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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

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No. 40039-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

BRANDON BYRNE, Respondent

v.

Kylie Decker, Petitioner

BRIEF OF RESPONDENTS
Submitted by Peter J. Kesling
Attorney for Respondent

Submitted By: Peter J. Kesling
Counsel for Respondent
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I INTRODUCTION

Respondent Brandon Byrne, plaintiff below, asks this court to deny the appeal of the Petitioner and to Affirm the decision of the Pierce County Superior Court denying the Petitioner's Motion for Summary Judgment. This matter arises from the appropriate denial of the defendant's/petitioner's Motion for Summary Judgment on the issue of jurisdiction over the person, which was heard by the Pierce County Superior Court on October 30, 2009.

II. STATEMENT OF ISSUES

Under RCW 46.64.040, was the Trial Court correct in finding that the Respondent obtained proper service of process upon the Petitioner when they made 4 attempts at personal service and put forth substantial effort in attempting to locate the Petitioner, who's name had changed?

III. STATEMENT OF THE CASE.

This Appeal arises out of the Superior Court's Denial of the Petitioner's Motion for Summary Judgment on the issue of lack of valid service and personal jurisdiction. The petitioner made it's motion based upon the premise that the respondent failed to comply with the Non-Resident Motorist Statute, RCW 46.64.040.

On or about March 23, 2009, Peter J. Kesling and his staff attempted to locate Kylie Decker. They researched possible current addresses via public web sites, people finders, and West Law for the purpose of attempting service upon defendant, Kylie Decker. Peter J. Kesling and his staff identified a potential address for Ms. Decker at 14902 122nd Ave E., Puyallup Washington. A search of Real Property records revealed Kylie Decker was not on title to any real property.

On or about March 25, 2009, Peter J. Kesling contacted Larry Walsh who is a private investigator with Bayside Professional Investigations (BPI) for the purposes of researching defendant's address and accomplishing service of the summons and complaint upon Ms. Decker.

Shortly after receiving this work request, Mr. Walsh also checked public records databases and located another potential address of 3121 E. Main St, Apartment O-6, in Puyallup, Washington. On Marh 26, 2009, Mr. Walsh attempted service of process and drove to both of the address he found and the address provided by counsel's office.

No one was available at the home on 122nd Ave E., so Mr. Walsh left a business card. He never received any contact from anyone regarding the business card he left.

Mr. Walsh then attempted service at the apartment on E. Main St. While attempting service, Mr. Walsh discovered that the apartment was occupied by someone other than Ms. Decker.

On March 20 7, 2009, Mr. Walsh conducted further research on the Internet attempting to locate Ms. Decker. As a result of that research, Mr. Walsh discovered that Kylie Decker had married an individual identified as Jesse. Mr. Walsh conducted a search and determined that there were two addresses in Seattle at which Jesse Decker had lived. Mr. Walsh also discovered that Jesse Decker had used addresses that had been previously listed as addresses for Kylie Decker.

On March 30 1, 2009, Mr. Walsh attempted service at the addresses of 1020 Seneca St, Apartment 303, Seattle, Washington, and 600 7th Ave Apartment 318 Seattle, Washington. At the Seneca Street address, Mr. Walsh found a Jesse Decker listed in Apartment 303 on a directory outside of the apartment. Mr. Walsh attempted service in Apartment 303, but there was no answer after knocking. Mr. Walsh left another business card, but received no telephone call.

On April 2, 2009, Mr. Walsh performed a vehicle/vessel search in order to determine if any vehicles had been registered to Kylie Decker. He discovered there were no such vehicles registered to the plaintiff. He did discover that one vehicle was registered to a Jesse Decker, a 2001

Dodge neon, and that the vehicles was registered to the 1020 Seneca St address.

After this due diligent attempt to locate Ms. Decker, Peter J. Kesling determined in good faith that the plaintiff could not be located in the State of Washington for service of process. Peter J. Kesling further concluded that the only way to accomplish service was by way of the Non-Resident Motorist Statute, RCW 46.64.040. On May 12, 2009, the Peter J. Kesling sent to the Secretary of State's office the proper documentation had been received and that for purposes of RCW 46.64.060 service had been accomplished. On May 15, 2009, Peter J. Kesling received confirmation from the Secretary of State of the State of Washington that the proper documentation had been received and that the Secretary of State sent the pleadings to the last known address of the plaintiff.

Also, on May 12, 2009, a copy of the pleadings, including the sworn statement of due diligence, and a letter to the Washington Secretary of State were sent by way of certified mail, return receipt. This was received by the defendant on May 14, 2009.

At the hearing on the petitioner's Motion for Summary Judgment, it is clear that the Court did not make any errors. At the onset of the

hearing the exchange between the Court and respondent's counsel went as follows:

THE COURT: Okay. What are we doing here?

MR. FERGUSON: this is our Motion for Summary Judgment based on the plaintiff's failure to use due diligence in attempting to serve the defendant under the non-resident motorist statute.

THE COURT: What more did you want him to do? They served the Secretary of State, in the end, didn't they?

MR. FERGUSON: they can't serve the Secretary of State unless they used due diligence.

THE COURT: but what didn't they do that you think they should have done?

MR. FERGUSON: they had the last known address of the defendant. All their investigator did was go there and leave a card. No letters were sent. No one was contacted at the address.

THE COURT: okay. What did they do?

MR. KESLING: Your honor, there were actually 4 attempts at service at four different addresses. Mr. Ferguson is correct that one of the addresses that we identified as a potential address for the defendant was in fact the correct address. Our private investigator, however, attempted service there and there was no answer.

THE COURT: and he left his card?

MR. KESLING: and he left his card. And he got no call.

IV. ARGUMENT

In the present case, the petitioner moved the court for an Order of Summary Judgment based on its belief that the respondent did not show “due diligence” in attempting to locate the defendant. The petitioner also tries to confuse this Court that there was only one attempt at service. In fact, there were four actual attempts at service, and several hours of time and resources used on attempting to accomplish actual service.

To attempt to show this court that the Court below erred in concluding the respondent complied with RCW 46.64.040, the petitioner cites several cases regarding the Court’s interpretation of that statute. However, petitioner’s reliance on the cited case law dated prior to the revisions to RCW 46.64.040 are misplaced and should be disregarded by the Court. In fact, the Court should take note that counsel for the defense has failed to cite any case decided subsequent to the enactment of the revised RCW 46.64.040, July 27, 2003.

The Washington Legislature amended the Washington Non-Resident Motorist Statute, RCW 46.64.040, effective July 27, 2003. Prior to that time the statute required a Washington resident operating a motor vehicle in this state and involved in an accident to have departed from the State of Washington for substitute service on the Secretary of State of the State of Washington. In July 23, 2003, the statute was changed to allow for a Washington resident to be served via the Secretary of State who,

while operating a motor vehicle on the public highways of this state, are involved in an accident, collision, or liability, and thereafter at any time within the following three years cannot, after a due diligent search, be found in the State. RCW 46.64.040.

The court has the authority to permit alternate forms of service, including by RCW 46.64.040. RCW 4.28.080(15) requires that an action in the court, begun by a plaintiff, be personally served upon the defendant. CR 4(e) empowers this court to approve alternative forms of service. The list of alternative methods specifically includes service by RCW 46.64.040. CR 4(e)(4) (2008).

The plaintiff has complied with the requirements of the statute, including due diligence in attempting personal service of the defendant. RCW 46.64.040 allows for plaintiffs, after a diligent search for defendants, to serve the action upon the Secretary of State as attorney in fact for the defendant. RCW 46.64.040 (2008).

There are four proper steps to follow to comply with RCW 46.64.040, and they are spelled out in the statute:

1. There must be a good faith attempt at service;
2. Once that good faith attempt has been made, copies of the summons and complaint are sent to the Washington Secretary of State

with filing fee, upon receipt of which a certificate is returned by the Secretary of State confirming receipt of the proper items;

3. The summons and complaint, along with the certificate must be sent registered mail to the defendant's last known address; and

4. An affidavit or declaration of compliance with the statute, as well as proof of due diligence is filed with the court, and service is deemed completed.

If the proper steps are followed and there is agreement by the parties as to what has occurred, the inquiry by the court is a legal one and not a factual one. *Carras v. Johnson*, 77 Wash. App. 588, 592, 892 P.2d 780 (1995). The *Carras* court held that it considers what the serving party did, as opposed to what it did not do when determining due diligence. *Id* at 593. The serving party may rely on a traffic collision report as a reliable source of locating the defendant. *Id* at 593. Proximity to the statute of limitations has no effect on the inquiry of due diligence. *Id* at 594.

In the present case, the plaintiff made more than reasonable efforts at serving the defendants with process at multiple locations on differing dates and times. As none of them produced good service, the plaintiff relied on the statute which permits him to achieve good service in a manner which assures the most effective manner of delivery possible.

Clearly, at the time of the attempted service upon the defendants in this matter, and March of 2009, the new statute was in effect, and the new statute simply required a finding that the defendants could not be found in the State after a due and diligent search.

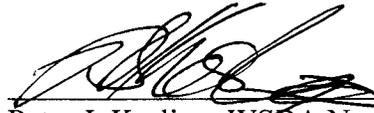
Thus, the petitioner has to show that the lower Court erred in finding that the respondent exercised due diligence in attempting to locate the petitioner. "Due diligence requires that the plaintiff make honest and reasonable efforts to locate the defendant". *Martin v. Meier*, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). In other words, the petitioner has to show that the Court abused its discretion in finding that 4 attempts of service and much time in research was a due and diligent search for the plaintiff whereabouts.

V. CONCLUSION

The plaintiff has diligently attempted to serve the defendants in this matter, spending significant resources, time and effort. RCW 46.64.040 was enacted for this particular circumstance, and the plaintiff now prays the court enter an order affirming the Trial Court's Decision denying the defendant's motion for summary judgment and deeming it's compliance with the statute and valid service of process upon the defendants.

September 07, 2010.

Respectfully Submitted



Peter J. Kesling, WSBA No. 29342
Attorney for Respondent

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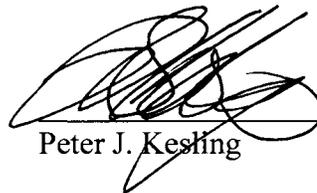
Certificate of Service

STATE OF WASHINGTON

Peter J. Kesling, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail, to the following:

Counsel for defendant Kylie Decker
Glen Ferguson
Freise and Welchman
PO Box 4567
Seattle, WA 98194

Signed at University Place, Washington this 7th Day of September,
2010.


Peter J. Kesling