

69400-6

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No. 69400-6-I

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

GAIL K. DIAMOND, Respondent,

v.

JONATHAN RICHMOND, Petitioner.

BRIEF OF PETITIONER

Attorney for Petitioner:
DANIEL R. LAURENCE
WSBA No. 19697
1802 Grove Street
Marysville, WA 98270
Tel. (360) 657-5150
Fax (360) 657-2465
dan@drlfirm.com

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INTRODUCTION

Petitioner Jonathan Richmond is the defendant in *Gail K. Diamond v. Jonathan Richmond and "Jane Doe" Richmond*, King County Superior Court Cause No. 11-2-23782-6 KNT. This Court granted discretionary review of the Superior Court's order entered on September 14, 2012 (Appendix A hereto), which denies Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

Mr. Richmond contends the trial court erred by failing to find as a matter of law that, on the undisputed record before it, Plaintiff-Respondent Gail K. Diamond did not prove she complied with the so-called "nonresident motorist statute,"¹ RCW 46.64.040 (Appendix B hereto), and so failed to effect substitute service of process; such that this action must be dismissed.

Three reasons – any one of which is sufficient – require reversal: (1) Ms. Diamond's attorney's affidavit of compliance with RCW 46.64.040 was legally inadequate; (2) Ms. Diamond undisputedly failed timely to serve process at addresses required by the statute; and (3) Ms. Diamond failed to present *prima facie* proof

¹ Despite its common name, the statute applies not only to nonresidents, but also to *residents* who cannot "after a due and diligent search, be found in this state."

that the Secretary of State complied with its statutory duties. Thus, she thrice violated the terms of the statute and due process.

ASSIGNMENT OF ERROR

The trial court erred in entering its Order on Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, dated September 14, 2012, which denied Defendant Jonathan Richmond's Motion to Dismiss for Lack of Personal Jurisdiction.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Does the trial court lack personal jurisdiction over Defendant Richmond because, on the undisputed record, Plaintiff Diamond failed as a matter of law to comply with the so-called "nonresident motorist statute," RCW 46.64.040, in at least one of the following respects:

1. Ms. Diamond undisputedly failed timely to file and serve an affidavit of compliance with RCW 46.64.040 that specifically stated (a) that Ms. Diamond left *two* copies of the summons or process with the Secretary of State of the state of Washington, and/or (b) the *amount* of the fee Ms. Diamond left with the Secretary; which defects cannot be cured *nunc pro tunc*?

2. Ms. Diamond failed timely to serve the summons or process at the addresses required by RCW 46.64.040; having (a) allegedly sent the required documents only to Mr. Richmond's California address, a place where she had already been told he did *not* reside, and (b) failed to attempt personal service of a copy of the summons or process, and failed to send the required documents by registered mail with return receipt requested, to Mr. Richmond in *Mauritius, Bangladesh or Massachusetts*, despite the mandate in RCW 46.64.040 to exercise due diligence to discover such addresses; having undisputedly failed to review information in *public records*, on the *internet*, and in *her own insurer's possession*, which undisputedly would have led to discovery of Mr. Richmond's addresses at or before the time Ms. Diamond attempted to serve process?

3. Ms. Diamond failed to *prove* the Secretary of State complied with its statutory duties under RCW 46.64.040; in that she: (a) failed to offer admissible evidence of the Secretary's actions; and, even if the evidence is admissible, (b) failed to prove that the Secretary used regular mail, which is the only mailing method prescribed by statute?

STATEMENT OF THE CASE

This tort suit arises from a car accident that occurred on July 15, 2008 in SeaTac, Washington. Respondent (Plaintiff below) Gail Diamond alleges Petitioner (Defendant below) Jonathan Richmond was at fault. *See generally*, CP 1-3. At the scene of the collision, Ms. Diamond said she was “fine” and appeared to be uninjured. CP 27 at ¶5. Yet, on July 11, 2011, four days before the limitations period expired, she filed this lawsuit. CP 1. Under the 90-day tolling period allowed by RCW 4.16.170, she had until October 9, 2011 to effect proper service of process without violating the three-year limitations statute, RCW 4.16.080. Yet, she did not serve him within the required timeframe. CP 29 at ¶12. Accordingly, Mr. Richmond filed a motion to dismiss the action pursuant to CR 12(h). CP 11-25. The motion was based on the following facts and arguments.

On September 9, 2011, Ms. Diamond’s counsel sought and obtained an order from the Superior Court to permit service of process by publication in accordance with RCW 4.28.100 and 4.28.110, CP 4-7, but never published the required notice, CP 29 at ¶13. To the motion for publication, CP 4-7, Ms. Diamond’s counsel,

Mark Anderson, appended a declaration stating that he researched “internet telephone directories,” searched Accurint legal databases, and contacted Homeland Security in an effort to locate Mr. Richmond for personal service or service by mail, but was “unsuccessful.” CP 5 at ¶3. Later, on October 6, 2011, he filed an “Affidavit of Attempted Service Pursuant to RCW 46.64.060,” CP 8-9, stating the same things. CP 8 at ¶3. Mr. Anderson did not – and still does not – reveal what information, if any, he obtained or failed to obtain about Mr. Richmond. In the declaration submitted with the motion for service by publication, Mr. Anderson admitted that he “could not confirm that Jonathan Richmond ever used” the California address listed on the police report. CP 5 at ¶4. Mr. Anderson speculated that Mr. Richmond “probably provided a falsified address and other contact information” to the police. CP 5 at ¶4. However, the declaration lacks factual detail to support that improper conclusion.

In fact and to the contrary, Mr. Richmond provided no false information to the police. CP 28 at ¶7. Rather, he properly presented his driver’s license. Mr. Richmond is a single man who has never been married, and has always been a citizen of the United Kingdom. CP 26 ¶2. Mr. Richmond has never been a

Washington resident. CP 27 at ¶13. He had a California driver's license bearing an address in California. This address was recorded on the police report. CP 27 at ¶14. At the time of the collision, however, he did not live in California. Rather, he resided in the Republic of Mauritius, a country located on an island in the Indian Ocean. CP 27-28 at ¶15.

At the scene of the collision, Mr. Richmond dutifully told Ms. Diamond that he lived in Mauritius and was returning to Mauritius. CP 27-28 at ¶15. He told her again that he lived there when he telephoned her later to see how she was doing, and gave her his telephone number, which had a 617 (Boston, Massachusetts) area code, CP 27-28 at ¶15. Ms. Diamond admits that she spoke with Mr. Richmond at the scene of the collision and on the telephone in 2008. CP 50 at ¶2. She testified, "From my conversations with Mr. Richmond, I understood that Mr. Richmond did not live within the United States but that he lived in a foreign country at the time of the collision," and "I seem to remember he had a job in Mauritius....," CP 50 at ¶3. She acknowledged that Mauritius was his "home." CP 31. She admits she had his telephone number, which she understood was "in the Boston, Massachusetts area." CP 51 at ¶4. The telephone number was also on the police report, CP 80. She

says he never told her “his physical address or where he actually lived,” CP 50 ¶3, see also CP 51 ¶4, but does not testify that she ever *asked* him or his passenger for Mr. Richmond's address. The police report also identifies Mr. Richmond's passenger by name, address, and telephone number. CP 81. In responding to the infraction notice issued by the police to him at the scene, he wrote, on the back of the notice, his Mauritius residence address, two telephone numbers – one of which had a 617 (Massachusetts) area code and the other of which had a 230 (Mauritius) country code – and his e-mail address. CP 28 at ¶6 & CP 33. He also used that address in correspondence with the SeaTac Municipal Court concerning the infraction notice. CP 28 at ¶6 & CP 34-39. Apparently, neither Ms. Diamond nor her attorney followed up on any of this information.

Mr. Richmond corresponded about the collision with Ms. Diamond's insurer, Progressive Insurance. CP 28 at ¶8 & CP 40-42. He also corresponded with Fox Rent-A-Car, from whom he had rented the vehicle involved in the collision. CP 29 at ¶9 & CP 43-44. He advised both of them of his residence in Mauritius, of his employer, of his job title, and of his employment address in Mauritius, and of his Massachusetts and Mauritius phone numbers

as well as his e-mail address. CP 40-44. Ms. Diamond's attorney, Mr. Anderson, even had a copy of Mr. Richmond's Fox Rent-A-Car contract. CP 62 at ¶9 & CP 77. Yet, apparently, Ms. Diamond and her counsel never bothered to obtain that information either.

Mr. Richmond's resume was available on the internet during the limitations period as well. CP 29 at ¶11 & CP 45-47; CP 93-116; CP 117-124. At the time Mr. Richmond's motion to dismiss was filed, his resume was the third item that came up when entering "Jonathan Richmond" into the search engine Google.com. CP 29 at ¶11 & CP 45-47. His resume lists on the first page a Massachusetts address, where he received mail, and a Bangladesh address where he lived after departing Mauritius and at the time the lawsuit commenced, CP 46. On the fourth page, it also shows his job in Mauritius, confirming this is the same "Jonathan Richmond" involved in the collision. CP 47. The last page gives his date of birth, a further clue that could be used to determine his whereabouts. CP 29.

In fact, Mr. Richmond's resume was easy to find on the internet throughout 2001 to 2011, and the version of his resume showing his Bangladesh residence address and Massachusetts contact address was posted and easily located as of May 1, 2011.

CP 93-94 at ¶¶2-3. He consistently appeared at or near the top of results obtained by searching his name on various popular internet search engines. CP 95 at ¶4. And yet, Ms. Diamond's counsel says, he searched the internet using the sole search term "Jonathan Richmond" in "early 2011," he "did not see" Mr. Richmond's resume. CP 63 at ¶12. A plethora of other readily available information and strategies existed that could have been used to locate Mr. Richmond's addresses timely. For example, Ms. Diamond or her counsel could have focused her internet search by adding search terms based on information known to them: For instance, they could have Googled "Jonathan Richmond *and Mauritius*." Upon seeing the nearly instantaneous results of such a search, they could have verified that the resulting web link to Mr. Richmond's website at or near the top of their search results was in fact to his by looking at photos of him and his resume posted there; and obtained his residence address and other contact information from the same resume. But neither Ms. Diamond nor her lawyer took these simple, quick and cost-free steps. There were a number of other strategies that could have been (but were not) used to locate Mr. Richmond, such as contacting his former employers, publisher, and *alma mater* M.I.T.; all of which were also readily

identifiable by conducting internet searches. See generally, CP 93-116.

Not until four days before the 90-day tolling period would expire on the expiration of the statute of limitations did Ms. Diamond's lawyer, Mark Anderson, discover that Mr. Richmond no longer lived in Mauritius. On October, 5, 2011, Mr. Anderson spoke with Mr. Richmond on the telephone, and learned that Mr. Richmond had been "kicked out" of Mauritius due to religious prejudice at some unstated time, and had left Bangladesh in 2008. CP 60-61 at ¶¶2-3. Ms. Diamond offers no proof that her lawyer ever asked Mr. Richmond whether he had returned to Bangladesh again after 2008 or could receive mail there or anywhere else. Yet, the factual record is clear that at the time this lawsuit was commenced, July 11, 2011, CP 1, Mr. Richmond resided in Bangladesh at an address published on his resume, which was both available and readily identifiable on the internet, CP 29 at ¶11 & CP 45-47; CP 100 at ¶11, and could receive mail in Massachusetts. In that conversation, Mr. Richmond also told Mr. Anderson that Mr. Richmond intended to visit family in London and friends in California some time in the next few weeks. CP 61 at ¶3.

However, Mr. Richmond did not say he resided in either location. See CP 61 at ¶3.

After that telephone conversation ended, Ms. Diamond's counsel, Mr. Anderson, dialed *69 to obtain Mr. Richmond's telephone number and learned that it was a number with a 617 area code, which counsel knew to be associated with Boston. CP 61 at ¶6. Yet, no evidence exists on the record that Mr. Anderson called back to ask about Mr. Richmond's Massachusetts address, or took any other action to discover that address.

In sum, the last information Ms. Diamond had upon filing suit on July 11, 2011, was that Mr. Richmond had *not* resided in California since the collision, had resided in Mauritius but had left there after the collision, and had resided in Bangladesh for a period ending in 2008. Even so, Mr. Anderson ignored information readily available on the internet, which showed that Mr. Richmond had returned to reside in Bangladesh after 2008 and had a Massachusetts mailing address when suit was commenced.

Despite the available information, Ms. Diamond and her attorney made no effort, prior to attempting constructive service under RCW 46.60.040, to locate and send process by personal service or by registered mail to Mr. Richmond's Mauritius,

Bangladesh or Massachusetts addresses, and did not file or serve an affidavit that they made diligent efforts to do so. Nor did they mail notice of service on the Secretary of State and a copy of the summons or process to Mr. Richmond at his Mauritius, Bangladesh and/or Massachusetts addresses by registered mail with return receipt. CP 29 at ¶12.

Regardless, according to Ms. Diamond's counsel's sworn Affidavit of Compliance, CP 70, on October 6, 2011 – over three years after the collision and three days before expiration of the 90-day grace period for service of process – he mailed to the Washington Secretary of State only *one* copy (“a copy”) of process intended for Mr. Richmond, specifying the disclaimed California address only. Moreover, Ms. Diamond's counsel's Affidavit of Compliance – which was provided to the Secretary with the summons and complaint and given to the process server for delivery at the California address only – failed to state the *amount* of the fee paid. CP 70 at line 20. Not until his response to Mr. Richmond's motion to dismiss did Ms. Diamond's counsel first provide an unauthenticated and unsworn boilerplate statement from the Washington Secretary of State that says the Secretary received a “Summons/Complaint and other legal documents,” of which the

Secretary sent a “duplicate copy” of unclear origin, by certified mail, to Mr. Richmond at an unspecified “last known address as supplied by the plaintiff or his/her representative.” CP 76. Presumably, if such notice was sent, it would have been sent to the California address. See CP 76. Ms. Diamond’s counsel also filed with the trial court, and allegedly mailed to Mr. Richmond at the California address, an *unsworn* notice that counsel left two copies of the “Summons and Complaint with the Secretary of State.” CP 68. Only in response to Mr. Richmond’s motion to dismiss did Ms. Diamond’s counsel untimely serve an Amended Affidavit of Compliance stating that he left *two* copies. CP 128-130. Mr. Richmond never received any mail from Ms. Diamond’s lawyer. CP 100-101 at ¶13.

In light of these *uncontested* facts, Mr. Richmond asserts as an affirmative defense lack of personal jurisdiction due to insufficient service of process, CP 15, Affirmative Defenses ¶1, and moved for dismissal under Civil Rules 12(h) and 56(c). See CP 11-49. Ms. Diamond responded. See CP 50-85. Mr. Richmond replied. See CP 93-124. The matter was initially heard on August 31, 2012. See CP 144. The Superior Court ordered supplemental briefing, CP 125, which the parties submitted, CP 131-134 & CP

135-139. The motion was denied by order entered on September 14, 2012. CP 140-141 (Appendix A hereto). On October 3, 2012, Mr. Richmond filed and served his Notice of Discretionary Review and paid the appellate filing fee. CP 142-145.

ARGUMENT

This Court should reverse the trial court's order denying summary judgment and direct entry of an order dismissing this action. The facts are not in dispute; only their legal meaning is. Mr. Richmond submits that the trial court lacks personal jurisdiction because Ms. Diamond has failed to comply with RCW 46.64.040 as a matter of law.

The standard of review of an order denying summary judgment is *de novo*. E.g., Pascua v. Heil, 126 Wn. App. 520, 524, 108 P.3d 1253 (2005), citing Charboneau Excavating, Inc. v. Turnipseed, 118 Wn. App. 358, 361, 75 P.3d 1011 (2003), review denied, 151 Wn.2d 1020 (2004). The appellate court may only consider the evidence that was before the trial court. Hudesman v. Foley, 73 Wn.2d 880, 441 P.2d 532 (1968). 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).

The order from which Mr. Richmond appeals fails to identify any genuine issue of material fact that would preclude an order granting his motion to dismiss for lack of personal jurisdiction. Indeed, no genuine issue of material fact exists. On the record, this Court can only conclude that Ms. Diamond violated the nonresident motorist statute in numerous ways described herein. Thus, her attempt at constructive service is invalid; the case against Mr. Richmond must be dismissed.

Absent effective service of process, a court lacks personal jurisdiction over a defendant. "First and basic to personal jurisdiction is service of process." Painter v. Olney, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984), review denied, 102 Wn.2d 1002 (1984). To be valid, service of process must comply with statutory requirements. Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972), review denied, 82 Wn.2d 1001 (1973). "Mere receipt of process and actual notice alone do not establish valid service of process." Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 177, 744 P.2d 1032 (1987).

Statutes providing for constructive or substituted service must be strictly construed as in derogation of the common law, and RCW 46.64.040 must be strictly adhered to or no jurisdiction is obtained under the statute. Martin v. Meier, 111 Wn.2d 471, 479, 760 P.2d

925 (1988). See also Reynolds v. Richardson, 53 Wn.2d 82, 330 P.2d 1014 (1958).

Omaits v. Raber, 56 Wn. App. 668, 670, 785 P.2d 462 (1990), review denied, 114 Wn.2d 1028. Accord, Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993); Pascua v. Heil, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005); see also, Haberman, id. (“As statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly pursued.”)

Plaintiff bears the burden of demonstrating valid service of process. Farmer v. Davis, 161 Wn. App. 420, 250 P.3d 138 (2011), review denied, 172 Wn.2d 1019 (2011); Witt v. Port of Olympia, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). Plaintiff’s affidavits are not entitled to special weight in that regard. Id. If the factual issues are undisputed or cannot reasonably be disputed, the question is one of law for the court. See Martin v. Triol, 121 Wn.2d 135, 151, 847 P.2d 471 (1993); Carras v. Johnson, 77 Wn. App. 588, 593, 892 P.2d 780 (1995). “Since proper service of process is required for jurisdiction, sufficiency of service of process is a question of law. As a result, the determination of valid service is reserved to the judge.” Gross v. Sundig, 139 Wn. App. 54, 67, 161 P.3d 380

(2007). Hence, the defense of inadequate service of process may be adjudicated on a motion to dismiss. See CR 12(h).

On the record described above and for the reasons described below, this Court can and should decide as a matter of law that personal jurisdiction over Mr. Richmond is lacking. Washington law permits constructive service of process on a nonresident driver by serving the Washington Secretary of State in compliance with procedures designed to maximize the chance for the defendant to receive timely and complete notice of suit. See RCW 46.64.040. Ms. Diamond failed to effect constructive service on Mr. Richmond because she fails to make a *prima facie* case that her attempted service on the Secretary of State strictly complied with the statute's mechanics and due process. This Court can only conclude that she failed to perfect her suit.

In order to secure jurisdiction over a nonresident motorist, the plaintiff can serve the Washington Secretary of State:

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. ... 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.

RCW 46.64.040 (emphasis added).²

A plaintiff's failure to notify the defendant in the statutory manner that process has been served upon the Secretary of State renders process served on the Secretary fatally defective. Omaits, 56 Wn. App. at 670.

As demonstrated below, here Ms. Diamond failed in her obligations to comply with the statute. She failed in three respects,

² As this Court noted at page 4 of its Order Granting Discretionary Review, Clay v. Portik, 84 Wn. App. 553, 929 P.2d 1132 (1997) distilled the statute into a four-part reformulation: The plaintiff must (1) Deliver two copies of the summons to the Secretary of State with the required fee; (2) Either (a) personally serve the defendant with a copy of the summons and notice of service on the Secretary, or (b) send the same documents by registered mail, return receipt requested, to the defendant's last known address; (3) File an affidavit of compliance with the court; and (4) If the defendant was served by registered mail, file an affidavit of due diligence with the court. 84 Wn. App. at 559. (Filing the affidavits with the court is not expressly required by the statute, but is required as a matter of proving service.) That reformulation was sufficient to dispose of the issues raised in Clay. Crucial to this appeal, but glossed over in the Clay reformulation (at the second clause), is the plain statutory requirement that personal service must be attempted on *all* of the defendant's addresses – not merely the last known address. As case law makes clear, the "due diligence" in making such service includes a duly diligent effort to identify all of the defendant's addresses, whether "last known" or not, and whether residential or not. See Section 2.b., below.

any of which is sufficient to invalidate her claim of personal jurisdiction over Mr. Richmond. First, she failed to deliver timely to him a proper form of affidavit of compliance. Second, even assuming for argument that the forms had been timely and proper, she failed to exercise due diligence to identify Mr. Richmond's addresses and to attempt personal service of the summons or process at all those addresses, and failed to send him at all those addresses by registered mail the notice of service on the Secretary, the summons or process, the affidavit of compliance, and the affidavit of due diligence. Lastly, she failed to prove that the Washington Secretary of State complied with its duties under the statute.

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

Washington law is clear that a plaintiff must *serve* a proper affidavit of compliance as an element of securing personal jurisdiction, so that the defendant may have adequate notice that plaintiff has secured jurisdiction over the defendant. An affidavit of compliance must *demonstrate* compliance. The nonresident motorist statute prescribes no form for the affidavit. The facts contained in the affidavit will depend upon the circumstances.

Even so, each statutory requirement must be proved in the affidavit by facts grounded in admissible evidence, not mere conclusory statements of Ms. Diamond's counsel. CR 56(e). Ms. Diamond's counsel's Affidavit of Compliance, CP 70, is deficient for the following two reasons, either of which is sufficient to merit dismissal.

- a. The Affidavit of Compliance undisputedly fails to meet the statute's requirement that *two* copies of the summons or process be delivered to the Secretary of State.**

An affidavit of compliance must demonstrate compliance with RCW 46.64.040; both to give the defendant adequate notice as a matter of *securing* jurisdiction, and to advise the court of facts as a matter of *proving* jurisdiction. The statute requires, among other things, that *two* copies of the "summons or process" be delivered to the Secretary. Thus, plaintiff's affidavit must say so.

In Keithly v. Sanders, 170 Wn. App. 683, 285 P.3d 225 (2012), Division I explained the importance of the affidavit of compliance's notice function, as distinct from the function of ultimate proof. "Some provision for notice to the defendant, in addition to service on the Secretary of State or other state official, in statutes such as RCW 46.64.040 is essential to due process.

[Footnoted citation omitted.]” Keithly, 170 Wn. App. at 692. “As the U.S. Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., the ‘fundamental requisite of due process of law is the opportunity to be heard.’ *This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*’ [Footnoted citation omitted.]” Keithly, id. (quoting Mullane v. Central Hanover Bk. & Trust Co., 339 U.S. 306, 314 (1950) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))) (emphasis added). See also, Omaits v. Raber, 56 Wn. App. 668, 670, 785 P.2d 462 (1990), review denied, 114 Wn.2d 1028. Accord, Martin v. Triol, 121 Wn.2d 135, 847 P.2d 471 (1993).

In that case, this Court reaffirmed that constitutional notice requires “both service of two copies of the summons on the secretary ***and*** mailing of notice of such service, together with the other statutorily required documents, must be accomplished to effect proper service. Only then does one strictly comply with the terms of RCW 46.64.040 for service of process.” 170 Wn. App. at 688 (Bold italic emphasis in original; underline added.)³

³ In Keithly, this Court distinguished Division Three’s decision in Carras v. Johnson, 77 Wn. App. 588, 892 P.2d 780 (1995) as “unhelpful,” because the court there did not state whether Carras mailed a copy of the notice of service to

By contrast, here, Ms. Diamond's counsel's Affidavit of Compliance says only that "a copy" of the summons was delivered to the Secretary. CP 70 at line 19. The affidavit is therefore defective, regardless of whether it is accurate, because even if Mr. Richmond had received the affidavit timely and in the proper manner (which he did not), opposing counsel's statement in the affidavit could not have notified Mr. Richmond that Ms. Diamond had secured personal jurisdiction over him by means of RCW 46.64.040. Put more directly, the affidavit in fact represented that she had *not* complied with the statute. Thus, she cannot meet her burden to prove valid service of process.

b. The Affidavit of Compliance undisputedly fails to state the *amount* of the fee Ms. Diamond paid to the Secretary of State.

Ms. Diamond's failure to state the amount of the fee paid also renders her counsel's Affidavit of Compliance fatally defective. A bare recitation of the statutory factors required to obtain jurisdiction is insufficient. Rather, the plaintiff must produce the

the defendant's last known address and compliance with that part of the statute was not at issue. Keithly, 170 Wn. App. at 693. And even in Carras, plaintiffs made reasonable but unsuccessful efforts to find out where the defendant had moved. See also, Harvey v. Obermeit, 163 Wn. App. 311, 261 P.3d 671 (2011) (plaintiff's effort to locate and serve defendant at address on accident report were insufficiently diligent).

specific facts that support the conclusions required by the statute. Pascua v. Heil, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005), citing Charboneau Excavating, Inc. v. Turnipseed, 118 Wn. App. 358, 362, 75 P.3d 1011 (2003), review denied, 151 Wn.2d 1020 (2004); Kent v. Lee, 52 Wn. App. 576, 579–80, 762 P.2d 24 (1988). See also CR 56(e). Such facts are required to satisfy the notice function articulated in Keithly v. Sanders, 170 Wn. App. 683, 285 P.3d 225 (2012) and discussed in the preceding subsection of this brief. From the affidavit of Ms. Diamond’s counsel, one cannot determine whether she paid the correct amount of the fee. Thus, even if Mr. Richmond had received the affidavit in the proper and timely manner (which he did not), he could not have determined whether the suit was properly commenced. The affidavit falls short of its constitutional notice function. Moreover, due to the lack of “specific facts,” CR 56(e), the trial court could not rely on the affidavit as proof that the proper fee was paid. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact). For both reasons. Ms. Diamond failed in her burden to prove valid substitute service of process.

c. The Affidavit of Compliance cannot be cured *nunc pro tunc* as a matter of law.

A plaintiff cannot, in response to a motion to dismiss, “cure” the contents of a defective affidavit of compliance without timely and otherwise properly serving the correction. Cf. Pascua, 126 Wn. App. at 526; Keithly, 170 Wn. App. at 688. As described above, proper notice in the required form of the affidavit was not provided here before the limitations tolling period expired. Ms. Diamond’s lawyer’s untimely correction of his statements, CP 129-130, may clarify what he actually did, but fails to comply with the strict requirement of the statute that a proper affidavit be furnished timely to the defendant. Ms. Diamond’s counsel sent a defective affidavit of compliance to the Secretary. Because the affidavit was defective, Mr. Richmond was not timely and properly advised that a lawsuit had been properly commenced and was legitimately pending. Thus, he was (and is) entitled to make the determination that he has not been generally haled into court.

This procedural failure was not a mere defect of “form”; rather, the affidavit’s form is what confers the *substance* of the *notice* required for due process: Defective notice violates the substantive right to procedural due process. The affidavit of

compliance cannot be cured under Civil Rule 4(h) after the limitations period is expired because of the material prejudice that would result to Mr. Richmond's "substantial right" not to be dragged into a court that lacks personal jurisdiction.

Were the opposite true, a plaintiff would have little incentive to comply with the statute in the first instance. Unlike the long-arm statute, RCW 4.28.185, the nonresident motorist statute, RCW 46.64.040, has no provision for awarding to a defendant like Mr. Richmond the reasonable attorney's fees and costs required to extricate himself from being wrongly haled into court. Thus, unjustly, a plaintiff is free from the strict requirements of the statute could drag a defendant into court and force the defendant to shoulder the inconveniences and expenses of litigation, only later to discover that the court had no personal jurisdiction. That result occasionally occurs at the end of a case even when the procedures of the nonresident motorist statute have been honored, such as when there is a genuine issue of material fact bearing on personal jurisdiction, which must be resolved at trial. But in a case such as this one, where the facts are not in dispute, if the legal conclusion can be drawn early in defendant's favor, then it should be: The core purpose of the statute's proof hurdles is to avoid

unconstitutional process. Where the statute alone does not dissuade a plaintiff from unconstitutionally shortcutting process, Civil Rules 12(h) and 56(c) facilitate that purpose.

Due process is fundamentally defined by notice and an opportunity to be heard. E.g. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). Here, the notice Ms. Diamond half-heartedly directed to Mr. Richmond did not comport with the notice required by statute. The statute is designed to ensure that the defendant has a reasonable opportunity to learn that the action has been properly commenced. That is the obvious purpose of the legislature's requirement that plaintiff's affidavit of compliance be included in the material to be sent to the defendant. That affidavit is a *sworn* statement⁴ of *compliance* with the *entire* statute. The notice of service on the Secretary of State, also required by the statute, is *not* a *sworn* statement. The statute requires *both* a notice of service *and* an affidavit of compliance; the notice is not a substitute for the affidavit.

⁴ "By definition an affidavit is a 'sworn statement in writing made ... under an oath or on affirmation before ... an authorized officer.'" Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 452, 842 P.2d 956 (1993), quoting Webster's Third New International Dictionary 35 (1965); see also Kent v. Lee, 52 Wn. App. 576, 579, 762 P.2d 24 (1988) ("[a]n affidavit is ... a solemn, formal asseveration, under oath, upon which others might rely"), quoted with approval in Our Lady of Lourdes Hosp., 120 Wn.2d at 453.

Contrary to an argument Ms. Diamond made below, Ekanger v. Pritchard, 93 Wn.2d 777, 613 P.2d 129 (1980) does not suggest the opposite conclusion. The issue in Ekanger was whether a defect in an affidavit supporting service by publication was fatal to jurisdiction or could be cured by amendment. Under the service-by-publication statute, RCW 4.28.100, the role of the affidavit – which, by contrast to the nonresident motorist statute, need only be filed with the clerk of the court – is to place on the court’s record that the summons and complaint have been mailed “to the defendant at his place of residence.” That statute does *not* require that any effort be made to transmit to the defendant a notice of such filing. The Court of Appeals was careful to draw the implicit distinction between RCW 4.28.100 and RCW 46.64.040, which *does* have such a requirement: Under the former statute, “The affidavit is to be filed in the proceeding prior to commencement of publication. It is not sent to the defendant. Its only purpose is to inform the court that the conditions necessary for publication were extant.” Ekanger v. Pritchard, 22 Wn. App. 938, 945, 593 P.2d 170 (1979).⁵ In Ekanger, the plaintiff’s affidavit did not state the nature

⁵ Indeed, this Court has previously recognized that unlike the nonresident motorist statute, which is “substitute service,” service by publication is “constructive service” only – it “is not, as a practical matter, an effective means of

of the cause of action and that copies of the summons and compliant had been mailed to defendant, though in fact plaintiff had mailed them as required and defendant did not deny receiving them. 93 Wn.2d at 779-81; Ekanger, 22 Wn. App. at 942. Both appellate courts held the plaintiff could cure those defects, after publication, by submitting a corrected affidavit. The courts reasoned that "Ekanger's rights were not materially prejudiced.... Ekanger in fact received exactly the same notice she would have received if the original affidavit had not been defective." 93 Wn.2d at 782.

By contrast, RCW 46.64.040 *does* require that an affidavit of compliance be sent *to the defendant*. That affidavit is part of the notice the legislature deems necessary to ensure due process. Without it, a defendant has not been advised *under oath* that the plaintiff has secured personal jurisdiction, and thus personal jurisdiction does not exist because constitutional notice, in the form prescribed by the statute, is lacking. Here, in contrast to Ekanger, Mr. Richmond did *not* receive the notice required by statute (here, RCW 46.64.040) – namely, a sworn affidavit of compliance stating

notifying a party of the pendency of a lawsuit." Brown v. ProWest Transport Ltd., 76 Wn. App. 412, 421, 886 P.2d 223 (1994), citing Cauette v. Martinez, 71 Wn. App. 69, 75, 856 P.2d 725 (1993).

that plaintiff had delivered *two* copies of the summons and complaint to the Secretary of State, as required by statute. "Ekanger, however, does no more than apply the principle ... that a *nunc pro tunc* order [may not] add new facts." Kent v. Lee, 52 Wn. App. 576, 580, 762 P.2d 24 (1988). The affidavit here *cannot* be cured untimely (after the expiration of the limitations tolling period) to add the fact that a proper affidavit was sent to Mr. Richmond, because the nonresident motorist statute requires such an affidavit to be delivered *to Mr. Richmond* as a *condition* of giving him the notice necessary to secure personal jurisdiction.

Unlike in Ekanger, the point here is not what actually happened, but what the statutory object of the notice, Mr. Richmond, was *told* had happened, because unlike the situation in Ekanger, the issue is the latter; not the former. Indeed, this important distinction was also recognized by the Court of Appeals in Pascua v. Heil, 126 Wn. App. 520, 108 P.3d 1253 (2005) even in regard to RCW 4.28.100: In Pascua, the court held that an affidavit presented to obtain an order authorizing constructive service by publication and substitute service mail under RCW 4.28.100 and CR 4(d)(4) could not be cured to "add information never presented to the judge" who granted permission for such service. Similarly,

here, Mr. Anderson's affidavit of compliance cannot be cured, because he was constitutionally and statutorily required to send Mr. Richmond a proper affidavit *before* the limitations period (and 90-day tolling period) expired. That did not occur, so personal jurisdiction fails. Even if the affidavit were considered, jurisdiction would fail for lack of due diligence. See Rodriguez v. James-Jackson, 127 Wn. App. 139, 111 P.3d 271 (2005) (considering plaintiffs' supplemental affidavit with regard to RCW 4.28.100, but finding plaintiffs' lack of due diligence in locating defendant resulted in lack of personal jurisdiction). See Section 2.b., below.

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

Ms. Diamond attempted service where Mr. Richmond was not, and failed to attempt service where he was.

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

The nonresident motorist statute cannot serve its purpose if the plaintiff fails to discover a proper address for the defendant. Substitute service under the statute is not available to a plaintiff who is can find no address for the defendant. Brown v. ProWest Transp., Ltd., 76 Wn. App. 412, 421, 886 P.2d 223 (1994). The

statute requires that notice of suit be mailed to the defendant's "last known address" as well as defendant's other addresses. Even so, by law, that requirement is subject to the statute's due diligence requirement. In Bethel v. Sturmer, 3 Wn. App. 862, 867, 479 P.2d 131 (1970), the court held that it is unreasonable for a plaintiff who waits until the eve of the expiration of the limitations period merely to assume the defendant necessarily resides at the address given at the time of the collision. By application of Brown and Bethel, if the "last known address" has been disclaimed and no contrary information appears, and/or a more recent address can with due diligence be discovered, then the plaintiff should not be allowed to rely on RCW 46.64.040.

The undisputed facts here are that Mr. Richmond immediately after the collision undisputedly disclaimed residence in California, and provided Ms. Diamond information that would have led, with little difficulty, to locating his addresses in Mauritius and Bangladesh and his Massachusetts address. In other words, Ms. Diamond and her insurer *actually* knew, and her lawyer reasonably *should have known*, that the California address was *not* Mr. Richmond's "last known address" (recall that Mr. Anderson admitted that he "could not confirm that Jonathan Richmond ever

used” the California address listed on the police report, CP 5 at ¶4), and that he lived in Mauritius within the limitations period, later moved to Bangladesh within the limitations period, and resided in Bangladesh at the time suit was commenced. Nevertheless, Ms. Diamond’s lawyer admits he directed personal service and mail solely to Mr. Richmond in California. Under the principles of Brown and Bethel, Ms. Diamond was in no position to attempt substitute service under RCW 46.64.040 in sole reliance on that address.

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 legislature directs the plaintiff relying upon the substitute service mechanism of the nonresident motorist statute to prove by affidavit that her “attorney has with due diligence attempted to serve personal process upon to the defendant at *all addresses* known to him or her of defendant,” RCW 46.64.040 (emphasis added). This statutory requirement is *not* restricted to “*last known*” addresses. The purpose of this language is clearly to create the maximum opportunity for substitute service to reach the defendant. Washington law is clear that willful or negligent ignorance of an address is no excuse for failure to identify it and to attempt service

there. Rather, the plaintiff and her attorney have a statutory duty to act with due diligence to identify such addresses. The attorney must make reasonable efforts to investigate. Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). Unfortunately, that did not happen here.

Ms. Diamond and her lawyer failed to exercise the due diligence required by RCW 46.64.040 to determine *all* of Mr. Richmond's addresses, including the Bangladesh address he had when suit was commenced.

The due diligence standard is reasonable but firm.

We hold that "due 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.

Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). See also Pascua v. Heil, 126 Wn. App. 520, 529, 108 P.3d 1253 (2005).

Such due diligence is required to satisfy due process. Martin, 111 Wn.2d at 477, citing Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

The law is cognizant that some defendants may require more exertion to find than others, but the existence of such challenges does not excuse a plaintiff from meeting them. Leads must be followed. Martin v. Meier, 111 Wn.2d at 482. For example, in Martin, the process server checked with the police department in an attempt to locate defendant. This Court, in its opinion granting Mr. Richmond's petition for discretionary review, expressly recognized the importance of pursuing leads:

[A] plaintiff must follow up on information that might reasonably assist her in finding the defendant. In Pascua v. Heil, 126 Wn. App. 520, 529-30, 108 P.3d 1253 (2005), the plaintiff had the contact information of an individual who likely knew the defendants' addresses. Despite that knowledge, the plaintiff failed to seek the addresses before applying for service by publication. Thus, the plaintiff failed to make the honest and reasonable efforts required for such service.

Order Granting Discretionary Review (No. 69400-6-I) at p. 4.

A plaintiff controls when to commence suit. With that right comes the responsibility to do so timely. The obvious consequence of waiting too long is that information will grow stale and that the plaintiff risks losing opportunities to complete service of process. That is exactly what happened here; to Ms. Diamond's detriment.

She knew from the start that Mr. Richmond did not live in California. She knew he lived in Mauritius at the time and had no contrary information; in fact, could have confirmed that information through the municipal court, Fox Rent-A-Car and her own insurer, as well as the internet. She waited until after he left Mauritius. She filed suit while he lived in Bangladesh. But she did not serve him there, or at his addresses in Mauritius or Massachusetts, even though she could easily have found those addresses on the internet – literally at her fingertips.⁶ Ms. Diamond produces no information to contradict Mr. Richmond's testimony that his Bangladesh address and 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 be readily located using an internet search-engine search (e.g., Google.com). Indeed, the evidence is overwhelmingly in his favor. See generally, CP 93-116 & CP 117-124.

A plaintiff must present specific facts to meet plaintiff's burden to prove due diligence. Pascua v. Heil, 126 Wn. App. 520,

⁶ Mr. Richmond had no duty to advise Ms. Diamond of his whereabouts or otherwise assist with process service. Weiss v. Glemp, 127 Wn.2d 726, 734, 903 P.2d 455 (1995); Pascua v. Heil, 126 Wn. App. 520, 532, 108 P.3d 1253 (2005), citing Thayer v. Edmonds, 8 Wn. App. 36, 41, 503 P.2d 1110 (1972), review denied, 82 Wn.2d 1001 (1973). Even so, he stayed in touch with Ms. Diamond and her counsel and was truthful with them.

526, 108 P.3d 1253 (2005), citing Charboneau Excavating, Inc. v. Turnipseed, 118 Wn. App. 358, 362, 75 P.3d 1011 (2003), review denied, 151 Wn.2d 1020 (2004); Kent v. Lee, 52 Wn. App. 576, 579–80, 762 P.2d 24 (1988); CR 56(e). Here, Ms. Diamond's lawyer's reported efforts to locate Mr. Richmond are as mysterious as they were unproductive. Ms. Diamond's counsel does not say what information he obtained from the unnamed internet telephone directories, Accurint and the Department of Homeland Security. Ms. Diamond's failure to put those specific facts before the trial court is sufficient basis to conclude that she has failed in her burden of proof to show due diligence. Nor does her counsel say what, if anything, he and/or Ms. Diamond did to pursue other leads: "Reasonable diligence requires contacting known third parties who may have knowledge of the defendant's whereabouts." Pascua, 126 Wn. App. at 529; accord, Martin, 111 Wn.2d at 482. Ms. Diamond's counsel Mr. Anderson does not say that he spoke to his client regarding the information Mr. Richmond conveyed to her; that Mr. Anderson requested the traffic citation file from the SeaTac Municipal Court, which contained documents bearing Mr. Richmond's home and work addresses in Mauritius; that Mr. Anderson contacted Ms. Diamond's insurer (Progressive

Insurance), or Fox Rent-A-Car (both of whom had Mr. Richmond's contact information in Mauritius), Mr. Richmond's passenger (whose address and telephone number were on the police report), the residents at the California address where a process server failed to serve process in person, or any airline for leads as to Mr. Richmond's address. Mr. Anderson didn't even bother to "Google" Mr. Richmond, apparently. If he had, he would have seen Mr. Richmond's extensive resume disclosing his connection to Mauritius, his job and address in Bangladesh, and a Massachusetts mailing address, and his date of birth. Ms. Diamond thus fails the test of due diligence.

Under these circumstances, service upon the Secretary of State is ineffective as a matter of law to secure personal jurisdiction over Mr. Richmond.

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."

a. Ms. Diamond's proof of the Secretary's action is inadmissible.

Civil Rule 56(e) provides in pertinent part,

opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence.... Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. ... an adverse party..., by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In response to Mr. Richmond's challenge, Ms. Diamond offers a letter from the Secretary of State to prove compliance with its duties under RCW 46.64.040. CP 76. Yet, its statements are not sworn and the letter is hearsay; the letter is not certified under RCW 5.44.040. She fails to prove the letter to be a business record per RCW 5.45.020, which provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Here, Ms. Diamond produced no “testimony” from the Secretary of State’s office. The letter is not evidence. Thus, if offered as fact, the letter cannot be accepted in avoidance of summary judgment.

b. Even if Ms. Diamond’s proof were admissible, she failed to prove that the Secretary used regular mail.

The nonresident motorist statute specifies that the Secretary of State shall send one of the copies of the summons or process to the defendant “by mail, postage prepaid.” Even if the Secretary’s letter, CP 76, were competent evidence, it would not prove compliance with RCW 46.64.040, because it says the Secretary used *certified* mail, which cannot be used to satisfy due process where a statute (such as RCW 46.64.040) does not specify certified mail be used.⁷ By using certified mail, the Secretary “acted beyond the authority of his office.” Cf. Clay v. Portnik, 84 Wn. App. at 560

⁷ See Certification from U.S. Ct. of App. for 9th Cir. v. Kachman, 165 Wn.2d 404, 411-13, 198 P.3d 505 (2008) (“Sending notice of cancellation by certified mail does not satisfy the ‘mailed’ requirement of RCW 48.18.290”; “certified mail is not equal to regular mail”), expressly agreeing with, e.g., Aetna Fin. Co. v. Summers, 44 Colo.App. 491, 492-93, 618 P.2d 726 (1980), aff’d 642 P.2d 926 (Colo. 1982) (certified mail “places restrictions on delivery of notice and was therefore not as effective as” regular mail), and Conrad v. Universal Fire & Cas. Ins. Co., 686 N.E.2d 840, 841-42 (Ind. 1997) (“certified mail requires signature and is therefore not reasonably calculated to reach the insured and is not effective as a ‘mailing device.’”); International Brotherhood of Elec. Workers, Local Union No. 46 v. Mitchell, 98 Wn. App. 700, 704-05, 990 P.2d 998 (2000), review denied, 141 Wn.2d 1008 (2000).

(Secretary lacked statutory basis to demand defendant's address for mailing process under RCW 46.64.040).

CONCLUSION

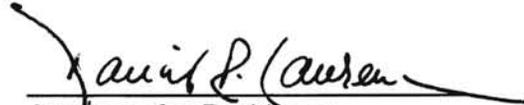
Here, Ms. Diamond's alleged substitute service on the Secretary of State under the nonresident motorist statute fails for multiple reasons: She (1) did *not* timely prove that she delivered *two* copies of the required documentation to the Secretary of State, and did not *prove* such by affidavit, see CP 70 at line 19, despite the statutory mandate to do so; (2) did *not* timely prove the required sum was paid to the secretary of state, see CP 70 at line 20, despite CR 56(e) and the case law stating that jurisdiction requires proof of facts and not mere recitation of statutory language, Pascua, id.; Charboneau Excavating, id.; (3) allegedly sent the required documents *only* to the California address, see CP 70 & CP 76, where she was told Mr. Richmond did *not* reside, CP 27 at ¶5; and (4) did not personally serve or mail by registered mail with return receipt requested a copy of the summons or process to Mr. Richmond in Mauritius, Bangladesh or Massachusetts, despite the statutory mandate to exercise due diligence and to serve process upon Mr. Richmond at "all addresses known to him or her of defendant." None of these facts is disputed. Ms. Diamond's

failures of due diligence are clear under the law. *Ipsa facto*, the Affidavit of Compliance with RCW 46.64.060. CP 70, and the affidavit of due diligence (“Affidavit of Attempted Service Pursuant to RCW 46.64.060,” CP 8-9) were defective. In addition, when opposing Mr. Richmond’s motion to dismiss, Ms. Diamond failed to prove that the Secretary of State complied with its statutory duties. For any or all these reasons, this Court can only conclude that Ms. Diamond did not comply with the nonresident motorist statute.

Ms. Diamond cannot secure personal jurisdiction through substitute service of process by willfully ignoring facts and leads which were there to be seen, and which would have permitted personal service of process on Mr. Richmond had she taken time and made the minimal effort to discovery them timely. Nor, having turned a blind eye, should she be permitted to invoke substitute service by ignoring the very procedural requirements that legitimize such process and ensure a defendant haled into court, whether residing in a foreign jurisdiction or not, will have adequate notice that suit is *properly* commenced. This Court should reverse the trial court and mandate entry of summary judgment of dismissal in favor of Mr. Richmond so as to avoid an unnecessary and unconstitutional trial.

DATED: June 20, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel R. Laurence", written over a horizontal line.

Attorney for Petitioner
Jonathan Richmond

Daniel R. Laurence,
Attorney at Law
1802 Grove Street
Marysville, WA 98270
(360) 657-5150
WSBA No. 19697

Attorney for Defendant-Petitioner:

Daniel R. Laurence (WSBA No. 19697)
1802 Grove Street
Marysville, WA 98270
Telephone: (360) 657-5150
Facsimile: (360) 657-2465
E-mail: dan@drfirm.com

Attorney for Plaintiff-Respondent:

Mark B. Anderson (WSBA No. 25895)
Anderson Law Firm, PLLC
1119 Pacific Avenue, Suite 1305
Tacoma, WA 98402
Telephone: (253) 327-1750
Facsimile: (253) 327-1751
E-mail: marka@mbaesq.com

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 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 June 21, 2013, at Marysville, Washington.


Daniel R. Laurence

APPENDICES

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**IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

GAIL K. DIAMOND,

Plaintiff,

VS.

JONATHAN RICHMOND and JANE DOE
RICHMOND, husband and wife and the
marital community comprised thereof,

Defendants

NO. 11-2-23782-6 KNT

COURT'S ORDER ON DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

THIS MATTER having come before the undersigned judge of the above-entitled Court upon Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, and Court having the reviewed the court record and specifically the following:

1. Defendant Jonathan Richmond's Motion to Dismiss for Lack of Personal Jurisdiction;
2. Declaration of Jonathan Richmond (with exhibits attached thereto);
3. Plaintiff's Response in Opposition to Defendant's Motion to Dismiss;
4. Declaration of Mark B. Anderson Re Defendant's Motion to Dismiss (with exhibits attached thereto);
5. Defendant Jonathan Richmond's Reply in Support of Motion to Dismiss for Lack of Personal Jurisdiction;

Hon. Patrick Oishi
King County Superior Court
Regional Justice Center, 401 Fourth Avenue North
Kent, Washington 98032

- 6. Second Declaration of Jonathan Richmond (with exhibits attached thereto);
- 7. Declaration of Eric Starkman (with exhibits attached thereto);
- 8. Plaintiff's Surreply in Opposition to Defendant's Motion to Dismiss;
- 9. Amended Affidavit of Compliance Pursuant to RCW 46.64.040; and
- 10. Defendant Jonathan Richmond's Response to Surreply Re Motion to Dismiss for

Lack of Personal Jurisdiction.

the Court otherwise deeming itself fully advised, it is

ORDERED, ADJUDGED, AND DECREED as follows:

Viewing all the evidence, facts, and reasonable inferences of fact in the light most favorable to the non-moving party, the plaintiff, the defendant's Motion to Dismiss for Lack of Personal Jurisdiction is hereby denied.

SIGNED this 14th day of Sept., 2012.



HONORABLE PATRICK OISHI
King County Superior Court Judge

Hon. Patrick Oishi
King County Superior Court
Regional Justice Center, 401 Fourth Avenue North
Kent, Washington 98032

RCW 46.64.040**Nonresident's use of highways — Resident leaving state — Secretary of state as attorney-in-fact.**

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. 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. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

[2003 c 223 § 1; 1993 c 269 § 16; 1982 c 35 § 197; 1973 c 91 § 1; 1971 ex.s. c 69 § 1; 1961 c 12 § 46.64.040. Prior: 1959 c 121 § 1; 1957 c 75 § 1; 1937 c 189 § 129; RRS § 6360-129.]