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CLERK OF COURT  
WASHINGTON STATE COURT OF APPEALS  
DIVISION III

**IN THE WASHINGTON STATE COURT OF APPEALS  
DIV. III**

**No. 302482**

**MATTHEW M. MARRY**

**Appellant,**

**v.**

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

**Respondents.**

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**BRIEF OF RESPONDENT**

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Brian Sheldon, WSBA #32851  
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## I. INTRODUCTION

The statute authorizing service by publication is in derogation of the common law requirement of personal service of process and therefore requires strict compliance with all of the requisites contained within the statute. Plaintiff did not strictly, or even substantially, comply with the requirements of RCW 4.28.100. Instead, Plaintiff's counsel relied on unsupported conjecture and speculation as to the Defendant's whereabouts to conclude that Mr. Eling was attempting to avoid service. Plaintiff further asserts that he should be excused from the requirements of the publication statute because, ultimately, Mr. Eling was advised of the lawsuit against him and, therefore, the method of service was effective.

Plaintiff did not comply with the black letter requirements of the statute. Nor did he conduct an honest and diligent attempt to serve Mr. Eling because he did not pursue information about Mr. Eling's whereabouts that was readily available.

Furthermore, Plaintiff did not avail himself to an alternative means of effecting service on Mr. Eling, under the non-resident motorist statute, which would have been more likely to notify Eling of the lawsuit against him.

Under the facts of this case, the trial court correctly ruled that plaintiff did not strictly comply with the requirements for service by publication.

Therefore, the court lacked personal jurisdiction over Mr. Eling. The case was properly dismissed because plaintiff failed to serve Mr. Eling within the applicable statute of limitations.

## **II. STATEMENT OF THE CASE**

The only facts relevant to this appeal are those relating to the Plaintiff's compliance with RCW 4.28.100 and Plaintiff's efforts to locate and serve Mr. Eling. The record on appeal establishes the following attempts to serve Mr. Eling:

1. R. Craver, a process server with Eastern Washington Attorney Services, attempted to serve Mr. Eling at 509 E. Mission in Spokane, Washington. (CP 15) Craver made one attempt to serve Eling on March 2, 2011. Craver's declaration states that the location was a "frat house" and that "Daniel Eling is unknown." (CP15) The declaration does not identify the person engaged at the address, nor does it describe any additional efforts to locate Mr. Eling through the University or otherwise.

2. Paul Shober, a process server with Advanced Private Investigations made one attempt to serve Mr. Eling at 5719 Lester River Road in Duluth, Minnesota on March 9, 2011. (CP 10) The record does not support that Mr. Eling had ever lived at this address. Rather, Mr Eling's mother lived at that address and she advised the process server that Mr. Eling had been living and

teaching in China for the past year. (CP 10) There is no evidence that the process server attempted to obtain any information about Mr. Eling's location in China; whether Mr. Eling had any forwarding address; or whether Mr. Eling could be contacted by mail, phone or email. Nor was there any attempt to determine whether Mr. Eling was actually in China or when he would be returning.

3. A search was initiated using Accurint/Lexis Nexis search engine and no address was found for Mr. Eling. (CP 7) There is no evidence as to how the search was conducted or what information resulted from the search.

4. The collision report for the accident listed a second address for Mr. Eling at 2922 E. 2<sup>nd</sup> Street in Duluth, Minnesota. (CP 36) Plaintiff's counsel knew of that address at the time that it was attempting service. No attempt was made to serve Mr. Eling at that address.

5. Mr. Eling maintained a Facebook page that indicated he was teaching at the Shane English School in Shanghai, China. (CP 65) The address for the school is 22<sup>nd</sup> Floor, No. 167 Jiangning Road, Shanghai, China. (CP 64) No attempt was made to serve Mr. Eling at his work address.

On April 1, 2011, Plaintiff's counsel submitted a Declaration in Support of Motion Authorizing Service by Publication. (CP 6) The declaration did not state that Mr. Eling's address was unknown. Nor did the

declaration state that a copy of the summons and complaint had been mailed to Mr. Eling's residence. The declaration provided no evidence that Mr. Eling had either left the state with the intent to defraud his creditors or to avoid service of a summons. Rather, the declaration supported only that Mr. Eling had been living and teaching in China for approximately one year before the lawsuit was filed. (CP 7)

The declaration provides no factual evidence to support Plaintiff's conclusion that Eling had left the state in order to avoid service. In fact, the only reasonable inferences that can be drawn from the facts are that Mr. Eling was temporarily residing in Washington while attending school at Gonzaga (as his Spokane address was affiliated with the school, yet his vehicle was registered in Duluth) and that, at some point, Mr. Eling took a teaching job in China (as his mother told the process server). There is no evidence that Mr. Eling was aware of the lawsuit being filed or that he was attempting to avoid service. To the contrary, the facts demonstrate that he left the state long before the lawsuit was filed or service was attempted.

On July 11, 2011, Plaintiff's counsel filed an Affidavit in Support of Plaintiff's Response to Motion to Dismiss. (CP 31) The affidavit states that it was plaintiff counsel's judgment that Mr. Eling had left the state to avoid service of process. (CP 32-33) However, the affidavit provides no factual

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support for this statement. Rather, the affidavit and accompanying exhibits only support that some unknown person at the Spokane “frat house” did not know Mr. Eling and that Mr. Eling, who was 25 years old at the time, did not live with his parents and was, in fact, living and teaching in Shanghai, China.

### III. LEGAL ANALYSIS

1. Plaintiff Did Not Strictly Comply, or Even Substantially Comply, with RCW 4.28.100

Service of process is critical to personal jurisdiction. *Pasqua v. Heil*, 126 Wn. App 520, 108 P3d 1253 (2003). Statutes authorizing service by means other than personal service, i.e., constructive or substituted service, are in derogation of the common law and require strict compliance. *Id.*; *Boes v. Bisiar*, 122 Wn. App. 569, 94 P.3d 975 (2006). Substituted service by publication is permissible when the plaintiff establishes the following facts: (1) that the defendant could not be found in Washington after a diligent search, and (2) that the defendant, being a resident of the state, has departed therefrom with the intent to defraud his creditors, or to avoid service of a summons, or keeps himself concealed within the state with like intent. RCW 4.28.100. Upon sufficient proof of these facts, the plaintiff may then substitute service by publication provided that the plaintiff also mail a copy

of the summons and complaint to the defendant, unless an affidavit is submitted stating that the defendant's address is not known to the plaintiff.

The statute does not authorize alternative service simply because the defendant cannot be found. *Kent v. Lee*, 52 Wn. App. 576, 762 P.2d 24 (1988). The affidavit of due diligence must clearly show that all conditions required under the statute have been met. *Boes, supra*. Because substitute and constructive service are not ideal methods of providing notice to the defendant, an order authorizing such service must not be based on conclusory statements; the authorizing judge must closely scrutinize the facts provided, rather than merely serving as a rubber-stamp, to ensure that substitute or constructive service is being used only as a method of last resort. *Pasqua*, 126 Wn. App. at 528.

A. Plaintiff Did Not Exercise Due Diligence in Attempting to Locate and Serve Mr. Eling.

“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). While reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant, it does require the plaintiff to follow up on any information possessed that might reasonably assist in determining the defendant's whereabouts. *Carson v.*

*Northstar Dev. Co.*, 62 Wn. App. 310, 316, 814 P.2d 217 (1991). An accident report, if made, must be examined and the information therein investigated with reasonable effort. *Martin*, 111 Wn.2d at 482; accord *Parkash v. Perry*, 40 Wn. App. 849, 853, 700 P.2d 1201 (1985) (finding the plaintiff did not conduct a diligent search where he failed to follow up on information in the accident report.); *Painter v. Onley*, 37 Wn.App. 424, 680 P.2d 1006, *review denied*, 102 Wn.2d 1002 (1984) (failure to follow up on information regarding defendant's whereabouts contained in the vehicle accident report is not due diligence). When the plaintiff has information that the defendant was attending college, reasonable diligence includes inquiring with the college about the defendant's location. *Martin*, 111 Wn.2d at 482.

The likelihood of success in following up on information is not determinative; where a reasonable lead exists, it is the act of pursuing the lead, not the ultimate success that evidences due diligence. *Pasqua, supra*. A plaintiff may not claim that a diligent search was conducted where the plaintiff failed to pursue information that, on its face, has a reasonable probability of being fruitful. *Id.*

Here, plaintiff did obtain the police report and did attempt to serve Eling at the Spokane address listed on the report. Plaintiff also had reason to believe that Mr. Eling was a student at Gonzaga. However, plaintiff never

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attempted to contact the university to obtain an alternative or forwarding address. More importantly, plaintiff never attempted service at Mr. Eling's address in Duluth, which was also listed on the police report. Finally, although Plaintiff's counsel had information that Mr. Eling may be living and teaching in China, no effort was made to locate him there. A simple Facebook search would have revealed that Eling was teaching at the Shane English School and an address for the school was also easily obtained by internet search. Plaintiff's counsel did not pursue this avenue because, for unknown reasons, he believed the information to be "suspect." Plaintiff goes as far as stating that Mr. Eling's parents were complicit in covering his whereabouts when, in fact, the information about Mr. Eling living and teaching in China was true. Plaintiff cannot claim that he conducted an honest and reasonable effort to locate Mr. Eling when he failed to act on the information that was available.

B. Plaintiff Had No Factual Basis to Conclude That Mr. Eling Had Fled the State to Avoid Service.

A sufficient affidavit for publication is as essential to obtaining jurisdiction as the publication of the summons itself. *Burns v. Stolze*, 111 Wn. 392, 191 P. 642 (1920). If it does not contain statutorily required statements, it is not sufficient to authorize publication as a means of conferring

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jurisdiction. *Id.* A deficient affidavit is akin to having no affidavit at all. *Kent v. Lee*, 52 Wn. App. 576, 579, 762 P.2d 24 (1988). An affidavit in support of service by publication must provide not only the conclusions of the affiant, but the facts in support of those conclusions. *Bruff v. Main*, 87 Wn. App. 609, 943 P.2d 295 (1997); *Brennan v. Hurt*, 59 Wn. App. 315, 796 P.2d 786 (1990). A bare recitation of the statutory factors required to obtain jurisdiction by substituted service is insufficient. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362, 75 P.3d 1011 (2003), *review denied*, 151 Wn.2d 1020, 91 P.3d 95 (2004).

A mere change of address in the three years between the accident and the attempted service of process is not sufficient to support a conclusion that the defendant left the state with the intent to avoid service. *Pasqua*, 126 Wn. App. at 531. In fact, the fact that a defendant had moved from the state prior to the filing of a lawsuit *negates* any assertion that the defendant left Washington to avoid service. *Kennedy v. Korth*, 35 Wn. App. 622, 624, 668 P.2d 614, *review denied*, 100 Wn.2d 1026 (1983) (the fact that the defendant moved to Germany before suit was filed negates the assertion that he had left Washington to avoid service). Likewise, the lack of a “public recorded persona,” without more, does not raise an inference that a defendant is

attempting to avoid process. *Bruff v. Main*, 87 Wn. App. 609, 613, 943 P.2d 295 (1997).

The evidence here supports only that: (1) Mr. Eling was not known to some unidentified person at the “frat house” when service was attempted more than three years after the accident; (2) Mr. Eling was not at his parents’ home in Duluth; and (3) Mr. Eling had been living and teaching in China for a year prior to the attempted service.

Plaintiff counsel’s original Declaration in Support of the Motion to Authorize Service by Publication provides no attestation that Mr. Eling had left the state to avoid service, yet alone any factual support for such a belief. Recognizing this deficiency, plaintiff’s counsel then submitted an affidavit, in response to defendant’s motion to dismiss, containing a conclusory statement that, in his judgment, Mr. Eling was a resident of the state but had left the state to avoid service of process. But again, he provided no factual information to support that conclusion. Plaintiff’s counsel merely stated, again without factual support, that it was “improbable” that Mr. Eling was residing in China. Thus, the affidavit is merely conjecture based upon speculation. Had plaintiff attempted to follow up on the information provided, he would have learned that Mr. Eling was, in fact, in China. Instead, he chose to ignore the information out of hand.

Plaintiff cites *Martin, supra*, for the proposition that plaintiff is entitled to rely on a good faith belief that the defendant had departed the state. *Opening Brief at pg. 10.* *Martin* is inapposite on this issue. *Martin* involved service by mail under the non-resident motorist statute (RCW 46.64.060), not RCW 4.28.100. As such, the plaintiff did not have the additional burden of proving that the defendant had departed the state with the intent to defraud creditors or avoid service. Additionally, a good faith belief must be based on some factual basis, not on pure speculation as is the case here.

C. Plaintiff did not Comply with the Mailing Requirement of RCW 4.28.100.

RCW 4.28.100 requires that the plaintiff mail a copy of the summons and complaint to the defendant's place of residence, unless it is stated in an affidavit that such residence is not known.

The Declaration in Support of the Motion for Service by Publication does not state that the summons and complaint were mailed to Mr. Eling. Nor does the declaration state that Mr. Eling's address was not known. This procedural error alone is fatal to personal jurisdiction over Mr. Eling under the strict compliance standards of the statute.

Plaintiff's counsel had learned that Mr. Eling was no longer residing at the Spokane address. However, no attempt was made to serve Mr. Eling at

his Duluth address and no attempt was made to mail a copy of the summons and complaint to that address. This is inexplicable in light of the fact that plaintiff's counsel considered Eling's move to China improbable. Plaintiff's brief ignores the fact that he knew of the Duluth address and states, incorrectly, that Mr. Highberg had only identified two possible addresses for Mr. Eling. *Opening Brief at page 13*. Plaintiff's counsel could not attest that Mr. Eling's address was not known because no attempt was made to locate him at known address. Therefore, plaintiff was obligated to mail the summons and complaint to Mr. Eling under the terms of the statute.

Plaintiff cites *Musselman v. Knottingham*, 77 Wn. 435, 135 P. 1012 (1914) for the proposition that mailing a copy of the complaint is not required if the defendant's address is not known. *Musselman* is distinguishable. There, the court had determined that the plaintiff had made a diligent attempt to locate an address for the defendant and none could be found. *Musselman* also submitted an affidavit stating that the defendant's address was unknown. Here, plaintiff ignored a known address at which mail service could have been made on Mr. Eling. Therefore, in candor to the Court, plaintiff's counsel could not attest that Eling's address was unknown.

D. The Fact That Mr. Eling Eventually Learned of the Suit Does Not Subject Him to Personal Jurisdiction.

Plaintiff was required to file and properly serve this action within the applicable statute of limitation and the tolling statute. RCW 4.16.080; RCW 4.16.170. Absent proper service, within the statute of limitations, the court does not obtain personal jurisdiction over the defendant. *Nelson v. Schnautz*, 141 Wn. App. 466, 170 P.3d 69 (2007). Statutes of limitations serve a valuable purpose by promoting certainty and finality and protecting defendants against stale claims. *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 585 P.2d 812 (1978). They further guard against untrustworthy evidence and undue burdens placed on defendants. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998). Thus, contrary to plaintiff's assertions, Mr. Eling would be prejudiced if this action allowed because he will be forced to defend stale and untimely claims.

Plaintiff also argues that due process considerations require only that notice be "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." *Opening Brief at pg. 14*. That certainly is the due process intent of the service statutes. However, the policy considerations do not trump the statutes themselves. If they did, there would

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be no need to comply with the statutory requirements of RCW 4.28.100 or any other service statute. A plaintiff would need only show that the defendant was reasonably apprised of the action even if there had been no service at all. This argument ignores the strict compliance requirements under RCW 4.28.100.

E. Plaintiff's Reliance on the Order Authorizing Service by Publication Cannot Create Personal Jurisdiction over Mr. Eling.

Plaintiff obtained the Order Authorizing Service by Publication on an ex-parte motion. Plaintiff therefore had an obligation to advise the Court that he had complied with all of the statutory requirements necessary for such service and to ensure that his representations were accurate. *In Re Discipline of Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004). Likewise, the Court Commissioner who issued the order, had an obligation to closely scrutinize the facts provided and not to merely rubber-stamp the order. As outlined above, the service by publication was both factually and legally deficient.

Plaintiff cannot be allowed to do, under the shield of a wrongfully obtained order, that which he otherwise could not. Nor can Mr. Eling be subjected to jurisdiction of the Court without proper service.

2. Plaintiff had an Alternative Method for Serving Mr. Eling under the Non-Resident Motorist Statute.

The Non-Resident Motorist statute (RCW 46.64.040) provides that a non-resident who is involved in an accident in the state of Washington will be deemed to have appointed the Secretary of State as his agent for service of process. The statute has been held to include Washington residents involved in automobile accidents who thereafter leave the state. *Carras v. Johnson*, 77 Wn. App. 588, 892 P.2d 780 (1995). The statute does not require that the plaintiff prove that the defendant left the state with the intent to defraud creditors or to avoid service. The statute only requires a showing of due diligence in attempting to locate and serve the defendant within the State.

The Non-Resident Motorist statute is designed to minimize the procedural difficulties in bringing actions involving motor vehicle accidents in the State. *Martin v. Triol*, 121 Wn.2d 135, 147, 847 P.2d 471 (2000).

Therefore, Plaintiff had a readily available means to effect proper service on Mr. Eling that he chose not to use.

#### **IV. CONCLUSION**

The trial court correctly determined that plaintiff did not use due diligence to locate and serve Mr. Eling prior to service by publication. The trial court also correctly determined that plaintiff did not strictly comply with

the requirements of RCW 4.28.100. The decision of the trial court should, therefore, be affirmed.

DATED this 12 day of December, 2011.

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#### CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 12<sup>th</sup> day of December, 2011, a true and correct copy of RESPONDENT'S OPENING BRIEF, to which this declaration is attached, was served by the method indicated below, and addressed to the following:

Erik Highberg	<input checked="" type="checkbox"/>	U.S. Mail
Craig Swapp & Associates	<input type="checkbox"/>	Hand Delivered
16201 East Indiana Avenue, Suite 1900	<input type="checkbox"/>	Overnight Mail
Spokane Valley, Washington 99216-2830	<input type="checkbox"/>	Fax: 252-5038
	<input type="checkbox"/>	Email:
Patrick Cronin	<input checked="" type="checkbox"/>	U.S. Mail
Winston & Cashatt	<input type="checkbox"/>	Hand Delivered
601 West Riverside Avenue, Suite 1900	<input type="checkbox"/>	Overnight Mail
Spokane, Washington 99201	<input type="checkbox"/>	Fax: 838-1416
	<input type="checkbox"/>	Email:

Carl Huber  
Winston & Cashatt  
601 West Riverside Avenue, Suite 1900  
Spokane, Washington 99201

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Fax: 838-1416  
 Email:

DATED: 12/12/11

  
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Shannan Sheldon

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