

NO. 47495-6-II

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

CORINN JAMES and IAN JAMES, wife and husband and their marital
community,

Appellants,

vs.

CASEY McMURRY and "JANE DOE" McMURRY, husband and wife and their
marital community,

Respondents.

APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Erik D. Price, Judge

BRIEF OF RESPONDENTS

REED McCLURE

By William H. P. Fuld

Suzanna Shaub

Attorneys for Respondents

WSBA #40735

WSBA #41018

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

RECEIVED
AUG 17 2015
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

COPY

TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. ISSUES PRESENTED.....	1
III. STATEMENT OF THE CASE.....	2
A. STATEMENT OF RELEVANT FACTS	2
B. STATEMENT OF PROCEDURE.....	2
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT.....	6
A. MR. AND MRS. JAMES FAILED TO EFFECT PERSONAL OR SUBSTITUTE SERVICE ON MR. MCMURRY.....	6
1. The Jameses Failed to File an Affidavit of Compliance as Required by This Court’s Ruling in <i>Clay</i> and the Statute	6
2. The Legislative History and WASHINGTON PRACTICE Mandate Filing an Affidavit of Compliance	10
3. Regardless of the Jameses’ Failure to File the Affidavit of Compliance, the Jameses Still Failed to Comply with the Statute.....	14
a. The Jameses Failed to Mail Notice of Service on the Secretary of State to McMurry at His Last Known Address.....	14
b. The Jameses Failed to Serve Notice on McMurry at All Known Addresses	15
VI. CONCLUSION	16

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	12
<i>Clay v. Portik</i> , 84 Wn. App. 553, 929 P.2d 1132 (1997).....	6, 7, 8, 9, 10, 12
<i>Heinzig v. Hwang</i> , 2015 Wash. App. LEXIS 1365 (Wash. App. June 29, 2015), ordered published Aug. 10, 2015.....	9
<i>Larson v. Kyungsik Yoon</i> , 187 Wn. App. 508, 351 P.3d 167 (2015).....	6
<i>Martin v. Triol</i> , 121 Wn.2d 135, 847 P.2d 471 (1993).....	6, 10, 15, 16

Statutes

Laws of 1961, ch. 12, § 46.64.040.....	11
Laws of 1971, 1st Ex. Sess., ch. 69, § 1.....	11
Laws of 2003, ch. 223, § 1.....	12
RCW 4.16.170	2
RCW 46.64.040	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

Other Authorities

9 Breskin & Barbier, WASH. PRAC., <i>Civil Procedure Forms</i> §§ 4.46, .47 (2d ed. 1990).....	10
9 Breskin, WASH. PRAC., <i>Civil Procedure Forms</i> § 4.56 (3rd ed. 2000).....	9, 10

063060.000168/663150

I. NATURE OF THE CASE

Plaintiffs and defendant were in a traffic accident. Plaintiffs waited until one day before the three-year limitations period was to expire before filing suit.

Plaintiffs attempted to accomplish substituted service of process on the defendant pursuant to Washington's nonresident motorist act, RCW 46.64.040. Plaintiffs failed to file with the court an affidavit of compliance with the statute before the applicable statutory limitation period expired. The trial court dismissed the suit for insufficiency of service of process.

II. ISSUES PRESENTED

A. Did the trial court properly dismiss the case where substitute service under the nonresident motorist act was not accomplished because plaintiffs:

1. failed to file with the court an affidavit of compliance with RCW 46.64.040;
2. failed to mail notice of service on the secretary of state to the defendant's last known address;
and
3. failed to attempt personal service of process upon the defendant at all known addresses?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

On December 20, 2011, defendant/respondent Casey McMurry was involved in an automobile accident with plaintiff/appellant Corinn James in Thurston County. (CP 7)

B. STATEMENT OF PROCEDURE.

On December 19, 2014, one day before the three-year statute of limitations expired, Corinn and Ian James filed a complaint against McMurry in Thurston County Superior Court alleging negligence and seeking damages for their alleged injuries.¹ (CP 6-10, 59)

Pursuant to RCW 4.16.170, the Jameses had 90 days after filing their complaint to effect service. A process server hired by the Jameses attempted to personally serve McMurry with the summons and complaint between December 28, 2014 and February 19, 2015 at three different addresses (2617 Judd St. S.E., Lacey, WA 98503, 7740 Prine Drive S.W. in Olympia, WA, and 3938 Clerfield Drive S.E., Olympia, WA 98503). (CP 64-69) All personal service attempts were unsuccessful. (CP 64-69) McMurry did not reside at any of the addresses at the time of the service attempts. (CP 43-44)

¹ Filing the lawsuit tolled the statute of limitations for 90 days, to March 19, 2015, to permit time for service of the summons and complaint.

The Jameses did not attempt personal service at a fourth address identified as a past address for McMurry by a private investigator hired to locate him (5807 Titleist Lane I202, Lacey, WA 98513-6502). (CP 61-69, 100-02)

On February 25, 2015, the Jameses' counsel attempted to effectuate substitute service on McMurry through the Washington secretary of state pursuant to RCW 46.64.040, the nonresident motorist statute. (CP 71-72)

That same day, the Jameses' counsel mailed, *inter alia*, two copies of the summons and complaint with the "Affidavit of Tim Friedman re RCW 46.64.040" and the "Affidavit of Tim Friedman re Due Diligence" to Casey McMurry at 2617 Judd St. S.E., Lacey, WA 98503. (CP 71-72) McMurry did not reside at that address. (CP 43-44) In fact, McMurry last resided on Judd Street in 2008. (CP 43-44)

At the time of the subject motor vehicle accident in 2011, McMurry resided at 7740 Prine Drive S.W. in Olympia, Washington. (CP 43-44) The State of Washington Police Traffic Collision Report from this incident identifies McMurry's residence address as on Prine Drive S.W., as does McMurry's Washington State drivers' license. (CP 45-49) In 2012, McMurry moved from the address on Prine Drive to a new address in Olympia, where he resided until at least March 2015. (CP 43-44)

Counsel for McMurry appeared on March 12, 2015. (CP 13-14) The Notice of appearance specifically stated that it was entered “without waiving objections to improper service and/or jurisdiction.” (CP 13)

On April 7, 2015,² McMurry filed a Motion to Dismiss the Complaint on the grounds of insufficient service of process and that the claims were barred by the statute of limitations. (CP 16-27) McMurry argued that the Jameses failed to strictly comply with the technical requirements of RCW 46.64.040 and service of process was not effectuated on three distinct grounds: (1) the Jameses did not mail notice of service on the secretary of state and a copy of the summons or process to McMurry at his last known address; (2) the Jameses did not file with the court plaintiff’s affidavit of compliance or the affidavit of the plaintiff’s attorney that he had with due diligence attempted to serve personal process upon McMurry at all known addresses; and (3) the affidavit of due diligence was deficient because the Jameses did not attempt to serve personal process upon McMurry at all addresses known to them. (CP 16-27)

After a hearing, the trial court granted McMurry’s motion and dismissed the case with prejudice. (CP 110-11) The court noted in its

² The motion appears to be incorrectly dated April 8, 2015. (CP 27)

written order that its ruling was “[f]or the reasons expressed in this Court’s oral ruling dated April 17, 2015.” (CP 110-11) The trial court based its ruling on the fact that the Jameses did not comply with the technical requirements of the nonresident motorist statute. (RP 23, 25-29) Specifically, they failed to file with the trial court plaintiff’s affidavit of compliance, in violation of RCW 46.64.040, before expiration of the statute of limitations. (RP 25-29)

The Jameses now argue that the trial court erred because they were not required to file an affidavit of compliance with RCW 46.64.040.

IV. SUMMARY OF ARGUMENT

The Superior Court correctly dismissed the Jameses’ case because they failed to serve McMurry within the statute of limitations. Service pursuant to the nonresident motorist statute was not effective because the Jameses failed to serve and file a proper affidavit of compliance as required under Washington law. Dismissal was also correct because the Jameses did not serve notice on McMurry at all known addresses, or mail notice of service on the secretary of state to McMurry at his last known address as required under Washington law.

This Court should affirm.

V. ARGUMENT

A. MR. AND MRS. JAMES FAILED TO EFFECT PERSONAL OR SUBSTITUTE SERVICE ON MR. MCMURRY.

1. The Jameses Failed to File an Affidavit of Compliance as Required by This Court's Ruling in *Clay* and the Statute.

Here, Mr. and Mrs. James relied on the nonresident motorist statute, RCW 46.64.040, as their method of service of process. The service was not effective because plaintiffs failed to comply with the requirement of filing an affidavit of compliance with service of process. Following established Division II precedent, the superior court correctly concluded as a matter of law that service was not accomplished.

A plaintiff seeking to use an alternative to personal service must strictly comply with the statutory provisions for substitute service. *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993). RCW 46.64.040, the nonresident motorist statute, requires nothing short of strict compliance. “[S]ervice of the summons on the secretary of state is not itself sufficient to constitute strict compliance with the statute and does not, by itself, obtain jurisdiction over the person of the nonresident motorist.” *Larson v. Kyungsik Yoon*, 187 Wn. App. 508, 514, 351 P.3d 167 (2015).

The statute sets forth detailed procedures necessary to accomplish a form of substitute service on a defendant in a manner that satisfies due

process requirements. Explaining the service requirements, RCW

46.64.040 provides in pertinent part:

. . . 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 the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. 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

This Court has previously instructed that to perfect service under the statute, the plaintiff must,

(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 on the Secretary or send the same documents 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 v. Portik, 84 Wn. App. 553, 559, 929 P.2d 1132 (1997).

In *Clay*, the appellant, Lolita Clay challenged the secretary of state's interpretation of RCW 46.64.040. Ms. Clay argued that RCW 46.64.040 did not require that a plaintiff provide the defendant's address

and did not prohibit a plaintiff's attorney from submitting and signing an affidavit of compliance on behalf of her client. *Clay*, 84 Wn. App. at 560. The opinion discussed whether an affidavit of compliance was insufficient because Ms. Clay's attorney signed it on her behalf, and went on to explain the requirements of the statute. *Id.* at 560-61. The Court specifically laid out the four-part mandate for complying with the statute, including filing an affidavit of compliance. *Id.* at 559.

In the present case, it is undisputed that the Jameses did not file an affidavit of compliance with the Court. Instead, the Jameses wrongly allege the statute does not call for such a filing, and that the lower court's reliance on this Court's prior ruling in *Clay* is incorrect. Mr. and Mrs. James now argue that nowhere in the plain language of the statute, nor in this Court's prior ruling in *Clay v. Portik*, is the filing of an affidavit of compliance mandatory. The Jameses insist this Court should disregard its prior instruction in *Clay*, but this Court's instruction in *Clay* is clear.

After review, the trial court in this case did not find *Clay's* reasoning inconsistent with the statutory language on filing the affidavit of compliance. In referring to the sentence in *Clay* that requires filing, Judge Price specifically noted that he "spent a lot of time with that sentence in *Clay v. Portik* to see if there is some way to distance the actual law from what the Court is saying it is." (RP 26:13-16) The trial court also

explained that *Clay* was still good law and its filing requirement had been cited in numerous other unpublished decisions. (RP 28-29) Obviously, unpublished decisions have no merit to the Court, but the trial court also noted that WASHINGTON PRACTICE supports *Clay's* filing instruction. (RP 26-27)

Additionally, since the trial court's ruling in this case, a Division I case recently approved for publication, *Heinzig*, specifically cites to *Clay v. Portik* for Division II's prior requirement that affidavits must be filed with the Court. *See Heinzig v. Hwang*, 2015 Wash. App. LEXIS 1365 at *11 (Wash. App. June 29, 2015), ordered published Aug. 10, 2015. In *Heinzig v. Hwang*, the appellant Heinzig argued that the trial court erred in finding that his attempt to accomplish substituted service pursuant to RCW 46.64.040 was ineffective. He contended that sufficient compliance with the procedural requirements of the statute was enough. *Heinzig* at *7. The defendant Hwang noted that Heinzig failed to adhere to two statutory requirements: (1) sending notice by registered mail to Hwang of service upon the secretary of state, and (2) attaching to that mailing an affidavit of due diligence signed by his attorney and certifying that attempts had been made to serve Hwang personally. *Id.* at *4. On appeal, the court affirmed, holding that only strict compliance could permit jurisdiction over the underlying defendant. *Id.* at *13. In discussing the correct procedure for

appending affidavits to the service, the Court cited *Clay*, noting that Division II required the affidavits be filed with the court. *Id.* at *11.

2. The Legislative History and WASHINGTON PRACTICE Mandate Filing an Affidavit of Compliance.

The *Clay* court cites to both RCW 46.64.040 and to WASHINGTON PRACTICE. *See Clay* at 559 citing 9 David E. Breskin & Margaret L. Barbier, WASH. PRAC., *Civil Procedure Forms* §§ 4.46, .47 (2d ed. 1990). The current version of WASHINGTON PRACTICE continues to instruct that plaintiffs file the affidavit of compliance. The Author's Comment section of § 4.56 reads:

The Washington Non-resident Motorist Statute, RCWA 46.64.040, provides for service on a defendant by leaving two copies of the summons and complaint with the Secretary of State. In addition to service on the Secretary of State, a copy of the summons and notice of the service on the Secretary of State must be sent by registered mail to, or personally served on, the defendant, **and an affidavit of compliance filed with the court.**

9 WASH. PRAC., *Civil Procedure Forms* § 4.56 (3rd ed. 2000) (emphasis added). WASHINGTON PRACTICE goes on to cite *Clay* and reminds plaintiffs that “These provisions of the statute must be strictly observed or jurisdiction over the defendant will be invalid. *Martin v. Tirol*, 121 Wn.2d 135, 847 P.2d 471 (1993).” *Id.*

WASHINGTON PRACTICE and *Clay*'s requirement for filing the affidavit finds further justification in the legislative history of the statute.

RCW 46.64.040 was amended in 1971. The previous version of the statute stated, in relevant part:

That notice of such service and a copy of the summons or process is forthwith sent by registered mail, requiring personal delivery, by plaintiff to the defendant and the defendant's return receipt, or an endorsement by the proper postal authority showing that delivery of said letter was refused, and the plaintiff's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof.

Laws of 1961, ch. 12, § 46.64.040. In this version, plaintiff was instructed to append the affidavit of compliance to the process and then proceed to have it “entered as a part of the return thereof.” In using the word “entered,” it would be incredibly bizarre if the statute meant something other than filing with the court. In this earlier version, service was required to be by personal delivery, but this was modified in a 1971 amendment which also added an affidavit of due diligence. RCW 46.64.040. Laws of 1971, 1st Ex. Sess., ch. 69, § 1. The new language was slightly altered, explaining that if an endorsed receipt was received and filed as a part of the return of process, then the affidavit of due diligence need only show that defendant received personal delivery by mail. *Id.* In doing this, the newly created affidavit of due diligence section was placed next to the affidavit of compliance section, instead of listing two sections requiring that the affidavits needed to be “entered as a part of the return thereof,” the

Legislature kept one, but the implication of filing for both remained clear. The word, “entered” still remained and read in conjunction with the legislative history strengthens the logic behind the requirement in *Clay*. While the language may be awkward, this section of the statute is the same version that appears today.

In reading the current statute’s language regarding the return receipt, it allows a plaintiff to slightly modify her filed affidavit of due diligence, but only where she has proof the defendant received personal delivery by mail. The statute still instructs that it must be filed, along with the affidavit of compliance. *See* RCW 46.64.040. If, on the other hand the plaintiff does not possess a return receipt, the statute instructs that the affidavit of due diligence must include additional information, such as all the addresses at which service was attempted. *Id.* However, this more comprehensive affidavit of due diligence, along with the affidavit of compliance, must still be filed. *Id.*

Post *Clay*, in 2003, the Legislature amended the statute, but did not make any amendments affecting the filing of an affidavit of compliance or due diligence. *See* Laws of 2003, ch. 223, § 1. Thus, the Legislature was aware of the interpretation by this Court in *Clay* and yet did nothing to amend the statute. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (“This court presumes that the legislature is

aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.").

From a practical perspective, simply sending an affidavit of compliance to a defendant would serve no purpose. A potential defendant is placed on notice by receiving the summons and complaint, but an affidavit of compliance notifies the trial court of plaintiffs' compliance with the statute, much the same way filing the complaint must occur before a lawsuit commences. An alternative interpretation of the statute where affidavits are filed only with a return receipt, or not at all, would be incredibly strange and inconsistent with basic notice and due process requirements of substitute service.

The trial court properly dismissed the Jameses' suit based on their failure to file an affidavit of compliance before expiration of the statute of limitations. Should the Court reject this, however, dismissal is still proper. The Jameses failed to strictly comply with other elements of the nonresident motorist statute, as argued in McMurry's original motion to dismiss. (CP 16-27)

3. Regardless of the Jameses' Failure to File the Affidavit of Compliance, the Jameses Still Failed to Comply with the Statute.

a. The Jameses Failed to Mail Notice of Service on the Secretary of State to McMurry at His Last Known Address.

RCW 46.64.040 expressly requires that the plaintiff send by registered mail with return receipt requested notice of the service of process on the secretary of state to the defendant at his last known address. Otherwise, substitute service under the statute is invalid. RCW 46.64.040.

Here, the Jameses failed to mail notice of service on the secretary of state to McMurry at his last known address. The Jameses mailed notice to Casey McMurry at 2617 Judd St. S.E. in Lacey, Washington. (CP 71-72) The Judd Street address, however, was not the last address of McMurry known to the Jameses. McMurry last resided on Judd Street in 2008. (CP 43-44) At the time of the subject motor vehicle accident, three years later in 2011, McMurry resided on Prine Drive S.W. in Olympia, Washington. (CP 43-44) This is reflected on the State of Washington Police Traffic Collision Report from this incident, as well as on McMurry's Washington State drivers' license. (CP 45-49)

The Jameses' failure to mail notice of service on the secretary of state to McMurry's last known address does not comport with RCW 46.64.040. As explained more fully above, strict compliance with the

statutory provisions for substitute service is required when a plaintiff attempts to use an alternative to personal service. *Martin v. Triol*, 121 Wn.2d at 144. This failure to strictly comply with the statute is fatal to the Jameses' attempt at substitute service.

b. The Jameses Failed to Serve Notice on McMurry at All Known Addresses.

To effectuate substitute service under RCW 46.64.040, plaintiff must serve “the affidavit of the plaintiff’s attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at *all addresses* known to him or her of defendant” (emphasis added).

The affidavit of due diligence of the Jameses’ counsel entitled “Affidavit of Tim Friedman re RCW 46.64.040” lists three addresses at which they attempted personal service on McMurry (2617 Judd St. S.E., Lacey, WA; 7740 Prine Drive S.W., Olympia, WA; and 3938 Clerfield Drive S.E., Olympia, WA). (CP 61-69) The Jameses, however, did not even attempt to serve McMurry at 5807 Titleist Lane I202 in Lacey, Washington, a fourth address identified by the Jameses’ private investigator for McMurry. (CP 61-69, 100-02) This failure to attempt to personally serve McMurry at all addresses known to the Jameses, including on Titleist Lane, invalidates their attempt at substitute service under RCW 46.64.040.

The Jameses may argue that their failure to attempt personal service at Titleist Lane is immaterial because McMurry did not reside there at the time of the service attempts. This fact, however, is irrelevant. Strict compliance with the requirements of the nonresident motorist statute is required when a plaintiff attempts to use it as an alternative to personal service. *Martin v. Triol*, 121 Wn.2d at 144. By not attempting personal service on McMurry at all known addresses as required by statute, the Jameses failed to strictly comply with the nonresident motorist statute; and their service was invalid.

VI. CONCLUSION

Mr. McMurry respectfully asks this Court to uphold the lower court's dismissal. The Jameses did not comply with the requirements of RCW 46.64.040. Service was not accomplished within the statute of limitations and the lower court does not have personal jurisdiction. The superior court ruled correctly and should be affirmed.

Dated this 12 day of August 2015.

REED McCLURE

By 

William H.P. Fuld WSBA # 40735
Suzanna Shaub WSBA # 41018
Attorneys for Respondents