

JAN 10 2012



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 REPLY BRIEF

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This brief is in reply to the Brief of Respondent. There, Mr. Eling sets forth a number of things that Mr. Highberg might have done to effectuate service. While setting forth a hypothetical and theoretical reality can be interesting¹, using it as the foundation for the present legal argument is fatally flawed.

This Court is being asked to determine whether Mr. Highberg's actions in thoroughly investigating all leads in the police report, conducting internet research, hiring investigators in two states, and obtaining a non-required judicial order authorizing service by publication was reasonable. Washington law is clear that this determination is to be made based on what was done – not by what was not done in a hypothetical universe. Mr. Eling's argument is built on a faulty premise.

A. The proper focus is on what actions were taken rather than what was not done.

Mr. Marry was required to exercise due diligence in attempting to obtain personal service as a prerequisite to service by publication. Due diligence does not mean all conceivable means. It only requires an honest

¹ One additional hypothetical may be the possibility that a drunk college student had not gotten into his car and slammed into Mr. Marry. Another hypothetical is that the parties could have exchanged more complete information at the scene had Mr. Eling not been arrested for DUI. (CP 36)

and reasonable effort. Martin v. Meier, 111 Wn.2d 471, 481, 760 P.2d 925 (1988).

Washington courts have set forth four considerations to be examined when making this due diligence determination. Carras v. Johnson, 77 Wn.App. 588, 748, 892 P.2d 780 (1995). The first of these considerations is that the court must focus on what the plaintiff did, not what the plaintiff failed to do. Martin v. Triol, 121 Wn.2d 135, 150, 847 P.2d 471 (1993); Meier, 111 Wn.2d at 481.

Mr. Eling has asked this Court to focus on actions that Mr. Highberg might have taken. These arguments have no bearing on the dispositive issue of whether Mr. Highberg's actions were honest and reasonable.

Mr. Eling has asked this Court to speculate whether several actions "would have been more likely to notify Eling of the lawsuit against him." (Respondent's Brief, p. 1) This argument ignores the fact that Mr. Highberg's actions actually provided Mr. Eling with notice of the present lawsuit. Mr. Eling is here and represented by counsel.

Mr. Eling asserts that Mr. Highberg should have contacted Gonzaga University to obtain an address. (Respondent's Brief, pp. 7-8) In addition to this inquiry being outside the parameters of the Court's proper consideration, it also relies on several misplaced assumptions.

The police report indicates that Mr. Eling's current address on the date of the collision was 509 E. Mission, Spokane, WA 99207. (CP 36) At that time, he was a student attending Gonzaga University. Assumedly, Gonzaga had that same address.

The disclosure of any student information by Gonzaga University is governed by FERPA.² A student's address is "directory information" that may be disclosed only after the school has advised the parents and student about "directory information" and allowed the parents and student a reasonable amount of time to request that the school not disclose the directory information about them. 20 USC §1232G(5)(A).

The assertion that Mr. Highberg could have merely called Gonzaga University and asked for the release of Mr. Eling's current address is pure folly. The best case scenario is that the 509 E. Mission address would have been disclosed.

Mr. Eling also argues that Mr. Highberg should have followed up with the registered owner address set forth on the police report. (Respondent's Brief, pp. 3,8) This argument misstates the available information set forth on the police report.

² The Family Educational and Privacy Rights Act as set forth in 20 USC §1232G.

The police report (cover page attached as Addendum "A" to this brief) identifies Mr. Eling's current address as 509 E. Mission, Spokane, WA 99207. (CP 36) It also identifies the registered owner of the vehicle as Daniel J. Eling. The vehicle registration shows an address for Mr. Eling as 2922 E. 2nd St., Duluth, MN 55812. (CP 36) Assumedly, this was Mr. Eling's address prior to moving his residence to 509 E. Mission to attend Gonzaga University.

After learning that Mr. Eling was no longer residing at 509 E. Mission, Mr. Highberg conducted internet research to try to locate Mr. Eling's whereabouts. (CP 32) He learned that Mr. Eling was from Duluth, Minnesota and that Mr. Eling's parents resided at 5719 Lester River Road in Duluth, MN. (CP 32) At that point, Mr. Highberg retained the services of the Minnesota investigator in an attempt to locate Mr. Eling. (CP 32) Mr. Eling's parents told the investigator that Mr. Eling had moved to China. (CP 32)

In his current brief, Mr. Eling claims to have moved to China to teach at the Shane English School there. (Respondent's Brief, p. 8) Assuming this to be true, Mr. Eling did not reside at the registered owner address set forth on the police report. Sending a letter to that address would have been a useless and futile act.

Mr. Eling poses several additional possible actions including the use of the Non-Resident Motorist statute to serve him. (Respondent's Brief, p. 15) There are more examples of the Court being asked to look at what was not done, rather than what actually happened.

Engaging in a series of "what ifs" and the litany of related assumptions to determine whether reasonable efforts were taken highlights the reasons underlying the holdings that the Court should only consider what was done, not what might have been done.

B. Mr. Highberg's conclusions were based on established facts.

In his brief, Mr. Eling asserts that Mr. Highberg's conclusions that Mr. Eling left the state to avoid service is not factually supported. (Respondent's Brief, p. 4) This assertion is without merit.

The record establishes that at the time of this collision, that Mr. Eling was attending Gonzaga University and had a current address of 509 E. Mission Avenue. (CP 36) Mr. Highberg hired an investigator that determined Mr. Eling no longer lived at that address. (CP 32, 39)

The police report referenced a prior address for Mr. Eling in Duluth, Minnesota. (CP 36) Internet research did not find Mr. Eling. However, it did locate Mr. Eling's parents, who were then residing in Duluth, Minnesota. (CP 32) Mr. Highberg hired a Duluth investigator who attempted to locate and serve Mr. Eling at his parents' residence in

Duluth. (CP 32,41) Mr. Eling's mother claimed her son had moved to China and failed to provide any contact information for him. (CP 32,41)

Based upon this information, Mr. Highberg reasonably concluded that Mr. Eling had left Washington State to avoid service. (CP 33) These same facts and conclusions were presented to the Spokane County Superior Court that authorized service by publication. (CP 14,43)

C. Mr. Eling has conceded that there was no prejudice.

The fourth consideration is whether there has been any prejudice to the defendant. Carras, 77 Wn.App. at 593; Meier, 111 Wn.2d at 483. Mr. Marry asserted in his Opening Brief that "there was absolutely no prejudice to Mr. Eling." (Opening Brief, p. 12)

Mr. Eling has conceded the lack of prejudice. No prejudice can be shown. The record is clear that the service by publication resulted in Mr. Eling getting actual notice of the lawsuit. His counsel timely appeared prior to a default being taken or the entry of an adverse order. In this case, service by publication worked. There can be no prejudice.

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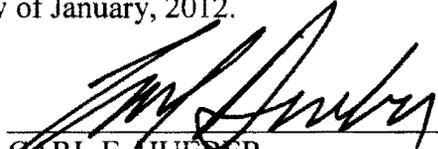
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CONCLUSION

Mr. Highberg's actions were an honest and reasonable attempt to personally serve Mr. Eling. The dismissal of Mr. Marry's case should be reversed and the matter remanded for trial.

DATED this 10th day of January, 2012.



CARL E. HUEBER
PATRICK J. CRONIN
WINSTON & CASHATT, LAWYERS,
a Professional Service 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 January 10, 2012, 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"/>
Phillabaum, Ledlin, Matthews & Sheldon	VIA CERTIFIED MAIL	<input type="checkbox"/>
421 West Riverside, Suite 900	HAND DELIVERED	<input type="checkbox"/>
Spokane, WA 99201-0413	BY FACSIMILE	<input type="checkbox"/>
	VIA FEDERAL EXPRESS	<input type="checkbox"/>

Attorney for Respondents

Erik E. Highberg	VIA REGULAR MAIL	<input checked="" type="checkbox"/>
Gregory & Swapp, PLLC	VIA CERTIFIED MAIL	<input type="checkbox"/>
16201 E. Indiana, Suite 1900	HAND DELIVERED	<input type="checkbox"/>
Spokane Valley, WA 99216	BY FACSIMILE	<input type="checkbox"/>
	VIA FEDERAL EXPRESS	<input type="checkbox"/>

Attorney for Appellant

DATED on January 10, 2012, at Spokane, Washington

Cheryl Hansen

Addendum A



STATE OF WASHINGTON POLICE TRAFFIC COLLISION REPORT



REPORT # 2924378 *ATA*

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INTERSTATE CITY STREET FIRE RESULTED
 STATE ROUTE OTHER STOLEN VEHICLE
 COUNTY RD PRIVATE WAY HTY & PUM INVOLVED

CASE # 08-53113

LOCAL AGENCY CODING

TOTAL # OF UNITS 02 OBJECT STRUCK

DATE OF COLLISION: 02-24-2008 TIME (2400) 0131 COUNTY # 32 MILES CITY # 1220
 N E IN S W OF

ON (PRIMARY TRAFFIC WAY) INTERSECTION NON-INTERSECTION
 DIVISION BLOCK NO. MILE POST

DISTANCE OF (REFERENCE OR CROSS STREET) MISSION
 MILES N E FEET S W

UNIT 01 MOTOR VEHICLE PEDAL CYCLE DAMAGE THRESHOLD MET PHONE 509-863-5963

LAST NAME ELINGH FIRST NAME DANIEL MIDDLE INITIAL J

STREET NEW ADDRESS 509 E MISSION

CITY SPOKANE ST WA ZIP 99207

CDL ENDORSEMENTS RESTRICTIONS

DRIVER'S LICENSE # D014027616105 STATE MN SEX M D.O.B. 03-22-1986

ON DUTY STATUS AIRBAG 2 RESTR. 4 EJECT 1 HELMET USE INJURY CLASS 1 NATURE OF INJURIES

LICENSE PLATE # PND902 STATE MN VIN# 1HGES15525L026245

TRAILER PLATE # STATE TRAILER PLATE # STATE

VEH. NO. 2005 MAKE HONDA MODEL CIV STYLE 4D VEHICLE TOWED YES NO TOWED BY AT TOWAGE GOVT. VEHICLE YES NO

REGISTERED OWNER INFO ELINGH DANIEL J 292 E 2ND ST, SPOKANE, WA 99201

LIABILITY INSURANCE IN EFFECT YES NO CITATION # B69120 / U087687 CHARGE 902 - FAIL TO STOP RED LIGHT

UNIT 02 MOTOR VEHICLE PEDAL CYCLE PEDESTRIAN PROPERTY OWNER DAMAGE THRESHOLD MET PHONE 509-768-1573

LAST NAME GOCHNAUER FIRST NAME KASSANDRA MIDDLE INITIAL L

STREET NEW ADDRESS 14407 E NIXON

CITY SPOKANE VALLEY ST WA ZIP 99216

CDL ENDORSEMENTS RESTRICTIONS

DRIVER'S LICENSE # G10CHNKL178MU STATE WA SEX F D.O.B. 07-31-1983

ON DUTY STATUS AIRBAG 3 RESTR. 4 EJECT 1 HELMET USE INJURY CLASS 1 NATURE OF INJURIES

LICENSE PLATE # 153TCJ STATE WA VIN# 1N1XB8B0ZE9V8501900

TRAILER PLATE # STATE TRAILER PLATE # STATE

VEH. NO. 9997 MAKE TOYOTA MODEL COA STYLE 4D VEHICLE TOWED YES NO TOWED BY EVERETT STATE GOVT. VEHICLE YES NO

REGISTERED OWNER INFO GOCHNAUER CYNTHIA G. 3801 STORLIAN VALLEY RD N, CRESTED, WA 99117

LIABILITY INSURANCE IN EFFECT YES NO CITATION # FARMERS # 71764-35-44 CHARGE

OFFICER'S NAME (PRINT) S. YAKUP BADGE OR ID # 698 AGENCY SPOKANE PD

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