

FILED
COURT OF APPEALS
DIVISION II

2015 SEP 10 AM 9:55

No. 47495-6-II

STATE OF WASHINGTON

BY 
DEPUTY

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

CORINN JAMES and IAN JAMES
Appellants,

v.

CASEY MCMURRY and "JANE DOE" MCMURRY
Respondents,

APPELLANTS' REPLY

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ORIGINAL

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I. ARGUMENT

- A. **Filing Affidavits is not set forth in the statute. The James' complied with RCW 46.64.040 and their case should be heard on the merits.**

The language in *Clay v. Portik* regarding *filing* affidavits, on which McMurry relies, is dicta.

The issues in *Clay v. Portik* were (a) whether the Plaintiff's attorney (opposed to the Plaintiff) can sign the Affidavit of Compliance — and (b) whether the Secretary of State lacked a statutory basis to demand an address for the defendant from the Plaintiff. *Clay v. Portik*, 84 Wash. App. 553, 557, 929 P.2d 1132 (1997). The issue **was not** whether any affidavits must be filed with the Court to comply with RCW 46.64.040.

The Appellate Court in *Clay* stated in its opening paragraph:

We hold that the statute does not require a plaintiff seeking to use the statute to provide the Secretary of State with the defendant's address or with a certificate of compliance signed by the plaintiff personally, rather than by the plaintiff's attorney.

Consequently, we reverse the trial court's dismissal of Clay's action and remand for trial.

Clay v. Portik, at 556.

McMurry argues that the legislature acquiesced to the 2007 case *Clay v. Portik's* interpretation of RCW 46.64.040 by not amending RCW 46.64.040 to specifically add language to exclude a requirement to file an

affidavit of compliance or due diligence.

However, dicta is not controlling. The Court in *Clay v. Portik* reiterating that dicta is not controlling when discussing the *Brown v. ProWest Transport Ltd.*, 76 Wash App 412 886 P.2d 223 (1995) case (a case concerning RCW 46.64.040). The Clay court stated about the Brown case:

The Brown court was called upon to decide whether an attempted filing with the Secretary tolled the statute of limitations. Brown had been unable to obtain any address for the defendant. Thus, Brown could not comply with the statutory requirement that he mail a copy of the summons and complaint to the defendant's last known address. Accordingly, the Brown court concluded that the nonresident motorist statute was not available for Brown's use.

Clay v. Portik, 84 Wash. App. 553, 560, 929 P.2d 1132, 1135 (1997).

Nonetheless, the Court in *Clay* then stated:

Although the Brown court, 76 Wash.App. at 421, 886 P.2d 223, 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 v. Portik, at 560. [emphasis added]. “Dicta is not controlling authority and need not be followed.” *Gerberding v. Munro*, 134 Wash. 2d 188, 224, 949 P.2d 1366 (1998); citing *State v. Potter*, 68 Wash.App. 134, 150 n. 7, 842 P.2d 481 (1992).

Accordingly, it is entirely unfair and unfounded to charge the legislature with acquiescing to language from the Court’s ruling that is not

controlling and that need not be followed.

Notwithstanding the foregoing, McMurry's argument ignores that (a) in 2012 the Court of Appeals in *Keithly v. Sanders*, 170 Wash. App. 683, 285 P.3d 225 (2012), set forth what was required to comply with RCW 46.64.040 and filing affidavits with the Court was **not** required and (b) at no point since that opinion has the legislature amended RCW 46.64.040 to add language requiring the serving party to file an affidavit of compliance or due diligence.

In short, both service of two copies of the summons on the secretary of state and mailing of notice of such service, together with the other statutorily required documents, must be accomplished to effect proper service. **Only then does one strictly comply with the terms of RCW 46.64.040 for service of process.**

Keithly v. Sanders, at 688. [emphasis added].

Second, McMurry's argument also ignores that in 2015, the Appellate Court in *Larson v. Yoon* discussed strict compliance with RCW 46.64.040 – did not include filing an affidavit with the Court – and cited not to *Clay v. Portik* but rather to the above-referenced *Keithly v. Sanders*:

Strict compliance with the statute means that “both service of the secretary of state and mailing of notice of such service forthwith to the defendant must be accomplished, in addition to the other statutory requirements.” *Keithly*, 170 Wash.App. at 693, 285 P.3d 225 (emphasis added).

Larson v. Yoon, 187 Wash. App. 508, 351 P.3d 167, 170 (2015).

The legislature was aware of the interpretation of RCW 46.64.040 by the Appellate Court in the *Keithly v. Sanders* case and then again in *Larson v. Yoon*, and yet did nothing to amend the statute to add language requiring the serving party to file any affidavits.

Accordingly, the legislature has acquiesced – at the time of service in the present case and also currently – to the Court’s interpretation of RCW 46.64.040 in the *Keithly v. Sanders* case that omits filing affidavits as a requirement to comply with the RCW 46.64.040.

In the present case, service occurred in February, 2015. At the time of service and currently, no language exists in RCW 46.64.040 stating that an affidavit of compliance or an affidavit of due diligence must be filed with the Court. At the time of service and currently, the Appellate Court in the 2012 opinion from *Keithly v. Sanders* interpreted RCW 46.64.040 as not requiring that any affidavit be filed with the Court to comply with RCW 46.64.040. At the time of service and currently, the legislature had never amended RCW 46.64.040 to add language requiring that affidavits of due diligence or compliance be filed with the Court.

Moreover, RCW 46.64.040 sets forth a list – upon which the statute operates – for what the serving party should do with the operative documents: (a) leave certain documents with the Secretary of State, (b) pay a fee to the

Secretary of State, (c) and send certain documents registered mail return receipt requested to the defendant's last known address. *Filing* affidavits with the Court was – and is – omitted from that list.

“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.” *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280, 4 P.3d 808 (2000).[emphasis added]. At the time of service and currently, this was applicable law.

McMurry also cites *Heinzig v. Seok Hwang*, an appellate opinion published on June 29, 2015. In *Heinzig v. Seok Hwang*, the Court discussed the statutory procedure for notifying a defendant that process has been served on the secretary of state:

The statutory procedure for notifying a defendant that process has been served on the secretary requires the plaintiff to (1) either personally serve the defendant with a copy of the summons and notice of service on the secretary or send the same documents by registered mail, return receipt requested, to the defendant's last known address, and (2) append to the mailing an affidavit of compliance with the statute signed by the plaintiff and an affidavit of due diligence signed by the plaintiff's attorney and certifying that attempts were made to serve the defendant personally.

Heinzig v. Seok Hwang, No. 72269-7-I, 2015 WL 4726965, at *4 (Wash. Ct. App. June 29, 2015).

As is clear from the Court's interpretation of RCW 46.64.040, the statute does **not** require filing the affidavit of compliance or due diligence with the Court.

This is not only clear from the above-quoted excerpt from the *Heinzig v. Seok Hwang* Court's written opinion, but also by the fact that the *Heinzig v. Seok Hwang* Court notes the difference between its interpretation of RCW 46.64.040 (not requiring filing of the affidavits) and the language from the *Clay v. Portik* case. Specifically, the Court in *Heinzig v. Seok Hwang* provides:

The statutory procedure for notifying a defendant that process has been served on the secretary requires the plaintiff to (1) either personally serve the defendant with a copy of the summons and notice of service on the secretary or send the same documents by registered mail, return receipt requested, to the defendant's last known address, and (2) append to the mailing an affidavit of compliance with the statute signed by the plaintiff and an affidavit of due diligence signed by the plaintiff's attorney and certifying that attempts were made to serve the defendant personally. RCW 46.64.040; *Keithly v. Sanders*, 170 Wash.App. 683, 688–90, 285 P.3d 225 (2012). ***But see Clay v. Portik*, 84 Wash.App. 553, 559, 929 P.2d 1132 (1997) (requiring only that the affidavits be filed with the court).**

Heinzig v. Seok Hwang, at *4. [bold emphasis added]. Notably, to support its interpretation of RCW 46.64.040, the *Heinzig v. Seok Hwang* Court, cited to *Keithly v. Sanders* – the 2012 opinion that also interpreted RCW 46.64.040 as having no requirement to file affidavits of compliance and due diligence

with the Court.

The James' counsel executed an Affidavit of Tim Friedman re Due Diligence and executed an Affidavit of Tim Friedman re RCW 46.64.040, sent copies of both Affidavits along with two copies of the Summons and Complaint and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, as well as a check in the amount of \$50.00, to the Washington Secretary of State, mailed copies of both Affidavits along with two copies of the Summons and Complaint and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire to McMurry, filed the confirmation of service letter from the Washington State Secretary of State (which identifies Casey McMurry as the Defendant) under cover-pleading entitled "Proof of Service of Summons; Complaint for Damages" and received McMurry's counsel's notice of appearance ---- all within the 90 day tolling period.

B. RCW 46.64.040 is unambiguous in its lack of a requirement to file Affidavits wit the Court. Nonetheless, the legislative history supports that the current version of RCW 46.64.040 has no language requiring that Affidavits be filed.

McMurry invokes legislative history concerning RCW 46.64.040. However, where language of a statute is not ambiguous, there is no need for judicial interpretation. *Martin v. Triol*, 121 Wash. 2d 135, 149, 847 P.2d 471 (1993).

Here, the statute is **unambiguous in its lack of a requirement** that a plaintiff provide the defendant's address.

Clay v. Portik, at 558. [emphasis added]. Similarly, the statute is unambiguous in its lack of requirement to file any affidavit with the Court, as nowhere in the statute is there language requiring filing or entering an affidavit of compliance or due diligence. “The plain words of RCW 46.64.040 are dispositive.” *Keithly v. Sanders*, 170 Wash. App. 683, 688, 285 P.3d 225 (2012).

Nonetheless, a prior version of RCW 46.64.040 that specifically directed that the affidavit of compliance be entered as part of the return thereof (i.e. “the plaintiff’s affidavit of compliance herewith are appended to the process **and entered as part of the return thereof**”) is supportive of the James’ arguments. The statute was since amended (last amended in 2003), and the above-language requiring the affidavit be appended to the process *and entered* was removed.

The only time the word “entered” is used in the current version of the statute (which is the version when service was made) is with respect to the defendant’s endorsed receipt as part of the return of process:

However, **if** process is forwarded by registered mail **and defendant’s endorsed receipt is received and entered as 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: ...

RCW 46.64.040 [Emphasis added].

The statute does not say that the affidavit of compliance or due diligence must be entered.

“The lack of return of service does not deprive a court of jurisdiction, nor does it affect the validity of the service.” *Jones v. Stebbins*, 122 Wash. 2d 471, 482, 860 P.2d 1009, 1015 (1993).

Respectfully, McMurry misses an important point when he claims that “simply sending an affidavit of compliance to a defendant would serve no purpose.” First, this incorrectly characterizes the James’ efforts in serving McMurry. The James’ mailed by registered mail return receipt requested, copies of both the Affidavit of Tim Friedman Re RCW 46.64.040 and Affidavit of Due Diligence, along with two copies of the Summons and Complaint, along with a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire to an address that has been sworn-to by investigator Mike Crockett as “the last known address listed for Mr. McMurry”.CP 101

Moreover, also within the 90 day tolling period, the James’ filed the confirmation of service letter from the Washington State Secretary of State. CP 93:2 2-23; 55:17-20; 87-89. It is evident from this document that (a) there is a legal action “relating to: Corinn James And Ian James vs. Casey

McMurry And Jane Doe McMurry;

(b) There is a cause number identified as "Cause No. 14 2 02400 0";

(c) Corinn and Ian James are labeled as "Plaintiff";

(d) Casey McMurry and Jane Doe McMurry are labeled as "Defendant";

(e) And the author is a duly appointed and acting clerk in the office of the Secretary of State responsible for the receipt and handling of the service of process under the Washington state statute indicated ;

(f) that the statute indicated as RCW 46.64.040.

(g) that on March 3, 2015, the Summons/Compliant and other legal documents in the action relating to Corinn James and Ian James (Plaintiff) vs. Casey McMurry and Jane Doe McMurry (defendant) were received in the office of the Secretary of State and that said documents were placed on file and a duplicated copy was mailed via certified mail, item number 91 7199 9991 7031 7900 3208 to: The marital community of Casey McMurry and Jane Doe McMurry 2617 Judd St SE Lacey, WA 98503.

CP 88.

Second, the affidavit of compliance used by the James' in the present case was more than just a one-sentence affidavit stating compliance with RCW 46.64.040. Rather, it provided notice to McMurry of when, how and with what the service was made to the Secretary of State. It also referenced

the service statute RCW 46.64.040 twice. CP 71-72.

C. The James' mailed notice of service to McMurry's last known address.

McMurry admits that "The Jameses mailed notice to Casey McMurry at 2617 Judd St. S.E in Lacey, Washington. *See Respondent's Brief, p.14.*

However, McMurry jumps to the conclusion that because he did not live at the Judd St. address when the collision occurred, the last known address to the Jameses must be the address on the 2011 collision report (the Prine Drive SW address). This is a flawed analysis.

In his own argument, McMurry finds it notable to mention that three years had passed from when he last lived at the Judd Street address to when the collision occurred. "McMurry last resided on Judd Street in 2008. At the time of the subject motor vehicle accident, three years later in 2011, McMurry resided on Prine Drive S.W. in Olympia, Washington." Respondent's Brief, p.14.

It would therefore also be notable that three years had passed from when the collision occurred to when service was accomplished. To that end, McMurry even admits that in 2013 he moved from the Prine Drive address to a new address. CP 18:14-16.

It is unfair and unfounded to summarily conclude that the last known address to the James' must have been the address on the collision report. The

Plaintiff hired a private investigator and owner of C&A Investigations to locate a service address for McMurry. CP:091; CP 55:17-20.

Investigator Crockett performed a search in an effort to locate McMurry. CP 101. This was done years after the 2011 police report was generated. Mr. Crockett provided the James' with the 2617 Judd St. SE, Olympia, WA 98503.

The most recently-dated address on investigator Crockett's report is shown as the 2617 Judd St. SE, Olympia, WA 98503 address. CP 102. "The last known address listed for Mr. McMurry was: 2617 Judd St. SE Olympia, WA 98503." CP 101 (Michael Crockett Declaration).

The James' sent the documents giving notice of service by registered mail return receipt requested to McMurry at the 2617 Judd Street SE, Lacey, WA 98503 address.

The James' did not violate RCW 46.64.040 by sending the notice of service to the Judd Street address.

The James' deferred to the professional investigator – hired much more recently than when the 2011 collision report was generated.

D. RCW 46.64.040 does not impose a duty on plaintiffs to attempt service at old, past addresses.

McMurry claims that the James' violated RCW 46.64.040 because they did not attempt to serve McMurry at a Titleist Lane address. However,

McMurry ignores that this address was not listed an address for McMurry, but was an address dating back to before the 2011 collision – i.e. a *past* address. CP 102.

The only current address for McMurry on investigator Crockett’s report was the Judd Street address. Investigator Crockett even testified in his Declaration that some of the information he receives when conducting a search is an individual’s current addresses and *past* addresses:

“As a normal course of business, I subscribe to several different information companies. I use these companies when attempting to locate an individual. Some of the information I receive is an individual’s **current and past addresses** associated with him....” CP 101.

The Titleist Lane address was not an address for McMurry, but a past address for McMurry. This has been confirmed by McMurry when he admits that he did not reside at the Titleist Lane address at the time of the service attempts. Respondent’s Brief, p.16. The Titleist Lane address was not even the address that was provided – presumably by McMurry – to law enforcement after the collision occurred. (The 2011 police report identifies the Prine Street address.) CP 076.

The Titleist Lane address was old – a past address – as is clear by investigator Crockett’s report and confirmed by McMurry himself.

RCW 46.64.040 does not require a plaintiff to attempt service at past

addresses. This would be incredibly odd, and incredibly burdensome to the serving party.

This fact – that the Titleist Lane location was not an address for McMurry but rather a past address – does not change simply because McMurry attempted service at the Pine Drive address even though it was also a past address. The Prine Street address was on the police report, and the fact that the James' attempted personal service at that address should not be used against them – it does not change the Titleist address from being an old, past address.

McMurry admits that investigator Crockett's report identifies the Titliest address as a past address. "The Jameses did not attempt personal service at a fourth address identified *as a past address* for McMurry by private investigator hired to locate him . . ." Respondent's Brief, P.3. [emphasis added].

The only address in investigator Crockett's report contemporaneous with his search was the Judd Street address. This was the only address at which the James' needed to attempt service. Nonetheless, the James' tried other addresses (both the Prine Street address and even an address associated with a woman believed to possibly be his girlfriend).

CONCLUSION

Prior to serving McMurry via service through the Washington Secretary of State, the James' counsel executed an "Affidavit of Tim Friedman re Due Diligence" and an "Affidavit of Tim Friedman re RCW 46.64.040." CP 61-69; 71-72;

On February 25, 2015, prior to the 90 day statute of limitations tolling period, the James' counsel's office mailed two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and a copy of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, as well as a check in the amount of \$50.00, to the Washington Secretary of State at 801 Capitol Way South, Corporations Division, PO Box 40234, Olympia, WA98504-0234. CP 71.

On February 25, 2015, prior to the 90 day statute of limitations tolling period, the James' counsel's office mailed, via registered mail return receipt requested, two copies of the Summons and Complaint, with the Affidavit of Tim Friedman re RCW 46.64.040 and with the Affidavit of Tim Friedman re Due Diligence enclosed therewith, and two copies of the Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire, to Casey McMurry at the 2617 Judd St. SE, Lacey, WA 98503

address. CP 71-72.

On March 6, 2015, the James' counsel's office sent McMurry's attorney's office a copy of the Summons, Complaint, Notice of Assignment and Notice of Trial Scheduling Date and Scheduling Questionnaire – and it was received by defense counsel on March 9, 2015. CP 84-85.

On March 7, 2015, the James' counsel's office received the confirmation of service letter from the Washington State Secretary of State. CP 93:8-9; 55:17-20; 82. This confirmation of service letter states in pertinent part:

The undersigned hereby states that she is a duly appointed and acting clerk in the office of the Secretary of State responsible for the receipt and handling of the service of process under the Washington State statute indicated and is qualified to make the following statements:

On March 3, 2015, Summons/Complaint and other legal documents in the action relating to: Corinn James And Ian James (plaintiff) vs. Casey McMurry And Jane Doe McMurry (defendant), Cause No. 14 2 02400 0, were received in the office of the Secretary of State. Said documents were placed on file and a duplicated copy was mailed via "Certified" mail, item number 91 7199 9991 7031 7900 3208 to:

...
the non-resident motorist at the last known address as supplied by the plaintiff or his/her representative (RCW 46.64.040). CP 82.

On March 11, 2015, prior to the 90 day statute of limitations tolling period, the James' counsel filed the confirmation of service document from

the Secretary of State with the Court. CP 93:2 2-23; 55:17-20; 87-89.

On March 12, 2015, the James' counsel's office received Malarchick Law Office's Notice of Appearance, on behalf of Defendants Casey and Jane Doe McMurry, along with a fully executed Agreement to Allow Electronic Service. CP 93:24 - 94:1; 55:17-20; 13-14.

“... the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.” *Coggle v. Snow*, 56 Wash. App. 499, 507, 784 P.2d 554 (1990).

McMurry was served via the Washington State Secretary of State. This occurred prior to the 90-day tolling period. This case should be heard on the merits.

DATED: September 9, 2015.

RON MEYERS & ASSOCIATES PLLC

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Appellants,

v.

CASEY MCMURRY and "JANE DOE" MCMURRY
Respondents,

DECLARATION OF SERVICE OF APPELLANTS' REPLY

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ORIGINAL

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS: 1. APPELLANTS' BRIEF
 2. DECLARATION OF SERVICE

ORIGINAL TO (+2): David Ponzoha, Clerk of the Court
Via Hand Delivery Washington State Court of Appeals, Div II
by ABC Legal Services 950 Broadway Ste 300
 Tacoma, WA 98402

COPIES TO:

Attorneys for Respondents McMurry:

William H. Fuld

Reed McClure

1215 Fourth Avenue, Suite 1700

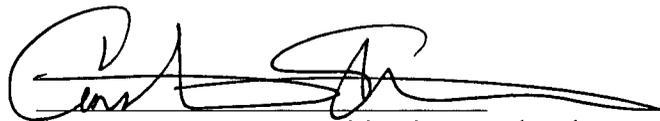
Seattle, WA 98161

Via Facsimile: 206.223.0152

Via Hand Delivery Courtesy of ABC Legal Services

Via Email: wfuld@rmlaw.com

DATED this 9th day of September, 2015, at Lacey, Washington.



Constance Stevenson, Litigation Paralegal