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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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NO. 63539-5-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

KEVIN RANDALL PERRIN and CINDY PERRIN,
husband and wife and the marital community thereof,

Appellants,

v.

JEFF STENSLAND and JANE DOE STENSLAND, husband and wife,
and the marital community thereof; HATTIE VAN WEERDUIZEN ,

Defendants

DALE VAN WEERDUIZEN, Personal Representative of the Estate of
Gordon Van Weerduizen ,

Respondent

RESPONDENT DALE VAN WEERDUIZEN'S RESPONSE BRIEF

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I. INTRODUCTION

Plaintiffs waited approximately two years and 11 months after the automobile accident at issue to file their complaint. Months before they filed the complaint, one of the parties involved in the automobile accident, Gordon Van Weerduizen, died. Plaintiffs' attorney was advised by his process server before the three year statute of limitations expired that Mrs. Van Weerduizen, who was also named in the complaint as a defendant, was a widow. According to his declaration, plaintiffs' attorney "did not notice" his process server's notification that Gordon Van Weerduizen had died. Plaintiffs, and their attorney, did nothing to attempt to pursue any claim against the personal representative of the Estate of Gordon Van Weerduizen before the statute of limitations ran on August 15, 2006.

Then, in response to written discovery requests, Mrs. Van Weerduizen identified herself as a widow. Once again, according to his declaration, plaintiffs' attorney "did not notice" this September 26, 2006 response clearly showing Gordon Van Weerduizen died on March 20, 2006. No attempt was made at that time to pursue any claim against the Estate of Gordon Van Weerduizen.

Finally, six months after the original complaint was filed, plaintiffs filed the amended complaint at issue in this appeal, and, for the first time named the personal representative of the Estate of Gordon Van

Weerduizen. The personal representative and Mrs. Van Weerduizen then moved to dismiss the lawsuit. The personal representative argued that the statute of limitations had run. Hattie Van Weerduizen argued she should be dismissed because the community of Mr. and Mrs. Van Weerduizen dissolved upon the death of Gordon Van Weerduizen. The trial court granted both motions. Plaintiffs appeal only the dismissal of the claim against the personal representative. Thus, while plaintiffs listed both Hattie Van Weerduizen and personal representative, Dale Van Weerduizen, as respondents in their brief, the only true respondent is the personal representative.

To prevail on this appeal, the plaintiffs must show that the trial court abused its discretion in applying the "relation back" elements under CR 15(c). In particular, the plaintiffs must convince this Court that the trial court abused its discretion in finding that the failure of the plaintiffs to timely pursue their claim against the personal representative constituted inexcusable neglect.

II. COUNTER STATEMENT OF THE CASE

Plaintiffs begin their Statement of the Case on page 3 of their brief by stating that "unbeknownst to" the plaintiffs or their counsel, Gordon Van Weerduizen had died before they filed their complaint. There is no evidence in the record concerning what the plaintiffs knew as of July,

2006 with respect to the death of Gordon Van Weerduizen. There was no affidavit or declaration submitted by the plaintiffs concerning their knowledge of the death of Gordon Van Weerduizen. The only declaration came from plaintiffs' counsel.

There is also no indication on the record as to why the plaintiffs, and their attorney, waited until nearly 2 years and 11 months to file their complaint. Plaintiffs argue in their brief at page 27 that they "cannot be faulted" for waiting until one month before the three-year statute expired before filing their lawsuit. Certainly, plaintiffs had the right to wait until the very last minute to file their complaint. However, by doing so, the plaintiffs and their attorney assumed the risk of what could go wrong by waiting so long. In light of this invited peril, plaintiffs' attorney had a heightened obligation to at least review the return of service documentation and not ignore the notice of Gordon Van Weerduizen's death.

Plaintiffs' counsel then received discovery responses from Mrs. Van Weerduizen on September 26, 2006 identifying herself as a widow as of March 20, 2006. (CP 36) Plaintiffs' attorney stated in his declaration that he "did not notice" this response to the discovery requests just as he "did not notice" his process server's notification in July that Mrs. Van Weerduizen was a widow. (CP 30)

Plaintiffs state on page 5 of their brief that the plaintiffs and their attorney did not "learn" that Gordon Van Weerduizen had died until the Estate's probate lawyer served plaintiffs and their attorney with a Notice to Creditors in December, 2006. The plaintiffs' attorney was advised of the death of Gordon Van Weerduizen in July, 2006.

In the trial court, plaintiffs made numerous arguments in opposition to defendants' motions to dismiss. The only relevant arguments for purposes of this appeal concern the arguments relating to CR 15(c). In the trial court, defendants argued in their reply brief that the plaintiffs had not shown the required elements of CR 15(c). (CR 25-26) Defendants argued plaintiffs had not shown that the personal representative, Dale Van Weeerduizen, had the required notice of the lawsuit and knowledge of the asserted mistake in identity within the three year statute of limitations. Defendants also argued that the plaintiffs' delay in naming the personal representative was inexcusable. The trial court reviewed the materials submitted, listen to arguments and found that plaintiffs did not satisfy the elements of CR 15(c), in particular, the requirement of excusable neglect. The trial court stated that "I think it was not excusable neglect, and I think that the notice was there, and the opportunity to resolve the problem by plaintiffs was available, and they did not do that when they had actual knowledge". RP 25. The trial court

went on to state in its opinion: "My reading of the circumstances in this case is that it is not excusable neglect, and there was an option available to the plaintiffs which was to ask for the appointment of a personal representative or an administrator, and that was not done, and then, therefore, the service, the filing of the new complaint and service of that was well beyond the running of the statute of limitations." RP 25. The trial court also found that: "The plaintiffs knew or should have known well before the statute of limitations ran that Mr. Gordon Van Weerduizen had passed away." RP 25-26.

II. SUMMARY OF ARGUMENT

To prevail on this appeal, the plaintiffs must prove that the trial court abused its discretion in deciding the amended complaint filed in February 2007 did not relate back for statute of limitations purposes to the original filing in July, 2006. The burden was and still is on the plaintiffs to show that the new defendant, personal representative Dale Van Weerduizen,[1] received notice of this lawsuit before the three-year statute of limitations ran and that the personal representative knew or should have known before the three-year statute of limitations ran on August 15, 2006

[1] Plaintiffs refer in their brief to "the deceased Dale Van Weerduizen" (p. 14), the Estate of Dale Van Weerduizen (p. 16) and to "Dale Van Weerduizen's death" (p. 26). Obviously, it was Gordon Van Weerduizen who died. As the saying goes, news of Dale Van Weerduizen's death has been greatly exaggerated by plaintiffs.

that, but for a mistake in the identity of the proper party, the lawsuit would have been brought against him.

Plaintiffs did not prove any of these requirements of CR 15(c) and cannot now do so on appeal. They failed to offer any evidence for the trial court to consider as to whether the personal representative had any notice of this suit or knew about any asserted identity mistake before August 15, 2006. The plaintiffs' "community of interest" imputed notice and knowledge theory dealing with what an insurance carrier might have known or what Hattie Van Weerduizen's attorney might have known should be rejected.

To prevail on this appeal, the plaintiffs must also convince this Court that the trial court abused its discretion when it determined that plaintiffs failed to show excusable neglect. As the trial court stated in its opinion, the plaintiffs' attorney was advised that Gordon Van Weerduizen had died, but failed to pursue a claim against any personal representative before the three-year statute of limitations expired and failed to file the amended complaint naming the personal representative until six months later. The trial court did not abuse its discretion in finding the delay and conduct was inexcusable.

III. ARGUMENT

A. Standard of review

A determination of relation back under CR 15(c) rests within the trial court's discretion and will not be disturbed on appeal absent manifest abuse of discretion. *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670, P.2d 240 (1983); *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986). The burden of proof is on the party seeking to have an amendment relate back. *Foothills*, 46 Wn. App. at 375. The moving party has the burden of proving that any mistake in failing to amend in a timely fashion was excusable. *Tellinghuisen v. King County Council,* 103 Wn.2d 221, 224, 691 P.2d 2 575 (1984); *Foothills*, 46 Wn. App. at 375. This finding as to excusable neglect is also reviewed based on an abuse of discretion standard.

B. CR 15(c) Relation Back Elements

Under CR 15(c), an amendment changing a defendant may relate back to the date of the original complaint if three conditions are satisfied: (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading (not at issue in this case); (2) **within the applicable statute of limitations**, the party to be brought in by the amendment

received notice of the action such that it will not be prejudiced in maintaining a defense on the merits; and (3) **within the applicable statute of limitations**, the party to be brought in knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party. *Foothills,* 46 Wn App. at 374-375. All of these elements must be proven by the moving party to the satisfaction of the trial court. *Kiehn v. Nelson's Tire Co.*, 45 Wn. App. 291, 724 P.2d 434 (1986) (The failure to prove each element of CR 15(c) is fatal to the relation back of an amended complaint).

In addition to these CR 15(c) requirements, an amended complaint changing or adding a defendant will relate back only if the plaintiff also convinces the trial court that the delay in naming the new defendant was the result of excusable neglect. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987) ("[I]n cases where leave to amend to add additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion."). *Teller v. APM Terminals Pacific, Ltd.,* 134 Wn. App. 696, 142 P.3d 179 (2006); *Tellinghuisen,* 103 Wn.2d at 224. If the correct defendant is apparent, or ascertainable upon reasonable investigation, the failure to timely name him is inexcusable. *Haberman*, 109 Wn.2d at 174; *Tellinghuisen*, 103 Wn.2d at 224; *Foothills*, 46 Wn.

App. at 376. For example, failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record. *Haberman*, 109 Wn.2d at 174; *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 77-78, 677 P.2d 114 (1984).

Plaintiffs' discussion in their brief of cases involving a substitution of the named **plaintiff** is inapplicable and unhelpful. This case involves naming a new **defendant**, not substituting a new plaintiff under CR 17 (a).

C. Trial Court Did Not Abuse It's Discretion As To The CR 15(c) Elements

Plaintiffs offered no evidence in opposition to the motion to dismiss showing, in any way, that the defendant added by way of the amended complaint, personal representative Dale Van Weerduizen, received notice of the lawsuit before August 15, 2006. Plaintiffs likewise offered no evidence in opposition to the motion to dismiss showing in any way that Dale Van Weerduizen knew or should have known, by August 15, 2006, that the lawsuit would have been brought against him as the personal representative instead of Gordon Van Weerduizen. Defendants pointed out these deficiencies to the trial court. Without offering any evidence proving these factors, plaintiffs cannot legitimately argue on appeal that the trial court abused its discretion in rejecting plaintiffs' relation back argument.

Plaintiffs recognize this lack of proof and assert in their brief at page 21 that it makes no difference under CR 15(c) if the defendant to be added had knowledge of the lawsuit at any time, let alone before the statute of limitations ran. Plaintiffs' argument on appeal relies upon a fictitious imputed "community of interest" knowledge theory. The plaintiffs assert that, because an insurance carrier may have been involved, somehow unproven knowledge that the insurance carrier might have had is imputed to the personal representative. They also argue that the attorney appearing for Mrs. Van Weerduizen also eventually appeared for the personal representative after the amended complaint was filed and, therefore, unproven knowledge of the attorney is somehow imputed to the personal representative.

First, it makes no sense to suggest that insured defendants should be treated differently than uninsured defendants under CR 15(c). Second, and more importantly, the record is barren of any evidence as to what the insurance carrier knew as of August 15, 2006. In other words, plaintiffs' argument is that whatever knowledge the insurance carrier had before the statute of limitations ran is imputed to Dale Van Weerduizen. But, plaintiffs made no attempt to introduce any evidence as to what the insurance carrier knew as of August 15, 2006. There was no evidence, for example, that a claims representative for the insurance carrier knew that,

in Washington, only personal representatives of an estate can be sued or that, when a plaintiff files a lawsuit against a deceased insured, the plaintiff will eventually file an amended complaint and name a personal representative as the defendant. There is no evidence the insurance carrier even knew who Dale Van Weerduizen was before August 15, 2006. Without any such evidence, there is nothing to impute to the personal representative.

Third, the fact that an attorney for a widow (Hattie Van Weerduizen) might also eventually represent a personal representative (Dale Van Weerduizen) when that personal representative was added to the lawsuit by way of an amended complaint should not be dispositive of any CR 15(c) issue. In this case, a different attorney could have been appointed to represent the personal representative after the amended complaint was filed and served in February, 2007. The ultimate choice of the attorney is of no consequence. *See also Foothills,* 46 Wn. App. at 376 (Fact that attorney for one party knew of lawsuit irrelevant as to attempt to relate back filing bringing in new party also represented by that attorney). There is also no evidence in this record that the attorney for the widow knew, on or before August 15, 2006, that the plaintiffs would eventually file a lawsuit and that Dale Van Weerduizen would eventually be appointed as a personal representative and would eventually be served

with an amended complaint. Hattie Van Weerduizen's attorney did not even represent Dale Van Weerduizen until months after the statute of limitations expired. Any knowledge the attorney may have had certainly cannot be imputed to a person before the attorney even represents that person.

Plaintiffs discuss cases from Division III to support their novel imputed "community of interest" knowledge argument. Division I has never adopted such an imputed knowledge theory with respect to CR 15(c), and for good reason. CR 15(c) requires the plaintiff prove that the **party** being added to the lawsuit by amendment had certain notice and knowledge. The rule does not provide that the party to be brought in by amendment "or his agent, attorney, insurer" had such notice or knowledge. Such an imputed notice and knowledge standard would require discovery into the notice and knowledge of insurance carriers, attorneys or other asserted agents when the plaintiff cannot prove that the party to be brought in as a defendant by amendment had the requisite timely notice and knowledge.

Even if this Court were inclined to adopt this imputed notice and knowledge standard, the plaintiffs have not shown that the trial court abused its discretion in refusing to apply this imputed standard under these facts. Once again, plaintiffs made no attempt to show what the insurance

carrier knew as of August 15, 2006 or how or what knowledge was imputed to the personal representative, who was not even appointed as the personal representative until August 15, 2006. Plaintiffs made no attempt to show what the widow's defense counsel knew or why that attorney's knowledge should be dispositive. The plaintiffs on appeal rely on speculation, not evidence presented to the trial court.

Further, to suggest that an insurance carrier and a personal representative eventually brought in as a defendant always share a "community of interest" at all times, and thus knowledge or notice to an insurance carrier constitutes knowledge or notice to the personal representative, rests on faulty assumptions. As noted above, there is no evidence in this case that the insurance carrier knew about estate procedures in Washington or knew that personal representatives needed to be appointed and named as defendants. To suggest that knowledge of insurance carriers is binding upon and imputed to a personal representative who is not even a named insured under the policy is likewise unsupportable. The insured in this case was the deceased, Gordon Van Weerduizen, not Dale Van Weerduizen. (CP 48) There is no evidence that the insurance carrier even knew who Dale Van Weerduizen was or agreed to consider him an insured under any policy until March, 2007 (CP 48), which is long after the statute of limitations expired in August, 2006.

Finally, an insurance carrier is not always aligned with every insured for all purposes.

This Court need not even entertain this imputed notice and "community of interest" knowledge standard as to Dale Van Weerduizen. Plaintiffs did not prove the asserted imputed knowledge and did not prove excusable neglect, as discussed in more detail below, and cannot now show that the trial court abused its discretion. If this Court agrees, this Court should affirm the dismissal and leave for another day the question of whether and to what extent, imputed notice and "community of interest" knowledge can successfully be asserted by a proponent of a relation back theory under CR 15(c).

D. Trial Court Did Not Abuse Its Discretion As To the Excusable Neglect Requirement of CR 15(c).

Presumably recognizing the uphill battle in proving abuse of discretion with respect to the excusable neglect element, plaintiffs begin their argument by suggesting there is no requirement that a proponent of relation back prove excusable neglect. This is mistaken. Even the Division III cases prominently cited by plaintiff under their imputed knowledge argument (discussed above) held that the plaintiff bringing in a personal representative as a defendant must prove excusable neglect to the satisfaction of the trial court. *Craig v. Ludy*, 95 Wn. App. 715, 720, 976

P.2d 1248 (1999) (Amendment adding the personal representative is not allowed if the delay in substituting the personal representative is because of excusable neglect); *Schwartz v. Douglas*, 98 Wn. App. 836, 840, 991 P.2d 665 (2000) (Any delay in amending to name personal representative that is the result of excusable neglect will not support a relation back argument under CR 15(c).) These cases are consistent with other cases from the Washington Supreme Court and all divisions of the Court of Appeals. *See Tellinghuisen*, 103 Wn.2d at 224; *Teller*, 134 Wn. App. at 708.

Excusable neglect is clearly an element that must be proven to the satisfaction of the trial court to succeed on a relation back theory under CR 15(c) and the trial court has discretion to decide whether the plaintiff has met that burden. This is so whether a plaintiff attempts to characterize the amendment as a "substitution" instead of what it truly is, an amendment naming a new party defendant. This attempt by plaintiffs to confuse a substitution of named plaintiffs under CR 17(a) with adding a new defendant under CR 15(c) is unhelpful.

Here, the undisputed evidence showed that the plaintiffs' attorney knew right after the lawsuit was filed that the driver he had sued, Gordon Van Weerduizen, was dead. Plaintiffs' attorney had more than three weeks to determine if a personal representative had been appointed. If he

was unable to make such a determination or if no personal representative had been appointed, the attorney could have simply petitioned for appointment of a personal representative of the estate, just as the trial court noted in oral argument and just as plaintiffs' counsel did in *Banzeruk v. Estate of Howitz*, 132 Wn App. 942, 135 P.3d 512 (2006) rev den 159 Wn. 2d 1016 (2007); *see also* RCW 11.28.120(6). In *Banzenuk*, this Court dealt with a similar issue involving a defendant in an automobile accident who had died before the lawsuit was filed. The plaintiffs' attorney, upon finding out about the death, petitioned for appointment of a personal representative and filed an amended complaint.

Plaintiffs argue in their brief at page 27 that the trial court's reasoning was faulty because there was no estate to serve before August 15, 2006. Plaintiffs' counsel did not need to wait for a personal representative to be appointed and could have had a personal representative appointed, just as the trial court stated. Plaintiffs' counsel failed to do so, not because of a lack of time, but because he claimed he simply did not notice his process server's advise that Gordon Van Weerduizen had died. Arguments about whether three weeks would be enough time to get a personal representative appointed ring hollow on appeal since the simple fact is, no attempt was ever made.

Plaintiffs' attorney was again advised in September, 2006, that Mrs. Van Weerduizen was a widow and had been a widow since March, 2006. Plaintiffs' attorney stated in his declaration that he "did not notice" this disclosure either. Plaintiffs argue in their brief that they did not "learn" that Gordon Van Weerduizen had died until they received the Notice to Creditors from the estate on December 20, 2006. That assertion is disingenuous, as noted above.

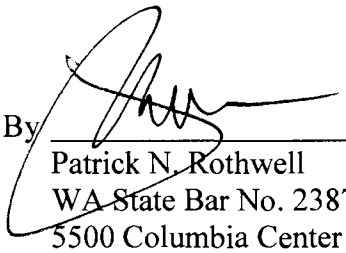
The trial court listened to the arguments, considered the material submitted, including the declaration of plaintiffs' counsel and, exercising its discretion, decided that the excusable neglect standard had not been met. There is no basis for the Court to decide the trial court abused its discretion finding inexcusable neglect by plaintiffs' counsel in waiting until February, 2007 to file the amended complaint.

IV. CONCLUSION

The trial court's dismissal of the claim against Dale Van Weerduizen, as personal representative of the Estate of Gordon Van Weerduizen, should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of October, 2009.

Davis Rothwell Earle & Xóchihua, P.C.



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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 30, 2009, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of RESPONDENT DALE VAN WEERDUIZEN'S RESPONSE BRIEF addressed to:

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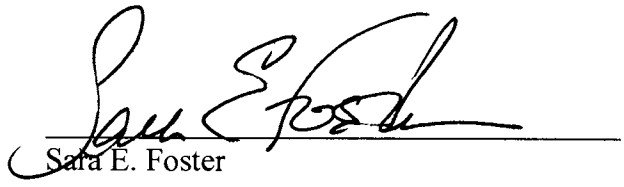

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