

65645-7

65645-7

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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**BRIEF OF APPELLANT**

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## **INTRODUCTION**

In 2005, plaintiff Zaynab Farole was injured in an automobile accident when her vehicle was rear ended while she waited to make a left turn on her way home from her college class. She used an insurance form called “What to do in case of an accident” that she had in the glove compartment and copied down all the information requested on the form with regard to the following driver, the owner of the vehicle, and the insurance company insuring the vehicle. She hired an attorney and gave the attorney this information. The attorney copied it and mailed her back the originals. She gave the envelope with the originals to her father. He put the envelope away in his house, but it was lost in a series of family moves before the case was commenced.

Ms. Farole felt she was protected, however, because she had given all of the original documents from the accident scene with the information regarding the owner and driver of the at-fault vehicle to her attorney. But her attorney withdrew from her representation several months prior to the expiration of the statute of limitations. She was told by the attorney that all of the documents from her case file were mailed with the letter of withdrawal. Therefore, she thought she had what she needed to hire a new attorney. When she learned that her previous attorney had not included the

information regarding the driver of the following vehicle she called the attorney's office. She was told that everything in her case file had been mailed to her with the letter of withdrawal.

She made a diligent search for a new lawyer, and met with one lawyer who could not take her case because he already had a full caseload. This lawyer referred her to several other lawyers, and she was able to get an appointment with a lawyer willing to take her case one week prior to the expiration of the limitations period. Through a simple misunderstanding, her new attorney thought that a draft complaint she brought with her to her appointment had been drafted by the original attorney and contained the accurate name of the driver of the other car. Her new attorney thought that the withdrawing attorney had provided this draft complaint to Ms. Farole along with the other documents he had sent accompanying his letter of withdrawal so she could file the case herself since he was withdrawing so close to the expiration of the statute of limitations. Ms. Farole confirmed that the name on the draft complaint was the name she remembered for the driver of the other vehicle. The new attorney used the name of the defendant driver on the draft complaint as the name of the defendant driver on the Summons and Complaint which he filed in King County Superior Court on the last day of the limitations

period.

The insurance company that insured the following car was on notice of the claim at all times relevant to the case. It was on notice of the first attorney's representation and his withdrawal several months prior to the end of the limitations period. It was on notice of the new attorney's representation and it received a copy of the filed Complaint a few days after it was filed. The new attorney asked the insurance company for witness statements and incident reports regarding the accident, but these were not provided.

In the course of attempting to serve the Complaint the new attorney learned that the name of the driver of the at-fault vehicle might be someone other than was named in the Complaint. The new attorney also learned that the person who had been named in the Complaint as the driver might actually have been the owner of the vehicle. He amended the Complaint to name both the individual he learned might have been the driver of the vehicle and to correct a misspelling of the first name of the owner of the vehicle. The Amended Complaint was filed within the 90-day period for service of the Complaint.

Thereafter, also within the 90-day period for service of the Complaint, one of the two named defendants was served, that being the

owner of the vehicle. Prior to the end of the 90-day period, the owner of the vehicle that had been served called the driver of the vehicle who had not yet been served and told the driver that she had been named in the Complaint arising from the accident that had occurred when the owner loaned her vehicle to the driver. This conversation provided the unserved driver of the at-fault vehicle with notice of the action against her within the 90-day period for service following the filing of the original Complaint. Two days following the end of the 90-day period, the insurance company hired an attorney who appeared on behalf of both of the named defendants. The driver was not able to be formally served until several months after the 90-day service period had passed.

This is a case which examines issues surrounding the “relation back” of amendments under CR 15(c). As the Court will see, the plaintiff contends that the requirements of CR 15(c) were met because the claims in the original and amended Complaints were the same, the defendant driver received notice of the case “in the time provided by law for commencing an action,” such that she would not be not prejudiced in maintaining a defense on the merits. And but for a mistake concerning the identity of the defendant driver, the actual driver knew or should have known that the action would have been brought against her.

Critical to this case, and quite possibly misapprehended by the Trial Court, the plaintiff will show that it is settled law that the “period provided by law for commencing an action” referred to in CR 15(c) is the period allowed by law for filing *and* service of the Complaint, meaning the period which expires 90 days after the filing of the Complaint. It is within this time that CR 15(c) requires that a party must have received notice of the action (not formal service) for the amendment to relate back to the time of the filing of the original Complaint. The plaintiff will show that the defendant driver, Ms. Gilliam, received such notice within this period of time.

The plaintiff will also show that the case law interpreting CR 15(c) provides that an analysis by the court regarding whether the plaintiff’s failure to originally name a party resulted from “inexcusable neglect” is inappropriate when an amendment changing a party corrects a misidentified party, in contrast to adding a new party whose negligence was not described in the original Complaint. In this case, the negligence of the defendant driver was described in both the original and the Amended Complaint. The defendant driver was simply misidentified. In these circumstances, an inexcusable neglect analysis does not apply.

The plaintiff will also show that even if an “inexcusable neglect” analysis did apply, the Ms. Farole’s conduct cannot be fairly described as “inexcusable.”

Finally, the plaintiff will show that service of the Amended Complaint on one named defendant, here the owner of the vehicle, within the 90-day period for service following the filing of the original Complaint, tolled the statute of limitations as to other named but unserved defendant, here the driver of the vehicle. Thus, when the driver of the vehicle was later served, the statute of limitation remained tolled and filing and service was perfected against her.

Because the elements of CR 15(c) are met, the Amended Complaint will relate back to the time of filing; because an “inexcusable neglect” analysis is inappropriate in the case of a merely misidentified party whose negligence was described in the Complaint; and because service on one named defendant tolls the statute of limitations as to the other named defendant, the Trial Court erred in granting Defendant Jennifer Gilliam’s motion for summary judgment, dismissing her from the case. Accordingly, plaintiff Zaynab Farole asks this Court to reverse this decision of the Trial Court and remand the case for trial.

## ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting Jennifer Gilliam’s motion for summary judgment.<sup>1</sup>

## RESTATED ASSIGNMENTS OF ERROR

1. Does an Amended Complaint changing a party, filed after the expiration of the statute of limitations but before the 90 days allowed for service following the filing of the Complaint, “relate back” to the time of filing when the requirements of CR 15(c) are met and the changed defendant receives notice of the action within the 90-day period following filing?

2. Does the “period provided by law for commencing an action” in CR 15(c) refer to the period allowed for filing *and* service of the Complaint?

3. Did Ms. Gilliam receive “such notice of the institution of the action that she will not be prejudiced in maintaining her defense on the merits,” and did she know, or should she have known, that “but for a mistake concerning the identity of the proper party, the action would have been brought against her”?

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<sup>1</sup> Because the Trial Court did not provide an oral ruling from the bench, and since no findings are provided on summary judgment, the plaintiff does not know the basis of the Court’s decision. Therefore, she can only formally assign error to the result.

4. Does an “inexcusable neglect” analysis apply when an amendment changing a party corrects a misidentified party, in contrast to adding a new party whose negligence was not described in the Complaint?

5. If an “inexcusable neglect” analysis applies, does Ms. Farole’s conduct rise to that standard?

6. Does service on one defendant toll the statute of limitations as to other named defendants?

### **STATEMENT OF THE CASE**

A. The accident.

On June 23, 2005, at approximately 2:30 p.m., Zaynab Farole was on her way home from classes at Highline Community College where she was a sophomore in the pre-med program. CP 125. She was driving her father’s black 1994 Nissan Ultima four-door sedan. She proceeded eastbound on S. Ryan Way up a slight hill and slowed, preparing to turn left on 47th Avenue S. which is about half way up the hill. *Id.* Ms. Farole lived with her parents several blocks from the intersection of S. Ryan Way and 47th Avenue S. She was wearing her seatbelt. CP 126.

Ms. Farole arrived at the 47th Avenue S. cross street and waited in the left lane of S. Ryan Way with her blinker on, waiting for westbound traffic to clear before making her turn. All at once she felt a tremendous

impact from the rear of her car and she was thrown forward against her shoulder belt with her head rotating forward and backwards until the car came to rest. As she gathered herself after the crash, a woman came over to her window and asked if she was okay. The woman said she was very sorry for hitting her. The woman was Jennifer Gilliam, the driver of the following car. *Id.*

Ms. Farole called her father, Abukar Yarrow, who was at home several blocks away and quickly came to the accident scene. Ms. Farole exchanged information with Ms. Gilliam who was polite and apologetic. Ms. Gilliam used the back of a church program to write down the name and address of the owner of the car, a Chanda Pratt, as well as her own address and telephone number. Ms. Farole recorded the same information on a Farmers Insurance Company "What to do in case of an accident" form that her father kept in the glove compartment, including the names and addresses of both Ms. Pratt and Ms. Gilliam, the licence plate number of Ms. Pratt's car, the number of Ms. Pratt's automobile insurance policy with Unitrin Insurance Company, and Unitrin's address. After this information was exchanged, Ms. Farole walked several blocks to her home. Her father drove the car home. *Id.*

B. Representation by the Morgan firm.

On December 2, 2006, after approximately one and one-half years of medical treatment which was unfortunately not successful in completely resolving her injuries, Ms. Farole and her father met with attorney Don Morgan to discuss a possible claim arising from the accident. *Id.* Ms. Farole signed a fee agreement hiring Mr. Morgan to represent her with regard to her accident-related injuries. CP 130-31. At that time Ms. Farole provided Mr. Morgan with all of the documents in her possession regarding the accident, including the back of the church program on which Ms. Gilliam had provided her and Ms. Pratt's contact and insurance information at the accident scene and the Farmers Insurance "What to do in case of an accident" form on which Ms. Farole had recorded the same information. CP 126. She also provided Mr. Morgan with a quantity of medical bills, correspondence she had received from Farmers and Unitrin insurance companies regarding the accident, and a body shop estimate indicating the extent of the damage to her father's car. Mr. Morgan asked Ms. Farole to leave all of these documents with him and told her that he would have his staff copy them and mail the originals back to her. *Id.*

A few days later, the Morgan firm mailed letters of representation to various entities, including to Unitrin Insurance Company who insured

the Pratt vehicle. CP 133. The letter to Unitrin included the date of the accident and the claim number Unitrin had assigned to the accident. It stated that Ms. Farole had suffered personal injuries and property damage as a result of Unitrin's insured's negligent act and that Ms. Farole would be "looking to your insured for damages." *Id.* Several days later, the Morgan firm mailed all of the original documents Ms. Farole had provided back to Ms. Farole in a large manila envelope. CP 126. Ms. Farole gave the envelope of documents to her father who put them away in a box in his house. Ms. Farole felt she had provided all of the needed documents to the Morgan firm, they had been copied, and thereafter that the Morgan firm would protect her interests relative to claims arising from the accident. In the one and one-half years between this time and the expiration of the statute of limitations on June 23, 2008, Ms. Farole's father moved his residence twice and the envelope from the Morgan firm with the original documents was lost. CP 127.

On May 5, 2008, approximately two and one-half months prior to the expiration of the statute of limitations, Mr. Morgan sent a certified letter to Ms. Farole withdrawing from her representation. CP 135-36. Mr. Morgan stated that his decision to withdraw was not an easy one and he "was beginning to draft the Summons and Complaint to the person who

caused your accident and injuries.” Mr. Morgan included copies of documents from the case file at his firm with the letter withdrawing from representation. CP 127. In a subsequent conversation, Mr. Morgan told Ms. Farole that the documents he included with the letter were all of the documents in her case file with his firm. In fact, the documents which accompanied the letter were primarily copies of outgoing correspondence generated by the Morgan firm and did not include any of the documentary evidence she had provided at the commencement of her representation, including the critical documents recording the exchange of information at the accident scene containing the name of the owner and driver of the vehicle involved in the accident. *Id.* The outgoing correspondence from the Morgan firm only cited the Unitrin claim number and the date of the accident, not the name of the owner or driver of the vehicle that had hit Ms. Farole. *See, e.g.*, CP 133, 137, 138. There were no documents among those mailed to Ms. Farole with the letter of withdrawal which named Jennifer Gilliam or Chanda Pratt in any way. CP 127-28.

C. Ms. Farole’s diligent search for alternative legal representation.

After her conversation with Mr. Morgan in which she was told that everything in her legal file at his office had accompanied the letter of withdrawal, Ms. Farole felt she had what she needed to hire another

attorney. She approached attorney Steven Sitcov. Mr. Sitcov elected not to undertake her representation given his current caseload, but he nevertheless tried to help her preserve her rights. CP 127. Mr. Sitcov asked Ms. Farole the name of the driver of the car who had hit her and she replied as best as she could from her memory that the driver's name was Chappa Pratt. It had been almost three years since the accident and this was the name she remembered from the Unitrin Insurance correspondence she had received prior to hiring Mr. Morgan. *Id.* Mr. Sitcov prepared a *pro se* Summons and Complaint to be filed in King County District Court in case Ms. Farole was unable to obtain representation. CP 128, 140-45. Mr. Sitcov also sent out an email message on the Washington State Trial Lawyers Association list serve describing the situation and asking if any attorneys were interested in undertaking Ms. Farole's representation. He received four or five responses which he passed on by email to Ms. Farole. CP 128.

D. Representation by the Richardson firm.

On the advice of Mr. Sitcov, Ms. Farole chose attorney David B. Richardson in Bellevue. *Id.* Her first telephone contact with Mr. Richardson's firm was on June 9, 2008. CP 146. She and her father met with Mr. Richardson on June 16, 2008. Ms. Farole and her father told Mr.

Richardson that they had brought with them all the documents they had received with the letter of withdrawal from Mr. Morgan, and that Mr. Morgan had told Ms. Farole that all of the documents in her case file were included. Ms. Farole also provided Mr. Richardson with the draft *pro se* Summons and Complaint naming Chappa Pratt as the defendant. *Id.*

Mr. Richardson read the letter of withdrawal by Mr. Morgan, including his statement that he “was beginning to draft the Summons and Complaint to the person who caused your accident.” CP 135. He also read the *pro se* Complaint which was among the documents Ms. Farole brought to the appointment. CP 140-45. Mr. Richardson mistakenly understood that the *pro se* Complaint had been drafted by Mr. Morgan and was included with the other documents sent with his letter of withdrawal to Ms. Farole for her to file herself since he withdrew so close to the expiration of the statute of limitations. CP 147. He had no idea that the draft Complaint had been drafted by Mr. Sitkov only from Ms. Farole’s memory of the name of the defendant. Having no documents identifying the defendant other than the draft Complaint, Mr. Richardson asked Ms. Farole the name of the defendant and she responded “Chappa Pratt,” exactly as it was in the draft Complaint. *Id.* Believing that the draft Complaint had been prepared by Mr. Morgan and that Mr. Morgan would

have been in a position to know the name of the defendant through his long period of representation of Mr. Farole, and further believing that Mr. Morgan would have named the defendant properly in a draft Complaint intended to be filed by Ms. Farole *pro se*, Mr. Richardson used the information in the draft Complaint to prepare his standard automobile accident Summons and Complaint in his own word processing system. This Complaint, which named Chappa Pratt as the driver of the vehicle that caused the accident, was filed in King County Superior Court on June 23, 2008, and assigned cause number 08-2-21160-6 KNT. *Id.*

On June 24, 2008, Mr. Richardson mailed adjuster Sean McGuire of Unitrin Insurance Company a letter of representation regarding the June 23, 2005 accident. CP 153-54. He attached a copy of the Summons and Complaint which had been filed the day before in King County Superior Court naming Chappa Pratt as the driver of the car. *Id.* In the letter he stated:

Under Washington law, we have 90 days to serve Ms. Pratt to preserve the statute of limitations. We will endeavor to forward a settlement demand package to you to attempt to settle the case to avoid the necessity of serving a lawsuit against your insured.

Mr. Richardson also asked Mr. McGuire to send him documents relating to the accident, as follows:

Towards that end, please send a copy of every document in your file which is not exempt from disclosure under a recognized claim of privilege. We specifically ask that you send a copy of *any written or recorded statements regarding this incident, activity logs documenting conversations and other events related to the above-referenced incident, incident reports, medical records, as well as any medical and/or wage loss authorizations that Zaynab Farole may have executed and medical/billing documents*. For any documents withheld, identify the nature of the document, who wrote the document, the date it was written, the subject matter covered in the document and under what claim of privilege the document is being withheld. [Emphasis in original.]

CP 153-54.

Mr. Richardson did not receive a response from Mr. McGuire or any other person at Unitrin Insurance. Unitrin Insurance did not send any of the documents requested, including incident reports, written or recorded statements, and other documents regarding the accident or naming the driver of the vehicle that were fully discoverable at the time in a filed lawsuit. Nor did Unitrin Insurance provide a list of documents it refused to provide or assert any claim of privilege. *Id.*

Over the following month, it became clear that it would not be possible to forward a settlement demand package to Unitrin Insurance Company because Ms. Farole's complete medical records could not be obtained prior to the expiration of the 90 days following the filing of the Summons and Complaint. CP 147.

E. Service of the Complaint and its subsequent amendment.

On July 28, 2008, when it became clear that a settlement within the 90-day period would not be possible, the Richardson firm commenced efforts to serve the Complaint before the expiration of the 90-day period following the filing of the Complaint. The 90-day period would expire on September 21, 2008. *Id.*

Since undertaking Ms. Farole's representation the Richardson firm had requested the entire case file from the Morgan firm and received several documents that had not been provided to Ms. Farole with the letter of withdrawal (despite the claim that all file documents had been included), including a damage estimate which named the insured under the Unitrin policy as Chanda Pratt. CP 156-60. The Richardson firm immediately searched public records databases and discovered records indicating that Chanda Pratt was listed at four different addresses in the Seattle area. The same search revealed no record of Chappa Pratt in the Seattle area. CP 147. In the documents received from the Morgan firm, the Richardson firm also found a check stub from Unitrin Insurance Company paying for the vehicle damage indicating that their insured's name was Chanda E. Pratt. CP 148.

On July 29, 2008, concerned that the latest documents received from the Morgan firm and the public records database search cast doubt upon the proper spelling of Ms. Pratt's first name, Mr. Richardson called Vicky Gandara, the PIP representative at Farmers Insurance Company which had insured the Farole vehicle at the time of the accident. Farmers had provided medical benefits to Ms. Farole arising from the accident and Mr. Richardson thought they might have some information in their file from their initial investigation of the accident. Ms. Gandara was able to provide a P.O. Box and telephone number for Chanda Pratt. *Id.* She also indicated that a somewhat cryptic entry in her computer claims screen suggested, but was not clear, that a person named "Jennifer Gilliam" identified on her claims screen as a "friend" may have been driving the vehicle at the time of the accident. Ms. Gandara told Mr. Richardson that her claims screen showed an address for Ms. Gilliam on "Hanson Street" in Seattle, as well as a telephone number, both of which she provided. A search of public records data bases revealed several Jennifer Gilliams in the Seattle area, none of whom lived at the Hanson Street address indicated on the Farmers claims screen. *Id.*

With this new information, on August 13, 2008, Mr. Richardson amended the Complaint to change the name of defendant driver from

“Chappa Pratt” to “Chanda Pratt” and, in the alternative, change the name of the defendant driver to Jennifer Gilliam. CP 14-20. The Amended Complaint indicated that it was unknown “whether Defendant Chanda Pratt or Defendant Jennifer Gilliam was driving the following vehicle at the time of the accident” and thus plead in the alternative that Defendant Chanda Pratt or Defendant Jennifer Gilliam was the owner or driver of the vehicle at the time of the accident. *Id.* Mr. Richardson also filed a declaration in the court file explaining the circumstances of the amendment, when this information had been discovered, and indicating that no leave to amend was required under CR 15(c) because no responsive pleading had been filed. CP 7-11. Mr. Richardson asserted that the amendment would relate back to the time of the filing of the original Complaint under CR 15(c) because it arose out of the same conduct, transaction, or occurrence as set forth in the original Complaint and the defendants would receive notice of the institution of the action prior to 90 days following the filing of the original Complaint. Therefore, there would be no prejudice to either defendant. *Id.*

On September 12, 2008, Chanda Pratt was served with the Amended Complaint naming both she and her friend Jennifer Gilliam as defendants, along with Mr. Richardson’s declaration describing the details

regarding the amendment of the Complaint. CP 162, 7-20. Thereafter, she called her friend Jennifer Gilliam and left a message. CP 149, 164-69 (Answer to Interrogatory No. 1). Several days later Chanda Pratt and Jennifer Gilliam had a telephone conversation in which Ms. Pratt told Ms. Gilliam that she had received court papers regarding the accident that had occurred when Ms. Gilliam was driving Ms. Pratt's car. CP 164, 177-78 (Answers to Interrogatory Nos. 10 and 11), 182 (Answers to Interrogatory Nos. 10 and 11). *See also* CP 177-78 (Answer to Interrogatory No. 3, describing that Ms. Pratt learned of the accident soon after it occurred from Ms. Gilliam). Pratt told Ms. Gilliam that the court papers named Ms. Gilliam as a defendant in the case. *Id.* This conversation occurred "later in the week" after Ms. Pratt was served on Friday, September 12, 2008. CP 164. Therefore, through this conversation, Ms. Gilliam received notice that the action had been instituted against her prior to September, 21, 2008, the 90th day following the filing of the original Complaint. CP 149.

Jennifer Gilliam was harder to serve than Ms. Pratt. On August 23, 2008, service was attempted on Jennifer Gilliam at the Hanson Street address which had been provided by the Farmer's PIP adjuster. CP 149-50. It was returned "no such address." CP 185. On August 25, 2008, the Richardson firm performed another search for a good address for Jennifer

Gilliam and obtained an address of 2259 North 54th Street, Seattle, Washington 98103. CP 150. This address was forwarded to ABC Legal Services for a service attempt. On August 28, 2008, at 7:56 a.m., service was made on Jennifer Gilliam at 2259 North 54th Street, Seattle, Washington by D. Reeves of ABC Legal Messengers. CP 186. That same day, Mr. Richardson received a telephone message from Jennifer J. Gilliam indicating she was an attorney at law in Seattle, Washington and that she was not the Jennifer Gilliam that was allegedly involved in the automobile accident on June 23, 2005. CP 150. On September 12, 2008, following an investigation which confirmed that this Jennifer Gilliam was not involved in the subject accident, Mr. Richardson and Jennifer J. Gilliam stipulated to dismiss her from the case, without prejudice to later serve the “Jennifer Gilliam” who was involved in the subject motor vehicle accident. *Id.*

On September 23, 2008, attorney Eric Freise appeared on behalf of defendants Chanda Pratt and Jennifer Gilliam. CP 188-89. This occurred eleven days after Chanda Pratt had been served, between two and eleven days after Chanda Pratt had told Jennifer Gilliam that she had been named

as a defendant in the lawsuit,<sup>2</sup> and two days after the 90th day following the original filing of the Complaint.

Further investigation was undertaken to try to serve the correct Jennifer Gilliam. CP 150. It turned out that she was living at her mother's residence and thus was very difficult to locate in public records databases. Nevertheless, her address was finally determined and she was served at 1127 – 33rd Avenue S., Seattle, Washington on December 3, 2008 at 3:12 p.m. CP 35-36, 191-92.

On April 22, 2010, approximately one and one-half years into the case, defendants brought a motion for summary judgment, claiming that the Statute of Limitations had passed prior to service on Ms. Gilliam. CP 51-101. Defendants also alleged that the misspelling of Ms. Pratt's first name in the original Complaint required dismissal of plaintiff's claims against her. *Id.*

F. Procedural history.

This action was filed on June 23, 2008, three years from the date of the accident on June 23, 2005. CP 1-6. The Amended Complaint was

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<sup>2</sup> Chanda Pratt testified that she spoke to Jennifer Gilliam "later in the week" after she was served on Friday, September 12, 2008. CP 164. The end of that week would have been Sunday, September 14, 2008. The end of the following week would have been Sunday, September 21, 2008. Under either meaning of "later in the week," Ms. Pratt spoke to Ms. Gilliam on or before September 21, 2008, the 90th day following the filing of the original Complaint. Therefore, she spoke to Jennifer Gilliam two to eleven days before attorney Eric Freise appeared on behalf of both defendants.

filed on August 13, 2008. CP 12-20. Defendant Chanda Pratt was served on September 12, 2008. CP 162. Defendant Jennifer Gilliam received notice that she had been named as a defendant in the action during a telephone call with Chanda Pratt at some time between September 12, 2008 and September 21, 2008. CP 164, 177-78, 182. Attorney Eric Freise appeared on behalf of defendants Chanda Pratt and Jennifer Gilliam on September 23, 2008. CP 27-28, 188-89. Jennifer Gilliam was served on December 3, 2008. CP 35-36, 191-92.

Defendants Chanda Pratt and Jennifer Gilliam filed a motion for summary judgment on April 22, 2010, scheduling the hearing for May 21, 2010. CP 101-03. On May 21, 2010, following full briefing and oral argument, King County Superior Court Judge Cheryl Carey granted the motion as to defendant Jennifer Gilliam and dismissed her from the case. CP 203-05. Judge Carey denied the motion as to defendant Chanda Pratt. *Id.* On May 26, 2010, defendant Chanda Pratt filed another motion for summary judgment, scheduling the hearing for July 16, 2010. CP 206-08. This motion argued that Ms. Pratt was not liable for the accident since she was not driving the car at the time of the accident. CP 209-33. Plaintiff filed a Response to this motion on June 9, 2010, stating that discovery had made it clear that Jennifer Gilliam was the driver of the car at the time of

the accident and that no facts had been uncovered that suggested that Chanda Pratt was vicariously liable for the accident. CP 234-35. Plaintiff therefore consented to the entry of summary judgment of dismissal of Chanda Pratt. *Id.* Judge Carey granted the motion for summary judgment and dismissed Ms. Pratt with prejudice on June 18, 2010. Dkt. 43.

On June 23, 2010, Ms. Farole filed this appeal regarding the May 21, 2010 dismissal of Jennifer Gilliam. Dkt. 44.

### ARGUMENT

A. Standard of review.

Appellate review of the Trial Court's order on Summary Judgment is *de novo*. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In a motion for summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988); *Nicholson v. Deal*, 52 Wn. App. 814, 764 P.2d 1007 (1988); *Hostetler v. Ward*, 41 Wn. App. 343, 346, 704 P.2d 11903 (1985) *review denied*, 106 Wn.2d 1004 (1986). If the moving party meets this burden by presenting evidence from which reasonable persons could reach but one

conclusion, the burden shifts to the non-moving party to present evidence that would support a genuine issue for trial. *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 769 P.2d 298 (1989). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988). The facts submitted and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989); *Douchette v. Bethel Sch. Dist. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991). The court may grant the motion only if reasonable minds could reach but one conclusion. *Nicholson, supra*. "Issues of negligence and proximate cause are generally not susceptible to summary judgment." *Owen v. Burlington Northern and Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (citing *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 299 (1995)). As long as a reasonable jury could find for the nonmoving party, the motion for summary judgment must be denied and the issue submitted to the trier of fact. *Herron v. KING Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). The trial court may not replace the trier of fact by weighing facts or deciding factual issues. *Babcock v. State*, 116 Wn.2d

596, 809 P.2d 143 (1991); *Hemenway v. Miller*, 116 Wn.2d 725, 807 P.2d 863 (1991); *Ames v. Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993).

The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists; it is not to resolve issues of fact or to arrive at conclusions based thereon. *Hamilton v. Huggins*, 70 Wn. App. 842, 855 P.2d 1216 (1993).

The parties stipulated to most of the facts giving rise to the motion for summary judgment. CP 53-54. The only factual issue impacting this appeal is plaintiff's assertion that Ms. Gilliam received notice that she was named as a defendant in this lawsuit prior to September 21, 2008, during her telephone conversation with Ms. Pratt. Ms. Pratt states this in her sworn answers to written discovery when she says the conversation occurred "later in the week" after she was served on September 12, 2008. CP 164. Taking all facts in the light most favorable to the non-moving party as is required on summary judgment, this Court should decide this appeal assuming that Ms. Gilliam received notice that she was named as a defendant in this lawsuit prior to the 90th day following the filing of the original Complaint.

- B. An Amended Complaint changing a party relates back to the time of filing when the requirements of CR 15(c) are met and the changed defendant receives notice of the action within the 90-day period following filing. The “period provided by law for commencing an action” in CR 15(c) refers to the period allowed for filing *and* service of the Complaint.

CR 15(c), Relation Back of Amendments, provides: “whenever 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, the amendment relates back to the date of the original pleading.” Here, the claim in the Amended Complaint is identical to the claim in the original Complaint: that the driver of the vehicle that struck Ms. Farole’s car on June 23, 2005 is liable for Ms. Farole’s resulting damages. CP 1-6, 12-20. The only changes were to the spelling of Ms. Pratt’s first name and to plead in the alternative that Jennifer Gilliam was the driver at the time of the accident. *Id.* The claims against the driver remained the same. Therefore, the requirement set out in this first section of CR 15(c) is met.

CR 15(c) goes on to provide two further requirements in the case of an amendment changing a party. The Rule provides: “An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied [the claim arose out of the same conduct, transaction, or occurrence] and, within the period provided by law for

commencing an action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (2) 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.”

As the Court will see from the discussion which follows, these two elements are met in this case. That is, Ms. Gilliam received such notice of the institution of the action that she will not be prejudiced in maintaining a defense on the merits (because she received such notice prior to the expiration of the 90-day service period and her liability and defense are provided by the insurance covering the vehicle), and Ms. Gilliam knew that but for a mistake concerning the identity of the proper party the action would have been brought against her (because she knew she was the driver). Although these two elements will be covered in detail below, what the Court will find is that what is left to decide in this case is whether these two elements were met “within the period provided by law for commencing an action against her,” as required by the rule. Thus, the question fairly framed is whether the phrase “the period provided for commencing an action” contained in CR 15(c) refers to the period of time by which a Complaint must be filed, or the period of time by which a

Complaint must be filed *and* served. In other words, is the action “commenced” by filing the Complaint or is it “commenced” by filing and serving the Complaint? This is a purely legal issue which plaintiff contends is settled law in her favor. Because the Trial Court apparently did not recognize this, plaintiff contends its decision was error.

In *LaRue v. Harris*, 128 Wn. App. 460, 115 P.3d 1077 (2005), the Court of Appeals analyzed what was meant by the phrase “within the period provided by law for commencing an action” in the context of CR 15(c) and held, in a case with nearly identical facts as the one at bar, the phrase meant that the defendant had to have received notice of the action within the 90-day period after filing of the Complaint. This was true, even if the Complaint was amended to change a party after the statute of limitations had run, as long as the newly named party received notice of the action prior to expiration of the 90-day service period after the filing of the original Complaint. If this occurred, the amendment of the Complaint changing the party would relate back to the date of the original filing of the Complaint.

In *LaRue*, the parties were in an automobile accident on June 20, 1997. The plaintiff’s attorney put the defendant’s automobile insurance carrier, Farmers, on notice of the accident. Pre-suit negotiations did not

produce a settlement and on June 19, 2000, one day before the running of the statute of limitations, LaRue filed a personal injury lawsuit, naming Corrine Harris as the defendant. *Id.* at 463. While trying to serve Ms. Harris after the statute of limitations had expired, LaRue discovered that she had died. On August 15, 2000, approximately two months following the expiration of the statute of limitations, LaRue amended the Complaint to name Samuel H. Harris, the Personal Representative of the Estate of Corrine A. Harris, a completely different person and legal entity than had been named in the original Complaint. On August 17, 2000, within the 90-day period for service following the filing of the Complaint, LaRue served Samuel Harris as Personal Representative of the Estate. *Id.* Mr. Harris, on behalf of the Estate, moved for summary judgment, which was denied by the trial court. The decision was affirmed on appeal, the Court of Appeals observing with respect to CR 15(c):

As can be seen, this rule allows a plaintiff to change the party against whom he or she is asserting a claim, after the statute of limitation has expired, so long as the claims made in the original and amended pleadings arise out of the same occurrence, the party being added had notice and knowledge of the claim, and that party will not be prejudiced in maintaining his or her defense. The claims alleged in LaRue's original and amended complaints arose out of the same auto accident. Farmers had notice and knowledge since at least 1998, and because it shared a community of interest with the Estate, its notice and knowledge were imputable to the Estate. [footnote omitted] Neither Farmers

nor the Estate was prejudiced in maintaining a defense because, except for substituting the Estate in place of Harris, the amended claim was the same as the original one. The requirements of CR 15(c) were met, and the trial court did not err by ruling that the action had been timely commenced.

*LaRue* at 465.

As in *LaRue*, the present action was an automobile accident filed at the expiration of the three year limitations period. In *LaRue*, it was filed the day before the period expired and here it was filed the day the period expired. In both cases the insurance company played a game of “cat and mouse” when they each failed to reveal information to plaintiff’s counsel regarding the defendant driver that was known and extremely material to the case. In *LaRue*, the insurance company did not inform plaintiff’s counsel that the defendant had died nine months after the accident, and stood silent while the plaintiff sued the deceased driver personally rather than the Personal Representative of the deceased driver’s Estate. In the present case, the insurance company consistently referred to Ms. Pratt as the only “insured” in correspondence with the plaintiff and her attorneys when Ms. Gilliam, as the permissive driver at the time of the accident, was obviously also an “insured” with respect to this accident.<sup>3</sup> Also, in this case, the insurance company failed to provide plaintiff’s counsel with

statements or incident reports which indicate that Ms. Gilliam was the driver of the vehicle at the time of the accident, despite being asked to provide such documents in writing and despite being provided with a copy of the Complaint which named only Ms. Pratt. CP 153. As in *LaRue*, the insurance company in this case sat silently.

Even more significantly, in both cases, *LaRue* and the case at bar, the entity required to be named to acquire jurisdiction was not sued in the original Complaint. In *LaRue* the plaintiff named Corrine Harris rather than Samuel Harris, the Personal Representative of the Estate. In the case at bar, the plaintiff named Ms. Pratt, rather than the friend to whom she had loaned her car, Ms. Gilliam. In both cases the plaintiff discovered that the wrong party was named when seeking to serve the Complaint after the statute of limitations had passed. In both cases an Amended Complaint was filed changing the name of the defendant after the statute of limitations had passed but before the 90-day period for service had passed. In both cases the insurance company liable to pay plaintiff's damages had notice of the claim all along. *LaRue* at 463, 465; CP 133, 137, 153, 156. And in both cases the amendment of the Complaint did not affect the insurance company's contractual obligation to its insured to provide an

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<sup>3</sup> In their Answer, defendants Pratt and Gilliam state, "Gilliam was driving defendant Pratt's vehicle with her permission . . . ." CP 24, 98.

indemnity and a defense. *LaRue* at 465; CP 199-201. Thus, neither the defendant in *LaRue* nor Ms. Gilliam herein would be prejudiced by maintaining a defense on the merits because in both cases the insurance company that had notice of the claim all along was contractually obligated to pay plaintiff's damages on behalf of their insured and to provide the defendant with a legal defense. Indeed, Ms. Gilliam was represented by a lawyer appointed and paid by the insurance company within days of learning that she had been named as a defendant herein. CP 188-89. Because of this, the *LaRue* court observed that the insurance company and the defendant shared a "community of interest" making knowledge of the claim by the insurance company imputable to the defendant. *LaRue* at 465.

Thus plainly, per *LaRue*, the phrase "within the period provided by law for commencing an action" contained in CR 15(c) means the time by which the defendant would have been required by law to have received notice of the commencement of the suit, which is 90 days after the filing of the original lawsuit in court. RCW 4.16.170; *LaRue* at 1079. The *LaRue* court explained:

Given that RCW 4.16.170 permits a plaintiff who files his or her complaint within three years to give notice by serving an original (uncorrected) complaint within the ensuing 90 days, is it logical to say that a plaintiff cannot

give notice by filing and serving an amended (corrected) complaint within the same 90 days (assuming of course that the other requirements of CR 15(c) are met)? We think not.

*Id.* One court has explained that under RCW 4.16.170, the filing of the Complaint is actually only “tentative commencement” of the action for purposes of tolling the statute of limitations and the action is not “commenced” until the Complaint is actually served, which must occur within 90 days. *Banzeruk v. Estate of Howitz*, 132 Wn. App. 942, 945-6, 135 P.3d 512 (2006), *rev. den.*, 159 Wn.2d 1016, 157 P.3d 403 (2007). Thus, amendment of the Complaint and notice to the defendant within the 90-day period complies with RCW 4.16.170 and allows the Amended Complaint to relate back to the time of filing. *Id.*

Returning to the central point, it is clear that it is settled law that the phrase “within the period provided by law for commencing an action” in CR 15(c) includes the 90-day period for service following the filing of a Complaint, even if that period extends beyond the statute of limitations. This is because this is the period within which the law requires defendants to receive notice that an action has been brought against them.

- C. Ms. Gilliam “received such notice of the institution of the action that she will not be prejudiced in maintaining her defense on the merits” and “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.”

Within the 90-day period after the filing of the Complaint, according to CR 15(c), “the party to be brought in by amendment” must have “received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits” and “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.” In this case, it is readily apparent that both Chanda Pratt and Jennifer Gilliam both received notice of the institution of the action within the 90-day period after the filing of the Complaint, which ended on September 21, 2008.

In the case of Ms. Pratt, she was served on September 12, 2008, within the applicable period. CP 162. There can be no issue as to her. She clearly received notice within the 90-day period. With respect to Ms. Gilliam, she states as follows in her answers to interrogatories:

Interrogatory No. 10: After Chanda Pratt was served with the Summons and Complaint in this action, did Chanda Pratt contact you with regard to anything relating to this case? If so, please describe in detail the substance of your communication with Chanda Pratt.

ANSWER: Yes. She called and told me that she had been served and that I was named on the papers.

Interrogatory No. 11: Did Chanda Pratt tell you that you had been named as a defendant in the Summons and Complaint she received?

ANSWER: She told me my name was on the papers.

CP 182.

Ms. Pratt's responses to the same questions mirror the answers of

Ms. Gilliam:

Interrogatory No. 10: After you were served with the Summons and Complaint in this action, did you contact Jennifer Gilliam with regard to anything relating to this case? If so, please describe in detail the substance of your communication with Jennifer Gilliam.

ANSWER: Yes. I let her know that I had been served with papers regarding the accident where she was driving my car. We also discussed the validity of the claim, and Jennifer told me that as far as she knew no one had been injured in the accident.

Interrogatory No. 11: Did you tell Jennifer Gilliam that she had been named as a defendant in the Summons and Complaint you received?

ANSWER: I told her that her name was on the papers I had received.

CP 177-78.

With respect to the time frame that this conversation took place,

Ms. Pratt answered as follows:

Interrogatory No. 1: . . . In follow up to the above interrogatory questions, how soon after you were served on September 12, 2008 did you call Jennifer Gilliam and tell her that you had received papers regarding the accident where she was driving your car and in which you told her that her name was on those papers?

ANSWER: I was served on a Friday around 8:00 or 9:00 pm, so I recall thinking that it was too late to call Jennifer that night. I also recall that when I did try calling her, the number was no longer any good. I then found another number for her, and was able to leave a message. By the time I got a call back from Jennifer it was quite a bit later in the week, but I do not remember the exact day of our telephone conversation.

CP 164.

Ms. Pratt was served on Friday, September 12, 2008. She says she found another number for Ms. Gilliam, left a message, and then spoke to Ms. Gilliam “quite a bit later in the week.” The end of the week in which she was served was Sunday, September 14, 2008. Even if she meant the following week, that week ended Sunday, September 21, 2008, the 90th day after the filing of the Complaint. Therefore, any way one interprets her testimony, the conversation occurred on or prior to September 21, 2008, the 90th day following the filing of the Complaint on June 23, 2008. Certainly taking the facts in the light most favorable to the non-moving party as we must in this motion, Jennifer Gilliam received notice that she was named in a lawsuit arising from the accident which occurred when she

borrowed Ms. Pratt's car within the 90-day period following the filing of the Complaint. Therefore, she "received such notice of the institution of the action that she will not be prejudiced in maintaining her defense to on the merits." CR 15(c). She received notice of the lawsuit within the same time as if she had been named in the original Complaint. Her attorney appeared for her in the case two days later. He filed an Answer on her behalf a week later. CP 97. And Unitrin Insurance continued to be contractually obligated to pay for damages to which she became liable and to provide for her defense. She cannot possibly be said to be prejudiced in maintaining a defense on the merits.<sup>4</sup>

The final requirement of CR 15(c) is that the party to be brought in by the amendment "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." Here, Jennifer Gilliam knows (or should know) that she was driving the car that struck Ms. Farole. She admits the same in her Answer. CP 98. Ms. Pratt testified that when she spoke to Ms. Gilliam, "I

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<sup>4</sup> During oral argument before the Trial Court, Ms. Gilliam's attorney asserted that Ms. Gilliam could be prejudiced by maintaining a defense on the merits because the Unitrin policy only provided the statutory minimum liability limits of \$25,000 and therefore, since Ms. Farole's damages were possibly more than \$25,000, Ms. Gilliam might be subject to an excess judgment against her personal assets. RP 21. Ms. Farole's attorney, in open court and on the record indicated to Judge Carey that Ms. Farole offered to accept the \$25,000 policy limits as full settlement of the claim and dismiss the case against Ms. Gilliam, so she would never be subject to an excess judgment in this case. RP 22. This offer stands, so Ms. Gilliam will never be prejudiced financially by maintaining a defense on the merits herein.

let her know that I had been served with papers regarding the accident *where she was driving my car.*” (Emphasis added.) CP 177. Ms. Gilliam had to know that but for a mistake as to the identity of the driver, the action would have been brought against her.

Accordingly, since all of the elements identified in CR 15(c) are met, the amendment of the Complaint will relate back to the time of filing of the Complaint on June 23, 2008.

Leading commentators in Washington regarding CR 15(c) are in accord with this analysis. Professor Tegland, in his Handbook on Civil Procedure, Volume 15A, *Washington Practice*, at §28.7, states, “when the defendant is arguing that he or she will be prejudiced if the amendment relates back, it is insufficient to argue, in effect, that ‘we will be prejudiced because if the amendment relates back, we will have to defend against the claim on the merits instead of getting it dismissed on the basis of the statute of limitations.’ To prevent an amendment from relating back, the defendant must do more – the defendant must convince the court that he or she will be somehow prejudiced in maintaining a defense *on the merits.*” (Emphasis in original.)

Washington courts adopt the same approach. In *DeSantis v. Merline & Sons, Inc.*, 71 Wn.2d 222, 233, 427 P.2d 728 (1967), the

Washington Supreme Court observed in a case in which the plaintiff had “made a mistake in the description of the parties” “the rule [15(c)] is to be liberally construed on the side of allowance of amendments, particularly where the opposing party is put to no disadvantage (citing cases) . . . .” “And the spirit of the Federal Rules demands that insofar as possible, controversies be determined upon the merits and not upon procedural niceties (citing cases).” The Court found that under the facts in *DeSantis*, allowing the amendment of the Complaint to relate back to the time of filing, even though, as here, the amendment added a party after the expiration of the statute of limitations, was appropriate because “[t]he fact that all of the parties defendant had actual knowledge of the claim emphasizes the necessity for our adoption of the exception, for no prejudice to the substituted party could result from its application; and to hold otherwise would be to sanction manifest injustice.” *Id.* at 225.

The Supreme Court in *North Street Association v. City of Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981), *overruled on other grounds*, *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), provided some historical context regarding CR 15(c), observing that the old version of the rule did not allow a “new and unrelated party to be added after the statute of limitations had run.” *North Street Association* at

368. But following the 1966 amendments, the Court observed, “most courts have determined that new parties may be added if all the requirements of 15(c) are met.” *Id.* After citing numerous cases, law review articles and civil procedure treatises supporting its view, the Supreme Court stated, “New parties can be added, these courts have concluded, because once the notice and prejudice requirements of the rule have been met, any amendment does not subvert the policies of the statute of limitation. Rule 15(c), as amended, dovetails with the policies of the limitation statutes.” *North Street Association* at 368 (citing law review articles and Moore’s Federal Practice). *Accord, Haberman v. WPPSS*, 109 Wn.2d 107, 173, 750 P.2d 254 (1988) (citing the same language from *North Street Association*); *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998) (relation back under CR 15(c) does not subvert the policies behind statutes of limitation once the notice and prejudice requirements of CR 15(c) have been satisfied, citing *North Street Association* and *Haberman*); *Snohomish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 823, 965 P.2d 636 (1998) (same); *Kiehn v. Nelsen’s Tire Company*, 45 Wn. App. 291, 296, 724 P.2d 434 (1986) (“CR 15(c) should be construed liberally on the side of relation back of the amendment if the defendant will be put to no disadvantage.”)

It is plain that Washington law encourages relation back of amendments adding parties where there is no prejudice to the defendant and the defendant receives notice within the time provided by law. The time provided by law is 90 days following the filing of the original Complaint. Since this is the same period of time by which the defendant would have received notice without the amendment, there is no prejudice to the defendant, and rather than subvert the policies of the statute of limitations, the current CR 15(c) dovetails with them. Since Jennifer Gilliam received such notice and will not be prejudiced by maintaining a defense on the merits, the Amended Complaint should relate back to the time of filing.

D. An “inexcusable neglect” analysis does not apply when an amendment changing a party corrects a misidentified party, as opposed to adding a new party whose negligence was not described in the Complaint.

In *Nepstad v. Beasley*, 77 Wn. App. 459, 892 P.2d 110 (1995), the Court of Appeals allowed an Amended Complaint to relate back to the time of filing of the original Complaint when the amendment corrected a previously misnamed party, even though the Amended Complaint was filed, as in *LaRue* and numerous other cases cited above, after the expiration of the statute of limitations. In *Nepstad*, the plaintiff originally named Delores Beasley as the defendant driver of the vehicle that caused

the accident. But, as here, Ms. Beasley turned out to be the owner of the vehicle, not the driver at the time of the accident. An individual named Joselyn Fox was the driver of the vehicle at the time of the accident, but the plaintiff had copied down the owner's name from the vehicle's insurance card at the accident scene. *Nepstad* at 462. As in the case at bar, as time went on, the insurance company repeatedly referred to Ms. Beasley, the named insured on the policy and the owner of the vehicle, in correspondence with the plaintiff and her attorney. *Id.*; CP 156.

The defendant moved for summary judgment, arguing that the plaintiff was guilty of "inexcusable neglect." The *Nepstad* court rejected that argument, stating, "we question whether the 'inexcusable neglect' case law applies to bar relation back where a party has incorrectly identified the defendant." *Id.* at 467. The court distinguished cases in which plaintiffs sought to add new defendants whose negligence had not been identified in the original Complaint from cases in which a party's negligence had been described in the Complaint but the party whose negligence was described had been misidentified. *Id.* In so doing, the court found that it was the vehicle driver's negligence that was alleged in both the original and the amended Complaint, and that the plaintiff had merely misidentified the vehicle driver, not sought to bring in another

entity whose negligence had not been described in the original Complaint, such as a municipality for negligent road design, a mechanical shop for negligent repair of the vehicle's brakes, an insurance company that had allegedly breached some duty owed the plaintiff, or some other such new actor whose conduct had not been described in the Complaint. Rather, the claim in the original and Amended Complaint was against the driver of the vehicle who had hit the plaintiff. The plaintiff had simply misidentified the driver by name.

In both *Nepstad* and the case at bar, the claim in both the original and Amended Complaint is against the *driver of the car that hit Ms. Farole* on June 23, 2005, at the corner of S. Ryan Way and 47th Avenue S., not against some other entity sought to be added whose negligence was not described in the original Complaint, such as a municipality for negligent road design or a auto shop for failure to properly repair the brakes. In neither case is the plaintiff trying to add a new defendant. In both, the plaintiff is attempting to properly identify the person which they know to be at fault for the accident: the driver of the car. Thus, the *Nepstad* Court stated:

Nepstad did not merely seek to "add additional defendants". Rather, Nepstad sought leave for "an amendment changing the party against whom a claim is asserted", which falls squarely within the language of CR 15(c). By contrast,

none of the plaintiffs in the "inexcusable neglect" cases misidentified the defendant. Rather, the plaintiffs in those cases failed to name all necessary parties and moved to amend to add the additional parties. The Supreme Court recognized this distinction in the leading "inexcusable neglect" case, *North St. Ass'n*, when it distinguished the case before it from *DeSantis*. The court pointed out that *DeSantis* was a case of "mistaken capacity, misnomer or oversight", while *North St. Ass'n*, involved no such mistake, but was simply an effort to add new parties. *North St. Ass'n*, 96 Wash.2d at 368, 635 P.2d 721. 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. *North St. Ass'n*, at 368, 635 P.2d 721. The case at bar falls into the latter category and it therefore appears that inexcusable neglect should not in itself bar amendment.

*Nepstad* at 467-8. The case at bar is a case of "substitution to correct a mistaken identity" rather than without a mistake, "simply an effort to add new parties" whose negligence had not been described in the original Complaint. According, per *Nepstad*, the "inexcusable neglect" analysis should not be applied herein. Since the elements of CR 15(c) relation back are met, the Amended Complaint should relate back to the time of filing.

E. Even if an "inexcusable neglect" analysis is applied, Ms. Farole's conduct cannot be said to have been "inexcusable".

In *Nepstad*, despite the fact that the court held that the inexcusable neglect analysis did not apply, the Court examined the plaintiff's conduct

and found that it did not constitute inexcusable neglect. *Id.* at 466. The Court observed, “The Supreme Court has held, ‘[g]enerally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.’” *Nepstad* at 466 (citing *Haberman v. WPPSS*, 109 Wn.2d 107, 173-4, 744 P.2d 1032 (1988)). The *Nepstad* court held that the reason for the failure to name the correct party was clear: the plaintiff misread the insurance card and mistakenly believed that Ms. Beasley was the defendant driver of the car. The court held, “this may have been neglect, but it was not ‘inexcusable.’” *Id.* at 466.

In the case at bar, the reason for the initial failure to name Ms. Gilliam appears clearly in the record: Ms. Farole gave the exchange of information documents from the accident scene to Mr. Morgan who was supposed to copy and retain them. Mr. Morgan mailed the documents back to Ms. Farole who gave them to her father, and they were lost in two moves of his residence. Thus, when Mr. Morgan withdrew, Ms. Farole did not have Ms. Gilliam’s name when she sought out alternative counsel. This reason appears plainly in the record. CP 126-27; *Nepstad* at 466. Accordingly, it is not a case in which “no reason for the initial failure to name the party appears in the record,” which was the threshold inquiry in an inexcusable neglect analysis per *Haberman*. Thus, since the reason for

the initial failure to name Ms. Gilliam appears in the record herein, an inexcusable neglect analysis is inappropriate.

Further, if the Court considers the reason for the mistake that appears in this record, can it be said that losing documents in a series of moves is worse or more “inexcusable” than writing down the vehicle owner’s name from an insurance card rather than the name of the driver standing in front of her, as was the plaintiff’s mistake in *Nepstad*? Let the person who has never lost items in a move cast the first stone. As the Court stated in *Nepstad*, “this may have been neglect, but it was not ‘inexcusable.’” *Id.* at 466.

It should also be remembered that in this case Ms. Farole copied down the proper information at the scene of the accident, saved it for a year and a half and then gave it to her attorney. She reasonably depended on her attorney to retain that critical information. When her attorney withdrew with only a short time before the expiration of the statute of limitations and did not provide her with all of the documents that were supposed to be in her file, including the documents recording the exchange of information from the scene of the accident, she contacted the attorney’s office and was told all of her documents had been mailed to her with the letter of withdrawal. She then acted diligently to secure other counsel.

She did the best she could to remember the name of the defendant, and was actually successful in remembering the name she had seen on numerous pieces of correspondence from the insurance company over the years, Chanda Pratt, although she erred in her recollection of the spelling of Ms. Pratt's first name.

No part of Ms. Farole's conduct can be described as "inexcusable." She was a young women going to college trying to overcome injuries that were not of her own making. She acted diligently under the circumstances. The totality of these circumstances should not work to deprive Ms. Farole of her legal rights, particularly when no prejudice will occur to the defendant in maintaining a defense on the merits.

F. Service on one defendant tolls the statute of limitations as to other named defendants.

In the series of arguments set out above, plaintiff has shown that the Amended Complaint "relates back" to the time of filing of the original Complaint on June 23, 2008, meaning that through the operation of CR 15(c), the filing of the original Complaint tolled the running of the statute of limitations as to Jennifer Gilliam and Chanda Pratt. But, of course, the statute of limitations will only stay tolled per RCW 4.16.170 if one of the named defendants was served within 90 days. Of course, Chanda Pratt was served on September 12, 2008. CP 162.

It is critical to point out that service on “one or more defendants” tolls the running of the statute of limitations on the defendant served *and* all other unserved defendants. RCW 4.16.170; *Sidis v. Brodie/Dohrmann, Inc.* 117 Wn.2d 325, 327, 815 P.2d 781 (1991) (“service of process on one defendant tolls the statute of limitation as to unserved defendants”). Thus, the service on Chanda Pratt on September 12, 2008, tolled the running of the statute of limitations as to herself, but also as to any other defendants, in this case named defendant Jennifer Gilliam. Jennifer Gilliam was a named defendant in the Amended Complaint that relates back to the time of filing. She was a named defendant at the time Ms. Pratt was served. CP 162. Indeed, her name was in the caption of the Amended Complaint that was served on Ms. Pratt and she was identified in the “Identification of Defendants” section, which is why Ms. Pratt called her and told her that she had been named as a defendant in a suit regarding the accident that occurred when Ms. Gilliam had borrowed Ms. Pratt’s car. CP 74-78, 177-78.

Ms. Gilliam was served after a diligent search on December 3, 2008. CP 191-92. With respect to service against other defendants after one named defendant has been served within the 90-day period, the Supreme Court in *Sides* stated, “Plaintiffs . . . must serve each defendant in

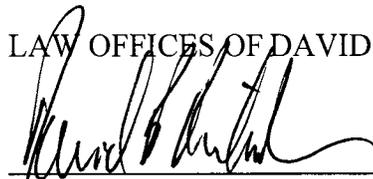
order to proceed with the action against the defendant.” *Id.* at 329. Since the plaintiff herein served Ms. Gilliam, she may proceed with this action against her, and the statute of limitations will not act to bar her claims against Ms. Gilliam since it was tolled by the Amended Complaint that related back to the date of the filing of the original Complaint, and remained tolled as a result of the service on Ms. Pratt on September 12, 2008 when Ms. Gilliam was served on December 3, 2008.

### CONCLUSION

For the reasons stated, the plaintiff requests this Court reverse the decision of the Trial Court and remand, finding that the Amended Complaint filed August 13, 2008, relates back to the filing of the original Complaint filed on June 23, 2008, that service on named defendant Chanda Pratt on September 12, 2008 resulted in the statute of limitations remaining tolled as to named defendant Jennifer Gilliam, and that after service on Jennifer Gilliam on December 3, 2008, plaintiff’s action against her was perfected and may therefore proceed in the normal manner.

Respectfully submitted: October 1, 2010.

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