

No. 48415-3-II

COURT OF APPEALS, DIVISION II,
FOR THE STATE OF WASHINGTON

SHANTA STEGER,

Appellant/Cross-Respondent,

v.

JANICE TURNER,

Respondent/Cross-Appellant,

and

DONALD LUCE,

Defendant.

COMBINED BRIEF OF RESPONDENT/CROSS-APPELLANT
JANICE TURNER

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	2,3
I. INTRODUCTION.....	4
II. ASSIGNMENT OF ERROR AND ISSUE PRESENTED FOR REVIEW.....	4
III. COUNTERSTATEMENT OF THE CASE	5
IV. ARGUMENT.....	8
A. Standards of Review	8
B. The Trial Court Properly Dismissed Steger's Claims Against Turner On Summary Judgment	9
1. Steger did not strictly comply with RCW 46.64.040 because her sworn statement was defective	9
2. Steger did not strictly comply with the remaining provisions of RCW 46.64.040	15
(a) Steger failed to file the required affidavits of compliance and due diligence with the trial court.....	16
(b) Steger did not exercise due diligence.....	20
C. Steger Is Not Entitled To Attorney Fees And Costs On Appeal Even If She Prevails	22
V. CONCLUSION	22

TABLE OF AUTHORITIES

STATE COURT CASES

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	15
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P. 3d 1172 (2009).....	19
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	15
<i>Clay v. Portik</i> , 84 Wn. App. 553, 929 P. 2d 1132 (1997)	16, 17
<i>Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp.</i> , 66 Wn.2d 469, 403 P.2d 351 (1965).....	11
<i>Heinzig v. Hwang</i> , 189 Wn. App. 304, 354 P.3d 943 (2015)	12
<i>In re Estates of Hibbard</i> , 118 Wn.2d 737, 826 P.2d 690 (1992).....	13
<i>Johnson v. King County</i> , 148 Wn. App. 220, 198 P.3d 546 (2009)	14
<i>Kiethly v. Sanders</i> , 170 Wn. App. 683, 285 P.3d 225 (2012)	12
<i>Martin v. Meier</i> , 111 Wn.2d 471, 760 P.2d 925 (1988).....	11, 20
<i>Martin v. Triol</i> , 121 Wn.2d 135, 847 P.2d 471 (1993).....	10, 20
<i>Moreover, Manius v. Boyd</i> , 111 Wn. App. 764, 47 P.3d 145 (2002)	14
<i>Muncie v. Westcraft Corp.</i> , 58 Wn.2d 36, 360 P.2d 744 (1961).....	11
<i>Omaits v. Raber</i> , 56 Wn. App. 668, 885 P.2d 462 (1990)	12
<i>Reiner v. Pittsburg Des Moines Corp.</i> , 101 Wn.2d 475, 680 P.2d 55 (1984).....	11
<i>Retail Clerks Local 629 v. Christiansen</i> , 67 Wn.2d 29, 406 P.2d 327 (1965).....	16
<i>Robinson v. Khan</i> , 89 Wn. App. 418, 948 P.2d 1347 (1998)	15
<i>Sheldon v. Fettig</i> , 129 Wn.2d 601, 919 P.2d 1209 (1996).....	11
<i>State v. Ammons</i> , 136 Wn.2d 453, 963 P.2d 812 (1998).....	8

<i>Thayer v. Edmonds</i> , 8 Wn. App. 36, 503 P.2d 1110 (1972)	11, 12
<i>Thompson v. Thompson</i> , 82 Wn.2d 352, 510 P.2d 827 (1973).....	15
<i>Veranth v. Department of Licensing</i> , 91 Wn. App. 339, 959 P.2d 128 (1998)	14
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	8
<i>Woodruff v. Spence</i> , 76 Wn. App. 207, 883 P.2d 936 (1994)	9

STATUTORY AUTHORITIES

RCW 4.16.170	9
RCW 4.28.080(15)	11
RCW 4.28.080(15) (1991).....	11
RCW 9A.72.085	13, 14
RCW 46.64.040	passim
RCW 46.64.40	passim

STATE RULES AND REGULATIONS

CR 56(c)	8
GR 13(a)	13, 15
RAP 3.1	15
RAP 18.1	22
RAP 18.1 (a)	22
RAP 18.1(b)	22

TREATISES

9 David E. Breskin and Margaret L. Barbier, <i>Wash. Prac., Civil Procedure Forms</i> §§ 4.46 (2d ed. 1990).....	16
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ADDITIONAL AUTHORITIES

Black's Law Dictionary, 476 (5th ed. 1979)	18
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I. INTRODUCTION

Shanta Steger appeals the summary judgment dismissal of her personal injury action against Janice Turner for insufficient service of process. Steger claims she accomplished substituted service of process pursuant to Washington's non-resident motorist statute, RCW 46.64.040, before the applicable statute of limitations expired. She did not. Steger failed to strictly comply with the procedural requirements contained in RCW 46.64.40 before the statute of limitations expired. Consequently, service under RCW 46.64.040 was ineffective and prevented the trial court from obtaining jurisdiction over Turner. The dismissal was proper. This Court should affirm.

II. ASSIGNMENT OF ERROR AND ISSUE PRESENTED FOR REVIEW

Turner acknowledges Steger's assignment of error, but believes the issue associated with that error is more appropriately formulated as follows:

Did the trial court properly grant summary judgment to the defendant where the plaintiff did not accomplish substituted service of process before the applicable three-year statute of limitations expired because she failed to strictly comply with RCW 46.64.040?

III. COUNTERSTATEMENT OF THE CASE

Turner's statement of the case is, while accurate, written in a perceptibly lopsided manner. Br. of Appellant/Cross-Resp't at 1-3. Her factual approach to this case ignores or downplays a number of significant facts that impacted the trial court's decision to summarily dismiss her case.

The vast majority of facts in this case are undisputed. Steger was allegedly injured in a multi-car collision on July 20, 2012 when the vehicle she was operating was struck from behind by a vehicle driven by Donald Luce.¹ CP 4, 80-84. According to Steger, Luce rear-ended her vehicle when he was struck from behind by a vehicle driven by Turner. CP 4, 84. Turner's collision with Luce caused a chain reaction, ultimately propelling Steger into the vehicle in front of her. CP 4, 84.

On July 14, 2015, Steger filed a complaint against Turner in Kitsap County Superior Court for personal injuries arising out of the 2012 collision. CP 3-5. The complaint was filed just days before the statute of limitations was set to expire. CP 3. Upon filing of the complaint, however, the limitation period was tolled for 90-days so long as Steger achieved valid service of process on Turner within

¹ Luce is not a party to this appeal, having been dismissed on summary judgment.

that statutory period. The limitation period thus expired on October 13, 2015. CP 20.

Between July 18, 2015 and August 9, 2015, Steger claimed she attempted to serve Turner with the complaint on ten separate occasions. CP 87-88, 97-98, 102-03, 107-110. The Turners denied Steger's service-related allegations, asserting they were home between July 18, 2015 and August 1, 2015 and did not recall anyone coming to the home to attempt to serve either one of them with Steger's lawsuit. CP 30, 55. The Turners seldom left their home and if they did, it was only for short periods of time. CP 30, 55. The Turners have lived in their home for 35 years. CP 30, 55.

Between August 2, 2015 and August 9, 2015, the Turners were on vacation. CP 30, 55, 78. A neighbor checked the Turners' home while they were away. CP 30, 55. The neighbor left a note for the Turners from a process server in the Turner's kitchen. CP 30-31. When the Turners returned home from their vacation, John discovered the note. CP 31. John called the number listed on the card on August 10, 2015 and left a message for the process server. CP 31. The process server did not return John's telephone call. CP 31.

On August 14, 2015, Steger filed an amended complaint

against Turner and added Luce as a defendant. CP 8-11, 78.

On or about August 18, 2015, Steger served copies of the summons, complaint, and other documents on the Washington Secretary of State. CP 90. The same day, Steger sent two copies of the summons, complaint, notice of service of summons, declaration of due diligence, and sworn statements of Steger and her counsel to Turner by certified mail. CP 40-41, 54.

Turner answered the complaint on August 26, 2015 and raised the affirmative defenses of insufficient service of process and statute of limitations termination. CP 14-17.

Turner moved for summary judgment on November 6, 2015 on multiple bases. CP 18-28. She argued that she had not been validly served before the statute of limitations expired because Steger failed to strictly comply with RCW 46.64.040 in four respects; namely, failing to use registered mail, failing to use due diligence, failing to utilize a proper sworn statement, and failing to file the affidavit of compliance and the affidavit of due diligence. CP 18-28. Steger opposed the motion, arguing she substantially complied with the statute and Turner received actual notice. CP 67-76.

The trial court granted Turner's motion on December 4, 2015

on three out of the seven grounds asserted, concluding Turner had not been properly served under RCW 46.64.040 before the statute of limitations expired because Steger's affidavit of compliance was defective. CP 156-58; RP 19-20.

Steger appealed the summary judgment dismissal of her claims. CP 154-55. Out of an abundance of caution, Turner filed a cross-appeal. CP 150-51.

IV. ARGUMENT

A. Standards of Review

The standard of review for cases resolved on summary judgment is a matter of well-settled law. This Court reviews a trial court's summary judgment decision *de novo*, engaging in the same inquiry as the trial court. *See, e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Here, the parties do not dispute the facts; the sole issue is the proper interpretation of RCW 46.64.040. Interpretation of a statute is a question of law that this Court reviews *de novo*. *State v.*

Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998).

B. The Trial Court Properly Dismissed Steger's Claims Against Turner On Summary Judgment

1. Steger did not strictly comply with RCW 46.64.040 because her sworn statement was defective

With little analysis of the law or the facts, Steger first contends the trial court erred when it granted summary judgment because she achieved substitute service of process on Turner under RCW 46.64.040. Br. of Appellant/Cross-Resp't at 4-9. According to Steger, she substantially complied with the statute because Turner received actual notice of the lawsuit and was not prejudiced. *Id.* at 4. But substantial compliance with the statute is not the proper standard. Only strict compliance permitted the trial court to obtain personal jurisdiction over Turner. Here, Steger's attempt at substituted service was insufficient under the statute and thus deprived the trial court of jurisdiction over Turner. The trial court did not err by dismissing Steger's lawsuit where Steger failed to effect service of process before the statute of limitations expired.

Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994). Under RCW 4.16.170, a plaintiff is required to personally serve one or

more of the defendants within 90 days of the date the complaint was filed. Generally speaking, RCW 46.64.040² allows substituted service on the Washington Secretary of State when the person intended to be served is not an inhabitant of or cannot be found within Washington. *Martin v. Triol*, 121 Wn.2d 135, 149-50, 847

² RCW 46.64.040 states, in pertinent part:

[E]ach 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. 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: 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[.]

P.2d 471 (1993).

For more than 50 years, Washington courts have strictly construed statutes providing for constructive or substituted service because they are in derogation of the common law.³ See, e.g., *Martin v. Meier*, 111 Wn.2d 471, 476, 760 P.2d 925 (1988); *Muncie v. Westcraft Corp.* 58 Wn.2d 36, 38, 360 P.2d 744 (1961). But see, *Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 478, 680 P.2d 55 (1984) (applying substantial compliance analysis to statute more analogous to personal service statutes than to constructive service statutes); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 403 P.2d 351 (1965) (noting that substantial rather than strict compliance with personal service statute is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing); *Thayer v. Edmonds*, 8 Wn. App. 36, 39, 503 P.2d 1110 (1972) (distinguishing between constructive and substituted service

³ Steger relies on *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996) to support her argument that statutes governing substituted service should be liberally construed where the defendant received actual notice. Br. of Appellant/Cross-Resp't at 5-7. Her reliance is misplaced. *Sheldon* is not relevant here. The plaintiff in *Sheldon* attempted to personally serve the defendant at her parents' home according to former RCW 4.28.080(15) (1991). The *Sheldon* court never addressed RCW 46.64.040 and stated in the second sentence of the opinion, "the only issue is whether the place where the summons was left constitutes defendant's house of usual abode." 129 Wn.2d at 603. The court subsequently held that "house of [defendant's] usual abode" as used in RCW 4.28.080(15) "is to be liberally construed to effectuate service." *Sheldon*, 129 Wn.2d at 609. Steger's arguments are meritless.

statutes that require strict compliance and personal service statutes that require substantial compliance).

Inherent in these decisions is the fact that a defendant may not receive actual notice of a pending action under the substituted service statute unless the steps for accomplishing such substituted service are strictly followed. *Thayer*, 8 Wn. App. at 39. *See also, Kiethly v. Sanders*, 170 Wn. App. 683, 285 P.3d 225 (2012) (noting the “plain words of RCW 46.64.040 are dispositive.”). Consequently, only strict procedural compliance with the requirements of RCW 46.64.040 will permit personal jurisdiction to be obtained over a nonresident defendant. *Heinzig v. Hwang*, 189 Wn. App. 304, 310, 354 P.3d 943 (2015); *Omaits v. Raber*, 56 Wn. App. 668, 885 P.2d 462 (1990). A plaintiff’s failure to adhere to the statutory procedures renders the service a nullity. *Omaits*, 56 Wn. App. at 670.

To perfect substituted service of process, 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. RCW 46.64.040.

Steger failed to strictly adhere to this statutory procedure because her affidavit of compliance was defective. CP 42-43. General Rule 13(a)⁴ permits an unsworn declaration to be submitted as an affidavit only if the declarant avers that the statement is true under penalty of perjury and under state law and indicates the date and place of its execution. Here, Steger admits she signed her sworn statement but did not date it. Br. of Appellant/Cross-Resp't at 3. Her statement indisputably did not comply with the requirements of GR 13(a) and thus fails to satisfy a requirement of RCW 46.64.040. *See In re Estates of Hibbard*, 118 Wn.2d 737, 741 n.7, 826 P.2d 690 (1992) (declining to consider

⁴ GR 13(a) states:

Unsworn statement permitted. Except as provided in section (b), whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085. The certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

(Date and Place)

(Signature)

unsigned, unacknowledged and undated affidavit).

Steger's argument that the Court should adopt a practical solution over a technical one is unavailing. Br. of Appellant/Cross-Resp't at 9-12. Even RCW 9A.72.085, upon which Steger relies, requires a declarant to indicate the date and place of signing when attesting to a sworn statement. Br. of Appellant/Cross-Resp't at 10. Moreover, *Manius v. Boyd*, 111 Wn. App. 764, 47 P.3d 145 (2002) and *Johnson v. King County*, 148 Wn. App. 220, 198 P.3d 546 (2009) are easily and fundamentally distinguishable.

In both *Manius* and *Johnson*, the declarants failed to indicate the "place of signing" of a declaration of service and a claim for damages, respectively. 111 Wn. App. at 770; 148 Wn. App. at 229. This Court in *Manius* and the Court of Appeals, Division I in *Johnson* concluded that the declarants' failure to state the place of signing was not fatal to their compliance with the requirements of the statutes at issue in those cases. *Id. See also, Veranth v. Dep't of Licensing*, 91 Wn. App. 339, 342, 959 P.2d 128 (1998) (declining to strictly interpret RCW 9A.72.085, Washington's claim filing statute). Unlike the plaintiffs in *Johnson* and *Manius*, however, Steger failed to *date* her sworn statement. The date of Steger's statement is critical because the timing of the statement impacts

Steger's due and diligent attempts to serve Turner and goes directly to the heart of Steger's efforts to strictly comply with RCW 46.64.40. Steger's statement was not a valid sworn statement under GR 13(a) because she failed to date it.

Because Steger's statement was defective, Steger did not strictly comply with RCW 46.64.40 and her efforts to serve Turner were a nullity. The trial court did not err by dismissing Steger's claims where it did not obtain jurisdiction over her. This Court should affirm.

2. Steger did not strictly comply with the remaining provisions of RCW 46.64.040

Even if the Court determines that the trial court's reasoning is wrong or insufficient, the Court should still affirm because the summary dismissal of Steger's lawsuit can be sustained on alternate grounds.⁵ *Thompson v. Thompson*, 82 Wn.2d 352, 355,

⁵ Turner was granted summary judgment in her favor; accordingly, she is not "aggrieved" and has no standing to bring a cross-appeal. RAP 3.1; *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987) (holding that when arguments on cross-appeal present alternate grounds for the trial court order that is the subject of the main appeal, the appellate court can consider them). She is not required to cross-appeal to urge any additional reasons in support of the summary judgment order, even though rejected by the trial court. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000) ("A successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court[.]") (citation omitted). *But see Robinson v. Khan*, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998) (holding notice of cross-review is essential if the respondent seeks affirmative relief as distinguished from the urging of additional grounds for affirmance).

510 P.2d 827 (1973) (noting a correct judgment can be sustained on any theory within the pleadings and the proof); *Retail Clerks Local 629 v. Christiansen*, 67 Wn.2d 29, 31, 406 P.2d 327 (1965) (noting the Court has held on many occasions that when a judgment is correct, it will not be reversed because the trial court may have given a wrong or insufficient reason).

- (a) Steger failed to file the required affidavits of compliance and due diligence with the trial court

Steger's attempt at substituted service was additionally deficient because Steger failed to file an affidavit of compliance and an affidavit of due diligence with the trial court.

RCW 46.64.040 sets forth the detailed procedures necessary to accomplish a form of substitute service on a defendant in a manner that satisfies due process requirements. *Supra*. Service and filing of an affidavit of compliance and an affidavit of due diligence are just two of the four requirements to achieving valid service of process under RCW 46.64.040 and obtaining personal jurisdiction over a nonresident defendant. *Clay v. Portik*, 84 Wn. App. 553, 559, 929 P. 2d 1132 (1997) (citing RCW 46.64.040 and 9 DAVID E. BRESKIN AND MARGARET L. BARBIER, *WASH. PRAC., Civil Procedure Forms*, §§ 4.46, 4.47 (2d ed. 1990)).

Here, Steger admitted she did not file her sworn statement or her attorney's declaration of due diligence with the trial court. By failing to file the required documents with the trial court, she did not strictly comply with all of the requirements for valid substituted service. RCW 46.64.040; *Clay*, 84 Wn. App. at 559. Steger's attempt at substituted service was thus ineffective.

Turner anticipates that Steger will argue, as she did below, that she was not required to file the affidavits of compliance and due diligence to perfect service. CP 75-76 (dismissing as dicta the four requirements for substituted service recognized in *Clay*). She is mistaken. The *Clay* court's decision is dispositive here and comports with the legislative history of RCW 46.64.040.

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

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

Laws of 1961, ch. 12, § 46.64.040. The plaintiff was instructed to append the affidavit of compliance to the process and have it

“entered as a part of the return thereof.” It would be highly unusual if the Legislature intended the word “entered” to mean anything other than “filing with the court” in this context. “Entered” is typically defined to mean: “[t]o place anything before a court, or upon or among the records, in a formal and regular manner, and usually in writing[.]” BLACK’S LAW DICTIONARY, 476 (5th ed. 1979).

The earlier version of the statute required the plaintiff to accomplish service by personal delivery; however, that requirement was subsequently modified in 1971. At the same time, the Legislature added the affidavit of due diligence requirement. Laws of 1971, 1st Ex. Sess., ch. 69, § 1. The Legislature slightly modified the statute, requiring that the affidavit of due diligence need only show the defendant received personal delivery by mail if an endorsed receipt was received and filed as a part of the return of process. *Id.* With this amendment, the Legislature placed the newly created affidavit of due diligence requirement next to the affidavit of compliance requirement. Rather than list two separate sections that required the affidavits to be “entered as a part of the return thereof,” the Legislature kept just one. Nevertheless, the necessity of filing both remained clear. The word “entered” remained.

While the language seems awkward, it remains in the current version of the statute. The plaintiff may slightly modify her filed affidavit of due diligence, but only where she has proof that the defendant received personal delivery by mail. RCW 46.64.040. If the plaintiff does not possess a return receipt, however, she must include additional information in her affidavit of due diligence, such as all the addresses at which service was attempted. *Id.* But this more comprehensive affidavit of due diligence, along with the affidavit of compliance, must still be filed. *Id.*

Presumptively aware of this Court's *Clay* decision, the Legislature's 2003 amendments to RCW 46.64.040 did not alter the filing requirement for the affidavits of compliance and due diligence. Laws of 2003, ch. 223, § 1. The Legislature's failure to amend the statute post-*Clay* indicates its legislative acquiescence in that decision. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P. 3d 1172 (2009).

From a practical perspective, simply sending an affidavit of compliance to a defendant serves no purpose. While a potential defendant is placed on notice by receiving the summons and complaint, an affidavit of compliance notifies the trial court of the plaintiff's strict compliance with the statute. Interpreting the statute

in a way that only requires the affidavits to be filed with the return receipt, or not at all, is inconsistent with the basic principles of notice and due process required for valid substitute service.

Steger's substituted service was ineffective because Steger did not strictly comply with RCW 46.64.40. Where Turner was not properly served before the statute of limitations expired, the trial court did not obtain jurisdiction over her and did not err by summarily dismissing Steger's lawsuit.

(b) Steger did not exercise due diligence

Steger's attempt at substituted service also failed because she did not exercise due and diligent efforts to locate Turner. As a result, the trial court did not gain personal jurisdiction over Turner before the statute of limitations expired and thus properly dismissed Steger's lawsuit.

A plaintiff utilizing substituted service of process must have a "good faith belief that defendant ha[s] departed the state . . . [and with] due diligence . . . [attempt] to locate and serve defendant." *Meier*, 111 Wn.2d at 482. Due diligence requires the plaintiff to make honest and reasonable efforts to locate the defendant. *Triol*, 121 Wn.2d at 150. Not all conceivable means need be employed, but, at the least, the accident report, if made, must be examined

and the information in it investigated with reasonable effort. *Id.*

Here, substituted service of process under RCW 46.64.40 was improper because Steger's efforts were not due and diligent. Steger's own research resulted in the same address for the Turners as that listed on the accident report. CP 49. In addition, Steger conducted her own research that confirmed Turner resided at the address shown on the police report. CP 49. And the knowledge that Turner lived at that address was again confirmed on August 26, 2015, when John signed and returned the return receipt sent there by the Secretary of State. CP 92. At that time, *more than a month remained* in the 90-day service period. But even with these confirmations that Turner could in fact be found at her home of 35 years, Steger made only 10 attempts at personal service (at nearly the same time each day) and then chose to rely on service under RCW 46.64.040. Her reason for doing so was obvious: she had only 90 days to effect service on Turner before the statute of limitations expired on her negligence claims. Steger's efforts did not satisfy RCW 46.64.040.

Steger's attempt at substituted service was improper because her efforts were not due and diligent. As a result, the trial court did not gain personal jurisdiction over Turner before the

statute of limitations expired.

C. Steger Is Not Entitled To Attorney Fees And Costs On Appeal Even If She Prevails

Under RAP 18.1(a), a party can recover attorney fees and costs on appeal if applicable law grants the right to such recovery and the party devotes a section of the opening brief to the request. RAP 18.1(a), (b). Here, Steger did not comply with RAP 18.1 because she did not devote a section of her opening brief to attorney fees. Thus she is not entitled to attorney fees and costs from this Court even if she prevails on appeal.

V. CONCLUSION

Here, Steger did not strictly comply with RCW 46.64.040 because her sworn statement was defective, her efforts to locate Turner were not due and diligent, and she failed to file the required affidavits of compliance and diligence with the court. Steger's attempt at substituted service was ineffective. Given that the statute of limitations expired on October 20, 2012, the trial court did not err in granting Turner's summary judgment motion. This Court should affirm.

DATED this 25th day of April, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

On the date given below, I caused to be sent out for service a true and correct copy of **Combined Brief of Respondent/Cross-Appellant Janice Turner** on the following parties in the manner indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 25th day of April, 2016, at Seattle, Washington.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Julie J. Johnson
Julie J. Johnson, Legal Assistant

LEWIS BRISBOIS BISGAARD SMITH LLP

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