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No. 69400-6-1

COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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GAIL K. DIAMOND, Respondent,

v.

JONATHAN RICHMOND, Petitioner.

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**REPLY BRIEF OF PETITIONER**

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## STATEMENT OF THE CASE IN REPLY

The Statement of the Case should contain "A fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). However, Ms. Diamond's Counterstatement of the Case contains numerous assertions and conclusions unsupported by the record at all, and/or that are arguments and not facts. If these statements were regarded as facts, they would violate the rule that a genuine issue of material fact cannot be created by argumentative assertions on appeal. Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 871 P.2d 601 (1994), review denied, 124 Wn.2d 1029 (1994).

Ms. Diamond's non-factual assertions include the following (page references are to her brief):

- *At pages 2 and 3:* Ms. Diamond characterizes her attorney's actions as "diligent." Yet, because the facts are not in dispute, diligence in the current context is not a fact, but rather an issue of statutory and constitutional law applied to fact, and is for the Court to determine. Martin v. Triol, 121 Wn.2d 135, 151, 847 P.2d 471 (1993); Pascua v. Heil, 126 Wn. App. 520, 528, 108 P.3d 1253 (2005).

- *At page 2:* Ms. Diamond discusses the California address that Mr. Richmond disclaimed at the accident scene, then states:

Ms. Diamond's attorney then attempted to cross-reference this information [presumably, the California address] with the Massachusetts telephone number shown on the police report, *CP 80*, using internet telephone directories and Accurint legal research services. *CP 8*. When the information obtained appeared to be inconsistent and incapable of correlation, Ms. Diamond's attorney concluded that Mr. Richmond may have provided a falsified address and other contact information, and made email inquiry to the Department of Homeland Security, *CP 9*.

Yet, the factual record is devoid of any proof that Ms. Diamond's attorney "attempted to cross-reference" any information. Nor does the record show what information he input into the unnamed internet directories and the Accurint search, or what the information returned to him from those sources was. Nor does Ms. Diamond's attorney state in any declaration that "the information obtained appeared to be inconsistent and incapable of correlation" (or whether he or someone else drew that conclusion), or that this claimed inconsistency preceded his inquiry of the Homeland Security Department, or led to it. Moreover, the factual record does not show the content of that inquiry, or that he contacted the Homeland Security Department by email as opposed to some other

method. Nor does the record demonstrate whether the Department replied and if so, what the reply was.

On a record lacking such facts, or even of facts from which such inferences could be drawn without speculation, a court cannot determine what information was available to counsel, much less whether it was "incapable of correlation." Moreover, it is unclear what he means by "incapable of correlation." In the age of a global economy powered by cell phones and frequent mobility, many people maintain telephone numbers that have area codes different from one or more of their physical addresses. That telephone and address information may not correlate with one locale does not lead to a reasonable inference that such information cannot be used to locate a person, or that the person is falsifying information. Indeed, when searching for a person, one may use divergent data, including cell and address data, to segregate a search subject from others who share a common name. As Mr. Richmond shows in his brief and the record cited, there were numerous ways in which Ms. Diamond or her counsel could have used various pieces of information in a few minutes to find his addresses using various multi-term internet searches and/or information available from Mr.

Richmond and/or other public and private sources readily available to them. See generally, Brief of Petitioner at pp. 7 – 11.

- *At pages 3 - 5*: A person at the California address apparently told Ms. Diamond's process server that Mr. Richmond was "not in and will not be there for weeks." CP 62 at ¶10. Ms. Diamond concludes, "This confirmed to Ms. Diamond's attorney that Mr. Richmond was continuing to use the California address...as his own." Brief of Respondent at p. 3.

That bootstrapped conclusion may reflect the lawyer's then-existing subject state of mind, but should not be confused with a reasonable inference that the California address was Mr. Richmond's "last known address" for two reasons:

First, Ms. Diamond disregards history before service of process was attempted. Mr. Richmond told Ms. Diamond at the accident scene that he didn't live at that address, but that he lived in Mauritius and gave her a Massachusetts telephone number. CP 27-28 at ¶5. He never told her that he resided in California after that. CP 50 at ¶3, see also CP 51 at ¶4. He lived in various other places around the world during the limitations period, which he disclosed to Ms. Diamond and/or other sources available to her. See generally Brief of Petitioner at pp. 5 – 11. She ignores the fact

that on October 5, 2011, Mr. Richmond had told her attorney that Mr. Richmond “went on a lecture tour in the United States in March and April of 2011 and then *went back to Asia, ...*,” CP 61 at ¶3 (emphasis added). In light of that statement, Ms. Diamond’s assertion on page 6 of her brief that “there was no need to follow up on any address that Mr. Richmond may have used in either Mauritius or Bangladesh” is not reasonable, even though he had said he had come and gone from those places at times in the past, CP 60 - 61; as he had California, where Ms. Diamond chose to do some limited searching.

Second, the person who spoke with the process server, and Mr. Richmond in his October 5, 2011 conversation with Ms. Diamond’s lawyer, each at most suggested that Mr. Richmond might appear in California in the indefinite future; perhaps well beyond the expiration of the limitations tolling period. In that phone call, Mr. Richmond stated he had “tentative plans” to make a trip to California “sometime in the upcoming weeks” (to visit friends, but apparently without stating he would stay with them at that address) and to London “for the holidays.” CP 61 at ¶3. As to neither address did Mr. Richmond say he would be there within the limitations period or the tolling period. Even assuming for argument

that he was to be: The California address was no more a "last known address," than was the London address. Yet, Ms. Diamond apparently directed no notice to the London address.

The record shows that Mr. Richmond also told Ms. Diamond's attorney on October 5, 2011 that Mr. Richmond's California friends "had allowed Mr. Richmond to stay with them for extended periods of time so he could meet the requirements of his green card," CP 61 at ¶¶3. The facts that Mr. Richmond used the California address over three years earlier for purposes of obtaining a driver's license, and at some untold time, a "green card," do not reasonably imply that he more likely than not lived there or used it as a mailing address on or about the dates on which service of process was attempted or by which service required to be completed. No person or data reasonably suggests that Mr. Richmond used the California address for any purpose at that time substitute service of process was attempted. All the record discloses is a possible inference from the statement to the process server that Mr. Richmond might be visiting California at an indefinite future date for an indefinite time. Ms. Diamond has presented no information of which she or her lawyer was aware within the

limitations period to suggest that Mr. Richmond ever traveled to California in the three years and three months after the collision.

In light of these facts, and the ease of finding his other addresses, it was not reasonable for Ms. Diamond or her lawyer to infer that the California address was Mr. Richmond's "last known address." Ms. Diamond and her attorney could only reasonably infer from these facts that Mr. Richmond may have had some form of contact with the people at the California address at an indefinite earlier time, but not that he had necessarily committed to being there within the limitations period; and certainly not that he would remain there for any length of time. Her assertion that the California address was an "active residence address," Brief of Respondent at p. 4, is a leap into the factual void. Nothing in the process server's cryptic hearsay statement supports her claim that "Mr. Richmond was either at the California address or was going to be at the California address in the near future," and that address was "known to be current," as her appellate brief at page 5 contends. In fact, to the contrary: He said on October 5, 2011 that he tentatively planned to visit California, then London and then travel to Vietnam after the 2011 winter holidays. CP 61 at ¶3.

In short, the California address could not be a “last known residence” as contemplated by RCW 46.64.040. The California address may have been the last *street* address Ms. Diamond *actually* knew. But only by use of counterfactual inferences can she favor the an old address on file with the California Department of Motor Vehicles as his “last known address” that could with due diligence have been determined when she served process. Ms. Diamond’s conclusion that Mr. Richmond’s last known address was in California was speculation, or, at best, wishful thinking.

Ms. Diamond characterizes Mr. Richmond as an “international vagabond,” Brief of Respondent at p. 5. Yet, when it suits her, she contrarily elects unreasonably to infer from scant information that the California address was the only one at which he could reasonably be found. She does so to the irrational exclusion of the abundant information describing his other locations throughout the limitations period and up to the end of that period. She ignores the possibility (which was the reality) that he had returned to his residence in Bangladesh. Ms. Diamond simply hoped that he would return to California because it seemed logistically easier to try to serve him there in the little time she had left. In fact, Mr. Richmond did return to Bangladesh (which is in

Asia), where he resided, could be located, and could receive notice of suit even in the fading sunset of the limitations period. CP 29 at ¶11 & CP 45-47; CP 100 at ¶11.

Ms. Diamond's duty under RCW 46.64.040 is to take a wider view of the facts known or that could have with reasonable diligence been discovered. As described in Mr. Richmond's papers in this action, she failed in that regard. When one considers the information reasonably available to Ms. Diamond bearing on the subject of Mr. Richmond's addresses prior to expiration of the limitations period<sup>1</sup>, the last address of which Ms. Diamond in the exercise of due diligence reasonably should have known was Mr. Richmond's 2011 Bangladesh address. See CP 29 at ¶11 & CP 45-47; CP 100 at ¶11.

- *At page 6:* Ms. Diamond's assertion that the California address was "the only address currently associated with Mr. Richmond as of October 2011" (emphasis in original) is a rhetorical conclusion, not a factual one. Her use of passive voice lends a tone of authority to the statement it does not deserve given the context established by all the facts known or reasonably available

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<sup>1</sup> Information Ms. Diamond obtained after October 9, 2011 is irrelevant. For purposes of RCW 46.64.040 analysis, the "last known address" should be assessed based on what the plaintiff knew at the time substitute service was attempted, not what she learned later.

to her then. As described above, his association with the California address at the time was unclear and tenuous at best. Although Ms. Diamond and/or her lawyer may have preferred to associate Mr. Richmond only with the California address, clearly, the record is replete with readily available information associating him with Bangladesh at that time. CP 29 at ¶11 & CP 45-47; CP 100 at ¶11.

It is also important to keep in mind that the plaintiff's duty of diligence is not minimized when she chooses to wait until the last minute to commence an action; else the plaintiff could dilute the duty by waiting until the limitations period expires to file suit. Due process is not subject to reduction through lack of diligence and/or strategic maneuvering. Ms. Diamond has offered no reason at all why she could not have sued Mr. Richmond when she had more concrete information about his whereabouts. She has offered no explanation why she did not contact the SeaTac Municipal Court, her own insurer, his rental car company, his passenger, his Mauritius employer, his Bangladesh employer. She has offered no explanation why she could not locate his resume on the internet, which stated his Bangladesh address and other information by which he could be found. For her to state, "Ms. Diamond knew nothing about Mr. Richmond that would have helped identify any

current address for him at the time of service,” Brief of Respondent at p. 6, wishfully white-washes the undisputed state of facts both known and readily available to her and her lawyer.

She implicitly acknowledges her failure to pursue these facts by arguing – still in her “Counterstatement of the Case” – that she cannot be reasonably expected to chase a defendant around the world to serve him. Brief of Respondent at p. 8. But under circumstances such as these, that is exactly what she has to do to ensure compliance with state due process requirements. Due process is not necessarily easy process.

Surprisingly, Ms. Diamond goes “over the top” with her argument, suggesting that Mr. Richmond “secreted” himself. Brief of Respondent at p. 6. No such inference is remotely legitimate based on the facts. While he did not disclose his location, the facts are clear that he remained in contact with her and her lawyer, that he made no false statements, and that he took no steps to avoid being found other than to refuse to tell her lawyer where he was. Her use of “catch me if you can” to describe Mr. Richmond’s behavior is a cute rhetorical phrase. But it is also misleading, because that phrase describes a range of behavior, from providing intentionally false or misleading information, which Mr. Richmond

concedes is not allowed by law, to passive resistance, which is clearly allowed; see Petitioner's Brief at p. 35 note 6 (citing cases). The fact is, Mr. Richmond made available to her and to the world plenty of information that she could have used to find him throughout the limitations period and tolling period.

- *At page 9:* Ms. Diamond's appellate brief states that, according to her attorney Daniel Shin, on October 26, 2011 (17 days *after* the limitations tolling period expired), Mr. Richmond called her attorney's office and said that "a piece of certified mail" had been sent to "his California address." See also CP 52 at ¶12. The dates of the mailing, of the attempted delivery, and when and how he acquired such knowledge, are not described. Mr. Shin does not explain what type of relationship with the address the word "his" is intended to signify, or that Mr. Richmond was aware of the contents or even the addressee of the certified mail. It is undisputed that Mr. Richmond never received it and has no idea what was in that mail, having become aware of it only through a notice of attempted delivery left at the address. CP 100-101 at ¶13. The fact that some information may have found its way to him through "his California address," even when construed in Ms.

Diamond's favor, does not reasonably imply that this place was Mr. Richmond's last known address or his only address.

- *At page 10:* Ms. Diamond incorrectly represents that the trial court “effectively decided as a matter of law that substituted service had been properly made under RCW 46.64.040 and that the court does have jurisdiction over the parties here.” Yet, the September 14, 2012 order, CP 140-141 (Petitioner's Brief Appx. A), says no such thing. At most, the order may be construed as reserving the issue of personal jurisdiction for trial, though the trial court did not specifically address any of Mr. Richmond's arguments and the basis on which that court based its plainly erroneous conclusion is not set forth in the order.

### **ARGUMENT**

Ms. Diamond does not dispute any fact presented by Mr. Richmond. Therefore, this appeal turns on whether these facts, and the reasonable inferences from those facts construed most favorably to her, compel judgment as a matter of law in favor of Mr. Richmond. This Court can only conclude that Ms. Diamond failed to meet her burden to make a *prima facie* case that her attempted substitute service strictly complied with the mechanics and due process required by RCW 46.64.040. She has not raised a

genuine issue of material fact on every infirmity identified by Mr. Richmond. Thus, her case must be dismissed for any or all of those reasons.

A comparison of the parties' positions under the main analytical structure of the argument presented in Mr. Richmond's opening brief reveals not only the flaws in Ms. Diamond's arguments, but also the fact that she fails to address some of Mr. Richmond's dispositive arguments at all.

**1. The Affidavit of Compliance required by RCW 46.64.040 is undisputedly deficient and cannot be cured.**

Ms. Diamond presents no evidence or reasonable inferences from evidence, and no legal authority, to suggest that her attorney's initial Affidavit of Compliance was proper. The affidavit was defective in two ways: First, it did not state that *two* copies of the summons or process were delivered to the Secretary. Second, it did not state the *amount* of the fee she paid.<sup>2</sup> Her attorney admits these deficiencies, having filed a corrected affidavit, CP 128-130. But he did so too late to allow Mr. Richmond to be timely advised that a lawsuit had been properly commenced against him.

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<sup>2</sup> Ms. Diamond cites no authority for her assertion that "the exact amount need not be shown or proven," Brief of Respondent at p. 28. RCW 46.64.060 makes no such exception in its mandate of an affidavit of compliance.

The fact that Ms. Diamond's attorney attempted service of an unsworn notice mentioning "two copies," CP 68, does not obviate his need to comply with the rest of the statute. The statute requires *both* a notice of service on the Secretary of State, which need not be sworn, *and* a sworn affidavit of compliance with the entire statute. The notice of service on the Secretary is a distinct statutory requirement, not a substitute for the affidavit of compliance. Both are required. Keithly v. Sanders, 170 Wn. App. 683, 688, 285 P.3d 225 (2012); see also Brief of Petitioner at p. 21.

All information demonstrating compliance must be on the face of the affidavit, else the affidavit is merely a conclusory statement and fails in its notice and proof functions. A defendant should not need to depose the plaintiff's attorney or conduct other discovery to determine the facts of compliance in order to assess whether the plaintiff has secured personal jurisdiction. The affidavit of compliance is useless unless on its face it demonstrates at least *prima facie* evidence of compliance with each element of the statute. Here, Ms. Diamond failed to provide a proper affidavit. In fact, she provided a misleading affidavit, which stated that only "a ... copy," CP 70 at line 19, not two copies, of process had been delivered to the Secretary. The affidavit is a violation of due

process and reason enough to dismiss this action. Substitute service is in derogation of common law and thus must be strictly pursued. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 177, 744 P.2d 1032 (1987). A proper affidavit must be provided within the limitations period (here, as extended by the tolling period, RCW 4.16.170) because the affidavit is a necessary element of substitute service. Where, as here, the substitute service is incomplete within the tolling period, the plaintiff has run out of time to amend her affidavit.

Regardless of timeliness, the new affidavit is not properly regarded as a "correction" *nunc pro tunc*; rather, it untimely seeks to add new facts. An untimely affidavit is therefore constitutionally infirm because it fails to provide notice to the defendant by the time the defendant needs to decide whether to defend the case. See Keithly, 178 Wn. App. at 692; see also Brief of Petitioner at 20 – 30 (especially discussions of Ekanger v. Pritchard, 93 Wn.2d 777, 613 P.2d 129 (1980), Kent v. Lee, 52 Wn. App. 576, 762 P.2d 24 (1988), and Pascua v. Heil, 126 Wn. App. 520, 108 P.3d 1253 (2005)).

**2. Ms. Diamond failed to serve by mail, and failed to attempt to serve process at the addresses specified in RCW 46.64.040.**

As shown in the Statement of the Case in Reply, above, the inconsistent logic Ms. Diamond now uses to rationalize her and her counsel's focus on the California address as the "last known address" to the exclusion of other available information regarding Mr. Richmond's addresses demonstrates their strange complacency; a comportment made even more egregious given that they chose to serve process under the temporal guillotine of the expiring limitations tolling period. Their failure to disclose the details of some of their inquiries – such as what they learned from Accurant or the Department of Homeland Security – further belie their purported diligence. Rather than take a few simple steps to use the modern, powerful and virtually free internet to locate Mr. Richmond, they instead made a charade of their statutory and constitutional obligations.

**a. As matters of undisputed fact and law, the California address was not a "last known address."**

Delay and presumption are the enemies of due diligence. Old information goes stale. "Last known" is not an invitation to willful or even negligent ignorance. See *Brown v. ProWest Transp.*

Ltd., 76 Wn. App. 412, 421, 886 P.2d 223 (1994); Bethel v. Sturmer, 3 Wn. App. 862, 867, 479 P.2d 131 (1970). As discussed at length in Mr. Richmond's opening brief and as supplemented by the Statement of the Case in Reply above, the information Mr. Richmond undisputedly provided to Ms. Diamond and her lawyer, and that was undisputedly available from other physical and electronic sources known to them, would have led, with little difficulty, to locating his addresses in Mauritius and Bangladesh and his Massachusetts address. Ms. Diamond's singular focus on the California address, in view of information that it was not reasonable to consider it a "last known" address as a matter of law, is sufficient reason to deny personal jurisdiction here.

**b. As matters of undisputed fact and law, Ms. Diamond failed to exercise due diligence to discover and send a summons or process in the statutory manner to all of Mr. Richmond's addresses.**

The statutory due diligence required of the plaintiff does not end with the inquiry into defendant's "last known" address. Rather, plaintiff's attorney must diligently attempt to find and serve "*all* addresses known to him or her of defendant," RCW 46.64.040 (emphasis added). Leads must be followed. Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988); see also Pascua v. Heil, 126

Wn. App. 520, 529-30, 108 P.3d 1253 (2005); Order Granting Discretionary Review (No. 69400-6-I) at p. 4. A failure of such diligence is a failure of due process. Martin, 111 Wn.2d at 477, citing Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

Contrary to Ms. Diamond's assertion at pages 12 to 13 of her brief, the due diligence requirements are not different for serving nonresidents. Nonresidents are entitled to no less due process than Washington residents are under RCW 46.64.040; particularly given the substitute nature of service. Cf. Summerrise v. Stephens, 75 Wn.2d 808, 814, 454 P.2d 224 (1969) (personal service on nonresidents required by long-arm statute "is a much surer guarantee of notice and due process than the more synthetic procedures provided by [RCW 46.64.040]"); Wuchter, id. No distinction in the level of due diligence required to effect substitute service on nonresidents is apparent in Washington case law. For example, Bethel v. Sturmer, 3 Wn. App. 862, 867, 479 P.2d 131 (1970) reversed the trial court and ordered dismissal of a defendant who lived in Canada at the time substitute service was attempted and who had a Canadian driver's license and car registration, but who gave a Florida address to an accident investigator. The court concluded she was not evading process and there was no showing

that she could not with due diligence have been served within or without the state of Washington. See also, e.g., Keithly v. Sanders, 170 Wn. App. 683, 285 P.3d 225 (2012) (plaintiff violated due process with respect to former-resident defendant, who relocated to China within limitations period, by failing to mail process “forthwith” to last known address after serving Secretary of State).<sup>3</sup>

Contrary to Ms. Diamond’s assertion on page 14 of her brief, RCW 46.64.040 *does* create a burden on plaintiff to discover addresses outside Washington and outside the United States. As a matter of statutory interpretation, she cites only the due diligence requirement appearing before the first proviso in the statute. She ignores the second due diligence requirement, which is stated *in* the first proviso that applies both to nonresidents and residents. Moreover, as discussed in the preceding paragraph, Washington courts apply the due diligence requirement to plaintiffs seeking to serve nonresident defendants under this statute.

In response to Mr. Richmond’s challenge, Ms. Diamond has failed to present any fact or any reasonable inference from fact even to suggest that Mr. Richmond’s Bangladesh address and

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<sup>3</sup> In Keithly the question of whether the “last known address” for purposes of RCW 46.64.040 should have been in China or in Washington was not decided, and may not have been presented.

personal whereabouts in the July 11, 2011 to October 9, 2011 timeframe (from the filing date until the expiration of the limitations tolling period), and at other times, could not be readily located. The fact that Mr. Richmond, in reciting his whereabouts over the past three years, had told Ms. Diamond's counsel that Mr. Richmond had come and gone from various places, including a departure from Bangladesh in December 2010, CP 61 at ¶3, was not a disclaimer or rebuttal of the available information that pointed to his valid address in Bangladesh at the time substitute service of process was attempted in October 2011. See generally, CP 93-116 & CP 117-124. By law, such information is "required" to be investigated. Pascua, 126 Wn. App. at 529; accord, Martin, 111 Wn.2d at 482. Yet, here it was not. Indeed, the fact that Ms. Diamond's counsel regarded Mr. Richmond as an "international vagabond" should have prompted him to consider that third parties associated with or knowledgeable of his former addresses (current residents, neighbors, employers, etc.) might know his then-current whereabouts. Although RCW 46.64.040 does not specify that the addresses be residence addresses, Mr. Richmond contends that the fact that an address is *not* an obvious residence address should lead a reasonable plaintiff to investigate further to pursue "all

addresses” of the defendant, in order to maximize the purpose of the statute, which is to provide the defendant notice. However, as demonstrated in Mr. Richmond’s opening brief, Ms. Diamond and her lawyer ignored the available information. There is no evidence in the record that Ms. Diamond or her agents asked such questions of anyone or even made a basic intelligent internet search.

Mr. Richmond does not contend that Ms. Diamond should have taken a “no holds barred” or “all conceivable means” approach to locating him. Nor does he seek to “focus on what plaintiff did not do” to the exclusion of “what plaintiff did do.” The quoted rhetorical phrases, though invoked by our courts from time to time to eschew arguments that a plaintiff did not do more, *when doing more would exceed the requirements of due process*, are not very useful in determining the threshold of a plaintiff’s duty of due diligence under RCW 46.64.040. See, e.g., Keithly, 170 Wn. App. at 693 (criticizing Carras v. Johnson, 77 Wn. App. 588, 892 P.2d 780 (1995) as unhelpful). To demonstrate inadequacy would be impossible if a defendant were barred from discussing how and why a plaintiff should have done more. Such broad rhetoric becomes even less useful under circumstances made challenging by the plaintiff’s

delay in commencing suit and the fact that the defendant travels widely and frequently. Martin v. Meier holds:

"[D]ue diligence" under the statute requires that plaintiff make honest and reasonable efforts to locate the defendant. Not all conceivable means need be employed, but, at the least, the accident report, if made, must be examined and the information therein investigated with reasonable effort. In addition, if plaintiff has information available pertaining to defendant's whereabouts other than that contained in the accident report, plaintiff must make reasonable efforts to investigate based on that information as well.

111 Wn.2d 471, 482, 760 P.2d 925 (1988). On the facts before this Court, Ms. Diamond fails to prove due diligence and does not pass minimal due process muster, which voids her attempted substitute service on the Secretary of State.

### **3. Performance of the Secretary of State's statutory duties lacks competent proof.**

Ms. Diamond fails to prove that the Secretary fulfilled its duty under RCW 46.64.040 to "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." Despite the challenge raised in Mr. Richmond's summary judgment motion, she offers no *admissible* evidence – required by CR 56(e) – that

mailing occurred at all, or if it did, that if it did, that the Secretary of State complied with the statute's mandate to use regular mail. Her appellate Brief of Respondent offers no new argument why this Court should ignore her failures of proof.

### **CONCLUSION**

Ms. Diamond's alleged substitute service on the Secretary of State under the nonresident motorist statute fails for multiple reasons already repeatedly identified to this Court. She failed as a matter of law to exercise the due diligence required by constitutional due process and the express language of the statute, and failed in her burden of proof required by the Civil Rules and the Evidence Rules. This Court is compelled to conclude that her Affidavit of Compliance with RCW 46.64.040, CP 70, and the affidavit of due diligence ("Affidavit of Attempted Service Pursuant to RCW 46.64.040," CP 8-9) were defective, such that she has failed to secure personal jurisdiction over Mr. Richmond under the nonresident motorist statute. The record fails to hold reasonable promise that further adjudication of this issue could yield a contrary conclusion. This Court should reverse the trial court and mandate entry of summary judgment of dismissal in favor of Mr. Richmond.

DATED: August 22, 2013.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that I am over the age of 18 and that on the date signed below, I transmitted by e-mail to marka@mbaesq.com and deposited into the United States Mail, first class postage prepaid, a true and correct copy of the foregoing document with all appendices referenced therein, addressed to counsel for Respondent, Anderson Law Firm, PLLC, 1119 Pacific Avenue, Suite 1305, Tacoma, WA 98402.

Signed on August 22, 2013, at Marysville, Washington.

  
Darriel R. Laurence