

NO. 68512-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DERRICK GALLARD,

Plaintiff/Appellant,

vs.

JOHN ANDERSON, and DOLORES ANDERSON and the Marital
community thereof;

Defendants and

RAYMOND and ARDIS DUMETT, and the Marital community thereof,
THE RAYMOND-ARDIS DUMETT TRUST, DOES 1-25,

Defendants/Respondents,

**BRIEF OF RESPONDENTS RAYMOND AND ARDIS DUMETT
AND RAYMOND ARDIS DUMETT TRUST**

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A. INTRODUCTION

Plaintiff-Appellant Derrick Gallard (“Gallard”) appeals the trial court’s dismissal of defendants-respondents Raymond and Ardis Dumett and the Raymond-Ardis Dumett Trust (“the Dumetts”) based on the expiration of the three year statute of limitations for personal injuries.

Gallard based his claims against the Dumetts on their ownership of the property where he was injured. Yet, despite the fact that the Dumetts’ ownership of the property was public record, Gallard failed to name the Dumetts in his original Complaint or do anything to notify them of the action prior to the expiration of the three statute of limitations. Rather, having failed to reasonably investigate the facts, Gallard incorrectly named John and Delores Anderson (“the Andersons”) as the owners of the property in his original complaint.

Gallard admittedly learned on the day before the running of the three year statute of limitations that the Dumetts were listed as the property owners in the public record. However, after learning this, he did nothing to immediately amend the complaint or attempt to notify the Dumetts of the lawsuit. Instead, Gallard waited almost two months after the expiration of the three year statute of limitations before filing his Amended Complaint, in which he added the Dumetts as parties, naming them as the property owners, and alleged that the Andersons were the

property managers. Gallard subsequently served the Dumetts with the Amended Complaint more than two months after the expiration of the statute of limitations. Gallard never made any documented efforts to serve the Andersons.

The Dumetts moved for dismissal pursuant to CR 12 on the grounds that the action was not commenced against them within the applicable three year statute of limitations under RCW 4.16.080.

Even though the Dumetts were not named in the original complaint and Gallard never served the original named defendants, Gallard argued that his claims against the Dumetts were tolled and timely commenced under RCW 4.16.170 because he filed his original Complaint within the three year statute of limitations. Alternatively, Gallard argued that under CR 15(c) his later amendments, including the addition of the Dumetts as defendants, should have related back to the date of filing of the original Complaint. The trial court held that both of these arguments were contrary to the case law and granted the Dumetts' motion. Gallard claims that this was error.

In this appeal, Gallard has reiterated the same arguments that were rejected by the trial court. Gallard also states that the trial court erred by not finding that the Dumetts' alleged failure to cooperate in locating the Andersons, who were only named defendants in the original Complaint,

was “relevant”. This argument was not raised to the trial court and is not developed in Gallard’s Opening Brief. Furthermore, this argument is not supported by the facts or the law.

B. NO ASSIGNMENT OF ERROR

The trial court correctly dismissed the Dumetts on February 24, 2012 based on their motion to dismiss. The Dumetts do not raise any assignments of error.

C. STATEMENT OF THE CASE

This appeal arises from an action for personal injuries. Gallard alleges in his Complaint that on July 14, 2008, while performing maintenance at a house located at 1442 Roy Road in Bellingham, where he claimed to be a tenant, he fell off the roof and injured his back. CP 38.

Almost three years later, on July 13, 2011, Gallard filed a Complaint that named John Anderson and Dolores Anderson as defendants and alleged that they were the owners of the property. CP 38. Gallard alleged that the Andersons hired him and his roommate to perform maintenance and cleaning work on the property in exchange for a reduction in rent and that he fell from the roof of the house while performing the work. CP 38. Gallard alleged that the Andersons were liable based on a theory that the Andersons were negligent for not assuring that the work was performed in a safe manner and based on common law

principles of premises liability. CP 38. Gallard also named “Does 1-25” as defendants in the caption of the original Complaint, but he did not describe anywhere in the Complaint how any Does, or any other person besides the Andersons, had any fault or responsibility for his injuries. CP 36-43.

On July 14, 2011, one day after filing the original Complaint (and the final day of the three year statute of limitations), Gallard’s counsel looked up the subject property and learned that the Dumetts were listed as the owners of the property and not the Andersons. CP 8. Gallard’s counsel then verified with the Whatcom County Assessor’s office that the Dumetts owned the property. CP 8. Despite learning within the three year statute of limitations that the Dumetts, not the Andersons, owned the property, Gallard did not file his Amended Complaint adding the Dumetts as defendants until September 8, 2011. CP 25. Therefore, the Dumetts were not named as defendants until 56 days after the final day of the three year statute of limitations (and 56 days after the date Gallard learned that the Dumetts owned the property). In his Amended Complaint, Gallard alleged that the Dumetts were the owners of the property and claimed that the Dumetts approved and authorized of having Gallard perform the maintenance and cleaning work. CP 26-27.

Gallard served the Amended Complaint on the Dumetts on September 15, 2011, which was 63 days after the final day of the three year statute of limitation. The Dumetts submitted declarations to the trial court indicating that they had no knowledge of the lawsuit until they were served. CP 53-54¹.

Gallard never served the Andersons. In fact, there is no documented evidence that Gallard ever even attempted to serve the Andersons and he never asked to trial court to allow him to serve the Andersons by publication under RCW 4.28.100. Gallard also indicates that the Dumetts “refus[ed] to cooperate” with his efforts to locate the Andersons, but Gallard never requested such information from the Dumetts through a discovery request and has not demonstrated how this is relevant.

D. ARGUMENT

1. GALLARD’S CLAIMS AGAINST THE DUMETTS WERE NOT TIMELY AND WERE NOT TOLLED UNDER RCW 4.16.170

Gallard does not dispute that the three year statute of limitations for personal injuries described in RCW 4.16.080 applies to this action.

Gallard filed his original Complaint one day before the three year statute

¹ The Dumetts filed their Supplemental Designation of Clerk’s Papers on January 2, 2013, adding two documents. The Whatcom County Superior Court has not yet completed its index. Presumably, if the documents are added in chronological order, the correct reference will be to CP 53-54. Otherwise, it appears the current reference will be to CP 59-60.

of limitations, but that was not sufficient to commence the action against the Dumetts, when they were neither named as parties nor served within the three year statute of limitations.

Gallard argues incorrectly that by filing his original Complaint against others within the statute of limitations, the statute of limitations against the Dumetts (who were not named in the original Complaint) was tolled under RCW 4.16.170.

RCW 4.16.170 states the following:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

While the Dumetts had the burden of proving the statute of limitations, Gallard has the burden of proving the application of any exception or tolling to the statute of limitations. Cortez-Kloehn v. Morrison, 162 Wn. App. 166, 172, 252 P.3d 909 (2011) *rev. den.* 173 Wn.2d 1002. There are a number of cases, however, which demonstrate that RCW 4.16.170 does not toll the statute of limitations against unnamed

defendants in these circumstances. The key cases will be addressed in chronological order, starting with Kiehn v. Nelsen's Tire Co., 45 Wn. App. 291, 298, 724 P.2d 434 (1986) *rev. den.* 107 Wn.2d 1021 (1987), in which the court held that RCW 4.16.170 does not toll the statute of limitations as to an unnamed defendant.

The Kiehn opinion involved an action for wrongful death allegedly caused by the decedent's tractor losing its left wheel and then crashing. Id. at 292. Plaintiff, the decedent's wife, filed an action against various defendants as well as "X. Doe, Y. Doe, and other Does" about one week before the three year statute of limitations was to expire. The complaint specifically alleged that the "Does" negligently maintained and repaired the wheels of the tractor the decedent was driving. Id. Plaintiff added Nelsen's Tire as a named defendant about one and a half years after filing the original complaint. Then, plaintiff argued that the amended complaint naming Nelsen's Tire should relate back to the original filing, in part based on the theory that RCW 4.16.170 extended the statute of limitations by 90 days from the date of the original complaint (during which time Nelsen's Tire went into bankruptcy and an automatic stay arguably applied to toll the statute of limitations).

The court rejected plaintiff's argument based on its interpretation of RCW 4.16.170, which it described in detail. First, the court described the general nature of the statute:

“The time period provided for in RCW 4.16.170 is not an extension of the statute of limitations. Instead, the 90 days simply allows a plaintiff, who has *tentatively commenced an action against a party* by filing a complaint just *before the period of statute of limitations runs*, to perfect the commencement of the action *by serving that party, even after the statute runs*, as long as it is within the 90 days of the date the complaint was filed.” (emphasis added) (internal citations omitted). *Id.* at. 298.

Second, the court explicitly stated that RCW 4.16.170 would not toll the statute of limitations as to an unnamed defendant. The court stated that the statute would permit plaintiff:

“only to perfect the action it had filed on November 26, 1980. Because Nelsen's Tire was not named in the original complaint...Nelson's Tire was not a party to the November 26, 1980 action.” *Id.* at 298.

Kiehn's clearing regarding unnamed defendants would certainly defeat Gallard's claim that RCW 4.16.170 tolls the statute of limitations as to the Dumetts.² The Dumetts recognize, however, that this holding has

² Gallard attempts to avoid the consequences of his holding by stating that it is merely *dicta*. That is incorrect since it was central to the court's determination. Gallard cites Broad v. Mannesmann Anlagenbau, A.G., 141 Wn.2d 670, 10 P.3d 371 (2000) in support of his position, but he misreads the case. In Broad, the court actually noted that the key holding in Kiehn was that “the 90-day period is not an extension of the statute of limitations.” *Id.* at 684. The Broad court goes on to explain that there is *dicta* in Kiehn regarding the effect of a bankruptcy stay on the 90 day

been called into question by some *dicta* in Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991), indicating that claims against unnamed defendants may be tolled if certain requirements are met. But, as described below, even if the *dicta* from Sidis were to be given effect, Gallard still would be unable to meet the requirements of that *dicta* and his claims against the Dumetts would still be considered untimely.

In Sidis, which involved consolidated cases addressing a common legal issue, the plaintiffs filed complaints naming several defendants, but each plaintiff served only one of the defendants in a timely manner. Id. at 327-28. The issue for the court was what effect service on a single defendant had on the other *named*, but un-served, defendants. The court held that when a plaintiff serves one of multiple defendants within 90 days of filing the complaint, the statute of limitations is tolled for all *named* defendants. Id. at 329, 331.

The Sidis court responded to defendants' argument that tolling the statute of limitations as to unnamed defendants could potentially lead to abuse of process by clarifying that it was not addressing the effect of the statute on unnamed defendants:

“Respondents assert there is no valid reason to distinguish between named and unnamed defendants for the purposes of the tolling statute. That issue is not, however, part of

period described in RCW 4.16.170. Id. at 684-85. The effect of a bankruptcy stay is not relevant to this case.

this case. All defendants have been named...a ruling on this issue can await another time.” Id. at 331.

Although the Sidis court made it very clear that it was not addressing the effect of RCW 4.16.170 on unnamed defendants, the court then went on to state in *dicta* that “[I]n some cases, if identified with reasonable particularity, ‘John Doe’ defendants may be appropriately ‘named’ for purposes of RCW 4.16.170.” Id. (emphasis added).

Following the decision in Sidis, there are several cases in which the courts have rejected attempts to use RCW 4.16.170 to toll the statute of limitations against unnamed parties (who are subsequently identified and named) when the plaintiff has made only general, non-specific allegations towards “John Doe” defendants.

In Iwai v. State, 76 Wn. App 308, 884 P.2d 936 (1994) *cert. granted on separate issue and aff’d* by 129 Wn.2d 84, 915 P.2d 1089 (1996), plaintiff amended her complaint to add a defendant, WAM (the lessee of property where plaintiff fell and was injured), beyond the applicable three years statute of limitations period. Plaintiff argued that she could still timely add WAM as a named defendant because she had tolled the statute of limitations against the “unnamed ‘John Doe’ defendants” described in the original complaint, by timely serving other defendants that were named in the original complaint. Id. at 312. The

court rejected plaintiff's argument, which relied on the above-described *dicta* from Sidis.

“Mrs. Iwai urges us to extend the holding in Sidis to unnamed ‘John Doe’ defendants, such as she designated in her original complaint. We decline to do so.” Id.

The Iwai court (which cited to Kiehn in support of its holding) went on to indicate that, even if the Sidis dicta applied, plaintiff's claim would still fail. The court explained that plaintiff's “broad designation of John Doe Defendants allegedly ‘negligent or otherwise responsible’ does not sufficiently identify WAM so as to justify tolling the statute here.” Id. In a later portion of the opinion, analyzing CR 15(c), the court noted that if plaintiff had run a title search for the property, she would have discovered that it was owned by the state, which would have led her to the identity of WAM, as lessee of the property. Id. at 313-14. Accordingly, the court concluded that the claim against WAM was not commenced until after the statute of limitations had expired and her claim was untimely.

In a later case, Bresina v. Ace Paving Co., 89 Wn. App. 277, 948 P.2d 870 (1997) *rev. den.* 108 Wn.2d 1010 (1998), plaintiff filed an amended complaint adding Ace Paving as a named defendant beyond the three year statute of limitations period. Plaintiff argued that the statute of limitations against Ace Paving was tolled because within the statute of limitations she had timely served the original complaint upon a properly

named defendant and had also named “ABC Corporation, an unknown entity” as a John Doe defendant in the original complaint. Id. at 279-81.

The court, relying on the Sidis dicta, indicated that it would

“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.’” Id. at 282 (emphasis added).

The Bresina court went on to state that it was apparent that plaintiff could have obtained Ace Paving’s name through proper investigation or by filing a complaint earlier and conducting discovery that would have led to the identification of Ace Paving. The court concluded that plaintiff’s failure to name Ace Paving in the original complaint was not reasonable and, accordingly, the court refused to toll the statute of limitations as to Ace Paving. Id. at 282.

The above cases demonstrate that even if one assumes that the *dicta* is Sidis should be given effect and it is theoretically possible to use RCW 4.16.170 to toll the statute of limitations against unnamed John Doe defendants in some circumstances, tolling is not appropriate in this case.

As indicated in Bresina, one of the requirements for tolling the statute of limitations against an unnamed defendant would be “timely filing and serving a named defendant.” In this case, however, Gallard has failed to meet this requirement as he never served the Andersons (the only defendants named in the original complaint), and has not even made a documented effort to do so.

Furthermore, the Bresina court noted that the *dicta* in Sidis required that the unnamed defendant be described with “reasonable particularity.” The Bresina court noted that this required an analysis of the plaintiff’s opportunity to identify and name an unnamed defendant.

In this case, Gallard surely did not meet the “reasonable particularity” requirement as he did not describe the Doe defendants with any particularity at all. The trial court agreed with this assessment, stating that:

“John Does 1 through 25, I would note are not identified with any degree of particularity or specificity or any way of providing meaningful notice to anyone. There is only a passing reference to them, and I can’t recall that any reference anywhere beyond the caption in the initial complaint, but I would have to double check to be sure.”³
RP 14-15.

³ The trial court was correct in believing that there is no reference to the Does in the original Complaint aside from the caption. CP 36-43.

Also, given the fact that the Dumetts' ownership of the property was public record and Gallard had three years to figure this out (and actually learned of the Dumetts' ownership within the statute of limitations period), Gallard's degree of particularity as to the unnamed defendants could not be considered "reasonable" as described in Bresina. The trial court recognized the importance of this fact in its analysis of RCW 4.16.170. The trial court stated:

"I believe that Iwai v. State as well as Sidis, both support defendant's position, and as was the case in Iwai, the identity of the landlord was a matter of public record that would have been ascertainable." RP 15.

Given Gallard's failure to describe the unnamed Doe defendants with any reasonable particularity in accordance with the *dicta* in Sidis, the trial court rejected the argument that RCW 4.16.170 tolled the statute of limitations against the Dumetts. Gallard argues that the holdings in the above mentioned cases are factually distinguishable because the defendants at issue in those cases were added at least one year after the statute of limitations had run. However, that factual distinction was not relevant to the courts' interpretation of RCW 4.16.170.

Gallard's interpretation of RCW 4.16.170 is simply inconsistent with case law interpreting the statute. Gallard fails to reconcile his interpretation of the statute with the existing cases or explain why the cases have misinterpreted the statute. Gallard has failed to meet his

burden of showing that the statute of limitations must be tolled. The cases interpreting RCW 4.16.170 were correctly decided and, accordingly, Gallard's claims against the Dumetts were not tolled.

Finally, even if this court were to hold that Gallard met the requirements of the Sidis dicta, this court should still require compliance with CR 15(c). As stated in Kiehn v. Nelsen's Tire Co., 45 Wn. App. 291, 295, 724 P.2d 434 (1986) *rev. den.* 107 Wn.2d 1021 (1987), when a fictitious party is substituted by a true named party, "CR 15(c) is triggered and the Amended Complaint must meet the specific requirements of the rule." The Sidis dicta did not indicate that CR 15(c) should not apply in cases involving unnamed defendants. Applying CR 15(c) would give effect to that rule's specific considerations of fairness and notice when adding or changing parties beyond the statute of limitations and attempting to relate those amendments back. For the reasons stated below, however, Gallard cannot meet the requirements described in CR 15(c).

2. GALLARD'S AMENDED COMPLAINT DOES NOT RELATE BACK TO THE DATE OF HIS ORIGINAL COMPLAINT UNDER CR 15(c)

Gallard alternatively argues that even if his claims against the Dumetts were not commenced within the statute of limitations, his claims against the Dumetts should relate back to the date of his original Complaint under CR 15(c). The trial court, however, determined that

Gallard's claims should not relate back to the date of the original Complaint. "A determination of relation back under CR 15(c) rests within the discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion." Foothills Dev. Co. v. Clark County Bd. of County Comm'rs, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986) *rev. den.* 108 Wn.2d 1004 (1987).

For the reasons stated below, the trial court acted well within its discretion in holding that relation back was not permitted in this case.

In Teller v. APM Terminals Pacific, Ltd., 134 Wn. App. 696, 705-06, 142 P.3d 179 (2006), the court described the requirements under CR 15(c) for relation back of amendments to a complaint:

"Under CR 15(c), an amendment changing a party may relate back to the date of the original complaint if three conditions are satisfied: (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; (2) within the applicable statute of limitations, the party to be brought in by the amendment has received notice of the action such that it will not be prejudiced in maintaining a defense on the merits; and (3) within the applicable statute of limitations, the party to be brought in knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party." (citations omitted).

The absence of any requirements "is fatal to the relation back of an amended complaint." Kiehn v. Nelsen's Tire Co., 45 Wn. App. 291, 296, 724 P.2d 433 (1986).

Relation back is not permitted under CR 15(c) in this case because Gallard cannot satisfy the second and third conditions cited in Teller because the Dumetts did not have notice of the action within the applicable statute of limitations and had no reason to know or expect that an action would be filed against them. As noted above, the Dumetts did not receive notice of this lawsuit until they were served with the Amended Complaint on September 15, 2011, two months after the three year statute of limitations expired.

The fact that the Dumetts were served within 90 days of the date of the original Complaint was filed is not relevant to the above requirements for CR 15(c). In Kiehn v. Nelsen's Tire Co., 45 Wn. App. 291, 298, 724 P.2d 434 (1986) *rev. den.* 107 Wn.2d 1021 (1987), the court clarified the 90 day service period described in RCW 4.16.170 does not extend the statute of limitations. The Kiehn court noted that its holding was consistent with a United States Supreme Court case addressing the federal counterpart of CR 15(c), Schiavone v. Fortune, 477 U.S. 21, 91 L. Ed. 2d 18, 106 S. Ct. 2379, 2380 (1986). In Schiavone, the court held that the period within which a substituted defendant must receive notice under FED. R. CIV. P. 15(c) does not include the time available for service of process. (FED. R. CIV. P. 15(c) was subsequently amended to expressly indicate that the time in which a substituted defendant must receive notice

of the action includes the federal service of process period. In contrast, CR 15(c) has not undergone any material changes since the Kiehn case).

The trial court agreed that Gallard did not meet the requirements of the Teller case, stating:

“I do not believe that under the law the amendment relates back because I believe the plaintiff has not met the three-part test that I think was set forth in the Teller case. And it is my opinion that the 90-day period of RCW 4.16.170 does not operate to serve as an extension of the statute of limitations.” RP 16-17.

Furthermore, the Teller court explained that in order for relation back to occur, in addition to complying with the CR 15(c) requirements, the plaintiff must not have omitted the defendant because of “inexcusable neglect.” The court explained:

“In addition to CR 15(c)'s requirements, an amended complaint changing or adding a party defendant will not relate back if the plaintiff's original omission of the party resulted from ‘inexcusable neglect.’ Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987) (‘[I]n cases where leave to amend to add additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion.’), *appeal dismissed sub nom. Am. Express Travel Related Servs. Co. v. Wash. Pub. Power Supply Sys.*, 488 U.S. 805 (1988); Tellinghuisen v. King County Council, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) (‘[T]he plaintiff's failure to timely name the correct party cannot have been “due to inexcusable neglect.”’ (quoting N. St. Ass'n v. City of Olympia, 96 Wn.2d 359, 368, 635 P.2d 721 (1981))).” Id. at 706.

Washington courts have held that “failure to name a party in an original complaint is inexcusable where the omitted party’s identity is a matter of *public record*.” Teller, 134 Wn. App. at 707. (emphasis added). In Teller, the court stated that the identity of an added defendant, who was the lessee and operator of a marine terminal, was a matter of public record because the owner, the Port of Tacoma, was a municipal corporation. Id. at 708. The court also remarked that a visit to the Port’s website provided information about defendant’s address, telephone number, website, and background information. Id. The court concluded that plaintiff’s failure to name defendant was inexcusable. Other cases are in accord. *See e.g.* Tellinghuisen v. King County Council, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (failure to name all necessary parties was inexcusable neglect when the identity of the parties was a matter of public record); South Hollywood Hills Citizens Ass’n v. King County, 101 Wn.2d 68, 77-78, 677 P.2d 114 (1984) (failure to name defendant was inexcusable neglect when the party or party’s counsel could have identified the name of property owner by simply checking the county records); Iwai v. State, 76 Wn. App 308, 313-14, 884 P.2d 936 (1994) *cert. granted on separate issue and aff’d by* 129 Wn.2d 84, 915 P.2d 1089 (1996) (failure to name defendant was inexcusable neglect when running a title search on property where plaintiff fell would have revealed the State owned the property and,

in turn, plaintiff would have learned that defendant was leasing the property).

In this case, Gallard's failure to name the Dumetts in the original Complaint was inexcusable. Ownership of the Dumett property is a matter of public record. Whatcom County maintains a website, open to the public, where properties can be readily searched by address. After information regarding the address in question is entered, the website states that the owner of the property is "RAYMOND-ARDIS DUMETT TRUST/TR." The website further states that ownership was last transferred pursuant to a warranty deed dated 12-17-02. CP 55-57.⁴

Gallard had three years to determine what parties he should sue, but he did not add the Dumetts to this lawsuit until after the applicable statute of limitations expired despite the fact that information regarding the property's owners was readily available. The fact that Gallard's counsel was not retained until shortly before the expiration of the statute of limitations does not provide any assistance to Gallard. That same argument was raised and rejected in Bresina v. Ace Paving Co., 89 Wn. App. 277, 282 fn. 10, 948 P.2d 870, 872 (1997) (although plaintiff's

⁴ The Dumetts filed their Supplemental Designation of Clerk's Papers on January 2, 2013, adding two documents. The Whatcom County Superior Court has not yet completed its index. Presumably, if the documents are added in chronological order, the correct reference will be to CP 55-57. Otherwise, it seems the reference will be to CP 61-63.

counsel was retained shortly before the expiration of the statute of limitations, the plaintiff's reasonableness in attempting to name a defendant should be judged by the time available to plaintiff, rather than "the time available to a specific attorney.")

In this case, Gallard's failure to name the Dumetts in the original lawsuit is inexcusable, as was his failure to immediately file an amended complaint on July 14, 2011, the day he learned the identity of the Dumetts as the property owners. The trial court made a point of mentioning, that as in Iwai, the identity of the landlord "was a matter of public record that would be ascertainable." RP 15. As the case law generally indicates that it is inexcusable neglect to fail to name a defendant whose identity is a matter of public record, the court acted well within its discretion in denying Gallard's efforts to have the Amended Complaint relate back to the date of the original Complaint under CR 15(c).

3. GALLARD'S ASSIGNMENT OF ERROR REGARDING THE ALLEGED FAILURE OF THE DUMETTS TO COOPERATE HAS NO EXPLANATION AND WAS NOT PRESERVED

Although Gallard assigned error to the Dumetts' alleged "failure" to cooperate" with locating the Anderson defendants, Gallard does not really specify how the trial court erred with regard to that allegation. This issue was also not developed before the trial court, so any argument has been waived.

Even so, this argument is not factually supportable. There are no records indicating that Gallard made any discovery requests to the Dumetts regarding information for the Andersons. Nor is there documentation of any efforts that Gallard made on his own to locate the Andersons. Finally, Gallard did not seek leave of the court to serve the Andersons by publication under RCW 4.28.100, which is a method of service available after exhausting other service attempts.

Again, Gallard did not describe how the trial court erred with regard to this alleged failure to cooperate, so the Dumetts have little opportunity to make a meaningful response to this point. But based on the fact that Gallard not only failed to name the Dumetts in a complaint or notify them of this action within the statute of limitations, but also failed to notify the Dumetts or even try to identify the Dumetts before the three year anniversary of the injury, his claim against them is untimely in accordance with case law interpreting RCW 4.16.170 and CR 15(c). Any subsequent actions or inactions by the Dumetts are not relevant.

E. CONCLUSION

Gallard did not name the Dumetts in his original Complaint or serve or notify them of the action within the statute of limitations. Nor did Gallard ever serve the only defendants that he named in his original Complaint. These failures occurred despite the fact that the Dumetts'

ownership of the property in question was a matter of public record and Gallard had three years to learn the correct owner of the property and identify and locate any relevant parties.

Gallard's failure to name the Dumetts as defendants within the statute of limitations was the result of inexcusable neglect and his arguments that the claims against the Dumetts were tolled or should relate back are contrary to the case law. The trial court correctly applied the law to these facts and acted well within its discretion in dismissing the Dumetts. The trial court's decision should be affirmed.

Respectfully Submitted this 11th day of January, 2013.

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DECLARATION OF FILING AND SERVICE

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

I arranged for filing and service of the foregoing Respondents' Brief to the court (one original and one copy) and to appellant's counsel (one copy) as follows:

Office of the Clerk
Court of Appeals, Div. I
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One Union Square
Seattle, WA 98101-1176

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By depositing the foregoing Respondent's Brief, postage pre-paid, for mailing with the U.S. Post Office on this 11th day of January, 2013.

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