

38513-9
NO: ~~81549-6~~

SUPREME COURT
OF THE STATE OF WASHINGTON

RUTH JORGENSEN and STANLEY JORGENSEN, wife and husband,

Appellants

v.

KELLY KEBLER and JOHN DOE KEBLER, wife and husband and the
marital community composed thereof.

Respondents

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court correctly held that the affidavit offered by Ruth and Stanley Jorgensen (“the Jorgensens”) to support their decision to use substituted service to obtain *in personam* jurisdiction over the Keblers failed to meet the standard of proof clearly set out by the Washington Court of Appeals. In doing so, the trial court determined that the Jorgensens failed to bring forward admissible evidence in the form of substantiated facts to raise an inference that the Keblers had left Washington state with the intent to avoid service of process or had otherwise concealed themselves for that purpose.

The trial court’s decision correctly applied the standard of proof to the facts offered by the parties. The Jorgensens failed to submit admissible facts at all and, even with the unsubstantiated facts being viewed in the light most favorable to the Jorgensens, there simply was no inference that the Keblers left the State with the requisite intent. As such, the trial court’s decision to grant the *sua sponte* motion for reconsideration and the Keblers’ Motion for Summary Judgment was correct and should not be overruled.

II. ASSIGNMENT OF ERROR

A. Trial Court's Ruling is without Error

The Keblers contend that there is no error on the part of the trial court in its decision to grant the Keblers' Motion for Summary Judgment heard in open court on March 14, 2008 based upon insufficient service of process. The Keblers contend that the trial court correctly applied the standard of proof uniformly adopted by the three divisions of the Court of Appeals and reached a correct conclusion thereby. The trial court's conclusion that there was no *in personam* jurisdiction over the Keblers is in conformity with Washington precedent and statutory authority. The trial court's decision should be upheld by this Court.

B. Statement of the Issues

1. Where the Jorgensens failed to establish evidentiary facts to demonstrate that the Keblers concealed themselves to defraud creditors or avoid service of process, and where the admissible facts presented by the Jorgensens do not raise such an inference, is there any error in a trial court's decision to find that there is insufficient service of process? No.
2. Where the trial court has applied the standard of proof clearly set out by all three divisions of the Court of Appeals and where that standard of proof is clear and easily applied to the facts in

question, is there any error in a trial court's decision that the facts presented by the Jorgensens fail to meet that standard of proof? No.

III. STATEMENT OF THE CASE

A. Procedural History

On April 11, 2007, the Jorgensens filed a Complaint with Kitsap County Superior Court.¹ On June 6, 2007, the Jorgensens filed a Declaration for Service by Publication.² On November 28, 2007, the Kebblers filed a Motion for Summary Judgment.³ On December 14, 2007, in response to the Kebblers' Motion for Summary Judgment, counsel for the Jorgensens filed an Amended Declaration for Service by Publication.⁴ In addition, on the same date, counsel for the Jorgensens filed the Declaration of Due Diligence, Search & Inquiry of process server Ken Palmer.⁵ The Kebblers struck their motion upon the filing of the response by the Jorgensens. After reviewing the Declaration of Ken Palmer, the

¹ CP 1-5.

² CP 6-7.

³ CP 8-18.

⁴ CP 36-40.

⁵ CP 34-35.

Keblers filed a subsequent Motion for Summary Judgment on different grounds, which Motion was heard by the trial court on March 14, 2008.⁶

After hearing oral arguments from both parties, the trial judge orally denied the Keblers' motion.⁷ However, that same day, the judge file a *sua sponte* Motion for Reconsideration, and requested additional briefing from the parties.⁸ On April 2, 2008, the judge reversed his oral decision and granted Respondent Keblers' Motion for Summary Judgment, holding that service by publication was insufficient to provide the court with jurisdiction over the Keblers.⁹ This appeal by the Jorgensens followed.¹⁰

B. Factual History

This case arises out of a minor motor vehicle accident that occurred on July 21, 2004 involving Ruth Jorgensen and Kelly Kebler.¹¹ The Jorgensens filed a Summons and Complaint for Damages on April 11, 2007.¹²

⁶ CP 42-54.

⁷ RP 1-14.

⁸ CP 85.

⁹ CP 126-128.

¹⁰ CP 129-133.

¹¹ CP 1-5.

¹² *Id.*

On June 6, 2007, the Jorgensens filed a Declaration for Service by Publication, executed by the Jorgensens' counsel, Andrew Williams.¹³ The Declaration for Service by Publication stated that “[o]n several occasions, service of process of the original summons and complaint in this action was attempted on defendants KEBLER at the above residence by process server Ken Palmer, without success.”¹⁴ The Declaration stated no other facts or evidence with regard to any further attempts to serve the Kebblers.

According to the Declaration of Service by Publication, a copy of the Summons and Complaint were deposited in the U.S. Post Office in Silverdale, Washington, postage prepaid, return receipt requested, directed to the Kebblers at a Bremerton address.¹⁵ The Declaration concluded that “[u]pon belief, Defendants have concealed themselves within the state and/or have left the state to avoid service of a summons.”¹⁶

On December 7, 2007, process server Ken Palmer prepared and executed a Declaration of Due Diligence, Search & Inquiry outlining his efforts at service.¹⁷ This Declaration provided further details regarding

¹³ CP 6-7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ CP 34-35.

Palmer's efforts to locate the Keblers. The Declaration states that Palmer spoke with an occupant at 647 NE Conifer Drive, Bremerton:

On 4/15/07, the current resident at the Conifer address did not know the defendant but believed she may have been the previous occupant that moved to Montana. They also said mail had been delivered for the defendant but they simply returned it.¹⁸

The Declaration also stated that:

[The defendant's] name, date of birth and SSN were submitted to national credit data base, the reports returned indicated that she was now residing somewhere in the State of Montana.¹⁹

On December 14, 2007, the Jorgensens' counsel filed an Amended Declaration for Service by Publication, outlining the service issues with regard to Kelly Keber.²⁰ The Amended Declaration notes that the Jorgensens employed the services of Ken Palmer in an attempt to effect personal service upon Kelly Keber.²¹ The Jorgensens' counsel states in the Amended Declaration that:

[u]pon belief, Defendants have concealed themselves within the state and/or have left the state to avoid service of a summons, based on the fact that no forwarding address was submitted to the US Post Office, nor was any forwarding information left at her prior residences, and the

¹⁸ CP 34-35.

¹⁹ *Id.*

²⁰ CP 36-40.

²¹ *Id.*

evidence discovered by Ken Palmer indicating that Ms. Kebler is now in Montana.²²

The Amended Declaration provided no other facts or evidence to substantiate the Jorgensens' belief that the Kebblers concealed themselves or left the State to defraud creditors or avoid service.

IV. ARGUMENT

A. The Jorgensens submitted no nonhearsay evidence to support an inference that the Kebblers had left Washington State with the intent to avoid service and, therefore, the trial court's ruling that service was insufficient was correct.

The Kebblers' Motion for Summary Judgment sought a ruling from the trial court that, as a matter of law, process of service pursuant to RCW 4.28.100 was insufficient and that, therefore, the court lacked jurisdiction over the Kebblers.²³ *In personam* jurisdiction over an individual is obtained either by serving that person personally or by the appropriate substitute service, which must be strictly construed by the court.²⁴

The Jorgensens sought to effect substitute service pursuant to RCW 4.28.100, which states, 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

²² *Id.*

²³ CP 42-54.

²⁴ *Lepeska v. Farley*, 67 Wn.App. 551, 833 P.2d 437 (1992).

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 keep himself concealed therein with like intent;²⁵

In examining the evidence pertaining to the Kebblers' Motion for Summary Judgment, the trial court was required to strictly construe RCW 4.28.100, since service by publication requirements are strictly construed.²⁶

In their Motion, the Kebblers alleged that the Jorgensens' affidavit outlining attempts at service was insufficient to grant jurisdiction over the Kebblers because it failed to state facts from which it could be inferred that the Kebblers had left the State with the intent to defraud creditors or avoid process of service.²⁷

²⁵ RCW 4.28.100 (2008).

²⁶ *Kent v. Lee*, 52 Wn.App. 576, 579-80, 762 P.2d 24 (1988).

²⁷ CP 42-54.

In responding to the Kebblers' Motion for Summary Judgment, the Jorgensens failed to produce any evidentiary facts whatsoever to contradict the Kebblers' contention that the Jorgensens failed to strictly comply with RCW 4.28.100(2). As the various Declarations disclose, the only fact offered by the Jorgensens to support substituted service is an unsubstantiated fact that the Kebblers allegedly did not leave a forwarding address with the Postal Service or at a prior residence.²⁸ This single fact is presented through the Declaration of the Jorgensens' counsel, Andrew Williams, wherein he states that "no forwarding address was submitted to the U.S. Post Office, nor was any forwarding information left at her prior residences . . ."²⁹ Mr. Williams, however, had no personal knowledge of these facts, and the Jorgensens submitted no affidavits from the U.S. Postal Service or from individuals living in the Kebblers' prior residences to provide admissible evidence of such a contention. Therefore, the only submission by the Jorgensens for the trial court's consideration was a fact supported only with a hearsay statement by counsel with no personal knowledge of the fact.

The Declaration of the process server Ken Palmer offers no admissible evidence either, but simply states that "Postal tracers were sent

²⁸ CP 6-7; CP 34-35; and CP 36-40.

²⁹ CP 36-40.

to both the Poindexter & Conifer Dr. addresses and both returned with 'Mail delivered as addressed.'"³⁰ This statement does not provide admissible evidence from the U.S. Postal Service that, in fact, the Kebblers did not leave a forwarding address.

In fact, it is entirely possible that the Kebblers did leave a forwarding address and that the period of time for forwarding mail had simply expired (mail is typically only forwarded for a period of less than a year). The accident that resulted in the Jorgensens' civil action occurred nearly three years earlier, and there had been less than \$1,000 in damage to both vehicles combined – nothing that would alert an individual that a civil action would likely be contemplated. Nothing about the accident would give the Kebblers reason to have anticipated being served three years later and that the Kebblers then, in anticipation of such an event, would relocate to avoid service on that basis. This is the inference that the Jorgensens asked the trial court to adopt.

Accordingly, the Jorgensens failed to offer anything more to the trial court than hearsay statements from their attorney and the process server regarding the alleged failure to leave a forwarding address. The Jorgensens had the burden, in responding to the Motion for Summary

³⁰ CP 34-35.

Judgment, to bring forward admissible evidentiary facts to refute the Motion. With regard to dispositive motions, the nonmoving party:

May not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to material fact. Issues of material fact cannot be raised by merely claiming contrary facts.³¹

The Jorgensens note that, in considering a dispositive motion, the trial court must construe all facts in favor of the nonmoving party. However, those facts must first and foremost be evidentiary facts, admissible at trial. A trial court should not consider unsubstantiated hearsay statements as sufficient to rebut a Motion for Summary Judgment, and this trial court judge did not. The issue of construing facts in favor of the nonmoving party is moot where the nonmoving party simply fails to offer any evidentiary facts at all.

Even if the facts submitted by the Jorgensens had been substantiated, these facts would still have been insufficient to meet the requirements of RCW 4.28.100(2). The requirements of RCW 4.28.100 are twofold: (1) following reasonably diligent efforts to personally serve the defendant by exhausting all information readily available, the

³¹ *Meyer v. UW*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)(citations omitted).

defendant cannot be found in the state; and (2) facts must be provided supporting an inference that the defendant concealed himself or herself within the State or left the State with the intent to avoid the service of a summons.³² The Jorgensens offered only one fact to support their contention that the Keblers were avoiding service: the fact that they apparently did not leave a forwarding address. Even assuming this fact is evidentiary rather than hearsay, this single fact falls far short of establishing that the Keblers were deliberately concealing themselves to defraud creditors and avoid service.

It is well established that a person's lack of public recorded persona does not, without more, raise an inference that he or she is attempting to defraud creditors or avoid process.³³ Furthermore, as noted above, the Jorgensens had not established whether the period within which the U.S. Postal Service forwards mail was still in effect. It is entirely possible, in fact likely, that the mail was not being forwarded simply because the period for forwarding the mail had expired.³⁴ The Amended Declaration does not show any attempt to contact the post office to find

³² *Rodriguez v. James-Jackson*, 127 Wn.App. 139, 141, 111 P.3d 271 (2005).

³³ *Bruff v. Main*, 87 Wn.App. 609, 613, 943 P.2d 295 (1997).

³⁴ *Id.* at 142 (postal delivery limited to one year).

out if it still may have had a forwarding address even if the year-long forwarding time had expired.

There is no indication that the Jorgensens attempted to locate the Keblers through previous employer or through the insurance agent or company listed on the police report. These were the type of steps that the Court of Appeals in *Rodriguez v. James-Jackson*, 127 Wn.App. 139, 111 P.3d 271 (2005) expected to see with regard to substitute service pursuant to RCW 4.28.100(2).³⁵ The Court of Appeals concluded that there were “no direct or circumstantial evidence, or any reasonable inference that James-Jackson left the state with the intent to defraud or hide from any action filed by Rodriguez.”³⁶ The same is true in the instant case. There is nothing in the record to show that the Keblers were trying to conceal themselves to avoid service of process as opposed to simply being ignorant of the existence of the suit.

Other cases concerning RCW 4.28.100(2) shed light on facts that would be sufficient to establish that a defendant has attempted to conceal himself to defraud creditors and avoid service, and which facts are insufficient. In *Bruff v. Main*, 87 Wn.App. 609, 943 P.2d 295 (1997), the

³⁵ *Rodriguez v. James-Jackson*, 127 Wn.App. 139, 111 P.3d 271 (2005).

³⁶ *Id.* at 146.

parties were also involved in an automobile accident.³⁷ The defendant in *Bruff* had apparently provided a false address to the police, and had a documented history of credit problems.³⁸ Even with these fairly strong facts, the court held that these facts were insufficient to support a reasonable inference that the defendant was concealing himself with the intent to defraud creditors or avoid process.³⁹

In *Brown v. ProWest Transport Ltd.*, 76 Wn.App. 412, 421, 886 P.2d 223 (1994), the defendants, who had been involved in a traffic accident with the plaintiff, failed to stop at the scene of the accident, provide information, or file an accident report.⁴⁰ The defendants also refused to provide information to the investigating officers and refused to cooperate with the Washington State Patrol.⁴¹ In addition, the defendants refused to respond to plaintiff's counsel's inquiries.⁴² Plaintiff's counsel could not serve the defendants before the statute of limitations had run because he did not have any addresses.⁴³ In *Brown*, the court held that the

³⁷ *Bruff v. Main*, 87 Wn.App. 609, 943 P.2d 295 (1997).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Brown v. ProWest Transport Ltd.*, 76 Wn.App. 412, 421, 886 P.2d 223 (1994).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

facts were sufficient to support the inference that the defendants had concealed themselves.⁴⁴

In *Pascua v. Heil*, 126 Wn.App. 520, 108 P.3d 1253 (2005), the parties were involved in a car accident.⁴⁵ Nearly three years later, the plaintiff attempted to locate the defendant for service.⁴⁶ The defendant challenged the sufficiency of service by publication and the plaintiff's assertion that the defendant had concealed himself.⁴⁷ The court noted:

In addition, we briefly note that Pascua also failed to establish a reasonable belief that Crystal had concealed herself or departed the state with the intent to avoid service of process. Relying on the amended affidavit, the trial court found that the following facts suggested that [the defendant] was attempting to avoid service: she had changed her residence and phone number, she did not provide a forwarding telephone number or address, she did not obtain a listed phone number, and she did not inform Pascua or his attorney of her change of address. But nothing in the court's findings suggests that [the defendant] was aware of Pascua's suit or his attempts to serve her. That [the defendant] had changed addresses and phone numbers in the three years between the accident and the attempted service of process does no more than suggest that [the defendant] is within the norm of Washington residents. As to the lack of a listed phone number, an individual is not required to have a listed phone number, and a person's lack of a "public recorded persona," without more, does not raise an inference that he or she is attempting to defraud creditors or avoid process. Finally, there is no support for

⁴⁴ *Id.*

⁴⁵ *Pascua v. Heil*, 126 Wn.App. 520, 108 P.3d 1253 (2005).

⁴⁶ *Id.*

⁴⁷ *Id.* at 525.

the trial court's implied finding that [the defendant] had an affirmative duty to report to Pascua or his attorney. Far from an obligation to assist service of process, this court has held that a defendant's only duty is to accept service when validly tendered and not to evade service. In sum, the order authorizing service by mail and publication was invalid and service of process on [the defendant] was not effective.⁴⁸

The defendant in *Pascua* had not left a forwarding address, just as the Jorgensens allege regarding the Keblers in this civil action. However, this fact, even when combined with a number of other key facts, was not sufficient to establish that the defendant had been concealing herself and avoiding service, according to the Washington Court of Appeals, Division Two.

A review of the facts outlined in the concealment with intent cases make it abundantly clear that, where the only fact offered is that the defendant allegedly failed to leave a forwarding address three years after the incident, the evidence is insufficient to meet the burden required of the plaintiff under RCW 4.28.100(2). Thus, even if the Jorgensens had submitted substantiation for this fact, and even if this fact is construed most favorably to the Jorgensens, it would not be sufficient to meet the standard established by Washington case law with regard to substituted service under RCW 4.28.100(2).

⁴⁸ *Id.* at 531-532 (citations omitted).

B. The Divisions of the Court of Appeals uniformly apply a single standard of proof with regard to RCW 4.28.100, and that standard simply requires facts that raise an inference as to the defendant's intent to conceal.

The Jorgensens' contention that there is disparity between the Divisions of the Court of Appeals as to the standard of proof for RCW 4.28.100 and that the standard requires proof of a subjective intent is not accurate. In fact, the Courts of Appeals substantially concur on the standard applicable to RCW 4.28.100(2), and that standard is clearly set out in the case law and was applied by the trial court in this instance.

The Court of Appeals in all three divisions is uniform in applying the standard outlined in *Bruff v. Main*, 87 Wn.App. 609, 943 P.2d 295 (Div. 1, 1997). *Bruff* was decided by Division 1 of the Court of Appeals in 1997 and set the standard for what a plaintiff needs to establish to effect *in personam* jurisdiction over a defendant that cannot be personally served. Division I set out the standard to be applied, as follows:

In order to perfect service by publication, the Bruffs' [sic] were required to set forth facts supporting a conclusion that Main had left the state or was concealing himself with intent to defraud creditors or avoid service of process. A bare recitation of the statutory factors required to obtain jurisdiction is insufficient.⁴⁹

The *Bruff* court further stated that the facts provided by the plaintiff must raise an inference that the defendant is attempting to defraud

⁴⁹ *Bruff v. Main*, 87 Wn.App. 609, 612, 943 P.2d 295 (1997) (citations omitted).

creditors or avoid process.⁵⁰ This standard has been uniformly applied by the divisions of the Courts of Appeals since the *Bruff* decision was issued. Division II considered this same standard of proof in *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn.App. 358, 75 P.3d 1011 (Div. II, 2004). In setting out the standard, the court cited directly to *Bruff*:

One claiming jurisdiction under [RCW 4.28.100(2)] has the burden of showing proper service by publication. He cannot meet this burden merely by reciting the relevant statutory factors in conclusory fashion; rather, he must produce “facts which support the conclusions required by the statute.” [Citation to *Bruff*, 87 Wn.App. 609 at 612, 943 P.2d 295]. Such facts must show (1) that his efforts to personally serve the defendant were reasonably diligent, and (2) that the defendant either (a) left the state with intent to defraud creditors or avoid service, or (b) concealed himself within the state with intent to defraud creditors or to avoid service. [Citation to *Bruff*, 87 Wn.App. 609 at 612, 943 P.2d 295].⁵¹

In 2005, Division II again considered the issue of the standard of proof necessary to satisfy RCW 4.28.100(2).⁵² The *Pascua* court stated that the facts provided by the plaintiff in that case did not “raise an inference that he or she is attempting to defraud creditors or avoid

⁵⁰ *Id.* at 613.

⁵¹ *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn.App. 358, 362, 75 P.3d 1011 (Div. II, 2004) (citations omitted).

⁵² *Pascua v. Heil*, 126 Wn.App. 520, 108 P.3d 1253 (Div. II, 2005).

process.”⁵³ The *Pascua* court cited the standard specifically as stated in the *Bruff* decision.

In *Boes v. Bisiar*, 122 Wn.App. 569, 94 P.3d 975 (Div. III, 2004), Division III considered the appropriate standard of proof with regard to RCW 4.28.100(2).⁵⁴ The Jorgensens allege that the *Boes* court deviated from the *Bruff* standard of proof; however, that is not the case. In fact, the *Boes* court clarifies that the *Bruff* standard of proof requires the plaintiff to clearly articulate facts to meet the required conditions, and need not clearly prove intent to avoid service.⁵⁵ The *Boes* court noted that, indeed, without a fact-finding hearing, it would be impossible to determine intent – that is not the standard required.⁵⁶ Instead, the *Boes* court adopted the *Bruff* standard of proof requiring facts that *infer* the defendant’s intent, rather than prove that intent.⁵⁷ In further discussing the *Bruff* decision, the *Boes* court stated:

The court in *Bruff* ultimately held that the affidavits were insufficient because they included only “conclusory allegations.” The affidavits there failed to set out the steps taken to personally serve the defendant. And they made the “bare allegation” – without factual support – that the defendant had “a history of credit problems.” They then

⁵³ *Id.* at 531-32 (emphasis added).

⁵⁴ *Boes v. Bisiar*, 122 Wn.App. 569, 94 P.3d 975 (Div. III, 2004).

⁵⁵ *Id.* at 577.

⁵⁶ *Id.*

⁵⁷ *Id.*

used this allegation to justify publication. Other affidavits filed in the case merely stated conclusions such as that the defendant was not employed, had an unlisted telephone number, and never lived at the address listed in the police report which the plaintiff had. But the plaintiff did not state how the affiant came about this information. The court then concluded that the showing was insufficient. And, the court held, the mere fact that the defendant's "lack of a 'public recorded persona,' *without more*" does not raise "an inference that he or she is attempting to defraud creditors or avoid process." (emphasis added). There is nothing new in the analysis or standard set out in *Bruff*.⁵⁸

The *Boes* court did not reject the *Bruff* standard of proof, but ultimately found that the facts before the court were distinguishable from those outlined in *Bruff*:

Mr. Bisiar argues that the court in *Bruff* sets a more vigorous legal standard for proof of intent – that plaintiff set forth facts "clearly suggesting" intent to evade service. But that quoted language relates to what facts were present or not present in the *Bruff* case. *Bruff* does not set a new legal standard. Rather, the court summarized in its conclusion, "[i]n sum, the Bruffs' affidavits contained no facts clearly suggesting that Main's change of residence, or any other conduct, was undertaken with the intent required by RCW 4.28.100(2). RCW 4.28.100(2) does not authorize service by publication merely because the Bruffs were unable to locate Main, despite diligent efforts."⁵⁹

The *Boes* court then said that "[t]he facts here are distinguishable."⁶⁰ The *Boes* court applied the standard of proof set out in

⁵⁸ *Id.* at 578 (citations omitted).

⁵⁹ *Id.*

⁶⁰ *Id.*

Bruff, and concluded that, in the case before it, the plaintiff had provided facts sufficient to infer that the defendant had the intent to avoid service.⁶¹ Clearly, there is no conflict between any of the Divisions of the Courts of Appeals as to the standard of proof applicable under RCW 4.28.100(2). Furthermore, the standard is easy to apply in that it simply requires facts that infer an intent, not the proof of the intent itself.

C. The Washington State Legislature has mandated the standard to be applied with regard to RCW 4.28.100(2) to ensure a sufficient finding to justify achievement of *in personam* jurisdiction without personal service upon an individual.

The Jorgensens argue that RCW 4.28.100 imposed too difficult a burden on a plaintiff seeking a form of substitute service because the statutory requirements differ from that of RCW 46.64.040, another form of substituted service. The Jorgensens offer no explanation as to why they did not choose to comply with RCW 46.64.040, in light of the fact that they feel the burden is less onerous.

The Jorgensens ask the Supreme Court to make a determination as to how much weight a trial court should give to the requirement that a plaintiff provide facts to infer the defendant's intent to avoid service. RCW 4.64.040 and RCW 4.28.100(2) are both forms of substituted service of process established by the Legislature in derogation of the common

⁶¹ *Id.*

law, and both require strict compliance to establish jurisdiction over defendants. Furthermore, both statutes have been found to be constitutional and to satisfy the requirements of due process, as the Jorgensens concede in their Statement of Grounds. Other than the fact that both statutes serve as substitute service of process, there is no requirement that any factors in one statute mirror the requirements of the other, as the Jorgensens suggest.

The Legislature has the power and inherent authority to generate legislation concerning substitute service. The courts have authority to interpret that legislation, but only as drafted by the Legislature. It is not the function or prerogative of the courts to second guess and substitute their judgment for the judgment of legislators in matters of legislation.⁶² A fundamental principle of the American constitutional system is that governmental powers are divided among three separate and independent branches – legislative, executive, and judicial.⁶³ Although the Washington state constitution does not contain a formal separation-of-powers clause, nonetheless, separation of powers is a vital doctrine, presumed throughout Washington state history from the division of the state government into

⁶² *Fritz v. Gorton*, 83 Wn.2d 275, 917, 517 P.2d 911 (1974).

⁶³ *State v. Osloond*, 60 Wn.App. 584, 587, 805 P.2d 263, *review denied*, 116 Wn.2d 1030, 813 P.2d 582 (1991).

three separate branches.⁶⁴ The separation-of-powers doctrine serves mainly to ensure that fundamental functions of each branch of government remain inviolate.⁶⁵

According to the Legislature, RCW 46.64.040 is based upon the acceptance of the rights and privileges conferred by law in the use of the state's public highways, as evidenced by operating a vehicle on the highways, which is deemed equivalent to appointment by the defendant of the secretary of state to accept service.⁶⁶ The United States Supreme Court has held that while the act of a nonresident in using the highways of another state may properly be declared to be an agreement to accept service of process on a state office such as the secretary of state in a suit arising out of an automobile accident while the nonresident is using the highway, due process requires either the state officer or the plaintiff to mail notice to the defendant or advise him, by some written communication, in a way so as to make it reasonably probable that the defendant will receive actual notice.⁶⁷ As the United States Supreme Court has held, due process is satisfied as long as notice reasonably calculated under all the circumstances to apprise interested parties of the

⁶⁴ *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994).

⁶⁵ *Id.* at 135.

⁶⁶ *Martin v. Meier*, 11 Wn.2d 471, 476, 760 P.2d 925 (1988).

⁶⁷ *Wuchter v. Pizzutti*, 276 U.S. 13, 19, 48 S.Ct. 259, 260-61, 72 L.Ed. 446 (1928).

pendency of the action and afford them an opportunity to present their objections is provided.⁶⁸ The Washington Court of Appeals has determined that both RCW 46.64.040 and RCW 4.28.100(2) meet that standard. Therefore, the issue of what weight should be given to a single factor within the statute is not relevant to whether due process has been satisfied.

D. The Jorgensens have provided no basis for an award of fees and costs and, in fact, there is no basis to award fees and costs to the Jorgensens.

The Jorgesens request an award of fees and costs “pursuant to RAP 18.1”, should this Court rule in favor of them. However, the Jorgensens fail to elaborate a basis for such an award. RAP 18.1 states that “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule . . .”⁶⁹ However, there is no basis under the applicable law for the Jorgensens to receive an award of fees and costs in this instance. This is evidenced by the fact that the Jorgensens cannot identify a basis for an award of fees or costs. Their request, therefore, should be denied.

⁶⁸ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

⁶⁹ RAP 18.1(a) (emphasis added).

V. CONCLUSION

The Jorgensens decided to rely upon a form of substitute service of process to effect *in personam* jurisdiction on the Kebblers rather than to pursue personal service in Montana, where they knew the Kebblers had relocated. The Kebblers challenged the sufficiency of the efforts made by the Jorgensens, pursuant to the requirements set out in RCW 4.28.100(2), which must be strictly construed. In response to the Kebblers' challenge to the sufficiency of process, the Jorgensens offered nothing more than hearsay statements that the Kebblers had failed to provide a forwarding address to allow for contact three years after a minor accident occurred. Even taking those hearsay statements at face value and construing them in the light most favorable to the Jorgensens, the trial court determined that the facts presented by the Jorgensens were not sufficient to establish an inference that the Kebblers were attempting to conceal themselves and had left the State to defraud creditors or avoid process of service. As such, the trial court determined that the court did not have *in personam* jurisdiction over the Kebblers and that, therefore, the Kebblers' Motion for Summary Judgment should be granted.

The trial court considered the facts in light of the statutory requirements, which must be strictly construed. The trial court correctly applied the standard of proof applied uniformly by the Divisions of the

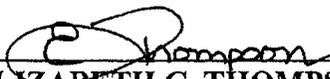
Court of Appeals and determined that the Jorgensens simply had failed to produce evidentiary facts to infer that the Kebblers had left the State to avoid process of service. The trial court's decision was not erroneous. The trial court's finding that the fact that a defendant failed to leave a forwarding address is in conformance with the precedent set by prior Washington State cases is correct and without error.

In light of the record and in light of Washington State case law, the trial court's decision should be upheld by this Court.

RESPECTFULLY SUBMITTED this 13th day of August, 2008.

GIERKE, CURWEN, DYNAN & JONES, P.S.

Attorneys for Respondents Kelly Kebler and John Doe
Kebler, wife and husband and the marital community
composed thereof

By: 
ELIZABETH C. THOMPSON, WSBA #32222

CERTIFICATE OF SERVICE

On this day, the undersigned served a copy of this document via
ABC Legal Messenger Service, Inc. to Appellants' attorney of record:

J. Michael Koch
Lori McCurdy
J. Michael Koch & Associates, P.S., Inc.
10049 Kitsap Mall Boulevard, Suite 201
Silverdale, WA 98383

I certify under penalty of perjury under the Laws of the State of
Washington that the foregoing is true and correct.

Dated at Tacoma, Washington this 13th day of August, 2008.

SIGNED: 
Francine Manibusan

SUPREME COUR TOF THE STATE OF WASHINGTON
RUTH JORGENSEN, ET VIR.,

Plaintiff/Petitioner

vs

No. 81549-6

KELLY KEBLER, ET VIR.,

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

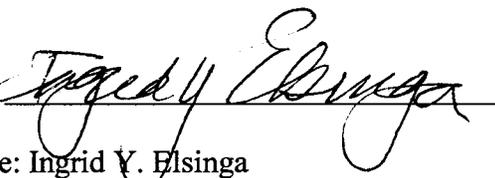
Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 33 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 9/2/08 at Olympia, Washington.

Signature: 

Print Name: Ingrid Y. Elsinga