

67064-6

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No. 67064-6

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

TODD KEITHLY, in his individual capacity,

Appellant,

v.

BENJAMIN SANDERS and JANE DOE SANDERS, husband and wife
and the marital community composed thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

RCW 46.64.040 provides plaintiffs injured in automobile accidents on Washington highways a straightforward and convenient means to serve resident defendants who cannot, after diligent search, be located for personal service. In order to be in compliance with the United States Constitution, the statute contains detailed service requirements, including the requirement that notice be mailed to the party being served at his or her last known address. Washington Courts have repeatedly held that all of these requirements must be completed in order for service to be valid under RCW 46.64.040.

Plaintiff Todd Keithly delivered his summons and complaint to the Secretary of State four days before the statute of limitations on his claim against Sanders expired. However, Keithly neglected to mail the required notice via registered mail to Sanders' last known address until over three weeks after expiration of the statute. Additionally, Keithly neglected to file an affidavit of due diligence or an affidavit of compliance until after he had been served with a motion for summary judgment.

Keithly contends he completed service under RCW 46.64.040 when he delivered his summons and complaint to the Secretary of State. This contention runs directly contrary to every case interpreting the statute, including those relied upon by Keithly. Washington Courts have

consistently held service under RCW 46.64.040 is not complete until all actions specified by the statute have been performed. Because Keithly failed to complete service under RCW 46.64.040 prior to expiration of the statute of limitations for his claim, his claim is barred. The trial court properly dismissed Keithly's lawsuit.

II. STATEMENT OF THE CASE

Most of the relevant facts of this appeal are undisputed. On December 13, 2007, plaintiff Todd Keithly and defendant Benjamin Sanders were involved in an automobile accident. (CP 68) The damage to the vehicles was minimal. *Id.* The police were not called and no accident report was filed. *Id.* at 68-69.

In August 2008, Benjamin Sanders went to China to teach. (CP 69) He changed the address on his automobile registration to that of his father, Bernie Sanders, and had his mail forwarded to that address. *Id.* Benjamin Sanders did not live at his father's address at the time of the accident at issue in this law suit, nor at any time between the time of the accident and the present. *Id.*

Keithly filed his complaint in the instant action on October 5, 2010. (CP 3)

Keithly attempted to personally serve Benjamin Sanders at his father Bernie Sanders' home address on or about October 26, 2010. (CP

18-19) Bernie Sanders informed the process server that Benjamin Sanders did not reside there. *Id.*

On November 30, 2010, the claims representative at Benjamin Sanders' insurance company wrote to plaintiff's attorney informing him that Benjamin Sanders could not have been personally served because he had resided in China since 2008. (CP 71-72, 75) On December 7, 2010, plaintiff's attorney informed the claims adjuster that he would serve Benjamin Sanders via substitute service with the Secretary of State, pursuant to RCW 46.64.040. (CP 72)

On December 30, 2010, plaintiff's counsel filed the following papers with the Secretary of State's office (CP 76-103):

(1) A cover letter, dated December 29, 2010, stating that enclosed were two copies of a summons and complaint, two copies of the case schedule, and two copies of a Due Diligence Affidavit, along with a check for \$50.00. It gave the last known address of the defendant Benjamin Sanders as that of his father, Bernie Sanders.

(2) A Summons for the instant action. However, the summons had the wrong case number written on it (10-2-35043-1 SEA, as opposed to 10-2-35047-1SEA) and stated it was addressed to "the Hefley Defendants" (as opposed to the actual defendants Benjamin and Jane Doe Sanders).

(3) A Complaint for the instant action.

(4) An Order Setting Case Schedule.

(5) An Affidavit of Due Diligence to Serve Defendant, dated December 29, 2010 and signed by plaintiff's attorney. This pleading also had an incorrect case number (10-2-35043-1SEA). Attached as an exhibit to this Affidavit was an "Affidavit of Attempted (sic) Personal Service upon Benjamin Sanders," signed by process server Justin Mettler and dated December 15, 2010. This pleading also had an incorrect case number (10-2-35043-1SEA). Also attached as an exhibit to this affidavit was the aforementioned correspondence from Benjamin Sanders' insurance company adjuster, dated November 30, 2010, informing plaintiff's counsel that Benjamin had not been personally served and that he had resided in China since 2008.

A clerk in the office of the Secretary of State mailed a letter dated January 4, 2011 to Keithly's counsel confirming she had received a summons and complaint in the instant matter on December 30, 2010. (CP 80) She also confirmed she had mailed those same documents to the last known address (as supplied by Keithly) to the defendant via certified mail. *Id.* The letter indicates these mailings took place on January 5, 2011. *Id.*¹

¹ Keithly asserts, without any citation to the record, that the Secretary of State mailed notice of service on the Secretary to the last known address of defendant Sanders on December 30, 2010. Brief of Appellants at 19. There is no evidentiary support for this assertion. The letter from the Secretary of State acknowledging receipt of Keithly's

The statute of limitation on plaintiff's claim expired December 13, 2010.² The 90-day tolling period that began when plaintiff filed his complaint on October 5, 2010, expired January 3, 2011.³

According to Keithly, on January 27, 2011, his counsel deposited the following documents with the United States Postal Service, postage prepaid, by certified mail, addressed to the address of Benjamin Sanders' father: Cover letter to Secretary of State, Summons and Complaint, Case Schedule, Affidavit of Compliance, Affidavit of Due Diligence, and Notice of Service to Benjamin Sanders. Appellant's Brief at 3.⁴ The envelope was returned to Keithly's counsel with the notation "Not Here" "Addressee Unknown." (CP 29)

Keithly never filed an affidavit of compliance nor an affidavit of due diligence with the trial court, prior to being served with a motion for summary judgment.⁵

Sanders filed a motion for summary judgment on April 1, 2011, arguing the case should be dismissed on the basis that Keithly did not

documents and indicating they were mailed to Sanders is dated January 4, 2011, and indicates January 5, 2011 as the "Date document Mailed". (CP 80)

² The statute of limitations on Keithly's claim was 3 years. RCW 4.16.080.

³ RCW 4.16.170.

⁴ Because Benjamin Sanders never received that correspondence—it was returned to plaintiff's counsel as undeliverable—he has no way of confirming or denying those documents were contained in the envelope mailed by Keithly's counsel to his father's address.

⁵ Keithly did include those documents as attachments to his counsel's declaration in support of his response to Sanders' summary judgment motion. (CP 23-27)

serve him within the 90-day tolling period of RCW 4.16.170, and that the statute of limitations therefore barred his suit. (CP 46-55) The trial court granted this motion on April 6, 2011. (CP 33-34)

III. ISSUE PRESENTED ON APPEAL

Is Keithly's claim against Sanders barred by the three-year statute of limitations on his claim, where he failed to complete service pursuant to RCW 46.64.040 prior to expiration of the statute of limitations?

IV. LEGAL AUTHORITY AND ARGUMENT

When a plaintiff attempts to effect service pursuant to RCW 46.64.040, "its procedures must be strictly adhered to, otherwise jurisdiction is not obtained under the statute." *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988). Indeed, Washington Courts have repeatedly and consistently held that a Court does not obtain personal jurisdiction over a defendant served pursuant to RCW 46.64.040 unless the party attempting service strictly complies with all of its procedural requirements. *Id.*; *accord, Reynolds v. Richardson*, 53 Wn.2d 82, 83, 330 P.2d 1014 (1958); *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961); *Omaits v. Raber*, 56 Wn. App. 668, 670, 785 P.2d 462, *review denied*, 114 Wn.2d 1028 (1990); *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671, 675 (2011). These procedures include: (1) delivery of summons and complaint to the statutory agent (the Secretary of State); and (2) service of notice

upon the defendant, via certified mail, along with providing proof of compliance with all statutory requirements. RCW 46.64.040; *Clay v. Portik*, 84 Wash.App. 553, 559, 929 P.2d 1132 (1997).

While Keithly does not deny that all of the requirements of RCW 46.64.040 must be strictly complied with in order to complete service under the statute, he illogically contends service is perfected for purposes of tolling the statute of limitations when only one of the requirements set forth in the statute is completed: delivery of the summons to the Secretary of State. Fundamental to Keithly's position is his assertion that service and due process (notice) are distinct legal entities that, in the context of RCW 46.64.040, involve separate and distinct procedures. He contends valid and complete personal service can be perfected without due process, and that due process can be completed at the plaintiff's convenience, without regard to the statutory time limit for effecting service.

Keithly's position is inconsistent with Washington case law interpreting RCW 46.64.040, as well as with federal constitutional law and the decisions of courts in other jurisdictions which have directly considered this issue. Acceptance of Keithly's interpretation of the statute would go against a plain reading of the statute. It would leave courts without a reliable means of determining if and when they have obtained

personal jurisdiction over defendants served pursuant to RCW 46.64.040.

The trial court was correct to dismiss Keithly's claim.

A. Standard of Review.

The Courts of Appeal review summary judgment rulings de novo, engaging in the same inquiry and issues called to the attention of the trial court. *TracFone Wireless, Inc. v. Washington Dept. of Rev.*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). The relevant facts in the instant case are undisputed. The only issue before the trial court, and before this Court, is how RCW 46.64.040 and RCW 4.16.170 apply to the undisputed facts.

B. Perfection of Service of Process Pursuant to RCW 46.64.040 Requires Completion of All Requirements Contained in the Statute, Including Those Pertaining to Notice.

RCW 46.64.04 provides:

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, . . . 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 . . . in which such nonresident may be involved while operating a vehicle upon the public highways, . . . 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.

Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, . . . and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. 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, . . . and such service shall be sufficient and valid personal service upon said resident or nonresident: 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. 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: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

As can be seen, the statute sets forth particular requirements for a plaintiff to perfect service of process. As stated by this Court in *Clay v.*

Portik:

To perfect service of process under [RCW 46.64.040], 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.

84 Wn. App. at 559 (emphasis added).⁶

1. Case Law Makes Clear That All Actions, Including Those Pertaining to Minimum Required Due Process Notice, Must Be Completed to Perfect Service.

There is a reason RCW 46.64.040 requires the plaintiff to mail summons and other documents to the prospective defendant and to file affidavits in addition to delivery of process to the statutory agent: these requirements are necessary for the substitute service to meet minimum constitutional due process standards. *Meier*, 111 Wn.2d at 477-78;

⁶ Keithly contends this language in *Clay* is dicta, and further, that the statute does not, by its language, require that the affidavits noted in requirements (3) and (4) be filed with the Court. Brief of Appellant at 10-12. Given that the affidavits are designed to ensure compliance with the statute—and therefore, to ensure that the statutory procedure complies with minimum due process requirements—it makes little sense to interpret the statute as not requiring that the affidavits be filed. The statute specifies that the affidavits be “appended to the process,” which is filed as a matter of course. In any event, Keithly does not deny that the statute requires, at a minimum, that these documents be sent by registered mail to the last known address of the person being served.

Wuchter v. Pizzutti, 276 U.S. 13, 19, 48 S.Ct. 259, 260-61, 72 L. Ed. 446 (1928). While Keithly seeks to characterize these requirements as a “mere technicality,” (Brief of Appellant at 20) they go to the very heart of the United States Constitution and the core purpose of the service of process statutes:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

...

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 313-14, 70 S.Ct. 652, 656-57 (1950). Indeed, the very purpose of statutes which prescribe methods of service is to ensure the provision of notice required by constitutional due process standards. *Carson v. Northstar Dev. Co.*, 62 Wn. App. 310, 317, 814 P.2d 217 (1991).

With respect to statutes authorizing substitute service on a statutory agent such as the Secretary of State, the United States Supreme Court has established very specific minimum requirements for the statutes to meet constitutional muster:

[T]he state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued. Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

Wuchter, 276 U.S. at 20 (emphasis added). RCW 46.64.040's various specific notice provisions meet these minimum constitutional requirements. *Meier*, 111 Wn.2d at 478.

It is important to note that although minimum due process/notice requirements must be met in every case, the fact that those minimum standards are met in a particular case does not necessarily end the inquiry. Even where actual notice has been provided, this is not sufficient to create personal jurisdiction if the specific requirements of the applicable service statute are not met. *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455 (1995) (“[B]eyond due process [requirements], statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties.”) (quoting *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972)); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 970-72, 33 P.3d 427 (2001). It logically follows that service is not complete until all statutory requirements are accomplished.

The specific question presented in the instant case is whether, when a party effects service pursuant to RCW 46.64.040, all or only some of the mandatory requirements for perfection of service under the statute must be completed prior to expiration of the statute of limitations. Resolution of this issue requires this Court to once again interpret RCW 46.64.040 in conjunction with the tolling statute, RCW 4.16.170. That latter statute provides, in relevant part:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. . . . If . . . following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

(emphasis added)

The interplay between RCW 46.64.040 and 4.16.170 was considered by the Washington Supreme Court in *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993). The issue in *Triol* was whether RCW 4.16.170 applied to service accomplished pursuant to RCW 46.64.040. As framed by the *Triol* Court, the issue was “whether substituted service on the Secretary of State qualifies as personal service within the meaning of the tolling statute” The Court concluded that it was. *Id.* at 149-50.

Although the Court did not directly address the question at issue in this appeal, its opinion clearly demonstrated that all of the procedures mandated by RCW 46.64.040 must be completed to perfect personal service under the statute. The Court stated:

Service of process requires adherence to due process requirements, and in its execution must provide notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 145 (emphasis added).

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. . . . The Legislature has . . . 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.

Id. at 149 (emphasis added) (footnote omitted).

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 149-50 (emphasis added) (footnote omitted).

Keithly contends the notice provisions of RCW 46.64.040 are not a part of perfecting service. He asserts that he can complete the notice provisions at his convenience, at some indeterminate time after the statute of limitations has run. Nowhere did the *Triol* Court state or imply what

Keithly urges the Court to hold here: that delivery of process to the Secretary of State, standing alone, without completing the notice procedures specified in the statute, constitutes “valid personal service.” To the contrary, the *Triol* Court explicitly stated that “[s]ervice of process requires adherence to due process requirements, and in its execution must provide notice.” *Id.* at 145 (emphasis added).

2. A Plain Reading of RCW 46.64.040 Indicates it Requires All of Its Required Actions to be Completed to Perfect Service.

While Keithly advocates for an interpretation based upon a plain reading of the statute, he fails to provide such a reading himself. Rather, Keithly’s “plain reading” of the statute completely ignores the mandatory notice provisions of the statute. A true plain reading of the statute clearly demonstrates that personal service is not complete until the notice provisions are performed. The statute 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, . . . and such service shall be sufficient and valid personal service upon said resident or nonresident: 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 [due diligence affidavit]. [emphasis added]

The word “provided” means “on condition that.” Merriam-Webster Online Dictionary (<http://www.merriam-webster.com/dictionary/provided?show=0&t=1320971292>) (November 10, 2011).

The word “provided” means “on condition that: with the understanding: only if.” Webster, Third New International Dictionary. The word “provided” in common speech naturally expresses a qualification, a limitation, a condition. *Weiner v. Boston*, 342 Mass. 67, 74, 172 N.E.2d 96. . . .

The word “provided” as contained in § 14-227a(b) of the General Statutes creates a condition precedent which must be met and satisfied

State v. Anonymous, 388 A.2d 840 (Conn. Sup. 1978). Applied to RCW 46.64.040, this means leaving two copies of the summons with the Secretary of State with the required fee is sufficient and valid personal service on the defendant on condition that, i.e., only if the subsequently specified notice requirements are completed. *Id.*; *Cf. McPhail v. Nunes*, 177 P. 193, 195 (Cal. App. 1918) (where statute authorizing service by publication set forth conditions under which service by publication is permissible, “provided” the affidavit in support of the motion for service by publication contain certain essential facts, the statute “unqualifiedly” made inclusion of these facts “one of the essentials of the affidavit”, and where affidavit did not include such averments, service was not perfected). It logically follows that, until Keithly completed the notice requirements of RCW 46.64.040, he had not perfected “valid personal service.”

Unfortunately for Keithly, this did not occur until over three weeks after the statute of limitations on his claim had expired.

3. Cases Involving Analogous Situations Demonstrate Service Cannot be Separated from Due Process.

Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005) dealt with an analogous situation. In *Topliff*, the plaintiff complied with his responsibility under RCW 48.05.200 for perfecting service upon a foreign insurer when he delivered copies of his summons and complaint to the insurance commissioner. However, the Insurance Commissioner failed to complete the required service by delivering the summons and complaint to the insurance company, as it was required to do under the statute.⁷ As in the instant case, the statute at issue provided that a foreign insurer “shall appoint the [insurance] commissioner as its attorney to receive service of, and upon whom shall be served, all legal process issued against it in this state,” and “[s]ervice upon the commissioner as attorney shall constitute service upon the insurer.” *Id.* at 306.

Not having received notice of the plaintiff’s lawsuit, the defendant insurer failed to appear, and the plaintiff obtained a default judgment.

⁷ The statute provided that upon receiving process, the commissioner shall “send one of the copies of the process, by registered mail with return receipt requested, to the person designated for the purpose by the insurer in its most recent such designation filed with the commissioner.” *Id.*

Overruling the trial court's denial of the insurer's motion to void the default judgment, the Court of Appeals stated:

Service statutes are designed to ensure due process. [citation omitted] In our context, due process requires notice and an opportunity to be heard. [citation omitted] As with other service statutes, the procedure set forth in RCW 48.05.200 and .210 would normally satisfy due process. See *Martin v. Meier*, 111 Wash.2d 471, 478, 760 P.2d 925 (1988) (mailing notice to last known address of resident motorist satisfies due process). As a substitute service statute, RCW 48.05.200 requires strict compliance. *Martin v. Triol*, 121 Wash.2d 135, 144, 847 P.2d 471 (1993). Service of process must satisfy the due process standard. *Id.* at 145, 847 P.2d 471.

Here, the facts show the insurance commissioner failed to forward the process to CIC at its given address. Thus, the trial court had tenable grounds for concluding CIC was deprived of due process. Nonetheless, the Topliffs argue any subsequent failure of the commissioner to forward notice of process to the insurer does not invalidate the effective service of process. . . .

. . .

. . . We follow the majority of cases holding that substitute service upon the designated state agency does not constitute effective service if the agency fails to notify the defendant.

Id. at 306-08 (emphasis added).

Another analogous situation, involving service by publication, was considered by this Court in *Clark v. Falling*, 92 Wash.App. 805, 965 P.2d 644 (1998). In that case, the plaintiff Clark filed her summons and complaint less than 90 days prior to expiration of the statute of limitations, thereby tolling the statute for 90 days. On the 90th day, Clark obtained an

order permitting service by publication. However, the first publication did not occur until more than 90 days had passed. On appeal from an order dismissing her case on summary judgment, Clark argued she had “commence[d] service by publication within ninety days from the filing of [her] complaint” in accordance with RCW 4.16.170 by obtaining an order permitting service by publication. This Court disagreed, pointing out that, “The statute clearly requires the commencement of actual service, not the steps leading up to commencing service.” *Id.* at 810.

Because the underlying purpose of service is to notify the defendant of the action, it would be absurd to interpret “commence service by publication” to refer to the date of entry of an order permitting such service. Such an order does not notify the defendant of the action.

Id. at 811 (emphasis added). This Court concluded: “Service, and therefore notice to the defendant, begins with the publication of the summons.” *Id.* (emphasis added). *Accord, Lund v. Benham*, 109 Wn. App. 263, 34 P.3d 902 (2001).

The *Clark* Court additionally reasoned that if Clark’s interpretation were adopted, plaintiffs could defeat the purpose of the statute of limitations by indefinitely postponing actual publication after obtaining an order permitting publication. *Id.* at 811. Likewise, here, if Keithly’s interpretation were adopted, a plaintiff could indefinitely postpone notifying the defendant of the existence of the cause of action after

delivering summons to the Secretary of State, limited only by the undefined requirement that he mail the notice “forthwith.”⁸

4. Cases Directly Considering Statutory Agent Service of Process Statutes Have Consistently Held All Required Actions Must be Completed to Perfect Service.

a) Washington Cases

In *Bethel v. Sturmer*, 3 Wn. App. 862, 479 P.2d 131 (1970), the plaintiff in a personal injury lawsuit arising out of an automobile accident with a non-resident driver filed her summons and complaint with less than 90 days left on the statute of limitations. She served her summons and complaint on the Secretary of State less than 90 days after her filing. The plaintiff then attempted to mail the summons to the defendant at a Florida address, which was returned as undeliverable. At the time, RCW 46.64.040’s notice provisions required that the plaintiff obtain a receipt showing actual delivery or refusal of delivery of notice. After the 90 days had expired, the defendant specially appeared and contested the Court’s jurisdiction. On interlocutory appeal of the trial court’s denial of the defendant’s motion to dismiss, the Court of Appeal noted that service on the Secretary of State “constituted service upon defendant’s statutory resident agent.” *Id.* at 864-65. “The question remaining,” said the Court,

⁸ Keithly himself argues this term is “elastic” and has “no precise definition.” Brief of Appellant at 9. *See* discussion *infra*.

“is simply whether or not such service on the statutory agent constitutes effective service on the defendant within the statutory requirements of due process as measured by the non-resident motorist statute.” *Id.* at 865. The Court held it was not, given that the plaintiff had not complied with the notice requirements of the statute. *Id.* The Court concluded:

More than 90 days elapsed between the filing of the complaint and the court's order of May 11, 1970. The statute not having been explicitly complied with, we would ordinarily declare that the court did not acquire jurisdiction over the person of the defendant. If the court has not acquired jurisdiction over the person of the defendant, she would ordinarily be entitled to immediate dismissal.

Id. at 864-86. However, the plaintiff contended the defendant had tolled the statute by evading service. The Court considered, but rejected that contention, and the claim was dismissed. *Id.* at 866-68.

In *Omaits v. Raber, supra*, the Court of Appeal held the trial court properly dismissed plaintiff's claim on the basis of insufficiency of process, where, although plaintiff mailed the defendant his summons, complaint and affidavit of compliance, he failed to mail notice of service on the Secretary of State. *Omaits*, 56 Wn. App. at 670. *Accord, Reynolds v. Richardson*, 53 Wn.2d 82, 83, 330 P.2d 1014 (1958); *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961); *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671, 675 (2011).

Keithly attempts to distinguish cases such as *Bethel* and *Omais* on the basis that they did not involve a “timeliness issue,” but rather, a “missing document” issue. Appellant’s Brief at 17. What Keithly fails to explain is how a Court is to determine when a “timeliness issue” becomes a “missing document issue” under his interpretation of the statute. In other words, without the statute of limitations to set the outside boundary of when service must be completed—i.e., the point by which all notice requirements must be fulfilled—how is a Court to determine in which cases it has acquired jurisdiction and in which cases it has not?

According to Keithly, a plaintiff can disregard the statutory time limit as long as he or she completes the statutory notice requirements “forthwith.” However, Keithly himself suggests the term “forthwith” is “elastic” and has “no precise definition.” Brief of Appellant at 9. For example, in the instant case, by waiting over three weeks, did Keithly comply with the statutory notice requirements⁹ “forthwith”? Would he have acted “forthwith” if he had waited four weeks? Ten? Something so fundamental and basic as personal jurisdiction cannot be left to such an indeterminate standard as Keithly advocates here.

⁹ As noted *supra*, Keithly never filed affidavits of compliance or due diligence (except in response to defendant’s motion for summary judgment); required steps according to the Court of Appeals in *Clay v. Portik*. 84 Wn. App. at 559.

b) Other Jurisdictions

Courts in other jurisdictions interpreting their own (virtually identical) statutory-agent substitute service statutes have concluded that all requirements of the statute—i.e., delivery of process to the statutory agent and notice via mailing to the defendant—must be completed prior to expiration of the statute of limitations. For example, *McMahill v. MacLean*, 173 N.W.2d 749 (Mich. App. 1970) is on all fours with the instant case. There, the plaintiffs filed, on the last day of the statutory time period, a complaint alleging they had been injured in an auto accident with a non-resident defendant. That same day, plaintiffs delivered their summons and complaint to the statutory agent, pursuant to Michigan’s non-resident motorist statute.¹⁰ Plaintiffs mailed notice to the defendants only seven days later; but this occurred after the statute of limitation had expired.¹¹ As does Keithly here, the plaintiffs contended that even though they were required to complete all requirements of the substitute service statute, they did not need to do so within the statutory time period so long as they served the Secretary of State before expiration and completed the notice requirements “forthwith.” The Michigan Court of Appeals disagreed:

¹⁰ The Michigan statute was virtually identical to Washington’s in all material respects. *See, id. at* 750.

¹¹ Michigan apparently had no tolling provision equivalent to RCW 4.16.170.

Jurisdiction under this statute, however, is not established, so as to toll the running of the statute of limitation, until plaintiff has fully complied with the provisions. Notice was not sent to defendant forthwith, in accordance with the provisions, before the end of the three year period following the accident. Therefore, the cause of action abated on August 11, 1967, when the statute was not tolled under M.C.L.A. § 257.403 (Stat. Ann. 1968, Rev. s 9.2103) and M.C.L.A. § 600.5856(2) (Stat. Ann. 1962 Rev. § 27A.5856(2)).

Plaintiffs' argument suggesting that the legislature intended to permit an extension in time following service of a copy of the complaint and of the summons upon the secretary of state lacks merit. The legislature did not intend to extend the statute of limitation to permit service of notice upon defendant beyond the limitation period; rather, it set forth a procedure by which a plaintiff can establish court jurisdiction over a nonresident motorist defendant. Accordingly, the provisions must be fully complied with within the statutory period.

Id. at 750-51 (emphasis added).

Likewise, here, there is absolutely nothing in the language, purpose or intent of RCW 46.64.040 suggesting the Legislature intended to extend the statute of limitations to permit service of notice on a defendant beyond the limitation period. Rather, the statute sets forth “detailed requirements of service of process.” *Triol*, 121 Wn.2d at 149. “Provided a party complies with [these] requirements, ‘such service shall be sufficient and valid personal service upon’ defendants.” *Id.* (emphasis added)

The Eighth Circuit Court of Appeals faced a virtually identical scenario, interpreting Iowa’s non-resident motorist statute, in *Meeker v.*

United States, 437 F.2d 69 (8th Cir. 1971). There, the plaintiff injured in an auto accident with a non-resident motorist served the statutory agent one day before the two-year limitations period expired, but neglected to mail statutory notice until seven days later (i.e., six days after the limitations period had expired). Once again, the Court concluded that both the requirements of delivery to the statutory agent and mailing of notice to the last known address of the defendant must be completed to perfect service; and thus, must be done prior to expiration of the limitations period. *Id.* at 69-70. *Accord*, *Matney v. Currier*, 203 N.W.2d 589, 592 (Iowa 1973).

Other cases are in accord. For example, in *Wilson v. Smith*, 227 N.W.2d 597 (Neb. 1975), the Supreme Court of Nebraska stated:

Plaintiffs argue that service was complete when summons was served on the Secretary of State, and that thereafter substantial compliance with the provisions relating to mailing is all that is required. We do not agree. The plain requirements of the statute cannot be fragmented. Both (1) substituted service upon the Secretary of State, and (2) the proper and timely mailing to a defendant of notice of such service and a copy of the process are definitely required, and no jurisdiction can be acquired until both requirements have been met.

Id. at 598 (emphasis added).

In *Delta International Machinery Corp. v. Plunk*, 378 S.E.2d 704 (Ga. App. 1989), the plaintiffs attempted to serve the defendants under a Georgia statutory agent service statute which, like RCW 46.64.040,

required both delivery to the statutory agent and mailing of notice to the defendant. In the first attempt at such service, the statutory agent returned the documents to the plaintiffs because the plaintiffs had failed to provide the defendants' mailing addresses. Approximately 6 weeks later, the plaintiffs again delivered process to the statutory agent—this time including the defendants' mailing addresses—and notice was mailed that same day. Approximately four weeks later, the plaintiffs moved for default, contending service was perfected upon their first delivery to the statutory agent (not the second) and therefore, the time period for the defendants to answer had expired. The Court of Appeals disagreed, holding service was not complete until all of the statutory requirements—including mailing of notice—were completed:

[W]e conclude that, even assuming substituted service on the Secretary of State was authorized, such service was not shown by the record to have been effected prior to . . . the date the Secretary mailed a copy of the summons and complaint to [the defendant] by certified mail. As that date was less than 30 days before [the defendant] filed its answer, we accordingly hold that the answer was not in default.

. . .

[I]n construing the analogous provisions of OCGA § 14-2-62(b) (former Code Ann. 22-403(b)), dealing with domestic corporations, this court has indicated that although there is no requirement that a corporation actually receive the service copy of the complaint and summons mailed to it by the Secretary of State, service upon the Secretary of State is not complete until the Secretary “does his duty and sends a

copy to the defendant....” [Citations omitted] Indeed, if the statute were construed otherwise, it would undoubtedly be violative of the constitutional due process requirement that service of process be effected in a manner which is reasonably calculated to apprise the defendant of the pendency of the action and to afford him an opportunity to present his defenses. [Citations omitted] For these reasons, we hold that service upon [defendant] was not perfected at the time the service documents were originally served upon the Secretary of State.

Id. at 705-06. *See also, Howard v. Jenny’s Country Kitchen, Inc.*, 223 F.R.D. 559, 564-65 (D. Kan. 2004) (collecting cases from multiple jurisdictions holding that notice provisions of various states’ statutory agent service statutes must be complied with “in order for service to be deemed complete.”)

C. Keithly’s Arguments are Without Merit.

Keithly contends his position is supported by *Smith v. Forty Million, Inc.*, 64 Wn.2d 912, 395 P.2d 201 (1964). Although there is some language in that opinion that appears to make a distinction between service and notice, the case is clearly distinguishable. *Smith* did not consider the interaction between RCW 46.64.040 and RCW 4.16.170. The issue in *Smith* was whether the tolling provisions of former RCW 4.16.180—which tolled the statute of limitations while a defendant was absent from the state or concealing himself from service—applied “when the plaintiff has available to him at all times the right to proceed under

[former] RCW 46.64.040.” *Id.* at 913 (emphasis added). The plaintiff in *Smith* had available to him, prior to expiration of the statute of limitations, both the ability to deliver his summons and complaint to the Secretary of State and the ability to provide actual notice via registered mail to the corporate defendant, as evidenced by the fact that the mailed notice was received by the defendant several days after it was mailed.¹² *Id.* at 917. Nevertheless, the plaintiff waited until after expiration of the limitations period to deliver his summons and complaint to the Secretary of State and to mail notice to the defendants. The Court was not faced with—and expressly did not consider—a situation where the plaintiff delivered summons to the Secretary of State prior to expiration of the statute of limitations, but was unable comply with the statute’s notice requirements until after the statute had expired. *Id.*

The case of *Brown v. ProWest Transport, Ltd.*, 76 Wn. App. 412, 886 P.2d 223 (1995) considered the issue not addressed by the *Smith* Court. In *Brown*, the plaintiff contended the statute of limitations on his claim against non-resident defendants was tolled while defendants were actively concealing themselves from service. As in *Smith*, the defendants argued RCW 4.16.180 did not apply because plaintiff could have served

¹² Under the version of RCW 46.64.040 in existence at the time of the *Smith* decision, it was necessary, in order to comply with the statute, for the plaintiff to demonstrate actual notice to the defendant of the claim by filing a return receipt of notice transmittal or a postal endorsement of refusal of delivery. *See, id.* at 913, n.2.

them pursuant to RCW 46.64.040. This Court disagreed, on the basis that plaintiff could not comply with the service requirements of RCW 46.64.040 by mailing service to a last known address of the defendants, because plaintiff did not have available to him a last known address. This Court held that plaintiff's inability to comply with all of the service provisions of RCW 46.64.040—including mailing of notice—made the use of that form of service “unavailable” to the plaintiffs. *Id.* at 421. “Because addresses were not available in this case, this Court held, “[the plaintiff] did not have the option of serving the Secretary of State.” *Id.*

Keithly's primary complaint with the plain language of RCW 46.64.040 appears to be that it precludes him from being able to wait until the very last day of the statutory period to effect service by simply delivering it to the Secretary of State, without complying with its notice provisions. While Keithly's desire for an instantaneous means of accomplishing service may be understandable, it is not consistent with any means of service available to plaintiffs in this state. For example, a plaintiff must make a “due and diligent search” to serve a defendant personally before RCW 46.64.040 is even available as a means of substitute service. *Harvey*, 163 Wn. App. at 675-76. Such efforts necessarily take time. The fact that a plaintiff must invest some time and effort in providing notice to a defendant is clearly justified by a

defendant's constitutional right to a minimum threshold of due process before being deprived of property interests. *Mullane*, 339 U.S. at 313-14. And this Court in *Clark v. Falling*, along with the Court of Appeals in *Lund v. Benham*, *supra*, rejected an identical argument pertaining to service by publication. *Clark*, 92 Wn. App. at 811-12; *Lund*, 109 Wn. App. at 271 (the plaintiff "could easily submit her summons earlier" for publication to avoid having the first publication occur after expiration of the statute of limitations).

In any event, the time required to complete the mandatory requirements of RCW 46.64.040 is minimal. Conceivably, a plaintiff could serve the Secretary of State, mail the required documents to the plaintiff, and file the required affidavits all on the same day. Keithly's contention that "several weeks, at least, are eroded from a plaintiff's 90 day period" by requiring him or her to comply with the statute is quite simply without basis.

Finally, Keithly argues that the appropriate remedy under RCW 46.64.040 for his failure to effect timely service was for the Court to grant him a continuance, rather than dismiss his action. This contention is wholly without merit. First, RCW 46.64.040 does not purport to give trial courts the authority to extend the statutes of limitation, and Keithly points to no language in the statute suggesting that it does. Rather, the statute

permits a trial court to give the defendant additional time to defend the action, if necessary; presumably because substitute service may not reach the defendant as quickly as direct personal service. RCW 46.64.040. Keithly cites no authority whatsoever for the proposition that a trial court has the authority, via granting a continuance, to extend the statute of limitations. *See, e.g., Fisher v. City of Tacoma*, 70 Wash.App. 635, 640, 855 P.2d 299 (1993) (trial court is without authority to extend the statute of limitations for good cause), overruled on other grounds, *Stikes Woods Neighborhood Ass'n v. City of Lacey*, 124 Wash.2d 459, 462, 880 P.2d 25 (1994).

Keithly additionally contends, for the first time on appeal, that CR 4(h) somehow authorized the trial court to extend the statute of limitations; and despite Keithly's failure to request that the court apply the rule to extend the statute, it erred in failing to do so. Court Rule 4(h) gives a trial court discretion, absent prejudice to the defendant, to permit amendment of any process or proof of service thereof. Keithly does not explain how CR 4(h) creates any authority for the trial court to permit him to effect service after expiration of the statute of limitations on his claim. Keithly is not asking this Court to permit him to amend his process; rather, he is asking this Court to amend the substitute service statute, RCW 46.64.040, and the tolling statute, RCW 4.16.170. This Court need not

consider arguments unsupported by authority or adequate briefing. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). Furthermore, this Court should not consider an issue not raised by plaintiff below.¹³ RAP 2.5(a); *Clark*, 92 Wn. App. at 812.

V. CONCLUSION

Keithly agrees he is required to strictly comply with all requirements for perfection of service contained in RCW 46.64.040 in order to properly serve a defendant pursuant to that statute. Yet, he contends he perfected service under the statute when he complied with only one of its requirements: delivery of his summons and complaint to the Secretary of State. Keithly's contention is illogical on its face. It is illogical to argue that service—the entire purpose of which is to provide notice—is complete before one complies with requirements of the service statute specifically designed to provide notice. Keithly's interpretation cannot be reconciled with the plain wording of the statute, the cases interpreting it, nor cases interpreting similar statutes in other states. It provides trial courts no identifiable basis to determine if and when they obtain jurisdiction over a defendant who is served pursuant to RCW 46.64.040. Keithly's interpretation should be rejected in favor of the straightforward approach adopted by the trial court here, and by the Courts

¹³ See CP 104-15.

of Appeal in other jurisdictions that have decided the same issue. Respondents Sanders respectfully request that this Court affirm the decision below.

DATED and respectfully submitted this 16th day of November, 2011.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the foregoing document as follows:

VIA HAND DELIVERY TO:

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VIA HAND DELIVERY TO:

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SIGNED this 16th day of November, 2011, at Seattle, WA.



Lin Walker