I. INTRODUCTION.

Housing and Redevelopment Authority of St. Cloud v. Royston, 990 N.W.2d 730 (Minn. App. May 1, 2023), *rev. denied* (August 22, 2023) dealt with the detailed requirements for serving a summons in an eviction action on a residential tenant by "posting" under Minn. Stat. § 504B.331.

A Minnesota eviction action starts with the plaintiff (usually a landlord) filing a complaint with the court administrator, who then prepares a summons. The plaintiff's process server must then serve a copy of the summons on the defendant (usually a tenant) at least seven days before the initial hearing.

There were three ways to do this:

> [1] The process server hands a copy of the summons to the defendant. Lawyers call this "personal service".
>
> [2] The process server goes to the defendant's last usual place of abode and leaves a copy of the summons with a person of suitable age and discretion residing there. Lawyers call this "substitute service".
>
> [3] By "posting". This involves mailing a copy of the summons and complaint to the defendant and posting the summons and complaint in a conspicuous place on the property. Lawyers often call this by the slang phrase "nail and mail".
>
> > A recent amendment to Minn. Stat. § 504B.331 which goes into effect January 1, 2024,[1] allows the landlord to choose USPS mail (snail mail) or another written-communication method it typically uses with the tenant (e.g., email). This amendment is discussed below in Part IV.

The posting part of Minn. Stat. § 504B.331 (2023)[2] now reads as follows:

> (d) Where the defendant cannot be found in the county, service of the summons may be made upon the defendant by posting the summons in a conspicuous place on the property for not less than one week if:

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[1] The amendment is available in Appendix 1 on page 2.

[2] Available in Appendix 1 on page 3.

(1) the property described in the complaint is:

(i) nonresidential and no person actually occupies the property; or

(ii) residential and service has been attempted at least twice on different days, with at least one of the attempts having been made between the hours of 6:00 p.m. and 10:00 p.m.; and

(2) the plaintiff or the plaintiff's attorney has signed and filed with the court an affidavit stating that:

(i) the defendant cannot be found, or that the plaintiff or the plaintiff's attorney believes that the defendant is not in the state; and

(ii) a copy of the summons has been mailed to the defendant at the defendant's last known address if any is known to the plaintiff.

In *Royston*, the initial hearing was set for September 6, 2022. Prior to that the following happened:

- 13 days prior to the hearing, at 6:49 pm, "the sheriff" (presumably a deputy sheriff) tried personal service but no one was home.
- 12 days prior to the hearing, at 10:48 am, the sheriff again tried personal service but no one was home.
- Immediately after that second try, 12 days prior to the hearing, presumably at 10:49 am, the sheriff posted the summons in a conspicuous place at the apartment
- 7 days prior to the hearing, the HRA mailed a copy of the summons to Royston
- 7 days prior to the hearing, the HRA signed and filed an affidavit saying that Royston could not be found and that it had mailed him a copy of the summons.

Royston contested personal jurisdiction. He argued that the HRA did not follow section 504B.331 because the statute requires that the posting cannot be done until the two unsuccessful attempts at personal service failed, the summons was mailed to him, and the affidavit of not found & mailing was filed. I.e., in slang, "try twice, mail, file affidavit, <u>then</u> nail".

The district court denied Royston's motion, set the case for trial, and Royston lost the trial. He appealed only on the issue of personal jurisdiction, making the same argument he made in district court.

II. THE COURT OF APPEALS DECISION – PLAIN LANGUAGE ANALYSIS.

The Court of Appeals ruled for the HRA. It held that under *Koski v. Johnson,* 837 N.W.2d 739 (Minn. App. 2013), *rev. denied* (Minn. Dec. 17, 2013), the landlord must strictly comply with Minn. Stat. § 504B.331. *Royston*, 990 N.W.2d at 734. However, it then held that the HRA did strictly comply, construing section 504B.331(d) as follows:

> The plain language of section 504B.331(d) provides that posting a summons at least seven days before the first hearing in an eviction action constitutes effective service so long as the following have also occurred not less than one week before the first hearing: (1) there have been two attempts at personal service on two different days, including one between the hours of 6:00 p.m. and 10:00 p.m. and (2) the landlord or landlord's attorney has signed and filed an affidavit with the court stating that the tenant cannot be found or is believed to be out-of-state and that the summons has been mailed to the tenant's last known address or that such an address is unknown to the plaintiff.

Id. at 738. I.e., the *Royston* court held that the order of these acts didn't matter so long as they all occurred at least 7 days before the initial hearing.

It's a bit hard to follow the court's reasoning. It is apparently based on the idea that the statute "governs service of the summons and not the physical act of posting a summons". *Id*. at 736. But the statute does limit service of the summons to one of three physical acts: giving it to the defendant (personal service, part [a]); giving it to a co-resident of the defendant (substitute service, part [b]); or posting it (parts [c]-[d]). Other physical acts – e.g., mailing the summons by Certified Mail[3] – might be good ideas but aren't allowed by section 504B.331.

The simplest way to see why the Court of Appeals is wrong is to consider the rule it did lay down (quoted above). According to its rule, the summons must be mailed at least 7 days before the initial hearing. Obviously, it makes sense that there is a

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[3] E.g., Nebraska allows Certified-Mail service in some cases. NRS § 25-505.01(1)(c).

deadline for mailing; if there were none, the landlord could mail the summons one minute before the hearing, doing the tenant no good.

However, the statute does not say – at least directly – when to mail the summons. In part (d) of section 504B.331 the **only** stated deadline is that the summons must be posted at least 7 days prior to the hearing. How does one figure out the deadline for mailing? The answer is that posting may occur if "the plaintiff or the plaintiff's attorney has signed and filed with the court an affidavit [of not found & mailing]."

Therefore, the only way part (d) of section 504B.331 can be read in a way that creates a mailing deadline is if the affidavit, and thus the mailing, precedes the posting. If the statute were read to allow posting to precede mailing, then nothing stops the landlord from mailing any time he likes.

Could the legislature have enacted a statute like the one the Court of Appeals claims it did? Yes. A statute that allowed the landlord to pick the order of mailing, posting, and the two attempts at personal service, and to require they all be completed at least 7 days prior to the initial hearing would be a sane statute. Perhaps some states have a statute like that. However, that is not what the legislature enacted. It enacted a statute with a particular order, one focused on posting as the actual service and limiting posting to a time after mailing and filing a certain affidavit. Under *Koski*, what the legislature actually enacted must be strictly followed.

III. LEGISLATIVE HISTORY.

The history of section 504B.331 confirms that it requires filing the affidavit of not found & mailing before posting the summons.

Versions of the posting part of Minn. Stat. §504B.331

Appendix 1 shows every version of the eviction-action-service-of-process statutes from Territorial days through today. Starting with the Territorial statutes and through the first fifty years of statehood, eviction-action summons could be served only via personal service or substitute service.

Then the 1909 legislature enacted 1909 Minn. Laws ch. 496, s. 1, which allowed an eviction-action summons to be served by publication plus posting. It read:

An act to amend sections 4041 … of the Revised Laws of Minnesota, 1905 … Be it enacted by the Legislature of the State of Minnesota:

Service of summons by publication. — Section 1. That section 4041 [of the Revised Laws of Minnesota, 1905] be and the same is hereby, amended to read as follows, to-wit:

Section 4041. Summons — How served — The summons shall be served at least three days before the return day thereof by delivering a copy to the person against whom it is issued or if such person be a corporation, a minor under fourteen years of age or a person under guardianship, by delivering a copy as provided in the case of a service of summons in a civil action in the district court; but in case such person cannot be found in the county, the summons may be served on him at least six days before the return day thereof, by leaving a copy thereof at his last usual place of abode with a member of his family, or person of suitable age and discretion residing at such place, or if he had no place of abode, by leaving a copy thereof upon the premises described in the complaint with person of suitable age and discretion occupying the same or any part thereof;

Provided, that in case the defendant has no usual place of abode and cannot be found in the county, of which the return of the officer, shall be prima facie proof, and further that there is no person actually occupying the premises described in the complaint, then upon the filing of an affidavit by the plaintiff or his attorney in the court in which said action is brought stating that no person is actually occupying said premises and that he believes the defendant is not in said state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his last known address, or that such address is not known to him, service of the summons may be made upon such defendant by posting the summons in a conspicuous place on said premises one week and by one week's published notice thereof in some newspaper printed and published in the county wherein said action is brought, or, if there be no newspaper therein, then in some newspaper printed and published at the capitol of the state and if upon the return day the said defendant or his attorney does not appear in said court in said action then the trial thereof shall be continued for one week to enable the defendant to make his appearance and defend therein. [italics in original]

The first paragraph of this section essentially restated existing law[4]. The second paragraph (starting "*Provided*") created a third method of service –posting and publication.

There have been four subsequent changes to this provision.

First, a 1976 session law[5] eliminated the publication requirement, changing posting + publishing into just posting. The same session law also made two minor changes, allowing posting even if there was no proof that the defendant lacked a usual place of abode and eliminating the need for the affidavit to state that there was no one actually occupying the premises.

Second, a 1981 session law changed the timing rules for personal and substitute service and made several stylistic changes to the posting part of the statute. [6]

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[4] Codified at Rev. Laws 1905 § 4041, available in Appendix 1 on page 21.

[5] 1976 Minn. Laws. Ch. 123, s. 1, available in Appendix 1 on pages 11-12.

[6] 1981 Minn. Laws ch. 168, s. 4. In Revisor's font here is that part of the law (the last part of 1981 Minn. Laws ch. 168, s. 4):

> ~~In case~~ If the defendant cannot be found in the county, of which the return of the sheriff or constable, shall be prima facie proof, and ~~further that there is~~ no person actually ~~occupying~~ occupies the premises described in the complaint, ~~then~~ upon the filing of an affidavit ~~by~~ of the plaintiff; or his attorney ~~in the court m which the action is brought~~ stating that ~~he believes~~ (1) the defendant ~~is not in this state~~, ~~or~~ cannot be found ~~therein~~ or on belief that the defendant is not in this state, and ~~either that he has mailed~~ (2) a copy of the summons has been mailed to the defendant at his last known address, ~~or that such address is not~~ if any is known to ~~him~~ the plaintiff, service of the summons may be made upon ~~such~~ the defendant by posting the summons in a conspicuous place on the premises for not less than one week and. If ~~upon the return day~~ the defendant, or his attorney, does not appear in court ~~upon the return day~~ in the action ~~then,~~ the trial thereof shall proceed.

Another part of the session law was substantial. It changed the timeline for serving by personal service or substitute service, making the notice period 7 days for all methods of service. The session law is available in Appendix 1 on page 9-10.

Third, a 1985 session law[7] added a requirement for residential evictions that the landlord's process servers had to make a minimum of two attempts, at least one between 6:00 pm and 10:00 pm, to serve the tenant. A technical change was also made; it eliminated the requirement than no one actually occupied the premises (the 1976 session law already had eliminated the need for the affidavit to state this).

Lastly, in 1999, the wording of the statute was changed slightly but not materially. This change was part of an overall recodification of the landlord-tenant statutes. The "purpose of that recodification law was to consolidate, clarify, and recodify the majority of Minnesota's housing statutes under one chapter … [and] it was made clear that no substantive changes to the current housing laws were intended." *Occhino v. Grover*, 640 N.W.2d 357,362 (Minn. App. 2002) (emphasis added).

> The 1909 amendment essentially copied an existing service-by-publication law.

Service by publication, while not allowed in eviction actions pre-1909, was not a new idea. It had been allowed since statehood began.[8] It seems very likely that when the legislature wanted to allow service of an eviction-action summons by publication it largely copied the existing publication statutes applicable to certain civil actions, to wit Rev. Laws 1905 §§ 4111-4112 which read:

> **4111. Service by publication—Personal service out of state**—In any of the cases mentioned in § 4112, when the sheriff of the county in which the action is brought shall have duly returned that the defendant cannot be found therein, and an affidavit of the plaintiff or his attorney shall have been filed with the clerk, stating the existence of one of such cases, and that he believes the defendant is not a resident of the state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his place of residence, or that such residence is not known to him, service of the summons may be made upon such defendant by six weeks' published notice thereof: Provided, that personal service of said summons without the state, proved by the affidavit of the person making the same, made before an

[7] 1985 Minn. Laws. Ch. 214, s. 1, available in Appendix 1 on page 7-8.

[8] *See* *Easton v. Childs*, 67 Minn. 242 (1897) for a good history of service by publication.

authorized officer having a seal, shall have the same effect as the published notice herein provided for.

4112. Same—In what cases—Such service shall be sufficient to confer jurisdiction:

1. When the defendant is a foreign corporation, having property within the state.
2. When the defendant, being a resident of the state, has departed therefrom with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or has departed therefrom, or cannot be found therein, and has property or credits therein upon which the plaintiff has acquired a lien by attachment or garnishment.
3. When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.
4. When the action is for a divorce, or a separation from bed and board, and the court shall have ordered that service be made by published notice.
5. When the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien.
6. When the action is to foreclose a mortgage or to enforce a lien on real estate.

The 1909 session law is headed "Service of summons by publication", indicating the that the new law would largely copy old publication law.[9] Indeed copying did occur. There are minor differences between 1905 Rev. Laws § 4111 and the second

[9] A detailed legislative history of 1909 Minn. Laws ch. 496 is set out in Appendix 2.

A "court is not permitted to consider the caption as part of the statute — Minn. Stat. § 648.36 (1982) — [but] the headings are relevant to legislative intent where they were present in the bill during the legislative process." *Minnesota Exp. Inc. v. Travelers Ins. Co.,* 333 N.W.2d 871, 873 (Minn.1983). As indicated in Appendix 2, there appear to be no extant copies of the original bill. The engrossed copy, Endnote 5 in this appendix, doesn't have the heading "Service of summons by publication". Therefore, I guess this heading was added by the Revisor. Nevertheless, the thrust of the bill, as obviously evident to the Revisor (and the bill's author, Rep. Sawyer) was that the bill was about service by publication.

paragraph of 1909 Minn. Laws ch. 496, s. 1; for example, the former requires six weeks of publishing while the latter requires only one week, and the latter requires posting and publishing while the former only requires publishing. However, the passages are generally very similar.

The 1909 law presumably added a posting requirement to the publication requirement due to the short time between filing an eviction-action case and the initial hearing as opposed to a typical, slow-moving civil action. The fact that sixty-eight years later the 1976 legislature decided to remove the publication requirement and rely on posting does not change the clear intention of the legislature which enacted the overall scheme in 1909 to copy existing publication law.

> Case law construing the copied statute held that if the plaintiff does not file the affidavit of not found & mailing before publishing the case must be dismissed for lack of personal jurisdiction.

Helpfully, for both today's reader and the legislators in 1909, REVISED LAWS OF MINNESOTA, 1905 printed not just the statutes but, under each statute, citations to applicable case law. Most telling is this group of citations provided for § 4111: [10]

> **4. Filing affidavit**—The filing of the affidavit is a jurisdictional prerequisite. It cannot be filed after publication or after the commencement of publication (37-194. 33+559; 38-506, 38+698; 44-97, 46+315; 67-242, 69+903; 44-505, 47+169; 85-261, 88+748. See validating act, 1901 c. 349). What constitutes filing (85-261, 88+748).

REVISED LAWS OF MINNESOTA, 1905 at 828. The citations with a "+" sign are cases discussing side points as are some of the others. However, the first two cases with a "-" sign are directly on point. Both held that the affidavit of not found & mailing cannot be filed after publication or after the commencement of publication and that failure to do so deprives the court of jurisdiction. *Barber v. Morris*, 37 Minn. 194 (1887); *Brown v. St. Paul & Northern Pacific Railway Co.*, 38 Minn. 506 (1888).[11]

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[10] The entire set of citations in question is available at https://www.revisor.mn.gov/statutes/1905/cite/77/pdf#search=%22has%20departed%20therefrom%20with%20intent%20to%20defraud%20his%20creditors%22 on PDF pages 20-21. This webpage is the entire Chapter 77 of the REVISED LAWS OF MINNESOTA, 1905.

[11] The *Easton v. Childs* case cited above held that while the filing of the affidavit of not found & mailing was jurisdictional, the sheriff's return of service was not.

Summary: Service by posting can only be done after the affidavit of not found & mailing is filed.

The 1909 legislators knew two things when they enacted chapter 496: [a] The existing publication law required the plaintiff to file the affidavit of not found & mailing before publishing. Failure to do so rendered his case void and deprived the court of jurisdiction. [b] The new (proposed) law for serving eviction-action complaints by publication largely copied the existing general publication law (and added a posting requirement). Thus the 1909 session law incorporated this jurisdictional rule.[12]

Since the current 2023 statute remains materially unchanged regarding the sequence of the filing the affidavit and posting, the same jurisdictional rule applies. The plaintiff must file the affidavit of not found & mailing before posting the summons or forfeit jurisdiction.

IV. THE 2023 SESSION LAW.

The 2023 legislature amended several parts Minn. Stat. § 504B.331. The amendments[13] are effective January 1, 2024. The amendment to part (d) was as follows (using Revisor's font to show additions as underlined and deletions as struck out):

> (d) Where the defendant cannot be found in the county, service of the summons and complaint may be made upon the defendant by posting the summons in a conspicuous place on the property for not less than one week if:
>
> (1) the property described in the complaint is:
>
> (i) nonresidential and no person actually occupies the property; or

[12] Minn. Stat. §645.17(4) ("when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language"); statutes in *pari materia* are to be construed together, *State v. Stroschein*, 99 Minn. 248, 252 (1906).

[13] 2023 Minn. Laws ch. 52, art. 19, s. 106

(ii) residential and service has been attempted at least twice on different days, with at least one of the attempts having been made between the hours of 6:00 p.m. and 10:00 p.m.; and

(2) the plaintiff or the plaintiff's attorney has signed and filed with the court an affidavit stating that:

(i) the defendant cannot be found, or that the plaintiff or the plaintiff's attorney believes that the defendant is not in the state; ~~and~~

(ii) a copy of the summons has been mailed to the defendant at the defendant's last known address if any is known to the plaintiff~~.~~**; or**

(iii) the plaintiff or plaintiff's attorney has communicated to the defendant that an eviction hearing has been scheduled, including the date, time, and place of the hearing specified in the summons, by at least one form of written communication the plaintiff regularly uses to communicate with the defendant that have a date and time stamp. **[bolding added, strikeouts and underlines in original]**

The main change is that the landlord can choose between mailing the summons and sending another communication (e.g., an email) stating the date, time, and place of the initial hearing.

Historically when using nail-and-mail, landlords have mailed a photocopy of the summons and complaint. Starting next year the landlord can instead just email the tenant with the date, time, and place of the initial hearing. If this email is sent before the summons is posted, at least the tenant can be on the lookout for the posted summons. If the summons is posted before the email, the email doesn't help the tenant to be on the lookout or to take steps to prevent its removal before he reads it. Therefore, this amendment indicates that the 2023 legislature intended the mailing or emailing and the affidavit of same to precede the posting. I.e., the new law may well have abrogated *Royston*.

There as another indication that the 2023 legislature did not think the *Royston* court's construction was correct. 2023 Minn. Laws ch. 52, art. 19, s. 106 was part of a huge omnibus bill that incorporated civil-law changes on a variety of subjects. Sections 83 to 120 were taken wholesale from a landlord-tenant bill that itself was an omnibus bill comprised of smaller landlord-tenant bills. The amendments to Minn. Stat. § 504B.331 started out as part of 2023 HF 917 and 2023 SF 1298. These bills received meaningful hearings with legislators listening to specific

testimony, asking questions, and discussing the proposed changes. Most of the discussions were not pertinent to the *Royston* issue but one was.[14]

At the February 14 hearing in a Senate committee, Mary Kaczorek, a Legal Aid attorney and proponent of the bill, was asked out how posting worked. She testified as follows:

> 504B.331 is the service part of the statute that talks about how an eviction case can be served. It can be served personally … it can be served by substitute service… or it can be served by mail and post. And <u>the requirements in 331 are really clear about the server has to go out twice, once in the evening hours, the landlord has to put a copy of the summon and complaint in the mail, they have to file an affidavit with the court saying they couldn't find the tenant. **Then** they are able to post it on the door</u>. And all these protections are in place again for due process. The tenant should know they have court before they get put out of their home. And <u>the case law in Minnesota says that if the landlord doesn't do that the case has to be dismissed. So, this statute takes that case law, and or this bill, and puts it into statute.</u>

Transcription of the 2/14/23 hearing on SF 1298 by the Senate Committee on Housing and Homelessness Prevention at approximately timepoint 1:18:50-1:20:00 (emphasis added).

In other words, Ms. Kaczorek explained that existing case was that posting had to follow the filing of the affidavit. She did not cite the actual cases but surely she was referring to a set of cases summarized in the leading treatise on eviction defense, written by a former head of Legal Aid's housing bureau, RESIDENTIAL EVICTION DEFENSE AND TENANT CLAIMS IN MINNESOTA (2023) by Lawrence

[14] I watched and listened to the landlord-tenant parts these entire hearings: House Committee on Housing Finance and Policy, 2/14/23 (HF 917); House Committee on Judiciary Finance and Civil Law, 3/23/23 (HF 917); Senate Committee on Housing and Homelessness Prevention, 2/14/23 (SF 1298); Senate Committee on Housing and Homelessness Prevention, 3/9/23 (SF 1298); Senate Committee on Judiciary and Public Safety, 3/24/23 (SF 1298). Audio and video recordings are available at https://www.lrl.mn.gov/media/

McDonough. These cases held that dismissal for lack of personal jurisdiction was required where the posting preceded the filing of the affidavit.[15]

V. PRACTICAL CONSIDERATIONS.

Effect on timing.

Assuming my view of the construction of Minn. Stat. §504B.331 is correct, here is how things stood in 1985 (when the last change was made to the statute prior to 2023): Practitioners accepted, and very likely the legislature intended, that the affidavit of not found & mailing couldn't be filed until after the process server had made his two failed attempts at serving a residential tenant. The mailing could have been done anytime, but presumably it was the two failed attempts that proved that the residential tenant cannot be found. For a commercial tenant, the standard is less clear but the process server would have to make at least one try at personal service, probably two (at the commerce and at the home or office of the owner or manager

[15] Here is the passage from the treatise:

> *See Renne v. _____,* No. 27-CV-HC-14-5385 (Minn. Dist. Ct. 4th Dist. Oct. 17, 2014) (Appendix 767) (dismissal where summons and complaint were posted before mailing); *TCF National Bank v. Meldahl,* No. 27-CV-HC-14-2308 (Minn. Dist. Ct. 4th Dist. May 21, 2014) (Appendix 769) (dismissal where all affidavits were filed at the same time, rather than following the statutory sequence of filing affidavits before posting); *Howard v._____,* No. 62-HG-CV-13-469 (Minn. Dist. Ct. 2nd Dist. June 21, 2013) (Judge Van de North) (Appendix 765) (dismissal where summons and complaint were posted before filing affidavits of not found and mailing); **** *Ali v.* _____, No. HC 040213545 (Minn. Dist. Ct. 4th Dist. Feb. 27, 2004) (Appendix 463) (dismissal for posting before filing affidavits); *Plymouth Avenue Townhomes and Apartments v. Hollie*, No. UD-1950912555 (Minn. Dist. Ct. 4th Dist. Sept. 26, 1995) (Appendix 96); *Blackmon v. Johnson*, No. UD-1950516515 (Minn. Dist. Ct. 4th Dist. June 2, 1995) (Appendix 97); *Gasparre v. Acres*, No. UD-2940715809 (Minn. Dist. Ct. 4th Dist. July 28, 1994) (dismissal) (Appendix 41); *Minneapolis Public Housing Authority v. McKinley*, No. UD-98-0305507 (Minn. Dist. Ct. 4th Dist. Mar. 27, 1998) (Appendix 348A) (Posting of summons before mailing of summons did not comply with statute and rule, requiring dismissal).

of the commerce, e.g.). At this point, the process server could call the plaintiff or his attorney on a nearby pay phone or via a radio like a taxi driver calling her dispatcher.[16] Unless the plaintiff or plaintiff's attorney was located next to the courthouse, he would have to drive or take the bus there to file the affidavit (or mail it if personal delivery was impractical). The delivery would have to be during business hours. Perhaps the process server could be contacted and make another trip later that day or evening[17], but probably this would occur the next day or so. Thus, in 1985, the statute effectively made mailing occur at least 8 days prior to the initial hearing in most instances. In almost all situations, the process server would have to make a third trip to do the posting. And, the filing had to be done during business hours, not on weekends.

With the modern advent of cellphones, tablets and Wi-Fi, and, most importantly, electronic filing, even pre-Royston the process server would not have to make a third trip in most cases. After his second failed attempt at personal service, he would call the plaintiff or plaintiff's attorney on his cellphone and then sit in his car or go work on other things. The plaintiff or plaintiff's attorney would electronically file the affidavit of not found & mailing (he'd already done the mailing earlier just in case) and call the process server, who would post the summons. And this "all-in-one-trip" service could be done on weekends and evenings.[18] For the mom-and-pop landlord, things might be as slow as in 1985 but for the professional landlord only a tiny bit slower.

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[16] As indicated in footnote 11, under *Easton v. Childs* the affidavit of the process server (then a sheriff or his deputy, now any adult) of his being unable to locate the defendant is not jurisdictional. Therefore, the process server could wait a bit to file his affidavit of trying twice (and eventually his affidavit of posting). The plaintiff or his attorney could file his affidavit of not found & mailing based on what the process server told him by phone or radio.

[17] Under *Central Internal Medicine Assoc. P.A. v. Chilgren*, File No. C2-00-36 (Minn. Ct. App. 7/18/2000) (non precedential) the seven-days-of-service rule is vindicated if the process server serves the summons some time on the seventh day before the hearing. E.g., if the case is set for a Wednesday, the deadline to serve is 11:59 pm on the previous Wednesday. "Seven days" does not mean 7 x 24 hours.

[18] 2005 Minn. Laws ch. 136 art. 14 s. 21 abolished the statute that had prohibited service of process on Sundays. As footnote 17 indicates, evening service was already okay.

Under *Royston*, the process server only makes two trips instead of three. However, for a professional landlord, pre-*Royston* the process server's third trip might be short one – from his car, where he waited a few minutes for the plaintiff or plaintiff's attorney to confirm filing, back to the defendant's door.

Royston might motivate landlords and process servers to make only a minimal effort to achieve the gold standard of personal service (e.g., they might try service at 9:59 pm on two nights, knowing most tenants are asleep then). It also will encourage posting early in the process – good for tenants in stable neighborhoods, but bad for those where notices are likely to be literally ripped off or blown away before the tenant can be on the lookout for the summons.

Denial of review by the Minnesota Supreme Court

I don't know why the Minnesota Supreme Court denied review of the Court of Appeals' decision in *Royston*. One possibility is that, as just discussed, *Royston*'s real-world effect will be real but relatively small. With many cases to hear, the supreme court might have decided that fixing *Royston*'s construction error was not worth the time.

District-court litigation by defendants.

A defendant's best hope when served the way Mr. Royston was served is to win the underlying case. However, such a tenant does have two nonfrivolous arguments that the service was unlawful.

First, as discussed above, the 2023 session law might have abrogated *Royston,* effective 1/1/2024.

Second, denial of review is not the same as the supreme court ruling on the issue. A tenant can nonfrivolously assert that she intends to appeal the *Royston* jurisdictional issue to the state supreme court and win in that court. Illustrating this principle is this pair of landlord-tenant cases about fire insurance: *RAM Mut. Ins. Co. v. Rohde,* 820 N.W.2d 1 (Minn. 2012), overruling *United Fire & Casualty Co. v. Bruggeman,* 505 N.W.2d 87 (Minn.App.1993), *rev. denied* (Minn. Oct. 19, 1993).

VI. CONCLUSIONS.

[1] The Court of Appeals' *Royston* holding is inconsistent with the plain language of Minn. Stat. § 504B.331.

[2] Minn. Stat. §504B.331 derives from 1909 Minn. Laws ch. 496, s. 1. That 1909 law, allowing service by publication + posting was largely copied from an existing statute, Rev. Laws 1905 section 4111. Section 4111 had been construed by the supreme court to require dismissal of a case if the plaintiff published before filing the affidavit of not found & mailing. It follows that Minn. Stat. §504B.331 requires filing the affidavit of not found & mailing before posting.

[3] 2023 Minn. Laws ch. 52, art. 19, s. 106 might have abrogated *Royston* effective 1/1/2024.

[4] The practical effect of *Royston* is real but relatively small.