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COURT OF APPEALS NO. 67064-6

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

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Todd Keithly, Appellant,
v.
Benjamin Sanders and Jane Doe Sanders, Respondents.

REPLY BRIEF OF TODD KEITHLY, APPELLANT

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A. Argument

The issue in this appeal is one of first impression: whether or not a plaintiff is required to mail his Notice of Service to a defendant pursuant to RCW 46.64.040 prior to the expiration of the 90 day tolling period in order to satisfy the statute of limitations. RCW 46.64.040 is clear and unambiguous and allows a plaintiff to mail the Notice of Service after the 90 day tolling period because the statute of limitations was satisfied upon serving the Secretary of State with the same documents required to serve a defendant personally, akin to RCW 4.28.100 and RCW 4.28.110 that require publication of the summons for six consecutive weeks, while case law holds that the statute of limitations is satisfied upon the first week's publishing of the summons.

- I. RCW 46.64.040 sets forth the requirements to serve a defendant by alternate means in plain language and this court does not need to rely on Clay.

RCW 46.64.040 sets forth the requirements to serve a defendant by alternate means in plain language. While Clay, in dicta, discusses RCW 46.64.040, as cited by Sanders, those statements were not dispositive on the ruling, and are not binding. Clay v. Portik, 84 Wn.App 553, 929 P.2d 1132 (1997). Clay held that RCW 46.64.040 does not require a plaintiff to provide the defendant's last known address to the

Secretary of State and that the certificate of compliance need not be signed by the plaintiff personally, but can be signed by his attorney. Id., at 555-56. For this reason, Clay, respectfully, should not be read as authority for the proposition that RCW 46.64.040's requirements need to be met prior to the 90 day tolling period. Such a strained reading of Clay would violate the first rule of judicial interpretation, namely that "the court should assume that the legislature means exactly what it says. Plain words do not require construction." Sidis v. Brodie, 117 Wn.2d 325, 329, P.2d 781 (1991) (citing Snohomish v. Joslin, 9 Wn. App. 495, 498, 513 P.2d 293 (1973)).

II. Keithly's interpretation of RCW 46.64.040 allowing him to mail the defendant a copy of the process after the 90 period ran does not postpone the case indefinitely, is fair to all parties, and serves the purpose of the statute of limitations.

Statutes of limitation are procedural rules that are properly the realm of the Legislature, and the fairness of such statutes should generally be left to the Legislature to determine. Sidis, 117 Wn.2d at 330. In drafting RCW 46.64.040, the Legislature set an undefined statute of limitations when it used the term "forthwith," but because it did so it assured fairness to a defendant when it allowed the court to grant a continuance to allow a defendant a reasonable opportunity to defend the action ("[t]he 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.” RCW 46.64.040).

As a result of the Legislature’s choice of words and fairness proviso, strict compliance with RCW 46.64.040 requires that all the requirements be completed within the plain meaning of RCW 46.64.040’s language, not that they be completed within the 90 day period. No Washington case cited by Sanders, nor found by Keithly, holds that the due process notice requirement of RCW 46.64.040 needs to be completed within the 90 day period. Had the Legislature intended to define a time limit, it easily could have done so. It could have stated it shall be mailed within ten days of service on the Secretary of State, or some other similarly defined time period. As an example, I.C.A. § 321.501, as cited by Sanders, requires that a plaintiff send the required mailing “within ten days after said filing with the director.” The Washington Legislature however did not state a defined time requirement for said mailing.¹ And “the court should assume that the legislature means exactly what it says. Plain words do not require construction.” Sidis, 117 Wn.2d at 329, citing Snohomish v. Joslin, 9 Wn. App. at 498.

¹ I.C.A. § 321.501 can be further distinguished from RCW 46.64.040 because ICA 321.501 not only clearly states a date certain for said mailing but it also does not allow the court to order a continuance, as does RCW 46.64.040.

While it has been suggested that Keithly's interpretation would allow a plaintiff to postpone a case indefinitely, that seems to ignore the trial court's case schedule, deadline for filing the Confirmation of Joinder showing service on all parties, and it ignores other civil rules that come into play when a cause is filed that seek to move the case forward.

The Washington Supreme Court addressed Sanders' concern in the context of multi-defendant actions when it reversed the appellate court in Sidis:

The Court of Appeals found a literal reading of RCW 4.16.170² unacceptable because such a reading 'would permit a plaintiff to extend the statute of limitations indefinitely against multiple defendants merely by serving one defendant.' Sidis 58 Wn.App. at 672. **We disagree.** While it is true that RCW 4.16.170, literally read, tolls the statute of limitation for an unspecified period, that period is not infinite, as the court implied. **Plaintiffs must proceed**

² RCW 4.16.170 states:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had **on the defendant** prior to the filing of the complaint, the plaintiff shall cause **one or more of the defendants** to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on **one or more of the defendants** or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

with their cases in a timely manner as required by the court rules, and must serve each defendant in order to proceed with the action against that defendant.

Sidis, 117 Wn.2d at 329 (emphasis added) .

Sidis also found that such a reading is NOT UNFAIR to a defendant:

The Court of Appeals further stated that allowing service on one defendant to toll the statute against others “runs counter to fundamental notions of fairness...and would effectively negate the purpose of a statute of limitations, which serves in part to protect parties against stale claims...” Sidis, 58 Wn.App. at 672. This argument is unpersuasive. The simple existence of a statute of limitation does not mean that exceptions thereto are never appropriate.

Sidis, 117 Wn.2d at 330.

Sidis also found that such a reading would SERVE THE

PURPOSE OF THE STAUTE OF LIMITATIONS:

The purpose of the statute of limitations is to compel actions to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely. However, the statute’s operation could be tolled for what the legislature regarded as a good reason.

Id. (citing Summerrise v. Stephens, 75 Wn.2d 808, 812, 454 P.2d 224 (1969)).

Keithly's interpretation of RCW 46.64.040 does not postpone the case indefinitely, is fair to all parties, and does serve the purpose of the statute of limitations.

III. RCW 46.64.040 also allows, if not instructs, a plaintiff to wait until he receives the defendant's endorsed receipt before filing the affidavit of due diligence; highlighting Sanders' misapplication of Clay.

RCW 46.64.040's mandates regarding plaintiff's filing of the affidavit of due diligence is unambiguous even though its language when read as a whole may seem clumsy. Clumsy language can still be clear and unambiguous. See Sidis, 117 Wn.2d at 329.³ While RCW 46.64.040 requires that the affidavit of due diligence be appended to the process mailed to the defendant:

Notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, ... 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...

³ "even though there is a clumsy mixture of tenses in the statute [RCW 4.16.170], the meaning is clear. Contrary to the opinion of the Court of Appeals, we believe the language of RCW 4.16.170 to be straightforward and unambiguous: "[O]ne or more of the defendants" in the various predecessors to RCW 4.16.170 indicates that at some time the possibility of multi-defendant actions were considered; otherwise, those words would not appear. Moreover, if in enacting the present tolling statute the Legislature had intended to require that all defendants be served within 90 days, the words "one or more of" could simply have been omitted, and the statute would read: "[T]he plaintiff shall cause the defendants to be served."

The very next statement of the statute plainly states:

“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 ...

(emphasis added).

The Legislature clearly contemplates that before the affidavit of due diligence is entered with the court, the endorsed receipt is “received” by the plaintiff from the non-resident defendant. The plain language also contemplates that a plaintiff’s attorney amends the affidavit if the endorsed receipt is received and prior to filing the same with the court. Consequently, a plaintiff is required to wait to receive the endorsed receipt, amend the affidavit, and subsequent to these two, is to file the affidavit with the court.

These clear terms subject a plaintiff to waiting not only during the time it takes for the post office to make several attempts to get the signature of the non-resident defendant, but also allows a savvy defendant to elude the mail worker’s efforts, all the while the 90 days is running to his benefit. It can be weeks or longer for the return receipt to be returned, signed or not. All to the detriment of a plaintiff if Clay is read as Sanders argues. Such a reading would unfairly benefit a defendant and stray from

the intended purpose of RCW 46.64.040, which was designed as a remedy for plaintiffs; not as a trap. See Clay, 84 Wn. App. 553.

The plain language of RCW 46.64.040 at least allows, if not instructs, a plaintiff to wait until he receives the defendant's endorsed receipt before filing the affidavit of due diligence. To require it to be filed prior to the 90 day tolling period contradicts long-established case law that allows a plaintiff the full statute of limitations to attempt to serve a defendant.

IV. The law in other jurisdictions does not definitively support a reading of RCW 46.64.040 as requiring that all steps be completed prior to the 90 day tolling period as Sanders suggests.

Sanders' brief cites to Michigan case law in support of his argument that each and every step must be completed within the 90 day tolling period. Sanders relies on McMahill v. MacLean, wherein the Michigan Court of Appeals, Division 3, found that to toll the statute of limitations, plaintiff had to serve the Secretary of State, send notice by registered mail to the defendant "forthwith," and file an affidavit and exhibits with the court prior to the expiration of the statutory period. McMahill v. MacLean, 173 N.W.2d 749, at 750 (Mich. App. 1970). The

court held that the statute of limitations did not toll “until plaintiff has fully complied with the provisions.” Id.

A more recent Michigan Court of Appeals, Division 3, case had a more lenient perspective with a similar issue as McMahill, supra. In Kuenzer v. Osborn a plaintiff mailed service of process to the sheriff of the county where the defendant resided. Kuenzer v. Osborn, 180 N.W. 2d 298, 300 (Mich. App. 1970). The statute in question tolled the statute of limitations for 90 days when the complaint is filed and a copy of the process were “placed in the hands of an officer” for immediate service. Id., citing RJA § 5856(3). The issue was whether simply mailing it to an “officer”, as in a sheriff, instead of actually giving it to the officer, constituted “plac[ing it] in the hands of an officer” when the defendant did not receive the process until after the 90 day period expired. Despite the clear language of the statute requiring receipt by an officer, the court reasoned that to require actual physical receipt of mailed documents within the statutory period would create an unintended burden. Id., at 302-03. Further, the court stated that interpreting the words ‘placed in the hands of an officer’ to mean “when it is mailed to him” is “entirely consistent” with the legislature’s intent to fashion a procedure precisely informing counsel of the necessary elements guaranteeing the tolling of the statute of limitations. Id.

Further, in dicta, the Court stated that “[w]hen a plaintiff has unequivocally committed the complaint and summons to an officer for immediate service, the potential for further delay, depriving the defendant of notice that an action has been commenced against him, is obviated.” Id. The court held that a good-faith mailing of process to the officer satisfied the requirements of actual physical delivery to the officer for the purpose of tolling the statute of limitations. Id., at 304. The court’s reasoning carves a distinction between service upon the officer (and, hence, the defendant) and a subsequent notice to the defendant even if the notice is received after the 90 day period’s expiration.

In the present case, Keithly did a due and diligent search and then served the Secretary of State several days prior to the expiration of the tolling period, and thereby “unequivocally committed the complaint and summons to an officer for immediate service.” This left Keithly exposed to the potential for further delay by the Secretary of State, who is also required to send a copy of process to the defendant. The Secretary of State mailed the process to Sanders’ last known address. And plaintiff also mailed the Notice of Service with appendages to defendant’s last-known address, in compliance with the notice provision of RCW 46.64.040.

Sanders also places considerable reliance on cases out of Iowa, where the nonresident motorist statute is written in much different terms than RCW 46.64.040, showing a much different intent, and reads:

Plaintiff in any such action shall cause the original notice of suit to be served as follows:

1. By filing a copy of said original notice of suit with said director, together with a fee of two dollars, and
2. By mailing to the defendant... within ten days after said filing with the director, by restricted certified mail addressed to the defendant at the defendant's last known residence or place of abode, a notification of the said filing with the director.

I.C.A. § 321.501.

The Iowa statute and Michigan statute differ in several materially significant ways from the Washington version. First, both do not require a “due and diligent search” for the defendant prior to serving by alternate methods. They therefore do not require a plaintiff to lose weeks of his time prior to the expiration of the statute of limitations searching for a defendant. And the Iowa statute allows a plaintiff to serve the director the same day as he files his Complaint. Not so in Washington. Our Legislature had different policy consideration and a different intent when it drafted RCW 46.64.040 and required a due and diligent search before a plaintiff can serve the Secretary. There is a body of case law defining the

efforts required to meet the ‘due and diligent’ threshold. In the present case, there was no police report that provided Sanders’ address, contact information, make of car, plate number or any identifying information of defendant. Keithly’s insurer also had no contact or address information for Sanders. For Keithly to perform his due and diligent search he lost the period from October 5, 2010 (date of filing) through October 26, 2010 (date of attempted service at Sanders’ last address). Upon attempting service, all the objective information showed the named defendant resided at that address. CP 18, 19 and 26.

Second, the Iowa statute also defines a clear time period in which a plaintiff has to mail the required notice to a defendant, 10 days. I.C.A. § 321.501. RCW 46.64.040, on the other hand, requires it to be mailed “forthwith,” which is not a defined period of time.

Third, the Washington Legislature chose to codify this form of alternate service as “sufficient and valid personal service upon said resident or nonresident.” RCW 46.64.040. The Iowa Legislature did not codify its elements as a form of sufficient and valid personal service.

Fourth, the Washington Legislature used the words “PROVIDED THAT” in defining the notice requirement as an appendage to the mailing after service was had on the Secretary. The Washington Legislature’s

choice makes obvious the due process nature of the mailing of the Notice of Service to a defendant after his agent, the Secretary of State, was served so that the defendant is notified that he was served. The first page of the mailing is a **NOTICE** OF SERVICE. CP 21.

Sanders relies on Wilson v. Smith for support. In that case, the Nebraska Supreme Court was asked to interpret a much different statute than RCW 46.64.040. The Nebraska statute, like those in Iowa and Michigan, did not require a due and diligent search. Wilson v. Smith, 227 N.W.2d 597, at 598 (Neb. 1975); citing R.S.Supp.1974, § 25-530(7) (repealed). The Nebraska statute also had another material distinction; it had a ten day requirement in which plaintiff needed to mail notice to a defendant. Id. The interpreting court, as Sanders notes, found that the plaintiff did not obtain jurisdiction over the defendant because he mailed the notice 42 days after serving the Secretary of State, clearly outside the ten-day window prescribed by statute. Id., at 436. It's no wonder why the Nebraska court ruled as it did, 42 days fails to meet the 10 day requirement. RCW 46.64.040 is different.

Sanders also looks to Delta International Machinery Corporation v. Plunk case for support. In that case, the court upheld the dismissal of an action, stating that "service upon the Secretary of State is not complete

until the Secretary ‘does his duty and sends a copy to the defendant.’” Delta International Machinery Corporation v. Plunk, 378 S.E.2d 704, at 706 (Ga. App. 1989). It is agreed that an officer, like the Secretary of State, must also mail the Notice, but Delta is distinguishable from the case at bar because it addressed a strict compliance issue not involved in the present appeal when the plaintiff failed to provide the Secretary of State with proper service documents. The decision in Delta turned on the Secretary of State not having a mailing address to which it could send notice of the lawsuit. Id., at 706. In line with the policy considerations of Kuenzer, supra, when a plaintiff commits the process to an officer, the statute of limitations should be deemed satisfied.

Even assuming, *arguendo*, that Sanders’ reading of cases in other jurisdictions would have some persuasive value in this appeal, the Washington Supreme Court has already spoken on this issue in Smith v. Forty Million, 64 Wn.2d 912, 913, 395 P.2d 201 (1964). The Washington Supreme Court dealt directly with the elements of 46.64.040 and the determination of when a plaintiff satisfied the “service” requirement. Sanders attempts to dismiss the Supreme Court’s language, directly on point, because ultimately the Court dismissed the case on other grounds. While it is true that the Smith case did not concern a situation where the plaintiff served the Secretary of State prior to the expiration of the tolling

period, the Court nevertheless carved a clear distinction between service and notice of service, the latter being essential for due process:

[T]he plaintiff confuses **service**, which is upon the plaintiff's agent- the Secretary of State- with the **necessity of notice of that service**, actual or constructive, to the defendant. **Some provision for notice to the defendant, in addition to the service on the Secretary of State or other state official, in statutes such as RCW 46.64.040 is essential to due process...**

Smith, 64 Wn.2d at 915-17 (emphasis added).

The court went further to show that, of the requirements of RCW 46.64.040, service on the Secretary of State is the one that is required to occur prior to the statute of limitations:

We are not here concerned with a situation where the plaintiff does serve the Secretary of State within the period of the statute of limitations, but is unable to give the notice of that service to the defendant as required by RCW 46.64.040. **There can be no excuse for a failure to serve the Secretary of State within the period of the applicable statute of limitations.**

Id., at 915-17 (emphasis added).

Sanders seeks to avoid a plain reading of the case which states that serving the Secretary of State completes the service requirement, and that the due process notice provision, while required, is ancillary and not an

element of effecting personal service for the purposes of satisfying the statute of limitations.

That a defendant must receive notice under the statute is not in dispute- indeed, the Secretary of State mails a copy of the summons and complaint to the defendant upon receipt from the plaintiff. The Secretary's January 5, 2011, letter shows it mailed Sanders a copy of the process on December 30, 2010, prior to the 90 day period's expiration.

Sanders points to Brown v. Prowest Transport Ltd., for support. There, plaintiff attempted service on several defendants through the Secretary of State, but failed to provide addresses for any of the defendants until well after the statute of limitations for the action had passed. Brown v. Prowest Transport Ltd., 76 Wn. App. 412, 416, 886 P.2d 223 (1995). "Failure to provide an address makes service on the Secretary of State defective and unavailable." Id., at 421. Brown deals with a strict compliance issue as it relates to the need to provide an address to the Secretary, which the statute clearly mandates. Sanders's argument reaches for a distinction that is not within the language of Brown, arguing that the Court's statement that a plaintiff must comply with all of the service provisions of RCW 46.64.040 somehow changes the language of Smith to now distinctly mandate that due process notice be provided

within the 90-day period. *Id.* The Brown Court nowhere mentions, even in parenthetical citation, the holding of Smith. Like that of the defendants in Brown, Sanders’ “argument ignores the fact that [Keithly] does not claim that service without compliance with the statute is effective.” *Id.*, at 423. It is not argued that a plaintiff need not supply the Secretary of State with the defendant’s last known address, nor that Keithly is not required to complete the steps of RCW 46.64.040. The steps must be completed for strict compliance with the statute. The issue in this appeal is limited to whether or not the mailing to defendant need occur prior to the tolling period’s expiration. Hence, any reliance on Brown as applicable to the issue on appeal is misguided and misplaced.

Finally, Sanders misreads the Appellate Brief argument regarding a potential for continuance. The plain language of RCW 46.64.040 grants that “[t]he 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.” *Id.* This provision is in keeping with the holding in Smith that the notice provision affords due process to the defendant. Indeed, since a defendant who does not reside at the last-known address may not learn of the suit for some appreciable period of time following effective service on the Secretary of State, a court may choose to grant additional time to allow him to defend the suit against him.

The argument, before, as now, is not that the trial court should grant a plaintiff additional time to serve the defendant. The argument is that, per Smith and a natural reading of RCW 46.64.040, accomplishment of service on the Secretary of State will not magically notify a defendant who resides outside the state at an unknown location will not provide him with notice, even if the plaintiff mails the notice prior to the end of the statutory period.

- V. RCW 4.28.100 and RCW 4.28.110 highlight the distinction between completing the steps of an alternate service statute and the statute of limitations, proving that the statute of limitations is satisfied before an alternate service statute's requirements are "complete."

RCW 4.16.170 requires that a plaintiff "cause one or more of the defendants to be served personally, or **commence service by publication** within ninety days from the date of filing the complaint." (emphasis added). RCW 4.28.100 allows service by publication "[w]hen the defendant cannot be found within the state, ..., **the service may be made by publication of the summons....**" And RCW 4.28.110 mandates how service by publication is deemed "**complete**" and reads as follows:

The publication shall be made ... once a week for six consecutive weeks: PROVIDED, That publication of summons shall not be made until after the filing of the complaint, and **the service of the summons shall be**

deemed complete at the expiration of the time prescribed for publication. (emphasis added)

Service by publication per RCW 4.16.170, RCW 4.28.100 and RCW 4.28.110 require that a plaintiff, among other tasks, commence publishing of the summons in a newspaper for a period of six consecutive weeks. RCW 4.28.110 also states that “**service ... shall be deemed complete at the expiration of the time prescribed for publication**” (emphasis added).

These statutes are more clear than even RCW 46.64.040. They provide a defined time limit for when service is deemed “complete:” six weeks. See RCW 4.28.110. They are also “quite clear that service by publication commences on the first day the summons is published, not upon the entire six weeks of publication.” Clark v. Falling, 92 Wn. App. 805, 812, 965 P.2d 644 (1998). Despite the clear defined time limit and clear language that “SERVICE”, the same issue in this appeal, is “COMPLETE” only at the “EXPIRATION” of the six week period of publishing, case law interpreting this statute holds that the STATUTE OF LIMITATIONS is satisfied upon the FIRST DATE of publication: “We hold that service by publication is not commenced until the first date of actual publication of the statutory summons.” Id., at 811. Clearly, Washington courts carved out the distinction between satisfying the statute

of limitations and completing the steps of an alternate service statute for purposes of due process notice. And the distinction makes sense because alternate means of service of process are designed to provide notice, but such service is constructive only and is not as a practical matter an effective means of notifying a party of the pendency of a lawsuit. Brown v ProWest, 76 Wn.App. at 421.

Applying this same analysis to the present appeal confirms that the statute of limitations was satisfied when Keithly served the Secretary of State prior to the 90 day expiration even though there were additional steps to complete. RCW 46.64.040 reads “such service shall be sufficient and valid personal service upon said resident or nonresident” with the condition that plaintiff send the required mailing to the defendant “forthwith.” That analysis makes sense because such service is constructive only and is not as a practical matter an effective means of notifying a party of the pendency of a lawsuit. Our Legislature is not in Iowa, Michigan, or any other state. Our Legislature has its own policy considerations and its own view of what is best for the people of Washington. Their intent is seen in their words, and made clear in the words of RCW 46.64.040, RCW 4.16.170, RCW 4.28.100 and RCW 4.28.110. These statutes, all dealing with alternate means of service of process show the same intent by our Legislature, namely, to provide a

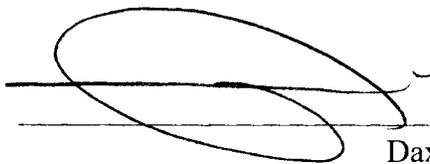
means of service for a plaintiff injured by a non-resident so that a plaintiff can satisfy the statute of limitations while also affording constructive due process notice to the non-resident defendant.

This same analysis would also reconcile Clay's dicta with RCW 46.64.040. RCW 46.64.040 requires that a plaintiff mail a defendant notice of service on the Secretary of State. Clay's dicta says that service of process is perfected after that mailing is made and the affidavits are filed. Read together, and keeping in mind RCW 4.16.170, RCW 4.28.100 and RCW 4.28.110 and the case law interpreting these statutes, the statute of limitations was satisfied upon serving the Secretary of State despite there being more to do to comply with RCW 46.64.040. This analysis is also consistent with the case law, including Omaits, holding that strict compliance is mandatory when fulfilling a statute's requirements. Omaits v. Raber, 56 Wn. App. 668, 669-70, 785 P.2d 462 (1990). The steps need to be completed and all the requisite documents need to be sent to defendant. And if, for example, a required document (Notice of Service) is not included in the mailing, strict compliance is not met, as occurred in Omaits. And lastly, it is consistent with the separation of powers doctrine and in line with the first rule of judicial interpretation, namely that "the court should assume that the legislature means exactly what it says. Plain words do not require construction." Sidis, 117 Wn.2d at 329 (citing

Snohomish v. Joslin, 9 Wn. App. at 498). The Legislature required the mailing to be done “forthwith” and allowed the court to order a continuance “as may be necessary to afford the defendant reasonable opportunity to defend the action.” RCW 46.64.040.

B. Conclusion

For the reasons set out above, Mr. Keithly respectfully requests that the Court of Appeals find that the trial court erred in dismissing his cause of action and asks that this court reverse the trial court and remand the case to the trial court with orders to set the case for trial.



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