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

Case No. 69400-6-I

GAIL K. DIAMOND,
Respondent,

v.

JONATHAN RICHMOND,
Appellant

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS DIVISION I

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I. INTRODUCTION

This appeal arises from a decision of the trial court in *Diamond v. Richmond*, King County Superior Court Cause No. 11-2-23782-6 KNT, in which Respondent Gail Diamond set forth claims for personal injuries against Appellant Jonathan Richmond. Mr. Richmond brought a motion to dismiss based on a claimed lack of personal jurisdiction; Mr. Richmond is appealing the trial court's denial of that motion. A copy of the Order reflecting the trial court's decision has been provided as Appendix A to Mr. Richmond's Brief.

II. COUNTERSTATEMENT OF THE ISSUES

Whether substituted service was effective under RCW 46.64.040 so that this Court has personal jurisdiction over the Mr. Richmond.

III. COUNTERSTATEMENT OF THE CASE

This case arises from a motor vehicle collision that occurred on July 16, 2008 in SeaTac, Washington. The vehicle driven by Jonathan Richmond, an out-of-state resident, struck the vehicle driven by Gail Diamond. As a result of the collision, Ms. Diamond suffered personal injuries and, through this action, made her claims for damages against Mr. Richmond. Ms. Diamond filed this action for personal injuries on July 11, 2011.

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A. Ms. Diamond Diligently Attempted Personal Service

After filing this action, Ms. Diamond's attorney diligently attempted to physically locate Mr. Richmond for personal service. *See, generally, CP 60-85.* To this end, Ms. Diamond's attorney examined the police report, *CP 63, 80*, which stated that Mr. Richmond's address was 1445 El Camino Real #3, Burlingame, California 94010. *CP 80.* Ms. Diamond's attorney then examined the rental contract for Mr. Richmond's vehicle, *CP 62, 77*, which identified Mr. Richmond as having a California driver's license #C2632939 with an expiration date of 01/19/12. *CP 77.* Ms. Diamond's attorney then obtained and examined records of the California Department of Motor Vehicles, *CP 63, 82-85*, which stated that, as of September 23, 2011, California driver's license #C2632939 belonged to Mr. Richmond and that Mr. Richmond's address was 1445 El Camino Real #3, Burlingame, California 94010. *CP 84.*

Ms. Diamond's attorney then attempted to cross-reference this information with the Massachusetts telephone number shown on the police report, *CP 80*, using internet telephone directories and Accurint legal research services. *CP 8.* When the information obtained appeared to be inconsistent and incapable of correlation, Ms. Diamond's attorney concluded that Mr. Richmond may have provided a falsified address and

other contact information, and made email inquiry to the Department of Homeland Security, *CP 9*.

Based on the address information diligently obtained and reasonably known, process servers were sent to Mr. Richmond's current California address on various days in September 2011 in an attempt to effect personal service. *CP 9, 78, 79*. During one such attempt at service at the California address, the process server was told that Mr. Richmond was "not in and will not be there for weeks." *CP 62 at 10, CP 78*.¹ This confirmed to Ms. Diamond's attorney that Mr. Richmond was continuing to use this California address in the United States as his own.

Unfortunately, all of these efforts to actually locate and personally serve Mr. Richmond were unsuccessful. *CP 8*.

Then, on October 5, 2011, Mr. Richmond called Ms. Diamond's attorney to discuss the case. By this time and through that October 5 phone conversation, Ms. Diamond's attorney was aware that Mr. Richmond had previously used a variety of addresses around the world. At the trial court and before this Court, Mr. Richmond places great importance on the fact that he had been living and working on the isle of Mauritius *at the time of the motor vehicle collision in 2008*. However,

¹ Other attempts at personal service were similarly unsuccessful. *CP 63 at 11, CP 79*.

according to Mr. Richmond's statements in the October 5 telephone conversation, his job in Mauritius ended in late 2008. *CP 61 at 3.* Mr. Richmond admitted in that phone conversation that he had been "kicked out" of Mauritius altogether. *CP 61 at 2.*

Mr. Richmond also reported in that conversation that, after he left Mauritius in late 2008, he took a position in Bangladesh, but that he lived and worked in Bangladesh only until he left there in December 2010. *CP 61 at 3.* Mr. Richmond reported that, after that, he was an itinerant lecturer in the United States for two months and then traveled to Asia where he was negotiating a contract for work in Vietnam. *Id.* The last information that Ms. Diamond's attorney had from Mr. Richmond himself was thus that, as of October 5, 2011, Mr. Richmond no longer resided in Mauritius or Bangladesh at all, or any place outside the United States in particular.

However, Mr. Richmond did tell Ms. Diamond's attorney that he planned to stay with close friends in California sometime in the weeks following the October 5, 2011 phone conversation. Mr. Richmond admitted that he had lived with these same friends for extended periods of time, and that he had identified this as his residence so he could meet the residence requirements to retain his green card. *CP 61 at 3.* Accordingly, Ms. Diamond's attorney knew that the California address was an active

residence address for Mr. Richmond (used for the purposes of getting his green card), and that Mr. Richmond was either at the California address or was going to be at the California address in the near future.

Mr. Richmond also said he planned to see his family in London over the winter holidays at the end of 2011, and then return to Vietnam for business in January or February of 2012. *CP 61 at 3*. In sum, Mr. Richmond was, for all intents and purposes, an international vagabond.

However, one of Mr. Richmond's possible addresses remained constant since the date of the motor vehicle collision: Mr. Richmond's California address, which was the only address known to be current as of October 2011. The car rental contract dated July 12, 2008, showed that Mr. Richmond had a California driver's license #C2632939 with an expiration date of 01/19/12. *CP 62 at 9, CP 77*. Subsequent due diligence investigation of this driver's license through the California Department of Motor Vehicles confirmed that Mr. Richmond's driver's license was still valid as of September 23, 2011. *See, CP 63 at 14, CP 84*. Therefore, as of the date of service, Mr. Richmond's California address was a current and still active and valid address for him, not only for purposes of meeting the residence requirements for his green card, but also for keeping an active driver's license in the United States.

Based on the representations of Mr. Richmond himself, there was no need to follow up on any addresses that Mr. Richmond may have used in either Mauritius or Bangladesh. Based on Mr. Richmond's own account in his October 5 telephone conversation with Ms. Diamond's attorney, he no longer had any work or other association at all with the addresses he says he had used prior to October 5, 2011. *CP 62 at 8*. And, based on the entirety of the evidence gathered, the proper conclusion to be drawn by Ms. Diamond's attorney was that the only address currently associated with Mr. Richmond as of October 2011 was the California address that was on his current, unexpired California driver's license and on file with the State of California. *Id.*

Ms. Diamond was even less well-informed as to Mr. Richmond's location or addresses. *See generally, CP 50-51*. Ms. Diamond knew nothing about Mr. Richmond that would have helped identify any current address for him at the time of service. *Id.*

Notably, Mr. Richmond himself made affirmative efforts to secrete himself so as to avoid service. During the October 5, 2011 phone conversation, Ms. Diamond's attorney specifically asked Mr. Richmond where he was calling from. Mr. Richmond affirmatively declined to reveal his physical location, even refusing to reveal whether he was in any

one of the United States. *CP 9 at 7; CP 61 at 5*. He seemed to be playing a game of “catch me if you can.”

Ms. Diamond’s attorney then told Mr. Richmond in that October 5 telephone conversation that he was going to attempt to serve Mr. Richmond either by publication or through the Washington Secretary of State, and that he should expect to receive some registered mail in that regard. *CP 61 at 4*. Mr. Richmond told Plaintiff’s counsel that he already had copies of the summons and complaint that he had downloaded from the Internet. *Id.*

B. Ms. Diamond Successfully Accomplished Substitute Service

After exercising due diligence in her attempts to locate Mr. Richmond for personal service, Ms. Diamond proceeded with substitute service as permitted by RCW 46.64.040. To fulfill Plaintiff’s statutory duties under RCW 46.64.040, Ms. Diamond’s attorney sent two (2) copies of the summons to the Washington Secretary of State, along with the required fee. *CP 62, CP 64*. Accompanying the two copies of the summons were two (2) copies of each of the following documents: Complaint and Order Setting Civil Case Schedule, Notice of Service to

Non-Resident Motorist, Affidavit of Attempted Service, and Affidavit of Compliance. *CP 64*.²

To fulfill the remaining requirements of RCW 46.64.040 to perfect substitute service, Ms. Diamond's attorney also sent Mr. Richmond the following documents: Summons, *CP 65*, Complaint, *CP 1-3*, Order Setting Civil Case Schedule, *CP 67*, Notice of Service to Non-Resident Motorist, *CP 68*, Affidavit of Attempted Service, *CP 69*, and an Affidavit of Compliance, *CP 70*. These documents were sent to Mr. Richmond via registered mail, return receipt requested to what was understood to be Mr. Richmond's last known address, in Burlingame, California. *CP 62 at 8, CP 69, CP 70*.

Ms. Diamond's attorney had already diligently attempted to serve personal process on Mr. Richmond at all current addresses known to him. As of October 6, 2011, the California address was the only effective address known to Ms. Diamond's attorney. *Id.* It would not be reasonable to expect that Ms. Diamond should attempt personal service on Mr. Richmond at any address other than the California address, as Mr. Richmond had already represented to Ms. Diamond's attorney in the October 5 telephone conversation that he had moved out of those prior locales.

² Upon receipt, the Secretary of State sent one of the two copies to Mr. Richmond at his Burlingame, California address by mail, postage prepaid. *CP 76*.

Mr. Richmond contended in the trial court that he was "unaware of any attempt" to deliver a copy of the summons and complaint to him by registered mail with return receipt at any of his "residences." *CP 29 at 12.* However, Mr. Richmond was not being entirely candid with the trial court. On October 26, 2011, Mr. Richmond called the office of Ms. Diamond's attorney and spoke directly with attorney Dan Shin. *CP 52 at 2.* Mr. Richmond told Mr. Shin that a piece of certified mail had been sent to "his California address" by Ms. Diamond's attorney. *Id.* Thus, combined with the knowledge that Ms. Diamond's attorney was going to send registered mail to Mr. Richmond regarding service of process, *CP 61 at 4,* Mr. Richmond was indeed aware that Ms. Diamond's attorneys were attempting to serve Mr. Richmond using registered mail. Mr. Richmond's admission to Mr. Shin more broadly acknowledged that mail sent to Mr. Richmond's Burlingame, California address would be effective to reach Mr. Richmond within the United States.

Nevertheless, Mr. Richmond contests the fact that he was properly served and that the Court does have personal jurisdiction over him. However, Ms. Diamond's efforts to effect service of process and those of her counsel were indeed sufficient under RCW 46.64.040, and this Court does have personal jurisdiction over Mr. Richmond.

C. **The Trial Court Denied Mr. Richmond's Motion to Dismiss**

On July 31, 2012, Mr. Richmond brought a Motion before the trial court to dismiss this action for lack of personal jurisdiction. *See CP 11-49.* Ms. Diamond responded, *CP 50-85*, and Mr. Richmond replied, *CP 93-124*. At the August 31, 2012 hearing on Mr. Richmond's motion, the trial court ordered supplemental briefing, which the parties submitted. *CP 131-134; CP 135-139.*

On September 14, 2012, the trial court entered its Order in which it denied Mr. Richmond's motion to dismiss for lack of personal jurisdiction. *CP 140-41*. After reviewing the undisputed facts in a light most favorable to Ms. Diamond, the trial court effectively decided as a matter of law that substituted service had been properly made under RCW 46.64.040 and that the court does have jurisdiction over the parties here. This appeal ensued.

IV. ARGUMENT

Mr. Richmond was properly served pursuant to RCW 46.64.040 and the trial court has jurisdiction over Mr. Richmond.

A. **The Burden of Proof**

When a defendant moves to dismiss based upon insufficient service of process, "the plaintiff has the initial burden making a *prima facie* showing of proper service." . . . A plaintiff may make this showing by producing an affidavit of service that on its face shows that service was properly carried out. . . . Then the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper.

Witt v. Port of Olympia, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). In the instant case, Ms. Diamond made her *prima facie* showing of proper service through an initial Affidavit of Compliance, CP 70, an Amended Affidavit of Compliance, CP 128-130, an Affidavit of Attempted Service, CP 69, and the Declaration of Mark B. Anderson, CP 60-85.

Now Mr. Richmond, the defendant below, bears the burden of proving by clear and convincing evidence that service was improper.

B. The “Non-Resident Motorist Statute” RCW 46.64.040

1. Service on the Secretary of State was Service on Mr. Richmond

RCW 46.64.040, the “non-resident motorist statute,” provides in pertinent part as follows:

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, ***shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability*** in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that ***any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington.***

Mr. Richmond is a non-resident of the State of Washington, *CP 27 at 3*. In 2008, Mr. Richmond operated a vehicle on Washington public highways. Pursuant to the foregoing language of RCW 46.64.040, Mr. Richmond appointed the Washington Secretary of State to be his lawful attorney to accept service on his behalf. Mr. Richmond also agreed, under RCW 46.64.040, that any summons or process against him that was served on the Secretary of State shall be of the same legal force and validity as if personally served on Mr. Richmond himself within the State of Washington.

2. A Due and Diligent Search is Not Required for Non-Residents

Mr. Richmond argues that Ms. Diamond did not exercise sufficient due diligence to find all of Mr. Richmond's addresses before attempting substitute service using RCW 46.64.040. However, RCW 46.64.040 requires that a "due and diligent search" for a party opponent only be made when effecting substitute service on a Washington resident:

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.

RCW 46.64.040 (emphasis added). Mr. Richmond has never been a Washington resident, *CP 27 at 3*, and a due and diligent search for him

personally was not required to satisfy these requirements of RCW 46.64.040 for substituted service.

3. The Mechanics of Service were Proper.

RCW 46.64.040 further provides

Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident

RCW 46.64.040. This requirement was met when Ms. Diamond's attorney sent two copies of the summons to the Washington Secretary of State along with the required filing fee. *CP 62 at 7, CP 64, CP 68, CP 128 at 2.*³

To effect substitute service under RCW 46.64.040, a plaintiff is also required to send certain documents to the defendant. Specifically, RCW 46.64.040 requires:

[t]hat notice of such service and a copy of the summons or process [be] 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

³ The Amended Affidavit of Compliance Pursuant to RCW 46.64.040, in the form marked as CP 128-30, is an electronically corrupted version of the Amended Affidavit that was filed in the trial court at Sub No. 33. The beginning of Paragraph 2 of the original version as filed in the trial court reads as follows:

2. On October 6, 2011, I caused two true and correct copies of the Summons & Complaint in this action, accompanied by a check in the amount of \$50.00 as the appropriate fee . . .

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. Note that the statute only requires that the documents be mailed to *one* address: on that actually *is* (i.e., presently) *the* last known address of the defendant. And the statute does not require that that address be a “residence” address or an address at which the defendant resides; it may only be an address at which the defendant receives mail. Thus, Ms. Diamond was not required to discover or mail the documents to “all” addresses that Mr. Richmond may ever have used in the past. Moreover, the statute does not require that the address to which the documents are sent to even be a residence of the defendant.

Notably, RCW 46.64.040 is silent as to the lengths to which a plaintiff must go to find all addresses that a non-resident party opponent may claim as the most “current.” The statute does not create any burden to be borne by a plaintiff to discover all international addresses or even United States addresses outside the State of Washington.

Each of the required documents was indeed sent to Mr. Richmond by registered mail with return receipt requested. *CP 62 at 8, CP 68, CP 129 at 3-5.* The documents were sent to *the* last known address of Mr. Richmond, *to wit*, his known and then current California address,

CP 129 at 5, such address being confirmed as current by the California Department of Motor Vehicles and Mr. Richmond's stated intent in October 2011 to go to that address. In addition to the Summons, Complaint, and case schedule, the documents sent to Mr. Richmond at his last known address included the Notice of Service to Non-Resident Motorist, *CP 68*, an Affidavit of Attempted Service Pursuant to RCW 46.64.040, *CP 8-9*, *CP 69*, and an Affidavit of Compliance Pursuant to RCW 46.64.040, *CP 70*.

4. The Express Notice Requirements of RCW 46.64.040 Were Met.

Mr. Richmond was given proper notice under RCW 46.64.040 that the Secretary of State had been served. *See, CP 68*. That statute designates the required notice as being "notice of such service (of the documents on the Secretary of State)."

Mr. Richmond nevertheless cites to two cases for the proposition that failure to provide notice to a non-resident motorist renders process served on the Secretary of State fatally defective. In both *Keithly v. Sanders*, 170 Wn. App. 683, 285 P.3d 225 (2012), and in *Omaits v. Raber*, 56 Wn. App. 668, 785 P.2d 462 (1990), review denied, 114 Wn.2d 1028, the driver failed to mail any notice of service on the Secretary to the

defendant at his last known address. In those cases, the action was dismissed for lack of jurisdiction.

In contrast to the facts in *Keithly* and *Omaits*, however, Ms. Diamond *did* mail the Notice to Non-Resident Motorist, CP 68, to Mr. Richmond at his last known address. CP 62 at 8. Both the substance *and* the form of the Notice to Non-Resident Motorist, CP 68, constituted proper notice required for due process. This mailing of the statutory notice specified by RCW 46.64.040 satisfied the due process requirements for substitute service on Mr. Richmond.

Mr. Richmond argues that “[t]he statute is designed to ensure that the defendant has a reasonable opportunity to learn that the action has been properly commenced.” *Appellant’s Brief at 26*. Unlike the infirmities discussed in *Keithly* and *Omaits*, the design of the statute was respected in this case. The Notice to Non-Resident Motorist that was directed to Mr. Richmond clearly ensured that Mr. Richmond was adequately informed that this action had been properly commenced.

As such, the mailing requirements of RCW 46.64.040 were indeed met to effect substitute service on Mr. Richmond.

5. Ms. Diamond Diligently Attempted Personal Service

RCW 46.64.040 does additionally require due diligence of a plaintiff with respect to attempts to obtain personal service. In this regard,

RCW 46.64.040 requires plaintiff's attorney to prepare an affidavit "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. This requirement of due diligence addresses the efforts to personally serve the defendant, but does not require the plaintiff to make a "no-holds-barred" attempt to discover each and every locale where a party opponent might be found for personal service.

To demonstrate due diligence for personal service under RCW 46.64.040, the plaintiff must 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 therein investigated with reasonable effort." *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988) (emphasis added). In its inquiry, the plaintiff has the right to rely upon the information in the accident report in its exercise of due diligence. *Carras v. Johnson*, 77 Wn. App. 588, 593, 892 P.2d 780 (1995), citing *Meier*, 111 Wn.2d at 482. "In addition, if plaintiff has information available pertaining to defendant's whereabouts other than that contained in the accident report, plaintiff must make reasonable

efforts to investigate based on that information as well.” Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988).

Here, Ms. Diamond’s attorney examined not only the accident report and conducted his investigation based on it, but also took a phone call from Mr. Richmond and spoke with him directly on October 5, 2011. Based on Mr. Richmond’s representations in that telephone conversation, Ms. Diamond’s attorney was reasonably led to believe by Mr. Richmond that he was no longer in Mauritius or Bangladesh. As such, Ms. Diamond’s attorney did have information about Mr. Richmond’s whereabouts – and where he wasn’t.

As correctly noted by the trial court at oral argument, when evaluating whether a plaintiff has exercised due diligence, the relevant inquiry is on what plaintiff did, rather than on what plaintiff failed to do. Carras, 77 Wn. App. at 593, 892 P.2d 780 (1995), citing Martin v. Triol, 121 Wn.2d 135, 150, 847 P.2d 471 (1993).

Ms. Diamond’s efforts to locate Mr. Richmond for personal service were diligent. Ms. Diamond’s attorney examined the police report, *CP 63*, *CP 80*. Ms. Diamond’s attorney examined the rental contract for Mr. Richmond’s vehicle, *CP 62*, *77*. Ms. Diamond’s attorney obtained and examined records of the California Department of Motor Vehicles, *CP 63*, *82-85*, which stated that, as of September 23, 2011, California driver’s

license #C2632939 belonged to Mr. Richmond and that Mr. Richmond's address was 1445 El Camino Real #3, Burlingame, California 94010. *CP 84*. Ms. Diamond's attorney attempted to cross-reference this information with the Massachusetts telephone number shown on the police report, *CP 80*, using internet telephone directories and Accurint legal research services. *CP 8*. When the information obtained appeared to be inconsistent and incapable of correlation, Ms. Diamond's attorney concluded that Mr. Richmond may have provided a falsified address and other contact information, and made email inquiry to the Department of Homeland Security, *CP 9*.

Based on the address information diligently obtained and reasonably known, Ms. Diamond's attorney sent process servers to Mr. Richmond's current California address on various days in September 2011 in an attempt to effect personal service. *CP 9, 78, 79*. During one such attempt at service at the California address, the process server was told that Mr. Richmond was "not in and will not be there for weeks." *CP 62 at 10, CP 78*.⁴ This confirmed that Mr. Richmond was continuing to use this California residential address in the United States.

⁴ Other attempts at personal service were similarly unsuccessful. *CP 63 at 11, CP 79*.

On October 5, 2011, Mr. Richmond called Ms. Diamond's attorney to discuss the case. When Ms. Diamond's attorney attempted to learn where Mr. Richmond was located, Mr. Richmond refused to reveal whether he was even within the United States. What Mr. Richmond did reveal to Ms. Diamond's attorney, however, was that he had been kicked out of Mauritius in 2008 and that he had left Bangladesh in 2010. Mr. Richmond went on to describe his travel plans, which included first a stop at his California address, and then on to the United Kingdom and Vietnam. Based on this information from Mr. Richmond himself, Ms. Diamond's attorney was entitled to reasonably conclude that any addresses that Mr. Richmond had ever had in the past in Mauritius or Bangladesh were no longer valid. So Ms. Diamond's attorney knew where Mr. Richmond no longer was, but was unable to ascertain from Mr. Richmond just where he actually was at all.

In total, Ms. Diamond's efforts to locate Mr. Richmond for personal service as described above were indeed an exercise of due diligence sufficient to justify the use of substitute service under RCW 46.64.040. The detailed documented attestations of efforts by Ms. Diamond's attorney to locate Mr. Richmond are more than mere recitations of the statutory factors required to obtain jurisdiction here; they were specific facts that support the conclusions required by the statute. *Cf.*

Pascua v. Heil, 126 Wn. App. 520, 108 P.3d 1253 (2005) (initial affidavits stated only that Pascua had “attempted a diligent search” to locate defendants).

In determining whether due diligence has been exercised by a plaintiff, a court may also consider absence of prejudice to the non-resident motorist. *Carras*, 77 Wn. App. at 593-94. In the present case, there is absolutely no prejudice to Mr. Richmond for any perceived shortcomings in the exercise of due diligence. By October 5, 2011, Mr. Richmond already had in his possession the Summons and Complaint. The telephone conversation on October 5 confirmed to Mr. Richmond that he should expect registered mail with documents related to the lawsuit. Mr. Richmond’s telephone conversation on October 26 with Mr. Shin confirmed that the California address was a proper, current address at which Mr. Richmond could receive and was receiving his mail. Mr. Richmond appeared in the action and has obviously begun to defend in this case, without impediment or prejudice.

Finally, the statute cannot be reasonably seen as contemplating that personal service be attempted at all of a defendant’s addresses that that defendant has ever used in the past, especially where the defendant has personally admitted that he has moved away from those addresses. So, even if Mr. Richmond’s Mauritius and Bangladesh addresses were known

to Ms. Diamond, it would be wholly inequitable to require Ms. Diamond to literally chase Mr. Richmond halfway around the world to attempt personal service.

C. **Mr. Richmond Should Not Be Permitted to Disavow his California Address.**

In his October 5, 2011 conversation with Ms. Diamond's attorney, Mr. Richmond admitted that he had identified his California address as his residence so he could meet the residence requirements to retain his green card. *CP 61 at 3*. Accordingly, Ms. Diamond's attorney knew that the California address was an active residence address for Mr. Richmond, in that it had been used for the purposes of getting his green card. In fact, Mr. Richmond stated that he intended to go back to that address within weeks of the October 5 telephone conversation. Mr. Richmond should not be permitted to now disavow his California address as being a valid address, in that he has based the validity of his presence in the United States upon his connection with that address.

D. **Any Alleged Deficiencies in the Affidavit of Compliance Were Permissibly Cured *Nunc Pro Tunc*.**

Mr. Richmond based his motion to dismiss, and thus this appeal, in part upon technical infirmities alleged to exist in the Affidavit of Compliance that was filed by Ms. Diamond's attorney on October 6, 2011. Mr. Richmond argues that because the Affidavit misstates the fact that two

copies of the Summons and Complaint were sent to the Secretary of State, the Affidavit is fatal to effective service under RCW 46.64.040. Mr. Richmond also contends that the Affidavit of Compliance is defective because it does not state how much money was actually paid to the Secretary of State as the fee.

It should first be noted that RCW 46.64.040 does not set forth any standards for the contents of an affidavit of compliance, except to describe it as "plaintiff's affidavit of compliance herewith." RCW 46.64.040.

The alleged deficiencies in the initial Affidavit of Compliance were ones of form and not of substance, and do not defeat the court's jurisdiction over Mr. Richmond. This distinction was recognized by Washington State Supreme Court in the case of *First Fed. Sav. & Loan Ass'n v. Ekanger*, 93 Wn.2d 777, 613 P.2d 129 (1980). In *Ekanger*, First Federal, the plaintiff, served Ms. Ekanger, the defendant, by publication and, when Ms. Ekanger failed to appear, proceeded with the foreclosure of a mortgage on her real property. Ms. Ekanger challenged the sufficiency of service on the basis that the affidavit filed by the plaintiff did not comply with the express requirements of RCW 4.28.100, in that it did not state the nature of the underlying action and did not specifically state that copies of the summons and complaint had been mailed to Ekanger at her place of residence.

Division III of the Court of Appeals had earlier held that plaintiff had indeed complied with the statutory requirements, despite failing to record that compliance. Ekanger, 22 Wn.App. at 946. In so ruling, Division III recognized that “[i]t is apparent that the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.” Ekanger, 22 Wn.App. at 944.

The Washington Supreme Court affirmed Ekanger, holding that the technical defect in the affidavit for service by publication could be cured *nunc pro tunc* by an amendment, so long as it merely altered the record to reflect what actually happened. In that case,

[t]he summons and complaint were in fact mailed to Ekanger prior to the filing of the affidavit. The complaint disclosed that the action was one of foreclosure and, therefore within the statute authorizing service by publication. Thus, First Federal actually complied with all elements of the statute, and the trial court acted within the proper limits of this discretion in allowing First Federal to amend its original affidavit to reflect what had in fact occurred.

Ekanger’s rights were not materially prejudiced by the trial court’s decision to allow First Federal to amend its affidavit. Ekanger in fact received exactly the same notice she would have received if the original affidavit had not been defective.

Ekanger, 93 Wn.2d at 782. The Supreme Court later described the import of Ekanger as follows:

We have long recognized procedural requirements directed by the legislature. Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936); Record Publishing Co.

v. Monson, 123 Wash. 569, 213 P. 13 (1923). Strict compliance with these procedures may, however, not always be required. We have held that “substantial compliance” or satisfaction of the “spirit” of a procedural requirement may be sufficient. See, e.g., *Zesbaugh, Inc. v. General Steel Fabricating, Inc.*, 95 Wn.2d 600, 627 P.2d 1321 (1981); *First Fed. Sav. & Loan Ass’n v. Ekanger*, 93 Wn.2d 777, 613 P.2d 129 (1980).

Appeal of Des Moines Sewer Dist., U. L. I. D. No. 29, 97 Wn.2d 227, 230, 643 P.2d 436 (1982).

Any “notice” problem caused by a perceived deficiency in Plaintiff’s Affidavit of Compliance is trumped by the fact that the Notice of Service to Nonresident Motorist, dated October 6, 2011, *CP 68*, was in fact properly sent to Mr. Richmond by registered mail with return receipt requested; that Notice expressly stated that two copies of the Summons and Complaint had indeed been sent to the Secretary of State. Mr. Richmond thus received exactly the same notice that he would have received if the original Affidavit of Compliance had not been "defective" as alleged.

And indeed, two copies of the Summons and Complaint had been sent to the Secretary of State. *CP 62 at 7*. As such, Mr. Richmond's rights were not materially prejudiced by any amendment of the Affidavit of Compliance. See also, CR 4(h).⁵

⁵ **CR 4(h) Amendment of Process.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

When compared to Ekanger, it is even more appropriate in this case that any technical defect in the Affidavit of Compliance be cured *nunc pro tunc* by an amended affidavit. The plaintiff in Ekanger submitted an affidavit to the Court, upon which the Court was asked to rely in deciding whether or not to authorize service by publication. In contrast, Plaintiff's Affidavit of Compliance in the instant case was not one upon which the Court was required to rely before Mr. Richmond would be subject to the personal jurisdiction of this Court. Moreover, the alleged technical deficiency has been handily cured by amendment, per Ekanger.

Consistent with and as permitted by the holding in Ekanger, Ms. Diamond filed an Amended Affidavit of Compliance and sent it to Mr. Richmond via to his California address by registered mail with return receipt requested. Mr. Richmond has not objected to the filing of this Amended Affidavit except to discount its import. Regardless, the facts set forth in the Amended Affidavit of Compliance, *CP 128-30*, address the issues of form and fully justify the court's continuing jurisdiction over Mr. Richmond.

Mr. Richmond also argues that the Affidavit of Compliance is defective because, although it states that service upon the Secretary of State was accompanied by "the appropriate fee," *CP 70*, it does not state

how much money was actually paid as the “appropriate fee.” RCW 46.64.040 does not specify how much is to be paid, just that it is to be “a fee established by the secretary of state by rule with the secretary of state of the state of Washington.” RCW 46.64.040. This is, in other words, the appropriate fee.

Mr. Richmond argues that, “due to the lack of ‘specific facts,’ CR 56(e), the trial court could not rely on the affidavit as proof that the proper fee was paid,” citing to *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988). In *Grimwood*, the plaintiff’s affidavit in opposition to a motion for summary judgment did not recite specific facts but, instead, “presented only his conclusions and opinions as to the significant of the facts set forth in the defendant’s affidavit. *Grimwood*, 110 Wn.2d at 360.

In the present case, however, the trial court did consider and was entitled to rely upon all of the evidence presented, including *but not limited to* the Affidavit of Compliance. Prior to making its decision, the trial court was in fact presented with proof of proper payment by way of the letter attached as Exhibit A to the Declaration of Mark B. Anderson, CP 64, and by way of the Amended Affidavit of Compliance, CP 128-30. Thus, the trial court had sufficient proof before it, from a variety of sources, that “the appropriate fee” had indeed been paid.

For the purpose of service, the exact amount need not be shown or proven to be consistent with the fee schedule set by the Secretary of State. The innocuous absence of a recital of a numerical amount paid does not offend due process. The fact that the appropriate fee was paid and that notice was given of this payment is sufficient to show that the statutory requirements were met.

E. The Office of the Secretary of State Properly Performed its Routine Statutory Duties.

The Washington Secretary of State sent a letter dated October 10, 2011 to Ms. Diamond's attorney, *CP 76*, in which the Secretary of State confirmed receipt of the documents it had been sent by Ms. Diamond's attorney pursuant to RCW 46.64.040. The letter went on to state the subsequent actions taken by the Secretary of State pursuant to that statute. The letter was offered into evidence as an exhibit to the Declaration of Mark B. Anderson, *CP 60-85*, to show the information upon which Ms. Diamond's attorney relied in confirming and concluding that service had been properly effected pursuant to RCW 46.64.040.

Even if the letter is seen as hearsay, it is subject to the exception under ER 803(6) and RCW 5.45.020 (business records). The letter reflected the regularly conducted activity of the office of the Secretary of State. It also constituted a regular business record of the office of

Ms. Diamond's attorney, in that it was a letter received by that office in the regular conduct of its business, and was introduced into the attorney's records as the response to submission of the service documents to the Secretary of State. The October 10, 2011 letter may not be excluded from evidence as hearsay.

The Secretary of State letter does specify that the documents were sent to Mr. Richmond using certified mail, but did not require a return receipt. Certified Mail is a type of special service mail offered by the United States Postal Service that allows the sender to track delivery and to provide a proof of mailing. Only if the sender specifies "return receipt requested" is there any burden on the recipient to sign for or accept the mail. This mailing was proper.

With further respect to the Secretary of State's choice of which method or mailing to use, it should be noted that Ms. Diamond has fulfilled her own responsibilities under RCW 46.64.040 to effect substitute service on Mr. Richmond; service on Mr. Richmond was effective by Ms. Diamond taking the actions required of her under RCW 46.64.040. Any challenge to the conduct of the office of the Secretary of State pursuant to that statute should not defeat the effect of Ms. Diamond's duties for effective service on Mr. Richmond.

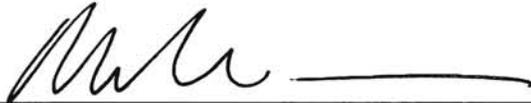
V. CONCLUSION

The trial court was correct: Ms. Diamond properly served Mr. Richmond as a nonresident motorist under RCW 46.64.040 and has met her burden in that regard. Mr. Richmond has failed to present sufficient, cogent evidence or argument that would warrant reversal of the trial court's denial of Mr. Richmond's Motion to Dismiss.

For all the foregoing reasons, Ms. Diamond requests that this court affirm the ruling of the trial court and order that the case proceed to trial.

Respectfully submitted this 24th day of July 2013.

ANDERSON LAW FIRM PLLC



MARK B. ANDERSON, WSBA #25895
Attorneys for Respondent
Gail K. Diamond

CERTIFICATE OF SERVICE

I hereby certify that I am a citizen of the United States of America and a resident of the State of Washington, am over the age of twenty-one years, am not a party to this action, and am competent to be a witness herein.

I hereby certify that, on this day, I both emailed and mailed, via the U.S. Postal Service first class regular mail, a copy of Respondent's Brief to the following parties entitled to service:

Attorney for Petitioner

Daniel R. Laurence, Esq.
1802 Grove Street
Marysville, WA 98270

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of July 2013, at Tacoma, Washington.



Mark B. Anderson