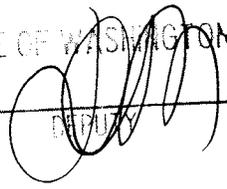


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 40039-1-H

BY 
COUNSEL

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Brandon Byrne, Respondent

v.

Kylie Decker, Petitioner

PETTITION FOR REVIEW
REPLY BRIEF OF PETITIONER

Submitted by: Glen K. Ferguson, WSBA #20401
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ORIGINAL

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I. Revisions to RCW 46.64.040 are Irrelevant to this Action

Plaintiff Byrne's response brief states that, "...[P]etitioner'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." (Brief of Respondents at page 6, paragraph 2, lines 4 - 6)

The current version of RCW 46.64.040, states, in full:

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. **Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents.** Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident: PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said

defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

RCW 46.64.040 (Emphasis added)

Plaintiff Byrne fails to cite any changes to the statute that would alter the requirement that a plaintiff must make a due and diligent search for a defendant prior to resorting to the provisions of the statute. In fact, plaintiff Byrne concedes the point by stating, "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 defendants could not be found in the State after a due and diligent search."

(Brief of Respondents at page 9, paragraph 1. Emphasis added)

II. Standard of Review

Since there are no disputed issues of material fact in this matter, the standard of review is de novo. *Brown v. Vail*, 169 Wn.2d 318, ___ P. 3d ___ (2010)

III. The Court Should Reverse and Dismiss

Defendant Kylie Maasen requests that this court reverse the denial of her summary judgment motion. RAP 12.2

There being no effective service of process upon defendant, and the statute of limitations having passed, the trial court has no jurisdiction over the person of defendant Maasen, and plaintiff's lawsuit against her should be dismissed.

IV. Conclusion

There are no material issues of fact in this matter, so the only questions before this Court are matters of law.

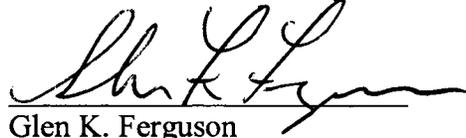
It is agreed that plaintiff's investigator went to the last known address of defendant Kylie Maasen and, finding no one home, left a business card, and then did no further follow up at that address of any kind. Plaintiff cites other efforts to locate defendant at other addresses. However, it was the failure to follow up on a good lead, defendant's last known address, or even determine who lived there that constituted a lack of due diligence in trying to locate and serve defendant in this matter.

The trial court's decision was obvious error that, if left in place, will result in a useless trial because the statute of limitations has run. RAP 2.3(b)(1)

Accordingly, the trial court having no jurisdiction over the person of defendant, the interests of judgment require that the trial court's decision be reversed as a matter of law, and plaintiff's lawsuit against defendant Maasen be dismissed.

October 7, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glen K. Ferguson", written over a horizontal line.

Glen K. Ferguson
Attorney for Appellant
WSBA #20401