IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUSAN KARLMANN, a single woman, Appellant, v. DAMIANN D. KEGNEY, a single man, Respondents, FERNANDO MAFFEI, a single man, Defendant.	No. 42136-4-ii UNPUBLISHED OPINION

Johanson, A.C.J. — Susan Karlmann[1] appeals an order denying her motion to amend her personal injury complaint. She argues that (1) the trial court lacked discretion[2] to deny her motion to amend because Damiann Kegney intentionally obfuscated David Kegney's identity, (2)

[1] We note that Susan Karlmann's last name is spelled two different ways in the record. For this opinion we use the spelling "Karlmann."

[2] Although Karlmann argues that the trial court lacked discretion to deny her motion to amend, we review a trial court's ruling on a motion to amend for abuse of discretion. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003).

Kegney violated CR 12(i) by not naming David in her answer, and (3) RCW 4.16.170 tolls the statute of limitations when one or more defendant is served within 90 days of filing the complaint. We hold that the trial court did not abuse its discretion and affirm the trial court's order denying Karlmann's motion to amend because she inexcusably neglected to name David in her complaint even though she had actual notice that he was the driver of the vehicle involved in the accident.

FACTS

In May 2007, Susan Karlmann was a motorcycle passenger involved in an accident when the motorcycle driver passed a line of automobiles on a two-lane highway. When the front vehicle made a left turn, it struck the motorcycle, throwing Karlmann to the ground and injuring her. Both parties agree that Damiann Kegney (Kegney) owned the vehicle involved in the accident and that at the time of the accident her son, David Kegney,[3] was the vehicle driver. The police filed a report immediately following the accident, naming all parties involved in the collision, including the drivers and the vehicle owners.[4]

In October 2007, David testified at the motorcycle driver's infraction hearing. Karlmann's counsel questioned David at the infraction hearing.[5] In her deposition, Karlmann stated that she attended the infraction hearing, that she saw David there, and that she was aware that he was the vehicle driver.

Two years later, in October 2009, Karlmann filed a personal injury complaint naming

[3] To avoid confusion, we refer to David Kegney by his first name.

[4] The motorcycle driver is not a party to this appeal.

[5] Karlmann's counsel also filed the original 2009 complaint.

Kegney, the owner of the automobile as the defendant, but she did not name David. In her answer, Kegney denied both the first and fourth paragraphs of the complaint. These paragraphs alleged, "That defendant Damiann D. Kegney, at all times material hereto, is a single man," and "Damiann Kegney[ ] made a left turn in the motorcycle's path." Clerk's Papers (CP) at 3-4.

On April 27, 2010, Kegney and her counsel notified Karlmann that neither she nor her counsel were available for the following day's scheduled deposition. Kegney did not answer Karlmann's interrogatories until June 3, 2010, eight days after the statute of limitations expired. Kegney's deposition occurred on August 13, 2010. The record does not indicate whether Karlmann moved to compel discovery.

At the end of August 2010, Karlmann moved to amend her complaint and to substitute David as a defendant. On September 3, 2010, Karlmann's counsel filed a declaration stating that he mistakenly thought Kegney was the same person as David. The trial court denied Karlmann's motion to amend the complaint. Karlmann appeals.

ANALYSIS

Karlmann argues that (1) the trial court is "without discretion" to deny a motion to amend under CR 15(c) and that CR 15(c) should be liberally construed in favor of amending the complaint; (2) Kegney violated CR 12(i) by not naming David in her answer; and (3) RCW 4.16.170 tolls the statute of limitations when one or more defendants served within 90 days of filing the complaint. Additionally, Karlmann argues that Kegney delayed and obfuscated the discovery process, preventing her from timely and correctly naming David in her complaint. Kegney responds that (1) inexcusable neglect bars an amended pleading; (2) Kegney did not

violate CR 12(i) because David had no duty to intervene and Kegney was not trying to conceal David's identity; and (3) RCW 4.16.170 does not apply. Kegney is correct.

I. Washington CR 15(c)

The party seeking to amend its complaint has the burden to prove that the conditions of CR 15(c) are satisfied. *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 477, 238 P.3d 1107 (2010). We review the trial court's CR 15(c) ruling for abuse of discretion. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003).

Karlmann first argues that the trial court abused its discretion by failing to interpret CR 15(c) liberally to allow the parties to try their claims on their merits. Relying on *DeSantis v. Angelo Merlino & Sons, Inc.*, Karlmann argues that historical interpretation of the Fed. R. Civ. P. 15(c) allows parties to try their claims on the merits. 71 Wn.2d 222, 224, 427 P.2d 728 (1967). Kegney responds that the trial court properly denied leave to amend because Karlmann's failure to add David was a result of inexcusable neglect. Kegney is correct.

In *DeSantis,* our Supreme Court held that the court should liberally construe Fed. R. Civ. P. 15(c) when the plaintiff misidentified the defendant as a proprietorship instead of a corporation. 71 Wn.2d at 222, 224. But the *DeSantis* court clarified that its holding applied only to the facts and circumstances of that particular case, which involved the misidentification of a corporation, not individual parties, and it declined to extend its holding concerning Fed. R. Civ. P. 15(c) to Washington's civil rules.[6] 71 Wn.2d at 225. Therefore, we reject Karlmann's argument that the court must always liberally construe Washington's CR 15(c).

[6] We apply Washington's CR 15(c) to this case.

The party seeking to amend its complaint has the burden to prove that CR 15(c) is satisfied. *Segaline*, 169 Wn.2d at 477. "When a party is added or substituted upon amendment of a complaint, the amended complaint relates back to the date of the original pleading for purposes of a statute of limitations *if* (1) the new party received notice of the institution of the action so that he or she will not be prejudiced in making a defense on the merits; (2) the new party knew or should have known that, but for a mistake concerning identity of the proper party, the plaintiff would have brought the action against him or her; and (3) the plaintiff's delay in adding the new party was not due to "'inexcusable neglect.'" *Segaline*, 169 Wn.2d at 477 (quoting *Stansfield v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002)) (citations omitted).

Regarding the requirement that the "new party knew or should have known" that Karlmann mistakenly named Kegney, Karlmann argues that David knew his mother was involved in a lawsuit concerning the collision in which he was involved. *Segaline*, 169 Wn.2d at 477. Kegney does not dispute that David knew Kegney was involved in a lawsuit. Instead she argues that Karlmann had actual notice that Kegney was not the proper party, thus Karlmann does not satisfy the third element of CR 15(c) because her mistake was a result of inexcusable neglect.

CR 15(c) does not allow for joinder of a new party if the plaintiff's delay in adding the new party was due to " 'inexcusable neglect.' " *Segaline*, 169 Wn. 2d at 477 (quoting *Stansfield*, 146 Wn.2d at 116). "[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). Furthermore, "'a conscious decision, strategy or tactic'" to fail to name a party will not defeat the expiration of the

statute of limitations under CR 15(c). *Stansfield,* 146 Wn.2d at 122 (quoting *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.,* 115 Wn.2d 339, 349, 797 P.2d 504 (1990)).

The plaintiff may establish that failure to name the proper party was excusable neglect under CR 15(c) when "the record reflected that [the plaintiff] misidentified the defendant after she misread the insurance card, misunderstood the identity of the driver, and had *no reason to know* the proper party." *Watson v. Emard,* 165 Wn. App. 691, 701, 267 P.3d 1048 (2011) (emphasis added) (citing *Nepstad v. Beasley*, 77 Wn. App. 459, 467, 892 P.2d 110 (1995)) . In contrast, the plaintiff fails to establish excusable neglect when informed of the proper party's identity. *See Segaline,* 169 Wn.2d at 477.

Recently, we held that the trial court abused its discretion when it denied plaintiff's proposed amendment to add an unnamed party because plaintiff's counsel had no way to identify the additional party before the statute of limitations expired. *Watson,* 165 Wn. App. at 702. In *Watson,* Miles Emard, the driver, showed Watson, the injured party, his father's insurance card at the accident scene and then left without filing a police report. *Watson,* 165 Wn. App. at 695-96. The insurance company sent six letters to Watson referring to the defendant as "our insured" or "Michael Emard" and did not indicate that the driver was Miles Emard. *Watson,* 165 Wn. App. at 696. Emard's counsel did not respond to the complaint by notifying plaintiff that he was not the driver until the statute of limitations had expired and Watson's counsel had no reason to know that Michael Emard was not the driver until that time. *Watson,* 165 Wn. App. at 696.

In *Watson*, we held that "'[g]enerally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.'" *Watson,* 165 Wn. App. at 700 (quoting

Teller v. APM Terminals Pac., Ltd., 134 Wn. App. 696, 706, 142 P.3d 179 (2006)). "The moving party has the burden of proof to show that any mistake in failing to timely amend was excusable." *Watson*, 165 Wn. App. at 700. Failing to "name a party who is apparent, or ascertainable upon *reasonable investigation*, is inexcusable." *Watson*, 165 Wn. App. at 700 (emphasis added). Furthermore, "[a] party is charged with her attorney's failure to research and identify all necessary parties." *Watson*, 165 Wn. App. at 700.

Unlike in *Watson*, here, reasonable investigation by Karlmann's counsel would have revealed David's identity before the statute of limitations expired. *Watson*, 165 Wn. App. at 700. And, unlike *Watson*, Karlmann had actual notice that David was the vehicle's driver.

Karlmann argues that she misidentified the driver because Kegney intentionally obfuscated the discovery process to conceal the driver's true identity.[7] But there is no evidence that Kegney intentionally obfuscated the discovery process, or otherwise attempted to hide David's identity. To the contrary, not only did Kegney deny being the driver, on three separate occasions before the statute of limitations expired, David's identity was "apparent, or ascertainable upon reasonable investigation" by Karlmann. *Watson*, 165 Wn. App. at 700. Again, Karlmann actually knew David was the vehicle's driver.

First, the May 2007 accident report identifies "David Kegney" as the vehicle's driver and "Damiann Kegney" as the vehicle's owner. CP at 79. It is reasonable to expect Karlmann's

[7] Karlmann further argues that Kegney's counsel could have called, "alerting him to the mistake" of naming the wrong defendant. Appellant's Reply Brief at 3. Kegney responds that because Karlmann never served David with process, David had no duty to intervene in the suit. We do not consider this burden-shifting argument because Karlmann's counsel must assume the burden of reasonably investigating all claims before filing his complaint. *See Watson*, 165 Wn. App. at 700.

counsel to note the different names and to make further inquiry. *See Watson*, 165 Wn. App. at 702. This initial investigation of public records would have provided the identity of the driver to counsel. *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984).

Second, two years before Karlmann filed her complaint, Karlmann and her counsel heard David testify that he was the vehicle's driver. Karlmann's counsel questioned David on the witness stand about this accident. Therefore, Karlmann had actual notice that David was the vehicle's driver.

Finally, in her answer to the original complaint, Kegney admitted her vehicle was involved in the collision but she denied that she was the driver of the vehicle involved and she denied that she was "a single man." CP at 3. Therefore two months before the statute of limitations expired, Karlmann's counsel received notice that Kegney was not male, and not the vehicle driver.[8] This information did or should have put Karlmann on notice that someone other than Kegney was the vehicle's driver.

Because Karlmann's counsel failed to name a party who was "apparent, or ascertainable upon reasonable investigation," the failure is inexcusable. *Watson*, 165 Wn. App. at 700. Thus Karlmann's argument that her neglect was excusable fails; and we hold that the trial court did not

[8] Karlmann argues that Kegney had a duty to answer the interrogatories within 30 days and that Kegney intentionally obfuscated the discovery process. But the record does not show that Kegney intentionally obfuscated the discovery process. Further, the record does not reflect that Karlmann moved to compel discovery after the 30-day prescribed period had passed. CR 26(j)(1) specifies that interrogatories and depositions are discovery and CR 37(b)(2) allows the trial court to sanction the nonmoving party for failing to comply with trial court's granting of a motion to compel discovery. Had Karlmann moved to compel discovery as prescribed by CR 26 within 30 days of filing her October 2009 complaint, she could have timely overcome any alleged obfuscation. Additionally, as we discussed above, Karlmann had actual notice of David's identity before Kegney answered the interrogatories. Therefore, we reject this argument.

abuse its discretion by denying Karlmann's motion to amend her complaint. *Segaline*, 169 Wn.2d at 477.

II. Civil Rule 12(i)

Karlmann next argues that Kegney failed to name all known defendants in her answer to Karlmann's original complaint and that she therefore waived her affirmative defenses under CR 12(i), including that another party caused the injury. Kegney responds that she never claimed her son was at fault and therefore had no duty to identify him as a "nonparty . . . at fault" in her answer. Br. of Resp't at 17. Kegney is correct.

In Washington, CR 12(i) requires that in answering the complaint and pleading affirmative defenses under RCW 4.22.070(1), the party will identify any nonparty known to be at fault. But Kegney did not claim as an affirmative defense that David was at fault. Instead, Kegney answered that the motorcycle driver caused or contributed to the accident. Because Kegney answered that her car was involved in the accident but she denied that the vehicle's driver was at fault, we conclude that Kegney did not violate CR 12(i) by failing to name David in her answer.

III. RCW 4.16.170

Karlmann argues that RCW 4.16.170 tolls the statute of limitations against David because Kegney was served within 90 days of the complaint's filing. Kegney responds that because David is not a named defendant, tolling under RCW 4.16.170 is inapplicable. We agree that tolling does not apply.

RCW 4.16.170 provides in part:

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

The statute of limitation tolls as to all defendants once an action against one defendant is timely filed and served. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 331, 815 P.2d 781 (1991). Although "*Sidis* did not involve an unnamed defendant such as 'ABC CORPORATION, an unknown entity.' It include[d] . . . dictum on the application of RCW 4.16.170 to [unnamed] defendants." *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 281, 948 P.2d 870 (1997), *review denied*, 135 Wn.2d 1010 (1998). We have concluded:

> [A] plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant—if, but only if, the plaintiff identifies the unnamed defendant with "reasonable particularity" before the period for filing suit expires. "Reasonable particularity" depends, obviously, on a variety of factors. A major factor is the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant; if a plaintiff identifies a party as "John Doe" or "ABC Corporation," after having three years to ascertain the party's true name, it will be difficult to say, at least in the vast majority of cases, that the plaintiff's degree of particularity was "reasonable."

Bresina, 89 Wn. App. at 282. Here, David was neither a named defendant nor an unnamed defendant described with reasonable particularity. Therefore, RCW 4.16.170 tolling does not apply. *Bresina*, 89 Wn. App. at 282.

We hold that Karlmann's failure to name a known defendant before the statute of

limitations expired was inexcusable neglect, and the trial court properly exercised its discretion in denying Karlmann's motion to amend.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.