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COURT OF APPEALS
DIVISION II
11/17/13 PM 4:25
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NO. 42136-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUSAN KARLMAN,
Appellant,

v.

DAMIANN D. KEGNEY,
Respondent

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY
THE HONORABLE JAY B. ROOF

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. STANDARD OF REVIEW: ISSUE OF LAW: APPLICATION OF RULES OF COURT

The main issue to be decided in this appeal is what impact do discovery and pleading violations of a party opponent have on a CR 15 (c) Motion to amend a complaint. In other words, will the defendant's violations of the Rules of Court including rule CR 12(i) requirements to identify an at fault party, a rule CR 30 failure to appear for a duly noted deposition, and a rule CR 33 failure to respond to interrogatories within 30 days after service waive defendant's objections to a CR 15(c) motion to amend a complaint. Can a defendant, putative defendant, or their counsel object to a CR 15(c) amendment on the basis of an "inexcusable" failure to name a proper party when that party or its counsel engaged in deliberately deceptive acts in violation of the rules to hide and perpetuate the mistake?

The interpretation and coordination of court rules is a question of law. The proper interpretation of a statute or rule of court. *State v. Karp*, 69 Wash. App. 369, 848 P.2d 1304 (Div. 2 1993)(statutes); *State v. Greenwood*, 120 Wash. 2d 585, 845 P.2d 971 (1993)(rules of court). 2A WAPRAC RAP 2.5.

The trial court judge when he made the decision in this case that is subject to appeal did not have the benefit of definitive case law on the subject. The interplay between the pleading and discovery rules upon a

motion to amend is subject to review on a mistake of law basis rather than on abuse of discretion.

Amendments to pleadings are normally thought of as being within the sound discretion of the trial court (see above). Nevertheless, it may be possible to persuade an appellate court to review the trial court's decision more closely by arguing that the trial court misinterpreted or misapplied applicable law. For example, in *Nepstad v. Beasley*, 77 Wash. App. 459, 892 P.2d 110 (Div. 2 1995), a case involving amendments under CR 15, the appellant was able to win a reversal by arguing that the trial judge was misguided in the exercise of his discretion because he had misinterpreted the case law as being more restrictive than it really was. The appellate court concluded that the trial judge "misapprehended" the case law. 2A WAPRAC RAP 2.5.

Where discretionary rulings are predicated upon rulings as to the law no element of discretion is involved, and the legal basis for the ruling is reviewed for an error of law only and not an abuse of discretion. *Schneider v. City of Seattle*, 24 Wash.App. 251, 255-256, 600 P.2d 666, 669 (Wash.App., 1979).

In the context of the trial court's decision the law was settled i.e. in normal circumstances where the identity of a putative defendant is known or knowable a failure to properly name him is in-excusable and an amendment to do so will be denied. *Teller vs. APM Terminals Pacific*, 134 Wn. App. 696, 142 P.2d.179 (2006).

However, in *Teller*, p. 715 the court also held found that a defendant may waive its objections to a CR 15(c) amendment pursuant to the authority of *Lybbert v. Grant County*, 141 Wash.2d 29, 38–39, 1 P.3d 1124 (2000) if the defendant is dilatory and acts in such a way as to intentionally delay the plaintiff’s discovery of the misnomer or mistake. In the present case it is clear that the defendant engaged in such tactics.

II. DEFENSE COUNSEL’S FAILURE TO TIMELY RESPOND TO PLAINTIFF’S DISCOVERY WAIVES OBJECTIONS TO THE CORRECTION OF THE COMPLAINT

Mistakes happen to everyone, but the discovery and the pleading process is intended by the rules to be used to detect and correct mistakes before they become irreversible so the proper parties are before the court. In counsel’s experience over the past 25 years when a party is misnamed in a complaint, and there is no immediate statute of limitations issue, counsel usually gets a call from the carrier or opposing counsel alerting him to the mistake so that everyone’s time and effort is not wasted on an incorrect party.

In the present case, the first name of Damiann was substituted for David by mistake. It is common for individuals to use nick names and/or middle names rather than their given names. Further, many people are creative in the spelling of common names such as Damian which can be changed to Damiann for the personal preference of a parent. The

complaint in this case clearly refers to the defendant correctly as a single man, but mistakes his first name. Ms. Karlmann asked to amend her complaint and correct the first name of the named defendant Kegney from Damiann to David.

In most cases where the court finds that a mistake inexcusable a plaintiff or defendant generally waited until the absolute 10th hour to originally file a case and then mistakes the identity of one of the parties, and his opposition does nothing to delay or obfuscate the matter. *Teller vs. APM Terminals Pacific*, 134 Wn. App. 696, 142 P 2d.179 (2006).

The Karlmann case does not factually fit within the typical scenario. In the Karlmann case when the insurance companies were at loggerheads as to who was responsible for various percentages of liability (Kegney vs Maffei) a complaint was filed. The original complaint was filed more than 9 months prior to the three year statute of limitations on October 14, 2009, and served on November 22, 2010. Defense counsel from the Hollenbeck firm appeared on November 30, 2011. Unlike the above-cited case, factually, the complaint in the Karlmann case was not a last minute filing.

Interrogatories were served on Kegney's counsel on February 3, 2010 which would have disclosed the mistake, but were not answered by defense Counsel until June 4, 2010, nine days after the Statute of

Limitations ran on May 26, 2010. CR 33 requires a good faith answer within 30 days.

The deposition of Damiann Kegney was scheduled for April 28, 2010 and then cancelled at the last minute by respondents. Not coincidentally counsel for respondents could not reschedule the deposition until July 7, 2011, well after the May 26, 2011 statute.

Plaintiff's requests, discovery, and notices were always properly served upon the office of Hollenbeck and Lancaster in Bellevue, WA after the original appearance was received by Plaintiff on November 30, 2009.

Counsel for respondent makes many excuses for the discovery and pleading abuses but does not deny them. For instance, counsel states that their office did not receive the answers to interrogatories from defendant until May. However, counsel is silent as to when in May the responses were received, and more importantly counsel is silent as to when the interrogatories were actually forwarded to their client. Were they sent in February when received, or were they sent in April or May with knowledge of the impending statute of limitations? Was there any attempt to answer the interrogatories within 30 days as required by the rules? Silence.

Respondents totally ignore the fact that both Mr. Lanthorn and Mr. Somers work for the same law firm, in the same office, and at the same address. If there was any delay or confusion in processing the

interrogatories of the plaintiff, or deposition scheduling due to the internal transfer of the file between attorneys in the same firm and office, it is defense counsel and/or their firm who is solely responsible for the delay not plaintiff.

Respondents also fail to address in their response the interplay between their failure to provide timely discovery and the operation of a waiver as a matter of law to the amendment of the complaint. *Teller vs. APM Terminals Pacific*, 134 Wn App. 696, 142 P 2d.179 (2006), *Lybbert v. Grant County*, 141 Wash.2d 29, 38–39, 1 P.3d 1124 (2000).

Instead, defense counsel cites *Foothills Development Co vs. Clark County*, 46 Wn App. 369, 730 P.2d. 1369 (1986) as attempting to define its duty in the case. However, the *Foothills* case does not address any discovery or pleading failures by counsel in that case. The *Foothills* case holding is limited to the proposition that defense counsel does not have to volunteer the names of the proper parties to existing litigation out of the goodness of his heart due to client ethical obligations. However, *Foothills* does not stand for the proposition that a defense attorney can delay timely answers to interrogatories, cancel depositions duly noted, or fail to plead as required by the rules in order to preserve the mistake of his opponent in order to cause a statute of limitations to run.

III. THE RESPONDENTS OBFUSCATE THEIR INTENTIONAL CR 12(i) NON DISCLOSURE

Respondents try to explain away the CR 12(i) failure to plead David Kegney as a possible at fault entity by stating in their brief that they did not plead David because they did not consider David Kegney a possible at fault party. This explanation defies the both the law and credulity.

In this case Ms. Karlmann was a passenger on a motorcycle. There was no alcohol involved, and a matter of law as a motorcycle passenger she has no liability for the accident and could collect full damages from any party at fault in the accident jointly and severally. *Jensen v. Beard*, 40 Wn..App. 1, 696 P.2d 612 (Wash.App.,1985), RCW 4.22.070.

The motorcycle that Ms. Karlmann was a passenger upon was established in the passing lane because it had passed several cars before reaching the Kegney vehicle, and thus it had the right of way in the passing lane. RCW 46.61.110. David Kegney never saw the motorcycle before beginning his left turn.

The law defines fault as follows:

“Fault” includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages. West's RCWA 4.22.015.

The law also requires the Courts and or trier of fact in actions involving more than one entity to determine the fault of every entity which caused or contributed to the claimant's injuries.

1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. West's RCWA 4.22.070.

Given the undisputed facts David Kegney cannot be doubted as a possible at fault party who needed to be pled under the rules by name? Further, the insurance company representing Kegney, Farmers, had already settled the claims of the driver of the motorcycle Maffei for policy limits. CP 97-98. Failing to plead David Kegney as an at fault party

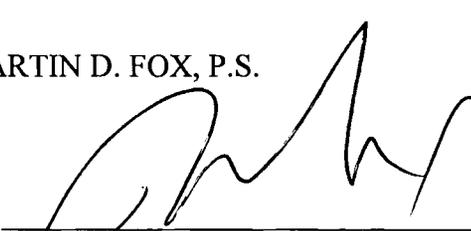
pursuant to CR 12(i) under these facts is intentional non disclosure and violates counsel's requirement under the to be candid with the court and is nothing but gamesmanship. RPC 3.3.

IV. CONCLUSION

This court should find that the defendants have waived as a matter of law their objections to plaintiff's CR 15(c) motion to amend her complaint and substitute the name of David Kegney for Damiann Kegney and remand the case to the trial court.

Respectfully submitted this 22nd day of November,
2011.

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DECLARATION OF SERVICE

I certify that on the 23rd day of November, 2011,

I caused true and correct copies of the following:

- 1) APPELLANTS' REPLY BRIEF

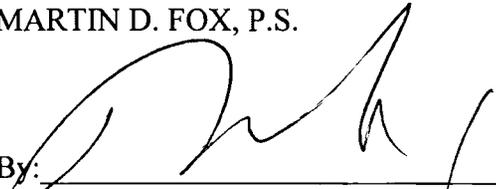
to be served on the following in the manner indicated below:

- 1) Counsel for Respondent () US Mail
Douglas Somers () Hand Delivery
Hollenbeck, Lancaster, Miller (X) ABC Legal Messenger
& Andrews () Email
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- 2) Counsel for Respondent () US Mail
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DATED this 22nd day of November, 2011 at Seattle, Washington.

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