from the grantor's possession," "actual delivery" is defined as "[t]he act of giving real and immediate possession to the buyer or the buyer's agent," and "constructive delivery" is defined as"[a]n act that amounts to a transfer of title by operation of law when actual transfer is impractical or impossible." *Black's Law Dictionary* 521–22 (10th ed. 2014).

To be sure, these three cases state that "delivery" includes "placing into the hands of the sheriff," but the decisions do not establish that a special meaning that precludes any other form of delivery necessarily exists. For example, we held in *Bond* that "[t]he action is commenced . . . when [the summons] is placed in hands [sic] of the proper officer for such service, if this be followed by actual or constructive service within the prescribed time." 144 N.W. at 944. But the question in *Bond* was whether an action was commenced when the summons was delivered to the sheriff where the action took place and then constructively served upon the out-of-state defendant *or* whether the action commenced when the out-of-state defendant was personally served with the summons and complaint. *Id.* at 943. The opinion simply states the undisputed fact that the summons and complaint were in the hands of the sheriff and *then holds* that an action may commence when personal service occurs.[3]

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[3] The court makes the interesting, and no doubt little-known, point that fax machines have a very long history. While it is true that the fax machine predates *Bond* by 70 years, it is anachronistic to say the court in *Bond* would be familiar with the modern fax machine. As a practical matter, no evidence exists of widespread use of facsimile technology among lawyers until long after all three of the decisions the court cites. *See* Jonathan Coopersmith, *Faxed: The Rise and Fall of the Fax Machine* 174 (2015). As the court notes, the early users of fax machines were indeed newspapers, but "[t]he number of fax machines actually was quite small—less than a hundred in 1933." *Id*. at 38. Faxing documents was still a challenge in the 1930s, when "message fax faced a great problem in gaining business acceptance: creating legible copies from faxed images, essential for normal information flow in offices. That problem remained unsolved until the Xerox photocopier in the 1960s." *Id.* at 68. It was not until the 1950s that the technology emerged that would allow "businesses to send whatever they wanted on a full-sized sheet of paper, such as invoices and signed letters on company letterhead." *Id*. at 97. Nonetheless, in that era some "still considered facsimile commercially unrealistic because of its costs and the firmly entrenched teletype[, a personal telegraph system.]" *Id*. at 81. According to one estimate, in 1956 "75 percent of regular lines were inadequate even for local faxing." *Id*. at 80. It was not until the 1980s and 1990s that the fax machine's use became widespread

Similarly, the other two cases do not necessarily require that delivery in Rule 3.02(c) must be personal. In *Bellows*, we said that "[t]he original action . . . was commenced on March 13, 1950, by placing the summons and complaint in the hands of the Hennepin county sheriff for service on defendant." 46 N.W.2d at 656. But this statement does not suggest that "into the hands" was the only acceptable way to deliver to the sheriff at that time. Instead it is a statement of what actually happened and that it was sufficient to initiate the action. In *Thompson Yards*, although we noted that "[t]he original summons, placed in the hands of the sheriff of Hennepin county . . . was without defect," this statement again does not reflect a conclusive view on our part that a personal handoff is the only way to deliver to the sheriff without defect. 201 N.W. at 301. In sum, I believe that, at most, these decisions suggest that "delivery" *includes* "placing into the hands" of the sheriff but does not limit other forms of delivery.[4]

The court emphasizes the need to be consistent with adjacent procedural rules when interpreting the word "delivery." I agree, but I note that Rule 3.01(c) is unique; parts (a) and (b) of Rule 3.01 are quite different from part (c). In contrast to the single step—serving the summons upon the defendant—required to commence an action under Rule 3.01(a), Rule 3.01(c) describes a two-step process for commencing an action. *See* Minn. R. Civ. P.

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and infiltrated the legal community as a whole. A survey of rural lawyers in 1990 found that "[n]inety percent had fax machines with two-thirds acquiring their machines only in 1989-90." *Id.* at 174.

[4] Indeed, because how the documents in *Bellows*, *Bond*, or *Thompson Yards* were delivered to the sheriff was not an issue, we do not know that the court, in any opinion, was using "in the hands" as synonymous with "personal delivery." That is not an unreasonable assumption, but it is entirely an assumption.

3.01(a), (c). The first step is to "deliver" to the sheriff and the second is for the sheriff to serve the defendant. *Id*. These two steps of the rule describe two different actions, which establishes that "delivery" is not the same as "service." On the other hand, Rule 3.01(b), which allows the defendant to consent to other forms of service, does not speak to "delivery." Minn. R. Civ. P. 3.01(b). Therefore, Rule 3.01(b) limits only the modes of *service*, not the method of *delivering* the summons and complaint to the sheriff. Similarly, the interpretations of "delivery" in the federal rules are not persuasive in this dispute because the term "delivery" in Rule 4 of the federal rules occurs when discussing service of process. *See, e.g.*, Fed. R. Civ. P. 4(e)(2)(A) (stating that "an individual . . . may be served in a judicial district of the United States by . . . delivering a copy of the summons and of the complaint to the individual personally").

Finally, the drafters of our civil procedure rules know how to indicate when delivery requires a physical handoff. As we have said, "Rule 4.03(a) provides that *personal* service can be accomplished '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.' " *Kmart Corp. v. County of Clay*, 711 N.W.2d 485, 489 (Minn. 2006) (emphasis added) (quoting Minn. R. Civ. P. 4.03(a)). We have interpreted this rule to exclude facsimile transmission. *Id.* at 490 ("Rule 4 . . . does not include any provision for service by facsimile."). "Delivery" can be easily limited to personal delivery, but the drafters chose not to do so in Rule 3.01(c).[5]

[5] The court is correct that I read "personally" in Rule 4.03(a) to modify "delivering" and not "individual." This interpretation is the only one that is grammatically possible.

In sum, I conclude that "delivery" of a summons and complaint by facsimile transmission to a sheriff for subsequent personal service was proper and permitted under Rule 3.01(c). More generally, I view the court's opinion to be an unnecessarily restrictive interpretation of our rule, and for no apparent reason. If another outcome is desired, either because of a parade of horribles that the court foresees, or for some other reason, then the appropriate action is to amend the rule.

I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.

CHUTICH, Justice (dissenting).

I join in the dissent of Justice Anderson.

"Personally" is an adverb, "by delivering" is a verb (present participle), and "individual" is a noun. Adverbs modify adjectives, verbs, and other adverbs. *See The Chicago Manual of Style* ¶ 5.143 (15th ed. 2003). Adverbs cannot modify nouns. *Id.* ¶ 5.146. The grammatical structure of the word "personally" supports my point that the most logical interpretation of Rule 3.01(c) is that "delivery" can include delivery by facsimile.