

**FILED**  
**MAY 31, 2012**  
**In the Office of the Clerk of Court**  
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

MATTHEW M. MARRY,	)	No. 30248-2-III
	)	
Appellant,	)	
	)	
v.	)	
	)	
DANIEL ELING and JANE DOE ELING,	)	UNPUBLISHED OPINION
husband and wife, and the marital	)	
community composed thereof,	)	
	)	
Respondent.	)	
	)	

Brown, J. • Matthew Marry appeals the trial court’s dismissal of his automobile-negligence suit against Daniel Eling. He contends the trial court erred in failing to rule his service by publication was proper under the case facts. We disagree, and affirm.

FACTS

On February 24, 2008, Mr. Eling drove through a red light and crashed into a vehicle carrying Mr. Marry, injuring him. Mr. Eling was arrested at the scene for driving under the influence and failure to stop at a red light. The police report listed Mr. Eling’s address as 509 E. Mission in Spokane, Washington and showed his registration address as

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2922 E. Second Street, Duluth, Minnesota.

On January 28, 2011, Mr. Marry's attorney, Erik Highberg, sued Mr. Eling for personal injuries. On March 2, 2011, R. Craver, a registered process server for Eastern Washington Attorney Services, unsuccessfully attempted to serve Mr. Eling at the Mission Avenue address, a fraternity house near Gonzaga University where Daniel Eling was unknown. Mr. Highberg then conducted internet research to locate Mr. Eling, learning he had been a Gonzaga student from Duluth, Minnesota. While no valid current address was found for Mr. Eling, Mr. Highberg learned Mr. Eling's parents resided in Duluth at 5719 Carter River Road. On March 11, 2011, at Mr. Highberg's request, Paul Shober, a Duluth process server, attempted to serve Mr. Eling at his parents' Duluth home. Mr. Eling's mother advised Mr. Shober her son was living and teaching in China. Mr. Highberg believed it was improbable that Mr. Eling had moved to China and concluded he was just avoiding service.

On April 1, 2011, Mr. Highberg moved to authorize service by publication. Mr. Highberg declared the above facts and stated, "[N]o valid addresses for the defendant were obtained." Clerk's Papers (CP) at 7. When Mr. Highberg presented these pleadings ex-parte, he expressed his concern that Mr. Eling was avoiding service and that the information concerning his move to China seemed improbable. The court reviewed the pleadings and counsel's comments and granted an order authorizing service by

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publication. The order was interlineated to require publication in Spokane County and Duluth, Minnesota. Mr. Highberg had the summons published for six consecutive weeks in the Spokesman-Review and the Duluth News-Tribune, beginning in early April 2011.

The statute of limitations for service expired on April 28, 2011. On June 29, 2011, Mr. Eling's counsel, who had been retained the day before, filed a notice of appearance. On July 1, Mr. Eling moved to dismiss for lack of personal jurisdiction. Mr. Marry responded by filing Mr. Highberg's affidavit detailing the above facts and specifying, "[I]t was my judgment that defendant was a resident of this state and that he had left the state to avoid service of process. At that point his residence address was unknown to my office or the two investigators (Washington and Minnesota) that I had employed." CP at 32-33.

The court granted Mr. Eling's motion to dismiss. Mr. Marry appealed.

#### ANALYSIS

The issue is whether, under these facts, the trial court erred in dismissing Mr. Marry's suit for failure to serve process within the statute of limitations.

Service of process is critical to personal jurisdiction. *Pasqua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 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, 577-78, 94

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P.3d 975 (2006). Compliance with RCW 4.28.100 procedural requirements is determined on a case-by-case basis. *Longview Fibre Co. v. Stokes*, 52 Wn. App. 241, 245, 758 P.2d 1006 (1988). Our review is de novo. *Bruff v. Main*, 87 Wn. App. 609, 611, 943 P.2d 295 (1997).

Under RCW 4.28.100(2), service may be made by publication of the summons when the defendant cannot be found within the state, and, “being a resident of this state, has departed . . . to avoid the service of a summons.” The statute first requires the plaintiff or his attorney to file an affidavit “stating that he or she believes that the defendant . . . cannot be found” in the state and stating either that a copy of the summons and complaint have been deposited in the post office, directed to the defendant at his place of residence, or “that such residence is not known to the affiant.” RCW 4.28.100. In order to show a defendant cannot be found, the plaintiff must demonstrate it “made reasonably diligent efforts to personally serve the defendant.” *Boes*, 122 Wn. App. at 574; *see also Martin v. Meier*, 111 Wn.2d 471, 481, 760 P.2d 925 (1988).

First, regarding the affidavit requirement, Mr. Eling argues Mr. Highberg failed to state in his affidavit that he either mailed a copy of the summons and complaint to Mr. Eling’s place of residence or that he did not know of such a residence. We consider both the initial declaration and the supplemental affidavit filed by Mr. Highberg. *Boes*, 122 Wn. App. at 574; *Dobbins v. Mendoza*, 88 Wn. App. 862, 872-73, 947 P.2d 1229 (1997);

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*Brennan v. Hurt*, 59 Wn. App. 315, 317-18, 796 P.2d 786 (1990). Nothing was mailed to any address for Mr. Eling. In his supplemental affidavit, Mr. Highberg revealed no mailing address was known for Mr. Eling, satisfying the statutory provision. The supplemental affidavit helps Mr. Marry. But whether such an address was actually unknown to Mr. Highberg goes to the reasonableness of Mr. Highberg's efforts to locate an address, the next question.

Second, regarding diligence, a party claiming service by publication was proper must present facts that show the efforts to personally serve the defendant were reasonably diligent. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362-63, 75 P.3d 1011 (2003). This factual question has frequently been used interchangeably with the question whether a service attempt was made with "due diligence," which is required prior to service under the nonresident motorist statute. *See Meier*, 111 Wn.2d at 481; *Boes*, 122 Wn. App. at 576. Although due diligence is normally a fact question reserved for the trier of fact, if the factual issues are undisputed, the question is one of law for the court. *Carras v. Johnson*, 77 Wn. App. 588, 593, 892 P.2d 780 (1995); *Martin v. Triol*, 121 Wn.2d 135, 151, 847 P.2d 471 (1993).

We focus on what reasonable steps the plaintiff took in light of what he knew, not on what other steps were possible. *Carras*, 77 Wn. App. at 593. Reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant, but

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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). For example, if an accident report is made, it must be examined and the information therein investigated. *Meier*, 111 Wn.2d at 482. Citing *Martin v. Meier*, Mr. Eling suggests Mr. Marry was required to ask Gonzaga about the defendant's location. But the *Meier* court merely recognized, "inquir[ing] of the university whether defendant was a student" was among several steps the plaintiff in that case took to locate and serve the defendant, ultimately evidencing due diligence. *Id.* Even so, while any such attempt would likely present privacy problems, no inquiry is shown.

Mr. Eling asserts Mr. Marry was not diligent because Mr. Highberg never attempted service at the Duluth address listed on the police report for Mr. Eling. While Mr. Marry responds that the Duluth address was merely a prior address before his then current Gonzaga address, nothing shows any service attempt at that address. Next, Mr. Eling argues the search was not reasonably diligent because Mr. Highberg made no effort to locate Mr. Eling in China. Mr. Highberg merely speculated that Mr. Eling had not actually moved to China because he did not believe Mr. Eling's parents because they had not provided any contact information. We cannot tell from this record whether the process server even inquired about contact information in China. And, international

teaching jobs may not be common, but they are not beyond reasonable contemplation.

Third, regarding service avoidance, while the affidavit need not prove the defendant left the state to avoid service, it must clearly articulate facts to support such a conclusion. *Boes*, 122 Wn. App. at 577; *Bruff*, 87 Wn. App. at 614. Mr. Eling persuasively argues no factual basis existed to conclude he was avoiding service. In support, he cites *Kennedy v. Korth*, 35 Wn. App. 622, 624, 668 P.2d 614 (1983), where the defendant's move to Germany before suit was an insufficient basis for the assertion that he had left the state to avoid service. Given all, we conclude Mr. Highberg's speculative conclusions about Mr. Eling's whereabouts were based upon unjustified inferences from this record. Without factual support for such a belief, an inference cannot satisfy the statutory requirement.

Fourth, because our analysis so far is dispositive, we acknowledge additional arguments in passing. Mr. Marry argues Mr. Eling received actual notice of the lawsuit and all due process considerations have been met. But as Mr. Eling responds, learning about the suit does not subject him to personal jurisdiction. Mr. Marry argues Mr. Eling was not prejudiced by substituted service because counsel timely appeared before a default judgment or any adverse order was entered. But as Mr. Eling responds, the problem here is that Mr. Eling was not served within the statute of limitations, depriving the court of personal jurisdiction. Finally, Mr. Eling argues Mr. Marry could have served

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him under the nonresident motorist statute (RCW 46.64.040), but did not. While this may be so, considering our issue, this omission at best highlights Mr. Highberg's untenable belief that Mr. Eling was a Washington resident avoiding service.

In sum, service by publication was improper as a matter of law because the facts do not support the statutory prerequisite that the defendant left the state to avoid service. While this alone is dispositive, additionally, we find no error in the trial court's factual due diligence determination as it was within the presented range of evidence. Accordingly, the trial court did not err in dismissing Mr. Marry's suit under RCW 4.28.100(2). Service by publication was improper.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

We Concur:

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Korsmo, C.J.



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Sweeney, J.