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No. 62947-6-I

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

ANDREW HERRICK,

Appellant,

v.

ELISABETH LOELIGER,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal is premised on the untenable claim that the failure of Andrew Herrick's attorney to sue Elisabeth Loeliger, the correct party defendant, within the three year statute of limitations was nothing more than an accidental misspelling of her name as a result of a typographical error. However, as explained in detail below, the record clearly refutes this claim, establishes that Elisabeth Loeliger did nothing to waive her statute of limitations defense, and fully supports the trial court's dismissal of Herrick's lawsuit as a matter of law.

II. ASSIGNMENT OF ERROR AND ISSUES

The trial court did not err in dismissing Andrew Herrick's lawsuit with prejudice because it was barred by the statute of limitations. The issues presented by Herrick's appeal are appropriately stated as follows:

A. Did the trial court properly dismiss Herrick's lawsuit because it was barred by the three year statute of limitations set forth in RCW 4.16.080(2)?

B. Did the trial court properly conclude that Herrick's amended complaint did not relate back to the filing date of his original complaint because Herrick's failure to name Elisabeth Loeliger in the initial complaint was the result of inexcusable neglect?

C. Did the trial court properly conclude that Loeliger did not waive her statute of limitations defense where Herrick's attorney was advised in writing of this defense in the early stages of this lawsuit, the omission of the defense in Loeliger's answer did not impact any of Herrick's substantial rights, and Loeliger's conduct was neither dilatory nor contradictory?

III. STATEMENT OF THE CASE

On October 8, 2004, Elisabeth Loeliger and Andrew Herrick were involved in an auto accident on I-5 South. CP 7. The Washington State Patrol investigated the accident, and the correct spelling of Elisabeth Loeliger's name is clearly printed in the police report. CP 39. The police report also provided Ms. Loeliger's date of birth (6/9/84, which made her 20 years old when the accident occurred), her middle initial ("A.") and her address, which was listed as 910 North 85th Street [Unit] C, Seattle, Washington 98103. CP 39.

Herrick originally filed suit on October 4, 2007, four days before the statute of limitations would run, naming Elizabeth Loeliger and Robert Loeliger as defendants. CP 3. The defendants named in the original complaint are Elisabeth Loeliger's parents; they reside at 4126 South

243rd Place, Kent, Washington. CP 33, 55, 84.¹ Shortly after filing suit, Herrick's attorney realized that she had sued the wrong party, and that Elisabeth Loeliger (not Elizabeth) was the proper defendant. CP 55. An amended complaint naming Elisabeth Loeliger was filed on October 17, 2007, nine days after the statute of limitations had expired. CP 6.

On November 4, 2007, copies of the amended summons, the amended complaint and the Order Setting Civil Case Schedule were served on Robert Loeliger at his Kent residence. CP 84. Mr. Loeliger informed the process server that his daughter, Elisabeth Loeliger, was living and working in Arizona. CP 84. Since this was not Elisabeth's residence, service on Robert Loeliger did not constitute valid service of process on Elisabeth Loeliger. RCW 4.28.080(15). On December 31, 2007 Herrick's attorney served Elisabeth Loeliger by leaving two copies of the summons and complaint with the Secretary of State in compliance with the Nonresident Motorist Statute (RCW 46.64.040). CP 13.

Although Loeliger filed an answer to the amended complaint on December 13, 2007 which did not allege the statute of limitations as an

¹ Although Herrick attempts to cast doubt on the fact that Elizabeth Loeliger is the mother of Elisabeth Loeliger (see appellant's brief, p. 3, fn 4), he has no credible basis for disputing this fact. Indeed, in his response to Loeliger's motion to dismiss, which stated that this lawsuit was originally "filed against Elizabeth and Robert Loeliger Jr., the parents of the defendant [Elisabeth Loeliger] on October 4, 2007" (CP 33), Herrick specifically acknowledged not only the existence of two separate people (Elisabeth and Elizabeth) but also that "Elisabeth is presumably the daughter of Robert and Elizabeth Loeliger." CP 55 (emphasis added).

affirmative defense (CP 11-12), counsel for Ms. Loeliger wrote a letter to Herrick's attorney (Teri Rideout) on March 12, 2008, stating that the amended complaint filed against Elisabeth Loeliger was barred by the statute of limitations. CP 53, 55. Loeliger's statute of limitations defense was also clearly articulated in the Confirmation of Joinder of Parties, Claims and Defenses filed by the parties on March 13, 2008. CP 70-71. That document included the following handwritten notation by Ms. Loeliger's attorney (James Koenig):

Elisabeth Loeliger can not be a "party" by relying upon the operation of the relation back doctrine under the case facts and thus was not timely served as service was attempted after the expiration of the statute of limitations.

CP 71.

On June 19, 2008, Herrick filed a motion to dismiss Robert Loeliger and to correct the case caption pursuant to the amended complaint (i.e., by changing the name Elizabeth Loeliger to Elisabeth Loeliger). CP 28-30. An order granting Herrick's motion (which was unopposed) was entered on June 30, 2008. CP 31-32.

Neither party ever commenced discovery (see CP 34), and after the above motion was granted the case remained dormant for several months. On December 10, 2008, Loeliger filed a motion to dismiss Herrick's lawsuit, along with a declaration of counsel and attached exhibits,

asserting that Herrick's claims were barred by the three year statute of limitations.² CP 33-51. In support of this motion, Loeliger asserted that the relation back doctrine under Civil Rule 15(c) did not apply because Herrick's failure to originally name Elisabeth Loeliger was due to "inexcusable neglect." CP 34-35.

On December 17, 2008, Herrick filed a memorandum and declaration of counsel in opposition to Loeliger's motion to dismiss, arguing that all of the requirements of the relation back doctrine had been met, and that the amended complaint naming Elisabeth Loeliger related back to the filing date of the original complaint. CP 52-59. In her declaration dated December 16, 2008, Herrick's attorney (Teri Rideout) erroneously stated that "[s]ervice of the original Complaint was accomplished on Robert Loeliger on October 4, 2007 at the address in Kent, the same address on the police report." CP 53. These assertions, made under oath, were inaccurate. As reflected in the record, Mr. Loeliger was served with the *amended* complaint on *November 4, 2007*, and his Kent address is different than the Seattle address listed for his daughter, Elisabeth Loeliger, on the police report. CP 39, 84. Herrick's

² Although Loeliger's motion to dismiss made a brief reference to subject matter jurisdiction (see CP 34), it was not the basis for the motion, nor did Loeliger ever assert that the trial court lacked subject matter jurisdiction over Herrick's lawsuit. In response to Herrick's discussion of this issue on appeal (see pp. 13-14 of appellant's brief), Loeliger agrees that the trial court at all times had subject matter jurisdiction in this case.

memorandum opposing the motion to dismiss also erroneously claimed that Robert and Elizabeth Loeliger (Elisabeth's parents), who have at all relevant times resided in Kent, resided at the Seattle address identified in the police report. CP 55.

On December 29, 2008, the trial court entered an order dismissing Herrick's case with prejudice. CP 64. Herrick's Notice of Appeal to this Court was filed on January 28, 2009. CP 62.

IV. ARGUMENT

A. Standard of Review.

"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). However, because Loeliger's motion to dismiss was supported by a declaration of counsel with attached exhibits (see CP 33-51), and the trial court treated it as a de facto summary judgment motion, the other issues on appeal (such as waiver) are subject to a de novo review. *Hardy v. Pemco Mutual Ins. Co.*, 115 Wn. App. 151, 154, 61 P.3d 380 (2003).

B. The Trial Court Properly Ruled That Herrick's Amended Complaint Did Not Relate Back To The Filing Date Of His Original Complaint Because Herrick's Failure To Name Elisabeth Loeliger In The Initial Complaint Was The Result Of Inexcusable Neglect.

In ruling on Loeliger's motion to dismiss, the central issue before the trial court was whether Herrick's amended complaint could properly relate back to the date that his original complaint was filed. In dismissing this lawsuit, the trial court necessarily concluded that Herrick's failure to originally name Elisabeth Loeliger in his original complaint was due to inexcusable neglect. As a result, the court rejected Herrick's assertion that his amended complaint should relate back to the date that his original complaint was filed, and properly held that his suit was barred by the three year statute of limitations set forth in RCW 4.16.080(2).

The relation back of an amended pleading is subject to the following requirements of Civil Rule 15(c):

15(c) Relation Back of Amendments. 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.

In addition to the above requirements, under Washington law an amended complaint changing or adding a new party defendant will not relate back to the date of the original pleading if the plaintiff's failure to name the new party in the earlier pleading was due to "inexcusable neglect." *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984). Washington courts are guided by the following rules when analyzing whether inexcusable neglect exists in a given case:

Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable. For example, failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record.

Moreover, the cases that have found "inexcusable neglect" have generally considered the actions of a party's attorney, who is presumably charged with researching and identifying all parties who must be named in an action and with verifying information that is available as a matter of public record.

Teller v. APM Terminals Pac. Ltd., 134 Wn. App. 696, 706-07, 142 P.3d 179 (2006) (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987);

Tellinghuisen v. King County Council, 103 Wn.2d 221, 224, 691 P.2d 575 (1984); *S. Hollywood Hills Citizens Ass'n*, 101 Wn.2d at 77-78).

In opposing Loeliger's motion to dismiss, Herrick had the burden of proving that all three conditions set forth in CR 15(c) had been met, and that his failure to originally name Elisabeth Loeliger (instead of her parents, who had nothing to do with this accident) did not constitute inexcusable neglect. *Foothills Dev. Co.*, 46 Wn. App. at 375. As previously noted, a trial court's 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." *Id.* at 374.

The above cited cases strongly support the trial court's conclusion that Herrick's failure to name Elisabeth Loeliger in the original complaint was due to inexcusable neglect. Courts will generally find inexcusable neglect if, as in this case, the identity of a defendant omitted in an original complaint is a matter of public record, and the plaintiff's attorney fails to properly identify and include that defendant in the initial pleading because he or she did not perform the necessary research and investigation (including a review of all relevant public records). Unless the plaintiff's attorney can provide a cogent explanation for this omission, Washington courts usually conclude that there was inexcusable neglect and refuse to apply the relation back doctrine. For example, in *Haberman*, 109 Wn.2d

107, the plaintiffs, who were asserting bondholders' claims against various corporate entities, invoked the relation back doctrine when requesting leave to file a fourth amended complaint to join additional corporations as defendants. However, the identities of all of these corporations were "readily available to plaintiffs from a variety of public sources." *Id.* at 174. Under these circumstances, the court concluded that "[p]laintiffs' failure to avail themselves of this information prior to their third amended complaint, without evidence in the record to the contrary, supports the trial court's conclusion that plaintiffs' failure to name these defendants originally was the result of inexcusable neglect." *Id.*

Likewise, in *South Hollywood Hills Citizens Ass'n*, 101 Wn.2d 68, the plaintiffs mistakenly filed suit against the former owners of property involved in a plat dispute, and then amended their complaint to name the correct property owners and sought to relate this amended pleading back to the date the original complaint was filed. The court held that plaintiffs' failure to identify the actual property owners constituted inexcusable neglect, since the sale of the property two months before the original complaint was filed was a matter of public record. As the court noted, the proper parties "would have been immediately evident" if plaintiffs' attorney had checked the County records, and because there was no reason in the record for the attorney's failure to do so, "[t]his omission was

inexcusable.” *Id.* at 77-78. Similarly, in *Tellinghuisen v. King County Council*, 103 Wn.2d 221, the plaintiffs filed a petition for a writ of review of a King County Council order granting a rezone request by adjacent property owners. However, plaintiffs failed to timely name the marital communities of the property owners or the welding shop located on the property that had been rezoned. The court rejected plaintiffs’ attempt to relate back a proposed amended petition to the date of the original pleading because the names of the omitted parties were all a matter of public record, and plaintiffs offered “no cogent explanation for failing to name those parties.” *Id.* at 224.

The grounds upon which the court found inexcusable neglect in each of the above cases are equally present in this case. As in *Haberman, S. Hollywood Hills* and *Tellinghuisen*, the record in this case provides no credible reason as to why Herrick failed to initially name Elisabeth Loeliger as the defendant in this suit. As pointed out in Loeliger’s motion to dismiss, Herrick’s attorney had a copy of the police report no later than February 9, 2007, long before this suit was filed. CP 37. That report, which is a matter of public record, clearly stated that Elisabeth A. Loeliger, who spelled her name with an “s” and was 20 years old and resided in Seattle, was involved in the October 8, 2004 accident. Brief internet research would have revealed that Elizabeth J. Loeliger and

Robert Loeliger, who reside at the Kent address Herrick's attorney erroneously claimed was on the police report, are both in their 50's. The internet's "White Pages" site, which provides this information for free, also indicates that Elisabeth A. Loeliger is a member of the same household as Elizabeth J. and Robert Loeliger.³

In short, even cursory research on Ms. Rideout's part should have alerted her to the fact that Elisabeth A. Loeliger was in all likelihood the daughter of Elizabeth J. and Robert Loeliger. Given these readily accessible facts, all of which are a matter of public record, the trial court had ample grounds for determining that Ms. Rideout's failure to name Elisabeth Loeliger in the original complaint constituted inexcusable neglect. In addition, the assertion under oath by Herrick's attorney that the elder Loeligers' Kent address was the same address listed in the police report, which is directly refuted by documents contained in the court file, further supports the trial court's finding of inexcusable neglect.⁴ Herrick's

³ This court can take judicial notice of the fact that such information is readily available on the internet's "White Pages" site, since this is a "generally known" fact that is "not subject to reasonable dispute." See, ER 201(b); *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999).

⁴ An amended Declaration of Service signed by Linh T. Bui on November 7, 2007, states that on November 4, 2007, Robert Loeliger, the father of Elisabeth Loeliger, was served with copies of the amended summons, amended complaint and civil case schedule at his residence address of 4126 S. 243rd PL, Kent, Washington; this document was filed with the court on November 13, 2007. CP 84. The October 8, 2004 police report, listing Elisabeth Loeliger's address as 910 N. 85th St [Unit] C, Seattle, Washington 98103, was filed on December 10, 2008 as an exhibit to the Declaration of Jodi M. Kipersztok. CP 36-40.

claim that postal trace and driver's license records indicated that Elisabeth was still residing at the Kent address was also unavailing, since many young people who leave home following high school continue to use their parents' address for mail and driver's license purposes, and provided the trial court with no cogent explanation as to why Herrick initially sued Elisabeth A. Loeliger's parents, Elizabeth J. Loeliger and Robert Loeliger, rather than Elisabeth A. Loeliger.

While Herrick claims that *Nepstad v. Beasley*, 77 Wn. App. 459, 892 P.2d 110 (1995) "is illuminating," (see p. 7 of appellant's brief), *Nepstad* is readily distinguishable and provides no support for Herrick's relation back argument. Unlike this case, in which Elisabeth Loeliger's identity was at all times a matter of public record that was readily accessible to Herrick's attorney, the facts in *Nepstad* involved a mistake made by the plaintiff, Lorena Nepstad, a 68-year-old woman who misread Jocelyn Fox's insurance card "immediately after experiencing the 'shock' of a rear-end automobile accident." *Id.* at 466. At the time of the accident Ms. Fox was living with her parents, and had transferred legal title to her automobile to her mother, Delores Beasley, so that the car could be insured under her mother's policy. When Nepstad looked at Fox's insurance card right after the accident, she mistakenly copied down Delores Beasley's name (instead of Jocelyn Fox's) as the driver of the

other vehicle. Nepstad, who subsequently sued Delores and Waylon Beasley, moved to amend her complaint when she learned Fox's true identity shortly after the statute of limitations had expired. Because the police did not investigate the accident, there was no police report (as there is in this case) that clearly identified the other driver as a matter of public record. Under these circumstances, the court held that there was no inexcusable neglect, and allowed the relation back of the amended complaint.

The court in *Nepstad* distinguished other Washington cases in which inexcusable neglect had been found, pointing out that in those cases it was the plaintiff's attorney who failed to review available public records, and therefore failed to properly identify the correct party defendant in the initial pleading. *Id.* at 466-67 (citing both *Tellinghuisen*, 103 Wn.2d at 223-24 and *S. Hollywood Hills*, 101 Wn.2d at 78, two cases which are directly analogous to this case and are cited and discussed above.)

Herrick's reliance on *LaRue v. Harris*, 128 Wn. App. 460, 115 P.3d 1077 (2005) and *Craig v. Ludy*, 95 Wn. App. 715, 976 P.2d 1248 (1999) (see pp. 10-12 of appellant's brief) is equally misplaced, as both cases are factually distinguishable and address a different requirement of CR 15(c) – whether a party who has been added in an amended pleading

“has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits.” In both *LaRue* and *Craig*, the plaintiffs were injured in automobile accidents, and correctly identified and initially sued the adverse drivers/tortfeasors. However, in each case the tortfeasor had died before the initial complaint was filed, and the plaintiff sought to relate back an amended complaint naming the tortfeasor’s estate. Whether notice of a lawsuit is properly imputed to the estate of a deceased tortfeasor, given the “community of interest” between the decedent and his/her estate, is simply irrelevant to the issues presented in this case. The same “community of interest” does not exist between an alleged tortfeasor who has reached the age of majority (such as Elisabeth Loeliger) and her parents, all of whom are living and have separate and distinct legal identities.

In addition, neither *LaRue* nor *Craig* addressed the issue of whether inexcusable neglect by a plaintiff’s attorney, who fails to initially file suit against the correct defendant when his or her identity is a matter of public record, precludes relation back of an amended pleading under CR 15(c). For instance, in *LaRue*, the plaintiff was injured in an automobile accident caused by Harris, who died approximately nine months after the accident occurred. 128 Wn. App. at 462. For more than two years after Harris’s death Farmers Insurance, who insured both LaRue

and Harris, negotiated with LaRue without ever telling her that Harris had died. When the case did not settle, LaRue filed a lawsuit against Harris one day before it would have been barred by the statute of limitations. LaRue subsequently learned that Harris had died, and moved to amend her complaint to name Harris's estate. Under these circumstances the court concluded that the requirements of CR 15(c) had been met, because Farmers' "notice and knowledge" of LaRue's claim could be imputed to the Harris estate, and neither Farmers nor the estate would be prejudiced in maintaining the defense of LaRue's lawsuit. *Id.* at 465. As a result, the court held that LaRue's amended pleading related back to the filing date of her original complaint. *Id.* Significantly, there was no evidence of inexcusable neglect by LaRue, particularly since Farmers had kept Harris's death a secret for more than two years before suit was filed, and the court in *LaRue* did not mention or discuss this issue. Although the court in *Craig* mentioned the inexcusable neglect requirement in passing as part of a general summary of CR 15(c), it was not an issue in that case either. *See*, 95 Wn. App. at 719.

Herrick's purpose, in citing and discussing cases such as *LaRue* and *Craig*, as well as equally irrelevant misnomer cases (which are addressed separately below), is to obscure and hopefully erase the fact that his failure to initially file suit against Elisabeth A. Loeliger, when her

identity was at all times a matter of public record that was readily ascertainable by his attorney, constituted inexcusable neglect precluding the relation back of his amended complaint under CR 15(c). Although inexcusable neglect was the critical issue before the trial court in ruling on Loeliger's motion to dismiss, and is the primary focal point on appeal, Herrick's final paragraph discussing the relation back issue does not even mention this issue. (See appellant's brief, pp. 12-13.) Instead, Herrick, without any citation to the record, makes the unfounded assertion that "Elisabeth Loeliger admitted she was the Elizabeth Loeliger identified in the original complaint," which is completely inaccurate,⁵ and further asserts that she was served before the statute of limitations expired (which is also incorrect⁶ and would only be true if Herrick's amended complaint properly related back to the date that his original complaint was filed).

Herrick further confounds the issues by improperly citing *LaRue* to support his assertion that, because Allstate was aware of his claim, its knowledge of this lawsuit should have been imputed to Elisabeth Loeliger. But whether Elisabeth Loeliger had knowledge of this lawsuit, for purposes of CR 15(c)(1), has never been in dispute and has no bearing

⁵ In Elisabeth Loeliger's answer to Herrick's amended complaint, she admitted that she was driving one of the vehicles involved in the October 8, 2004 accident; she has never admitted that she was Elizabeth Loeliger (her mother). See, CP 11.

⁶ Elisabeth Loeliger was served on December 31, 2007, via the Secretary of State. See , CP 13.

whatsoever on the issue of inexcusable neglect. In addition, as previously discussed, the imputation of notice to the estate of a deceased tortfeasor is readily distinguishable from the facts presented in this case. Herrick's flawed analysis, which serves only to obscure the actual issues in this case, should be rejected by this Court. Despite Herrick's attempt to ignore the issue of inexcusable neglect on appeal, he has never offered *any* cogent explanation for his failure to originally file suit against Elisabeth Loeliger. As a result, the trial court did not abuse its discretion in determining that Herrick did not meet the requirements for relation back of his amended complaint, and its dismissal of Herrick's lawsuit should be affirmed.

C. The Misnomer Rule Is Inapplicable Because Herrick Admittedly Sued The Wrong Party.

In opposing Loeliger's motion to dismiss, Herrick acknowledged to the trial court that, shortly after filing suit, "it was discovered that Elisabeth, not Elizabeth was the proper defendant," and that "Elisabeth is presumably the daughter of Robert and Elizabeth Loeliger." CP 55. Herrick nevertheless argued that relation back of the amended complaint was appropriate because "two Elisabeths apparently resided at the address listed on the accident report," that "the only difference was the spelling, one letter, of Elisabeth," and that, "[u]pon learning of the two Elisabeths, the Amended Complaint was immediately filed." CP 58. Herrick claimed

that his failure to name Elisabeth Loeliger in the original complaint, “[a]lthough possibly confused ... was not inexcusable neglect,” and erroneously asserted that there was no “obvious public record to identify which Elizabeth residing at the household was the correct party.”⁷ CP 58. These arguments, rejected by the trial court, completely ignored the fact that the existence of *two separate* people - a mother in her mid-50’s named Elizabeth J. Loeliger and a daughter in her mid-20’s named Elisabeth A. Loeliger - was at all times readily ascertainable as a matter of public record. As previously discussed, Herrick’s claims were also factually incorrect, since Elizabeth and Robert Loeliger’s Kent address was not listed on the police report for the accident, and there is no evidence that “two Elizabeths” ever lived at the Seattle address listed on that report for Elisabeth Loeliger. Given these facts, the trial court had ample grounds for finding inexcusable neglect in this case and there was no manifest abuse of discretion by the trial court in making this finding.

In a further effort to circumvent the inexcusable neglect requirement, which applies whenever an amended pleading changes or adds a new party defendant, Herrick improperly attempts to merge the identities of Elisabeth A. Loeliger and her mother, Elizabeth J. Loeliger,

⁷ Herrick acknowledged, in the same memorandum opposing Loeliger’s motion to dismiss, that “[a]t the time the action was commenced in 2007, Elisabeth was apparently no longer a resident of the household.” CP 55.

and then apply the rule applicable to misnomers. But this is not a case of misnomer. Herrick's attorney initially filed suit against Elisabeth Loeliger's parents, Elizabeth J. and Robert Loeliger, and his amended complaint named Elisabeth Loeliger, a completely separate person and a different party defendant. As Herrick correctly points out in his brief, there is a "well-recognized distinction between a complaint that sues the wrong party, and a complaint that sues the right party by the wrong name." (See appellant's brief, p. 8, quoting *Roberts v. Michaels*, 219 F.3d 775, 776 (8th Cir. 2000)). Herrick's claims that he accidentally misspelled Elisabeth Loeliger's name, that this "was a simple typographical error," and that "Elisabeth Loeliger admitted she was the Elizabeth Loeliger identified in the original complaint" (see pp. 12, 20 of appellant's brief) are both disingenuous and misleading, and should be summarily rejected by this Court. Since this is not a misnomer case, the federal cases that Herrick cites discussing misnomer (see pp. 8-10 of appellant's brief) are inapplicable and should be disregarded.

D. Loeliger Did Not Waive The Statute Of Limitations Defense.

- 1. Although Loeliger did not affirmatively plead this defense in her answer, Herrick's attorney was advised in writing of the statute of limitations defense in the early stages of this lawsuit and its omission in Loeliger's answer did not prejudice Herrick in any way.**

Although Loeliger did not affirmatively assert the statute of limitations as an affirmative defense in her answer, the trial court properly concluded that this omission did not result in a waiver of this defense under Washington law. It is undisputed that counsel for Ms. Loeliger wrote a letter to Herrick's attorney on March 12, 2008, advising her of Loeliger's statute of limitations defense. Herrick's counsel readily conceded this in her response to Loeliger's motion to dismiss. CP 53, 55. In addition, the Confirmation of Joinder of Parties, Claims and Defenses, filed by the parties on March 13, 2008, clearly articulated Loeliger's position that the relation back doctrine was inapplicable under the facts of this case, and that Herrick's lawsuit was therefore barred by the statute of limitations. CP 71.

Herrick's blanket assertion that the failure to plead an affirmative defense in an answer automatically results in the waiver of that defense does not accurately reflect Washington law and is, in fact, refuted by several of the cases in his brief. (See appellant's brief, p. 15, fn 57 and cases cited therein.) While Herrick twice repeats the same quote from

Boyle v. Clark, 47 Wn.2d 418, 423, 287 P.2d 1006 (1955) to support his argument (see pp. 15-16 of appellant's brief), more recent Washington cases reflect a more flexible approach in which a party's failure to plead an affirmative defense does not result in a waiver of that defense absent prejudice to the other party.

Under Washington law, a party generally waives an affirmative defense not affirmatively asserted in an answer, in a CR 12(b) motion, or tried by the express or implied consent of the parties. *Bernsen v. Big Bend Elec. Coop. Inc.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993). "However, if the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived." *Id.* at 434. As the Washington Supreme Court explained in *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975), because the underlying policy of CR 8(c) is to avoid surprise, pleading an affirmative defense is not always required:

It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. **Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.** *Tillman v. National City Bank*, 118 F.2d 631, 635 (2d Cir. 1941) [*cert. denied*, 314 U.S. 650 (1941)] (emphasis added).

Accord, Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 54-55, 2 P.3d 968 (2000); *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). Thus, unless a plaintiff can establish prejudice resulting from a defendant's failure to include an affirmative defense in an answer, the noncompliance with Rule 8(c) is deemed harmless, and the defendant is not precluded from asserting this defense. In *Mahoney*, the plaintiff asserted that defendants were precluded from raising a liquidated damages clause as a defense because they failed to affirmatively plead this defense in their answer in compliance with CR 8(c). 85 Wn.2d at 96. The court specifically rejected this rigid approach, noting the need for flexibility in procedural rules. *Id.* at 100. The court in *Mahoney* specifically cautioned against imposing "a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c)." *Id.* at 101. Citing *Mahoney*, the court in *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976) noted that "the affirmative defense requirement is not to be construed absolutely, particularly where it does not affect the substantial rights of the parties..."⁸

⁸ Although Herrick cites various federal cases in which the more rigid analysis reflected in *Boyle*, 47 Wn.2d 418, was applied (see pp. 16-18 of appellant's brief), those cases conflict with the more flexible approach adopted by Washington courts, and are neither binding nor persuasive. See, *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990) (court noted that a state court will only follow analogous federal law to the extent that it finds federal reasoning

In this case, Loeliger's oversight in not affirmatively pleading the statute of limitations as an affirmative defense in her answer did not prejudice Herrick in any way, nor did Herrick *ever* claim that he was prejudiced as a result of this omission. *See*, CP 58. Herrick was put on notice early in this lawsuit of Loeliger's position that the relation back doctrine was inapplicable, and that the amended complaint filed against Elisabeth Loeliger was barred by the statute of limitations. This position was set forth in defense counsel's March 12, 2008 letter to Herrick's attorney, Teri Rideout, and in the Confirmation of Joinder filed by the parties on March 13, 2008. Because Herrick received written notice of this defense more than a year before the scheduled trial date of March 23, 2009 (see CP 79), and had no basis for arguing surprise or prejudice, the trial court properly concluded that Loeliger had not waived the statute of limitations defense and accordingly granted Loeliger's motion to dismiss. Herrick's attempt to reverse the trial court's ruling, based on a procedural technicality that did not impact any of his substantial rights in this litigation, should be rejected.

persuasive); *Orwick v. City of Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984) (noting that "federal cases are of interest but not binding.")

2. Loeliger did not waive the statute of limitations defense by dilatory or contradictory conduct.

As noted in Herrick's brief, it is possible for a defendant to waive an affirmative defense "if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense." *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). However, the very cases cited by Herrick, including *King* and *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000), confirm that no such grounds for waiver exist in this case. For instance, in *King*, Snohomish County's answer to plaintiff's complaint alleged "claim filing" as one of its affirmative defenses. 146 Wn.2d at 423. However, the County did not raise the defense again, or seek dismissal on that basis until three days before trial and nearly four years after the complaint had been filed. During that time frame "the parties engaged in 45 months of litigation and discovery" (*id.*), the County moved for summary judgment on unrelated grounds without ever mentioning the claim filing defense, plaintiff moved for summary judgment, eighteen discovery depositions were taken, a mediation was conducted, and the County sought four continuances. Under these circumstances, the court held that the County had waived its claim filing defense because its behavior was inconsistent with the assertion of that defense.

Similarly, in *Lybbert*, the defendant (Grant County) actively participated in discovery for several months that was unrelated to an insufficiency of service defense, conversed on numerous occasions with plaintiffs' counsel, and discussed mediation. 141 Wn.2d at 32-33. The court found it most significant, however, that the County failed to timely answer interrogatories specifically asking whether it intended to rely on the insufficient service of process defense, when timely responses would have given the plaintiffs several days to cure the defective service, and then waited until the statute of limitations expired before filing an answer and asserting this defense for the first time. Given these facts, the court held that the County had waived this defense, emphasizing that it was not acceptable "for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action." *Id.* at 45.

No such circumstances exist in this case. As previously discussed, Herrick was put on notice early in this lawsuit (more than one year before trial) of Loeliger's statute of limitations defense. The fact that Loeliger did not oppose Herrick's motion to dismiss Robert Loeliger and amend the case caption could not reasonably be construed as an abandonment of that defense. No discovery was ever conducted in this case, and it remained dormant for several months before Loeliger filed her motion to dismiss.

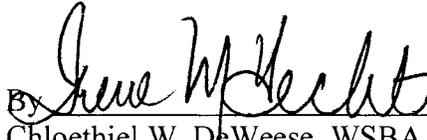
In short, there was no dilatory or contradictory conduct by Loeliger that would result in any waiver of her statute of limitations defense.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order dismissing Andrew Herrick's lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 10th day of July, 2009.

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