

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
38513-9  
2008 OCT 18 10:26 36

SUPREME COURT BY RONALD R. CARPENTER  
OF THE STATE OF WASHINGTON  
CLERK

---

Ruth Jorgensen and Stanley Jorgensen, wife and husband and the marital  
community composed thereof, Appellant,

v.

Kelly Kebler and John Doe Kebler, wife and husband and the marital  
community composed thereof, Respondent

---

**REPLY BRIEF OF APPELLANT**

---

LORI MCCURDY  
J. MICHAEL KOCH  
Attorneys for the Jorgensens

Lori McCurdy, WSBA No. 29801  
J. Michael Koch, WSBA No. 4249  
J. Michael Koch & Associates, P.S., Inc.  
10049 Kitsap Mall Boulevard, Suite 201  
P.O. Box 638  
Silverdale, WA 98383  
(360) 692-5551

ORIGINAL

### Argument

It is entirely incorrect to state that the Jorgensens presented only one single fact to support the inference that the Keblers had left the state to avoid service. Each of the facts listed in the Declaration of Due Diligence, Search & Inquiry filed by Ken Palmer also supports the inference that the Keblers did not want to be found, including Mr. Palmer's questioning of the residents at not one, but two of the Keblers' prior known addresses, the postal tracers sent, the database checks with the Department of Licensing and the Department of Motor Vehicles, and the national database search.<sup>1</sup> There is no question that it was "certainly a due diligent search"<sup>2</sup> to find and personally serve the defendants, yet all of the avenues pursued came up with nothing.

As the trial court noted, it is not normal in this day and age for someone to move without leaving a forwarding address with the Post Office.<sup>3</sup> The Jorgensens did not make it easy for anyone to find them, and

---

<sup>1</sup> CP 34-35

<sup>2</sup> RP at 13:7-8

<sup>3</sup> RP at 13:25 - 14:4

the natural inference when someone leaves no way to be located is that the person does not want to be found.<sup>4</sup> While there are many possible reasons why the Keblers did not want to be found other than to avoid service of process, all facts and inferences therefrom are to be viewed in a light most favorable to the Jorgensens.<sup>5</sup> And the inference the Jorgensens drew is not unreasonable.

It was only upon reconsideration that the trial judge decided that service by publication on the Keblers was insufficient. He had originally ruled that the Jorgensens did submit sufficient evidence to support a reasonable inference of the Keblers' intent.<sup>6</sup> Yet the law states that summary judgment may be upheld only where reasonable minds could have reached but one conclusion.<sup>7</sup> Here the trial judge granted the motion even though he himself was waffling on this issue. The fact that the trial court wrestled with the issue and changed its ruling to dismiss the case

---

<sup>4</sup> RP at 14:6-7

<sup>5</sup> *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 351, 27 P.3d 1172 (2001)

<sup>6</sup> RP at 14

<sup>7</sup> *Bulman*, 144 Wn.2d at 351

only after a motion for reconsideration is perhaps the most telling evidence that the standard for service by publication is not clear, and it demonstrates the reason that this Court should take a close look at what exactly the law requires.

The Jorgensens did strictly comply with the statutory requirements. The burden of presenting facts which support an inference of intent to avoid service is not onerous on its face, even with a strict compliance requirement. Unfortunately, the Courts of Appeals, in interpreting the statute and applying it to various sets of facts have made a plaintiff's burden nearly impossible to meet.<sup>8</sup>

The Jorgensens' affidavits clearly articulated facts supporting a reasonable inference that the defendants left the state with the intent to avoid service. They did not merely recite the statutory conditions, but presented several supporting facts and a reasonable inference drawn from those facts. A national credit database indicated that the Keblers were residing in Montana. Yet, there was no forwarding address left with the

---

<sup>8</sup>See, i.e., *Pascua v. Heil*, 126 Wn.App. 520, 108 P.3d 1253 (Div. II, 2005) (the Court of Appeals reversed the trial court's decision which found the plaintiff's affidavit sufficient to support service by publication)

US Post Office for either of the Kebblers' prior residences. The Kebblers did not leave any forwarding information with the occupants at either of their prior residences. There was no updated address information with the Department of Motor Vehicles, the Department of Licensing, or any other state database that was checked. Many inferences could be drawn from this set of facts, including the inference that the Kebblers were attempting to avoid service of process regarding the automobile collision with the Jorgensens.

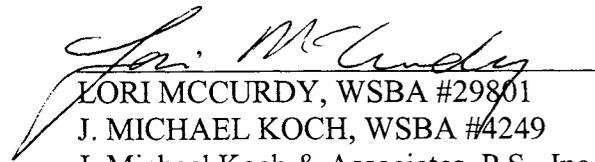
The right to due process applies to plaintiffs as well as defendants. As the trial judge stated, summary judgments are not favored and cases should be decided on their merits whenever possible. Where plaintiffs have in good faith followed the proscribed rules and procedures in making a claim against a defendant, they should not be denied having the case heard on its merits.

The trial court, upon reconsideration, applied too high of a standard of proof to the final element of R.C.W. 4.28.100, and erred in finding the Jorgensens' affidavit insufficient. Although the Jorgensens could not conclusively prove the missing defendants' intent, their affidavit

clearly articulated facts supporting a reasonable belief that the defendants left the state with the intent to avoid service. The decision of the trial court should be reversed, and the case should be remanded to Superior Court for trial on the remaining issues.

Dated this 30<sup>th</sup> day of September, 2008.

Respectfully submitted,

  
LORI MCCURDY, WSBA #29801  
J. MICHAEL KOCH, WSBA #4249  
J. Michael Koch & Associates, P.S., Inc.  
Attorneys for Appellants

