

67064-6

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COURT OF APPEALS NO. 67064-6

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

Todd Keithly, Appellant,

v.

Benjamin Sanders and Jane Doe Sanders, Respondent.

2011 SEP 28 PM 1:02
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

BRIEF OF TODD KEITHLY, APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred in granting Defendant Sanders' Motion for Summary Judgment dismissing Mr. Keithly's cause of action as barred by the statute of limitations. (CP 33-34)
2. The trial court erred in concluding that the tolling period to effect service on Mr. Sanders expired before he was served and that Mr. Keithly therefore did not strictly comply with RCW 46.64.040. (CP 33-34)

Issues Pertaining to Assignments of Error

1. Did Mr. Keithly satisfy the statute of limitations when he served the Secretary of State with two copies of the Summons and Complaint and required fee on December 30, 2010, 85 days after the case was filed with the trial court, and forthwith sent Mr. Sanders, by certified mail return receipt requested to Mr. Sanders's last known address, a copy of the Notice of Service, process served on the Secretary of State, Affidavit of Compliance, Affidavit of Due Diligence, and confirmation of service on the Secretary of State? (Assignments of Error 1 and 2).

2. Did the trial court err when it ruled that Mr. Keithly did not strictly comply with RCW 46.64.040 when Mr. Keithly forthwith sent Mr. Sanders, by certified mail return receipt requested to Mr. Sanders's last known address, a copy of the Notice of Service, process served on the

Secretary of State, Affidavit of Compliance, Affidavit of Due Diligence, and confirmation of service on the Secretary of State 20 days after Mr. Keithly received the certificate of service from the Secretary of State? (Assignments of Error 1 and 2).

B. Statement of the Case

On December 13, 2007, Mr. Sanders's vehicle struck Mr. Keithly's vehicle. On October 5, 2010, Mr. Keithly filed his Summons, Complaint, and paid the requisite filing fee in King County Superior Court of Washington, which assigned cause number 10-2-35047-1 SEA. The filing tolled the statute of limitations for a 90-day period, which would end January 3, 2011. CP 3.

A Washington Department of Licensing search and a Vehicle/Vessel Inquiry search confirmed that Mr. Sanders actively registered his vehicle with the State Washington at 2122 South 371st Street in Federal Way, WA 98003. CP 26. An Accurint Person Search also confirmed that the above Federal Way address was the current address for Mr. Sanders. *Id.* Personal service of process was attempted on October 26, 2010 at that Federal Way address. CP 18, 19, 26. The 1993 Jeep Wrangler, red in color, with WA plate 069SHF, that struck Mr. Keithly was parked in the driveway of the service address. CP 18. Bernie Sanders, Mr. Sanders's father, was personally served with two sets of the pleadings. CP 18.

On December 30, 2010, two copies of the Summons and Complaint and Case Schedule in this action were duly served on the Secretary of State, along with the requisite fee. CP 21-27.

On January 4, 2011, the Secretary of State prepared a letter to Counsel for Mr. Keithly and mailed the same on January 5, 2011. Said letter certified that the Secretary was duly served two (2) copies of the Summons, Complaint, and Case Schedule along with the requisite fee and notice of Defendant's last known address on December 30, 2010. CP 20. On that same date, the Secretary of State mailed a copy of the process documents via certified mail with return receipt requested to Benjamin Sanders's address. Id. The Secretary of State's letter to Mr. Keithly's counsel stated that Mr. Keithly or his counsel "should also consider" effecting service on Mr. Sanders directly. Id.

The Secretary of State's letter was received on or about January 8, 2011 by counsel for Mr. Keithly. Over the ensuing period of less than three weeks, counsel for Mr. Keithly prepared and assembled his Notice of Service package, including his Affidavit of Compliance, a copy of the Secretary's certificate of service etc. On January 27, 2011, Plaintiff's counsel deposited with the USPS, postage prepaid by certified mail, return receipt requested, the following documents pursuant to RCW 46.64.040: Cover letter to Secretary of State, Summons and Complaint, Case Schedule, Affidavit of Compliance, Affidavit of Due Diligence, and Notice of Service to Benjamin Sanders at the above Federal Way address.

CP 21-27. This mailing was returned to Plaintiff's counsel's office with a hand written note of "Not Here." CP 29.

Mr. Sanders moved for summary judgment on April 1, 2011 regarding the court's jurisdiction over Mr. Sanders due to a lack of service. The trial court judge granted that motion on grounds that Mr. Keithly did not mail copies of the Notice of Service to Mr. Sanders's Federal Way address until after the 90 day tolling period ran. Mr. Keithly brought this appeal on that issue.

C. Argument

- I. MR. KEITHLY SATISFIED THE STAUTE OF LIMITATIONS WHEN HE SERVED THE SECRETARY OF STATE ON DECEMBER 30, 2010, BECAUSE SAID SERVICE WAS PROPER AND VALID PERSONAL SERVICE UPON MR. SANDERS PER THE PLAIN AND UNAMBIGUOUS TERMS OF RCW 46.64.040.

Benjamin Sanders was properly, validly, and personally served with process on December 30, 2010 when Mr. Keithly served the Secretary of State because Benjamin Sanders affirmatively appointed the Secretary of State to accept service when he left the state per RCW 46.64.040.

RCW 46.64.040 is designed to provide a remedy for a Plaintiff who is injured by a non-resident motorist or departing motorist who cannot be located for purposes of service of process in the usual manner. See Clay v.

Portik, 84 Wn.App. 553, 929 P.2d 1132 (1997). The remedy it provides is to allow a plaintiff to serve the summons and complaint on the Secretary of State with the same force and effect as if the defendant was personally served. RCW 46.64.040 reads in relevant part:

Likewise each resident of this state who, ..., is involved in any accident, ... 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 ..., and such service shall be SUFFICIENT AND VALID PERSONAL SERVICE UPON SAID RESIDENT OR NON RESIDENT.... 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 he has with due diligence attempted to serve personal process upon the defendant at all addresses known to him of defendant and further listing in his affidavit the addresses at which he attempted to have process served. (emphasis added)

In Martin v. Triol, the Washington Supreme Court provided the following insight:

We are concerned in this case with whether substituted service on the Secretary of State qualifies as personal service within the meaning of the tolling statute, RCW 4.16.170.

Martin v. Triol, 121 Wn.2d 135, 149, 847 P.2d 471 (1993); citing Sidis v. Brodie / Dohrmann, Inc., 117 Wn.2d 325, 327, 815 P.2d 781 (1991).

The Legislature has, however, chosen to identify this type of service as a form of “personal” service. Martin, 121 Wn.2d at 149. Where language of a statute is not ambiguous, there is no need for judicial interpretation. Id., at 149-50.

Personal service in conformity with RCW 46.64.040 was accomplished on December 30, 2010 when Mr. Keithly duly served the Secretary of State, whom Mr. Sanders affirmatively appointed to accept service on his behalf when he left the state and moved to China in 2008. When the Secretary was served on December 30, 2010, said service was (1) sufficient and (2) valid personal service per the plain meaning of the statute and Martin v. Triol, 121 Wn.2d 135 provided that Mr. Keithly forthwith provides due process notice to Mr. Sanders of the pendency of the cause of action against him so he can have an opportunity to be heard.

II. MR. KEITHLY STRICTLY COMPLIED WITH THE DUE PROCESS NOTICE REQUIREMENT OF RCW 46.64.040 WHEN HE FORTHWITH SENT BY CERTIFIED MAIL RETURN RECEIPT REQUESTED A COPY OF THE NOTICE OF SERVICE 20 DAYS AFTER HE RECEIVED THE CERTIFICATE OF SERVICE FROM THE SECRETARY OF STATE AND THE TRIAL JUDGE APPROVED MR. SANDERS’ MOTION FOR SUMMARY JUDGMENT IN ERROR.

- A. RCW 46.64.040 does not require that Mr. Keithly mail the Notice of Service et cetera within the 90-day tolling period because notice to a defendant is a due process consideration not a component of actual service.

Service of process on a post office box in Olympia at the Secretary of State's office does not simultaneously provide notice to a defendant. Consequently, RCW 46.64.040 imposes a due process requirement of notice to allow an opportunity to be heard and to defend the action when it requires that a Notice of Service et cetera be sent to a defendant at his / her last known address.

Case law distinguishes service on the Secretary of State from notice of a cause of action, showing the latter as a due process consideration. The Court of Appeals in Smith v. Forty Million indicated that once the Secretary is served, notice must be provided to the defendant as a matter of due process notice and not as a component of actual service. Smith v. Forty Million, 64 Wn.2d 912, 915-16, 395 P.2d 201 (1964). Additionally, the Court cited Wuchter in stating that a line of cases allowing the Secretary of State to be served without subsequent notice to the defendant violated such defendant's constitutional rights as "such service by substitution... cannot meet the demands of **due process** unless such service is complemented by notice to the defendant of the service." Id., citing Wuchter v. Pizzuti, 276 U.S. 13, 72, 48 S. Ct. 259, 72 L. Ed. 446 (1928) (emphasis added).

RCW 46.64.040 itself shows the mailing requirement is a due process consideration because the Legislature expressly chose the word “forthwith” in describing how a plaintiff is to mail a defendant notice that a cause of action has commenced and that he was served at the Secretary of State’s office. If it was a component of actual service, the Legislature could have, but did not, use a defined period of time. The Legislature’s characterization of that Notice of Service mailing as a due process component is further evidenced where it expressly allowed a court to “order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.” RCW 46.64.040. Clearly, the Legislature contemplated its choice of words and settled on “forthwith” to show its intent, but to ensure a due process was met, set forth a remedy should there be a due process violation, namely, a continuance.

B. RCW 46.64.040 only requires that Mr. Keithly mail the Notice of Service “forthwith”, which case law defines as “elastic.”

The provisions of RCW 46.64.040 require that, after service is made upon the Secretary of State, the plaintiff provide the defendant of substitute service of process “forthwith.” RCW 46.64.040 reads:

... 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... (emphasis added)

The Legislature's intent is seen by its choice of words. See Clay, 84 Wn.App. at 558, citing Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 621, 628-29, 869 P.2d 1034 (1994). As Clay instructs, a court will determine the Legislature's intent from the language of the statute alone. Id. And where a statute does not have a defined requirement, the Legislature's intent can be inferred by a plain reading of the statute. See Clay v. Portik, 84 Wn.App. 553, 558, 929 P.2d 1132 (1997).

The term forthwith is "relative" and "elastic." Williams v. Continental Securities Corp., 22 Wn.2d 1, 13, 153 P.2d 847 (1944). It further states "So far as time is concerned there is no precise definition of the term," and it is construed with consideration of the circumstances of the case and the nature of the thing to be done. Id. RCW 46.64.040 is otherwise silent with regard to a period of time in which the Notice of Service et cetera is to be mailed to a defendant.

It is presumed that Mr. Sanders will rely on Clay v. Portik, 84 Wn.App. 553, 929 P.2d 1132 (1997) for the proposition that to perfect service of process, the plaintiff must do the following prior to the 90 day tolling period running: (1) deliver two copies of the summons to the

Secretary of State with the required fee, (2) either personally serve the defendant with a copy of the summons and Notice of Service or send the same to the defendant by registered mail return receipt requested to the defendant at his last known address, (3) file an affidavit of compliance with the court, and (4) if the defendant was served by registered mail, file an affidavit of due diligence with the court. Clay, 84 Wn.App. at 559.

To rely on Clay for the proposition that all the requirements need to be met prior to the 90 day tolling period running is a misreading and misapplication of Clay. Clay instructs us not to use it for what it does not hold because non-dispositive statements in a case are not controlling. See Clay, 84 Wn.App. 560.

Clay iterates the requirements of RCW 46.64.040 in passing but those statements are not dispositive on the ruling of Clay because the direct terms of the statute were unambiguous and made the Legislature's intent obvious.

Clay raised two issues: (1) whether or not a plaintiff needed to provide the defendant's last known address to the Secretary of State, and (2) whether or not a plaintiff's attorney can sign the Affidavit of Compliance on the client's behalf. Clay held that the clear and unambiguous language of 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. Clay, 84 Wn.App. 555-56. The court did not address the issue of whether the requirements of RCW 46.64.040 need to be met prior to the 90 day tolling period runs.

The analysis in Clay is important to the present case. In looking at the issue of whether the defendant's last known address needs to be provided to the Secretary, Clay noted that the statute was clear on its plain terms where it reads that "The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's last known address, if known to the secretary of state." (emphasis added) Clay, 84 Wn.App. at 559, citing RCW 46.64.040. The statute's clear language, not the court's iteration of the statute's procedures, allowed the court to hold that an address need not be provided. Clay, 84 Wn.App. at 559-60. It reasoned that:

Not only is the statute silent as to the need to supply an address, the last sentence of RCW 46.64.040 suggests the contrary where it states that the Secretary shall send copies to the defendant "at the defendant's address, if known to the secretary of state." That clearly indicates a legislative intent that substituted service be available even where the plaintiff has not furnished the Secretary with an address.

Clay, 84 Wn.App. at 560, citing Martin v. Meier, 111 Wn.2d 471, 760 P.2d 925 (1988).

In reaching its holding, the court made a passing statement of the procedures of RCW 46.64.040 but showed its holding relied on the specific wording of the statute because that wording showed the Legislature's clear intent, and that wording was not included in the court's enunciation of the statute's procedures. Thus, it was not dispositive to the holding in Clay and is not controlling of our case. Passing statements that are not dispositive to the case are not controlling. See Clay, 84 Wn.App. at 559. ("Although the Brown court, Brown v. Prowest Trans Ltd., 76 Wn.App. 412, 421, 886 P.2d 223 (1994), stated in passing that "RCW 46.64.040 ... requires an address to be provided" that statement was not dispositive of the case and thus, is not controlling). Clay, 84 Wn.App. at 560, citing Electric Lightwave, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). Clay goes further to say that the doctrine of stare decisis does not apply to language which is unnecessary to the conclusion reached. Id., citing Electric Lightwave, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

In the present case, should Clay be cited for the proposition that the requirements need to be completed prior to the running of the 90 day

tolling period, a passing statement that was not dispositive to Clay would be wrongly used as authority for something it does not say. Clay instructs that non-dispositive statements, like the enunciation of the statute's procedures, are not controlling on subsequent cases because the procedures were not dispositive to the ruling in Clay.

If it were cited for the proposition that the statute's procedures need to be completed prior to the 90 day tolling period runs, such a reading would also go against the purpose of the statute and contradict established case law and the statute itself.

RCW 46.64.040 is designed to provide a remedy for a Plaintiff who is injured by a non-resident motorist or departing motorist who cannot be located for purposes of service of process in the usual manner. See Clay v. Portik, 84 Wn.App. 553, 929 P.2d 1132 (1997). The remedy it provides is to allow a plaintiff to serve the summons and complaint on the Secretary of State with the same force and effect as if the defendant was personally served. The statute was not designed for, and does not contemplate, reducing a plaintiff's opportunity to serve a defendant and does not impose a time deadline for such notice.

If Clay were cited for the proposition that all four of the components it stated in passing were to be complete prior to the 90 day tolling period,

such a proposition further fails because component four, namely that if the defendant was served by registered mail, plaintiff must file an affidavit of due diligence with the court, would create the opportunity for a defendant to elude the mail receipt and efforts of the postal workers to avoid responsibility for hurting a plaintiff, which flies in the face of the purpose of the statute.

Additionally, consider the days eroded from a plaintiff's 90 day period just by the fact of mailing the documents to a defendant at his last known address. From there, it can be common for the postal worker to attempt service 2-3 times, and after the mailing is unclaimed, it is returned to plaintiff. Whether or not a defendant is served by registered mail as seen on the returned receipt determines under the statute's plain language of RCW 46.64.040:

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)

As the statute clearly states, before a plaintiff can comply with the plain language of the statute, he must wait to see whether or not the defendant was served by registered mail, as that determines the contents of the attorney's affidavit.

Thirdly, there is no language in RCW 46.64.040 that requires that the affidavits of due diligence and compliance be filed with the court. Clay cannot be cited for what it does not hold, and if it is cited for what it does not hold, it would go against the clear and unambiguous language of RCW 46.64.040. Where a statute is silent, the legislative intent must be followed. See Clay, 84 Wn.App. at 560.

Lastly, case law provides that a plaintiff has the full period of the statute of limitations or more if tolled in which to attempt to serve a defendant. Carras v. Johnson, 77 Wn. App. 588, 593, 892 P.2d 780 (1995). The Court of Appeals noted that “the plaintiff has the full period of the statute of limitation within which to **attempt** to effect service.” Id., at 593, citing Martin v. Meier, 111 Wn.2d 471, 480, 760 P.2d 925 (1988) (emphasis added). To require a due process notice mailing to a defendant prior cuts short the 90 day period allowed to a plaintiff to attempt to effect service.

All tolled, it is easy to see that several weeks, at least, are eroded from a plaintiff’s 90 day period if Clay stands for the proposition that a plaintiff needs to file an affidavit of due diligence prior to the 90 day period running. Such a reading of Clay would greatly benefit an elusive defendant who elected to ignore the mailing notices to the great detriment of a plaintiff.

Mr. Sanders was served thru the Secretary of State with process on December 30, 2010; the Secretary of State mailed notice to the defendant on December 30, 2010; the Secretary of State mailed its January 4, 2011, certificate of service on January 5, 2011 (received on or about January 8, 2011); counsel for Mr. Keithly endeavored to prepare his affidavits, Notice of Service with an attachment of the Secretary's certificate, and forthwith mailed the same with the requisite documents to Mr. Sanders on January 27, 2011, fewer than three weeks after the Secretary's certification was received. CP 21-27.

C. The trial judge erred in approving Mr. Sanders's motion for summary judgment, and in his application of *Omaits v. Raber*.

The trial judge stated that Plaintiff did not strictly comply with RCW 46.64.040, having mailed the Notice of Service to Defendant "several weeks after the 90-day tolling period had expired," citing *Omaits v. Raber*. (CP 34).

In *Omaits*, however, the trial court ruled the plaintiff did not strictly comply with RCW 46.64.040 because the plaintiff never sent notice of service of process to the defendant at all. *Omaits v. Raber*, 56 Wn. App. 668, 669-70, 785 P.2d 462 (1990). Indeed, in that case, the Appellant contended that "substantial compliance" with the service requirements was sufficient to avoid a motion for summary judgment. *Id.*,

at 670. The Court held that statutes requiring that service be constructive or substituted shall be strictly construed. Id. The court did not dismiss that case because of a timeliness issue; it dismissed the case because Plaintiff failed to send the document called a Notice of Service, which provides due process notice to a defendant that he was served through alternative means. Id. In failing to do so, Plaintiff did not strictly comply with RCW 46.64.040. Id.

The present case is distinguishable from Omaits because unlike plaintiff's attorney in Omaits, who did not send defendant a required document to the defendant (a copy of his Notice of Service), counsel in the present case did send such Notice, which was returned as "Not Here." CP 29-30. In so doing, Mr. Keithly strictly complied with the requirements of the statute, having sent each of the required documents to Mr. Sanders. Mr. Sanders's and the lower court's reliance on this case is mistaken, as Omaits does not center on a timeliness issue but rather a missing document issue. This is important because Omaits neither addresses nor holds that RCW 46.64.040 requires the Notice of Service documents to be mailed prior to the 90 day tolling period. Instead, Omaits provides that statutes should be strictly complied with because they derogate from common law. Omaits, 56 Wn.App. at 670.

Additionally, the facts of Omaitis do not show that that defendant maintained, through multiple sources, an active Washington address, as Benjamin Sanders did with the State of Washington and thru the Accurant Person Search. These facts have relevance and purpose in our case because they fulfill the legal definition of residency, as one can be a resident here but staying somewhere else.

D. RCW 46.64.040 authorizes a continuance, not a dismissal, should there have been a due process notice violation because rules of procedure are intended to allow the court to reach the merits, not dispositions on technical niceties, especially when there is an easy remedy like a continuance.

Even if, as Mr. Sanders argued at the prior Motion for Summary Judgment hearing, strict compliance with RCW 46.64.040 requires that each step of the service, notice, and filing with the Secretary of State occur before the expiration of the tolling period, the proper remedy would have been a continuance for a lack of due process notice. A dismissal was not warranted and flew in the face of the plain and unambiguous terms of RCW 46.64.040.

The legislature clearly contemplated a remedy for due process notice concerns, premised on ensuring that all parties are afforded a reasonable opportunity to be heard. RCW 46.64.040 plainly states that “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.” Further, a trial court has the discretion to allow amended service of

process so long as there is no injury to the substantial rights of the party against whom process is served. CR 4(h).

In this instance, notice of service on the Secretary of State was mailed to Mr. Sanders where he registered his vehicle with the State of Washington and maintained an active current address thru the Accurant Person Search database. These mailings were made on two separate occasions (December 30, 2010 and January 27, 2011), providing ample notice and opportunity to Mr. Sanders to defend his case. The Secretary mailed a copy of process to Mr. Sanders on December 30, 2010, more than 9 months prior to the mediation date, more than 13 months prior to the discovery cutoff, and nearly 15 months prior to trial on March 26, 2012. CP 12. Moreover, Mr. Keithly mailed the Notice of Service documents on January 27, 2011, more than 8 months prior to the mediation date, more than 12 months prior to the discovery cutoff, and nearly 14 months prior to trial on March 26, 2012. CP 12.

Mr. Keithly afforded Mr. Sanders ample time to defend the action and there was no due process violation. Had there been a due process violation, the remedy contemplated by the legislature on the face of the statute was a continuance; not a dismissal, because “Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.” In Re Marriage of Morrison, 26 Wn.

App. 571, 573, 613 P.2d 557 (1980). And a dismissal should not be granted on a mere technicality easily remedied. Id.

D. 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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