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SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER ENGLISH, an individual,

Appellant,

v.

STATE OF WASHINGTON, Department of Corrections and
STATE OF WASHINGTON, Department of Social and Health Services,
and DENNIS ALVIN BUSS, individually,

Respondents.

BRIEF OF RESPONDENT

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8-24-16



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A. INTRODUCTION

The first time Mr. Buss received any notice of a lawsuit against the State¹ for his alleged misconduct was four (4) years and (4) months after the date of Mr. English's alleged injury. The trial court correctly analyzed the requirements of CR 15(c) before granting Mr. Buss's Motion for Summary Judgment dismissing Mr. English's individual claims against him as untimely. There was no notice to Mr. Buss, nor notice to anyone who shared or represented his individual interests, no hearing, no oral argument, and no consideration of CR 15(c) requirements in conjunction with Mr. English's unopposed Motion to File Amended Complaint ("Motion") fifteen (15) months after the original Complaint to add Mr. Buss as a new party defendant. As such, the trial court correctly struck inappropriate relation back language included in the Order granting the Motion which would have eliminated Mr. Buss's meritorious statute of limitations defense without an opportunity for him to be heard on the issue. These decisions should be affirmed.

Mr. English confirms in his Brief at p. 22, fn. 8, "[t]he State's liability to English rested entirely on [Buss's] misconduct." Mr. English made a tactical choice to properly sue the State for the alleged misconduct

¹ Mr. English initially sued the Department of Corrections ("DOC") and Department of Social and Health Services ("DSHS") (collectively "the State").

of Mr. Buss, its employee at the time of the alleged injury. Mr. English made a tactical choice not to sue Mr. Buss personally or name him as a defendant in his individual capacity in the original Complaint. It was not until the State filed a Motion for Summary Judgment, that Mr. English then sought to amend his Complaint to include an individual action against Mr. Buss simply as a means for preserving his claims against the State. These claims were indeed preserved and resulted in a \$650,000 settlement and stipulated judgment to Mr. English from the State as a result of Mr. Buss's alleged misconduct.

The Honorable Judge Hogan was not fully apprised of the issues on Mr. English's Motion as it was presented to her in chambers as an agreed order, without hearing or oral argument.² Mr. Buss was unaware of the lawsuit against the State and the fifteen (15) months of litigation that had transpired as against the State only, had not been an employee of the State for over three (3) years, and was not served with the Motion. The State, who had long since alleged that Mr. Buss was acting outside the scope of his employment, did not represent or share his individual interests, and did not oppose the Motion. Judge Hogan unknowingly eliminated a meritorious statute of limitations defense by signing off on gratuitous language included in Mr. English's alleged agreed Order that

² RP 34, ll. 18-25, RP 35 ll. 1-3.

allowed his amendment to relate back to the filing of his original Complaint without a showing that CR 15(c) requirements had been met.

The Honorable Edmund Murphy, recognizing the fundamental unfairness and due process concerns given the procedural stance of the case, correctly provided Mr. Buss an opportunity to be heard.³ Judge Murphy correctly analyzed the CR 15(c) requirements at the trial court level and granted summary judgment, disbelieving that Mr. Buss's only remedy was to endure discovery, trial and wait for appeal on a meritorious statute of limitations defense.⁴ This decision should be affirmed.

B. COUNTER STATEMENT OF THE CASE

This case involves a self-inflicted injury Mr. English, a DOC inmate at the time, sustained on June 8, 2011, while dismantling a metal trailer in conjunction with the closing of the McNeil Island Correctional Center. CP 438-439.

Mr. English initially filed a Complaint on June 3, 2014, just days before the expiration of the three (3) year Statute of Limitations,⁵ naming only the State DOC and State DSHS as Defendants. CP 1-11. Mr. English was identified as Plaintiff. CP 1. The Complaint merely identified Mr. Buss as an employee of "Defendant State" and "acting

³ RP 35, ll. 8-22.

⁴ RP 23, 35.

⁵ CP 223.

within the course and scope of his employment at all relevant times...”

CP 2.

The State answered the Complaint in June 26, 2014, admitting only that Mr. Buss was an employee, denying that Mr. Buss was acting within the course and scope of his authority and affirmatively identifying Mr. Buss as a non-party at fault. CP 16-21.

Discovery then ensued between Mr. English and the State, including interrogatories, requests for production and several depositions, without representation for Mr. Buss personally or his individual interests. CP 77, 86, 90, 94, 98, 363, 420. Testimony was solicited from State employees suggesting that Mr. Buss was acting outside the scope of his employment, yet also confirming that Mr. Buss had permission from DOC Correctional Program Manager Fitzpatrick to take the frame from the trailer and that both Fitzpatrick and Mr. Buss’s immediate Supervisor, SCC Fire Chief Sanders, were aware of Mr. Buss’s plan to dismantle the trailer with inmates prior to Mr. English’s injury.⁶

⁶ The following excerpts are relevant to establish Mr. Buss was acting with knowledge of the State:

“Mr. Fitzpatrick said Mr. Buss came to him in late May 2011... He said he wanted the axle, wheels, and frame but not the rest of the travel trailer and Mr. Fitzpatrick said OK. Mr. Fitzpatrick said in any case, DOC would have to get rid of the trailer.” CP 404, CP 374.

“Mr. Fitzpatrick said CO Fomento and her crew were there when the injury took place and any of the DOC inmate crews could have cut up the trailer.” CP 404.

“Mr. Fitzpatrick said, “I should have questioned him [Buss] using inmates for the trailer but I didn’t at the time.” CP 404, CP 375.

As such, Mr. English continued to build his case against the State and never attempted to amend his Complaint to include an individual cause of action against Mr. Buss following discovery.⁷

It was not until (15) fifteen months later on September 24, 2015, and only in response to the State's Motion for Summary Judgment, that Mr. English sought to amend his Complaint to include an individual action against Mr. Buss. CP 37. This was just ten (10) weeks before trial. CP 184. At that time, Mr. Buss had no notice of the original Complaint, was not involved with the litigation, had not been an employee of the State since May 2012, and was not given notice of the Motion to Amend Complaint or proposed amendments. CP 309-311. The State did not oppose the Motion. CP 150. Mr. Buss could not respond or oppose as he had no notice. CP 309.

"On June 6, 2011, Mr. Buss informed Mr. Sanders that he was going to be away from the station for a while. On June 8, 2011, Mr. Buss mentioned that he wanted to finish the work from the last time he was out at the house. Mr. Sanders did not question Mr. Buss when informed that Mr. Buss was going out to the house where the trailer was stored and where the inmates were working on June 8, 2011." CP 406.

"Q: And then Dennis Buss told Chief Sanders that he was going back on the 8th to finish dismantling the trailer with the inmates, correct?

A: Yes.

Q. So Chief Sanders was aware that they were going back on the 8th?

A. Mm-hm. Yes." CP 369.

"Q: So between the 6th and the 8th and prior to the injury occurring on the 8th, both Sanders and Fitzpatrick were aware both that Buss was taking the trailer off, that he was cutting it up, and that inmates were doing the work?

A: Yes." CP 376.

⁷ Any recognition or claim that Mr. Buss was acting outside the scope of his authority would have only served to negate Mr. English's claims against the State; the party whom Mr. English clearly always intended as the target defendant.

As is clearly outlined in the Motion to File Amended Complaint, Mr. English was simply seeking a way to impose and/or ensure liability on the State in the event the Court entertained the State's argument regarding Title 51 Immunity. CP 37. Mr. English's Motion would have never been filed but for the filing of the State's Motion for Summary Judgment. As Mr. English outlined in his Motion:

“On September 18, 2015, after fifteen months of litigation Defendants [DOC and DSHS] filed a motion for summary judgment claiming that they were entitled to immunity under Title 51. Should the Court agree with the Defendants position Plaintiff's state law tort claims would be dismissed. The evidence in this case also establishes a claim for danger creation under 42 U.S.C. § 1983.

Plaintiff therefore requests an Order allowing them to file an Amended Complaint adding a claim for danger creation under 42 U.S.C. § 1983 and adding Dennis Alvin Buss as a Defendant in this case.”

CP 38.

Mr. English specifically indicated that his Motion was a precautionary measure to avoid dismissal of claims as against the State:

“Plaintiff ... did not amend the complaint to add claims under 42 U.S.C. § 1983 that would be allowed to proceed notwithstanding any claim of state law immunity... However, out of an abundance of caution, Plaintiff is requesting to file an Amended Complaint adding claims under 42 U.S.C. § 1983 that will not be subject to Title 51 Immunity.”

CP 45.

The State did not respond to the Motion. CP 150. The Motion was heard without oral argument or hearing; Judge Hogan signed the Order October 2, 2015, off the record, in chambers, as it was presented as an agreed order that was not opposed by the State.⁸ RP 34-35, CP 147-148. Mr. Buss was served with the Amended Complaint October 13, 2015. CP 309.

The Attorney General's Office did not appear for Mr. Buss; rather, a private lawyer appeared and filed a Motion to Dismiss or in the Alternative to Continue the Trial Date and Reopen Discovery based on the Statute of Limitations defense November 18, 2015. CP 297. At that time, trial was scheduled to begin December 1, 2015. CP 184. On November 24, 2015, the State settled Mr. English's claims with a Stipulated Judgment for \$650,000 which allowed the case to continue against Mr. Buss individually and without defense from the State. CP 176-181.

Subsequently, the parties agreed to move the trial date to May 2, 2016. CP 183. The merits of the Motion to Dismiss were not addressed at that time. Mr. Buss then raised his statute of limitations defense through a Motion for Summary Judgment and Relief from Order Pursuant to CR 60 filed January 29, 2016. CP 217.

⁸ There is no support for Mr. English's assertion at p. 1 of his Brief that Judge Hogan "*found* that [the amendment] related back to the filing of the original complaint." (Emphasis added).

Mr. Buss's Motion for Summary Judgment was granted by the trial court on February 26, 2016, because the requirements of CR 15(c) had not been satisfied. CP 596. The trial court did not decide the case on CR 60 grounds. Rather, the trial court indicated:

“Fundamentally... it is a due process issue.”

RP 35.

The trial court recognized the flawed procedural stance in this case wherein an Order granting an amendment preemptively included relation back language without a hearing including the interested parties about whether the requirements of CR 15(c) had actually been satisfied. RP 15.

As such, the trial court reasoned:

“Whether it is the Court reconsidering, which I didn't sign the order, but it was an order that was presented without any argument or any hearing, or addressing an unfair action, I am going to strike the portion of the language that relates it back from that order.”

RP 35-36.

Mr. English's Motion for Reconsideration was denied on March 21, 2016. CP 610. Mr. English filed a Notice of Appeal in conjunction with both Orders. CP 611. Mr. English seeks direct review; however, he has failed to articulate any basis for direct review. Response to Statement of Grounds.

C. ARGUMENT

The preliminary issue before the trial court on Mr. Buss's Motion for Summary Judgment was whether it was proper for the unopposed Order Granting Mr. English's Motion to File Amended Complaint to have included preemptory, self-executing language indicating "the Amendments relate back to the original filing of this case under Civil Rule C.R. 15 (c)." CP 147.

The trial court found the issue ripe for consideration and rejected Mr. English's argument that there was no remedy in the Civil Rules or that Mr. Buss's only remedy was to seek discretionary review. The trial court correctly analyzed the issue in terms of fundamental fairness and concluded that the Order allowing English to amend his Complaint to add Mr. Buss as a new individual party should not have included relation back language given there was no notice or opportunity for Mr. Buss to have been heard on that issue. It is undisputed that – in the absence of relation back – Mr. English's claims against Mr. Buss were over (16) sixteen months late. By signing the unopposed Order, Judge Hogan had unknowingly denied Mr. Buss a meritorious statute of limitations defense. Judge Murphy correctly remedied this oversight, being fully apprised of the issue and circumstances justifying removal of the troublesome language from the Order. Judge Murphy then correctly analyzed CR 15(c)

requirements, found they had not been met, and appropriately granted Mr. Buss's Motion for Summary Judgment. This decision should be affirmed.

(1) The Trial Court Did Not Err In Striking Relation Back Language Included in the Order Granting Mr. English's Motion to File Amended Complaint Which Would Have Eliminated Mr. Buss's Meritorious Statute of Limitations Defense Without Opportunity for Mr. Buss to Be Heard.

The trial court correctly characterized the issue as one involving fundamental notions of Due Process. RP 35. The trial court recognized that Mr. Buss was only first served after the time to bring a motion for reconsideration and refused to believe that Mr. Buss's only remedy was for review in the Appellate Court. RP 23, 35.

a. The Trial Court Recognized the Unique Circumstances Presented Wherein the Order Allowing Amendment Inappropriately Included Preemptive Relation Back Language.

There are no cases analyzing CR 60 as an avenue to address inappropriate relation back language included in an order allowing amendment of a complaint to add a new party. As such, there is no authority indicating that CR 60 is an inappropriate avenue for this specific context. The trial court recognized that in the cases cited by counsel in conjunction with Mr. Buss's Motion for Summary Judgment and the CR(15)(c) issue, there was a motion to amend and then a subsequent motion or argument about whether the amendment relates back. RP 15.

There were no cases where there had been relation back language included in an order. *Id.*

As such, the trial court rejected Mr. English's argument that there was no remedy in the civil rules for the trial court to address the inclusion of offensive relation back language in an order allowing amendment to add a new party. RP 12, 23, 35. However, the trial court did not decide the case based on CR 60. The trial court did not vacate the Order. CP 596-597. The Order stands, however, it was modified based on "the Court reconsidering" the Order or "addressing an unfair action." RP 35-36. Either way, the trial court's action was appropriate and should not be disturbed on appeal.

b. Judge Murphy Did Not Err In Rectifying the Unintended Action of Judge Hogan Which Would Have Resulted in the Destruction of a Meritorious Statute of Limitations Defense By Expanding the Time Frame for Reconsideration and/or Addressing an Unfair Action.

The Order Granting Plaintiff's Motion to File Amended Complaint was entered October 2, 2015. CP 147. Mr. Buss was first served with the Amended Complaint on October 13, 2015. CP 309. By the time Mr. Buss was served, the time for a motion for reconsideration had already

passed.⁹ Mr. Buss filed a Motion to Dismiss on November 18, 2015, which was never considered by the Court. CP 297.

Although PCLR 7(c)(5) was never addressed,¹⁰ the trial court did not violate the provision. Even if it did, this Court should presume it did so for sufficient cause.

PCLR 7(c)(5) provides:

Reapplication. No party shall reargue the same motion to a different judicial officer without showing by affidavit, what motion was previously made, when and to which judicial officer, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judicial officer.

First, it should be noted that at no time did Mr. Buss “reapply” to a different judicial officer. Mr. Buss’s Motion for Summary Judgment was properly noted before Judge Hogan. Judge Murphy took pause during oral argument to indicate that the motion came before him in the normal course of Judge Hogan off-loading cases to him given their connection between different departments. RP 16-17. Pierce County Superior Court process resulted in Judge Murphy hearing the motion; not any action of Mr. Buss.

Second, the rule indicates “no party shall reargue the same motion...” Mr. Buss was not a party at the time the Order allowing

⁹ A Motion for Reconsideration shall be noted and filed not later than 10 days following entry of the order. PCLR 7(c)(2).

¹⁰ The Court should not review on appeal an alleged error not raised at trial. RAP 2.5(a)(3).

amendment was entered. This is in fact the very issue supporting the trial court's correct ruling in this matter. Given he was not a party at the time of the initial ruling, Mr. Buss cannot be found to have reargued the same motion as he was not represented, nor were his interests, he had not been served and he was completely unaware of any such motion that was filed. CP 309-311.

Third, the Motion to File Amended Complaint, as the trial court repeatedly recognized, was never actually argued. It was presented as an agreed order, without hearing, and signed in chambers. RP 34-35. As such, the motion could not have been reargued at any time.

Fourth, Mr. Buss's motion cannot be considered to be the same motion as the agreed, unopposed motion presented to Judge Hogan wherein Mr. English was seemingly only seeking to amend the Complaint to preserve claims against the State to which the State did not object. Mr. Buss's Motion for Summary Judgment outlining the complete procedural stance and notice issues in regard to CR 15(c) and Mr. Buss's individual interests was a totally different motion than that originally presented to Judge Hogan as an agreed order with the State as the only Defendant.

In the end, LCR 7(c)(5) does not bar Mr. Buss's alleged reapplication in this matter and, if anything, supports it. Mr. Buss actually complied with the requirements included therein. Judge Hogan's Order

was the very issue addressed in conjunction with Mr. Buss's Motion for Summary Judgment. Judge Murphy clearly recognized her previous Order, the decision, and then specifically considered all of the "new facts or other circumstances that would justify seeking a different ruling from another judicial officer" in compliance with LCR 7(c)(5).

In *Snyder v. State*, 19 Wn. App. 631, 577 P.2d 160 (1978), the Court of Appeals Division I considered whether the trial court violated its Local Rule 7 by allowing a summary judgment motion to be presented and considered by two different Superior Court judges. The decision is quoted at length:

"Where the issue is the interpretation of a local rule by the trial court, that court is the best exponent of its own rules, and their use will not be disturbed by an appellate court unless the construction placed thereon is clearly wrong or an injustice has been done. Moreover, a superior court may, for good reason, relax and suspend its own special rules of procedure; observation of local rules is largely discretionary in the trial court. Rules of court are but expedients to further the transaction of the business of the court, and departures therefrom are not reviewable unless the departure has operated to the injury of the complaining party. This court will presume that the Superior Court disregarded the rule (if it did) for sufficient cause. The record does not show that the court was clearly wrong or that an injustice has been done."

Snyder v. State, 19 Wn. App. 631, 637, 577 P.2d 160, 163–64 (1978)

(citations omitted).

This Court should respectfully conclude that Judge Murphy did not depart from PCLR7(c)(5) and actually followed it, exercising his sound discretion and striking relation back language from the previous Order for sufficient cause given grave due process concerns. Such was not clearly wrong or unjust to Mr. English. In fact, the only injustice would have been to Mr. Buss if Judge Murphy did not eliminate the troubling relation back language from Judge Hogan's Order.

Further, the Court should recognize the standard of review in regard to a trial court passing on a motion to amend the pleadings in the first place. Such will not be disturbed on appeal except for a manifest abuse of discretion. *See Bramall v. Wales*, 29 Wn. App. 390, 391-92, 628 P.2d 511, 512-13 (1981). Here, the motion to amend was allowed which was appropriate. However, Judge Murphy simply chose to strike the addition of inappropriate and troublesome relation back language in the Order. Such was certainly not a manifest abuse of discretion and should not be disturbed on appeal.

(2) The Trial Court Did Not Abuse Its Discretion When It Correctly Analyzed CR 15(c) Requirements and Granted Mr. Buss's Motion for Summary Judgment Given Violation of the Statute of Limitations.

CR 15(c) provides as follows:

“[W]henever a claim ... asserted in the amended pleading arose out of conduct, transaction or the occurrence set forth or attempted to set forth in the original pleading, the amendment relates back to the date of the original pleading...”

As such, in order to add claims that relate back as against an existing party, the moving party must show that the claims arose out of the conduct, transaction or occurrence set forth in the original pleading and that there is no prejudice. *Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002).

Mr. English argued in favor of adding claims against an existing party, i.e. the State, and that there was no prejudice to the State. However, he also sought to add a claim against a new party, i.e. Mr. Buss, and the prejudice to Mr. Buss was extreme and was not even contemplated at the time of the amendment.¹¹

The rule clearly distinguishes between amendments adding claims and amendments adding parties. *Id.* at 122. When a party is added upon amendment of a complaint, the amended complaint relates back to the date of the original pleading for purposes of the statute of limitations, if the foregoing provision in regard to adding a claim is met (same conduct, etc.) and *only* if the party seeking to amend its complaint proves that three

¹¹ Mr. English alleged no prejudice to Mr. Buss in that he would “most likely be defended by the attorney general’s office in the same capacity that this case has been defended to date.” CP 51. This was untrue.

conditions are satisfied: (1) the new party received notice of the institution of the action so that he or she will not be prejudiced in making a defense on the merits; (2) the new party knew or should have known that, but for a mistake concerning identity of the proper party, the plaintiff would have brought the action against him or her; and (3) the plaintiff's delay in adding the new party was not due to "inexcusable neglect," CR 15(c); *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn.2d 467, 476–77, 238 P.3d 1107, 1112 (2010) citing *Stansfield*, 146 Wn.2d at 122 and *Foothills Dev. Co. v. Clark County Bd. of Courty Comm'rs*, 46 Wn. App. 369, 375, 730 P.2d 1369 (1986). The elements listed above are conditions precedent for the application of CR15(c); in other words, the absence of any of the elements is fatal to the relation back of an amended complaint. *Id.*

The standard of review of a trial court's determination under CR 15(c) is abuse of discretion. *Id.* citing *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003); *Foothills Dev. Co.*, 46 Wn. App. at 375, 730 P.2d 1369.

The critical requirement in CR 15(c) cases is notice in that Mr. Buss knew or should have known that he would be named in this action and the touchstone for denying amendment of a complaint is the prejudice such amendment would cause Mr. Buss, the nonmoving party. Whether

the State knew or should have known Mr. Buss would be individually named is immaterial and the prejudice to Mr. Buss is irrefutable.

a. **There Was No Dispute That Mr. English's Amended Pleading Arose Out of the Same Conduct Alleged in the Original Complaint.**

This element is not in dispute. However, this fact serves to highlight Mr. English's inability to meet the remaining elements of CR 15(c) given the same conduct was always alleged, but strategically only against his former employer, the State, and not Mr. Buss individually, in order to pursue and achieve settlement on claims against the State.

b. **Mr. Buss Did Not Receive Notice Within Three (3) Years of Mr. English's Alleged Injury and Was Prejudiced In Maintaining His Defense on the Merits.**

The trial court correctly granted summary judgment in favor of Mr. Buss because Mr. English did not provide any evidence that Mr. Buss received notice of the original pleading before the expiration of the statute of limitations on June 8, 2014. To the contrary, it is undisputed Mr. Buss did not receive ANY notice of Mr. English's claims until first served with the Amended Complaint on October 13, 2015, four (4) years and almost (4) months after the alleged injury. CP 309-311. This fact alone confirms that Mr. English's claims against Mr. Buss could not relate back to the

filing of his original Complaint and the trial court's decision should be affirmed.

c. There Was No Mistake in Regard to Mr. English's Tactical Choice to Sue the State and the State Only at Inception of His Lawsuit As the Proper Party.

Because Mr. Buss did not receive notice of Mr. English's original pleading within the statute of limitations, the trial court correctly found that Mr. English failed in his burden to prove the second CR 15(c) condition had been met. Mr. Buss did not, and indeed cannot be held to have had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him because he never received any notice until well after the statute of limitations had run. CR 15(c) specifies that the actual or constructive knowledge take place within the period provided by law for commencing the action against him. Because Mr. Buss had no notice of Plaintiff's claims at any time within the limitations period, the actual or constructive knowledge condition is not even implicated by these facts.

Mr. English argues that "Buss had knowledge of English's action directly or indirectly" and that he cannot "credibly claim to be oblivious to the potential for a civil action to be filed against him." Brief of Appellant

at 18-19.¹² Mr. English cannot use Mr. Buss's involvement in a disciplinary or ethics proceeding to establish knowledge of a *potential* lawsuit against the State.¹³ The analysis is whether Mr. Buss had knowledge of the actual lawsuit against the State; clearly he did not.

Further, Mr. English conveniently blurs the line between the mandatory first two elements of 15(c) outlined herein. Again, Mr. English cannot dispute that Mr. Buss had no actual notice of the lawsuit against the State within the statute of limitations such that he was not prejudiced.¹⁴

Mr. English completely ignores the language in CR 15(c) that links what Mr. Buss allegedly "should have known" to the fact that such knowledge must have been surrounding "a mistake concerning the identity of the proper party."

Importantly, Mr. English did name the proper party, the State, and secured a \$650,000 settlement and stipulated judgment from that party.

¹² In signing an Agreed Order with the Ethics Board on March 25, 2013, Mr. Buss stated: "I do not agree with all of the Findings of fact, nor am I admitting any guilt. I'm accepting this settlement in the interest of concluding this matter expeditiously." CP 464. Mr. Buss maintained he had permission and acted with knowledge of the State. *See* fn. 6 *supra*. He had no reason to anticipate an individual cause of action against him personally.

¹³ Mr. English relies on *RTC Transport, Inc. v. Walton*, 72 Wn. App. 386, 864 P.2d 969 (1994) for the proposition that notice may come from outside the pleadings. However, that case involved amendment to add new *claims*, not a new party. Neither that case, nor the cases cited therein, stand for the proposition that notice from sources other than a complaint about a potential lawsuit is sufficient for CR 15(c) analysis in adding a new party defendant.

¹⁴ Mr. English cites to *Sidis v Brodie/Dohrmann, Inc.*, 117 Wn.2d 325815 P.2d 781 (1985) and argues that service on one defendant tolls the statute of limitations for other defendants. This argument is disingenuous at best. Mr. Buss was not a Defendant which is the reason Mr. English sought to amend his Complaint in the first place. CP 1, 37.

CP 178. Mr. English has never once alleged that he failed to identify the proper party. As such, Mr. English's attempt to rely on cases that all revolve around identity of a property party and a Plaintiff's mistake in naming a previous party are inapposite. Nevertheless, even if the Court considers the line of cases involving failure to name a proper party and community of interest, such authority only supports the trial court's determination in this action.

d. There Is No Community of Interest Between Mr. Buss and the State Where Mr. Buss Was Not An Employee, Was Not Represented by the Attorney General's Office, and Where The State Had Affirmatively Alleged He Was Acting Outside the Scope of His Employment At the Time of Mr. English's Alleged Injury.

Mr. English again lodges a futile attempt to align Mr. Buss with the State for purposes of notice. As the trial court correctly noted, Mr. Buss was not an employee of the State at the time, he was not a named party Defendant, he was not deposed, he did not know of the lawsuit until personally served in October 2015, and he clearly had not received notice within the statute of limitations. RP 37.

Mr. English's arguments that he was just changing the capacity of Mr. Buss and that there is a community of interest between the State and Mr. Buss are not credible.

Mr. English cites *Perrin v. Stensland*, 158 Wn. App. 185, 240 P.3d 1189 (2010), which confirms community of interest is not applicable in this case and analyzed the notice requirement in this context. It is quoted at length below:

This court has concluded the notice requirement of CR 15(c) was satisfied in three other similar car accident cases: *LaRue v. Harris*, 128 Wn. App. 460, 115 P.3d 1077 (2005); *Schwartz v. Douglas*, 98 Wn. App. 836, 837, 991 P.2d 665, review denied, 141 Wn.2d 1003, 10 P.3d 404 (2000); and *Craig*, 95 Wn. App. 715, 976 P.2d 1248. Toward the end of the limitations period in each case, the plaintiff commenced the lawsuit by naming the driver as the defendant without being aware the driver was dead, and then moved to amend the complaint by substituting the driver's estate after the limitations period expired. In each case, we concluded the amendment related back under a theory of imputed notice. As noted in *Craig*, federal courts have held timely notice may be imputed to a defendant added in an amended complaint if **there is a community of interest between the originally named defendant and the party to be added, as with insurance carriers and the estates of their insureds**. See *Craig*, 95 Wn. App. at 719–20, 976 P.2d 1248. *Schwartz* is in accord: “Counsel retained by the insurer would have been required to defend this suit whether for Mr. Douglas or for his estate after he died. Due to this community of interest, the notice to the insurer is imputed to the estate.” *Schwartz*, 98 Wn. App. at 840, 991 P.2d 665 (citations omitted). In *LaRue*, we similarly concluded that where the defendant's insurer had notice of the lawsuit within the three year limitations period, the insurer's notice and knowledge “were imputable to the Estate.” *LaRue*, 128 Wn. App. at 465, 115 P.3d 1077. This case is like *Craig*, *Schwartz*, and *LaRue*. Because of the community of interest between Hattie, her husband's estate, and the insurer who provided the Van Weerdhuizens with coverage for the claim, we conclude timely notice to Hattie was sufficient notice to the estate under CR 15(c) so that

the estate will not be prejudiced in defending the action. Third, within the period provided by law for commencing the action against it, did the estate know, or should it have known, that the action would have been brought against it but for a mistake concerning the identity of the proper party? Yes. The mistake was obvious. As soon as Hattie was served with timely notice that is imputed to the estate, there could be no doubt that the estate would have been the named defendant but for Perrin's mistake in believing, when he commenced the action, that Gordon was still alive.

Perrin v. Stensland, 158 Wn. App. 185, 196-97, 240 P.3d 1189, 1194-95 (2010), as amended (Nov. 10, 2010) (emphasis added).

The reasoning of the *Perrin* case supports Mr. Buss's position.

The cases cited therein should be limited to their facts and do not apply here. The only individuals in this case that are concerned with Mr. Buss's defense, that is Mr. Buss (and now his personal insurer) had no notice of the claim against him within the statute of limitations. There is no community of interest between Mr. Buss individually, his insurer, and claims against Mr. Buss in his official capacity and the State.¹⁵

Mr. English also cites *Craig v Ludy*¹⁶, 95 Wn. App. 715, 976 P.2d

¹⁵ If the State's notice can be imputed to Mr. Buss because of their community of interest, then Mr. Buss should share in the benefit of the State's settlement of the claim on his behalf which should extinguish the individual claims against him.

¹⁶ The *Craig* court found that Mr. Ludy's insurer had notice of the action and Counsel did not allege the amendment would cause any prejudice to the insurer or to Mr. Ludy's estate. The Court found, there was thus "a sufficient community of interest that notice of the action may be imputed to the estate. Also the Court found the estate (through its insurer) knew that, but for the Craigs' mistake, the action would have been brought against it. *Id.* at 719-720. This is similar to other MVA cases cited by Plaintiff, with deceased individuals and subsequent amendment to include an estate, that have no application to the facts of this case.

1248 (1999), which supports the trial court's correct analysis in regard to adding a new party. There, "[t]he critical issue is whether Mr. Ludy's estate [the party to be added] had notice of the action..." *Id.* at 719.

Here, the critical issue is whether Mr. Buss had notice. He did not. This is irrefutable and ends the analysis under CR 15(c).

Beal, also cited, involved a wrongful death claim and analysis of CR 17(a) by analogy to CR 15(c). The Court specifically recognized: "The purpose of CR 15(c), as mentioned earlier, is to permit amendment provided the defendant is not prejudiced and has notice." *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 782, 954 P.2d 237, 243 (1998). There, the Court had no problem finding notice and lack of prejudice given simply a change in capacity from Guardian ad Litem to Personal Representative by the same person. This again presents hardly an analogous case. The problem here is that Mr. Buss had no notice and arguing that a change in his capacity does not prejudice him in the defense of an individual claim against him is ridiculous and unsupported by any case law.

This is not a situation where an individual died and the estate is not named and as such there is a failure to identify the real party at interest. Mr. English was intending to add Mr. Buss as an individual party after he purposely and properly sued only the State for the same conduct. There

can be no community of interest where the State has continually alleged Mr. Buss was outside the scope and is not defending him in this action.

The *LaRue* case is again instructive. *LaRue v. Harris*, 128 Wn. App. 460, 465, 115 P.3d 1077, 1079 (2005). It involved a motor vehicle accident brought by LaRue against Harris. Farmers insured both LaRue and Harris and negotiated the claim from 1998 to 2000. When LaRue finally sued, she did not know Harris had died and did not sue the Estate.

The case is quoted at length in regard to analysis under CR 15(c):

As can be seen, this rule allows a plaintiff to change the party against whom he or she is asserting a claim, after the statute of limitation has expired, so long as the claims made in the original and amended pleadings arise out of the same occurrence, **the party being added had notice and knowledge of the claim, and that party will not be prejudiced in maintaining his or her defense.** The claims alleged in LaRue's original and amended complaints arose out of the same auto accident. Farmers had notice and knowledge since at least 1998, and because it shared a community of interest with the Estate, its notice and knowledge were imputable to the Estate.³ Neither Farmers nor the Estate was prejudiced in maintaining a defense because, except for substituting the Estate in place of Harris, the amended claim was the same as the original one. The requirements of CR 15(c) were met, and the trial court did not err by ruling that the action had been timely commenced.

Id. (emphasis added).

This is not the same situation. Mr. Buss had no notice and is prejudiced in maintaining his defense. Mr. English offers no support for his bald assertion that Mr. Buss was not prejudiced. The prejudice is clear.

Mr. English also cites *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400, (9th Cir. 1984) which further supports the trial court's ruling in this matter. There the Court stated:

Avoiding prejudice **to the party to be added** thus becomes our **major objective**. **Timely notice**, whether formal or informal, **is one way of assuring that the party to be added has received ample opportunity to pursue and preserve the facts relevant to various avenues of defense.**" (Emphasis added).

Similarly, in yet another case cited by Plaintiff the Court reasoned:

Some Courts of Appeals have recognized an "identity-of-interest" exception under which an amendment that substitutes a party in a complaint after the limitations period has expired will relate back...The object of the exception is to avoid the application of the statute of limitations **when no prejudice would result to the party sought to be added.**

Schiavone v. Fortune, 477 U.S. 21, 28, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986) (emphasis added).

It was four years and four months from date of injury until first notice to Mr. Buss regarding any complaints against him. Fifteen (15) months of litigation ensued as against only the State without notice or

involvement of Mr. Buss. Multiple depositions were taken where no one represented the interests of Mr. Buss. The State alleged Mr. Buss was outside the scope from inception and the claim continued against the State with State employees pointing at Mr. Buss without his ability to defend, question, develop, pursue or preserve any defense of his own. The State then settled out of the case, leaving Mr. Buss to fend for himself. This is hardly the type of “community of interest” that can obviate the need for actual notice and eliminate a meritorious statute of limitations defense given prejudice to Mr. Buss and inability to prepare, pursue and preserve his defense on the merits.

e. **Given the Trial Court Correctly Analyzed the Preceding CR 15(c) Requirements Finding No Notice and No Mistake, the Fact that the Trial Court Also Found Inexcusable Neglect Is of No Consequence.**

The trial court correctly found no notice to Mr. Buss and no mistake regarding the identity of Mr. Buss as an individual actor; therefore, the fact that the trial court also considered inexcusable neglect is of no consequence.¹⁷

¹⁷ “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32, 36 (2010), *aff’d*, 174 Wn.2d 851, 281 P.3d 289 (2012) (error of law in regard to jury instructions).

Similar to cases cited in regard to alleged “community of interest,” the case Mr. English cites in support of his plea to abandon inexcusable neglect, only supports the trial court’s ruling and does not provide a basis for review.

In *Krupski*, the United States Supreme Court stated:

The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error.

Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 548, 130 S. Ct. 2485, 2498, 177 L. Ed. 2d 48 (2010).

The bottom line in that case was as follows:

Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity.

Id. At 557.

In terms of application to this case, then, the question again is whether Mr. Buss should have known he would be named as a Defendant but for an error. “But for an error.” Here, there was no error. Mr. Buss should not have known that Mr. English’s failure to name him as an individual Defendant in his original Complaint was due to a mistake

because it was not due to a mistake. Because the State was a proper party and remained a proper party all along.

To reach their ultimate conclusion, the *Krupski* Court outlined its understanding of the Rule 15(c)(1)(C)(ii):

When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met.

The *Krupski* Court indeed focused on the fact that the only reason there is discussion under this prong is when plaintiff has made a "mistake" as to identification of a proper party.

Mr. English cites to the very portion again highlighting there must be a mistake:

We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue... That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

Id. At 549.

Here, the trial court correctly found the requirements of CR 15(c) were not satisfied. Mr. Buss did not receive notice of the action. Mr. English made a fully informed decision to sue the State for negligence;

there was no “mistake” in naming the State and no “mistake” in the identity of Mr. Buss. There has never been an allegation by Mr. English of a mistake in identifying the State as a proper party. As such, the “judicial gloss” was not met and could not be met in this case.

The reasons the *Krupski* Court abandoned the inexcusable neglect prong are not present in this case. As such, the Court should not use this case, a case where the concerns of *Krupski* or otherwise are irrelevant and moot, to revisit inexcusable neglect.

Again, it is abundantly apparent that the only reason Mr. English ultimately did pursue such an individual claim against Mr. Buss was to preserve his initial purposeful claims against the State in the face of the State’s Motion for Summary Judgment, not because he was interested in pursuing an individual claim against Mr. Buss and certainly not because there had been a mistake. Mr. English received favorable settlement from the State. The State has left Mr. Buss to defend himself after litigating and settling the case on their own, without notice to Mr. Buss, for over fifteen (15) months.

The trial court correctly found that Mr. English did not meet his burden and the third CR 15(c) condition was not met because Mr. Buss was identified from the beginning and there was no reason for Mr. English to fail to name him individually other than as a conscious decision,

strategy or tactic. RP 38-39; *See Teller v. APM Terminals Pacific, LTD.*, 134 Wn. App. 696, 706, 142 P.3d 179 (2006); *Public Util. Dist. No. 1 v. Walbrook Ins. Co.*, 115 Wn.2d 339, 349, 797 P.2d 504 (1990); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987); *Foothills Development Co. v. Clark County Board of County Commissioners*, 46 Wn.2d 369, 375, 730 P.2d 1369 (1987).

The trial court's analysis under CR 15(c) was correct and should be affirmed.

D. CONCLUSION

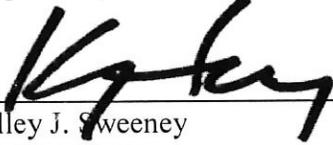
The trial court did not err in providing Mr. Buss an opportunity to be heard on a meritorious statute of limitations defense. "The statute of limitations 'is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts.' It serves to shield defendants and the judicial system from stale claims." *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252, 1255 (1997)(citations omitted).

The trial court correctly analyzed CR 15(c) requirements and found Mr. English could not meet his burden given Mr. Buss did not receive notice of the action within the statute of limitations such that he would not be prejudiced and there was no mistake in identifying the State as the proper party in the original Complaint. Mr. English received

favorable settlement from the State for Mr. Buss's alleged actions and the State was dismissed. Mr. English should not be allowed to use such proceeds to fund and pursue untimely claims against Mr. Buss individually for the same alleged conduct. The trial court should be affirmed.

Dated this 24th day of August 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said date below, I electronically served a true and accurate copy of the Respondent's Response to Appellant English's Opening Brief on the following parties:

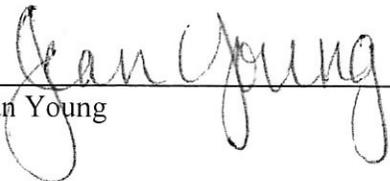
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 24, 2016, at Seattle, Washington.



Jean Young

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Subject: RE: Case # 92920-3 - Christopher English v. State of Washington, Department of Corrections, et. al.

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Please see Brief of Respondent Bus attached hereto.

Kindest regards,

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