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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

VICTOR and OLIVIA GUENTHER, a marital community,

Appellants,

v.

GALAXY PACIFIC SERVICES, LLC, a Washington corporation, and
MUHAMMAD M. JOYIA, an individual,

Respondents.

BRIEF OF RESPONDENT JOYIA

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I. INTRODUCTION

This appeal involves a personal injury action brought by Appellants Victor and Olivia Guenther (hereinafter collectively “Guenther”) against Respondents Muhammad M. Joyia and Galaxy Pacific Services LLC (hereinafter “GPS LLC”). Mr. Joyia is a Canadian citizen. GPS LLC is a limited liability company headquartered in Bellingham, Washington.

It is important to note at the outset that GPS LLC has no relationship to the underlying litigation, other than having been incorrectly named as a defendant by Guenther.¹ Apparently, Guenther intended to name Mr. Joyia’s employer, GPS Galaxy Pacific Services (2015) Ltd. (hereinafter “GPS Ltd.”) as a defendant; but for reasons not understood or explained, Guenther failed to do so despite discovering their mistake within one day of filing their complaint. GPS Ltd. is a Canadian trucking company headquartered in Surrey, British Columbia.

When Guenther attempted to note the case for trial after failing to provide proof of service and to amend their complaint, the undersigned counsel objected and demanded proof that Guenther had affected proper service of process on both Mr. Joyia and GPS Ltd. The “proof” provided

¹ Respondent GPS LLC (the incorrectly named defendant) has not appeared in the underlying action and is not represented by the undersigned counsel.

by Guenther unequivocally demonstrated that Guenther had failed to comply with service of process requirements for foreign litigants.

Mr. Joyia moved for dismissal with prejudice of Guenther's claims due to insufficient service of process. Such dismissal resulted in Guenther's claims against Mr. Joyia and GPS Ltd. being forever barred by the applicable statute of limitations. Having fully realized the gravity of their mistake, Guenther moved to amend their complaint to substitute GPS Ltd. for GPS LLC such that the substitution would "relate back" and avoid being barred by the statute of limitations. The trial court found that Guenther's attempts at service were insufficient and dismissed Guenther's claims against Mr. Joyia and GPS Ltd. Additionally, the trial court found that Guenther's failure to name GPS Ltd. during the limitations period was the result of Guenther's inexcusable neglect and denied Guenther's motion to amend their complaint.

This Court should affirm the trial court's rulings for three reasons. First, the trial court did not err in its construction of all facts and reasonable inferences in the light most favorable to Guenther when it granted Mr. Joyia's motion to dismiss Guenther's complaint under CR 12(b)(5). Even when viewed in the light most favorable to Guenther, the undisputed facts clearly demonstrated that Guenther could not prove a *prima facie* case of proper service of process on Mr. Joyia or GPS Ltd.

Second, it cannot fairly be argued that the trial court erred in denying Guenther's motion to amend where Guenther failed to offer a reasonable excuse for its failure (as was its burden as the moving party). In fact, Guenther's Opening Brief barely acknowledged or addressed the inexcusable neglect requirement – other than to inaccurately claim that it was eliminated from the state rule by the United States Supreme Court.² Contrary to Guenther's argument, inexcusable neglect continues to be a requirement of the “relation back” analysis under CR 15(c) and remains good law in Washington – it has not been eliminated as stated in the very case that Guenther cited in support of its position.³ The trial court did not err when it denied Guenther's motion to amend.

Third and finally, the trial court did not err when it denied Guenther's motion for reconsideration or evidentiary hearing. Guenther failed to identify the subject and specific basis for reconsideration under CR 59(a) or precisely how the trial court's rulings on the underlying motions materially affected the substantial rights of Guenther. Likewise, Guenther failed to request an evidentiary hearing during oral argument on the underlying motions and raised this issue for the first time in their motion for reconsideration. Nonetheless, an evidentiary hearing would not have

² CP at 79.

³ Opening Brief of Appellants Victor Guenther and Olivia Guenther (“Guenther's Opening Brief”) at 11-12; *Martin v. Dematic*, 182 Wn.2d 281, 340 P.3d 834 (2014).

changed the outcome of Guenther's motion to amend where it was abundantly clear that Guenther's failure to name GPS Ltd. was the result of inexcusable neglect. The trial court's rulings should be affirmed in their entirety.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Mr. Joyia disputes each of Guenther's assignments of error to the trial court's decisions to grant Mr. Joyia's Motion to Dismiss Guenther's Complaint Pursuant to CR 12(b)(5) (Assignment of Error No. A) and deny Guenther's Motion to Amend Complaint for Damages (Assignment of Error No. C). Mr. Joyia is unable to respond to Guenther's Assignment of Error No. B, as it appears to be an incomplete sentence.⁴ To the extent that Guenther may have intended to assign error to the trial court's decision denying its Motion for Reconsideration and Evidentiary Hearing, Mr. Joyia disputes such an assignment of error. This Brief of Respondent Joyia

⁴ Notwithstanding this omission, Guenther's Opening Brief does not include page numbers. Guenther has also failed to include proper references to the Clerk's Papers (CP) in their Opening Brief as required by RAP 10.4(f). An appellate court may impose sanctions for failure to include accurate record references in the statement of the case and in the argument section of the brief. *See, e.g., Hurlbert v. Gordon*, 64 Wn. App. 386, 400-01, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (imposing \$750 in sanctions for "laissez-faire" record citations). The appellate court may also simply refuse to address the issue. *Murphy v. Lint (In re Estate of Lint)*, 135 Wn.2d 518, 532, 957 P.2d 755, 762 (1998) ("If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.")

responds to Guenther's Assignments of Error A-C and the issues pertaining thereto.

III. COUNTERSTATEMENT OF ISSUES PERTAINING TO GUENTHER'S ASSIGNMENTS OF ERROR

- (1) Should this Court affirm the trial court's ruling dismissing with prejudice Guenther's claims against Mr. Joyia and GPS Ltd. where Guenther failed to demonstrate a *prima facie* case of proper service of process? (Assignment of Error No. A).
- (2) Should this Court affirm the trial court's ruling denying Guenther's motion to amend their complaint where the delay in substituting GPS Ltd. for GPS LLC was the result of inexcusable neglect? (Assignment of Error No. C).
- (3) Should this Court affirm the trial court's ruling denying Guenther's motion for reconsideration or evidentiary hearing where (1) there is no evidence that Guenther requested an evidentiary hearing prior to the Court ruling on Mr. Joyia's motion to dismiss, (2) there were no issues of fact that could only be resolved by a determination of the credibility of the witnesses, and (3) an evidentiary hearing regarding proof of "actual notice" under CR 15(c) would not have resulted in a different outcome on Guenther's motion to amend? (Assignment of Error No. B [*Incomplete as noted above in § II*]).

IV. STATEMENT OF THE CASE

The action that forms the basis of this appeal was brought by Guenther. Guenther's claims against Mr. Joyia arise from an alleged motor vehicle accident that occurred on October 31, 2016.⁵

On August 28, 2019, Guenther filed a Complaint for Damages (hereinafter "Complaint") naming Mr. Joyia and GPS LLC as defendants.⁶ Guenther's Complaint affirmatively identified GPS LLC as "a registered company located in Bellingham, WA."⁷ Guenther's Complaint also pled that "Defendant, Muhammad Joyia resides in Surrey, British Columbia, Canada at all times relevant to this Complaint."⁸

A. Guenther's Service of Process on GPS LLC.

On August 26, 2019, Guenther located the mailing address and registered agent for GPS LLC on the Washington Department of Revenue's website.⁹ On August 29, 2019, Guenther, via process server, personally served copies of the Summons and Complaint upon Vishavjeet Dhindsa, the registered agent for GPS LLC.¹⁰ Three days later, on or about August 29, 2019, Mr. Dhindsa informed Guenther that he had received the Summons and Complaint and notified Guenther that he was not the intended recipient

⁵ CP at 4-5.

⁶ CP at 3-8.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ CP at 100.

¹⁰ CP at 104.

or the intended defendant.¹¹ Mr. Dhindsa explained that he had previously received mail and other correspondence intended for GPS Ltd., and provided the DOT number¹² for GPS Ltd. to Guenther for verification.¹³ Guenther used the information provided by Mr. Dhindsa to verify that GPS LLC was not the intended defendant.^{14,15} Likewise, Guenther used the DOT number provided by Mr. Dhindsa to locate the Canadian address of the intended defendant GPS Ltd.¹⁶ Guenther, however, never amended their Summons and Complaint to substitute GPS Ltd. for the incorrectly named defendant, GPS LLC.

B. Guenther Attempts Service by Mail on Mr. Joyia.

On August 27, 2019, Guenther mailed copies of the 20-Day Summons¹⁷ and Complaint to Mr. Joyia at the Canadian address indicated on the exchange of information form completed at the time of the accident.¹⁸

¹¹ CP at 102.

¹² A Department of Transportation (“DOT”) number is a number the Federal Motor Carrier Safety Administration, or FMCSA, assigns to registered commercial vehicles. All carrier vehicles that weigh more than a certain amount, carry specific amounts of paying passengers or operate between state lines require DOT numbers.

¹³ *Id.*

¹⁴ CP at 140.

¹⁵ A printout containing verification of GPS Ltd.’s contact information and DOT number was attached as Exhibit C to a February 24, 2020 Declaration of Mailing (CP 122-40). This document can be found at CP 140. A copy of this document is also provided at Appendix A to this brief.

¹⁶ CP at 102, 140.

¹⁷ Guenther issued a 20-Day Summons instead of the 60-Day Summons required for a summons upon an out-of-state party under RCW 4.28.180. CP at 1.

¹⁸ CP at 101-02, 141-142, 155.

These documents were mailed to Mr. Joyia via U.S. Postal Service™ Certified Mail® with Return Receipt Service requested.^{19,20}

Certified Mail® is a U.S.P.S. service that provides the sender with a mailing receipt and electronic verification that an article was delivered or that a delivery attempt was made within the United States.²¹ Return Receipt® is a U.S.P.S. service that provides the sender with proof of delivery (the recipient’s signature along with information about the delivery address, if different, and date of and time of delivery).²²

Guenther paid the amount of postage for “international mailing” as indicated after weighing the mail on the postage scale.²³ Guenther completed the Certified Mail® Receipt, indicating the fees paid and Mr. Joyia’s address.²⁴ The Certified Mail® Receipt indicated in italicized print “Domestic Mail Only.”²⁵ On September 11, 2019, Guenther again mailed conformed copies of the unamended Summons and Complaint to Mr. Joyia

¹⁹ *Id.*; CP at 121.

²⁰ A scanned copy of Certified Mail® Receipt No. 7018 2290 0002 2078 8514 was attached as Exhibit B to a February 24, 2020 Declaration of Mailing (CP 141-55). This document can be found at CP 155. A copy of this document is also provided at Appendix B to this brief.

²¹ USPS.COM®, *What is Certified Mail?*, Article No. 000003249 (Sept. 24, 2020, 11:28 AM), <https://faq.usps.com/s/article/What-is-Certified-Mail>

²² USPS.COM®, *What is a Return Receipt and How does it Work?*, Article No. 000003145 (Sept. 24, 2020, 11:30 AM), <https://faq.usps.com/s/article/What-is-a-Return-Receipt-and-How-does-it-Work?r=8&ui-force-components-controllers-recordGlobalValueProvider.RecordGvp.getRecord=1>

²³ CP at 101.

²⁴ *Id.*; CP at 155; Appendix B.

²⁵ *Id.*

using the same method of mailing described above and completed another Certified Mail® Receipt.^{26,27}

C. Guenther Attempts Service by Mail on GPS Ltd. Without Amending Their Complaint to Name GPS Ltd.

On September 11, 2019, after verifying GPS Ltd.’s address using the DOT number provided by Mr. Dhindsa, Guenther mailed conformed copies of the unamended Summons and Complaint (naming Mr. Joyia and GPS LLC as defendants).²⁸ As with Mr. Joyia, Guenther used the same method of mailing described above and completed a Certified Mail® Receipt for “domestic use only”, despite GPS Ltd. being a Canadian corporation.^{29,30}

Despite Guenther’s assertion in their Opening Brief, Guenther did not use “registered mail” for any of the mailings sent to Mr. Joyia and GPS Ltd. Registered Mail® is a U.S.P.S.® mail service that requires a signature upon delivery - delivery information is also provided, including

²⁶ CP at 102, 105-06, 121.

²⁷ A scanned copy of Certified Mail® Receipt No. 7018 2290 0002 2078 8569 was attached as Exhibit B to a February 24, 2020 Declaration of Mailing (CP 105-121). This document can be found at CP 121. A copy of this document is also provided at Appendix C to this brief.

²⁸ CP at 102, 122-23, 138.

²⁹ *Id.*

³⁰ A scanned copy of Certified Mail® Receipt No. 7018 2290 0002 2078 8552 was attached as Exhibit B to a February 24, 2020 Declaration of Mailing (CP 122-40). This document can be found at CP 121. A copy of this document is also provided at Appendix D to this brief.

delivery status or attempted delivery status when an item reaches its destination.³¹

D. Notice of Appearance and Mr. Joyia’s Answer.

That same day, Guenther emailed copies of the unamended 20-day Summons and Complaint to a representative of the insurer for Mr. Joyia and GPS Ltd.³² The insurer responded and indicated that counsel would “respond and go on record for our insured.”³³ On November 18, 2019, a Notice of Appearance of Counsel was entered on behalf of Mr. Joyia and GPS Ltd., without waiver of “any objections as to improper service, jurisdiction, right to removal to federal court, or any other defenses available under CR 12.”³⁴ On December 23, 2019, Mr. Joyia answered Guenther’s Complaint.³⁵ Mr. Joyia again asserted “all defenses stated in [CR 12(b)] as far as they may be applicable, including insufficiency of process and insufficiency of service of process,” and pled the applicable statute of limitations as an affirmative defense.³⁶

³¹ USPS.COM®, *What is Registered Mail*®, Article No. 000003144 (Oct. 1, 2020, 10:47 AM), <https://faq.usps.com/s/article/What-is-Registered-Mail>

³² *Id.* at 102-03.

³³ *Id.*

³⁴ CP at 9-11.

³⁵ CP at 12-17.

³⁶ *Id.* at 15.

E. Guenther Moves to Set Trial Without Amending Their Complaint to Name GPS Ltd.

On February 3, 2020, Guenther filed a note for trial setting and requested a hearing.^{37,38} In so doing, Guenther represented to the trial court that “an answer has been filed” by all defendants.³⁹ However, neither GPS LLC (the incorrectly named defendant) nor GPS Ltd. (the intended defendant) had filed answers. On February 10, 2020, Mr. Joyia filed a response to Guenther’s note for trial setting.⁴⁰ In that response, Mr. Joyia informed the trial court and Guenther that GPS LLC had neither appeared nor answered because was not a proper party to the action. The response noted that Guenther had been advised of this issue and that GPS Ltd. had appeared out of an abundance of caution.⁴¹ Mr. Joyia also noted that Guenther had not amended the pleadings to address the error and requested that the trial court deny Guenther’s motion to set trial and refrain from further proceedings until Guenther addressed the real party in interest issue.⁴²

³⁷ CP at 24-27.

³⁸ A previous note for trial setting was late-filed on January 27, 2020. CP at 18-20.

³⁹ CP at 24.

⁴⁰ CP at 28-33.

⁴¹ CP at 29.

⁴² *Id.*

F. The Trial Court Dismissed Guenther’s Complaint and Denied Their Motion to Amend.

On February 12, 2020, Mr. Joyia moved to dismiss Guenther’s Complaint pursuant to CR 12(b)(5).⁴³ On February 24, 2020, Guenther filed a motion to amend their Complaint.⁴⁴ Guenther’s proposed Amended Complaint affirmatively identified GPS Ltd. as “a Canadian Limited Company located at 8621 168 Street, Surrey, BC, VAN 6A8 at all times relevant to this Complaint.”⁴⁵ The trial court continued the dismissal hearing originally set for February 28, 2020 to allow Guenther’s motion to amend to be heard concurrently with Mr. Joyia’s motion.⁴⁶ On March 6, 2020, oral argument was held on both motions.⁴⁷ The trial court entered an order denying Guenther’s motion to amend their Complaint and dismissing GPS LLC with prejudice.⁴⁸ The trial court then granted Mr. Joyia’s motion to dismiss Guenther’s Complaint pursuant to CR 12(b)(5) and entered an order dismissing Guenther’s claims against Mr. Joyia and GPS Ltd. with prejudice.⁴⁹

⁴³ CP at 34-49.

⁴⁴ CP at 77-81.

⁴⁵ CP at 86.

⁴⁶ CP at 167.

⁴⁷ CP at 191.

⁴⁸ CP at 192-93.

⁴⁹ CP at 195-96.

G. The Trial Court Denies Guenther’s Motion for Reconsideration or Evidentiary Hearing.

On March 13, 2020, Guenther moved the trial court for reconsideration of the orders denying their motion to amend the Complaint and granting Mr. Joyia’s motion to dismiss or, in the alternative, to hold and evidentiary hearing.⁵⁰ Notably, Guenther did not identify the specific grounds in which they were seeking reconsideration pursuant to CR 59(a).⁵¹ Furthermore, Guenther did not request an evidentiary hearing before oral argument on the underlying motions nor did they request it once the trial court made its oral rulings on the underlying motions. In fact, the first time that Guenther requested an evidentiary hearing was in its motion for reconsideration.⁵² On March 23, 2020, Mr. Joyia filed a response to Guenther’s motion for reconsideration.⁵³ On March 26, 2020, the trial court denied Guenther’s motion for reconsideration or evidentiary hearing.⁵⁴

V. ARGUMENT

A. Mr. Joyia Was Entitled to Dismissal Under CR 12(b)(5).

1. Standard of Review.

A motion for dismissal under CR 12 may be considered a motion for summary judgment where the trial court considered the pleadings as well as

⁵⁰ CP at 198-210.

⁵¹ CP at 198-99.

⁵² CP at 198, 207-08.

⁵³ CP at 211-18.

⁵⁴ CP at 219.

other papers in the clerk's file.⁵⁵ A party may not avoid an opponent's motion for summary judgment by resting on mere allegations, but must set forth specific facts showing there is a genuine issue of material fact.⁵⁶ Only the evidence and issues called to the attention of the trial court may be considered on appeal; all facts and reasonable inferences are considered in a light most favorable to the non-moving party, and all questions of law are reviewed *de novo*.^{57,58} Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the declarations, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁵⁹

The trial court did not err in granting Mr. Joyia's motion to dismiss Guenther's Complaint under CR 12(b)(5). Even when construed in the light most favorable to Guenther, the facts demonstrate that Guenther failed as a matter of law to provide sufficient service of process to Mr. Joyia (or the

⁵⁵ *In re Estate of Winslow*, 30 Wn. App. 575, 636 P.2d 505, 508 (1981); see also *Access Rd. Builders v. Christenson Elec. Contractor Eng'g Co.*, 19 Wn. App. 477, 481, 576 P.2d 71, 73-74 (1978).

⁵⁶ *Id.* at 579.

⁵⁷ RAP 9.12; *Manor v. Nestle Food Co.*, 78 Wn. App. 5, 895 P.2d 27 (1995), *rev'd on other grounds*, 131 Wn.2d 439, 932 P.2d 628 (1997), *cert. denied*, 523 U.S. 1102, 118 S. Ct. 1574, 140 L. Ed. 2d 807 (1998).

⁵⁸ Guenther's Opening Brief does not set forth the applicable standard of review in determining whether the trial court has committed reversible error in granting Mr. Joyia's motion to dismiss.

⁵⁹ CR 56(c).

real party in interest GPS Ltd.). This Court should affirm the trial court's dismissal of Guenther's Complaint.

2. *Guenther's Attempts at Service of Process by Mail Did Not Comply With CR 4(i)(1)(D) or CR 4(i)(2).*

Guenther's first issue pertaining to its assignments of error (§ III.A) erroneously conflates the burden of proof on the "actual notice" requirement of CR 15(c) with the burden of proof necessary to make a *prima facie* showing of proper service of process under CR 4(i)(1)(D). In their Opposition to Mr. Joyia's motion to dismiss before the trial court, Guenther argued that their attempted service by mail on Mr. Joyia and GPS Ltd. constituted valid service of process because it allegedly complied with CR 4(i)(1)(D). Guenther continues to stand by this argument on appeal. This argument still fails, however, because Guenther failed to provide the proof of service required by CR 4(i)(2).

CR 4(i) pertains to alternative provisions for service in a foreign country and provides as follows:

- (1) ***Manner.*** When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:
 - (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;
 - or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request;

or (C) upon an individual, by delivery to the party personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) **by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served;** or (E) pursuant to the means and terms of any applicable treaty or convention; or (F) by diplomatic or consular officers when authorized by the United States Department of State; or (G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. **The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.**

(2) ***Return.*** Proof of service may be made as prescribed by section (g) of this rule, or by the law of the foreign country, or by a method provided in any applicable treaty or convention, or by order of the court. **When service is made pursuant to subsection (1)(D) of this section, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.**⁶⁰

Guenther admits that signed return receipts were not returned by either Mr. Joyia or GPS Ltd. because Guenther's chosen method of mail was intended for domestic mail only within the United States.⁶¹ In attempt to suppress this error, Guenther asserts that their counsel's staff "calculated

⁶⁰ CR 4(i) (emphasis ours).

⁶¹ Guenther's Opening Brief at 6.

postage for international mailing, and further added in the extra fees to account for certified mailing and signed certified mailing receipt from the addressee.”⁶² Based upon Guenther’s counsel’s staff’s interpretation of the law, Guenther argues that this complied with CR 4(i)(2):

After reviewing CR 4(i), I interpreted the rule regarding service to Mr. Joyia to mean that service via Certified Mailing to his home address in Canada, was sufficient service, as each section indicates the word “or” meaning, at least one of the above forms of service was sufficient pursuant to CR 4(i).⁶³

This argument, however, ignores the fact that Guenther selected a method of mailing and a U.S.P.S. service that was not (1) “reasonably calculated, under all the circumstances, to give actual notice,” and (2) failed to provide evidence of delivery in the form of “a receipt signed by the addressee” as required by CR 4(i)(2). It is irrelevant that Guenther elected to pay extra postage (as determined by the weight of the mail on the postage scale) for international mailing where the U.S.P.S. services chosen would never provide evidence of delivery as required by CR 4(i)(2) because it was intended for domestic use only.

⁶² *Id.*

⁶³ CP at 101.

3. *Guenther Has Neither Identified Nor Offered “Other Evidence of Delivery” Under CR 4(i)(2).*

Guenther has also argued that they complied with CR 4(i)(2), which permits “other evidence of delivery to the addressee satisfactory to the court.” Guenther has not, however, identified what that “other evidence” is, how it comports with the rule or otherwise cited to any authority supporting this assertion.

While no Washington cases interpret CR 4(i)(2) and discuss “other evidence of delivery satisfactory to the court,” the language of Fed. R. Civ. P. 4(l)(2)(B) is similar to CR 4(i)(2). Fed. R. Civ. P. 4(l)(2)(B) provides that proof of service outside the United States, if made under Fed. R. Civ. P. 4(f)(2) or (f)(3) may be made “by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.”

One case from the Southern District of Florida examines this narrow issue.⁶⁴ In that case, the District Court held that the plaintiff could serve a Vietnamese defendant via Federal Express pursuant to Fed. R. Civ. P. 4(f)(3) because no applicable international agreement existed between United States and Vietnam governing service of legal documents abroad. As no international law prohibited this, pursuant to

⁶⁴ *Tracfone Wireless, Inc. v. Bitton*, 278 F.R.D. 687 (S.D. Fla. 2012).

Fed. R. Civ. P. 4(1)(2)(B), the plaintiff could file a copy of the Federal Express “proof of signature” (or substantially equivalent document) as proof that service was effectuated.⁶⁵ Thus, based on this interpretation, “other evidence of delivery” contemplates, at minimum, a document capable of providing evidence of receipt by the addressee. Guenther failed to provide such evidence in this case.

4. *Guenther’s Attempt at Service of Process by Mail Did Not Comply With CR 4(I)(1)(E) Because the Rule Does Not Contain Explicit, Affirmative Authorization for Service by International Mail Under the Hague Service Convention.*

On appeal, Guenther raises, for the first time, the argument that their attempts at service of process by mail also comply with both the Hague Service Convention and CR 4(i)(1)(E) based on their interpretation of *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). This argument fails because the Hague Service Convention does not prohibit, nor does it authorize, service by international mail and CR 4(i)(1)(E) contains no affirmative authorization for service by international mail. Thus, as discussed in detail below, Guenther was required to comply with CR 4(i)(1)(D).

⁶⁵ *Id.* at 693.

a. Relevance of the Hague Service Convention

CR 4(i)(1)(E) permits service of process “pursuant to the means and terms of any applicable treaty or convention.” In their briefing, Guenther “anticipate[s] that [Mr. Joyia] will argue that the Hague Convention is not relevant.”⁶⁶ On the contrary, Mr. Joyia did argue in the underlying briefing for the application of the Hague Service Convention and it continues to be relevant to Mr. Joyia’s arguments here.⁶⁷

The Hague Service Convention, ratified by the United States in 1965, regularized and liberalized service of process in international civil suits.⁶⁸ The primary means by which service is accomplished under the Convention is through a receiving country's "Central Authority."⁶⁹ The Convention affirmatively requires each member country to designate a Central Authority to receive documents from another member country.⁷⁰ The receiving country can impose certain requirements with respect to those documents (for example, that they be translated into the language of that country).⁷¹ If the documents comply with applicable requirements, the

⁶⁶ Guenther’s Opening Brief at 7.

⁶⁷ CP at 41-46, 163.

⁶⁸ *Brockmeyer v. May*, 383 F.3d 798 (2004).

⁶⁹ *Id.*

⁷⁰ *See* Hague Service Convention, art. 2.

⁷¹ *See id.*, art. 5.

Convention affirmatively requires the Central Authority to effect service in its country.⁷²

The Convention also provides that it does not "interfere with" other methods of serving documents.⁷³ Article 10(a) of the Convention recites:

Provided the State of destination does not object, the present Convention shall *not interfere with* --
(a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad.

At the time of the *Brockmeyer* decision, American courts disagreed about whether the phrase "the freedom to send judicial documents" in Article 10(a) includes within its meaning the freedom to *serve* judicial documents.⁷⁴ The Ninth Circuit Court of Appeals held that the "Convention permits – or, in the words of the Convention, does not ‘interfere with’ service of process by international mail, so long as the receiving country does not object."⁷⁵

The disagreement between the Circuit courts as to whether the Hague Convention permits service by mail was recently addressed by the United States Supreme Court in *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017). In *Water Splash*, the petitioner obtained permission to effect service by mail on the respondent from the trial court because the

⁷² See *id.*, arts. 4 & 5.

⁷³ *Brockmeyer*, 383 F.3d at 801.

⁷⁴ *Id.*

⁷⁵ *Id.* at 803.

respondent was a Canadian resident.⁷⁶ The respondent argued that service by mail did not comport with the requirements of the Hague Service Convention.⁷⁷ The Texas Court of Appeals held that the Hague Service Convention prohibited service by mail. The petitioner appealed to the United States Supreme Court. The United States Supreme Court held that the Hague Service Convention does not prohibit service of process by mail.⁷⁸ Likewise, it does not mean that the Convention expressly authorizes service by mail either. “Rather, service by mail is permissible if the receiving state has not objected to service by mail and if such service is authorized under otherwise-applicable law.”⁷⁹ Because the Texas Court of Appeals concluded that the Convention prohibited service by mail outright, it had no occasion to consider whether Texas law authorizes the methods of service used by petitioner. Thus, the United States Supreme Court remanded the case for these issues to be determined, to the extent they were properly preserved.⁸⁰

b. Interpreting Hague Service Convention and CR 4(i)

Similarly, in *Brockmeyer*, the Ninth Circuit held that the Hague Service Convention does not “interfere with” service of process by

⁷⁶ *Water Splash*, 137 S. Ct. at 1505.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1507.

⁸⁰ *Id.* at 1513.

international mail; however, it also held that any service by mail was required to be performed in accordance with the requirements of Fed. R. Civ. P. 4(f).⁸¹ In that case, the appellant, a British corporation, sought review of an order from the United States District Court for the Central District of California, which denied its motion to set aside a default judgment in a trademark infringement action filed by appellees, a trademark owner and his U.S. company.⁸² The appellant challenged service of process under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

The *Brockmeyer* Court found that appellees did not follow the procedure prescribed in Fed. R. Civ. P. 4(f)(2)(C)(ii) for service by international mail and that appellees did not seek the approval of the district court under Fed. R. Civ. P. 4(f)(3). Because service by international mail was not otherwise affirmatively authorized by Fed. R. Civ. P. 4(f), appellees' attempted service was ineffective, and thus, the default judgment against appellant could not stand.

After determining that the Hague Service Convention did not prohibit service by *international mail*, the *Brockmeyer* Court next analyzed Fed. R. Civ. P. 4(f) to determine whether it affirmatively authorized such

⁸¹ 383 F.3d at 799-800 (emphasis ours).

⁸² *Id.* at 801.

service. The *Brockmeyer* Court found “explicit, affirmative authorization for service by inter-national mail” in Fed. R. Civ. P. 4(f)(2)(C)(ii) which provides:

(f) “[S]ervice . . . may be effected in a place not within any judicial district of the United States:

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, ***provided that service is reasonably calculated to give notice:***

(C) unless prohibited by the law of the country, by

(ii) ***any form of mail requiring a return receipt***, to be addressed and dispatched by the clerk of the court to the party to be served.”⁸³

The language of Fed. R. Civ. P. 4(f)(2)(C)(ii) is similar, but not identical to CR 4(i)(1)(D). Nonetheless, the consistent theme between both rules is that service by mail must be (1) reasonably calculated to give actual notice (*i.e.*, a mailing method that will result in actual receipt), and (2) provide evidence of receipt. The *Brockmeyer* Court found that the appellants did not comply with the requirements of Fed. R. Civ. P. 4(f)(2)(C)(ii), as notice was not sent by the clerk of the district court, nor by a form of mail requiring a signed receipt.⁸⁴

⁸³ *Id.* at 804-05 (emphasis ours).

⁸⁴ *Id.* at 805.

Here, like the Plaintiffs in *Brockmeyer*, Guenther attempted to serve process on two Canadian defendants by using *ordinary first-class mail* (albeit Certified Mail[®] with Return Receipt[®] requested, “for domestic use only”) to send a summons and complaint from the United States to Canada. The emphasis on “ordinary first-class mail” in the preceding sentence is critical to the analysis. Ordinary first-class mail, along with the Certified Mail[®] and Return Receipt[®] services purchased by Guenther in the instant case, were not intended for international mail. For Guenther’s attempts at service of process by mail to have complied with the Hague Service Convention, CR 4(i)(1)(D) and CR 4(i)(2), the Summons and Complaint should have been mailed using the appropriate international postage (*e.g.* First-Class Mail International[®]) and services (*e.g.*, Registered Mail International[®] which provides a receipt issued by the office of mailing and a delivery record maintained at the office of destination for each registered item⁸⁵) to ensure proof of delivery.

Guenther’s assertion that “it is undisputed that the Summons and Complaint were sent by *registered* mail to both Defendants” is both inaccurate and a mischaracterization of documents that speak for

⁸⁵ USPS.COM[®], *What is Registered Mail[®] International?*, Article No. 000002918 (Sept. 24, 2020, 2:00 PM), <https://faq.usps.com/s/article/What-is-Registered-Mail-International>

themselves – this was not “registered” mail,⁸⁶ as evidenced by the Certified Mail® Receipts attached to Guenther’s declarations.⁸⁷ Guenther’s attempts at service of process by mail do not comply with the Hague Service Convention, CR 4(i)(1)(D), CR 4(i)(2) or CR 4(i)(1)(E).

5. *Guenther Failed to Comply with the Personal Service Requirement of Washington’s Long-Arm Statute.*

Notwithstanding the arguments above regarding the Hague Service Convention and CR 4(i), Guenther also failed to comply with Washington’s long-arm statute, which contains an express provision mandating *personal service*:

Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by *personally* serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.⁸⁸

A 2010 Division I Court of Appeals case succinctly summarizes the applicable legal principles:

A Washington court may assert personal jurisdiction over an out-of-state defendant if the long-arm statute is satisfied and if the assumption of jurisdiction meets the requirements of due process by comports with traditional notions of fair play and substantial

⁸⁶ This distinction is important because Registered Mail® International is a separate U.S.P.S. Service, distinguishable from both the Certified Mail® and Return Receipt® services used by Guenther in this case. USPS.COM®, *What is Registered Mail®?*, Article No. 000003144 (Sept. 24, 2020, 2:06 PM), <https://faq.usps.com/s/article/What-is-Registered-Mail>

⁸⁷ CP at 121, 138, 155; Appendices B-D.

⁸⁸ RCW 4.28.185(2) (emphasis ours).

justice. Because statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly construed.

Proper service of process is basic to personal jurisdiction. Mere receipt of process and actual notice alone do not establish valid service of process.

⁸⁹

Proper service of process requires compliance with constitutional due process requirements and with the statutory requirements proscribed by the legislature.⁹⁰ A trial court does not have jurisdiction over a defendant who is not properly served.⁹¹ Guenther maintains that its attempts at service under CR 4(i) were sufficient but ignores the salient fact that the very language of CR 4(i) and its subsections contemplates the existence of controlling statutes, rules and treaties and that CR 4(i) must be interpreted and construed in deference to such authorities. Guenther may not invoke an isolated subsection of a state civil court rule – that on its face, when read and interpreted in its entirety, gives deference to statutes, rules and treaties designed to ensure that due process of law is afforded to foreign litigants – to argue that service by mail is all that was necessary to achieve personal jurisdiction over two Canadian citizens without having first attempted to

⁸⁹ *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 584-85, 225 P.3d 1035 (2010) (internal quotations and citations omitted).

⁹⁰ *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138, 144-45 (2011).

⁹¹ *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 899, 988 P.2d 12, 17 (1999).

comply with Washington's long-arm statute (*i.e.*, service on the Secretary of State after demonstrating due diligence and an inability to achieve personal service through traditional means). Finally, Guenther's argument also ignores the fact that state law methods that are inconsistent with the Hague Service Convention are preempted by virtue of the Supremacy Clause of the United States Constitution.⁹²

A 2014 Washington Division II case, *Von Kleist v. Luksha*, is instructive on this point.⁹³ In that case, this Court held that improper service initially prevented the superior court from having personal jurisdiction over two Canadian defendants, reversing the denial of their motion to vacate a default judgment and remanding to the trial court to strike that judgment.⁹⁴ The plaintiff, Von Kleist (also a Canadian citizen), sued multiple defendants in Pierce County Superior Court. Von Kleist served a summons and verified complaint on several defendants by certified mail, including Canadian defendants Cochrane and Luksha.⁹⁵ Von Kleist moved for an order of default against all defendants for failure to appear or to indicate any intent to appear or to defend and the superior court entered an order of default

⁹² *Larson v. Kyungsik Yoon*, 187 Wn. App. 508, 515, 351 P.3d 167, 171 (2015).

⁹³ *Von Kleist v. Luksha*, Nos. 43138-6-II, 43718-0-II, 43885-2-II, 43318-4-II, 43335-4-II, 43425-3-II, 2014 Wash. App. LEXIS 306 (Ct. App. Feb. 4, 2014). Per GR 14.1(a), please take notice that this is an unpublished opinion with no precedential value and is not binding on any court. It may, nonetheless, be accorded such persuasive value as this Court deems appropriate.

⁹⁴ *Id.* at *1.

⁹⁵ *Id.* at *7.

against all defendants, including Cochrane and Luksha. Cochrane and Luksha moved to vacate the default judgments, arguing that they were void under CR 60(b)(5) for lack of personal jurisdiction over them. The superior court denied their motion; Cochrane and Luksha appealed. This Court held that because Cochrane and Luksha did not consent to service by mail, Washington's long arm statute governed service of process over them and that Von Kleist did not properly serve them in person outside the state with his first motion for default so as to confer personal jurisdiction.⁹⁶ This Court rejected Von Kleist's argument that service by mail under CR 4(i)(1)(D) established personal jurisdiction over Cochrane and Luksha noting that neither had consented to service by mail.

Here, as in *Von Kleist*, Guenther's attempts at service by mail under CR 4(i)(1)(D) were insufficient to confer personal jurisdiction over Mr. Joyia and GPS Ltd. There is no evidence in the record, nor has Guenther argued, that Mr. Joyia and GPS Ltd. consented to service by mail. In sum, Guenther failed to meet their burden of demonstrating a *prima facie* case of sufficient service of process. Because Guenther failed to meet their initial burden, Mr. Joyia need not provide additional evidence that service was

⁹⁶ *Id.* at *12.

improper, and the trial court did not err in granting Mr. Joyia's motion to dismiss.

B. Guenther's Motion to Amend Their Complaint Was Properly Denied Because Guenther Failed to Meet Their Burden of Proof.

1. Standard of Review.

The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.⁹⁷ A trial court's action in passing on a motion for leave to amend will not be disturbed on appeal except for a manifest abuse of discretion or a failure to exercise discretion.⁹⁸ A manifest abuse of discretion arises when "the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'"⁹⁹

In Guenther's Assignment of Error No. C, Guenther asserts "that the Court erred in not granting Plaintiffs' Motion to Amend."¹⁰⁰ Guenther, however, failed to identify the alleged error they attribute to the trial court's exercise of discretion in denying their motion. Neither has Guenther argued or demonstrated that the trial court's exercise of discretion in denying their motion was manifestly unreasonable or based upon untenable grounds. Following oral argument on Guenther's motion to amend, the trial court

⁹⁷ *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Etc.*, 100 Wn.2d 343, 351, 670 P.2d 240, 244 (1983).

⁹⁸ *Id.* at 351.

⁹⁹ *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052, 1060 (2017).

¹⁰⁰ Guenther's Opening Brief at 1.

made rulings that reflected careful consideration of the briefing, the argument of the parties and the potential prejudice to Guenther. There was no manifest abuse of discretion by the trial court in denying Guenther's motion to amend their Complaint. The trial court's ruling is consistent with the facts and applicable legal standards, and this Court should affirm the decision denying Guenther's motion to amend their Complaint.

2. *Guenther Failed to Meet Their Burden for Relation Back of Their Proposed Amended Complaint.*

A party may seek leave of court for an amendment changing the party against whom a claim is asserted.¹⁰¹ An amendment changing the party against whom a claim is asserted relates back if the claim arises out of the same transaction or occurrence set forth in the original pleading and, within the period provided by law for commencing the action against that party: (1) the party being added has received notice of the action so that the party will not be prejudiced in maintaining a defense on the merits; (2) the party being added knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it; and (3) any delay in making the amendment is not due to inexcusable neglect or a conscious decision or strategy.¹⁰² Those

¹⁰¹ CR 15(c); *Nepstad v. Beasley*, 77 Wn. App. 459, 467, 892 P.2d 110 (1995).

¹⁰² *Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002); *see also LaRue v. Harris*, 128 Wn. App. 460, 465, 115 P.3d 1077 (2005).

requirements are meant to ensure an identity of interest between the new and old parties so that due process may be satisfied.¹⁰³ Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.¹⁰⁴ An amended pleading will not relate back under CR 15(c) when these prerequisites are not met.¹⁰⁵ The burden of proof to prove the condition precedent under CR 15(c) is on the party seeking the relation back of an amendment.¹⁰⁶

3. *Guenther's Mailing of the Complaint Did Not Provide Actual or Constructive Notice*

Guenther argues that GPS Ltd. received actual notice on September 11, 2019 by mail which was “well within the limitations period.” Guenther relies heavily upon CR 5, which they argue creates the presumption that the mail was received by at least September 16, 2019. This argument fails, however, because CR 5 applies only *after* the original service of the summons and complaint.¹⁰⁷ Just as Guenther has failed to meet their burden that Joyia and GPS Ltd. were properly served, Guenther has failed to meet their burden that GPS Ltd. had actual or constructive notice of the lawsuit.

¹⁰³ *Kitsap Cty. Fire Prot. Dist. No. 7 v. Kitsap Cty. Boundary Review Bd.*, 87 Wn. App. 753, 764, 943 P.2d 380 (1997).

¹⁰⁴ *Public Util. Dist. No. 1 v. Walbrook Ins. Co.*, 115 Wn.2d 339, 349, 797 P.2d 504 (1990).

¹⁰⁵ *Id.*

¹⁰⁶ *Segaline v. Dept of Labor & Indus.*, 169 Wn.2d 467, 476-77, 238 P.3d 1107 (2010).

¹⁰⁷ *Jones v. Stebbins*, 67 Wn. App. 896, 841 P.2d 791 (1992), *aff'd*, 122 Wn.2d 471, 860 P.2d 1009 (1993).

4. *Where Guenther Had Easily and Actually Ascertained the Identity of GPS Ltd. and Failed to Name GPS, Ltd., Guenther's Failure Was Inexcusable Neglect.*

When leave to add an additional defendant is sought, inexcusable neglect alone is sufficient to deny the motion.¹⁰⁸ The nonmoving party need not show prejudice.¹⁰⁹ When the plaintiff has filed suit against the incorrect defendant, inexcusable neglect precluding amendment to substitute the correct defendant is present only if the correct defendant was easily ascertainable during the statute of limitations period.¹¹⁰ The moving party has the burden to show that any mistake in failing to amend a pleading in a timely manner was excusable.¹¹¹

Although CR 15(c) does not explicitly mention it, Washington courts have made clear that amendments adding parties will not relate back if the omission resulted from inexcusable neglect.¹¹² The requirement prevents harmful gamesmanship.¹¹³ Therefore, when faced with an amended pleading adding parties, the court must establish whether the

¹⁰⁸ *Haberman v. Washington Pub. Power Sys.*, 109 Wn.2d 107, 173, 744 P.2d 1032 (1987) (emphasis ours); see generally *Perrin v. Stensland*, 158 Wn. App. 185, 197–98, 240 P.3d 1189 (2010).

¹⁰⁹ *Haberman*, 109 Wn.2d at 173–74.

¹¹⁰ *Martin*, 182 Wn.2d at 290–91.

¹¹¹ *Watson v. Emard*, 165 Wn. App. 691, 700, 267 P.3d 1048 (2011).

¹¹² *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223–24, 691 P.2d 575 (1984) (finding inexcusable neglect); *Kitsap Cty. Fire Prot. Dist. No. 7 v. Kitsap Cty. Boundary Review Bd.*, 87 Wn. App. 753, 764, 943 P.2d 380, 386 (1997) (finding inexcusable neglect).

¹¹³ *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 492 n.10, 145 P.3d 1196 (2006).

requirements of CR 15(c) are met, and whether failure to amend the pleading earlier was the result of inexcusable neglect.¹¹⁴

Generally, inexcusable neglect exists when no reasons for the failure to name the party appears in the record. If the parties are apparent, or are ascertained on reasonable investigation, the failure to name them will be held inexcusable.¹¹⁵ Cases finding inexcusable neglect have generally considered the neglect of a party's attorney, who is charged with researching and identifying the parties to be named in a lawsuit, and with verifying information that is available as a matter of public record.¹¹⁶ A party is charged with its attorney's failure to research and identify necessary parties.¹¹⁷

a. Guenther Admitted They Knew the Identity of the Proper Party During the Statute of Limitations.

Here, the identity of the correct defendant, GPS Ltd., was easily ascertainable and known to Guenther during the statute of limitations period. The subject collision giving rise to the underlying action occurred on October 31, 2016.¹¹⁸ Under RCW 4.16.080(2), Guenther had three (3)

¹¹⁴ *Haberman*, 109 Wn.2d at 173.

¹¹⁵ *Segaline v. Department of Labor & Indus.*, 169 Wn.2d 467, 477, 238 P.3d 1107 (2010); *Stansfield*, 146 Wn.2d at 122; *Watson v. Emard*, 165 Wn. App. 691, 700, 267 P.3d 1048 (2011).

¹¹⁶ *See Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 707, 142 P.3d 179 (2006); *Nepstad*, 77 Wn. App. at 467.

¹¹⁷ *Watson*, 165 Wn. App. at 700.

¹¹⁸ CP at 4-5.

years from the date of the subject collision (October 31, 2019) to commence litigation against Mr. Joyia and GPS Ltd. Guenther filed their action on August 28, 2019.¹¹⁹ Guenther personally served the incorrect defendant, GPS LLC, on August 29, 2019.¹²⁰ Guenther’s Opening Brief does not address the reason for their failure to name GPS Ltd. for purposes of its request that its proposed amendment “relate back.” Instead, Guenther has argued that the “inexcusable neglect” prong has been eliminated and thus fails to address it in its entirety.

Nonetheless, by Guenther’s own admission, Guenther became aware of (1) their mistake in naming GPS LLC as a defendant and (2) the identity of the true defendant, GPS Ltd., when Mr. Dhindsa telephoned Guenther’s counsel “on or about August 29, 2019.”¹²¹ Guenther’s counsel verified the DOT information for GPS Ltd. provided by Mr. Dhindsa and found it to be correct.¹²² Guenther does not dispute that the identity of GPS Ltd. was easily ascertained and *actually* ascertained ninety days before November 26, 2019.

In their motion for reconsideration, Guenther disingenuously characterized their mistake as a “completely understandable and excusable

¹¹⁹ CP at 3.

¹²⁰ CP at 104.

¹²¹ CP at 102, 140; Appendix A.

¹²² *Id.*

[typo].”¹²³ However, Guenther ignores the fact that they affirmatively pled the identity of GPS LLC in their original Complaint as “a registered company located in Bellingham, Washington at all times relevant to this Complaint” and provided a sworn declaration outlining the steps taken to locate GPS LLC’s registered agent and mailing address in Washington.¹²⁴ Moreover, Guenther’s proposed amended complaint identified GPS Ltd. as “a Canadian Limited Company located at 8621 168 Street, Surrey, BC, VAN 6A8 at all times relevant to this Complaint.”¹²⁵ This is not an example of a few bad keystrokes or misspelled word; Guenther’s mistake cannot fairly be characterized as a mere “typo.” Thus, the trial court’s denial of Guenther’s motion to amend should be affirmed.

b. Guenther’s Argument that the Inexcusable Neglect Prong has been Abolished is an Inaccurate Statement of Washington law.

Guenther argues that the “inexcusable neglect” prong has been eliminated by Washington Courts presumably based upon two sentences written by the Washington State Supreme Court in *Martin v. Dematic*, 182 Wn.2d 281 (2014):

We originally adopted the “inexcusable neglect” requirement from the federal courts and their analogous federal civil procedure rule. We note that the United States Supreme Court has now eliminated “inexcusable neglect”

¹²³ CP at 206.

¹²⁴ CP at 4; 100-01.

¹²⁵ CP at 86.

from its analogous rule. See *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010). However, the parties have neither addressed *Krupski* nor asked us to consider similarly eliminating our “inexcusable neglect” requirement. Thus, we leave that issue for another day.¹²⁶

Since the Washington Supreme Court published its decision in *Martin* in 2014, however, the Washington courts have not abolished the inexcusable neglect requirement. Instead, the Washington Courts, relying upon *Martin*, have continued to disallow amendments if the delay in adding the new defendant resulted from inexcusable neglect.¹²⁷

Guenther’s argument rests solely upon *Martin*. In *Martin*, the wife and estate of a man who was killed by a machine at the paper plant where he worked sought damages for wrongful death and survival.¹²⁸ The action was filed against several companies within the statutory time limitation. After the three-year period expired, the plaintiffs filed an amended complaint to add another company as a defendant who they had not previously identified. The company moved for dismissal by summary judgment on the grounds that the amendment was time barred.

¹²⁶ *Id.* at 291.

¹²⁷ See, e.g., *McKee v. Chelan Cnty.*, 2015 U.S. Dist. LEXIS *10 (E.D. Wash. June 29, 2015); *Smith v. Monster Bev. Corp.*, 2016 U.S. Dist. LEXIS 60008 *5 (W.D. Wash. May 5, 2016); *Price v. Gonzalez*, 4 Wn. App. 2d 67, 73, 419 P.3d 858 (2018).

¹²⁸ *Martin*, 182 Wn.2d at 284-87.

The trial court entered a summary judgment in favor of the company, ruling that (1) the claim did not relate back under CR 15(c) because the plaintiffs did not demonstrate excusable neglect in identifying the company as a defendant, (2) the statutory time limitation was not tolled because naming the installer did not identify the company with “reasonable particularity,” and (3) the claim was not timely under the discovery rule because even if the discovery rule applied to the case, the plaintiffs did not demonstrate reasonable diligence in ascertaining the company.

On appeal, Division One of the Court of Appeals affirmed the judgment, holding that the amended complaint did not relate back due to inexcusable neglect, that the complaint did not toll the statutory time limitation, and that the discovery rule did not apply.¹²⁹ The Supreme Court reversed and remanded, holding that the plaintiffs' failure to timely identify the company was not due to inexcusable neglect absent proof by the company that its identity was easily ascertainable before the statutory time limitation expired. Here, unlike the plaintiff in *Martin*, Mr. Joyia offered undisputed proof that GPS Ltd.'s identity was easily ascertainable and known to Guenther before the statutory time limitation expired.

¹²⁹ *Martin v. Dematic*, 178 Wn. App. 646, 315 P.3d 1126 (2013).

The *Martin* Court also noted that although some of the publicly available documents could have pointed Martin to one of several related corporate entities, it would have been difficult for Martin to specifically identify which of the corporate entities was the proper defendant under the available information during the limitations period.¹³⁰ The only information in the record that would have pointed Martin to a related corporate entity was the combination of a news article announcing a corporate acquisition and documents on file with the secretary of state showing a link between the corporate entities.¹³¹ In other words, no single document could have allowed Martin to “connect the dots” and ascertain the identity of the proper defendant within the limitations period.¹³²

Again, unlike the plaintiff in *Martin*, Guenther does not contend that they could not have discovered the identity of GPS Ltd. before the expiration of the limitations period. On the contrary, Guenther was able to easily identify GPS Ltd. and verify its information within the limitations period using its DOT number.¹³³ Guenther provided proof of their verification of the same as an exhibit attached to a declaration.¹³⁴

¹³⁰ *Martin*, 182 Wn.2d at 291.

¹³¹ *Id.* at 291-92.

¹³² *Id.*

¹³³ CP at 102, 140.

¹³⁴ *Id.*; Appendix A.

Guenther has offered no argument as to why the Court should depart from precedent and decline to apply well-established Washington law. Guenther failed to give a reasonable excuse for their failure to name GPS Ltd. as a defendant within the limitations period; this failure constituted inexcusable neglect sufficient to bar the relation back of an amendment to substitute GPS Ltd. as a party. There is no evidence that the trial court manifestly abused its discretion and committed reversible error in denying Guenther's motion to amend their Complaint.

C. Guenther Was Not Entitled to An Evidentiary Hearing Under CR 43(e)(1).

1. Standard of Review.

A trial court's decision whether to allow oral testimony at a summary judgment hearing is discretionary. This is supported by the language of CR 43(e)(1) which states that the trial court "may" allow oral testimony at a hearing on a motion.¹³⁵ Whether or not the trial court orders oral testimony to be given, pursuant to CR 43(e)(1), in situations involving motions based on facts not appearing of record; is a matter for its discretion; its ruling will not be disturbed unless a manifest abuse of such discretion is shown.¹³⁶

¹³⁵ *Landberg v. Carlson*, 108 Wn. App. 749, 754-55, 33 P.3d 406, 408-09 (2001).

¹³⁶ *Rivard v. Rivard*, 75 Wn.2d 415, 419-20, 451 P.2d 677, 680 (1969).

2. *Guenther's Arguments Regarding Its Entitlement to An Evidentiary Hearing Under CR 43(E)(1) Are Not Based on Facts in the Appeal Record.*

At the outset, the plain language of CR 43(e)(1) contemplates situations involving “motion[s] based on facts not appearing of record.” As the moving party, Guenther submitted a declaration from their counsel with facts supporting their motion to amend; that declaration is part of the trial court record.¹³⁷ There is no evidence in the record to suggest that the trial court denied Guenther’s motion to amend “based on facts not appearing of record.” Moreover, there is no evidence in the record that Guenther sought an evidentiary hearing under CR 43(e)(1) during the motion hearing. Indeed, Guenther raised this issue for the first time in its motion for reconsideration.¹³⁸ The trial court properly denied this motion.¹³⁹

Guenther contends that “the [trial court], by granting Defendant’s Motion to Dismiss appears to have made the finding that they did not receive their mail.”¹⁴⁰ This characterization is both confusing and misleading. As explained above, the trial court properly granted Mr. Joyia’s motion to dismiss because Guenther failed to demonstrate a *prima facie* case of sufficient service of process. No findings of fact were included in the

¹³⁷ CP at 90-91.

¹³⁸ CP at 207-208.

¹³⁹ CP at 219.

¹⁴⁰ Guenther’s Opening Brief at 14.

order.¹⁴¹ Similarly, the trial court properly denied Guenther's motion to amend due to Guenther's inexcusable neglect in failing to amend their Complaint to substitute GPS Ltd. for GPS LLC within the limitations period. Likewise, there are no findings of fact included in that order.¹⁴²

Guenther elected not to file a Verbatim Report of Proceedings as part of the appeal record. Thus, it is inappropriate for Guenther to now ask this Court to consider and rule on Guenther's speculative arguments about the oral rulings and findings made by the trial court following oral argument on both motions.

3. *No Presumptions Required Rebuttal by Mr. Joyia Where Guenther Failed to Demonstrate a Prima Facie Case of Sufficient Service of Process and There Were No Conflicting Affidavits.*

The requirements for service of process under the Hague Service Convention and CR 4(i) are not identical to the actual notice requirement of CR 15(c). Indeed, the requirements for service of process are much more stringent than those required for actual notice under CR 15(c). Unfortunately, Guenther's characterization of the issue in § III.C and its arguments in § V.C of their Opening Brief have conflated the two requirements.

¹⁴¹ CP at 192-93.

¹⁴² CP at 195-96.

Mr. Joyia addressed Guenther's arguments and reliance on *Woodruff* in his opposition to Guenther's motion for reconsideration.¹⁴³ Guenther has once again offered the *Woodruff* case as support for its contention that the trial court abused its discretion by not holding an evidentiary hearing to allow witnesses to be cross-examined to determine the facts necessary for a just determination.¹⁴⁴ The present case, however, is distinguishable from *Woodruff*.

In *Woodruff*, the plaintiff seller had already established the *prima facie* showing necessary to meet his burden on service of process.¹⁴⁵ The defendant buyer submitted a competing affidavit stating that he was not at his residence on the day of the alleged service and that witnesses at the residence were not served.¹⁴⁶ The court found that the competing affidavits presented an issue of fact that could only be resolved by a determination of the credibility of the witnesses.¹⁴⁷

Unlike *Woodruff*, there were no competing affidavits on the service of process issue that presented an issue of fact whose resolution required a determination of witness credibility as Guenther contends. Mr. Joyia does

¹⁴³ CP at 214-15.

¹⁴⁴ Guenther's Opening Brief at 15; *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936, 938 (1994).

¹⁴⁵ *Id.* at 209.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

not contend that Guenther never mailed him copies of the Summons and Complaint. Rather, Mr. Joyia contends that Guenther's method of service failed to comply with the Hague Service Convention and CR 4(i), and that Guenther cannot provide the proof of receipt required to demonstrate sufficient service of process.

4. *An Evidentiary Hearing Regarding Proof of "Actual Notice" Under CR 15(C) Would Not Have Resulted in a Different Outcome on Guenther's Motion to Amend.*

Guenther contends, for the first time on appeal, that GPS Ltd. had actual notice as required by CR 15(c) because proof of mailing gives rise to a presumption that the mail was in fact received.¹⁴⁸ Assuming, *arguendo*, that GPS Ltd. did in fact have actual notice as required by CR 15(c) as Guenther posits, Guenther would still not be entitled to an evidentiary hearing under CR 43(e)(1) because there is no competing affidavit from GPS Ltd. on this issue. An evidentiary hearing on the actual notice issue would not have resulted in a different outcome where Guenther had already failed to demonstrate that their failure to identify and substitute GPS Ltd. for GPS LLC was not the result of inexcusable neglect. Moreover, the trial court could not have commanded GPS Ltd. to appear and give testimony at an evidentiary hearing where it did not have jurisdiction over GPS Ltd. due

¹⁴⁸ Guenther's Opening Brief at 12.

to Guenther's defective service of process. Notice without proper service is not enough to confer jurisdiction.¹⁴⁹

Thus, the trial court did not abuse its discretion in denying Guenther's request for an evidentiary hearing as stated in its motion for reconsideration.

VI. COSTS ON APPEAL

Respondent respectfully requests that the Court award Respondent its costs on appeal pursuant to RAP 14.1 – 14.6.

VII. CONCLUSION

Based on the evidence and the foregoing discussion of law, the trial court's order granting dismissal of Guenther's claims against Mr. Joyia and GPS Ltd. should be affirmed, as should the trial court's order denying Guenther's motion to amend their Complaint. Under the facts described herein and presented to the trial court, Guenther's omissions were fatal to its case. For these reasons and others developed above, this Court should affirm the decisions of the trial court.

¹⁴⁹ *In re Logg*, 74 Wn. App. 781, 875 P.2d 647 (1994).

Submitted this 5th day of October, 2020.

HOLT WOODS & SCISCIANI LLP

s/Kelsey L. Shewbert

s/Audrey C. Chambers

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Attorneys for Respondent Joyia and
GPS Ltd.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Holt Woods & Scisciani LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>C/O Appellants</u> Aaron K. Owada Richard Skeen Sean Walsh Owada Law, PC 975 Carpenter Rd NE, Ste 204 Lacey, WA 98516 Fax: (360) 489-1877	(X) Via U.S. Mail () Via Legal Messenger () Via Facsimile (X) E-Service via COA, Div. II (X) Via E-Mail aaron.owada@owadalaw.net richard.skeen@owadalaw.net sean.walsh@owadalaw.net
<u>C/O Respondent GPS, LLC</u> Vishavjeet Dhindsa Registered Agent Galaxy Pacific Services, LLC 4010 Kramer Lane Bellingham, WA 98226-7761	(X) Via U.S. Mail () Via Legal Messenger () Via Facsimile () E-Service via COA, Div. II () Via E-Mail

DATED this 5th day of October, 2020, at Seattle, Washington.

s/Christie Kramer

Christie Kramer, Legal Secretary

APPENDIX – A

G P S GALAXY PACIFIC SERVICES LTD (British Columbia Transport Company)

Company Overview

G P S GALAXY PACIFIC SERVICES LTD is an active carrier operating under USDOT Number 2045912 and MC Number 717155.

Total Trucks	14
Tractors Owned	14
Trailer Owned	18
Total Drivers	17

USDOT (UNIQUE IDENTIFIER FOR TRANSPORT COMPANIES OPERATING COMMERCIAL VEHICLES HAULING CARGO IN INTERSTATE COMMERCE REGISTERED WITH THE FMCSA) 2045912

MC NUMBER (MOTOR CARRIER NUMBER IDENTIFIES A CARRIER TRANSPORTING REGULATED COMMODITIES IN INTERSTATE COMMERCE) 717155

MCS-150 Mileage Year 2018

MCS-150 DATE (DATE FROM THE MCS-150 REGISTRATION FORM.) 20190418

MCS-150 MILEAGE (MILEAGE FROM THE MCS-150 REGISTRATION FORM.) 1147218

Does G P S GALAXY PACIFIC SERVICES LTD transport Hazardous Material? No

Carrier Operation (Interstate - Truck driver transports across State lines, or wholly within one State as part of a through movement that originates or terminates in another State. Intrastate - Truck driver transports wholly within one State.) Interstate

G P S GALAXY PACIFIC SERVICES LTD in business since 20100615

Get Paid Fast! Save Big on Fuel

Apex.

- Low Competitive Rates
- No Monthly, Minimum Volume Fees
- No Long-Term Contracts

Work with a Factor You Can Trust!

Company Contact Info

G P S GALAXY PACIFIC SERVICES LTD //
 8521 168 Street
 Surrey, BC V4N 5A6
 ☎ (G P S Galaxy Pacific Services Ltd Phone) 604-592-5355 (tel:6045925355)
 📠 (G P S Galaxy Pacific Services Ltd Fax) 604-533-5836 (fax:6045925355)

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Add Freight Broker Company (https://www.t
Find Loads/Trucks (https://www.quicktransport
Search Trucking Companies (https://www.quicktranspc
Refrigerated Trucking Companies (https://www.quicktr
FMCSA C
CDL Physical Exam Locations (https://www.quicktr
Freight Factoring Companies (https://www.qi
Ready to grow your Business? (https://
Truck Driving Schools (https://www.quicktran
Truck Stops (https://www.quicktran
Truck & Trailer Wash Locations (https://www.quick
Daily Fuel Prices (https://www
Freight Forwarders (https://www.quick
Process Agents (https://www.quicktr
Truck Service & Repair Companies (https://www.quick
Cargo Insurance (https://www.quicktrans
Trucking News (https://www
Trucking Resources (https://www
Computer Science Scholarships (https://www.quicktr
Green Transport (https://www.quicktr
Trucking Freight Glossary (https://www.qi
A/R Collection Companies (https://www.quicktranspo
Drug & Alcohol Random Programs (https://www.c
DOL Trucking Jobs Report (https://www.quit

Cargo Hauled by G P S GALAXY PACIFIC SERVICES LTD

Fresh Produce	General Freight	Household
Building Materials	Machinery	Grain Feed Hay
Meat	DryBulk	Refrigerated Food
Beverages	Paper Products	

APPENDIX – B

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\$	3.50
Extra Services & Fees (check box, add fee as appropriate)	
<input checked="" type="checkbox"/>	Return Receipt (hardcopy) \$ 2.80
<input type="checkbox"/>	Return Receipt (electronic) \$
<input type="checkbox"/>	Certified Mail Restricted Delivery \$
<input type="checkbox"/>	Adult Signature Required \$
<input type="checkbox"/>	Adult Signature Restricted Delivery \$

Postmark
Here

Postage

\$ 2.71

Total Postage and Fees

\$ 9.01

Sent to Muhammad Jovik

Street and Apt. No., or PO Box No. 13406 122 AVE SURREY BC

City, State, ZIP+4® CANADA V3X1K4

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

APPENDIX – C

7018 2290 0002 2078 8569

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

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OFFICIAL USE

Certified Mail Fee	\$ 3.60
Extra Services & Fees (check box, add fee as appropriate)	
<input checked="" type="checkbox"/> Return Receipt (hardcopy)	\$ 2.60
<input type="checkbox"/> Return Receipt (electronic)	\$ _____
<input type="checkbox"/> Certified Mail Restricted Delivery	\$ _____
<input type="checkbox"/> Adult Signature Required	\$ _____
<input type="checkbox"/> Adult Signature Restricted Delivery	\$ _____
Postage	\$ 2.71
Total Postage and Fees	\$ 9.01

Postmark
Here

Sent To	M. Jomin
Street and Apt. No., or PO Box No.	16498 W 21A Ave
City, State, ZIP+4®	Sumner BC Can. V3X 1K4

PS Form 3800, April 2015 PSN 7530-02-000-90-17 See Reverse for Instructions

APPENDIX – D

701A 2290 0002 207A 8552

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For delivery information, visit our website at www.usps.com ®.	
OFFICIAL USE	
Certified Mail Fee \$ 2.50	Postmark Here
Extra Services & Fees (check box, add fee as appropriate)	
<input checked="" type="checkbox"/> Return Receipt (hardcopy) \$ 2.00	
<input type="checkbox"/> Return Receipt (electronic) \$	
<input type="checkbox"/> Certified Mail Restricted Delivery \$ <input type="checkbox"/> Adult Signature Required \$ <input type="checkbox"/> Adult Signature Restricted Delivery \$	
Postage \$ 2.71	
Total Postage and Fees \$ 9.01	
Sent To GPS	
Street and Apt. No., or PO Box No. 852-1100 St	
City, State, ZIP+4® Surrey BC, Can. V4A 5A6	
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HOLT WOODS & SCISCIANI LLP

October 05, 2020 - 10:47 AM

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