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No. 92920-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CHRISTOPHER ENGLISH, an individual,

Appellant,

v.

STATE OF WASHINGTON, Department of Corrections and  
STATE OF WASHINGTON, Department of Social and  
Health Services,

Defendants,

and

and DENNIS ALVIN BUSS, individually,

Respondent.

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REPLY BRIEF OF APPELLANT ENGLISH

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A. INTRODUCTION

Reading the brief submitted by Dennis Buss, a Department of Social and Health Services (“DSHS”) employee who covertly exploited his government position to employ Christopher English and other Department of Corrections (“DOC”) inmates to work on a project for Buss’s own personal financial benefit, a casual reader would not be aware that Buss was disciplined for his greed nor would that reader be aware Buss did not ensure that the inmates he exploited had proper safety equipment or were subject to proper safety precautions. Buss is also oblivious to the serious personal injuries English sustained due to Buss’s negligence. Buss is unremorseful.

The trial court here misused the procedures of CR 60, and ignored PCLR 7(c)(5), to override a colleague’s decision that English was entitled to amend his complaint under CR 15 and have it relate back to the date of its original filing in accordance with CR 15(c).

Even if the matter were properly before the trial court, it erred in refusing to permit the complaint’s amendment to relate back. Buss would have this Court employ a hyper-technical reading of CR 15(c) to allow him to evade answering for his egregious misconduct. This Court should not utilize the standard for CR 15(c) Buss advances. It would be unjust for this Court not to allow English to secure full compensation for his

serious personal injuries from the man whose egregious disregard of ethical standards and safety rules caused them.

English's original complaint specifically referenced Buss in numerous passages; he was named in its parties section. Buss was aware that his illegal conduct would result in litigation and he engaged in a lengthy administrative proceeding regarding his ethical violations. English's amendment only made clear that he was also suing Buss in his personal capacity.

This case offers the Court the opportunity to clarify the proper test for CR 15(c) relation back; the Court should reject the employment of the unnecessary "excusable neglect" facet of the relationship back test, and allow English to amend his complaint so as to proceed on the merits against Buss.

#### B. STATEMENT OF THE CASE

In his deliberate effort to shirk any responsibility for his unethical use of inmate personnel for his own financial aggrandizement, Buss largely has *no answer* to the facts set forth in English's opening brief. Br. of Appellant at 3-11.

Buss does, however, make two assertions that are entirely unsupported on this record. First, Buss states that English's injuries were "self-inflicted." Br. of Resp't at 3. In making this statement, Buss ignores

the extensive record in this case that he placed English in harm's way, not for the benefit of DSHS or DOC, but for his own personal financial benefit and without the necessary equipment for English and the other DOC inmates to safely accomplish the work. CP 3-7, 434-50. Buss even ignores that testimony of Kelly Cunningham, the Special Corrections Center CEO and his DSHS superior, who notified him by letter that he had been negligent and that his negligence resulted in English's injuries. CP 435.

Second, Buss contends that DOC knew he intended to use inmate labor to take property for his own personal benefit. Br. of Resp't at 4. Even if true, that fact only indicates that Buss *admits* he exploited English and other DOC inmates for his own benefit; it also means that the State had every reason to defend him in the context of English's action against the State.

Third, Buss admits that he is named in English's complaint as the person whose actions resulted in the State's *respondeat superior* liability. Br. of Resp't at 3-4.

More pointedly, Buss's failure to respond to the facts set forth in English's opening brief means that he *admits* the following for purposes of this appeal:

- Buss used DOC inmates and equipment for his personal financial benefit;
- he failed to insure that the work was safely performed with proper safety equipment;
- Buss had English use a powerful Warthog saw to cut through the metal of the trailer Buss wanted for his personal financial benefit, an act that resulted in English's severe injuries;
- he knew English was injured having witnessed the injuries himself;
- he knew he was investigated by DSHS for his misconduct;
- he was fired by DSHS for his misuse of DOC inmate labor and State equipment for his personal use;
- he was disciplined by the Washington State Executive Ethics Board.

C. ARGUMENT

(1) Buss's CR 60 Motion Was Not Properly Before the Trial Court

(a) A CR 60 Motion Is Not Available to Address an Interlocutory Order

As English argued in his opening brief at 14-15, by its very terms, CR 60 addresses only relief from a *final judgment* or similar type of proceeding. Buss's response to this argument is to essentially *ignore* the plain language of CR 60 that speaks to the rule's purpose of relieving a

party from a final judgment. Br. of Resp't at 10-11.<sup>1</sup> Buss claims there is no authority that confines CR 60 to final judgments. He is wrong. In *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992), this Court held that CR 60(b) applies to final judgments and not interlocutory orders. *Washburn* supports English's position and makes clear that Buss's assertion in his brief at 11 that there is no authority barring the use of CR 60 here is wrong. The trial court erred in utilizing CR 60(b) as a vehicle to change the ruling of a colleague with which it disagreed.

Similarly, Buss has *no answer* to the related point that the trial court misapplied CR 60(b) to correct what it perceived to be an "error of law." Br. of Appellant at 15. It lacked authority to do so, as this Court has noted in numerous instances. *E.g., Burlingame v. Consolidated Mines and Smelting Co. Ltd.*, 106 Wn.2d 328, 335-36, 722 P.2d 67 (1986) (citing cases); *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 719 (2000).

Buss now seeks to evade the rule's plain language by asserting that the trial court did not base its decision on CR 60. Br. of Resp't at 11. Buss's argument is disingenuous. His motion addressed to the trial court was denominated a CR 60 motion and specifically invoked CR 60 as the

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<sup>1</sup> A court must interpret a civil rule just like a statute, implementing its plain language. *State v. Otton*, 185 Wn.2d 673, 683, 374 P.3d 1108 (2016). The trial court failed to do so here.

procedural vehicle by which Judge Hogan's order was to be changed. CP 217-18. Moreover, there was no other basis in the Civil Rules upon which the trial court could have acted. The trial court granted CR 60 relief. CP 597.

If Buss seriously contends that the trial court's illegitimate action was a "reconsideration" of Judge Hogan's order authorizing English's amendment of his complaint, such a belated justification fails. Buss's "reconsideration" effort (an effort he described below as based on CR 60) was *untimely* under CR 59(a) that requires a motion for reconsideration to be filed within 10 days of the entry of an order, as Buss himself *admits*. Br. of Resp't at 11-12. This Court need go no farther than the trial court's procedure to reverse the trial court's improper re-visitation of Judge Hogan's decision.

(b) PCLR 7(c)(5) Barred the Trial Court from Overturning Judge Hogan's Decision

Buss *concedes* that he did not insist that Judge Hogan remedy the legal error on relation back he perceived in her CR 15 order; rather, this issue was presented to a second judge to address the *very same issue*. Br. of Resp't at 11-15. This violated PCLR 7(c)(5).

Buss argues that because Judge Hogan's order on amendment of English's complaint was not entered until October 2, 2015 and he was not

served until October 13, he was justified in seeking out another judge to collaterally attack Judge Hogan's order on amendment and its relation back under CR 15(c). Br. of Resp't at 11-12. Buss is obtuse to the rationale for rules like PCLR 7(c)(5).<sup>2</sup> Moreover, Buss offers *no explanation* for his failure to take the very simple, straightforward act of asking Judge Hogan to address her amendment order, if he was aggrieved by it.

Although each superior court judge in Washington is independently elected, there are counties like Pierce County with multiple judges. It has long been the rule that each county has only one superior court and each judge in that court has identical authority. Wash. Const. art. IV, § 5; *State ex rel. Campbell v. Superior Court for King County*, 34 Wn.2d 771, 775, 210 P.123 (1949). Implementing this constitutional concept, RCW 2.08.160 provides in pertinent part:

Judgments, decrees, orders and proceedings of any session of the superior court held by one or more of the judges of said court, or by any judge of the superior court of another county pursuant to the provisions of RCW

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<sup>2</sup> Buss ignores the plain language of PCLR 7(c)(5) to argue that it does not apply to him; he looks to *the caption* of the rule that speaks to "re-application" rather than its content that bars re-argument of the same issue. Br. of Resp't at 12. Judge Hogan decided the amendment issue and the relation back of English's amended complaint. Under PCLR 7(c)(5), Buss was not entitled to re-argue the same motion already decided by Judge Hogan to a new judge, effectively an illicit collateral attack on the Hogan order, even if the case was reassigned to the trial court. RP 16-17. *Donlin v. Murphy*, 174 Wn. App. 288, 300 P.3d 424 (2013), cited by English in his opening brief at 14, controls on this issue. Buss has *no answer* to that case, failing to address it in his brief.

2.08.140 through RCW 2.08.170, shall be equally effectual as if all the judges of such court presided in such session.

The bottom line here is that Judge Hogan's amendment order and its ruling on CR 15(c) relation back was not subject to collateral attack by another superior court judge. No provision in any rule justified Buss's conduct here. In *Whitehead v. Satran*, 37 Wn.2d 724, 225 P.2d 888 (1950), this Court concluded that a garnishee defendant could not challenge the validity of the underlying judgment upheld by two prior judges in a third hearing, held before yet another judge:

A judgment against respondent had been entered by one judge of the superior court for King County. A second judge had denied respondent's motion to set aside the judgment. No appeal was taken from the judgment or the order denying the motion to set it aside. Clearly, a third judge, in ruling on a motion such as this, could not reconsider a matter which had already been determined in the same jurisdiction.

*Id.* at 726-27.<sup>3</sup> It is no different here. The trial court lacked authority to entertain a collateral attack on the order of a judicial colleague.

(2) The Trial Court Erred in Dismissing English's Case Against Buss as Untimely, Having Misapplied the Relation Back Provision of CR 15(c)

As argued in English's opening brief at 15-25, even if Buss properly raised his challenge to Judge Hogan's order authorizing English

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<sup>3</sup> An analogous principle to the one argued for by English here is the collateral bar rule; a party may not attack the validity of an underlying order or judgment in a proceeding to enforce it. *City of Seattle v. May*, 171 Wn.2d 847, 256 P.3d 1161 (2011).

to amend his complaint, the trial court erred in denying the relation back of that amended complaint under CR 15(c).

Before addressing the specific elements of relation back under CR 15(c), it is important to address Buss's baseless factual assertions about English's amendment of his complaint that permeate Buss's brief.

First, Buss repeatedly seeks to portray English's amendment of his complaint as a "tactical" effort. *E.g.*, Br. of Resp't at 1, 6, 18. Quite frankly, that argument is simply nonsensical. The State was liable *respondeat superior* for Buss's misconduct because Buss was a state employee acting ostensibly within the scope of his employment in injuring English. CP 2. Under Washington law, a settlement between a plaintiff and the employer of an actor whose negligence injured the plaintiff does not release the actor from liability. *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 486-89, 756 P.2d 111 (1988).<sup>4</sup> English only *partially settled* his tort claim when he settled with the State, and he reserved the opportunity to pursue Buss to answer for the remainder of his damages. CP 320-22, 521-22. Having Buss respond for the full scope of his injuries was not some ploy, but simply a rational exercise: English wanted to

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<sup>4</sup> Buss's statement in a footnote in his brief at 23 n.15 that he should share in the "benefit" of any State-English settlement plainly betrays his lack of knowledge of the rule that a settlement between a plaintiff and a principal does not release the principal's agent unless the settlement expressly purports to do so. English's settlement with the State did not purport to release Buss.

secure full compensation for his serious injuries from the man whose fault precipitated those injuries.<sup>5</sup>

Second, Buss argues on the one hand that his State superiors were *fully aware* of his misconduct, br. of resp't at 4, and at the same time that his interests and those of the State were not aligned. *E.g.*, Br. of Resp't at 21. Obviously, he cannot have it both ways. In fact, the State was liable as a principal on the basis of *respondeat superior* for his acts as its ostensible agent in harming English. This was carefully outlined in English's original complaint that clearly articulated Buss's misconduct, referencing him as a *party*. CP 1-2.<sup>6</sup>

Finally, Buss implies that Judge Hogan somehow acted improperly by signing the stipulated amendment order, repeatedly asserting it was signed in chambers. *E.g.*, Br. of Resp't at 2, 7, 13.<sup>7</sup> That is not supported on this record. In any event, the point is ultimately irrelevant. A stipulated order signed by Judge Hogan is no less an order of the court

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<sup>5</sup> Indeed, the *Vanderpool* dissent notes at 493-94 that *respondeat superior* imputes responsibility of the servant for injuries caused to others to the master. Moreover, this Court has long evidenced a regard for the policy that tort claimants must be afforded the opportunity to secure full compensation for their injuries before any other policies detracting from that principle come to bear. *Thuringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219-20, 588 P.2d 191 (1978).

<sup>6</sup> Buss's contention, br. of resp't at 1 n.1, that English only sued DOC/DSHS is belied by the express contents of that complaint in which Buss was a major actor. CP 1-11.

<sup>7</sup> Buss references RP 34-35 for this proposition. The trial court, without any evidence in the record to this effect, volunteered its own testimony regarding Judge Hogan's practices. This was improper.

simply because it was stipulated and did not require argument by the parties. Judgments of courts of general jurisdiction are presumed to be regular and in accordance with the requirements of justice, and its recitals are prima facie correct. *Haller v. Wallis*, 89 Wn.2d 539, 549, 573 P.2d 1302 (1978). Washington law recognizes and favors stipulated orders and judgments. *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957); *Smyth Worldwide Movers, Inc. v. Whitney*, 6 Wn. App. 176, 178, 491 P.2d 1356 (1971). Judge Hogan’s order was valid and enforceable.

English met the elements of CR 15(c) for the relation back of his amended complaint.<sup>8</sup>

(a) The Complaints Arose Out of the Same Factual Nucleus

Buss does not deny that the complaints here arose of the same nucleus of operative facts. Br. of Resp’t at 18. Nor could he, as the trial court so found here. RP 36.

(b) Buss Had Notice of English’s Action

Buss aggressively contends that he did not receive notice of English’s claim and further asserts that he should not be deemed to have

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<sup>8</sup> Buss’s contention that this Court reviews CR 15(c) decisions for an abuse of discretion, br. of resp’t at 17, is wrong. CR 15(c) decisions are reviewed de novo. *Martin v. Demantic*, 182 Wn.2d 281, 288, 340 P.3d 834 (2014). Moreover, he omits any reference to this liberal construction imperative.

indirectly received notice of English's claim despite the fact that he and the State had a community of interest. Br. of Resp't at 18-27. But to adopt Buss's position would ignore the liberal construction given by this Court to CR 15 both as to amendments and their relation back, br. of appellant at 16-17, and would defy logic where Buss was plainly cognizant of English's injuries, his misconduct leading to them, and his own discipline for that misconduct both by his employer and the State Executive Ethics Board.

First, Buss does not seriously dispute that notice under CR 15(c) must be construed from what he should have known and may be derived from his knowledge of collateral proceedings. Br. of Appellant at 19. He asserts, for example, *without any authority*, that this Court should be oblivious to his termination by DSHS or the State Executive Ethics Board decision. Br. of Resp't at 20. He is wrong. Here, Buss should have been aware that he would be sued from his knowledge of his conduct, his DSHS discipline, the State Executive Ethics Board decision, and his knowledge of English's injuries.

Second, Buss had a community of interest with the State as English noted in his opening brief at 21-22. Buss's efforts to distinguish those cases English cited is unpersuasive. Br. of Resp't at 21-27. As noted *supra*, the State was liable to English as Buss's principal on the basis of

*respondeat superior*. The State *admitted* Buss was DSHS's employee. CP 16. Buss's conduct, known to him, and well as its consequences, English's serious injuries, were the predicate for the State's liability. The interests of Buss and the State were obviously aligned in the same fashion as an insurer and insured or parties represented by the same attorney.

Finally, Buss asserts that the amendment here "prejudiced" him because it added a claim against a new party, implying that a *new* claim was made by English in the amended complaint against Buss. Br. of Resp't at 16. That is false. The amended complaint, as noted in English's opening brief at 19-20, did nothing more than to make Buss formally a party; the claims asserted there were the same as those made in the original complaint. *Compare* CP 1-11 with CP 151-62.

Buss was mentioned as the primary negligent actor *throughout* English's original complaint. CP 1-11. He was mentioned as a party in the "Parties and Jurisdiction" section of the complaint. CP 1-2. The amended complaint merely made formal what was obvious in the original complaint – Buss was a party. Br. of Appellant at 19-20.

Buss cannot point to any real prejudice here where the trial court should have tolled the statute of limitations as to Buss, where the State was properly served. Br. of Appellant at 20-21. Buss's attempt to distinguish this Court's decision in *Sidis v. Brodie/Dohrmann, Inc.*, 117

Wn.2d 325, 327, 815 P.2d 781 (1991) merely denies this Court's *Sidis* decision, without any analysis. Br. of Resp't at 20 n.14. Moreover, this Court's recent decision in *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016) only confirms that English's argument with respect to the statute of limitations here is correct.

In sum, the trial court failed to liberally construe notice under CR 15(c), as it should have, abusing its discretion here in concluding that he would be sued.

(c) Inexcusable Neglect

Buss admits that after *Krupski v. Costa Crociere S.A.*, 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010), "inexcusable neglect," a judicial gloss on the express language of the rule, is no longer an element of the relation back test under Fed. R. Civ. P. 15(c), despite his effort to distinguish that case. Br. of Resp't at 27-30. Instead, Buss disingenuously argues that any trial court ruling applying that element below was "harmless error." *Id.* at 27.

This assertion is obviously disingenuous because Buss argued "inexcusable neglect" below, CP 224-27, and the trial court adopted his contention. RP 38-39. Moreover, throughout his brief, as noted *supra*, Buss *repeatedly* argues that English's effort to seek amendment was "tactical." Thus, he has argued inexcusable neglect as a key facet of his

appellate position. Buss should not be allowed to be so cavalier about the arguments he is *actually* making to this Court.<sup>9</sup>

When discussing the merits of the “inexcusable neglect” prong of the CR 15(c) test, Buss has no real answer to the reasons articulated in English’s opening brief at 22-25 derived from *Krupski* and *Perrin v. Stansland*, 158 Wn. App. 185, 240 P.3d 1189 (2010) indicating that this third prong of the CR 15(c) test should be abandoned.

This issue is now squarely before the Court in this case and is the centerpiece of Buss’s argument. This Court passed on the opportunity to address this judicially-created gloss to CR 15(c) in *Martin* leaving it for another day. This case now presents the opportunity to re-examine this CR 15(c) requirement and to provide much needed clarity that will assist trial courts. This Court should finally abandon the judicially-created inexcusable neglect prong to CR 15(c), as it should have no place in the analysis in this case.

#### D. CONCLUSION

Buss stubbornly refuses to acknowledge his egregious misconduct in which he used his position as a state official to exploit the services of

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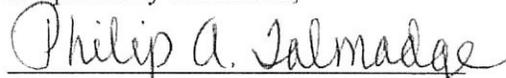
<sup>9</sup> Buss devoted the majority of his argument both before the trial court and again before this Court to this very argument claiming that the decision not to add him was “tactical.” This argument goes directly to inexcusable neglect prong. The United States Supreme Court in *Krupski* clarified that the focus of the third prong of CR 15(c) is on a defendant’s knowledge – not on a plaintiff’s conduct. Thus, the basis for adding Buss is removed from the equation under the *Krupski* analysis.

DOC inmates for his own personal financial advantage. Buss, in his rush to obtain that personal advantage, used shortcuts on worker safety, equipment and practices. In so doing, because he had knowledge of his own conduct and English's serious injuries that resulted and he knew that he was the subject of official discipline by DSHS and independently by the State Executive Ethics Board for such conduct, Buss was plainly on notice that he would be the subject of a civil action by English.

The trial court erred in ignoring PCLR 7(c)(5) and then in utilizing CR 60 to reverse the decision of another Pierce County Superior Court judge on the CR 15(c) effect of that court's decision to grant a motion to amend English's complaint. That court compounded its error by misapplying CR 15(c) and dismissing English's complaint against Buss on statute of limitations grounds. This Court should reverse the trial court's February 26, 2016 and March 21, 2016 orders and allow Christopher English his day in court against Dennis Buss on the merits.

DATED this 19th day of September, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Reply Brief of Appellant in Supreme Court Cause No. 92920-3 to the following parties:

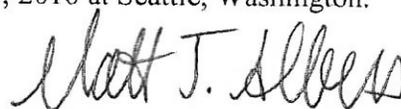
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 19, 2016 at Seattle, Washington.



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**Note: The Filing Id is 20160919111510SC988580**