

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

No. 41367-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STELLA WATSON and THOMAS WATSON

Appellants,

vs.

MICHAEL EMARD and "JANE DOE" EMARD,
and their marital community

Respondents.

BRIEF OF APPELLANTS (Corrected)

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NATURE OF THE CASE

This case arises out of a car accident. The driver of the allegedly at-fault vehicle was the son of the vehicle's owner. Plaintiff filed suit naming the father as the only defendant. After the statute of limitation had run, the father moved for summary judgment on the grounds he was not the driver. Plaintiff moved to amend her complaint to add the son and assert a claim against the father under the family car doctrine. The trial court denied Plaintiff's motion and granted the father's motion, dismissing Plaintiff's claims. Plaintiff appeals.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plaintiff's Motion To Amend Complaint to add Miles Emard as a Defendant, add a claim against the defendant Michael Emard under the family car doctrine, and relate the claims back to the date of filing the original complaint.
2. The trial court erred in granting Defendant's Motion for Summary Judgment dismissing Plaintiff's claims.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in applying the inexcusable neglect rule to deny relation back of Watson's claim that the named defendant, Michael Emard, also was liable to her under the family car doctrine? (Assignment of Error 1)
2. Did Watson present evidence of a reason why she failed to name Miles Emard in her initial complaint sufficient to show her failure was not due to inexcusable neglect? (Assignment of Error 1)

3. Did the trial court err in granting summary judgment dismissing Watson's suit when properly allowed amendments to her complaint would have stated viable claims against Michael and Miles Emard? (Assignment of Error 2)

STATEMENT OF THE CASE

A car accident occurred on May 10, 2006. Stella Watson was one of the persons involved. Watson was driving her car in the parking lot of the Aberdeen Safeway store. A 1979 Datsun backed from a parking stall causing the accident. (CP 49)

Both drivers stopped, exited their vehicles, and exchanged information. (CP49-50) The driver of the Datsun produced an insurance card confirming coverage by Safeco under policy no. H1775568. The card identified the insured as Michael Emard, 6509 Central Park Drive, Aberdeen, WA 98520. (CP 50) Watson claimed she wrote down and retained the information. (CP 53) The Datsun driver claimed he wrote the information for her. (CP 165)

The parties dispute whether they exchanged other information. Ms. Watson testified that after the Datsun driver produced the insurance card, she specifically asked if he was Michael Emard and was insured under the Safeco policy listed on the card. He answered "yes." (CP 50) She testified she also asked for his driver's license and stated the police should be called. The

driver refused to produce his driver's license and left the scene. (CP 50) By declaration, Miles Emard identified himself as the Datsun driver. (CP 165) Miles testified Watson did not ask his name or ask that he show his driver's license or discuss calling the police. He also denied leaving the scene. (CP 166)

Miles Emard is Michael Emard's son.

Watson notified Safeco of her claim shortly after the accident. (CP 50) Safeco took her statement on May 16, 2006. (CP 57, 180) She stated that Michael "Emond" was the driver. (CP 58, 185) Her statement is consistent with the facts she would later give in court. (CP 185-87)

At Safeco's request, on May 17, 2006, Watson obtained a damage estimate to repair her car. The estimate shows Michael Emard as the insured. (CP 195) Safeco began corresponding with Watson on May 31, 2006. (CP 200) Safeco identified "Michael Emard" as the "insured name" on its initial correspondence, and each correspondence to her thereafter. (CP 200-02)

Watson hired an attorney, Kamela James, in April, 2008. (CP 46) James notified Safeco on April 3, 2008. In her notice she identified Michael Emard as the insured. (CP 203, 218) Over the next year, James and Safeco exchanged correspondence. All of it referred to Michael Emard as the insured. (CP 204-10, 219-36)

On April 6, 2009, over a month before the statute of limitations ran, James provided Safeco with a copy of the complaint she would file on April 17, 2009, if the case did not get resolved. (CP 46, 176, 208, 225-31) This was the same complaint James ultimately filed naming Michael and “Jane Doe” Emard as the Defendants. (Compare, CP 1-3 to CP 229-31) Safeco responded on April 15, 2009, stating: “We have notified our insured of your expressed intent of filing suit and look forward to working with you in bringing this case to resolution.” (CP 209) Safeco again identified Michael Emard as the insured. (Id.)

James filed the lawsuit on April 27, 2009. (CP 1) The Emards were served on April 29, 2009. (CP 6, 61)

Safeco has acknowledged it was immediately aware the wrong defendants had been named. (CP 214, Ins. 1-2) On May 11, 2009, Safeco acknowledged the filing by letter to James. (CP 211) Despite now clearly knowing the insured was Miles, Safeco continued to identify the insured as Michael Emard. In the acknowledgment Safeco stated it had retained an attorney to represent its insureds. (CP 211) The adjuster told James the attorney would handle the legal aspects of the claim but she (the adjuster) “will maintain settlement authority.” (CP 211)

Michael Emard filed his answer on June 8, 2009. (CP 8) He denied

all liability and damages related allegations. (CP 9) In his affirmative defenses he pled:

By way of FURTHER ANSWER and AFFIRMATIVE DEFENSE, Defendants Medved [sic] allege:

3. Non-party at fault in the person of Miles Emard, according to the best knowledge and belief of Defendant.

(CP 9 (Emphasis in original))

In November, Michael moved for summary judgment. He argued he was not the driver involved in the accident. (CP 270) The parties agreed to stay the motion to allow discovery. (CP 37)

Watson served interrogatories on Michael. (CP 63-67) Michael answered on December 22, 2009. Michael repeatedly denied being the driver involved in the accident, stating that Miles was the driver. (CP 91, 94, 95) He acknowledged he was the owner of the Datsun, and the car was a family car. (CP 65 & 70, 96) He acknowledge Miles was residing with him. (CP 65 & 70) He also acknowledged he was aware of the accident the day it happened because he photographed the damage to the Datsun that afternoon. (CP 96, Ins. 2-3) Michael refused to produce statements Safeco took of its insureds. (CP 89, Ins. 22-24; 93, Ins. 7-9)

On January 11, 2010, Watson filed a motion to amend her complaint. (CP 35-45) She sought to add Miles as a defendant and a claim under the

family car doctrine against Michael and his wife. Michael opposed the motion. He claimed Watson had not requested information from Safeco which might have revealed Miles as the driver before filing the complaint. He also argued his Answer in June, 2009, gave Watson actual notice that Miles was the driver, and Watson waited too long after that notice to amend her complaint. (CP 81-84)

The trial court denied Watson's motion. (CP 253-55) The court stated:

I think there's two issues going on here, and it's very nice of you to throw all this verbiage out, counsel. They sat on their hands. They don't have an obligation to do your job of discovery. A simple set of interrogatories or a demand for filing not only the complaint but following up with a deposition or something would have solved it. And I hate to say that, but we've all been there. No way.

Motion to add, nope, not gonna happen.

For the claim and the defendant. It's kind of one of those. You know, there's no question here, regardless of what the company says, when you filed a complaint, they knew it. Anybody that says any different, then they're not smart over there. They sat on their hands.

But they don't have an obligation to do anything other than that. You've got to go get the money; they don't give it to you. They make you earn it, and that's just the way it is.

(RP (2/22/2010) at 9-10)

Michael then moved for summary judgment on the grounds that he was not the driver of the vehicle in the accident. The court granted that

motion on October 4, 2010. (CP 331-32)

ARGUMENT

A. Standard of Review

The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 338, 229 P.3d 893 (2010). Therefore, when reviewing the trial court's decision to grant or deny leave to amend, courts apply a manifest abuse of discretion test. *Id.* The trial court's decision will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *Perrin v. Stensland*, ___ Wn. App. ___, 240 P.3d 1189, 1192-93 (2010).

B. The trial court incorrectly applied Civil Rule 15 in denying Watson's Motion to Amend.

Civil Rule 15(a) governs motions to amend. It provides "leave shall be freely given when justice so requires."¹ The touchstone for the denial of

1. CR 15(a) states:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's

a motion to amend is the prejudice such an amendment would cause to the nonmoving party. *Matsyuk v. State Farm Fire & Cas. Co.*, *supra*, 155 Wn. App. at 338-39. Factors which may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *Id.* at 339. Futility is also a consideration. *Id.* Denying a motion for leave to amend is not an abuse of discretion if the proposed amendment is futile. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008).

Here, the parties did not contend Watson's proposed amendment would cause prejudice to either the named or proposed defendants, undue delay, unfair surprise, or jury confusion. Nor did the court deny the motion for those reasons. None of those would occur. The case was not set for trial. The additional parties and claims are typical of personal injury auto accident cases and would not confuse the jury. Neither Michael or Miles would be prejudiced by adding Miles because both knew from the outset that Watson's claim and suit should have been directed at Miles. Nor would adding a claim

pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

based on the family car doctrine prejudice Michael individually. Watson already was asserting a claim against Michael. The family car claim simply added an additional legal basis for that liability.

Instead, Emard and the court focused on the issue of relation back under CR 15(c). In essence, Emard argued the amendments were futile because they would not relate back under CR 15(c) and therefore would be barred by the statute of limitations. He contended that CR 15(c) required Watson to show that her failure to assert the claims earlier was not the result of inexcusable neglect, which Watson failed to show. Emard contended that Watson could have discovered earlier that Miles was the driver if she had just asked Safeco for the information. Emard also argued Watson should have acted more quickly after Emard pled his affirmative defense that Miles was a responsible party. The trial court agreed.

1. The trial court improperly applied the inexcusable neglect rule to Watson's request to add a new claim under the family car doctrine against Michael Emard, an existing party. The inexcusable neglect rule does not apply to relation back of amendments adding new claims against existing parties.

Watson's motion to amend had two distinct parts. The first was a motion to amend to add a new claim against the existing defendant, Michael, under the family car doctrine. The second, was to add an additional party,

Miles. Different standards apply to each request.

Relation back is governed by Civil Rule 15(c). That rule 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. 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.

Relation back under this rule is mandatory. Once its requirements are satisfied, the rule mandates relation back. *Perrin v. Stensland*, ___ Wn. App. ___, 240 P.3d 1189, 1193 (2010), quoting *Krupski v. Costa Crociere S. p. A.*, ___ U.S. ___, 130 S.Ct. 2485, 2496, 177 L.Ed.2d 48 (2010). The burden of proof is on the party seeking the relation back of the amendment to prove the conditions precedent under CR 15(c). *Segaline v. State, Dept. of Labor & Indus.*, 144 Wn. App. 312, 182 P.3d 480 (2008).

Civil Rule 15(c) “clearly distinguishes between amendments adding claims and amendments adding parties.” *Stansfield v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). Relation back of claims against existing parties is governed by the first sentence of CR 15(c); relation back

of amendments adding parties is governed by the second sentence. The inexcusable neglect standard does not apply to amendments adding claims.

Id.

Once litigation involving particular conduct has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of claims that arise out of the same conduct as set forth in the original pleading.

This accords with the purpose of notice pleading, to facilitate a proper decision on the merits.” “[A] party is permitted to recover whenever she has a valid claim, even though her attorney fails to perceive the proper basis of the claim at the pleading stage.

Id. (Internal quotations omitted).

The trial court erred in applying the inexcusable neglect rule to Watson’s request to add an additional claim against Michael under the family car doctrine. The only element for relation back of amendments adding claims against existing parties is whether the new claim arose out of the conduct, transaction, or occurrence set forth in the original complaint. CR 15(c). In this case it does. Liability under the family car doctrine arises when (1) the car is owned, provided or maintained by the parent (2) for the customary conveyance of family members and other family business and (3) at the time of the accident the car is being driven by a member of the family for whom the car is maintained, (4) with the express or implied consent of the

parent. *Pascua v. Heil*, 126 Wn. App. 520, 530 n.6, 108 P.3d 1253 (2005); *Cameron v. Downs*, 32 Wn. App. 875, 879-80, 650 P.2d 260 (1982). In her original complaint Watson already asserted a claim of direct liability against Michael for the car accident. Her amendment simply alleged another basis for his liability for the very same accident. Watson's motion should have been granted to allow that claim.

2. No evidence supports the conclusion that Watson's failure to name Miles initially resulted from inexcusable neglect.

Relation back of amendments adding parties has four elements. The first are the three elements specifically stated in Rule 15(c): (1) the claim or defense asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth in the original complaint; (2) the party to be brought in by amendment has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) 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 him. *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 706, 142 P.3d 179 (2006). The fourth element is not contained in the rule: the delay in adding the party must not be due to inexcusable neglect. *North Street Assoc. v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981).

Several courts have criticized the fourth element as not justified by either the language or purpose of the rule. See *Perrin v. Stensland*, ___ Wn. App. ___, 240 P.3d 1189, 1195-97 (2010); *Miller v. Issaquah Corp.*, 33 Wn. App. 641, 646, 657 P.2d 334 (1983); accord *Krupski v. Costa Crociere S. p. A.*, ___ U.S. ___, 130 S.Ct. 2485, 2496, 177 L.Ed.2d 48 (2010)(rejecting inexcusable neglect as an element under FRCP 15(c)).

Here there was no dispute that Watson met the requirements of CR 15(c). The only issue was whether Watson's failure to name Miles earlier was due to inexcusable neglect.

Inexcusable neglect under CR 15(c) should not be confused with inexcusable neglect as that term is used in deciding a motion to vacate a default judgment. *Perrin v. Stensland*, ___ Wn. App. ___, 240 P.3d 1189, 1197 (2010) Generally, inexcusable neglect for purposes of CR 15(c) exists when no reason for the initial failure to name the party appears in the record. *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). Ordinarily, this standard requires either that the identity of the party to be added either was known or was easily ascertainable such that the plaintiff's failure to name the party originally was likely to be a strategic choice rather than a mistake. *Perrin v. Stensland*, 240 P.3d at 1197.

The element is to be considered in light of the purpose of the rule.

[T]he 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.

Id. at 1196. The focus of the rule itself is on what the new defendant knew or should have known, not upon the diligence of the plaintiff. *Id.* at 1190. The rule is to be liberally construed on the side of allowing relation back. *Id.* at 1194.

Here Watson provided a reason why she failed to name Miles initially, and the record provides no reason to believe her failure to name Miles was a strategic choice. The information Watson obtained at the accident scene was Michael's name and address. Watson had no contact with Miles or Michael thereafter. Watson had no reason to doubt the information she had was both accurate and complete. Watson communicated with Safeco and even informed Safeco within a week of the accident that she believed Michael was the driver. Yet in all her correspondence with Safeco, Michael was identified as the insured.

Though Emard was critical that Watson had not conducted additional investigation, he did not describe what the investigation might have been or

how it could have produced Miles' true identity. There was no police report or other public record of the accident. Watson did not have a license plate number or vehicle registration. Safeco's adjuster testified she would not have corrected Watson's mistake: "I noticed the wrong defendant had been identified, *but as I am not an attorney, I do not have authority to compromise a defense of our insured.*" (CP 214 (emphasis added)) And, when Watson asked for copies of statements Safeco had taken or its investigation of the accident which might have identified Miles as the driver, Safeco refused, citing privilege. (CP 93)

Emard also relied upon Watson's post-notice delay. He claimed that Watson first learned that Miles was the driver in June, 2009, months after the statute of limitations had expired, she waited until January, 2010 to move to amend. This delay, he claimed, was inexcusable. But this argument misunderstands the relevant "neglect." As the court stated in *South Hollywood Hills Citizens Ass'n v. King County*, inexcusable neglect for purposes of CR 15(c) exists when no reason for the initial failure to name the party appears in the record. 101 Wn.2d at 78. Though delay after the initial failure may be a factor relevant to amendment under CR 15(a), it is not relevant to relation back under CR 15(c).

This case is on all fours with *Nepstad v. Beasley*, 77 Wn. App. 459,

892 P.2d 110 (1995). There, following an accident, plaintiff copied the name, address and policy number from an insurance card. The parties disputed whether the driver produced a drivers license as well. Over the next 2 ½ years, plaintiff's attorney corresponded with the insurer who repeatedly identified the person listed on the insurance card as "our insured." Plaintiff filed and served a complaint three months before the statute of limitations was to expire naming the person on the insurance card as the defendant. Two months before the statute of limitations was to expire, plaintiff served interrogatories on defense counsel asking about the circumstances of the accident. One month before the statute of limitations expired the defendant answered the complaint admitting the date and place of the accident, but denying her responsibility. The defense served the interrogatory answers on plaintiff's counsel just over 1 month after the statute of limitations had run. Then the defense moved for summary judgment on the ground that they did not drive the vehicle and were not negligent. Plaintiff moved to amend the complaint to add the actual driver as a defendant, arguing that the amendment should relate back to the date of filing. The trial court granted the Beasleys' motion for summary judgment. The court refused, concluding that plaintiff's mistaken reading of the insurance identification card constituted "inexcusable neglect" which barred relation back of the amendment under CR 15(c), then

dismissed plaintiff's complaint. 77 Wn. App. at 462-63.

The Court of Appeals reversed. After noting that the motion clearly met the explicit requirements of CR 15(c), the court rejected the defendants' argument that plaintiff's failure was the result of inexcusable neglect.

We hold that plaintiff did not inexcusably neglect to identify the proper defendant. 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.” *South Hollywood Hills*, 101 Wn.2d at 78, 677 P.2d 114. In this case, the 68-year-old Nepstad had a reason--she misread Fox's insurance card immediately after experiencing the “shock” of a rear-end automobile accident. Plaintiff recorded some, but not all, of the information on the card, and misunderstood the identity of the driver of the car that had just struck her. This may have been neglect, but it was not “inexcusable.”

The cases that have found “inexcusable neglect” have generally considered the neglect of a party's lawyer, who is presumably charged with researching and identifying all of the parties who must be named in a lawsuit, and with verifying information that is available as a matter of public record. *Tellinghuisen, supra* (identity of proper defendant could be obtained by resort to public record); *South Hollywood Hills, supra* (same); *PUD 1 v. Walbrook Ins. Co.*, 115 Wn.2d 339, 797 P.2d 504 (1990) (plaintiff was aware of the proper party but failed to join party for tactical reasons or through pure neglect); *North St. Ass'n, supra* (no reason given for failure to name party). None of these facts is present in this case, and we find that plaintiff was not inexcusably neglectful.

77 Wn. App. 466-67.

In the trial court Emard relied upon one case: *Teller v. APM*

Terminals Pacific, Ltd., 134 Wn. App. 696, 142 P.3d 179 (2006). (CP 81-84). In Teller, the plaintiff was injured in a car accident at a terminal in the Port of Tacoma. Plaintiff had worked at the terminal for several years. He sued the driver. He attempted also to sue the terminal operator, the driver's employer, but named the wrong entity. After the statute of limitations had run he asked to amend his complaint to substitute the correct entity. The Court of Appeals reversed a trial court decision allowing the amendment to relate back to the date of the original complaint. The court decided that plaintiff's initial failure resulted from inexcusable neglect. The correct terminal operator had been identified to the plaintiff in documents he received from the State before filing his complaint, plaintiff worked at the terminal and the operator's name was posted on a large sign at the terminal's one entrance, and the identity of the terminal operator was easily discoverable through public records. 134 Wn. at 707-08. The court distinguished Nepstad v. Beasley for these reasons.

Unlike Teller, who first took action against Maersk Line three to four weeks before the statute of limitations expired, Nepstad actively participated in settling disputes with the other driver through Beasley's insurance company for two and a half years following the accident. Further, the record indicates no good reason for Teller to have believed that any of the improperly named Maersk defendants leased and operated the marine terminal. Nepstad, however, had reason to believe that Beasley was the proper defendant because Fox's insurance company consistently referred to Beasley as

“our insured.” Furthermore, the Maersk defendants did not participate in discovery and then move for summary judgment after the statute of limitations expired. And unlike 68-year-old Nepstad, who misunderstood the insurance card of a stranger immediately after an automobile accident, Teller worked at the marine terminal for several years before the accident; his failure to correctly name the proper defendant, therefore, is less understandable. Finally, as noted earlier, Fox’s identity, unlike APM Terminals’, was not a matter of public record.

134 Wn. at 711.

The same circumstances distinguish *Teller* from this case. Here, unlike *Teller*, Watson had a reason for misidentifying Miles in the first place: Michael was the name Miles disclosed at the accident scene. Unlike Teller, Watson did not wait until just before the expiration of the statute of limitation to take any action with regard to the accident. Watson immediately presented a claim to Safeco, participated in their investigation, and even disclosed her belief that Michael and not Miles was the at-fault driver. Unlike *Teller* where correspondence to the plaintiff had disclosed the correct terminal operator before he filed his complaint, Safeco’s correspondence identified Michael as the insured. Unlike *Teller*, Watson had no other way of determining Miles’ correct identity. She had no ongoing contact with him, his name was not a matter of public record, and Safeco would not disclose information about his identity. *Teller* is not analogous.

Emard’s real contention here is that, to avoid any risk that she might

name the wrong party, Watson should have started her lawsuit much earlier so she could have conducted discovery and confirmed the correct identity of the defendant. The argument puts form over substance. Washington law gave Watson three years to commence her action. Every bit of information available to her – all of which was reliable on its face – indicated Michael Emard was the proper defendant. Only the parties responsible for the accident – Michael, Miles and Safeco – knew he was not. Watson had no reason to suspect she would be naming the wrong party by naming Michael. She had no reason to commence her action any earlier than the statute allowed. If Watson should have proceeded as though her information was incorrect or dubious, then literally every plaintiff in every case must proceed as though they potentially may name the wrong party. Such a rule would eviscerate the statute of limitation.

C. The trial court's Order Granting Summary Judgment is dependent on its order denying leave to amend. If the trial court should have allowed Watson to amend her complaint, its order dismissing her lawsuit must be reversed.

Having denied Watson's motion to amend her complaint, the trial court granted summary judgment because Watson had no viable claim against Michael. (RP (10/4/2010)) If the trial court erred in denying Watson's motion to amend, its Order Granting Summary Judgment should be reversed

also. Watson's amended complaint would have asserted viable claims for negligence against Miles, the admitted driver of the car Watson claims struck her, and against Michael under the family car doctrine. Those claims would have related back to the time of her original timely complaint, and would not have been barred by the statute of limitations. Summary judgment dismissing those claims was in error.

CONCLUSION

Civil Rule 15(a) categorically allowed Watson to amend her complaint to add a claim against Michael under the family car doctrine. The trial court abused its discretion in denying her that relief. The trial court also abused its discretion when it concluded Watson's failure to name Miles Emard was a result of inexcusable neglect. Watson had good reason not to name Miles, and good reason to believe Michael was the proper defendant. Because of these errors, the trial court improperly concluded that Watson could not assert any viable claims and granted summary judgment dismissing her lawsuit. Watson asks this court to reverse these orders, reinstate her

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lawsuit, and remand to the trial court with instructions to allow her to amend her complaint as she proposed.

Dated this 1st day of February, 2011.

GOSSELIN LAW OFFICE, PLLC

By:


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Attorney for Appellants

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

FILED - I
STATE OF WASHINGTON
BY [Signature]
DEPUTY

STELLA WATSON and THOMAS
WATSON

NO. 41367-1-II

Appellants,

DECLARATION OF SERVICE

vs.

MICHAEL EMARD and "JANE
DOE" EMARD, and their marital
community

Respondents.

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of
Washington, over the age of twenty-one (21), not a party to the above-
entitled proceeding, and competent to be a witness therein.

On the 1st day of February, 2011, I did place in the United States
Mail, first class postage affixed, the following documents:

1. BRIEF OF APPELLANTS (Corrected)

and this declaration directed to and to be delivered to:

Gregory S. Worden
BARRETT & WORDEN, PS
2101 Fourth Avenue, Suite 700
Seattle, WA 98121

DECLARATION OF SERVICE

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

I declare and state under the penalty of perjury under the laws of
the State of Washington that the foregoing is true and correct.

Signed this 1st day of February, 2011 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Appellants

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