

FILED

NOV 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302482

WASHINGTON STATE COURT OF APPEALS
DIVISION III

MATTHEW M. MARRY,

Appellant,

vs.

DANIEL ELING and JANE DOE ELING, husband and wife, and the
marital community composed thereof,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Daniel Eling injured Matthew Marry in an auto collision. Mr. Eling could not be located for personal service after investigation of all available information including the police report, internet research, and hiring of investigators in two states. Mr. Marry's counsel reasonably concluded that Mr. Eling had left the state to avoid service. Although not required, Mr. Marry's counsel obtained a court order authorizing Mr. Eling to be served by publication. Shortly after this service, Mr. Eling appeared through counsel to defend this lawsuit. He also challenged the service and moved to dismiss for lack of personal jurisdiction. The Superior Court erred in granting his motion.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted the defendant's motion for dismissal based on service by publication.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred in dismissing this case based upon service by publication.

IV. STATEMENT OF THE CASE

On February 24, 2008, Daniel Eling drove through a red light at Division and Mission in Spokane and crashed into a vehicle in which Matthew Marry was a passenger. (CP 3) Mr. Marry was seriously injured

in the collision. (CP 3) Mr. Eling was arrested at the scene for Driving Under the Influence and Failure to Stop at a Red Light. (CP 31, 36)

Mr. Marry retained Attorney Erik Highberg to represent him in his claim against Mr. Eling. (CP 31) Mr. Highberg filed a personal injury suit in this matter on January 28, 2011. (CP 1) At that time, Mr. Highberg had limited contact information concerning Mr. Eling's whereabouts for service. (CP 32) The police report listed Mr. Eling's address as 509 E. Mission Avenue, Spokane, WA. (CP 36) The police report also listed Mr. Eling as the registered driver of the car he was driving. (CP 36) The police report showed an address on Mr. Eling's vehicle registration as 2922 E. Second Street, Duluth, Minnesota. (CP 36)

Mr. Highberg employed Eastern Washington Attorney Service to investigate, locate and serve Mr. Eling. (CP 32) On March 2, 2011, R. Carver, a registered process server for Eastern Washington Attorney Services, attempted to serve Mr. Eling at the Mission Avenue address. (CP 39) That address was a fraternity house affiliated with Gonzaga University and the person answering the door did not know a Daniel Eling. (CP 32, 39)

Having not located Mr. Eling at his Washington address, Mr. Highberg conducted internet research on the Accurint/Lexis Nexis search engine in an attempt to locate Mr. Eling. (CP 7,32) Mr. Highberg

was able to confirm that Mr. Eling was at one time a Gonzaga University student and was originally from Duluth, Minnesota. (CP 32) Mr. Highberg was also able to establish that Mr. Eling's parents, Carin and Thomas Eling, still resided in Duluth at 5719 Carter River Road. (CP 32)

Mr. Highberg next hired another investigator, Advanced Private Investigations, a Duluth agency, to locate and serve Mr. Eling. (CP 32) On March 11, 2011, Paul Shober of Advanced Private Investigations attempted to serve Mr. Eling at his parents' home in Duluth, Minnesota. (CP 32,41) Mr. Eling's mother advised the process server that her adult son had moved to China. (CP 32,41) Mr. Eling's mother did not provide any contact information for Mr. Eling. (CP 32,41)

At this point, neither Mr. Highberg nor his two investigators had a valid Washington or Minnesota address for Mr. Eling. (CP 33) The only lead he had was Mr. Eling's mother's comment that he had moved to China. (CP 32,41) Mr. Highberg believed it was improbable that Mr. Eling had moved to China and concluded that he was just avoiding service. (CP 33)

On April 1, 2011, Mr. Highberg presented a motion to the Spokane County Superior Court seeking an Authorization of Service by Publication. (CP 33) The service by publication statute, RCW 4.28.100, does not require judicial pre-approval. When Mr. Highberg presented

these pleadings to Judge James Triplett, Mr. Highberg expressed his concern that Mr. Eling was avoiding service and that the information concerning his move to China seemed improbable. (CP 33)

Judge Triplett reviewed the pleadings and counsel's comments and signed the Order Authorizing Service by Publication. (CP 14, 43) The order was interlineated to require publication in Spokane County and Duluth, Minnesota. (CP 14)

Mr. Highberg caused the Summons to be published for six consecutive weeks in the Spokesman-Review and the Duluth News-Tribune. (CP 33, 52, 53)

The service by publication was effective as Mr. Eling received actual notice of the lawsuit. On June 28, 2011, defense counsel for Mr. Eling was retained. (CP 23) On June 29, 2011, counsel for Mr. Eling filed his Notice of Appearance. (CP 21)

Mr. Highberg's approach, including judicial pre-approval of the publication service, resulted in Mr. Eling learning that a lawsuit had been filed against him. Mr. Eling appeared through counsel without the filing of any default proceedings or adverse rulings. Despite the fact that he received actual notice of the lawsuit through the judicially pre-approved publication, Mr. Eling claims the service was defective. The Superior

Court granted his motion to dismiss. (CP 76) This appeal followed.
(CP 73)

V. ARGUMENT

A. Mr. Highberg satisfied all of the requirements for service by publication.

Service by publication first requires a diligent effort to serve and then some showing that the defendant is trying to avoid service. RCW 4.28.100(2).¹ Boes v. Bisiar, 122 Wn.App. 569, 571, 94 P.3d 975 (2004).

RCW 4.28.100(2) authorizes service by publication when the defendant cannot be found in the state, and, with the intent to avoid service of a Summons, he either conceals himself within the state or leaves

¹ RCW 4.28.100(2) provides in pertinent part:

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his agent, or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in any of the following cases:

• • •

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent;...

the state. The plaintiff must also have made reasonably diligent efforts to personally serve the defendant. Boes, 122 Wn.App. at 574; Charboneau Excavating, Inc. v. TurnipSeed, 118 Wn.App. 358, 362, 75 P.3d 1011 (2003).

In reviewing Mr. Eling's challenge, this Court properly considers both the initial affidavit and the supplemental affidavit that were filed by Mr. Highberg after service was challenged. (CP 6, 31); Boes, 122 Wn.App. at 574; Dovans v. Mendoza, 88 Wn.App. 862, 872-73, 947 P.2d 1229 (1997); Brennan v. Hurt, 59 Wn.App. 315, 318-19, 796 P.2d 786 (1990).

A party claiming jurisdiction pursuant to RCW 4.28.100 must show that service by publication was proper. Charboneau Excavating, 118 Wn.App. at 362. In evaluating that showing, the focus is on what reasonable steps the plaintiff took in light of what he knew-not on what other steps were possible. Carras v. Johnson, 77 Wn.App. 588, 593, 892 P.2d 780 (1995).

While the procedural requirements of RCW 4.28.100 must be strictly followed, the determination of whether there has been compliance with the statute is on a case-by-case basis. Longview Fibre Co. v. Stokes,

52 Wn.App. 241, 245, 758 P.2d 1006 (1988). That question is reviewed de novo. Bruff v. Main, 87 Wn.App. 609, 611, 943 P.2d 295 (1997).

A review of Mr. Highberg's affidavits discloses the following facts:

- Mr. Eling failed to yield for a traffic signal and struck the vehicle in which Mr. Marry was a passenger. Mr. Eling was arrested at the scene for Driving Under the Influence of Intoxicants. (CP 31)
- A lawsuit was filed on Mr. Marry's behalf on January 28, 2011, which was within the three year statute of limitations for personal injury actions. (CP 32)
- The police report listed Mr. Eling's address as 509 E. Mission Avenue, Spokane, Washington. It also listed Mr. Eling as the registered owner of the vehicle he was driving. The address on the vehicle registration was 2922 E. 2nd St., Duluth, Minnesota. These two addresses were the only contact information Mr. Highberg had when he began to serve Mr. Eling. (CP 32)
- Mr. Highberg employed Eastern Washington Attorney Services to effectuate service on Mr. Eling. Mr. Eling's proper name was provided to the Washington process server.

The Washington process server attempted service on the Mission Avenue address on March 2, 2011 at 1:25 pm. That service attempt was unsuccessful. The process server learned that the address was a fraternity house affiliated with Gonzaga University and the person who answered the door did not know a Daniel Eling. (CP 32,39)

- Mr. Highberg next conducted internet research on the Accurint/Lexis Nexis search engine in an attempt to locate Mr. Eling. From that internet research, it appeared that Mr. Eling had, at one time, been a Gonzaga University student. It also appeared that Mr. Eling was originally from Duluth, Minnesota and that his parents, Carin and Thomas Eling, still resided there at 5719 Lester River Rd., Duluth, Minnesota. (CP 32)
- Mr. Highberg next hired Advanced Private Investigations, based in Duluth, Minnesota, to locate and serve the defendant. The Minnesota investigator attempted to serve Mr. Eling at his parents' home on March 11, 2011 at 4:50 pm. The Minnesota process server was informed by Mr. Eling's parents that their adult son had moved to China. His parents

did not provide any contact information for Mr. Eling.
(CP 32)

- Mr. Highberg was skeptical about the information received from Mr. Eling's parents that their son had moved to China. He reasonably concluded that Mr. Eling had been a resident of Washington State and that he left the state to avoid service of process. (CP 32, 33) At this point, Mr. Highberg had exhausted all information he had concerning the whereabouts of Mr. Eling.
- Mr. Highberg decided to serve Mr. Eling by publication. Before doing so, he obtained the pre-approval of the Spokane County Superior Court. On April 1, 2011, Mr. Highberg presented a motion for authorization by service by publication. At that time, Mr. Highberg advised Judge Triplett that he believed Mr. Eling was avoiding service and suggested that the information that he had moved to China seemed improbable. (CP 33)
- The Spokane County Superior Court authorized the service by publication. In so doing, the Superior Court ordered that Mr. Highberg publish in both Spokane County and Duluth, Minnesota. (CP 33)

- As authorized by the Superior Court, Mr. Highberg published the Summons in Spokane and Duluth for six consecutive weeks as required by statute. (CP 33)

In conducting an investigation to locate a defendant prior to seeking service by publication, a plaintiff is allowed to rely on his good faith belief that the defendant has departed the state. See, Martin v. Meier, 111 Wn.2d 471, 760 P.2d 925 (1988).

Mr. Highberg's efforts were honest and reasonable. He used all information available from the police report, conducted internet research to locate Mr. Eling, and hired investigators in two states to help locate and serve Mr. Eling-all without success. Prior to publication, all Mr. Highberg knew was that Mr. Eling had fled the State of Washington and may now be residing somewhere in China. Prior to serving by publication, he sought pre-approval of the Superior Court. These efforts constitute an honest and reasonable effort to locate Mr. Eling. Accordingly, his service by publication was proper.

Mr. Highberg established that Mr. Eling could not be found within Washington, exercised due diligence in attempting to locate Mr. Eling and acted in good faith and reasonably inferred that Mr. Eling had concealed himself with the intent to avoid service.

B. Mr. Highberg exercised due diligence in attempting to locate Mr. Eling.

Prior to serving a defendant by publication, a plaintiff must exercise due diligence in attempting to obtain personal service. Although the issue of due diligence is normally a factual question reserved for the trier of fact, if the factual issues are undisputed, the question is one of law for the court. Carras, 77 Wn.App. at 593; Martin v. Triol, 121 Wn.2d 135, 151, 847 P.2d 471 (1993).

The term "due diligence" has been interpreted to require not all conceivable means...but an honest and reasonable effort. Meier, 111 Wn.2d at 481, 760 P.2d 925.

The determination of what particular set of actions are sufficient to constitute due diligence is not subject to mathematical certainty. Carras, 77 Wn.App. at 748. This Court has identified four considerations to be examined when determining whether the plaintiff's efforts were reasonable.

The first consideration is focused on what the plaintiff did, rather than what the plaintiff failed to do. Id.; Triol, 121 Wn.2d at 150; Meier, 111 Wn.2d at 481. Here, Mr. Highberg used all available information from the police report, conducted internet research in an attempt to locate

Mr. Eling, hired investigators in two states to help locate and serve defendants, and obtained judicial pre-approval.

The second consideration is that the plaintiff has the right to rely on the information in the accident report. Carras, 77 Wn.App. at 593; Meier, 111 Wn.2d at 482; Triol, 121 Wn.2d at 150. Mr. Highberg followed up on all information contained in the police report concerning Mr. Eling's whereabouts.

The third consideration is that the plaintiff has the full period of the statute of limitations within which to attempt to effect service. Here, the underlying lawsuit was filed within the applicable statute of limitations. Mr. Highberg had 90 days from filing to serve Mr. Eling. RCW 4.16.170. The Superior Court authorized the service by publication which started to run in both Spokane and Duluth during this 90 day period.

The fourth consideration concerns prejudice, if any, to the defendant. Carras, 77 Wn.App. at 593; Meier, 111 Wn.2d at 483. Here, there was absolutely no prejudice to Mr. Eling. As a result of being served by publication, he timely received actual notice of the lawsuit. Counsel appeared on his behalf prior to the entry of any default order or any other adverse order. There was no prejudice.

C. Mr. Highberg was not obligated to mail the Summons and Complaint to Mr. Eling's last known place of residence, because Mr. Eling did not reside there.

Mr. Highberg had identified two possible addresses for Mr. Eling. The first was a fraternity house near Gonzaga University. His investigator had determined that Mr. Eling no longer lived at that address. The second address was Mr. Eling's parents' home in Duluth, Minnesota. The Minnesota investigator determined that Mr. Eling did not live at this address and that Mr. Eling's parents would only disclose that their son had supposedly moved to China. Mr. Highberg justifiably believed that Mr. Eling had fled the state of Washington to avoid service, and that his parents were complicit in that action and were covering his whereabouts. This was a reasonable inference based upon what Mr. Highberg knew at the time.

While RCW 4.28.100 requires a recital of the mailing of the copy of the Summons and Complaint to the defendant's place of residence. However, when the plaintiff does not know where the defendant resides, he is not required to mail a copy of the Summons and Complaint to the last known address. Musselman v. Knottingham, 77 Wash. 435, 436, 135 P. 1012 (1914). In Musselman, the plaintiff did not know the place of residence of the defendant. 77 Wash at 436. As a result, no copy of the Summons and Complaint was mailed. Id. Our Supreme Court ruled that

the service by publication was proper and the lack of mailing did not render the service defective. Id.

In the present case, Mr. Highberg did not have a good address for Mr. Eling. Accordingly, he was not required to mail a copy of the Summons and Complaint to either of the addresses that he did have that had been determined by his investigators to not be where Mr. Eling resided.

D. Mr. Eling received actual notice of the lawsuit and all due process considerations have been met.

Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Until notice, actual or constructive, is given to a defendant, the court has no jurisdiction to proceed to judgment. Ware v. Phillips, 77 Wn.2d 879, 882, 468 P.2d 444 (1970).

To serve by publication, a reasonable search is necessary. Meier, 111 Wn.2d at 481; Chase v. Carney, 199 Wash. 99, 103, 90 P.2d 286 (1939). Not all conceivable means need be used, but an honest and reasonable effort should be made to find defendant prior to service by

publication. Schmelling v. Hoffman, 111 Wash. 408, 414, 191 P. 618 (1920).

Due diligence under the statute requires a plaintiff make honest and reasonable efforts to locate the defendant. Not all conceivable means need be employed, but, at the least, the accident report, if made, must be examined and the information therein investigated with reasonable effort. Meier, 111 Wn.2d at 482.

Here, Mr. Highberg exercised due diligence in trying to locate Mr. Eling. In addition, he took the additional step of obtaining court approval prior to serving by publication, which is an additional indicia of the honest and reasonable steps taken by Mr. Highberg to locate Mr. Eling.

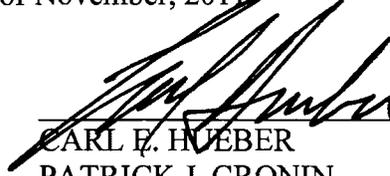
As a direct result of the publication service, Mr. Eling received actual notice of the lawsuit. The due process concerns have been met. The statutory scheme worked.

VI. CONCLUSION

Mr. Marry asks that the dismissal of his case be reversed and that

this case be remanded for his day in court.

DATED this 23rd day of November, 2011



CARL E. HUEBER
PATRICK J. CRONIN
WINSTON & CASHATT,
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Corporation
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on November 23, 2011, I caused the foregoing document to be served on the following counsel in the manner indicated:

Brian S. Sheldon	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
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DATED on November 23, 2011, at Spokane, Washington

Kim Hazel