

No. 42136-4-II

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BY: *CA*

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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SUSAN KARLMAN, Appellant,

v.

DAMIANN D. KEGNEY, Respondent.

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**BRIEF OF RESPONDENT**

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ORIGINAL

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**I. ISSUE PERTAINING TO APPARENT ASSIGNMENT OF ERROR**

Did the trial court act within its discretion in denying Appellant's Motion to Amend Complaint to substitute a new defendant after the statute of limitations had expired where the would-be new defendant was not named in the original complaint due to the appellant's inexcusable neglect?

**II. STATEMENT OF THE CASE**

Appellant Karlman was allegedly injured in a motorcycle-vehicle accident on May 26, 2007. CP 4. Ms. Karlman was a passenger on Fernando Maffei's motorcycle. CP 4. Immediately before the accident Mr. Maffei was passing several cars on their left side in the oncoming lane on State Route 109. CP 4. As David Kegney was turning left, Mr. Maffei collided with the left front corner of the Kegney vehicle. CP 4, CP 65, CP 79-80.

The police responded to the scene of the accident and cited Mr. Maffei for improper passing. CP 79-80. In the police report, David Kegney is listed as the driver of the vehicle involved in the accident. CP 79. His middle initial, driver's license number, date of birth, gender, phone number, and address are listed on the police

report. CP 79. DamiAnn Kegney is listed separately as the owner of the vehicle. CP 79.

Mr. Maffei challenged his infraction for improper passing in court, and an infraction hearing occurred in October of 2007. CP 65, CP 89. David Kegney was subpoenaed to testify as a witness at the infraction hearing, and he did so testify. CP 84-85. Ms. Karlman also testified at the infraction hearing. CP 89. Ms. Karlman remembers seeing David Kegney at the hearing and was aware that he was the driver of the car involved in the accident. CP 89-90. DamiAnn Kegney was also present at the hearing. CP 85.

Significantly, Ms. Karlman's counsel Martin Fox represented Mr. Maffei at the infraction hearing and questioned David Kegney on the witness stand. CP 65, CP 85, CP 90.

Ms. Karlman filed her Summons and Complaint on October 14, 2009, naming DamiAnn Kegney and Mr. Maffei as defendants and claiming that Ms. Kegney was the driver of the vehicle involved in the accident. CP 1-5. David Kegney was not named as a defendant. CP 1-5. Ms. Karlman's counsel later admitted that he thought that DamiAnn Kegney and David Kegney were the same person. CP 93.

Ms. Kegney's defense was assigned to Jeff R. Lanthorn of Hollenbeck, Lancaster, Miller & Andrews, who appeared in December 2009. CP 66. The case was reassigned to an attorney new to the office, Douglas E. Somers, in March 2010, and Mr. Somers prepared the Answer that same month. CP 66.

In the Answer, Ms. Kegney denied that she was a "single man." CP 18. Ms. Kegney admitted that her vehicle was involved in the accident but denied the other allegations regarding the facts of the accident contained in paragraph no. 4 of Ms. Karlman's Complaint. CP 18. Ms. Kegney also denied that she was negligent. CP 19.

Ms. Karlman served Ms. Kegney with interrogatories in February 2010. CP 66; Appellant's Brief at 2. Ms. Kegney did not return the interrogatory answers to her counsel until the end of May 2010. CP 53, 66. Answers were served on Ms. Karlman on June 4, 2010. CP 44. In her answers, Ms. Kegney stated that she was not involved in the accident. CP 46-47. Ms. Kegney also stated that her son David was the driver of the vehicle involved in the accident. CP 49.

In addition, co-defendant Maffei had scheduled Ms. Kegney's deposition for April 28, 2010. CP 66. However, the

notice of deposition went to the former attorney, Jeff Lanthorn. CP 15-17, CP 66, CP 74. As a result, Ms. Kegney's new attorney, Douglas Somers, did not learn of the deposition until a few days prior to it. CP 75. Upon receiving the notice, Mr. Somers contacted Ms. Kegney, who informed him that she was unavailable on April 28. CP 75. Mr. Somers also had a prior commitment on that date. CP 75. Upon Mr. Somers's request, Mr. Maffei's counsel agreed to continue the deposition. CP 66, CP 75. Ms. Kegney's deposition occurred on August 13, 2010. CP 55.

Ms. Karlman moved to amend her Complaint on August 26, 2010. CP 23. However, the statute of limitations had already expired on May 26, 2010. CP 67. The trial court denied Ms. Karlman's motion. CP 92.

### **III. ARGUMENT**

#### **A. Inexcusable Neglect Bars an Amended Pleading.**

An amended pleading changing the party against whom a claim is asserted may relate back to the date of the original pleading under CR 15(c) if certain conditions are met. CR 15(c). Ms. Karlman outlined these requirements in her opening brief. The element that is significant in the instant case is whether the failure to name David Kegney as a defendant was due to

inexcusable neglect. If the failure was due to inexcusable neglect, then the amended complaint would not relate back, and David Kegney could not be substituted as a defendant. Ms. Kegney averred in the trial court that Ms. Karlman failed to name David Kegney due to inexcusable neglect, and the court agreed.

A determination of relation back under CR 15(c) rests within the discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. Foothills Development Co. v. Clark County Board of County Commissioners, 46 Wn. App. 369, 730 P.2d 1369 (1986).

The burden of proof is on the party seeking the relation back of an amendment to prove the conditions precedent under CR 15(c). Foothills, 46 Wn. App. at 375. The moving party also has the burden of proving that the mistake in failing to timely amend was excusable. Id. “The absence of any of the CR 15(c) elements is fatal to the relation back of an amended complaint.” Id.

The inexcusable neglect element was recognized by our Supreme Court in North Street Ass’n v. Olympia, 96 Wn.2d 359, 635 P.2d 721 (1981). The court in North Street found that the rule “does not permit joinder if the plaintiff’s delay is due to inexcusable neglect.” Id. at 368. In North Street, the neglect was

held to be inexcusable because the “applicants were at all times aware of the [indispensable] parties and yet still failed originally to name them.” Id. at 368-69.

“Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” South Hollywood Hills Citizens Ass’n v. King County, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). Inexcusable neglect specifically applies to failure to name a party in an original complaint, and courts have held that it is inexcusable where the omitted party’s identity is a matter of public record. Teller v. APM Terminals Pacific, Ltd., 134 Wn. App. 696, 707, 142 P.3d 179 (2006).

“[I]n cases where leave to amend to add additional defendant[s] has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion.” Haberman v. WPPSS, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987) (identities of potential new defendants was readily available to plaintiffs from public sources; failure to name defendants was inexcusable neglect). “If parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable.” Id.

In South Hollywood Hills, a neighborhood association sought a writ of review challenging King County Council's approval of a plat for a development of a subdivision. After the 30-day period for appealing the approval had passed, the association learned that the property in question had previously been sold. South Hollywood Hills, 101 Wn.2d at 72. Upon learning of the ownership change, the association sought to have an amended complaint naming the new owners relate back. Id. The trial court dismissed the action. Id. The Court of Appeals reversed. Id. at 70.

In reversing the Court of Appeals and reinstating the trial court's decision to dismiss, our Supreme Court noted that "had the respondent or its counsel checked the county records, the proper parties would have been immediately evident." Id. at 78. The court concluded that "the information necessary to properly implead the parties was readily available. Respondent's attorney simply did not inquire. This omission was inexcusable." Id. Washington courts have held similarly on numerous occasions. See, e.g., Woodward v. City of Seattle, 51 Wn. App. 900, 756 P.2d 156 (1988) (names of potential defendants were readily available

from public sources, court found inexcusable neglect and affirmed denial of leave to amend).

**B. Ms. Karlman Failed to Name David Kegney Due to Inexcusable Neglect.**

Ms. Karlman failed to name David Kegney as a defendant due to inexcusable neglect. Therefore, the trial court did not abuse its discretion in denying her motion to amend her complaint.

According to Washington law, if a plaintiff fails to timely name a defendant due to inexcusable neglect, the plaintiff's attempt to add or substitute that defendant will be denied. The law is clear that inexcusable neglect alone is sufficient ground for denying a motion to amend a complaint and add or substitute a new defendant.

Failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record. In the instant case, David Kegney's identity was indeed a matter of public record—he is listed as the driver of the vehicle in the police report. Ms. Karlman needed to look no farther than the police report to find David Kegney's name, driver's license number, date of birth, address, and phone number. Ms. Karlman's counsel's belief that David Kegney and DamiAnn Kegney were

the same person is inexcusable given that the police report included the names of both David and DamiAnn, with DamiAnn listed separately as the registered owner of the vehicle.

Similarly, in South Hollywood Hills, the plaintiff could have discovered the name of the defendant, which would have been “immediately evident” had plaintiff checked the county records. Likewise, David Kegney’s identity was immediately evident by merely reading the police report. The police report made David Kegney’s identity apparent, and therefore under Washington law Ms. Karlman’s failure to name David was inexcusable neglect.

Washington courts have found inexcusable neglect where the name of the defendant is even less readily available than it was here. In Teller v. APM Terminals Pacific, Ltd., 134 Wn. App. 696, 142 P.3d 179 (2006), the plaintiff conducted a search on the Washington Secretary of State’s website for the defendant company. The search did not reveal the name of the defendant because the defendant had changed its name between the time of the incident resulting in the lawsuit and the time the plaintiff searched for the defendant. If the plaintiff’s failure to discover the defendant’s legal name even upon searching for it was inexcusable

neglect, then surely being handed the defendant's name, driver's license number, and contact information on a police report and failing to name that defendant is inexcusable neglect.

**C. Ms. Karlman's Reliance on Nepstad is Misplaced.**

Ms. Karlman cannot find support in the dicta of the Nepstad opinion for several reasons. Nepstad v. Beasley, 77 Wn. App. 459, 892 P.2d 110 (1995). The Nepstad court did not hold as Ms. Karlman claims it did. The Nepstad decision is thoroughly discussed in Teller, 134 Wn. App. 696. The court in Teller noted that the Nepstad court found that the plaintiff's neglect was excusable and did not determine whether inexcusable neglect would apply where the plaintiff attempts to correct misidentified defendants. Teller, 134 Wn. App. at 709. Therefore, the Nepstad court's discussion of inexcusable neglect is pure dicta.

In reaffirming the holding that inexcusable neglect bars relation back of an amendment, the court in Teller distinguished Nepstad and clarified the dicta contained in the opinion:

Teller contends that dicta in our decision in Nepstad demonstrates that 'inexcusable neglect' does not apply to cases where the plaintiff employs relation back to correct a misidentified defendant, but rather, applies only where the plaintiff seeks to add new, necessary defendants to existing proper defendants. We disagree.

Id. at 708. “[I]n Nepstad, we ultimately held that the plaintiff’s neglect was excusable and did not determine whether ‘inexcusable neglect’ would actually apply in cases where the plaintiff attempts to correct misidentified defendants.” Id. at 709. In further analyzing the issue, the Teller court cited Division Three of the Court of Appeals, which expressly applied the rule to **substitution** of parties:

In contrast, Division Three of this court, citing Public Util. Dist. No. 1 v. Walbrook Ins. Co., 115 Wn.2d 339, 349, 797 P.2d 504 (1990), has specifically held that ‘[a]mendment under CR 15(c) is not allowed if the delay in substituting a party is because of inexcusable neglect or is a conscious decision, strategy or tactic.’ Craig v. Ludy, 95 Wn. App. 715, 719, 976 P.2d 1248 (1999).

Teller, 134 Wn. App. at 709.

Nepstad is further distinguishable on its facts. In Nepstad, the plaintiff wrote down the incorrect name of the driver when the parties exchanged information immediately after the accident. The court found that the plaintiff’s neglectful act was excusable given the shock of the accident. Notably, there is no indication anywhere in the Nepstad opinion that the police were called or that either party filled out a police report. In the instant case, the police report correctly lists David Kegney as the driver of the vehicle and

separately names DamiAnn Kegney as the registered owner. The police report was not filled out incorrectly.

In discussing inexcusable neglect, the court in Nepstad noted that the plaintiff had a reason for her mistake—she misread the defendant’s insurance card immediately after experiencing the shock of an automobile accident. Id. at 466. The court found that this was neglect, but it was excusable. Id. In distinguishing its ruling from other case law, the Nepstad court noted that the courts that have found inexcusable neglect

have generally considered the neglect of a party’s lawyer, who is presumably charged with researching and identifying all of the parties who must be named in a lawsuit, and with verifying information that is available as a matter of public record.

Id. at 467. This language is instructive here. Ms. Karlman’s counsel was presumably charged with researching and identifying the parties. It seems logical that even a cursory investigation into DamiAnn Kegney’s identity would have revealed her gender and other identifying information, suggesting that she was not the male driver involved in the accident.

Ms. Karlman attempts to draw a parallel between Nepstad and this case, suggesting that she was merely trying to “correct a misnomer.” Appellant’s Brief at 6. In reality, in the instant case

Ms. Karlman was seeking to **substitute** David Kegney for DamiAnn Kegney. Ms. Karlman, in fact, used the word “substitute” throughout her motion to amend the complaint. CP 23-31. Ms. Karlman did not misidentify David Kegney—she named the wrong person. David Kegney and DamiAnn Kegney are separate human beings. Because Ms. Karlman was trying to substitute in a new defendant, the inexcusable neglect rule applies under Teller and the cases cited herein. But even if Ms. Karlman were trying to correct a misidentified defendant, inexcusable neglect would still apply, and the dicta in Nepstad would not change that.

**D. David Kegney Did Not Have a Duty to Intervene, and Counsel Was Not Trying to Conceal Him.**

Ms. Karlman’s attempt to demonize Ms. Kegney’s counsel is not only unsavory but also is based on a misunderstanding of the law regarding counsel’s role. Her accusations are completely unfounded and reckless. It is inappropriate for Ms. Karlman’s counsel to speculate in this manner without basis. Ms. Kegney’s counsel did not willfully delay discovery or intentionally fail to timely respond to discovery. Ms. Kegney’s counsel outlined the reasons for the delay in the fact section. Despite Ms. Karlman’s

displeasure with Ms. Kegney's delay in responding to discovery, Ms. Kegney's responses, served on June 4, 2010, did not prompt Ms. Karlman to move to amend the complaint. Ms. Karlman did not seek to amend her complaint until August 26, 2010. Regardless, Ms. Kegney has not found an opinion in Washington holding that a delay in responding to discovery forgives inexcusable neglect.

Ms. Karlman thoughtlessly suggests that Ms. Kegney's counsel was trying to conceal David Kegney's identity. This is completely false, and Ms. Kegney's counsel has vehemently denied this offensive implication. "Even if a party has actual knowledge of the pendency of litigation, a defendant who has not been served has no duty to intervene in an action." Foothills, 46 Wn. App. at 376. An attorney, as the client's agent, has a duty to obey his client's reasonable instructions and directions. Id. In Foothills, the plaintiff had filed a complaint naming Clark County Board of Commissioners as defendants, specifically listing three individual commissioners. The plaintiff later moved to amend its complaint and join Clark County as a defendant after the statute of limitations had expired.

An attorney for the Board of Commissioners stated in his brief opposing the joinder that the attorneys for the Board would represent Clark County as well if the motion were granted. Id. at 372. The attorneys conceded that Clark County had notice that it might be named as a defendant as early as three years prior to the motion. Id. However, it still would have been improper for the County's attorneys to seek intervention:

There was no evidence that the County instructed its attorneys to seek intervention of the County as a defendant, and it would have been improper for the County's counsel to do so without direction from his client.

Id. at 376. Similarly, it would have been improper for Ms. Kegney's counsel to seek the intervention of David Kegney without his consent. For Ms. Karlman to suggest otherwise is inappropriate and contrary to the law.

**E. Ms. Kegney Did Not Violate CR 12(i).**

Ms. Karlman is incorrect in her claim that Ms. Kegney violated CR 12(i). According to CR 12(i), "[t]he identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded." CR 12(i). The resolution to this issue is simple. Ms. Kegney did not claim in the Answer, and in fact has never claimed, that David Kegney was at

fault. Therefore, Ms. Kegney had no obligation to identify David Kegney in her Answer and did not violate CR 12(i) by not identifying him.

**F. RCW 4.16.170 Does Not Apply.**

Ms. Karlman argues that because at least one defendant was allegedly timely served, the statute of limitations was tolled as to David Kegney pursuant to RCW 4.16.170. However, her argument fails because RCW 4.16.170 does not apply here. Under RCW 4.16.170, service of process on one defendant tolls the statute of limitation as to unserved **named** defendants. Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991). The court in Sidis was clear that it was referring to named defendants and declined to decide whether the rule applied to unnamed defendants: “Respondents assert there is no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute. That issue is not, however, part of this case. All defendants were named.” Id. at 331. David Kegney was not a named defendant in the instant lawsuit, and therefore the statute of limitation was never tolled as to David Kegney. Thus, RCW 4.16.170 does not apply here.

**IV. CONCLUSION**

The trial court did not abuse its discretion in denying Appellant's Motion to Amend Complaint. Ms. Karlman failed to timely name David Kegney as a defendant due to inexcusable neglect, and thus her motion was properly denied.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of October, 2011.

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**DECLARATION OF SERVICE**

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I declare that I served the foregoing RESPONDENTS ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW on the attorneys below

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by causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Bellevue, WA, on the date set forth below;

By causing a full, true and correct copy thereof to be HAND-DELIVERED BY ABC MESSENGER SERVICE to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;

By causing a full, true and correct copy thereof to be FAXED to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bellevue, WA on this 27<sup>th</sup> day of October, 2011.

Clarine S Goodleaf  
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Legal Assistant