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No. 62947-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANDREW HERRICK,

Appellant,

v.

ELISABETH LOELIGER,

Respondent.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

ORIGINAL

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I. REPLY

A. Loeliger Now Concedes The Trial Court Had Jurisdiction

Before the trial court, Loeliger argued it lacked subject matter jurisdiction.¹ Now, before this court, it concedes, as it must, that the statute of limitations affirmative defense does not affect a court's jurisdiction.²

B. The Amended Complaint Related Back To The Original Filing Under CR 15(c)

Loeliger concedes that she had notice of this lawsuit within the statute of limitations period.³ Indeed, she concedes that all the elements of CR 15(c) are met, except for the judicially created requirement of inexcusable neglect.

It is unsettled whether the additional requirement of inexcusable neglect applies to cases where the amended complaint simply corrects a misspelling of the defendant's name.⁴ There are cases suggesting it does not. Division Two of the Court of Appeals has said:

¹ CP 34.

² Respondent's Brief ("RB") at 5 n.2.

³ RB at 17-18.

⁴ *Nepstad v. Beasley*, 77 Wn. App. 459, 467-68, 892 P.2d 110 (1995).

...we question whether the "inexcusable neglect" case law applies to bar relation back where a party has incorrectly identified the defendant. The Supreme Court has applied the "inexcusable neglect" inquiry "in cases where leave to amend to add *additional* defendant[s] has been sought..." ... The court announced that the inexcusable neglect requirement applied to joinder of additional parties, but never stated that the requirement applied to cases of substitution to correct a mistaken identity.^[5]

Division One of the Court of Appeals has also expressed discord with the additional requirement:

We have reservations about adding to a rule a requirement not suggested by the language of the rule. The cases cited in support are not persuasive. The requirements of fairness and absence of prejudice are met by the stated requirements of the rule.^[6]

Even our Supreme Court has acknowledged reservations about the added requirement:

A third factor, inexcusable neglect, added by the court was **not intended to alter the rule favoring relation back, but rather to prevent harmful gamesmanship.** ... [T]he purpose of CR 15(c) is to permit amendment, provided the defendant is not prejudiced and has notice. A broad construction of the inexcusable neglect standard undermines this rule and interferes with the resolution of legitimate controversies.⁷

⁵ *Id.* at 467 (emphasis and brackets in original). *Cf. Teller v. APM Terminals Pac.*, 134 Wn. App. 696, 708-11, 142 P.3d 179 (2006).

⁶ *Miller v. Issaquah Corp.*, 33 Wn. App. 641, 646, 657 P.2d 334 (1983).

⁷ *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 492, 145 P.3d 1196 (2006).

(Emphasis added).

In *DeSantis v. Angelo Merlino and Sons, Inc.*, the plaintiff brought suit for personal injuries against Angelo Merlino d/b/a Merlino Pure Food Products Company, a proprietorship.⁸ Mr. Merlino was actually only a vice president and five percent stockholder in a corporation, Angelo Merlino and Sons, Inc.⁹ The plaintiff, upon learning that he misidentified that defendant, moved to amend the complaint after the statute of limitations had ran.¹⁰ The trial court denied the motion, and dismissed the action pursuant to the statute of limitations defense.¹¹ On appeal, the court reversed, citing the liberal construction rule of CR 15(c) and noting that there was no prejudice in allowing the amendment to relate back because the parties had a "sufficient identity of interest."¹² The court did not require the plaintiff to show lack of inexcusable neglect. In overruling the trial court, the

⁸ 71 Wn.2d 222, 427 P.2d 728 (1967).

⁹ *Id.*

¹⁰ *Id.* at 223.

¹¹ *Id.*

¹² *Id.* at 224-25.

court concluded, "to hold otherwise would be to sanction manifest injustice."¹³

Herrick discussed *Nepstad v. Beasley* in his opening brief, but a few points are worthy of reiteration here.¹⁴ During settlement negotiations between Nepstad and the insurer, "Beasley" was identified as the "insured."¹⁵ The plaintiff mistakenly named Beasley, the mother of the driver, in the complaint.¹⁶ The Court of Appeals held that it was error for the trial court not to allow the amended complaint to relate back. While the court questioned the additional requirement of inexcusable neglect, it nonetheless found that the plaintiff's failure to properly name the defendant was not inexcusable.¹⁷

Here, the Court should hold that inexcusable neglect is not a requirement for relation back when the right party was sued, but by the wrong name. If, however, the Court is inclined to require Herrick to show inexcusable neglect, he can easily do so. As in *Nepstad*, in

¹³ *Id.*

¹⁴ See Appellant's Brief ("AB") at 7-8.

¹⁵ *Id.* at 462.

¹⁶ *Id.* at 461.

¹⁷ *Id.* at 466.

correspondence between Loeliger's insurer, Allstate, and Herrick, Robert Loeliger was identified as the "insured."¹⁸ This lead Herrick to believe Elisabeth Loeliger was married to Robert. Moreover, Herrick hired a private investigator, who identified Robert as Elisabeth's husband.¹⁹ When Herrick brought suit, he mistakenly misspelled Elisabeth as Elizabeth. There can be no question that Herrick intended to sue the Elisabeth Loeliger who crashed into him.²⁰ Misspelling a person's name by one letter is excusable.

Spelling Elisabeth's name incorrectly and believing she was married to Robert Loeliger does nothing to adversely effect Elisabeth Loeliger's substantive rights. She still has the same opportunity to present defenses, same exposure to litigation costs, and same damages reducing arguments that she would have had if her name was correctly spelled initially.

¹⁸ *See, e.g.*, CP 40.

¹⁹ CP 19.

²⁰ *See, e.g.*, CP 40, which is a Herrick's settlement proposal to Allstate in which he stated that "he was struck from behind by **Elisabeth Loeliger**." (emphasis added to show Herrick at all times intended to bring his claim against Elisabeth). Furthermore, if Elisabeth has a mother named Elizabeth, which there is no evidence of in the record, the potential for name confusion was profuse, and such confusion was excusable.

Loeliger goes to great lengths in her brief to argue there are two Elisabeths, one that spells her name with a "z" and the other with an "s". Loeliger's argument is that Herrick initially intended to sue Elisabeth's alleged mother, so the wrong party was before the court, and hence, the amended complaint added an additional party-defendant. This argument should fail for several reasons.

First, the alleged mother, Elizabeth, was never before the court. Elisabeth was the *only* party-defendant who appeared before the court. Robert Loeliger was dismissed based on Herrick's own motion.²¹ "Elizabeth" was never dismissed from the lawsuit.²² If Loeliger's argument were true that Elisabeth's mother was sued, then that would mean she is still a party-defendant in this case. No one contends that.

Not only was "Elizabeth" never dismissed from this lawsuit, but the trial court explicitly allowed Herrick to correct the misspelling of Elizabeth to Elisabeth.²³ In the declaration supporting the motion to

²¹ CP 18-32.

²² Before the trial court, Loeliger claimed that Elizabeth Loeliger and Robert Loeliger retained separate counsel and were dismissed from the lawsuit before the amended complaint was filed. CP 33. That allegation was blatantly false.

²³ CP 18-32.

correct the spelling of Elisabeth, dated June 17, 2008, Herrick's counsel stated:

This change would remove Robert Loeliger as Defendant and **correctly reflect the spelling of Defendant's first name.**^[24]

In his motion, Herrick requested the trial court allow him to change the spelling of Elizabeth to Elisabeth "**to properly reflect the correct first name spelling of the Defendant;**"²⁵ not to change the defendant, but to change the spelling of the named defendant that was before the court. Elisabeth Loeliger did not oppose that motion, and thereby conceded the obvious, that her name was simply misspelled in the original complaint.

Moreover, there is nothing in the record to substantiate that there are two Elisabeths. Loeliger asks this Court to take judicial notice of the allegation that there are two persons, one named Elisabeth Loeliger and the other Elizabeth Loeliger,²⁶ citing *Fusato v.*

²⁴ CP 19 (emphasis added).

²⁵ CP 28 (emphasis added).

²⁶ RB at 12, n.3.

*Washington Interscholastic Activities Ass'n.*²⁷ Loeliger failed to acknowledge that appellate courts are governed by RAP 9.11.

Under Evidence Rule 201, trial courts may take judicial notice in certain circumstances:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The *Fusato* opinion states the source of the alleged fact must be of "indisputable accuracy and verifiable certainty."²⁸ When an appellate court is asked to take judicial notice of an alleged fact, "RAP 9.11 applies in addition to the normal judicial notice standard."²⁹ "Even though ER 201 states that certain facts may be judicially noticed at any stage of the proceedings, RAP 9.11 restricts appellate consideration of additional evidence on review."³⁰

²⁷ 93 Wn. App. 762, 772, 970 P.2d 774 (1999).

²⁸ *Id.* at 772.

²⁹ *Spokane Research & Defense Fund v. Connor*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

³⁰ *Id.* (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000)).

In *Fusato*, the appellate court was reviewing the trial court's decision to judicially notice a fact.³¹ The appellate court was not being asked to judicially notice a fact that was not in the appellate record, as Loeliger is asking of this court.

The internet source Loeliger relied on in its judicial notice request does not meet the indisputably accurate and verifiably certain requirement. Loeliger also failed to satisfy the six requirements of RAP 9.11. As such, Loeliger's request for this court to take judicial notice of facts not in the record should be denied.

Loeliger also argued in her brief that Herrick admitted he sued the wrong party.³² That is not true. In his motion requesting leave to change the spelling of the defendant's name from Elizabeth to Elisabeth, it is clear that Herrick intended to sue Elisabeth, and simply misspelled her name by one letter. In response to Loeliger's motion to dismiss filed six months later, Herrick responded to the allegations by stating "presumably" – that is, based on defense counsel's unsupported accusations – presumably Elisabeth is the daughter of Robert and Elizabeth Loeliger. That statement was an assumption based on an

³¹ 93 Wn. App. at 771.

³² RB at 18.

unsupported statement, not an admission that Herrick sued the wrong party. Herrick clearly intended to sue Elisabeth Loeliger.

The cases relied upon by Loeliger, *Harberman v. Wash. Pub. Power Supply Sys.*,³³ *South Hollywood Hills Citizens Ass'n v. King County*,³⁴ and *Tellinghuisen v. King County Council*,³⁵ all involve situations where the plaintiff sought to add a new party; a party the plaintiff did not initially intend to sue. In *Haberman*, the plaintiffs admitted that, prior to the statute of limitations expiring, they did not know the identity of the defendants they sought to add.³⁶ In *South Hollywood Hills Citizens*, it was undisputed that the plaintiffs did not intend to sue, and did not initially sue, the owners of the real estate at issue in their original complaint.³⁷ In *Tellinghuisen*, it was undisputed that the plaintiffs did not initially sue a welding business or the named

³³ 109 Wn.2d 107, 744 P.2d 1032 (1987).

³⁴ 101 Wn.2d 68, 677 P.2d 114 (1984).

³⁵ 103 Wn.2d 221, 691 P.2d 575 (1984).

³⁶ 109 Wn.2d at 174.

³⁷ 101 Wn.2d at 72.

defendants' spouses.³⁸ Unlike those cases, here, Herrick intended to sue Elisabeth Loeliger.

This case is more analogous to *DeSantis v. Angelo Merlino and Sons, Inc.*³⁹ and *Roberts v. Michaels*.⁴⁰ The *Roberts* case was discussed in Herrick's opening brief at pages 8-9. In *Roberts*, the plaintiff sued the right party by the wrong name.⁴¹ The plaintiff sued her employer, who conducted business under the fictitious name "Midsouth Vending."⁴² The employer was actually incorporated by Ron Michaels as Midsouth Food Vending Service, Inc.⁴³ Since the plaintiff could not locate a business entity named Midsouth Vending, it sued "Ron Michaels d/b/a Midsouth Vending."⁴⁴ After the statute of limitations had ran, the plaintiff learned she misnamed the defendant, and moved to amend her

³⁸ 103 Wn.2d 222.

³⁹ 71 Wn.2d 222, discussed above at page 3.

⁴⁰ 219 F.3d 775 (8th Cir. 2000). *See also, Montalvo v. Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970); *Maier v. Koletsos*, 823 F. Supp. 497 (N.D. Ill. 1993); *Washington v. T.G. & Y. Stores CO.*, 324 F. Supp. 849 (W.D. La. 1971)

⁴¹ 219 F.3d at 777-78.

⁴² *Id.* at 777.

⁴³ *Id.*

⁴⁴ *Id.*

complaint and to have it relate back.⁴⁵ Relying on the misnomer rule, the appellate court reversed the trial court's denial of allowing the amended complaint to relate back.⁴⁶ The court noted that all the express requirements of Federal Rule 15(c) were met.⁴⁷ "What was involved was, at most, a mere misnomer that injured no one, and there is no reason why it should not have been corrected by amendment."⁴⁸

As in *Roberts* where the plaintiff intended to sue her employer, but misnamed it in her complaint, here, Herrick intended to sue Elisabeth Loeliger – the woman who crashed into him. There is no dispute that Elisabeth Loeliger was timely served. There is no dispute that Elisabeth Loeliger had timely notice of the suit. There is no dispute that Elisabeth Loeliger knew, but for a mistake, she would have been correctly named. Additionally, if there is an Elizabeth Loeliger (a fact not in the record) the potential for name confusion was abundant, and such confusion would not rise to the level of inexcusable neglect.

⁴⁵ *Id.*

⁴⁶ *Id.* at 779.

⁴⁷ *Id.* at 778-79.

⁴⁸ *Id.* at 778.

In her brief, Loeliger dismisses the cases of *LaRue v. Harris*⁴⁹ and *Craig v. Ludy*.⁵⁰ But, in each of those cases, unlike here, the plaintiff sued the wrong party, and the court of appeals still held that the amended complaint changing the party-defendant related back.⁵¹ Loeliger argued that since there was a "public record" – a police report – that listed the correct spelling of her name, Herrick's spelling error was inexcusable. However, death certificates are also "public records," but neither court in *Larue* and *Craig* held that the plaintiffs' failure to name the correct party (the estate) was inexcusable just because a public death record existed.

In summary, Herrick intended to sue Elisabeth Loeliger, the woman who negligently crashed into him. Loeliger concedes all the explicit requirements of CR 15(c) are satisfied. The right party has always been before the court. Loeliger does not claim that the misspelling has caused her any prejudice. She simply claims that the misspelling was inexcusable. The case law discussed above holds otherwise. Should there be any doubt, that doubt must be resolved in

⁴⁹ 128 Wn. App. 460, 115 P.3d 1077 (2005).

⁵⁰ 95 Wn. App. 715, 976 P.2d 1248 (1999).

⁵¹ Estates are separate entities with their own tax identification numbers. *See, e.g.*, IRS Publication 559 at page 2 (discussing the personal representative's duty to obtain a tax identification number for the estate).

favor of Herrick because CR 15(c) "is to be liberally construed on the side of allowance of amendments, particularly where the opposing party is put to no disadvantage."⁵² The courts always favor resolution of disputes on their substantive merits.⁵³

C. Loeliger Waived The Statute Of Limitations Defense

1. Civil Rule 8(c) Should Mean What It Says

Civil Rule 8(c) should mean what it clearly states, affirmative defenses "shall" be pled in the answer. In *Harris v. U.S. Dep't of Veterans Affairs*, the court acknowledged that some circuits permit parties to raise affirmative defenses for the first time in dispositive motions where no prejudice is shown.⁵⁴ After a thorough analysis, the court rejected that position:

This approach subtly alters the structure dictated by Rules 8(c) and 15(a) in two ways. First, it apparently relieves the moving party of the need to request amendment, and the District Court of the need to state and explain its grant of leave to amend, so long as the opposing party does not show prejudice. This change allows parties to omit affirmative defenses in pleadings strategically, in violation of the notice purpose. It will often prove difficult for a party to support a claim of prejudice in circumstances involving only inconvenience

⁵² *Nepstad v. Beasley*, 77 Wn. App. 459, 466, 892 P.2d 110 (1995) (quoting *DeSantis v. Angelo Merlino and Sons, Inc.*, 71 Wn.2d 222, 225, 427 P.2d 728 (1967)).

⁵³ *Craig*, 95 Wn. App. at 718-19.

⁵⁴ 126 F.3d 339, 344 (D.C. Cir. 1997).

or surprise. And, by the time the opposing party raises the prejudice claim, a strategic advantage may already have been gained by the party who failed to amend its pleading. By contrast, if the District Court systematically follows the procedural structure required by Rule 8(c) and 15(a), it can conduct its own inquiry in every case into the circumstances of the delay, and need not rely solely on a convincing showing of prejudice by one party. It likely will articulate the basis for the amendment, and will not simply approve it as a matter of course.

Second, automatically permitting late raising of affirmative defenses where no prejudice has occurred reduces the multifarious reasons for denying leave to amend envisioned by the Court in *Foman* to single, non-exhaustive factor of prejudice. Improper circumstances, such as "undue delay, bad faith or dilatory motive on the part of the movant, [or] repeated failure to cure deficiencies by amendments previously allowed," *Foman*, 371 U.S. at 182, 83 S.Ct. at 230, do not necessarily result in quantifiable prejudice to an opposing party. Nonetheless, taken collectively rather than individually, they may undercut the fairness and efficiency of litigation generally.⁵⁵

In *Funk v. F&K Supply, Inc.*, the court rejected the defendants' argument, stating that "[t]he general rule in this Circuit is that the statute of limitations must be asserted in a party's responsive pleading at the earliest possible moment and is a personal defense that is waived

⁵⁵ *Id.* at 344-45 (citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). See also, *Culpepper v. Snohomish County Dep't of Planning and Comm. Devel.*, 59 Wn. App. 166, 176, 796 P.2d 1285 (1990) (citing *Foman v. Davis* with approval).

if not promptly pleaded."⁵⁶ As in *Harris*, the court acknowledged that a few circuits allow the defense to be raised for the first time on motion.⁵⁷

The court rejected that rule, reasoning:

This more forgiving authority also is suspect. If a party is permitted to raise an affirmative defense by motion, Rule 8(c) is emasculated to the point of nullity. Moreover, the view is inconsistent with the notice function of Rule 8(c) and the discretionary design of Rule 15.^[58]

Here, Loeliger did not plead the statute of limitations as an affirmative defense in her answer.⁵⁹ She also never sought leave to amend her answer to add the defense. If CR 8(c) and 15(a) are to be meaningful, the Court should hold Loeliger's unpled defense was waived.

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⁵⁶ 43 F. Supp. 2d 205, 221 (N.D. N.Y. 1999) (citing *Davis v. Bryan*, 810 F.2d 42, 44 (2nd Cir. 1987) (quoting *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1155 (2nd Cir. 1968))) (internal quotations omitted).

⁵⁷ *Id.*

⁵⁸ *Id.* at 222.

⁵⁹ That Loeliger's counsel sent Herrick's counsel a letter mentioning the possibility of a statute of limitations defense should not alleviate Loeliger from her duty to comply with the civil rules. Affirmative defenses must be raised in a responsive pleading under CR 8(c), and must be signed by the attorney under CR 11. Neither of these requirements was met.

2. Loeliger waived the statute of limitations defense by conduct that was dilatory and contradictory

Loeliger offers no rationale for why she waited nearly one year after the litigation commenced, and six months after consenting to the trial court's authorization to change the spelling of her name, to raise the statute of limitations defense before the court. As stated above, Herrick made it clear in his motion to amend the case caption that he originally intended to sue Elisabeth, but misspelled her name by one letter. Loeliger's consent to the motion was entirely contradictory to her motion, six months later, to dismiss this case based on the misspelling of her name. Loeliger's conduct was dilatory and contradictory, thus resulting in a waiver of the defense.

II. CONCLUSION

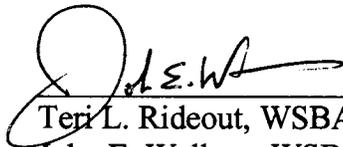
Herrick intended to sue Elisabeth Loeliger. He accidentally misspelled her name by one letter. Loeliger admits that all the express elements of CR 15(c) are satisfied. She only challenges the court made rule of inexcusable neglect, which should not apply to misnomer cases. Regardless, it is excusable to have a minor misspelling of a defendant's name. It would be a manifest miscarriage of justice to preclude Herrick from his day in court simply because he misspelled the defendant's name by one letter. Moreover, Loeliger waived the statute of

limitations defense by not pleading it in her answer and by conduct that was dilatory and contradictory.

DATED this 7th day of August, 2009.

Respectfully submitted,

RUMBAUGH, RIDEOUT, BARNETT & ADKINS



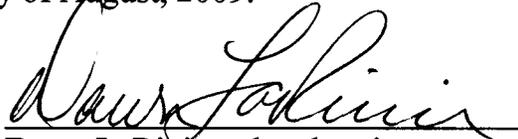
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CERTIFICATE OF SERVICE

I certify that on the date entered below, I sent via email and first class mail a copy of this reply brief to:

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DATED this 7th day of August, 2009.



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