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STATE OF WASHINGTON

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No. 48415-3-II

COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON

SHANTA STEGER, Plaintiff and Appellant,

v.

JANICE TURNER, Defendant and Respondent.

REPLY BRIEF OF APPELLANT/PLAINTIFF

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TABLE OF CONTENTS

I. INTRODUCTION. 1

II. LEGAL ARGUMENT. 2

 A. Failure to Date the Declaration Should
 Not be Fatal to Steger’s Claims 2

 B. RCW 46.64.040 Does Not Require
 An Affidavit to be Filed With the Court 4

 C. Shanta Steger Exercised Due Diligence
 in Attempting to Serve Turner 8

 D. Ms. Steger is Not Seeking Attorney’s Fees 11

III. CONCLUSION 11

TABLE OF AUTHORITIES

<u>Washington State Cases</u>	Page(s)
<i>Clay v. Portik</i> 84 Wash. App.533, 929 P.2d 1132 (1997)	5
<i>Heinzig v. Seok Hwang</i> 189 Wash.App. 304, 354 P.3d 943 (2015)	5
<i>Keithly v. Sanders</i> , 170 Wash.App. 683, 285 P.3d 225 (2012)	6
<i>Martin v. Meier</i> 111 Wn.2d 471, 760 P.2d 925 (1988)	4
<i>Martin v. Triol</i> 121 Wash.2d 135, 847 P.2d 471 (1993)	3, 8, 9, 10
<i>Pierce County v. State</i> 144 Wash.App. 783, 185 P.3d 594 (2008)	7
<i>Thayer v. Edmonds</i> 8 Wash.App. 36, 503 P.2d 1110 (1972)	3
 <u>Statutes</u>	
RCW 46.64.040	<i>passim</i>

I. INTRODUCTION

Turner brought her Motion for Summary Judgment on four grounds:

1. Ms. Steger failed to use registered mail to send the summons and complaint;
2. Ms. Steger failed to use due diligence in attempting service;
3. Ms. Steger failed to date her declaration; and,
4. Ms. Steger failed to file an affidavit of compliance with the Superior Court. (CP 18-21)

The trial court granted Turner's motion on one out of the four grounds (and not three of seven as argued by Turner, Brief of Respondent, pg. 8), the failure to date her Declaration. (RP 19-20)

Shanta Steger thereafter filed her appeal of the trial court's decision to grant summary judgment solely on the grounds that her Declaration that accompanied the documents served via the Secretary of State was undated. In response, Janice Turner has, in essence, re-argued her motion for summary judgment despite the trial court's rejection of these arguments. The trial court's ruling as to each of these was:

“The first issue regarding the certified versus registered mail, that’s no longer an issue and conceded by defense

...

And certainly with the ten attempts made by the process server, that weighs in favor of the plaintiff, so I'm not finding a lack of due diligence. ...

So far as filing the affidavit of compliance and due diligence, I am resorting to the rule itself. And the rule itself does not say specifically that there has to be a filing of those affidavits. ...

Getting to the last issue, which is the failure to date the declaration, ... without that dating of the declaration, it doesn't qualify as a declaration or a sworn statement.” (RP 19-20)

Ms. Steger hereby responds to these arguments as set forth below.

II. LEGAL ARGUMENT

A. Failure to Date the Declaration Should Not be Fatal to Steger’s Claims

RCW 46.64.040 states, in relevant part, that, provided a party complies with its requirements, “such service shall be sufficient and valid personal service upon” defendants. Service of process on the Secretary of State instead of service on a defendant is an obvious substitute for traditional personal service, and has been referred to by this court as substituted or constructive service. The Legislature has, however, chosen to identify this type of service

as a form of “personal” service. “This identification operates in favor of plaintiffs who use the statute in the manner in which it was used in this case and who rely on the wording of the statute to determine and satisfy the detailed requirements of service of process.” *Martin v. Triol* 121 Wash.2d 135, 847 P.2d 471 (1993). Where language of a statute is not ambiguous, there is no need for judicial interpretation. “In such a case, we accept the legislative characterization of the statute's procedures as a form of ‘valid personal service.’” *Id.* at 149-150 (emphasis added).

The court in *Thayer v. Edmonds* 8 Wash.App. 36, 503 P.2d 1110 (1972) provides instruction as to the different requirements for substituted service versus personal service: “[C]onstructive and substituted service statutes require strict compliance, while personal service statutes require substantial compliance.” *Thayer, supra.* 8 Wash.App. at 39. The reason for this is because personal service will provide actual notice of the pending action, where substituted service may not. *Id.*

In this case, it is undisputed that Turner received actual notice of the lawsuit against her within the statutory time period. Janice Turner’s husband signed the return receipt showing that all

of the documents, including the undated declaration of Shanta Steger, were received. (CP 32-54, 92)

B. RCW 46.64.040 Does Not Require An Affidavit to be Filed With the Court

There is no requirement in RCW 46.64.040 that affidavits be filed with the court. The operative statute plainly states:

“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 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.” RCW 46.64.040.

In *Martin v. Meier* 111 Wn.2d 471, 477, 760 P.2d 925 (1988)

the Washington Supreme Court held:

“The statute now has three tracks for notice to defendant: defendant’s endorsed return receipt; personal service out of state; or plaintiff’s attorney’s sworn statement that he or she has with due diligence attempted to serve the defendant at all known addresses, and has sent a copy of the summons and complaint to the last known address of defendant with notice that service has been made on the secretary of state. *Id.* at 477.

Janice Turner cites dicta from *Clay v. Portik* 84 Wash. App.533, 929 P.2d 1132 (1997) as standing for the proposition that a plaintiff must also file a declaration with the superior court in order for service on the Secretary of State to be effective. The *Clay* court explained,

“To perfect service of process under this 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 Wash.App. at 559.

Since that case, however, other courts have disagreed. In *Heinzig v. Seok Hwang* 189 Wash.App. 304, 354 P.3d 943 (2015) the court explained,

“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.”

Similarly, in *Keithly v. Sanders*, 170 Wash.App. 683, 688–90, 285 P.3d 225 (2012), the court held,

“The plain words of RCW 46.64.040 are dispositive. Under this statute, proper service of a summons is made by first “leaving two copies of [the summons],” together with the required fee, with the secretary of state. But a proviso follows this sentence, making the foregoing service conditional on complying with the terms of the proviso. Specifically, a defendant (*sic.*) must follow service on the secretary of state by sending “forthwith,” by registered mail, notice of service of the summons on the secretary of state to the defendant’s last known address. 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.”

In this case, the underlying court held, “So far as the filing the affidavit of compliance and due diligence, I am resorting to the rule itself. And the rule itself does not say specifically that there has to be a filing of those affidavits. I do agree with the plaintiff that this is more dicta in the *Portik* case, and I am not persuaded that the higher court intended to change the rule in Washington – and this was an interpretation in the form of dicta.” (RP, 19-20)

Additionally, Ms. Turner's brief performs an in-depth analysis of a repealed statute in an effort to convince this Court that RCW 46.64.040 means something other than what it actually says. Citing the 1971 version of the statute, Turner notes that, at that time, a plaintiff was required to have the affidavit of compliance "entered as part of the return thereof." However, as set forth more thoroughly above, the statute in its current and operative form makes no reference to filing the affidavit of compliance in the Superior Court. Under the "plain meaning" rule, if the statute's meaning is plain on its face, Courts must give effect to that meaning. *Pierce County v. State* 144 Wash.App. 783, 806, 185 P.3d 594 (2008).

Shanta Steger complied with the requirements in RCW 46.64.040. The supplemental affidavit of John Turner filed in support of the Motion for Summary Judgment, lists all the documents, including these affidavits, as having been received. Ms. Steger received the return receipt showing that Turner had, in fact, actually received these affidavits. There is nothing in the statute that says these documents should be filed with the court. The statute merely requires they be sent by registered mail with return receipt requested to the last known address of the defendant. Not

only were they sent, but Turner admits they received them.

C. Shanta Steger Exercised Due Diligence in Attempting to Serve Turner

RCW 46.64.040 provides in material part as follows:

“Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability 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 as provided in this section for nonresidents.”

Turner cites *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993) on the issue of “due diligence.” *Martin* arose out of an automobile accident that occurred on May 6, 1987. Martin first attempted service of process on the defendants on July 20, 1990 and continued daily through July 25, 1990. Unable to locate the Triols, they served process on the Washington Secretary of State of July 24, 1990 under RCW 46.64.040.

The court noted the purpose of the substituted service statute as follows:

“The purpose of the substituted service statute, RCW 46.64.040, is clearly stated in it. Attendant to the privilege of operating a motor vehicle on the public highways in Washington, residents “involved in any

accident, collision or liability” and thereafter within 3 years depart from the state confer agency on the Secretary of State for acceptance of service of summons and process, the same as provided in that statute for nonresidents. Such statutes are “reasonably calculated to promote care on the part of all ... who use [state] highways”, as well as to “provide ... a convenient method by which [claimants] may sue to enforce [their] rights.” The substituted service statute is designed to minimize procedural difficulties in bringing actions arising out of “... the use of [the State's] highways ... and the protection of persons and property within the State.” ...

Decisions of this court and the Court of Appeals have interpreted terms of the substituted service statute. A potential defendant's absence from the state does not toll the statute of limitations under RCW 4.16.18050 when the plaintiff has a statutory right, pursuant to RCW 46.64.040, to serve that party through the Secretary of State.⁵¹ The language “ ‘each resident ... who ... departs from this state’ ” applies to residents who only temporarily leave the state.” *Martin, supra*. 121 Wash.2d at 147.

Specifically, in regard to “due diligence” the court stated:

“This court has held that “ ‘due diligence’ under the statute requires that plaintiff make honest and reasonable efforts to locate the defendant. Not all conceivable means need be employed, but, at the least, the accident report, if made, must be examined and the information [in it] investigated with reasonable effort.” Further, courts need “not impose any strictures on the period of time during the limitations period in which plaintiff makes diligent search for defendant.” In this case, the record shows that Respondents began a series of personal service attempts 5 days prior to expiration of the 90–day extension and within the

statutory time limit.” *Id.* at 150.

The court held that as a matter of law, that Marin did act in good faith and with due diligence in attempting to personally serve Triol.

In the instant case the plaintiffs attempted service, not 5 times as in *Martin*, but ten times between July 18, 2015 and August 9, 2015. Ms. Steger provided declarations of the process servers showing that they had photographed the home each time they attempted service. (RP, 97-120) It is unknown whether Turner was actively evading service or merely did not hear the doorbell when the process server attempted service. These attempts ranged from between 8:21 a.m. on August 9, 2015 to 6:15 p.m. on July 26, 2015, and were not done at “nearly the same time each day.” (Def. Brief. pg. 21), (CP 98, 103)

Turner’s argument that it was “only” ten times notwithstanding, the trial court in this case held, “And certainly with the ten attempts made by the process server, that weighs in favor of the plaintiff, so I am not finding a lack of due diligence.” (RP, 19) There is no evidence that Ms. Steger was not diligent in effecting service.

D. Ms. Steger is Not Seeking Attorney's Fees

Ms. Turner correctly notes that no section of Shanta Steger's Opening Brief was devoted to attorney's fees and they are not being sought in this case.

III. CONCLUSION

Based upon the arguments set forth in Shanta Steger's Opening Brief and this Reply Brief, she respectfully requests that this Court reverse the decision of the underlying court and allow the case to proceed on the merits.

Respectfully submitted this 20 day of May 2016.

ORLANDINI & WALDRON

BY:



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DECLARATION OF SERVICE

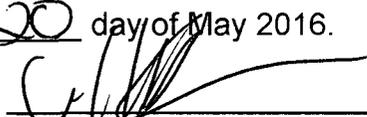
On this day I delivered a true and accurate copy of the document to which this certificate is affixed by personally by depositing the same in the mails of the United States of America a properly stamped and addressed envelope, for delivery to the attorney of record for Defendant/Respondent and also served via e-mail:

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DEPUTY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Tacoma, Washington this 20 day of May 2016.



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