

No. 66793-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RICHARD STALLWORTHY,

Appellant / Plaintiff,

v.

Judith Dykes,

Respondent / Defendant,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Appeal from the Superior Court of King County

The Honorable Richard E. Eadie

King County Superior Court No. 10-2-14309-2 SEA

Opening Brief of Appellant/Plaintiff,

Richard Stallworthy

Richard Stallworthy, Appellant Pro Se

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Even after asking for an extension there is insufficient time to prepare this brief so absent another extension I need to omit some formatting features such as page numbers and spelling checking.

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SUPREME COURT OF THE UNITED STATES

(Probate court was sufficiently involved with actions activating time bar in "nonclaim" statute).

Tulsa Professional Collection Servs. v. Pope,

485 U.S. 478; 108 S. Ct. 1340; 99 L. Ed. 2d 565; 1988 U.S. LEXIS 1870;
56 U.S.L.W. 4302; 56 U.S.L.W. 4303

State Cases

Constitutional Provisions

Due Process Clause of U.S. Const. amend. XIV. Ref. Err 3, Appendix 1.

Washington State Constitution

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

Statutes

RCW 4.28.020 Jurisdiction acquired, when. Ref. Err 4.

From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings

RCW 4.28.080 Summons, how served. Ref. Err 1 and 4.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

RCW 11.12.095 "Omitted Spouse ..."

(3) The omitted spouse . . . must receive an amount equal . . . intestate . . .
.RCW 11.04.015. Note brother was named in the will.

RCW 11.40.040 "Reasonably Ascertainable" Definition Ref. Err 3

(2) . . . the personal representative is presumed to have exercised reasonable diligence to ascertain creditors . . . any creditor not ascertained . . . is presumed . . . not reasonably ascertainable. . . . presumptions may be rebutted only by clear, cogent, and convincing evidence.

(3) . . . any creditors not known to the personal representative are not reasonably ascertainable.

Regulations and Rules

CR4 Ref. Err 4.

(d) Service.

(1) Of Summons and Complaint. The summons and complaint shall be served together.

(2) Personal in State. Personal service of summons and other process shall be as provided in RCW 4.28.080-.090, 23B.05.040, 23B.15.100, 46.64.040, and 48.05.200 and .210, and other statutes which provide for personal service.

CR5 Ref. Err 4.

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants

(b) Service--How Made.

(1) On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party

shall be made by delivering a copy to him or by mailing it to him at his last known address.

Other Authorities

1. Introduction

Complicated probate issues arise when plaintiff who became sick, had a POA, during recovery had his wife die, then the POA died purportedly because plaintiff expressed displeasure at the handling of his affairs. Plaintiff filed a creditor claim which was rejected by Dykes with no mention of timely filing non-reasonably ascertainable creditor (distinct from reasonably ascertainable name and address of creditor as stated by Justice O'Connor). saying to sue within 30 days as the only option, a suit followed then a summary judgement, a motion to reconsider and now an appeal.

2. Assignments of Errors

Assignments of Error

In general Error document segments are referred to in Issue Error items

Error 1 The Court and State Erred re Reasonably Ascertainable VRP

12 (This overlaps somewhat with Error 3.)

The meaning of reasonably ascertainable has been extended by the state and the court to ask not just was the name and address of the creditor reasonably ascertainable meaning could you find the person without

unreasonable efforts but instead granting to the defendant the right to decide that the creditor claim itself was not reasonably ascertainable based on nothing more than the defendant's opinion.

Error 2 The Court Erred Late Filing Creditor Claim

Error 3 The Court and State Erred when Overruling Supreme Court Decision

SUPREME COURT OF THE UNITED STATES

Tulsa Professional Collection Services. v. Pope,

485 U.S. 478; 108 S. Ct. 1340; 99 L. Ed. 2d 565; 1988 U.S. LEXIS 1870; 56 U.S.L.W. 4302; 56 U.S.L.W. 4303 (Appendix 1)

Actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are **reasonably ascertainable**.

A cause of action is a species of property protected by the Due Process Clause of U.S. Const. amend. XIV.

Private use of state sanctioned private remedies or procedures does not rise to the level of state action. Nor is the state's involvement in the mere running of a general statute of limitation generally sufficient to implicate due process. But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.

Where legal proceedings themselves trigger a time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time

bar lacks the self-executing feature necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required.

See appendix 1 for U.S. Supreme Court ruling, Appendix 2 for Washington Supreme Court ruling.

Error 4 The Court Erred re Late personal service

Rule CR 5 (b) Service--How Made.

(1) On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. ... Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address.

(2) Service by Mail.

(A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, . . .

B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be . . . by affidavit of the person who mailed the papers.

RULE CR 5 (see Appendix 3)

Error 5. The Court Erred Acceptance of Praecipe CP 73-79

Although the praecipe was filed two days before the hearing it was not presented to plaintiff until the hearing itself where it should as it was a

response to the plaintiff's response to the motion, been presented earlier. Although it asks within itself for acceptance it was not mentioned in the hearing and no mention is made of it being accepted. Yet the motion for summary judgment is referenced often leading one to wonder if such a reference is with or without the praecipe. Motion for Summary Judgement Ex. 8. CP 56-57.

Error 6 The Court Erred Too few Documents

The court considered in its order only a few documents presented to it, CP 104 omitting many documents which surely must have been needed to come to a decision.

Error 7 The Court Erred No Facts

No facts were listed in the order of summary judgment CP 103-105 making it difficult to determine what facts if any were used by the "trier of facts" to make this decision, or were there any facts at all.

Error 8 The Court Erred Dykes excused from personal liability VRP 10

Dykes was never personally sued in this case yet by claiming confusion about whether she was being personally sued she got the court to remove her.

Error 9 VRP 15 Spouse never named in will

VRP 15:2-5 Court denies knowledge of RCW 11.12.095 omitted Spouse law.

3. Issues Pertaining to Assignments of Errors

Issue Error 1 Reasonably Ascertainable

At issue is whether the court and state can grant to the defendant judicial powers to decide if a creditor claim is valid, is “reasonably ascertainable” to be valid where the defendant, one party to the action, will simply rule in his own favor. And the state goes further and extends to the defendant immunity from any reasonable dispute with the opinion the defendant has made, The term “reasonably ascertainable” has a simple meaning when applied to “name and address” as the US Supreme Court did. It has no meaning or at best an obscure convoluted meaning when ascribed to a creditor claim.

Issue Error 2 Late Filing Creditor Claim

Issue Error 3 Overruling Supreme Court Decision

In 1988 the supreme court made a ruling where they included the phrase “reasonably ascertainable.” After that several states grabbed the phrase but not the definition that the supreme court had given to it. Not the whole phrase “whose name and address are reasonably ascertainable.” It makes common sense that you cannot notify someone when you don’t know their name and address or cannot reasonable ascertain such. The court never intended to grant to the defendant the power to decided or judge on the merits of the creditor claim if the validity of the claimt were reasonably ascertainable. Yet that is exactly what the court and this state has done.

The original meaning was one of a simple fact. You can either determine the name and address of the creditor or you cannot. And within that meaning the phrase reasonably ascertainable simply states that there has to be some limit to the search for that name if it were very difficult to locate. Whether the claim itself is valid or reasonably ascertainable to do so is a matter for the court to decide, not for the defendant, only one party to the action who will decide in his own favor. The state created RCW 28.40.040 which stated that the defendant get to decide who is and who is not an ascertainable creditor effectively overruling the US Supreme Court. However it says anyone Mrs. Dykes did not know was not an ascertainable creditor and she certainly knows Stallworthy, me and my address and she received my money through her deceased husband acting as my POA.

Issue Error 4 Late personal service

Since the affidavit of mailing of summons and complaint to attorney per CR 5 was omitted it is included in appendix 4 A-3.

There is no doubt that (Dykes attorney) Garvey received these documents as they appear on CP 24, CP 25 CP 26 and CP 52 of his motion for Summary judgment.

Now with CR 5 (Appendix 2) we have (a) and (b) which are separate. We know this because (a) contains twice the phrase “unless the court orders otherwise” and lists specific kinds of documents, particularly excluded

initial service and says nothing about attorney service. And saying each document needs to be served. However (b) (1) does not list a selection of documents, does not refer to the list from (a), saying service of **all** (any doubt could be removed by naming excluded items) documents needs to be upon the now appeared attorney “unless [otherwise] ordered by the court.[CR5]” Of course the attorney is not the court so the notice of appearance by an attorney cannot stipulate that some documents be served upon him while others are not. Only the court can do that. The attorney in this case indicated a desire not to receive personal service, but he could not (since he is not the court) direct that “process” be addressed to the client rather than the attorney himself. “Please serve [to himself] all . . . documents exclusive of process” CP 6-12. And of course service to attorneys do not require personal service and have been met in this case. Only an affidavit (appendix 3) is required.

Issue Error 5. Acceptance of Praeceptum

Note that the praecipe was introduced to Stallworthy on the day of and the time of the hearing, not two days before when it was “filed” with the court. Although the praecipe contained words asking it be accepted, it was never accepted by the court at the hearing (VRP). The praecipe exhibit 8 contains two two page documents, the second an affidavit of due diligence which merely restates the law by Dykes which had never been filed before while the original exhibit 8 contained only the first half / first page of one

and the motion for summary judgement only refers to 1 document as exhibit 8. CP-19. The motion for summary judgment is referenced often leading one to wonder if such a reference is with or without the praecipe.

Issue Error 6 Too few Documents

Since only a few documents are listed CP 104:1-2 it is difficult to determine what documents were actually used to decide the order. In order to rule on a late filing don't you need to look at the filing documents at issue and their dates and perhaps the case summary? Does the response by the plaintiff need to include all previous documents in the case in order that they be considered by the court?

Issue Error 7 No Facts CP 103-105:25

Since no facts are given are we to assume there were no facts which the "trier of facts" used to support this order?

Issue Error 9 VRP 14 Spouce never named in will

VRP 18 request for notice was made. VRP 20 was set aside "for now."

4. Statement of the Case

This is a probate to superior court to summary judgement to reconsideration to appeal case. The reconsideration CP-112 did reverse one of the issues, one of the supposed facts of the summary judgement VRP 25-28 order CP 103-105 but left two items on the table vaguely described as timeliness issues but really those issues are something else, CP 112:17-19. The first item, CP 112:17 , that probate creditor claim was

not filed in a timely manner was really an error (error 1 or 2) by the court in interpreting the meaning of “reasonably ascertainable” to be other than the Supreme Court stated “name and address reasonably ascertainable” but extending a wider meaning allowing Dykes to pass judgement upon the validity of the creditor claim and having done so to reject the creditor claim. The second item CP 112:19 pertains to service, error 4, which assumes that personal service is required for a summons after the appearance of an attorney where CR5 allows / requires service to be made upon the attorney where personal service is not required.

5. Summary of Arguments

Regarding the two issues one has to do with the definition of “reasonably ascertainable” which the US Supreme Court said clearly pertain to “name and address.” Does extending the meaning to include judging whether the creditor has a valid claim overrule the Supreme Court decision?

The second issue is whether personal service of the summons etc. Is required in this case. On its surface the law seems clear that personal service is required until we have a notice of appearance from an attorney.

While some have argued that this action waived right to process, But in this case I am simply looking at the laws and rules where rules CR5 (b) requires service to be upon the attorney rather than the plaintiff directly and outlines the rules for service upon an attorney which does not appear to require personal service.

6. Argument

Regarding the two issues one has to do with the definition of “reasonably ascertainable” which the US Supreme Court, *Tulsa Coll. v Pope*, said clearly pertain to “name and address.” To allow Dykes to decide ascertainability based on her own opinion of the validity of the claim would raise her to the level of a judge and overrule the supreme court decision.

The second issue is whether personal service of the summons etc. Is required in this case. On its surface the law seems clear that personal service is required until we have a notice of appearance from an attorney. While some have argued that this action waived right to process, But in this case I am simply looking at the laws and rules where rule CR5 (b) requires service to be upon the attorney rather than the plaintiff directly and outlines the rules for service upon an attorney which does not appear to require personal service.

7. Conclusion

This is simply to request for relief by having the case remanded back to Superior Court.

JUL 18 2011

Affidavit of Mailing

Case Name: Richard Stallworthy, Appellant vs. Judith Dykes

Case NO.: 66793-9-I

I certify that a copy of the initial Appeal Brief was sent to Dykes via her attorney Huck on or before July 19, 2011.

were mailed to the persons listed below,

Name and Address	<u>R. Stallworthy</u> Date Mailed
Christopher Michael Huck	July 19, 2011.
Kelley Donion Gill Huck and Goldfarb 701 5 th Ave Ste 6800 Seattle WA 98104-7066	

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8. Appendix 1 US Sup. Ct. Tulsa Coll. v Pope 485 US 478 66793-9-I

SUPREME COURT OF THE UNITED STATES

Tulsa Professional Collection Servs. v. Pope,

485 U.S. 478; 108 S. Ct. 1340; 99 L. Ed. 2d 565; 1988 U.S. LEXIS 1870; 56 U.S.L.W. 4302; 56 U.S.L.W. 4303

(probate court was sufficiently involved with actions activating time bar in "nonclaim" statute).

Actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

A cause of action is a species of property protected by the Due Process Clause of U.S. Const. amend. XIV.

Private use of state sanctioned private remedies or procedures does not rise to the level of state action. Nor is the state's involvement in the mere running of a general statute of limitation generally sufficient to implicate due process. But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.

Where legal proceedings themselves trigger a time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required.

On appeal, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by O'Connor, J., joined by Brennan, White, Marshall, Stevens, Scalia, and Kennedy, JJ., it was held that the Oklahoma nonclaim statute violated the due process clause of the Federal Constitution's Fourteenth Amendment, because, although the statute provided solely for publication by notice, due process required that actual notice be given to known or reasonably ascertainable creditors of the decedent by mail or other means as certain to insure actual notice, for (1) such a creditor's claim--a cause of action against the estate for an unpaid bill--was an intangible property interest protected by the due process clause; (2) the statute in question was not a self-executing statute of limitations; (3) instead, the pervasive and substantial involvement of the state probate court in the activation and operation of the statute's time bar constituted sufficient state action to implicate due process; (4) the statute could adversely affect a creditor's protected property interest by barring untimely claims and causing probate proceedings to extinguish such claims; and (5) although the state had a legitimate interest in the expeditious resolution of probate proceedings, (a) creditors had a substantial practical need for actual notice, (b) the required actual notice was not so cumbersome as to hinder unduly the dispatch with which probate proceedings are conducted, and (c) probate proceedings were not so different in kind as to require a different result from other analogous situations in which the pressing need to proceed expeditiously had been held not to justify less than actual notice.

With respect to creditors' claims against a decedent, a state's nonclaim statute--which generally bars claims arising out of a contract, where the claims have not been presented to the executor or executrix of the decedent's estate within 2 months of the publication of a specified notice advising creditors of the commencement of probate proceedings--violates the due process clause of the Federal Constitution's Fourteenth Amendment, because, although the statute provides solely for notice by publication, due process requires that actual notice be given to known or reasonably ascertainable creditors of the decedent by mail or other means as certain to ensure actual notice, for (1) such a creditor's claim--a cause of action against the estate for an unpaid bill--is an intangible property interest protected by the due process clause; (2) the statute in question is not a

self-executing statute of limitations; (3) instead, the pervasive and substantial involvement of the state probate court in the activation and operation of the statute's time bar constitutes sufficient state action to implicate due process; (4) the statute may adversely affect a creditor's protected property interest by barring untimely claims and causing probate proceedings to extinguish such claims; and (5) although the state has a legitimate interest in the expeditious resolution of probate proceedings, (a) creditors have a substantial practical need for actual notice, (b) the required actual notice is not so cumbersome as to hinder unduly the dispatch with which probate proceedings are conducted, and (c) probate proceedings are not so different in kind as to require a different result from other analogous situations in which the pressing need to proceed expeditiously has been held not to justify less than actual notice. (Rehnquist, Ch. J., dissented from this holding.)

Under the due process clause of the Fourteenth Amendment to the United States Constitution, state action affecting property must generally be accompanied by notification of that action; in such circumstances, 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 to afford the parties an opportunity to present their objections; the focus is on the reasonableness of the balance between the interest of the state and the individual interest sought to be protected by the Fourteenth Amendment; whether a particular method of notice is reasonable depends upon the particular circumstances.

8 Appendix 2 Brower v. Wells, 103 Wn 2d 96 WA Supreme Court
Brower v. Wells, No. 50120-3 , SUPREME COURT OF WASHINGTON, 103 Wn.2d 96; 690 P.2d 1144; 1984 Wash. LEXIS 2040, November 6, 1984 , Reconsideration Denied February 7, 1985.

Due process requires that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.

Notice by publication in a condemnation proceeding, where the property owner's **name** and address were known to the city, do not meet due process standards.

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its **name and address are reasonably ascertainable**.

To state a claim for relief under 42 U.S.C.S. § 1983, the plaintiff must allege that (1) defendant acted under color of state law, and (2) his conduct deprived the plaintiff of rights, privileges and immunities protected by the Constitution of the United States. Other jurisdictions have held that failure to specifically plead 42 U.S.C.S. § 1983 does not prevent recovery under its provisions so long as the essential elements of a § 1983 claim are stated.

8 Appendix 3 RCW 11.12.095 Omitted spouse. (from KCBA)

(1) If a will fails to name or provide for a spouse of the decedent whom

the decedent marries after the will's execution and who survives the decedent, referred to in this section as an "omitted spouse," the spouse must receive a portion of the decedent's estate as provided in subsection (3) of this section, unless it appears either from the will or from other clear and convincing evidence that the failure was intentional.

(2) In determining whether an omitted spouse has been named or provided for, the following rules apply:

- a. A spouse identified in a will by name is considered named whether identified as a spouse or in any other manner.
- b. A reference in a will to the decedent's future spouse or spouses, or words of similar import, constitutes a naming of a spouse whom the decedent later marries. A reference to another class such as the decedent's heirs or family does not constitute a naming of a spouse who falls within the class.
- c. A nominal interest in an estate does not constitute a provision for a spouse receiving the interest.

(3) The omitted spouse must receive an amount equal in value to that which the spouse would have received under RCW 11.04.015 if the decedent had died intestate, unless the court determines on the basis of clear and convincing evidence that a smaller share, including no share at all, is more in keeping with the decedent's intent. In making the determination the court may consider, among other things, the spouse's property interests under applicable community property or quasi-community property laws, the various elements of the decedent's dispositive scheme, and a marriage settlement or other provision and provisions for the omitted spouse outside the decedent's will.

(4) In satisfying a share provided by this section, the bequests made by the will abate as provided in chapter 11.10 RCW.

• 8 Appendix 4 CR 5

CR 5 (b) Service--How Made.

(1) On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. ... Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address. See (2) Service by Mail.

RULE CR 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or

appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service--How Made.

(1) On Attorney or Party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule and in rule 71, Withdrawal by Attorneys.

(2) Service by Mail.

(A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day.

(B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers.

8 Appendix 5 Affidavit of Mailing

Since the affidavit of mailing of summons and complaint to attorney per CR 5 was omitted I will include it here in this appendix 3.

Affidavit of Mailing

Case Name: Richard Stallworthy, Appelant vs. Judith Dykes

Case NO.: 66793-9-I 10-2-14309-2

I certify that a copy of the request for documents, summons and complaint were mailed to Leo Garvey, appeared attorney for Dykes, at his preferred mailing address, P.O. Box 20321, Seattle WA 98102 on or about or before June 23, 2010.

R. Stallworthy