

WS445-7

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ORIGINAL

NO. 656457

IN THE COURT OF APPEALS,  
OF THE STATE OF WASHINGTON,  
DIVISION I

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ZAYNEB FAROLE, a single women, *Appellant*,

v.

JENNIFER GILLIAM and JOHN DOE GILLIAM, wife and husband, and  
the marital community thereof, *Respondents*,

CHANDRA PRATT and JOHN DOE PRATT, wife and husband, and the  
marital community thereof, *Defendants*.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CHERYL CAREY

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

**INTRODUCTION**..... 1

**APPELLANT’S REPLY**..... 4

A. Respondent claims that the trial court’s determination of relation back under CR 15(c) is reviewed under an Abuse of Discretion standard. This court recently rejected that view..... 4

B. Respondent seeks to manufacture an issue regarding whether Ms. Gilliam received notice that she was named “as a defendant” rather than simply received notice of the action, as the rule requires..... 5

C. Respondent’s citation to the recently-decided *Perrin* case is unavailing. The *Perrin* case supports Ms. Farole’s position in this appeal..... 7

D. *Perrin*’s analysis of “inexcusable neglect” strongly supports Ms. Farole’s position in this appeal..... 14

E. The *Teller* case is distinguishable..... 21

F. Respondent’s claim that Ms. Farole did not conduct a reasonable investigation is unavailing..... 24

**CONCLUSION**..... 25

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Craig v. Ludy</i> , 95 Wn. App. 715, 717, 976 P.2d 1248 (1999), <i>review denied</i> , 139 Wn.2d 1016, 994 P.2d 844 (2000).....	10, 11
<i>DeSantis v. Merline &amp; Sons, Inc.</i> , 71 Wn.2d 222, 233, 427 P.2d 728 (1967).....	9, 10
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 173, 750 P.2d 254 (1988).....	20
<i>Krupski v. Costa Crociere S. p. A.</i> , ___ U.S. ___, 130 S. Ct. 2485, 2496, 177 L. Ed.2d 48 (2010)...	5, 14, 17
<i>LaRue v. Harris</i> , 128 Wn. App. 460, 115 P.3d 1077 (2005).....	10, 11, 13
<i>Nepstad v. Beasley</i> , 77 Wn. App. 459, 892 P.2d 110 (1995).....	2, 4, 22, 23
<i>North Street Association v. City of Olympia</i> , 96 Wn.2d 359, 368, 635 P.2d 721 (1981).....	20, 23
<i>Perrin v. Stensland</i> , 240 P.3d 1189, 2010 WL 4159290 (2010).....	2, 4, 5, 7-20, 23, 25
<i>Schwartz v. Douglas</i> , 98 Wn. App. 836, 837, 991 P.2d 665, <i>review denied</i> , 141 Wn.2d 1003, 10 P.3d 404 (2000).....	10, 11, 13, 21
<i>Sidis v. Brodie/Dohrmann, Inc.</i> , 117 Wn.2d 325, 327, 815 P.2d 781 (1991).....	4
<i>South Hollywood Hills Citizens Ass'n v. King County</i> , 101 Wn.2d 68, 78, 677 P.2d 114 (1984).....	20
<i>Teller v. APM Terminals Pacific, Ltd.</i> , 134 Wn. App. 696, 142 P.3d 179 (2006).....	2, 21-23

***Tellinghuisen v. King County Council,***  
103 Wn.2d 221, 223, 691 P.2d 575 (1984)..... 5, 20

***Veradale Valley Citizens' Planning Comm. v.***  
***Bd. of County Comm'rs of Spokane County,***  
22 Wn. App. 229, 238, 588 P.2d 750 (1978)..... 19

**STATUTES**

RCW 4.16.170..... 3

**REGULATIONS AND RULES**

CR 15(c)..... passim

## INTRODUCTION

Ms. Farole's argument in this appeal involves several steps, and for her position to prevail, each step must be accepted. But each step is established. The first element of CR 15(c) is met because the amended pleading arises out of the same occurrence as the original pleading: the June 23, 2005 accident. The second element of CR 15(c), regarding notice and prejudice to the defendant, is met because Ms. Gilliam received notice of the institution of the action prior to the expiration of 90 days following the filing of the complaint, an attorney appeared for her at insurance company expense within days of receiving notice and represents her at insurance company expense to this day, and the insurance company indemnifies her liability exposure up to \$25,000 and Ms. Farole has offered to settle the case against her for that amount. Further, the insurance company, which has a "community of interest" with her, has been on notice of the events of this case every step of the way. Ms. Gilliam will suffer no prejudice whatsoever in maintaining a defense on the merits. The third element of CR 15(c) is met because Ms. Gilliam knew she was the driver of the vehicle in the accident, so she knew or should have known that "but for a mistake concerning the identity of the proper party, the action would have been brought against her." CR 15(c).

An inexcusable neglect analysis does not apply because the only

person ever named as a defendant and alleged to be at-fault in this action is the *driver* of the vehicle which struck Ms. Farole in the accident. The Amended Complaint did not seek to join a new entity or party. Rather, it substituted Chanda Pratt or Jennifer Gilliam, in the alternative, as the at-fault driver who struck the rear of Ms. Farole's car. In cases in which the amended complaint changes the name of a previously misnamed but identified defendant (e.g., the driver of the car), rather than adding a new defendant (e.g., an insurance company, mechanic, municipality, etc.), an inexcusable neglect analysis has not been applied by the Washington Supreme Court. *See Nepstad* at 467; *Teller* at 708-09.

Even if an inexcusable neglect analysis were employed herein, the reason the mistake occurred appears plainly in the record (a lost document during a home move) which removes this case from a group of older Washington Supreme Court cases finding inexcusable neglect because the failure to name a party was suspected to have been strategic. *Perrin* at 1197 (citing cases). And this mistake is innocent and less worthy of the loss of Ms. Farole's legal rights than mistakes addressed by courts in the past, including the failure to write down the name of the at-fault driver at the accident scene while that driver stood in front of the plaintiff, as was the case in *Nepstad*, which the court found might have been "neglect," but was "not 'inexcusable.'" *Id.* at 466. And according to this court's

decision in *Perrin*, balancing the interests of the parties and mindful that CR 15(c) is to be liberally construed in favor of allowing amendment so that disputes are resolved on the merits, Ms. Farole's loss of a piece of paper should not cost her all of her legal rights, particularly since Ms. Gilliam will suffer no prejudice in maintaining a defense on the merits.

It is critical to track the running of the statute of limitations at all times in this case, which is related but distinct from whether the Amended Complaint relates back to the time of the filing of the Complaint. The filing of the Complaint prior to the expiration of the statute of limitations on June 23, 2008, tolled the running of the statute of limitations for the ensuing 90-day period, during which service of process had to be accomplished. RCW 4.16.170. The Amended Complaint, which was filed August 13, 2008, relates back under CR 15(c) to the time of filing of the original Complaint under the analysis set out above and throughout this appeal. When the Amended Complaint, which named Ms. Gilliam as a defendant and corrected the spelling of Ms. Pratt's first name, relates back to the time of filing under CR 15(c), it is as if they were named in the original Complaint filed on June 23, 2008. Thus, by the operation of CR 15(c), the statute of limitations was tolled as to Ms. Pratt and Ms. Gilliam from the date of the filing of the original Complaint on June 23, 2008, and under RCW 4.16.170, for 90 days further through September 21, 2008 to

allow for service. Service on Ms. Pratt on September 12, 2008, nine days prior to the end of the 90-day period, tolled the running of the statute of limitations as to her *and since she was served with the Amended Complaint, as to all other named defendants, including Ms. Gilliam.*<sup>1</sup> *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 327, 815 P.2d 781 (1991). And under *Sidis*, the statute of limitations remained tolled until December 3, 2008, when Ms. Gilliam was formally served.

#### APPELLANT'S REPLY

A. Respondent claims that the trial court's determination of relation back under CR 15(c) is reviewed under an "abuse of discretion" standard. This court recently rejected that view.

Respondents claim that review of CR 15(c) relation back should be conducted under an "abuse of discretion" standard. Respondent's Brief at 5-6. This issue was comprehensively addressed in the recent case of *Perrin v. Stensland*, 240 P.3d 1189, 2010 WL 4159290 (Div. I, October 25, 2010). In *Perrin*, this court noted that several cases from the 1980s, as well as the *Nepstad* case cited herein, had been reviewed under an "abuse of discretion" standard, mainly because they arose in the context of appeals from motions for leave to amend. *Perrin* at 1192. But *Perrin* held that the proper standard of review under CR 15(c) was a *de novo*

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<sup>1</sup> The notice to Ms. Gilliam during the telephone call with Ms Pratt prior to the end of the 90-day service period is relevant to the issue of notice and prejudice under CR 15(c), allowing the amended complaint to relate back to the date of filing.

assessment of whether the three elements of CR 15(c) were met, not “abuse of discretion.” This court stated at page 1193 of the *Perrin* decision, after noting the several older Washington decisions that had been conducted under the “abuse of discretion” standard,

More typically, appellate courts do not refer to a determination of relation back as being discretionary with the trial court; rather, the question is whether the requirements of CR 15(c) have been met. (Citation omitted.) This was also the approach taken by the United States Supreme Court in a recent decision authoritatively construing Rule 15(c) of the Federal Rules of Civil Procedure: “Moreover, the Rule mandates relation back once the Rule’s requirements are satisfied; it does not leave the decision whether to grant relation back to the district court’s equitable discretion.” *Krupski v. Costa Crociere S. p. A.*, (citation omitted.) In accordance with this approach, we review the CR 15(c) ruling to determine whether the requirements of the rule were satisfied.

B. Respondent seeks to manufacture an issue regarding whether Ms. Gilliam received notice that she was named “as a defendant” rather than simply received notice of the action, as the rule requires.

Respondent begins her Statement of the Case with the pronouncement, “There is no genuine issue of material fact.”

Respondent’s Brief at 3. Several lines later, however, she asserts that there is an issue of fact regarding whether Ms. Gilliam subjectively “understood” that she had been named as a defendant in the Amended Complaint served on Ms. Pratt. *Id.*

Ms. Gilliam testified that Ms. Pratt “called and told me that she

had been served and that I was named on the papers.” CP 182. Ms. Pratt testified that after she was served she spoke to Ms. Gilliam and “let her know that I had been served with papers regarding the accident where she was driving my car.” She continued, “I told her that her name was on the papers I had received.” CP 177-78.

The first subpart of CR 15(c) requires that a party to be brought in by an amendment have “received such notice of the *institution of the action* that [s]he will not be prejudiced in maintaining a defense on the merits.” (Emphasis added.) This subpart of the rule requires notice of the institution of the action, not particularly that an individual is named as a defendant. Whether the party to be brought in by an amendment had notice of their status *as a defendant* is covered by the second subpart of CR 15(c), which requires that the party to 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 him.” CR 15(c)(2). Ms. Gilliam knew she was driving the car at the time of the accident and that she was she was the party responsible for the accident. Ms. Pratt told Ms. Gillian that the papers with which she was served named Ms. Gilliam and were in regard to “the accident where she was driving my car.” CP 177-78. There can be no serious claim that Ms. Gilliam did not know or should not have known that but for a mistake as to the identity of the

proper party, the action would have been brought against her.

As to her subjective understanding, a few days after Ms. Gilliam received notice of the lawsuit from Ms. Pratt, attorney Eric Freise filed a Notice of Appearance, stating “*Defendants* Chanda Pratt and Jennifer Gilliam, single persons, do hereby appear in the above-entitled action. . . .” CP 188. Not only would Ms. Gilliam have received this document, it is reasonable to assume that attorney Freise *spoke to his client* Jennifer Gilliam at some time prior to entering an appearance on her behalf. In that conversation, if Ms. Gilliam was not clear that she was a defendant when Ms. Pratt told her that “her name was on the papers” “regarding the accident where she was driving my car,” she was undoubtedly clear about her status as a defendant after her conversation with her attorney. But even so, Ms. Gilliam’s subjective understanding is not relevant in the context of CR 15(c), which asks whether the party to be brought in by the amendment “knew *or should have known*” that but for a mistake the action would have originally be brought against her. The rule creates an objective standard which is plainly met in this case.

C. Respondent’s citation to the recently-decided *Perrin* case is unavailing. The *Perrin* case supports Ms. Farole’s position in this appeal.

In *Perrin*, the plaintiff was injured when the car in which he was riding as a passenger was struck by Defendant Gordon van Weerdhuizen.

*Id.* at 1191. Nearly three years later, the plaintiff sued Mr. van Weerdhuizen. The plaintiff then served Mr. van Weerdhuizen's wife at the couple's regular abode on July 24, 2006. *Id.* The Plaintiff did not know that Mr. van Weerdhuizen had died four months before. The Plaintiff's attorney did not notice that the process server's Declaration of Service listed the wife who was served as "Spouse/Widow." *Id.* The statute of limitations ran on August 15, 2006. In answers to interrogatories on September 28, 2006, Mr. van Weerdhuizen's wife wrote, after listing her address and date and place of birth, "widow as of March 20, 2006." *Id.* Neither the plaintiff nor his attorney noticed this answer. On December 6, 2006, the plaintiff's attorney learned of Mr. van Weerdhuizen's death when he received a Notice to Creditors from the attorney for Mr. van Weerdhuizen's estate. On February 1, 2007, six months after service of the Complaint on Mr. Weerdhuizen's wife, five and a half months after the expiration of the statute of limitations, and approximately two months after the plaintiff's attorney learned of Mr. van Weerdhuizen's death, the plaintiff filed an amended complaint substituting Mr. van Weerdhuizen's son Dale van Weerdhuizen, in his capacity as personal representative of the estate, as defendant in place of Mr. van Weerdhuizen. Plaintiff personally served Dale van Weerdhuizen two weeks later. *Id.*

In its decision, this court emphatically stated: “The focus under CR 15(c) is upon what the new defendant knew or should have known before the limitations period expired, not upon the diligence of the plaintiff in amending the complaint.” *Perrin* at 1190. This was because, “CR 15(c) is to be liberally construed on the side of allowance of relation back of an amendment that adds or substitutes a new party after the statute of limitations has run, particularly where the opposing party will be put to no disadvantage.” *Perrin* at 1194.

Liberal construction on the side of allowance of amendments adding or substituting parties to “relate back” was what this court said was the “guiding principle” for deciding CR 15(c) relation back cases, first adopted by the Washington Supreme Court in *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn.2d 222, 427 P.2d 728 (1967). In *DeSantis*, the attorney for the plaintiff missed the fact that he had sued a proprietorship. The entity that should have been sued was actually a corporation and the Answer to the Complaint denied that the defendant was a proprietorship, something the plaintiff’s attorney also missed. But the Supreme Court in *DeSantis* did not focus on the plaintiff’s or his attorney’s conduct, but on whether there would be any prejudice to the defendant in defending the action on the merits. Finding none, the *DeSantis* court in 1967 allowed the amendment to relate back to the time of filing, indicating that any

other result would have been to “sanction manifest injustice.” *DeSantis* at 225. This was because the defendant corporation had notice of the action in the time provided by law and would not be prejudiced in defending. *Id.*

In *Perrin*, the estate’s argument was that the personal representative did not have notice of the action prior to the expiration of the statute of limitations, which ran on August 15, 2006, despite the fact that the primary beneficiary of the estate, Ms. van Weerdhuizen, had been served with the complaint in time. This court rejected the estate’s argument, indicating that the estate “presumed that only notice to the defendant’s personal representative was what mattered, which contravene[d] the liberal policy of construction of CR 15(c).” *Id.* at 1194. This court pointed to three prior cases, *LaRue v. Harris*, 128 Wn. App. 460, 115 P.3d 1077 (2005); *Schwartz v. Douglas*, 98 Wn. App. 836, 837, 991 P.2d 665, *review denied*, 141 Wn.2d 1003, 10 P.3d 404 (2000); and *Craig v. Ludy*, 95 Wn. App. 715, 717, 976 P.2d 1248 (1999), *review denied*, 139 Wn.2d 1016, 994 P.2d 844 (2000), in which notice to other entities that shared a “community of interest” with the defendant to be substituted or added satisfied the notice requirement, so long as the defendant was not prejudiced in maintaining their defense on the merits.

In each case, we concluded the amendment related back under a theory of imputed notice. As noted in *Craig*, federal courts have held timely notice may be imputed to a

defendant added in an amended complaint if there is a community of interest between the originally named defendant and the party to be added, as with insurance carriers and the estates of their insureds. (Citation omitted.) *Schwartz* is in accord: "*Counsel retained by the insurer would have been required to defend this suit whether for Mr. Douglas or for his estate after he died. Due to this community of interest, the notice to the insurer is imputed to the estate.*" (Citations omitted.) In *LaRue*, we similarly concluded that *where the defendant's insurer had notice of the lawsuit within the three year limitations period, the insurer's notice and knowledge "were imputable to the Estate."* (Citation omitted.) (Emphasis added.)

Ms. Farole submits that the present case is on all fours with *Perrin* and the three cases cited by *Perrin* as standing for the principal of imputed notice. Here, the insurance company which has a "community of interest" with Ms. Gilliam has had "notice and knowledge" of the accident, of plaintiff's claim, of plaintiff's legal representation, and of the legal action which followed, at the time of each event's occurrence. Unitrin was clearly aware of the accident at the time it occurred. The auto damage estimate for the repair dated six days after the accident, lists their insured as Chanda Pratt. CP 156. A check stub from Unitrin paying the auto damage lists the insured as Chanda E. Pratt. CP 148. Unitrin wrote letters to Ms. Farole after the accident. CP 126. Ms. Farole's original attorney wrote a letter of representation to the Unitrin claims adjuster, Sean McGuire, including the date of the accident and the Unitrin claim number. CP 133. He also sent a letter to Mr. McGuire at Unitrin when he

withdrew. CP 137. Her second attorney wrote a letter to Mr. McGuire enclosing a copy of the original Complaint. CP 153-54. The second attorney indicated an attempt would be made to send a settlement demand to try to resolve the case within the 90 days allowed for service, and requested Mr. McGuire send documents related to the accident, including incident reports and recorded statements. Despite having received the Complaint and knowing that it named only “Chappa Pratt,” Mr. McGuire did not send the requested documents. *Id.* On September 12, 2008, Chanda Pratt, Unitrin’s insured, was served with the Amended Complaint naming Ms. Pratt and Ms. Gilliam as defendants, along with Ms. Farole’s counsel’s declaration describing in detail the circumstances that lead to the amendment. CP 7-20, 162. Unitrin obviously received these documents from Ms. Pratt because Unitrin hired Mr. Freise to represent Ms. Pratt and Ms. Gilliam in the lawsuit several days later. CP 188-89. Mr. Freise appeared on September 23, 2008, two days after the 90-day period for service had passed. *Id.* Therefore, the insurance company herein had notice of all relevant events in this lawsuit. Under *Perrin* and the three “imputed notice” cases cited therein, the insurance company’s “notice and knowledge” is imputed to Ms. Gilliam because they shared a “community of interest,” and since Unitrin had notice all along, neither Unitrin nor Ms. Gilliam will be prejudiced in maintaining a defense on the merits.

*Schwartz* at 890; *LaRue* at 465; *Perrin* at 1195.

Respondents cite *Perrin* for the fact that it dealt with a successor entity to the original party named in the Complaint (the estate as successor to Mr. van Weerdhuizen), and in the present case Ms. Gilliam is not related to or a successor entity of Ms. Pratt who was the party originally named in the Complaint. With respect, it is submitted that Respondents miss Appellant's argument and the central point of *Perrin*. In *Perrin*, notice to Ms. van Weerdhuizen was imputed to the estate because of the "community of interest" between the two. *Id.* at 1195. Ms. Farole's argument herein is that there is a community of interest *not* between Ms. Gilliam and Ms. Pratt, but between Ms. Gilliam and Unitrin Insurance Company. As a permissive driver of Ms. Pratt's car, Ms. Gilliam is an insured person under the Unitrin policy, and Unitrin is bound to provide her with both a legal defense and indemnity up to the limits of the policy. This is why Mr. Freise appeared on her behalf and why she has been continuously represented by Unitrin-paid attorneys since that time. Because Unitrin has to provide Ms. Gilliam's defense and pay the plaintiff for the damages that resulted from Ms. Gilliam's negligence up to the limits of the policy, they have a "community of interest" such that notice to Unitrin will be imputed to Ms. Gilliam. *Perrin, supra.*

D. *Perrin's* analysis of "inexcusable neglect" strongly supports Ms. Farole's position in this appeal.

The *Perrin* court engaged in a lengthy analysis of the "inexcusable neglect" standard under CR 15(c). This court was critical of the practice of adding a judicially-created "fourth prong" to the three part test under CR 15(c), noting that the U.S. Supreme Court in *Krupski v. Costa Crociere S. p. A., supra*, had rejected such an approach. *Perrin* at 1195.

Despite meeting the three part test under CR 15(c), the trial court in *Perrin* had ruled that the plaintiffs had waited too long to amend the complaint after learning of Mr. van Weerdhuizen's death and refused to allow relation back due to "inexcusable neglect," stating:

if the Perrins had sought amendment of the complaint immediately upon learning that Dale had been appointed personal representative, "I think they would have been in good faith then. It would have been excusable neglect ... but they waited until February."

The plaintiff's conduct herein would have met the test of even the trial court in *Perrin*. Ms. Farole conducted a thorough investigation and her counsel immediately amended the complaint as soon as they received notice there was an issue regarding the identity of the defendant. Counsel first learned of a potential issue when no "Chappa Pratt" could be found in the Seattle area for service and, at approximately the same time, when the Unitrin auto damage estimate and the Unitrin check stub for the auto

damage which both included the name “Chanda Pratt” were finally received from prior counsel’s office. CP 148. Once alerted to potential issues regard the identity of the defendant, Ms. Farole’s counsel discovered that Jennifer Gilliam was a possible defendant by interrogating the first-party PIP adjuster regarding facts that might be in the insurance computer system of Ms. Farole’s long-closed PIP claim. *Id.* Counsel then immediately amended the complaint, swore out a declaration explaining the circumstances, and set out to serve both on defendants. CP 14-20. Counsel’s actions herein are exactly what the trial judge in the *Perrin* case indicated *would have been excusable*.

But this court’s decision in *Perrin*, rather than focusing on the conduct of the plaintiff or counsel, held that the proper focus is on prejudice to the defendant. In so doing, the *Perrin* court ruled that counsel’s missing of the “Spouse/Widow” note on the Declaration of Service, missing of the “widow as of March 20, 2006” answer to plaintiff’s interrogatories, and the two month delay to amend the complaint after learning of Mr. van Weerdhuizen’s death, did not constitute inexcusable neglect, stating at 1197:

The trial court erroneously interpreted the case law as calling for an exercise of equitable discretion to evaluate whether Perrin moved quickly enough to correct his mistake about the identity of the proper defendant. This view is inconsistent with liberal construction of the rule.

Thus, this court’s “inexcusable neglect” analysis was linked to proper standard of review under CR 15(c), and held that if trial courts viewed their role in relation back cases as calling for an exercise of “equitable discretion,” rather than a straightforward analysis of the elements of CR 15(c), this would lead to a focus on the plaintiff’s conduct, rather than whether there was notice and prejudice to the defendant, which would lead the court away from the appropriate liberal construction of the relation rule in favor of allowing amendments and cases to be decided on their merits. Thus, per *Perrin*, the proper focus of the decision-maker is a non-discretionary appraisal of whether the elements of CR 15(c), particularly an appraisal of whether there was prejudice to the defendant in maintaining a defense. It is not for the decision-maker to engage in an exercise of “equitable discretion” and pass judgment “upon the diligence of the plaintiff in amending the complaint.” Rather “[t]he focus under CR 15(c) is upon what the new defendant knew or should have known before the limitations period expired.” *Perrin* at 1190.

It is submitted that “an exercise of equitable discretion” is precisely what the trial court engaged in herein. Unfortunately, although the summary judgment argument was transcribed, after argument the trial court herein took the case under advisement and ruled in summary

fashion, never stating its reasoning on the record. CP 203-05. Since all the elements of CR 15(c) appear to be quite clearly met in this case, Ms. Farole can only surmise that the trial court ruled as it did because it believed Ms. Farole's act of losing the exchange of information documents in her residential move constituted inexcusable neglect. But such a finding is contrary to the proper focus of a CR 15(c) inquiry, per *Perrin*, which should be on "what the new defendant knew or should have known before the limitations period expired, not upon the diligence of the plaintiff." *Perrin* at 1190. Such a finding also improperly engages in "an exercise of equitable discretion" which is "inconsistent with a liberal construction of the rule." *Perrin* at 1197. Rather, the proper approach, according to *Perrin*, is to recognize that,

the purpose of relation back is to balance the interest of the defendant protected by the statute of limitations with the preference embodied in the civil rules for resolving disputes on their merits.

*Perrin* at 1196 (citing *Krupski*, 130 S. Ct. at 2492). Thus, properly viewed, Ms. Farole's interest in resolving the case on its merits, which dovetails with the same preference embodied in the civil rules, must be balanced against Ms. Gilliam's interest in being afforded the protections of the statute of limitations. Since Ms. Gilliam herself received notice within the time for service under Washington law (filing, plus 90 days),

since service on named co-defendant Ms. Pratt froze the running of the statute of limitations also with respect to Ms. Gilliam, since the insurance company has had “knowledge and notice” at all relevant times which is imputed to Ms. Gilliam, since an attorney appeared at no cost to Ms. Gilliam within days of Ms. Gilliam receiving notice of the lawsuit, and since Ms. Farole has agreed to accept the policy limits in the case so Ms. Gilliam will never personally pay a dime for the results of her negligence, Ms. Gilliam’s interest in being afforded the protections of the statute of limitations has been achieved. Thus, balancing the interests of the parties, since Ms. Gilliam’s interests are being protected, Ms. Farole and the civil rules’ interest in resolving cases on their merits must also be given effect. There is no other way to do that that to simply allow the case to proceed forward in the normal manner.

In *Perrin*, this court observed that in the balancing of competing interests, if a plaintiff took no steps whatsoever to actually file and serve a claim against an at-fault defendant in the time provided by law (the period of the statute of limitations, plus 90 days after filing for service), the defendant would naturally have an interest in the “repose” which would inure to her after the limitations passed without being sued. *Perrin* at 1196. On the other hand, this court observed:

But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.

*Id.* This is clearly what happened in this case, and any “repose” enjoyed by Ms. Gilliam would be a “windfall” and would only have resulted from the fact that “plaintiff misunderstood a crucial fact about her identity.” *Id.*

In *Perrin*, amendment of the complaint and notice to the proper defendant occurred approximately six months after the expiration of the statute of limitations. Still, this court held that the important inquiry was the notice and potential prejudice to the new defendant, not whether “plaintiff misunderstood a crucial fact about his identity.” *Id.* Here, amendment and notice to Ms. Gilliam occurred *prior to expiration of the limitations period plus 90 days for service*, so “repose” to Ms. Gilliam would simply be an injustice to Ms. Farole, particularly where the actual “repose” would only inure to the benefit of the insurance company.

In *Perrin*, this court also explained why appellate courts for years had repeated the requirement that inexcusable neglect could only be found when no reason for the failure to name a party appeared in the record:

Failing to name property owners when their identities are known or easily ascertainable is likely to be a strategic choice rather than a mistake. *Veradale Valley Citizens' Planning Comm. v. Bd. of County Comm'rs of Spokane County* (citation omitted.) We believe the reasoning in *Veradale Valley* explains why the Supreme Court has said

that generally, "inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *South Hollywood Hills Citizens Ass'n v. King County* (citation omitted.)

*Perrin* at 1197. Thus, this court noted that in one of the leading inexcusable neglect cases in Washington, *North Street Ass'n v. City of Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981), there had been no reason for neglecting to name a particular defendant, and the plaintiff's reasons appeared to be strategic. *Perrin* at 1197. This led to the general statement in many of the cases that inexcusable neglect would be found where no reason for the failure to name a party appeared in the record. *See e.g., Haberman v. WPPSS*, 109 Wn.2d 107, 173, 750 P.2d 254 (1988).

Concluding, this court stated:

In the present case, however, there was no reason to believe Perrin made a strategic choice to avoid naming the estate; no concern about adequate notice to the estate; and no identified prejudice to the estate. . . . Unlike in *North Street*, *Tellinghuisen*, and *South Hollywood Hills*, here the record provides a satisfactory reason why Perrin initially failed to name the estate as a party.

In the present case, there is no reason to believe that Ms. Farole made a strategic choice not to name Ms. Gilliam. Her reason for failing to originally name her appears in the record: she lost the papers with Ms. Gilliam's name on it in a residential move and only remembered Ms. Pratt's name from seeing it on multiple pieces of insurance

correspondence. Thus, rather than “strategic,” her mistake is “inadvertent,” just as the mistake that lead to the need to amend in *Schwartz. Id.* at 840.

E. The *Teller* case is distinguishable.

Respondent cites *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 142 P.3d 179 (Div. 2 2006), for the proposition that if the party to be added by the amendment is readily apparent or reasonably ascertainable by a reasonable investigation, the failure to name them may be found to be inexcusable neglect. Respondent’s Brief at 5-6. In *Teller*, the plaintiff named approximately five “Maersk-related” companies, but not Maersk Pacific, Ltd. or its successor APM Terminals Pacific which employed the at-fault driver. The trial court found there were three simple ways the plaintiff should have known the name of the proper defendant. First, the plaintiff was employed at the terminal and there was a 12 by 6 foot sign at the only entrance to the marine terminal through which all traffic had to pass that read “Maersk Pacific, Ltd.” from the time of the accident up through the transfer to APM Terminals Pacific, Ltd., and read “APM Terminals Pacific, Ltd.” thereafter. Second, APM Terminals Pacific, Ltd.’s lease with the Port of Tacoma was a public record because the Port of Tacoma is a municipal corporation. Third, a visit to the Port of

Tacoma's website quickly identified APM Terminals Pacific, Ltd. as the lessee and operator of the marine terminal. *Teller* at 707-08.

In finding inexcusable neglect in this circumstance because the plaintiff did not take simple and available steps to ascertain the identity of the defendant, the *Teller* court took pains to distinguish *Nepstad*. It noted that in *Nepstad*, the plaintiff and the other driver's insurance company had been in contact throughout the years after the accident, and the plaintiff "had reason to believe that Beasley was the proper defendant because Fox's insurance company consistently referred to Beasley as 'our insured.'" *Teller* at 711 (citing *Nepstad* at 462.) In contrast, no reason appeared in the record why *Teller* had failed to properly name the defendant. Also, the *Teller* court pointed out that the plaintiff in *Nepstad* had simply misunderstood the identity "of a stranger immediately after an automobile accident," which was quite different from Mr. *Teller* who went to work every day past a 12-foot by 6-foot sign identifying the identity of the proper defendant and who could have found defendant in a search.

The present case is more analogous to *Nepstad* since Ms. Farole only met Ms. Gilliam for a moment on the street immediately after the accident and then never saw her again. And the exchange of insurance correspondence over the years with Ms. Farole and later with her attorney only identified Ms. Pratt as "their insured." This understandably caused

Ms. Farole to believe that Ms. Pratt was the proper defendant, just as it had the plaintiff in *Nepstad*. But to the extent the *Teller* court focused on the conduct of the plaintiff rather than the notice and prejudice to the defendant, and engaged in an act of “equitable discretion,” this would not be consistent with this court’s approach per *Perrin*.

The *Teller* court also repeated *Nepstad*’s observation that “the Supreme Court has applied the ‘inexcusable neglect’ inquiry ‘in cases where leave to amend to add additional defendants has been sought’” and “none of the plaintiffs in the ‘inexcusable neglect’ cases misidentified the defendant,” but instead, had ‘failed to name all necessary parties and moved to amend to add the additional parties.’” *Teller* at 708 (citing *Nepstad* at 467.) *Teller* also cited *Nepstad*’s observation that the Supreme Court in *North Street* only applied the inexcusable neglect analysis to joinder of additional parties and “never stated that the requirement applied to cases of substitution to correct a mistaken identity,” and as such, “because *Nepstad* was a case of mistaken identity, inexcusable neglect should not in itself bar the relation back of the amendment.” *Teller* at 709 (citing *Nepstad* at 467-68.) The *Teller* court also agreed that the *Nepstad* court was correct that “the Supreme Court has applied ‘inexcusable neglect’ *only* to fact patterns involving plaintiffs seeking to add additional parties. . . .” *Id.* at 709 (emphasis added.)

F. Respondent's claim that Ms. Farole did not conduct a "reasonable investigation is unavailing.

At several places in her brief, Ms. Gilliam claims that the plaintiff and her attorney failed to perform a "reasonable investigation."

Respondent's Brief at 17, 20-21. In fact, Ms. Farole was extremely diligent at the scene of the accident and wrote down all of the necessary information, including the name, address and telephone number of the insurance company as well as the owner and driver of the vehicle. CP 126. This was not a matter of lack of diligence. This was simply an issue of the documents being lost in the regular course of human events. Once the documents were lost, there was no "investigation" that would uncover the information. There was no police report because the police did not come to the scene. There was no public records or website search that would uncover the name of the driver at the time of the accident. Sean McGuire of Unitrin insurance was asked for the information but did not provide it. CP 153-54. Ms. Farole felt that she had what she needed because her prior attorney told her that everything in her file had been sent. CP 127. She thought she remembered the name of the defendant, but she remembered the name from the insurance correspondence. She was 22 years old and she was doing the best she could. As Judge Becker wrote in *Perrin*, "The focus under CR 15(c) is upon what the new

defendant (here Ms. Gilliam) knew or should have known before the limitations period expired (filing, plus 90 days), not upon the diligence of the plaintiff (here, Ms. Farole) in amending the complaint.” *Id.* at 1190.

### CONCLUSION

Appellant submits that the proper focus in this case should be on the fact that Ms. Gilliam received notice of the action before the limitations period expired, the insurance company received notice of all events which is in turn imputed to Ms. Gilliam, and Ms. Gilliam is not prejudiced in maintaining a defense on the merits. Additionally, the court should be mindful of the fact that the only real party in interest herein is Unitrin Insurance Company, which is quite cynically claiming prejudice on the part of Ms. Gilliam (which does not exist) to avoid having to pay damages caused by its insured’s negligence under a \$25,000 minimum limits policy. Finally, the court is urged to bear in mind that CR 15(c) is to be liberally construed on the side of relation back of amendments, and the policy in the civil rules that cases should be decided on their merits. Respectfully submitted: February 24, 2011.

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