

65645-7

65645-7

NO. 656457

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

---

ZAYNEB FAROLE, a single woman, *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*.

---

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

---

**BRIEF OF RESPONDENT**

---

2010 DEC -9 PM 3:24

~~FILED~~

Submitted by: Glen K. Ferguson, WSBA #20401  
Counsel for Respondent  
108 S. Washington Street, #400  
Seattle, WA 98104  
Mailing Address:  
P.O. Box 4567  
Seattle, WA 98194-0567  
206-587-6570

## TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
I. Introduction.....	1
II. Assignments of Error – No Assignments of Error.....	2
III. Statement of the Case.....	3
IV. Summary of Argument.....	4
V. Argument.....	5
A. Standard of Review.....	5
B. Plaintiff’s Amended Complaint was Properly Found to not Relate Back under CR 15.....	6
C. No Proper Notice to Defendant and No understanding of Mistake Under CR 15(c) – Undue Prejudice to Defendant.....	10
D. Inexcusable Neglect Applies Whether an Amendment is to Add a New Party or Replace a Misidentified Party.....	16
E. Plaintiff’s Conduct Constituted Inexcusable Neglect.....	19
F. Without Relation Back Plaintiff’s Claim is Time Barred.....	21
VI. Conclusion.....	24

## TABLE OF AUTHORITIES

### Table of Cases

<i>Brown v. Vail</i> , 169 Wn.2d 318, ___ P. 3d ___ (2010).....	p. 5
<i>Peterson v. Groves</i> , 111 Wn.App. 306, 44 P.3d 894 (2002).....	p. 5
<i>Foothills Dev. Co. v. Clark County Bd. of County Comm'rs</i> , 46 Wash.App. 369, 730 P.2d 1369 (1986). ....	pp. 5 and 19
<i>Teller v. APM Terminals Pacific. LTD</i> , 134 Wn.App. 696, 705, 142 P.3d 179 (2006).....	p. 5
<i>State v. Athan</i> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	p. 6
<i>Ferrin v. Stensland</i> , ___ P.3d ___, 2010 WL 4159290.....	pp. 7, 8, 12, 13, and 15
<i>Nepstad v. Beasley</i> , 77 Wn.App. 459, 892 P.2d 110 (2006).....	pp. 10, 11, 13, 17, and 19
<i>LaRue v. Harris</i> , 128 Wn.App. 460, 115 P.3d 1077 (2005).....	pp. 13
<i>Schwartz v. Douglas</i> , 98 Wn.App. 836, 991 P.2d 665, review denied, 141 Wash.2d 1003, 10 P.3d 404 (2000).....	pp. 9 and 10
<i>Craig v. Ludy</i> , 95 Wn.App. 715, 976 P.2d 1248 (1999).....	p. 13
<i>Krupski v. Costa Crociere S.p.A.</i> , --- U.S. ---, 130 S.Ct. 2485, 2494, 177 L.Ed.2d 48 (2010).....	p. 15
<i>North Street Ass'n v. City of Olympia</i> , 96 Wash.2d 359, 635 P.2d 721 (1981).....	p. 17
<i>Teller v. APM Terminals Pacific, Ltd.</i> , 134 Wn.App. 696, 142 P.3d 179 (2006).....	pp. 17 and 18
<i>Dixie Insurance Co. v. Mello</i> , 75 Wn. App. 328, 877 P.2d 740 (1994).....	pp. 20 and 21
<i>Bresina v. Ace Paveing Co.</i> , 89 Wn. App. 277, 948 P.2d 870 (Div. 2, 1997).....	pp. 21-23

### Rules

Amended and Supplemental Pleadings, CR 15(c).....	pp. 1, 2, 4-16, 21, and 24
---	----------------------------

## **I. Introduction**

The trial court's order granting defendant Jennifer Gilliam's (respondent's) summary judgment motion dismissing plaintiff's case with prejudice, filed on June 18, 2010, should be upheld. The court below, having no jurisdiction over the person of defendant Gilliam, plaintiff's (petitioner's) appeal from summary judgment should be rejected by this Court.

Plaintiff and defendant Gilliam were involved in a motor vehicle accident in Seattle, Washington, on June 23, 2005. Plaintiff admits that defendant Gilliam provided her with complete and accurate identification information at the scene. Plaintiff and her original attorney then lost the information. Plaintiff's original attorney withdrew just before the running of the statute of limitations. Plaintiff retained new counsel who filed an original Complaint on the last day of the statute of limitations, June 23, 2008. Plaintiff's original Complaint named only one defendant, Chanda Pratt, with no reference whatever to defendant Jennifer Gilliam. Plaintiff then filed an Amended Complaint on August 13, 2008, for the first time adding defendant Gilliam as a party to this matter.

Plaintiff asserts that the trial court's summary judgment order should be overturned because she complied with the requirements of CR 15(c), allowing relation back of her Amended Complaint. Defendant

disagrees. Even if plaintiff did comply with CR 15(c), plaintiff's inexcusable neglect in losing the information provided by defendant Gilliam operates to estop relation back under CR 15(c), rendering her action against defendant Gilliam time barred. Accordingly, the trial court's order dismissing plaintiff's claims with prejudice should be upheld.

For ease of reference, the following is a Summary of the timeline in this matter:

Date of accident from which suit arises:	6-23-2005
Last day of statute of limitations:	6-23-2008
Original Complaint filed	6-23-2008
Amended Complaint filed:	8-13-2008
Service of process on Ms. Pratt:	9-12-2008
Statute of limitations + 90-days:	9-21-2008
Service of process on defendant Gilliam:	12-3-2008

## **II. Assignments of Error – No Assignments of Error**

There was no error below. The provisions of CR 15(c) have not been met and plaintiff's inexcusable neglect forecloses relation back of the Amended Complaint to add Jennifer Gilliam as a defendant. Accordingly, the trial court properly granted defendant Gilliam's motion for summary judgment, and plaintiff's appeal should be rejected.

### **III. Statement of the Case**

There is no genuine issue of material fact. Plaintiff's Statement of The Case is sufficiently accurate as to facts pertinent to her appeal that defendant will not make a separate Statement of the Case here. However, some clarification is necessary.

Plaintiff states that, "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." However, there is no factual issue because there is no legal authority for the proposition that a telephone call is sufficient notice, especially under the facts, or lack thereof, in this case.

There is no evidence that defendant Gilliam was told, or that she understood, that she was actually named as a defendant prior to the running of the statute of limitations, plus 90 days. Plaintiff's Second Interrogatories and Requests for Production Propounded to Defendant Chanda Pratt state:

**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 36)

What Ms. Pratt remembers saying in the telephone conversation corresponds to defendant Gilliam's understanding of what was said, as expressed in Plaintiff's Second Interrogatories and Requests for Production Propounded to Defendant Jennifer Gilliam:

**Interrogatory No. 10:** After Chanda Pratt was served with the Summons and Compliant 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 Compliant she received?

**Answer:** She told me my name was on the legal papers.

(Emphasis added. CP 36)

Accordingly, contrary to plaintiff's assertion, there is no evidence that defendant Gilliam was aware that she was a defendant in this action prior to the running of the statute of limitations, plus 90 days.

#### **IV. Summary of Argument**

Plaintiff did not serve defendant Gilliam prior to the running of the statute of limitations and, having failed to comply with CR 15(c), her Amended Complaint does not relate back. However, even if plaintiff is

found to have complied with CR 15(c), plaintiff's Amended Complaint is estopped from relating back due to plaintiff's inexcusable neglect in losing the information necessary to name defendant Gilliam in the original Complaint. Plaintiff's claim against defendant Gilliam being time barred, the trial court's order on summary judgment should be upheld.

**V. Argument**

**A. Standard of Review**

Since there are no disputed issues of material fact in this matter, the standard of review is de novo. *Brown v. Vail*, 169 Wn.2d 318, \_\_\_ P.3d \_\_\_ (2010) An order granting summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See, Peterson v. Groves*, 111 Wn.App. 306, 310, 44 P.3d 894 (2002), CR 56(c) There are no genuine issues of material fact here, so the trial court's order granting summary judgment should be affirmed.

In addition, a determination of relation back under CR 15(c) rests within the trial court's discretion and will not be disturbed on appeal absent manifest abuse of discretion. *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wash.App. 369, 374, 730 P.2d 1369 (1986), *See also, Teller v. APM Terminals Pacific. LTD*, 134 Wn.App. 696, 705, 142 P.3d 179 (2006) An abuse of discretion occurs when the trial court's

decision is based on untenable grounds or untenable reasons. *See, State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007) There was no abuse of discretion below.

The burden of proof is on the party seeking to have an amendment relate back to the original action. *Foothills*, at 375 The moving party also has the burden of proving that any mistake in failing to amend in a timely fashion was excusable. *Id. See also, Teller*, at 705-706

**B. Plaintiff's Amended Complaint was Properly Found to not Relate Back under CR 15(c)**

Relation back of amendments is allowed under CR 15(c) if three criteria are met:

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. An amendment **changing** the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the 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.

CR 15(c)

This Court recently discussed the requirements for compliance with CR 15(c) in *Perrin v. Stensland*, \_\_\_ P.3d \_\_\_, 2010 WL 4159290 (October 25, 2010), a case in which plaintiff Kevin Perrin was riding in Jeff Stensland's car when it collided with a car driven by Gordon Van Weerdhuizen on August 15, 2003. On July 3, 2006, plaintiff filed a Summons and Complaint, initially naming Stensland and Van Weerdhuizen as defendants, along with their marital communities. On July 14, 2006, **Perrin effected service on Hattie Van Weerdhuizen** and the Stenslands. Gordon Van Weerdhuizen had died on March 20, 2006, so the Summons and Complaint incorrectly named Gordon as a defendant, rather than his estate. The statute of limitations ran on August 15, 2006. On February 1, 2007, Perrin filed an Amended Summons and Complaint substituting Gordon's son, Dale Van Weerdhuizen as a defendant, in his capacity as personal representative of his father's estate. Dale was personally served two weeks later. Defendants Van Weerdhuizen moved for dismissal on the theory that plaintiff's claim was time barred, and the trial court granted summary judgment for failure to comply with the provisions of CR 15(c), which was then overturned by this Court. Although this Court found that 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, there are limits that distinguish it from this case.

In *Perrin*, the first requirement of CR 15(c) was found satisfied because, “The claim asserted in both the original and the amended complaint (arose) out of the 2003 car accident **and** the alleged negligence of Gordon Van Weerdhuizen.” *Perrin*, at paragraph 21 However, here the alleged negligence asserted in the original Complaint pertained to Chanda Pratt only, not Jennifer Gilliam:

4.1 On June 23, 2005, at approximately 2:30 p.m., Zaynab Farole was on her way home from her classes at Highline Community College where she is enrolled in the pre-med program. She was driving her father’s 1994 Nissan Ultima, black 4-door sedan. She was headed eastbound on South Ryan Street, going up the hill and planning to turn left on 47<sup>th</sup> Avenue South. She was wearing her seatbelt with the three-point shoulder restraint.

4.2 She came to a stop on South Ryan in the left lane, waiting for westbound traffic to clear in order to turn onto 47<sup>th</sup> Avenue South. Defendant Chappa Pratt, while talking on her cell phone, forcefully struck Ms. Farole from the rear while Ms. Farole waited for traffic to clear in order to turn onto 47<sup>th</sup> Avenue South. Ms. Pratt was later very polite and apologized to Ms. Farole for rear-ending her.

(CP 1)

On the other hand, plaintiff’s Amended Complaint states:

4.3 Defendant Chanda Pratt **or** Jennifer Gilliam, while talking on her cell phone, forcefully struck Ms. Farole from the rear while Ms. Farole waited for traffic to clear in order to turn onto 47<sup>th</sup> Avenue South. The following driver was later very polite and apologized to Ms. Farole for rear-ending her.

(CP 6)

Defendant Gilliam was added as an **alternate** defendant and possible driver. Here, unlike *Perrin*, while the claim asserted in both the original and the Amended Complaints arose from the same car accident, it is not clear from the face of the two pleadings that they both arose from the negligence of defendant Gilliam. Also, in *Perrin*, the amended complaint listed a defendant who was a successor entity to a defendant listed in the original complaint. Accordingly, the negligence of the decedent could be imputed to the decedent's estate, which makes sense since the assets of the deceased, including insurance coverage, inured to the estate. In short, the assets of one were the assets of another. Here, Ms. Pratt's assets are not defendant Gilliam's assets.

However, even if the first requirement of CR 15(c) is found to have been met by plaintiff, the notice requirement of CR 15(c) was not met, which will result in undue prejudice to defendant Gilliam, as discussed in Section C, below.

C. **No Proper Notice to Defendant and No Understanding of Mistake Under CR 15(c) - Undue Prejudice to Defendant**

CR 15(c) requires that, “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.” CR 15(c) In this matter, the statute of limitations plus 90 days ended on September 21, 2008, but defendant Gilliam was not actually served until December 3, 2008.

Plaintiff argues that notice can be by means other than service under the rubric of CR 15(c), and in so arguing relies upon *Nepstad v. Beasley*, 77 Wn.App. 459, 892 P.2d 110 (2006). However, the criteria for finding notice under *Nepstad* are not met here.

In *Nepstad*, defendant Jocelyn Fox moved back in with her parents and switched the legal title and insurance for her car to her mother Dolores Beasley’s name, but continued to drive and treat the car as her own and was subsequently involved in an accident. At the accident scene the plaintiff took down incomplete information from Ms. Fox, and mistakenly wrote that her mother, Dolores Beasley, was the driver based upon the information on the insurance card. Subsequently, plaintiff filed suit against Dolores Beasley without naming Jocelyn Fox, who was the actual driver. After the statute had run, plaintiff sought to amend the pleadings

to name Fox as a defendant. In considering the conditions for relation back under CR 15(c) the Court found that the notice requirement was satisfied because Ms. Fox was **living at home** when suit was commenced, she had a **“very close communicative relationship” with her mother, and that Ms. Fox was sure her mother told her about the lawsuit.** *Nepstad*, at 464-465.

Here, unlike *Nepstad*, Ms. Gilliam and Ms. Pratt were just friends who were not related or residing together, and did not have a very close communicative relationship. The evidence shows that when Ms. Pratt went to call defendant Gilliam after being served, she did not even have Ms. Gilliam’s current phone number. (Brief of Appellant, p. 37, CP 36, cited by plaintiff as CP 164) The evidence further shows that when Ms. Pratt did call she only told defendant Gilliam that she was named on the suit papers, but not specifically that she was a named defendant (CP 36, Plaintiff’s Second Interrogatories and Requests for Production Propounded to Defendant Chanda Pratt, No. 11, and Plaintiff’s Second Interrogatories and Requests for Production Propounded to Defendant Jennifer Gilliam, Nos. 10 and 11) Most importantly, unlike defendant Fox in *Nepstad*, here there is no evidence that defendant Gilliam understood that she was, or should be, a defendant in the action. (CP 36) Certainly,

for any type of notice to be effective for purposes of CR 15(c) there must be an understanding of exposure to liability.

The notice requirement of CR 15(c) can also be satisfied absent service of process where there is notice through a person or entity with a community of interest with defendant, so that notice could be imputed to defendant. There was no such notice here.

As noted above, this court recently addressed the issue of compliance with the requirements of CR 15(c), including the notice requirement, in *Perrin v. Stensland*, \_\_P.3d\_\_, 2010 WL 4159290 (October 25, 2010) In *Perrin*, notice to the successor entity named in the amended complaint, Gordon Weerdhuizen's estate, was found because it was:

[P]lain that the individuals who would necessarily be concerned with Gordon's estate and the defense of the claim against it were notified of the claim against Gordon before that date. Hattie Van Weerdhuizen was the first nominee for personal representative named in her husband's will. Hattie was timely and personally served on July 24, 2006, with notice of the suit directed both to herself and to Gordon. Presumably, she knew then that Gordon's estate could be liable.

*Perrin*, at paragraph 23

In *Perrin*, this Court looked to three other cases where it concluded that the notice requirement of CR 15(c) was met by imputed notice: *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 Wash.2d 1003, 10 P.3d 404 (2000); and *Craig v. Ludy*, 95 Wn.App. 715, 717, 976 P.2d 1248 (1999), review denied, 139 Wash.2d 1016, 994 P.2d 844 (2000). See, *Perrin* at paragraph 24. While all three arise from car accidents, *LaRue*, *Schwartz*, and *Craig* are all distinguishable from this case because they all involved estates succeeding deceased defendants, and in each the Court found a community of interest with the successor entity estate. In *Perrin*, the widow's close community of interest with her husband and his estate allowed service upon her to be imputed to the estate. *Perrin*, at paragraph 25. In *Craig* and *Schwartz*, the community of interest between the decedent, decedent's estate, and the insurance company allowed notice to the insurance company to be imputed to decedent's estate. See *Craig*, at 719-20, and *Schwartz*, at 840. However, here, there is no similar community of interest in this case.

Defendant Gilliam is not related to Ms. Pratt, is not a successor entity to Ms. Pratt, and did not reside with Ms. Pratt. Accordingly, here there is no community of interest similar to that in *Nepstad* or *Perrin*. Further, Ms. Pratt was the owner of the car and named insured on the

policy. An insurance policy is a contract, and that contract was between Ms. Pratt and her carrier, not between Ms. Gilliam and Ms. Pratt's carrier. Further, there is no evidence of any communication between the insurance company and defendant Gilliam after the motor vehicle accident that underlies this matter.

Accordingly, having not been served or received actual notice, and the criteria for imputing notice to defendant Gilliam have not been met, the notice requirement of CR 15(c) has not been met, and there can be no relation back under CR 15(c).

The third requirement of CR 15(c) is also not satisfied, that defendant 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, is not met here. Here there was no mistake, but simply a lack of information. The evidence shows that in their telephone conversation Ms. Pratt told defendant Gilliam that her name was on the suit papers, but not that she was a defendant.

Unlike the estate cases, there was no mistake here. The estate cases all involve a misunderstanding; namely plaintiff mistakenly believed that defendant was still alive, resulting in the necessity to name and serve a successor entity that was wholly unknown at the time of the accident. Here, there was no mistake based upon a change in circumstance.

Defendant Gilliam was the driver on the date of the motor vehicle accident giving rise to the underlying case, and that remains true to this day. There has been no change of the entity that should have been named and served in the original Complaint and, but for plaintiff and her first attorney losing the information provided, there could be no confusion about defendant Gilliam's identity as the driver.

Given the above, allowing relation back under CR 15(c) would result in undue prejudice to defendant Gilliam because there is no evidence that she understood, or should have understood, that an attempt was being made to sue her.

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. "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. 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." *Perrin*, at paragraph 33, citing, *Krupski v. Costa Crociere S. p. A.*, \_\_U.S.\_\_, 130 S.Ct. 2485, 2494, 177 L.Ed.2d 48 (2010).

Here, there was no mistake or misunderstanding regarding a crucial fact as to defendant Gilliam's identity. There was neglect in losing the information. Further, there is no evidence that defendant Gilliam received actual or imputed notice that she was a defendant. Even though she was aware of the lawsuit directed towards Ms. Pratt, there is no evidence that defendant Gilliam had any reason to believe that she was named, should have been named, or that failure to name her as a defendant prior to the running of the limitations period was the result of a mistake or neglect. Absent such an understanding prior to the running of the limitations period defendant Gilliam has a strong interest in repose.

The requirements for allowing relation back under CR 15(c) having not been met, allowing relation back here would subvert the statute of limitations, causing undue prejudice to defendant Gilliam, so the trial court's order granting summary judgment should be upheld. However, even if this Court finds the requirements of CR 15(c) to have been met, there can be no relation back due to inexcusable neglect.

**D. Inexcusable Neglect Applies Whether an Amendment is to Add a New Party or Replace a Misidentified Party**

Even if all criteria for relation back under CR 15(c) are found to have been satisfied, relation back is not allowed where plaintiff's failure to name a defendant in the original complaint is the result of inexcusable

neglect. *North Street Ass'n v. City of Olympia*, 96 Wash.2d 359, 368, 635 P.2d 721 (1981), disapproved on other grounds by *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wash.2d 325, 815 P.2d 781 (1991). Inexcusable neglect exists when, “[N]o reason for the initial failure to name the party appears in the record.” *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn.App. 696, 706, 142 P.3d 179 (2006), citing, *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032 (1987), 750 P.2d 254, (*appeal dismissed sub nom. Wood Dawson v. Haberman*, 488 U.S. 805, 109 S.Ct. 35, 102 Led.2d 15 (1988)) Further, “If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable.” *Id.*

Plaintiff argues that, under *Nepstad*, inexcusable neglect only applies to cases where there is an attempt to add a previously unnamed party, rather than substitute a mistaken party.

In subsequently discussing its holding in *Nepstad*, Division 2 has stated:

But in *Nepstad*, we ultimately held that the plaintiff’s neglect was excusable and did not determine whether “inexcusable neglect” would actually apply in cases where the plaintiff attempts to correct misidentified defendants. 77 Wn.App. at 466-68, 892 P.2d 110. Rather, we merely expressed uncertainty about whether “inexcusable neglect” would apply in such cases. *Nepstad*, 77 Wn.App. at 468, 892 P.2d 110

*Teller*, at 709, 142 P.3d 179 (2006)

In *Teller*, the plaintiff suffered injuries from an auto accident at the Port of Tacoma and sued several incorrect defendants before eventually amending his complaint to add the proper defendant after the statute had run. The Court held that Teller's failure to name the proper defendant resulted from inexcusable neglect, noting:

But where, as here, Teller attempted to amend his complaint to add a previously unidentified defendant, "inexcusable neglect" bars the claim despite our previous reluctance to apply "inexcusable neglect" under such circumstances.

*Teller*, at 711.

Further, even if plaintiff is correct that inexcusable neglect cannot apply in cases where the amendment seeks to substitute a correct party for a previously misidentified party, plaintiff was clearly adding Ms. Gilliam as a party here. Plaintiff's Amended Complaint, filed on August 11, 2008, states:

**4.4 It is unknown at this time whether Defendant Chanda Pratt or Defendant Jennifer Gilliam was driving the following vehicle at the time of the accident.** At this time, Defendant Chanda Pratt is alleged to be the owner or driver of the vehicle that struck Ms. Farole. **In the alternative**, Defendant Jennifer Gilliam is alleged to be the owner or driver of the vehicle that struck Ms. Farole.

(CP 6)

Contrary to plaintiff's assertion, the addition of Ms. Gilliam as an "alternative" second defendant was not corrective of a previous error, but rather a continuing symptom of plaintiff's failure to remedy her inexcusable neglect through reasonable investigation at any time during the three years, plus 90 days, that elapsed after the date of the accident.

Accordingly, plaintiff's attempt to add a previously unidentified party was due to inexcusable neglect, her Amended Complaint is estopped from relating back, and all claims against defendant Gilliam were properly dismissed, below.

**E. Plaintiff's Conduct Constituted Inexcusable Neglect**

Plaintiff essentially argues that if there is any reason stated in the record for making a mistake, the fact that a reason is stated makes an inexcusable neglect analysis inappropriate no matter how neglectful that reason may be. However, the party seeking to have an amendment relate back has the burden of proving that any mistake in failing to amend in a timely fashion was excusable. *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wash.App. 369, 375, 730 P.2d 1369 (1986).

Unlike in *Nepstad*, and the estate cases there was no mistake or confusion here and, instead, plaintiff concedes that the information provided directly to her by defendant Gilliam was lost both by her original

attorney, Mr. Morgan, and herself. (Brief of Appellant, p. 46, paragraph 2)

While this is a reason for plaintiff's failure to timely name defendant Gilliam, it cannot be an **excusable** reason. Information about the identity of defendant(s) being elemental to any lawsuit, the double neglect of Mr. Morgan and plaintiff in losing that information are doubly inexcusable. This neglect was further aggravated by plaintiff's failure to timely initiate a reasonable investigation to re-acquire the lost information regarding Ms. Gilliam.

Even if the neglect was, in part, the fault of plaintiff's original attorney, just hiring an attorney does not relieve a client of responsibility for conduct of a lawsuit. In *Dixie Insurance Co. v. Mello*, 75 Wn. App. 328, 877 P.2d 740 (1994), Mello was the driver of a vehicle involved in a collision with what she believed to be a phantom vehicle. She did no investigation, so she did not realize that the police report contained the license number of the supposed phantom vehicle, as reported by an independent witness in a following vehicle. Mello hired an attorney, who then also failed to do any investigation. Mello later demanded UIM arbitration with her insurance carrier, Dixie, who moved for dismissal based upon failure to use due diligence in determining that the other driver was uninsured. The trial court denied the motion, finding that Mello discharged her duty to ascertain the identity of the other driver by

retaining an attorney, and that her attorney's failure to perform a proper investigation of the accident was not attributable to Mello.

In overturning the ruling of the trial court, the Court in *Mello* held that, "Merely hiring an attorney does not, in our judgment, discharge the claimant's burden to use all reasonable efforts to determine the identity and insured status of the "phantom" vehicle." *Dixie*, at 745 In this case plaintiff did obtain information regarding the identity of the other driver and vehicle, which she provided to her first attorney. However, just retaining an attorney and providing the information cannot relieve plaintiff of all responsibility in the conduct of her lawsuit, and her first attorney's failure can be attributed to her.

**F. Without Relation Back Plaintiff's Claim is Time Barred**

Given plaintiff's failure to fulfill the requirements of CR 15(c) and her inexcusable neglect, plaintiff's Amended Complaint cannot relate back, and the trial court properly found that her claims against defendant Gilliam are time barred.

In *Bresina v. Ace Paveing Co.*, 89 Wn. App. 277, 948 P.2d 870 (Div. 2, 1997), a woman who tripped and fell on the edge of a sidewalk as she approached an automated teller machine outside of a grocery store sought damages for personal injuries from the owners of the store, a paving company that had allegedly performed work on or near the

sidewalk, and other defendants. The paving company was originally unnamed in the complaint and was identified only as "ABC Corporation . . . an unknown entity" having "some legal responsibility" for her injuries. An amended complaint specifically naming the paving company was filed after the statutory time limitation applicable to the action had expired. At least one of the defendants was timely served with notice of the action. Ace sought summary judgment on the ground that Bresina had not commenced her action against it within the three-year statute of limitation. The Superior Court granted Ace's motion and plaintiff appealed. The Court held that the plaintiff did not make a sufficient effort to identify the paving company with reasonable particularity before the statutory time limitation had expired. Specifically, the court stated:

...[W]e assume that a **plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant--if, but only if, the plaintiff identifies the unnamed defendant with "reasonable particularity" before the period for filing suit expires.** "Reasonable particularity" depends, obviously, on a variety of factors. A major factor is the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant; if a plaintiff identifies a party as "John Doe" or "ABC Corporation," after having three years to ascertain the party's true name, it will be difficult to say, at least in the vast majority of cases, that the plaintiff's degree of particularity was "reasonable." Here, Bresina had three years to obtain Ace's true name, and she offers no reason for not doing so. It

is apparent she could have obtained Ace's name at almost any time during the three years by proper investigation, or, if necessary by filing a complaint and seeking discovery. Given these circumstances, naming "ABC Corporation" did not involve a degree of particularity that was "reasonable," and the trial court did not err by ruling that the statute of limitation was not tolled.

*Bresina*, at 282

In *Bresina*, plaintiff's listing of a placeholder defendant in the form of "ABC Corporation" was held insufficient to toll the statute of limitations because plaintiff had three years to investigate and obtain defendant's true name.

In the instant case plaintiff did not need three years to do an investigation, having actually obtained all necessary information directly from defendant Gilliam at the accident scene. (CP 36, page 2, paragraph 3) Yet, there was absolutely no reference to defendant Gilliam in the original complaint, filed the same day that the statute of limitations ran, June 23, 2008. There was not even any placeholder reference that could have been construed as relating to defendant Gilliam. Certainly, if the statute of limitations was not tolled in *Bresina*, it cannot be tolled here given that plaintiff failed even to hint at the existence of defendant Gilliam in her original Complaint.

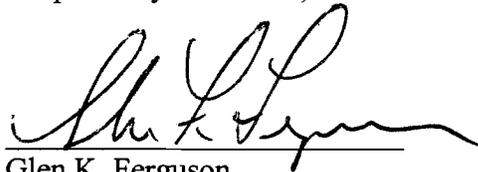
Accordingly, the statute of limitations was not tolled as to defendant Gilliam, and the claims against her were properly dismissed, with prejudice, below.

**V. Conclusion**

The undisputed facts show that plaintiff failed to meet the requirements of CR 15(c) for relation back. However, even if plaintiff is found to have complied with all requirement of CR 15(c), relation back of her Amended Complaint must be equitably estopped due to inexcusable neglect. There being no relation back, plaintiff's claims against defendant Gilliam are time barred, and the trial court's order granting defendant Gilliam's motion for summary judgment must be upheld.

December 9, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glen K. Ferguson", written over a horizontal line.

Glen K. Ferguson  
Attorney for Respondent  
WSBA #20401