



**TABLE OF CONTENTS**

**I. Introduction.....1**

**II. Responses to Assignments of Error.....2**

**III. Issues Pertaining to Assignments of Error.....2**

**IV. Statement of the Case.....3**

**V. Argument.....7**

**A. The Court’s Order Should Be Affirmed Because, Due To Evidence Of Inexcusable Neglect, It Was Well Within The Judge’s Discretion To Deny Amendment To Add Miles Emard As A Defendant.....7**

**1. The trial court should be affirmed because the standard of review is manifest abuse of discretion.....7**

**2. The trial court should be affirmed because under Washington law a motion to add a party is properly denied in cases of inexcusable neglect.....8**

**3. The trial court should be affirmed because the inexcusable neglect standard is applicable to a plaintiff’s actions both before and after the lawsuit.....10**

**4. The trial court should be affirmed because there was ample evidence of plaintiffs Watsons’ inexcusable neglect both before and after filing the lawsuit.....13**

**5. The trial court should be affirmed because the cases cited by Plaintiffs are distinguishable and do not compel a decision in Plaintiffs’ favor.....18**

**B. The Trial Court’s Orders Should Be Affirmed Because, When Miles Emard Could Not Be Legally Liabe, Neglect, It Was Well Within The Judge’s Discretion To Deny Amendment To Allow A Claim That Michael Emard Was Vicariously Liabe For Miles Emard’sActions.....23**

**C. The Order Granting Summary Judgment Should Be Affirmed Because Plaintiffs’ Conceded that, Absent Vicarious Liability, They Could Not Present A Genuine Issue Of Material Fact As To Michael Emard’s Liability.....27**

**VI. Conclusion.....28**

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Doremus v. Root</i> , 23 Wash. 710, 716, 63 P. 572 (1901).....	25
<i>Doyle v. Planned Parenthood of Seattle-King County, Inc.</i> , 31 Wn.App. 126, 639 P.2d 240 (1982).....	24
<i>Foothills Dev. Co. v. Clark County Bd. Of County Comm'rs</i> , 46 Wn.App. 369, 730 P.2d 1369 (1986).....	9
<i>Griffith v. Schnitzer Steel Indus.</i> , 128 Wn.App. 438, 115 P.3d 1065 (2005)...	25
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 744 P.2d 254 (1987).....	8, 9, 10, 11
<i>Holmes v. Raffo</i> , 60 Wn.2d 421, 374 P.2d 536 (1962).....	24
<i>Kaynor v. Farlane</i> , 117 Wn.App. 575, 72 P.3d 262 (2003).....	24
<i>Kittinger v. Bowen</i> , 21 Wn.App. 484, 585 P.2d 812 (1978).....	15
<i>Matsyuk v. State Farm Fire &amp; Cas. Co.</i> , 155 Wn.App. 324, 229 P.3d 893 (2010).....	8, 24
<i>Mutual of Enumclaw v. Paulson</i> , 161 Wn.2d 903, 169 P.3d 1 (2007).....	23
<i>Neigel v. Harrell</i> , 82 Wn.App. 782, 919 P.2d 630 (1996).....	23
<i>Nepstad v. Beasley</i> , 77 Wn.App. 892 P.2d 110 (1995).....	18, 20, 21, 22
<i>Northwest Animal Rights Network v. State</i> , 158 Wn.App. 237, 242 P.3d 891, (2010).....	24
<i>Otis Housing Assn., Inc., v. Ha</i> , 165 Wn.2d 582, 201 P.2d 309 (2009).....	24
<i>Perrin v. Stensland</i> , 158 Wn.App. 185, 240 P.3d 1189 (2010).....	18, 19, 20
<i>Physicians Ins. Exch. V. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	22

<i>Raines v. Mercer</i> , 55 S.W. 2d 263 (Tenn. 1932).....	26, 27
<i>Segaline v. State Dept. of Labor &amp; Indust.</i> , 144 Wn.App. 312, 182 P.3d 480 (2008).....	9, 11, 12, 13, 16, 17, 18, 19
<i>Tank v. State Farm Fire &amp; Cas.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	23
<i>Teller v. APM Terminals Pacific, Ltd.</i> , 134 Wn.App. 696, 142 P.3d 179 (2006).....	10, 11, 15, 18
<i>Thompson v. Grays Harbor Community Hosp.</i> , 36 WnApp. 300, 675 P.2d 239 (1983).....	25
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	8

<u>Statutes</u> .....	<u>Page No.</u>
CR 12 (a).....	5
CR 15 (c).....	8, 9
RCW 4.16.080.....	15

## I. INTRODUCTION

Whether to allow amendment is a trial judge's discretionary decision. It is well within that discretion to deny addition of a new party when the failure to earlier name that party resulted from inexcusable neglect, and it is well within that discretion to deny addition of a futile claim.

Here, Plaintiffs waited for almost three years to file suit and then failed to sue the other driver, Miles Emard, but instead filed suit naming Miles' father, Michael Emard, as the driver. Michael's answer denied that he was the driver and named Miles as a non-party at fault. Over six months later, Plaintiffs sought to add Miles as a party and to add a claim that Michael was responsible for Miles' conduct. The trial judge denied the motion to amend, and then later dismissed the suit against Michael, as he was not the driver.

The judge acted well within his discretion in denying Plaintiffs' request to add Miles as the defendant because, as Miles' identity was readily ascertainable, Plaintiffs' failure to name him as a defendant is fairly categorized as inexcusable neglect. Likewise, the trial judge acted well within his discretion in denying a request to add a claim that Michael was vicariously responsible for Miles' alleged conduct because it would be futile to make such a claim when Miles could not be found liable. Finally, given that Michael was not driving a car involved in the accident, he was properly dismissed on summary judgment. The trial court's orders should be affirmed.

## **II. RESPONSES TO ASSIGNMENTS OF ERROR**

1. There was no error because the trial judge acted within his discretion in denying Plaintiffs' request to add Miles Emard as a defendant.
2. There was no error because the trial judge acted within his discretion in denying addition of a claim that Michael Emard was vicariously liable for Miles Emard's alleged negligence.
3. There was no error in granting summary judgment dismissing the suit against Michael Emard.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Amendment to add a party is properly denied when the failure to earlier name that party resulted from inexcusable neglect. Here, ample evidence indicates that driver Miles Emard's identity was ascertainable upon reasonable investigation. But Plaintiffs filed suit at the tail end of the limitations period, without doing any investigation to discover Miles' identity, and without naming Miles. Was it within the Judge's discretion to deny amendment adding Miles as a defendant?
2. Amendment adding a claim is properly denied when such amendment would be futile. Plaintiffs sought to add a claim that Michael Emard was vicariously liable for driver Miles Emard's alleged negligence. But the statute of limitations prevents Miles from being held liable, and the limitations period had been elapsed for 8 months before Plaintiffs sought to amend. Was it within the Judge's discretion to deny amendment adding that vicarious liability claim?
3. Summary judgment is properly granted when there is insufficient evidence to establish an essential element of a plaintiff's claim. Here, the complaint alleged that Michael Emard negligently backed his vehicle into Plaintiff's vehicle. But Plaintiffs conceded that Michael was not driving the car and conceded that they could not present a genuine issue of material fact as to Michael's liability. Under those circumstances, was it proper to dismiss Plaintiffs' claim against Michael on summary judgment?

#### IV. STATEMENT OF THE CASE

On May 10, 2006, plaintiff Stella Watson and non-party Miles Emard were involved in a low speed motor vehicle accident in the Safeway parking lot in Aberdeen Washington.<sup>1</sup> Miles submitted a declaration testifying that he was involved in a minor parking lot collision with Ms. Watson, that Watson said she was fine, and that both exchanged insurance information:

As I was backing out of a parking stall, a minor collision took place with the plaintiff, Stella Watson. I pulled forward back into my parking stall. I got out of the car and asked Ms. Watson if she was ok. The plaintiff responded, "I am fine." She asked for my insurance information which I wrote on a piece of paper and gave to her. She in turn provided me with her insurance information.<sup>2</sup>

Miles was the permissive driver of his father, Defendant Michael Emard.<sup>3</sup> Safeco insured Michael and the subject vehicle (1979 Datsun B210) with Michael being the named insured and Miles being a permissive driver in the household.<sup>4</sup>

Miles further declared that Watson never asked his name or asked him to show her his driver's license, and that there was no discussion about calling the police:

At no time did she ask my name nor ask me to show her my driver's license. There was no discussion about calling the

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<sup>1</sup> CP 165: Declaration of Michael Emard

<sup>2</sup> CP 165-166: Declaration of Michael Emard

<sup>3</sup> CP 85: Declaration of Matthew Marinelli and attached interrogatory responses from Michael Emard

<sup>4</sup> CP 86: Declaration of Matthew Marinelli; CP 129: insurance policy dec. page

police. I asked if “we were good.” Plaintiff responded, “Yes.” At that time, we both proceeded to our vehicles and I left.<sup>5</sup>

The declaration provided by Miles’ passenger Justine Dombroski is consistent with that provided by Miles and provides testimony that (1) Ms. Watson and Miles were joking because of the extreme minor nature of the accident, that (2) at no time did Dombroski hear Watson ask for Miles’ name, that (3) at no time did Dombroski hear Watson suggest that they needed to call the police, that (4) at no time did Miles tell Watson that he was Michael Emard, and that (5) the encounter lasted less than five minutes and at no time did Dombroski get the impression that Miles was hiding any information from Watson.<sup>6</sup>

Ms. Watson also provided a declaration where she agreed there had been a Safeway parking lot collision and that the driver provided Ms. Watson with insurance information for the 1979 Datsun he was driving.<sup>7</sup> In contrast to what Miles declared, Ms. Watson also stated that Miles claimed to be Michael Emard, refused to wait for police, and refused to show Ms. Watson his driver’s license.<sup>8</sup>

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<sup>5</sup> CP 165-166: Declaration of Michael Emard

<sup>6</sup> Appendix 1: Dombroski Declaration. As set forth at RP 8-9 transcribing the 1-25-10 oral argument the trial Judge reviewed and considered the Dombroski declaration. But the declaration was apparently not entered into the Court File and so could not be included with the clerk’s papers.

<sup>7</sup> CP 49-50: Declaration of Stella Watson

<sup>8</sup> CP 50: Declaration of Stella Watson

Despite Ms. Watson's allegations that Miles refused to show his driver's license and refused to wait for police, it is undisputed that Ms. Watson took no steps to confirm the driver's identity.<sup>9</sup>

As noted in the Brief of Appellants Watson at page 3, Ms. Watson hired attorney Kamela James in April 2008 –when there remained more than a year until the three year statute of limitations would expire.<sup>10</sup> Attorney James corresponded with Safeco, but at no time did Attorney James or Ms. Watson inquire as to the driver of the insured vehicle.<sup>11</sup>

Ms. Watson and her counsel made the choice to file suit on April 27, 2009, which was less than two weeks before the statute of limitations would expire on May 10, 2009.<sup>12</sup> That complaint included only a single allegation of negligence against Michael Emard and alleged that Michael negligently backed his vehicle into Plaintiff's vehicle.<sup>13</sup>

On April 29, 2009, service was made on Michael's wife, Annette Emard.<sup>14</sup> The Court Rules do not require an answer before 20 days have elapsed after such service,<sup>15</sup> - which would be May 19, 2009 in this case.<sup>16</sup>

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<sup>9</sup> See CP 49-51: Declaration of Stella Watson (not describing any post accident investigation into the driver's identity despite alleging that the driver refused to show his license and refused to await police)

<sup>10</sup> CP 46: Declaration of Matthew Marinelli and insurance policy

<sup>11</sup> CP 214: Declaration of Kristi Hansen

<sup>12</sup> CP 1-3: Complaint for Damages

<sup>13</sup> CP 2: Complaint for Damages

<sup>14</sup> CP 6: Declaration of Service

<sup>15</sup> See CR 12 (a)

<sup>16</sup> See CR 12 (a)

Accordingly, the statute of limitations expired on May 10, 2009 – nine days before the defendants would have any obligation to answer.

On June 5, 2009, Michael Emard answered and that answer denied all allegations in the complaint with the exception of the allegations pertaining to Michael Emard's residence and marital status, and thus specifically denied that Michael Emard was the driver in the accident.<sup>17</sup> Also, the answer identified Miles Emard as a non-party at fault.<sup>18</sup>

Despite being on notice from the answer that Michael Emard denied being the driver, and despite being on notice that Miles Emard had been identified as a non-party at fault, over the next five (5) months, Plaintiffs did not engage in any discovery, investigation, or prosecution of the case.<sup>19</sup>

On November 20, 2009, Michael Emard filed a motion for summary judgment seeking dismissal of all claims against him as he was not involved in the subject accident.<sup>20</sup>

On November 30, 2009, only after receiving the pending motion for summary judgment, Plaintiffs first propounded discovery requests to Michael Emard, and the summary judgment was continued to allow that discovery.<sup>21</sup>

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<sup>17</sup> CP 8-11: Answer

<sup>18</sup> CP 9: Answer

<sup>19</sup> CP 86: Declaration of Marinelli

<sup>20</sup> CP 87: Declaration of Marinelli

<sup>21</sup> CP 87: Declaration of Marinelli

On January 11, 2010, Plaintiffs filed their motion to amend the complaint to add Miles as a party and to add a vicarious liability claim against Michael,<sup>22</sup> and the trial court denied that motion to amend.<sup>23</sup>

Thereafter, the motion for summary judgment proceeded, and in their response to the summary judgment motion, Plaintiffs reiterated their arguments in favor of allowing amendment of the complaint but admitted that, in the absence of a claim for vicarious liability under the family car doctrine, it was proper to grant summary judgment dismissal of Michael.<sup>24</sup>

The present appeal followed.

## V. ARGUMENT

The Superior Court (1) did not abuse its discretion in denying Plaintiffs' request to amend the complaint to add Miles Emard as a defendant, (2) did not abuse its discretion in denying Plaintiffs' request to add a claim against Michael Emard for vicarious liability under the Family Car Doctrine, (3) and acted correctly in granting summary judgment and dismissing this case. The court's orders should be affirmed.

### **A. The Trial Court's Orders Should Be Affirmed Because, Due To Evidence Of Inexcusable Neglect, It Was Well Within The Judge's Discretion To Deny Amendment To Add Miles Emard As A Defendant.**

#### **1. The trial court should be affirmed because the standard of review is manifest abuse of discretion.**

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<sup>22</sup> CP 35-45: Motion to Amend

<sup>23</sup> CP 253-255: Order Denying Motion to Amend

<sup>24</sup> CP 329: Response to Defendants Motion for Summary Judgment

As is acknowledged at page 7 of Watsons' Appellants Brief, the decision to grant or deny leave to amend is the discretionary decision of the trial court, when reviewing such a decision the courts apply a manifest abuse of discretion test, and the "[t]he 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."<sup>25</sup> In this case, plaintiffs Watson can show no abuse of discretion because there is ample evidence to conclude that Plaintiffs' failure to earlier name Miles as a party was the result of inexcusable neglect.

**2. The trial court should be affirmed because under Washington law a motion to add a party is properly denied in cases of inexcusable neglect.**

Here, at a time when the statute of limitations had run, Plaintiffs sought to add Miles as a defendant and to have that claim related back per CR 15(c). But the Washington courts have consistently held that a motion to add a party is properly denied when the failure to earlier name that party resulted from inexcusable neglect. For example, in *Haberman v. Wash. Pub. Power Supply Sys.*, the Washington Supreme Court held that inexcusable neglect alone is sufficient grounds to deny a request to add an additional defendant:

Plaintiffs contend that delay, excusable or not, is not sufficient to support the trial court's denial of their motion. Instead, plaintiffs argue that a showing of specific prejudice by the

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<sup>25</sup> *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn.App. 324,338, 229 P.3d 893 (2010); *Wilson v. Horsley*, 137 Wn.2d 500,505, 974 P.2d 316 (1999)

nonmoving party must be shown. See Caruso v. Local 690, Int'l Bhd. of Teamsters, 100 Wash.2d 343, 349, 670 P.2d 240 (1983) (delay alone insufficient to support denial of leave to amend to add new claims). However, in cases where leave to amend to add additional defendants has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion. North St. Ass'n, at 368, 635 P.2d 721; Tellinghuisen v. King Cy., 103 Wash.2d 221, 223, 691 P.2d 575 (1984); South Hollywood Hills Citizens Ass'n v. King Cy., *supra* at 77, 677 P.2d 114.<sup>26</sup>

The Supreme Court in *Haberman* went on to hold that if the identity of the party sought to be added is apparent or ascertainable upon reasonable explanation then the failure to name that party is inexcusable neglect:

Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record. South Hollywood Hills Citizens Ass'n, at 78, 677 P.2d 114. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable.<sup>27</sup>

Moreover, in cases, as here, where a plaintiff seeks to add a defendant after the statute of limitations has passed, the moving party (here Watsons) have the burden of proof to show that the failure to timely add the additional defendant is excusable.<sup>28</sup>

By citing cases that purportedly criticize the inexcusable neglect standard as being inconsistent with the language of CR 15(c), Watsons' Appellants Brief attempts to side step *Haberman's* holding that inexcusable neglect alone is sufficient grounds to deny a motion to add an additional

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<sup>26</sup> 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987)

<sup>27</sup> *Haberman*, 109 Wn.2d at 174

<sup>28</sup> *Segaline v. State Dept. of Labor & Indust.*, 144 Wn.App. 312, 331, 182 P.3d 480 (2008) (citing *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn.App. 369, 375, 730 P.2d 1369 (1986))

defendant. But that effort is untenable because no Washington Supreme Court decision has retreated from *Haberman's* inexcusable neglect requirement, and because that standard has been consistently used by the Court of Appeals.

**3. The trial court should be affirmed because the inexcusable neglect standard is applicable to a plaintiff's actions both before and after the lawsuit.**

For example, that inexcusable neglect standard was applied to a plaintiff's conduct before filing suit in the recent Division 2 case, *Teller v. APM Terminals Pacific, Ltd.*<sup>29</sup>

In *Teller*, a truck driver filed a complaint for damages against the other driver in an accident and against the entity that he believed was the other driver's employer.<sup>30</sup> That complaint was not filed until three to four weeks before the statute of limitations expired.<sup>31</sup>

After expiration of the statute of limitations, the plaintiff truck driver named the correct employer in an amended complaint. Thereafter, the employer moved for summary judgment claiming that the amendment adding it did not relate back, and the District Court granted that summary judgment motion.<sup>32</sup> The plaintiff appealed to the Superior Court which reversed the summary judgment.<sup>33</sup> But Division 2 reinstated the summary judgment based

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<sup>29</sup> 134 Wn.App. 696, 142 P.3d 179 (2006)

<sup>30</sup> *Teller*, 134 Wn.App. at 702

<sup>31</sup> *Teller*, 134 Wn.App. at 706

<sup>32</sup> *Teller*, 134 Wn.App. at 704

<sup>33</sup> *Teller*, 134 Wn.App. at 704

on its determination that the plaintiff's failure to earlier name the tortfeasor's employer resulted from inexcusable neglect.<sup>34</sup>

The *Teller* court cited *Haberman* for the proposition that “[I]f the parties are apparent or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable.”<sup>35</sup> And the *Teller* court then went on to explain how in the three years after the accident Teller or his attorney had the opportunity to ascertain and name the correct party, and that the failure to do so amounted to inexcusable neglect:

Here, Teller's failure to name APM Terminals in his original complaint, despite the existence of several Maersk entities, resulted from inexcusable neglect. He did not file his original complaint until three to four weeks before the three-year statute of limitations expired. See RCW 4.16.080(2). Teller or his attorney had the opportunity to ascertain the terminal's lessee and operator between 2001 and May 2004.<sup>36</sup>

Likewise, a 2008 Division 2 case, *Segaline v. State Dept. of Labor & Industries*,<sup>37</sup> applied the inexcusable neglect standard to actions taken by a plaintiff after filing suit.

In that case, in August 2005, the plaintiff filed claims against the Department of Labor and Industries stemming from a no trespass notice which

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<sup>34</sup> *Teller*, 134 Wn.App. at 707-708

<sup>35</sup> *Teller*, 134 Wn.App. at 706

<sup>36</sup> *Teller*, 134 Wn.App. at 707

<sup>37</sup> 144 Wn.App. 312, 182 P.3d 480 (2008)

the plaintiff received in June of 2003.<sup>38</sup> L&I employee Alan Croft had prepared the no trespass notice but was not named in the initial complaint.<sup>39</sup>

About a year after the lawsuit was filed, and after the three year statute of limitations had run, Plaintiff sought to add Croft as a defendant and to have the claims against him relate back to the original complaint.<sup>40</sup>

The trial court applied the inexcusable neglect standard to hold that an amendment adding Croft could not relate back, and that Plaintiff's claims against Croft were barred by the statute of limitations. The Court of Appeals affirmed the trial court's decision. In affirming that decision, the *Segaline* court noted that the party seeking amendment had the burden of proving that the failure to amend in a timely manner was excusable:

The burden of proof is on the party seeking the relation back of the amendment to prove the conditions precedent under CR 15(c). *Foothills Dev. Co.*, 46 Wash.App. at 375, 730 P.2d 1369. This party also has the burden of proving that the mistake in failing to amend in a timely fashion was excusable. *Foothills Dev. Co.*, 46 Wash.App. at 375, 730 P.2d 1369. "When no reason for the omission appears from the record, the omission will be characterized as inexcusable." *Foothills Dev. Co.*, 46 Wash.App. at 375, 730 P.2d 1369.<sup>41</sup>

And in finding inexcusable neglect, Division 2 focused not on what Plaintiff knew or had reason to know at the time he filed suit in August of 2005, but on the Plaintiff's post suit lack of diligence in waiting months

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<sup>38</sup> *Segaline*, 144 Wn.App. at 320-321

<sup>39</sup> *Segaline*, 144 Wn.App. at 320-321

<sup>40</sup> *Segaline*, 144 Wn.App. at 321

<sup>41</sup> *Segaline*, 144 Wn.App. at 331

before seeking to add Croft as a defendant after being put on notice that Croft had drafted the no trespass notice:

Segaline had the burden of proof on all issues and he failed to show that his failure to amend in a timely fashion was excusable. As of December 2005, Segaline knew that Croft had "drafted and designed" the "no trespass" notice. 2 CP at 220. When Segaline deposed Croft on June 9, 2006, Croft clearly stated, "I ended up creating [the "no trespass" notice] and providing the template ... to use." 2 CP at 235. Yet for no stated or apparent reason, Segaline waited until August 3, 2006, to amend his complaint to name Croft as a defendant and seek damages under 42 U.S.C. § 1983. When "the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable." Haberman v. Wash. Pub. Power Supply Sys., 109 Wash.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987). Thus, the trial court did not err when it ruled that Segaline's amendment would not relate back to the date of the original pleading.<sup>42</sup>

*Segaline's* reliance on post-suit delay rebuts the arguments made in Watsons' Appellants brief that the only relevant consideration was Watsons' initial failure to name Miles Emard. The *Segaline* court found inexcusable neglect based on the type of post-lawsuit delay that Watsons now ask this Court to discount.

**4. The trial court should be affirmed because there was ample evidence of plaintiffs Watsons' inexcusable neglect both before and after filing the lawsuit.**

As in *Teller*, there was ample evidence that supports a conclusion that there was inexcusable neglect based on the reasons that Miles' identity was ascertainable upon reasonable investigation and that Plaintiffs and their attorney did not investigate.

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<sup>42</sup> *Segaline*, 144 Wn.App. at 331-332

First, according to Miles' declaration, plaintiff Stella Watson never asked Miles for his name or to see Miles' driver's license.<sup>43</sup> It would be in the trial judge's discretion to credit Miles' declaration and accordingly find that Plaintiffs' failure to initially investigate the other driver's identity amounted to inexcusable neglect.

Second, according to plaintiff Stella Watson's declaration, Miles refused to provide his driver's license and refused to wait for police.<sup>44</sup> Those allegations are inconsistent with Miles' declaration, but if they had been true then they would have been red flags that Plaintiffs needed to verify the other driver's identity, and it would be within the trial court's discretion to find that, given such initial red flags, Plaintiffs' failure to take steps to verify the other driver's identity amounted to inexcusable neglect.

Third, during the three years after the accident, Plaintiffs and their attorney did nothing to investigate whether the named insured Michael Emard was the driver. This could have been done by posing a direct question to the insurer or by locating and questioning Michael Emard. The degree of neglect is heightened by the relatively early involvement of Plaintiffs' attorney Kamela James.<sup>45</sup> As referenced in Watsons' brief, attorney James was hired in April 2008<sup>46</sup> – over a year before the statute of limitations would expire.

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<sup>43</sup> CP 165-166: Declaration of Miles Emard

<sup>44</sup> CP 50: Declaration of Kamela James

<sup>45</sup> Watsons are represented by different counsel on appeal

<sup>46</sup> CP 46: Declaration of Stella Watson

An attorney like James can be expected to know that the fact that an insurer references a named insured in correspondence does not mean that the referenced named insured was the other driver. A personal injury attorney should be expected to know that persons besides the named insured (such as family members and permissive users) may be the driver responsible for the accident.

Fourth, as was the case in *Teller*, Watsons made the strategic choice to file suit as the statute of limitations was expiring. And they made this choice even though they had retained an attorney over a year before the limitations period would expire. By filing suit on April 27, 2009, when the limitations period would expire on May 10, 2009, Plaintiffs created a situation in which no answer would be due before the limitations period ran, and where Plaintiffs would have no opportunity to do discovery before the limitations period ran.

Statutes of limitations exist in part to protect against stale claims.<sup>47</sup> The Legislature, with RCW 4.16.080, has set a three year bench mark as the time beyond which claims are too stale to prosecute. But there is nothing magic about that three year period. Like a loaf of bread, claims become more stale with each passing day. By the time Watsons commenced suit about two weeks before the end of the limitations period, their claim, like a loaf of bread sold just prior to its expiration date, was still viable but no longer fresh. A

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<sup>47</sup> *Kittinger v. Bowen*, 21 Wn.App. 484, 487, 585 P.2d 812 (1978)

person who buys a loaf of bread just prior to the expiration date cannot expect the flavor or freshness of a loaf taken hot from the baker's oven and must deal with the consequences of that choice. Likewise, plaintiffs who wait until the end of the limitations period to file suit face consequences – including, as here, the inability to get an answer or do discovery before the limitations period expires.

The policies behind the statute of limitations indicate that courts should give no special assistance to plaintiffs, like the Watsons, who choose to flirt with the expiration dates that the Legislature sets for legal claims. The Watsons' strategic decision to flirt with the statute of limitations exacerbated the consequences of their neglecting to confirm the other driver's identity, and that strategic decision is another factor showing their neglect was inexcusable.

For at least the four reasons discussed above, Plaintiffs' failure to name Miles Emard in the original complaint is, on its own, enough to find that the trial judge was within his discretion in denying Plaintiffs' request to add Miles as a defendant. In addition, a finding of inexcusable neglect is also supported by plaintiffs Watsons' pattern of neglect that continued after they filed this lawsuit.

In *Segaline* inexcusable neglect was found when plaintiff Segaline knew by December 2005 that Croft had drafted the no trespass notice, but

waited for 8 months before seeking to add Croft as a Defendant. The situation in the present case is similar.

First, the answer filed on behalf of Michael Emard in June 2009 denied that Michael was driving and identified Miles as a non-party at fault. But despite that notice Plaintiffs failed to (1) seek amendment of the complaint to add Miles, (2) failed to propound any discovery, (3) failed to make any inquiry about Miles, and (4) failed to make any inquiry about who was driving the car.

Second, Plaintiffs' pattern of complete inactivity and neglect continued for five months. It was not until November 30, 2009 that Plaintiffs even propounded discovery regarding Miles,<sup>48</sup> and Plaintiffs did not even do that until 10 days after Michael Emard had filed his motion for summary judgment on November 20, 2009.<sup>49</sup>

Third, Plaintiffs did not move to add Miles as defendant until January 11, 2010<sup>50</sup> - more than 7 months after Miles was identified as a non-party at fault in Michael's June 8, 2009 answer.<sup>51</sup>

As is demonstrated by the *Segaline* court's reliance on neglect that happened after the plaintiff filed his lawsuit, a finding of inexcusable neglect can be based on a plaintiff's action (or inaction) after the lawsuit is filed. Here

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<sup>48</sup> CP 87: Declaration of Marenilli

<sup>49</sup> CP 12-34: Defendant's Motion for Summary Judgment

<sup>50</sup> CP 35-45: Motion to Amend Complaint.

<sup>51</sup> CP 9: Answer

plaintiffs Watsons' post lawsuit failure to follow up when they had notice that Michael Emard was not the driver and that Miles Emard was named as a non-party at fault supports the conclusion that Plaintiffs failed to meet their burden of proof to show excusable neglect, and supports the conclusion that the trial judge was within his discretion in denying Plaintiffs' request to add Miles as a defendant.

And when that evidence of post-suit neglect is considered in combination with the Plaintiffs' pre-suit failures to investigate and their strategic decision to flirt with the statute of limitations, there are even stronger grounds for denying amendment based on inexcusable neglect than were present in either the *Segaline* or *Teller* cases.

**5. The trial court should be affirmed because the cases cited by Plaintiffs are distinguishable and do not compel a decision in Plaintiffs' favor.**

Moreover, that conclusion is not undermined by the two cases, *Perrin v. Stensland*<sup>52</sup> and *Nepstad v. Beasley*,<sup>53</sup> relied on in Watsons' Brief.

*Perrin* does not compel a decision in Plaintiffs' favor for at least the following reasons.

First, while *Perrin* can be read as criticizing the wisdom of the inexcusable neglect rule,<sup>54</sup> the *Perrin* court itself recognized that only the

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<sup>52</sup> 158 Wn.App. 185, 240 P.3d 1189 (2010);

<sup>53</sup> 77 Wn.App. 459, 892 P.2d 110 (1995)

<sup>54</sup> See *Perrin*, 240 P.3d at 1195-1197 (describing requirement of excusable neglect as being not found in CR 15(c) and as not being followed in the Federal system)

Washington Supreme Court could act to change the requirement of excusable neglect.<sup>55</sup>

Second, this Court should refuse Plaintiffs' invitation to read *Perrin* as limiting what can be considered inexcusable neglect to action or inaction before the initial suit is filed. The Supreme Court has not imposed such a limitation, and the 2008 Division 2 opinion in *Segaline* did cite action and inaction done after suit was filed as supporting a conclusion that there was no relation back due to inexcusable neglect.

Third, the facts in *Perrin* show more evidence that the plaintiff's failure to name the party sought added was excusable. In that case, plaintiff was a passenger in a car involved in an accident with a car driven by Gordon Van Weerdhuizen, Van Weerdhuizen died about 3 months before plaintiff filed the complaint, and plaintiff sought amendment to add the estate.<sup>56</sup> Further, it was not until a month after the original complaint was filed that a probate was opened and a personal representative appointed.<sup>57</sup> And, unlike engaging in the 6 month period of inactivity which commenced after Michael Emard informed Plaintiffs that Michael was not the driver and that Miles was a non-party at fault, in *Perrin* the plaintiff acted promptly: after learning of VanWeerdhuizen's death on December 20, 2006, "Perrin promptly filed a

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<sup>55</sup> *Perrin*, 240 P.3d at 1196-1197

<sup>56</sup> *Perin*, 240 P.3d at 1191

<sup>57</sup> *Perrin*, 240 P.3d at 1191

claim with the estate,<sup>58</sup> and plaintiff Perrin filed an amended complaint naming the estate within a week after the Estate rejected the creditors claim.<sup>59</sup>

The *Nepstad* case likewise does not compel a decision in Plaintiffs' favor because there are significant factual distinctions which make the plaintiff's neglect in *Nepstad* more excusable than Plaintiffs' neglect in the present case.

First, in *Nepstad*, the Court of Appeals classified the plaintiff's neglect in misidentifying the driver as being excusable, in part, as a result of plaintiff being 68 years old.<sup>60</sup> By contrast, 46 year old Stella Watson is not a senior citizen. So, there is no basis to excuse Ms. Watson's neglect because of her age.

Second, in *Nepstad*, the Court of Appeals classified the plaintiff's neglect in misidentifying the driver as being excusable, in part, as a result of plaintiff misreading the driver's insurance card due to "shock." The *Nepstad* court noted "Plaintiff was shocked by the impact,<sup>61</sup>" and that the plaintiff "misread Fox's insurance card immediately after experiencing the 'shock' of a rear-end automobile accident."<sup>62</sup> By contrast, in the present case, there is no evidence of "shock" that could make Plaintiffs' neglect excusable. The declaration provided by Ms. Watson in support of her motion to amend does

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<sup>58</sup> *Perrin*, 240 P.3d at 1191

<sup>59</sup> *Perrin*, 240 P.3d at 1191

<sup>60</sup> *Nepstad*, 77 Wn.App. at 466

<sup>61</sup> *Nepstad*, 77 Wn.App. at 461

<sup>62</sup> *Nepstad*, 77 Wn.App. at 466

not state that she was suffering from “shock” or any other adverse condition at the accident scene.<sup>63</sup> And the evidence before the trial judge was that this was a minor parking lot collision.<sup>64</sup> Because there is no evidence that Ms. Watson was in shock or similarly influenced by this minor parking lot accident, there is no basis to excuse Ms. Watson’s neglect because of shock from the accident or any similar condition.

Third, in *Nepstad*, the plaintiff and her attorney did not make the same strategic choice to flirt with the statute of limitations as did the Watsons and their attorney here. The *Nepstad* court noted that plaintiff filed and served the complaint three months before the statute of limitations was to expire.<sup>65</sup> That is significantly less neglectful than the decision in the present case to commence suit only two weeks before the statute of limitations was to run. By commencing suit with three months leeway, plaintiff *Nepstad* gave herself the ability to get an answer within the statute of limitations and to propound discovery within the statute of limitations.

Fourth, in *Nepstad*, one month after filing suit and two months before the limitations period was set to expire, the plaintiff did serve interrogatories asking about the circumstances of the accident, and responses to those

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<sup>63</sup> CP 49-51: Declaration of Stella Watson

<sup>64</sup> CP 49-51: Declaration of Stella Watson (stating collision took place in the Safeway parking lot and being silent as to the collision’s severity); CP 165: Declaration of Miles Emard (stating “I was involved in a low speed motor vehicle incident the Safeway parking lot”)

<sup>65</sup> *Nepstad*, 77 Wn.App. at 462

interrogatories were due a month before the statute of limitations expired.<sup>66</sup> By contrast, plaintiffs Watson did not propound any discovery before the statute of limitations expired.

Fifth, *Nepstad* classified the plaintiff's neglect in misidentifying the driver as being excusable, in part, as a result of the defense's actions in not providing required discovery responses. In *Nepstad*, responses to the plaintiff's interrogatories were due a month before the statute of limitations was to run but no discovery responses were provided until after the statute of limitations had run.<sup>67</sup> Accordingly, that "the defense delayed providing answers to the interrogatories" is one of the factors the *Nepstad* court cited in ruling that the complaint could be amended.

But there is no such failure to provide required information by the defense in the present case. Plaintiffs Watson never propounded any discovery before the statute of limitations ran. Michael Emard's answer was not due until after the statute of limitations ran. Watsons' Appeal brief mentions that Michael's insurer, Safeco, did not correct Watsons' mistaken belief as to the driver's identity. But, unlike a defendant who is obligated to be cooperative and forthright in providing required discovery responses,<sup>68</sup> there is no legal duty for a tortfeasor's insurer to help a claimant prosecute a

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<sup>66</sup> *Nepstad*, 77 Wn.App. at 463

<sup>67</sup> *Nepstad*, 77 Wn. App. at 463

<sup>68</sup> See *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (holding "that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials")

case against the insured. By contrast “an insurance company’s duty is to the insured, not to third party claimants of the insured.”<sup>69</sup> And an insurer can be potentially liable to its insured for bad faith if the insurer takes actions which would prejudice the defense of an insured.<sup>70</sup> Accordingly, Watsons’ attempt to excuse their neglect by complaining that the Emards’ insurer did not correct Watsons’ mistake is untenable, and the specter of defense gamesmanship which underlay the *Nepstad* decision is absent from the present case.

In sum, the inexcusable neglect standard applies to Plaintiffs’ attempt to add Miles Emard as a defendant, the trial judge was provided ample evidence showing inexcusable neglect, and the trial judge was well within his discretion denying Plaintiffs’ motion to amend.

**B. The Trial Court’s Orders Should Be Affirmed Because, When Miles Emard Could Not Be Legally Liable, It Was Well Within The Judge’s Discretion To Deny Amendment To Allow A Claim That Michael Emard Was Vicariously Liable For Miles Emard’s Actions.**

The argument made in Watsons’ Appeal Brief that the trial court improperly applied the inexcusable neglect rule to Watsons’ request to add a new claim under the family car doctrine misses the mark because it fails to take into account the interrelationship between addition of that claim for vicarious liability and addition of Miles Emard as a party.

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<sup>69</sup> *Neigel v. Harrell*, 82 Wn.App. 782, 783, 919 P.2d 630 (1996) (citing *Tank v. State Farm Fire & Cas.*, 105 Wn.2d 381, 715 P.2d 1133 (1986))

<sup>70</sup> See e.g. *Mutual of Enumclaw v. Paulson*, 161 Wn.2d 903, 918, 169 P.3d 1 (2007) (commenting on how an insurer is in bad faith if it pursues a declaratory judgment that might prejudice its insured’s tort defense)

As referenced above, a trial court's denial of a motion to amend is reviewed for a manifest abuse of discretion.<sup>71</sup> A trial court's order may be affirmed on any grounds established by the pleadings and supported by the record.<sup>72</sup> It is not an abuse of discretion to deny a motion for leave to amend when the proposed new claim would be futile.<sup>73</sup> Here, the trial judge acted well within his discretion in denying Watsons' request to add a claim for vicarious liability under the family car doctrine because the trial court's refusal to allow addition of a claim against Miles Emard made it futile to add a claim that Michael Emard was vicariously liable for Miles' actions.

A parents' potential liability under the family car doctrine is vicarious in nature.<sup>74</sup> As stated by the Court of Appeals in *Kaynor v. Farlane*,<sup>75</sup> "liability under the family car doctrine is based on agency principals and members of the family who are permitted to drive the automobile are viewed as agents of the owners if it is established that they were using the vehicle in furtherance of a family purpose for which it was maintained."<sup>76</sup>

In this case, amendment to add a vicarious liability claim against Michael under the family car doctrine would be futile, because, as (1) the trial

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<sup>71</sup> *Matsyuk*, 155 Wn.App. at 338

<sup>72</sup> *Otis Housing Assn. Inc., v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009)

<sup>73</sup> *Northwest Animal Rights Network v. State*, 158 Wn.App. 237, 242 P.3d 891, 897 (2010); *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn.App. 126, 132, 639 P.2d 240 (1982)

<sup>74</sup> *Holmes v. Raffo*, 60 Wn.2d 421, 433, 374 P.2d 536 (1962)

<sup>75</sup> 117 Wn.App. 575, 72 P.3d 262 (2003)

<sup>76</sup> *Kaynor*, 117 Wn.App. at 583

court denied the request to add driver Miles as a party, and as (2) the three year statute of limitations had run as to Miles, there is no that way Miles could be held liable.

If an agent, like Miles, cannot be held be liable, then neither can a principal, like Michael. In Washington, the Courts follow this principal under the “*Doremus* rule,” which states that “if the employee who causes the injury is free from liability therefor, his employer must also be free from liability.<sup>77</sup>” The *Doremus* rule applies in situations, like here, where the principal’s liability is only based on vicarious liability. For example, in *Griffith v. Schnitzer Steel Indus.*,<sup>78</sup> the Court of Appeals cited to *Doremus* in explaining that if an employer’s potential liability for alleged religious discrimination was only vicarious then it would have been proper to dismiss such a claim against the employer when its employee could not be liable:

Schnitzer Steel contends that because the trial court dismissed the religious discrimination claim against Robinovitz, the trial court erred in not dismissing Schnitzer Steel as well. This argument would be correct if Schnitzer Steel was only vicariously liable for Robinovitz's actions. See *Doremus v. Root*, 23 Wash. 710, 716, 63 P. 573 (1901).

The *Doremus* rule would apply in the present case because, as it is undisputed that Michael Emard was not driving at the time of the subject accident, Michael’s potential liability was vicarious only. And, under the *Doremus* rule, once it became impossible for agent Miles to be held liable, it

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<sup>77</sup> *Thompson v. Grays Harbor Community Hosp.*, 36 Wn.App. 300, 305, 675 P.2d 239 (1983) (citing *Doremus v. Root*, 23 Wash. 710, 716, 63 P. 572 (1901)

<sup>78</sup> 128 Wn.App. 438, 115 P.3d 1065 (2005)

also became impossible for principal Michael to be held vicariously liable for Miles' actions.

No reported Washington cases specifically involve application of the *Doremus* rule in the context of vicarious liability under the family car doctrine, but that logic has been applied outside of Washington. For example, in *Raines v. Mercer*,<sup>79</sup> the Tennessee Supreme Court applied that logic to find that when the plaintiff (Pauline) could not maintain a cause of action against the driver (Bill) due to spousal immunity (Pauline married Bill post accident), the plaintiff could not maintain a cause of action against the driver's father under the family car doctrine:

The doctrine of respondeat superior rests upon the doctrine that the wrong of the agent is the act of his employer. 18 R. C. L. 786; Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L. R. A. (N. S.) 1116.

[3] If the agent, the immediate actor, cannot be charged with liability for the tort, the principal, the remote actor, who had no immediate part in the tortious transaction, cannot be held responsible, for, as held in Loveman Co. v. Bayless, 128 Tenn. 317, 160 S. W. 841, Ann. Cas. 1915C, 187, if the remote actor had no other direct relation to the wrong or injury, but is liable only because of the doctrine of respondeat superior, he does not occupy the position of a wrongdoer.

The conclusion in King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293, which adopted the family purpose doctrine, rested upon the doctrine of agency. See, also, Keller v. Truck Co., 151 Tenn. 427, 269 S. W. 914.

[4] Since the defendant in error could not maintain her action against her husband, alleged to be directly responsible for her injury, she could not avoid the forbidden frontal attack by an encircling movement against Bill's father who had no part in the negligent transaction. Riser v. Riser, 240 Mich. 402, 215 N. W. 290;

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<sup>79</sup> 55 S.W.2d 263 (Tenn. 1932)

Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N. W. 297, 56 A. L. R. 327; Newton v. Weber, 119 Misc. 240, 196 N. Y. S. 113.<sup>80</sup>

Given that the Washington law also grounds the family car doctrine in agency principals, the *Raines* case supports application of the *Doremus* rule to find that (1) once Miles Emard could not be held liable for plaintiffs Watsons' alleged injuries then (2) neither could Michael Emard be held vicariously liable, then (3) it would be futile to add a claim that Michael was vicariously liable under the family car doctrine, and (4) the trial court acted well within its discretion in denying such an amendment.

**C. The Order Granting Summary Judgment Should Be Affirmed Because Plaintiffs Conceded That, Absent Vicarious Liability, They Could Not Present A Genuine Issue Of Material Fact As To Michael Emard's Liability.**

In their Summary Judgment Response, plaintiffs Watson admitted that, in the absence of a claim for vicarious liability under the family car doctrine, summary judgment dismissal of Michael was appropriate:

Plaintiffs' complaint asserts a claim against Michael Emard based on his negligent operation of a vehicle on May 10, 2006. Based on the discovery that has occurred, Plaintiffs concede that Michael Emard was not the individual operating the vehicle, but rather, it was his son Miles Emard. Plaintiffs concede, therefore, they lack a basis for the claim asserted in the Complaint.

In the Motion to Amend, Plaintiffs did establish that they can prove claims against Miles Emard for negligence and against Miles Emard under the family car doctrine. The Court, however, declined to allow amendment of the pleadings. In

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<sup>80</sup> *Raines*, 55 S.W.2d at 264

light of that ruling, and the discovery establishing that Michael Emard was not driving the vehicle when the collision at issue occurred, Plaintiffs concede they cannot present a genuine issue of material fact regarding Michael Emard's liability to them. For that reason, they agree summary judgment dismissing their current limited claim against Mr. Emard is proper.<sup>81</sup>

Watsons' Appeal Brief likewise makes no argument that, in the absence of any claim under the family car doctrine, there exists any basis to hold Michael Emard responsible for the accident. Because, as was discussed above, the trial court's order denying Plaintiffs' request to add a claim against Michael under the family car doctrine should be affirmed, there is no error in the trial court's order of summary judgment.

## **VI. CONCLUSION**

The trial court's orders followed a logical and correct progression, and those orders should be affirmed.

Due to inexcusable neglect by Plaintiffs and their attorney, the trial court was well within its discretion in denying Plaintiffs' post statute of limitations motion to add driver Miles Emard as a defendant.

Because Miles was thus precluded from being held liable for Plaintiffs' alleged injuries, Michael Emard could not be held vicariously liable under the family car doctrine, amendment to add a family car doctrine claim

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<sup>81</sup> CP 329: Response to Defendant's Motion for Summary Judgment

against Michael would have been futile, and the trial court acted correctly and within its discretion in not adding such a claim.

Because the trial court acted properly and within its discretion in denying amendment to add a family car doctrine claim against Michael, and because it is undisputed that Michael was not driving the car involved in the accident, summary judgment dismissal of the case against Michael was not in error.

DATED THIS 21 day of March, 2011.

**BARRETT & WORDEN, P.S.**



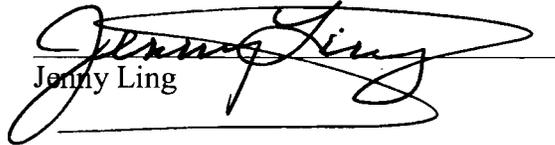
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CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on March 2, 2011, I caused service of the foregoing Brief of Respondents by First Class Mail, postage prepaid, to:

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