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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

8 ROSEMARY LUMPKINS,

9 Plaintiff,

10 v.

11 JESSE B. BUSHYHEAD, *et al.*,

12 Defendants.

Case No. C11-0357RSL

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

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15 **I. INTRODUCTION**

16 This matter comes before the Court on a motion for summary judgment filed by  
17 defendant Jesse Bushyhead ("defendant"). Defendant contends that plaintiff's claims  
18 against him must be dismissed because she failed to commence this lawsuit against him  
19 within the statute of limitations. The other defendant, insurance company USAA  
20 Casualty Insurance Company ("USAA"), does not join in the motion.

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22 For the reasons set forth below, the Court grants defendant's motion.

23 **II. DISCUSSION**

24 **A. Background Facts.**

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26 ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT - 1

1 This action arises out of an automobile collision between vehicles driven by  
2 plaintiff and defendant on November 2, 2007. Plaintiff, who is an inactive Washington  
3 attorney, filed the summons and complaint in King County Superior Court on November  
4 1, 2010. The original complaint named two defendants: USAA and James Bushyhead,  
5 defendant's father. Plaintiff attempted to serve Jesse Bushyhead on January 28, 2011 but  
6 was unsuccessful.  
7

8 On January 31, 2011, plaintiff served USAA and filed her amended complaint in  
9 King County Superior Court, naming Jesse Bushyhead as a defendant for the first time.  
10 USAA removed the case to this court on March 2, 2011. Defendant states that he has  
11 never been served with the original or amended complaint. Declaration of Jesse  
12 Bushyhead, (Dkt. #17) ("Bushyhead Decl.") at ¶ 6.

13 **B. Summary Judgment Standard.**

14 Summary judgment is appropriate when, viewing the facts in the light most  
15 favorable to the nonmoving party, the records show that "there is no genuine issue as to  
16 any material fact and that the movant is entitled to judgment as a matter of law." Fed. R.  
17 Civ. P. 56(a). Once the moving party has satisfied its burden, it is entitled to summary  
18 judgment if the non-moving party fails to designate, by affidavits, depositions, answers to  
19 interrogatories, or admissions on file, "specific facts showing that there is a genuine issue  
20 for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).  
21

22 All reasonable inferences supported by the evidence are to be drawn in favor of the  
23 nonmoving party. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir.  
24 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving  
25

1 party, summary judgment must be denied.” T.W. Elec. Serv., Inc. v. Pacific Elec.  
2 Contractors Ass’n, 809 F.2d 626, 631 (9th Cir. 1987). “The mere existence of a scintilla  
3 of evidence in support of the non-moving party’s position is not sufficient.” Triton  
4 Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). “[S]ummary  
5 judgment should be granted where the nonmoving party fails to offer evidence from  
6 which a reasonable jury could return a verdict in its favor.” Id. at 1221.  
7

8 **C. Analysis.**

9 In Washington, an action for personal injuries must be commenced within three  
10 years after the claim accrues. RCW 4.16.080(2). An action is commenced upon filing of  
11 the complaint or service of the summons and complaint, whichever occurs first. CR 3. In  
12 this case, the claim accrued on the date of the accident, so the statute of limitations ran on  
13 November 2, 2010. It is undisputed that plaintiff did not file a claim against defendant or  
14 serve him within three years after the claim accrued.  
15

16 In her surreply, plaintiff argued that her amendment was actually made during the  
17 limitations period because defendant “received notice of the action within the period  
18 provided by law for commencing the action against him. Under Washington law, an  
19 action is deemed commenced if it is filed within the statute of limitations, and it is served  
20 upon at least one defendant within 90 days of its filing.” Surreply at p. 3. Because that  
21 argument was made for the first time in a surreply, the Court did not consider it. Even if  
22 it did, the argument is unavailing. The statute on which plaintiff relies provides that if a  
23 plaintiff files her action within the limitations period, the action is deemed timely  
24 commenced if she also serves at least one defendant within ninety days of filing. RCW  
25

1 4.16.170. The 90-day rule does not extend the limitations period. Kiehn v. Nelson's  
2 Tire Co, 45 Wn. App. 291, 298 (1986). It “simply allows a plaintiff, who has tentatively  
3 commenced an action against a party by filing a complaint just before the pertinent statute  
4 of limitations runs, to perfect the commencement of the action by serving that party, even  
5 after the statute runs, as long as it is within 90 days of the date the complaint was filed.”

6 Id. Plaintiff did not serve defendant within ninety days of filing, so the statute is  
7 inapplicable to her claims against him.  
8

9 Because plaintiff failed to file or serve her claim against defendant within the  
10 limitations period, her claim against him will be allowed only if it relates back to the date  
11 of the original pleading. Plaintiff filed and amended her complaint in state court, so the  
12 Court applies the Superior Court rule, which provides:

13 c) Relation Back of Amendments. Whenever the claim or defense asserted in the  
14 amended pleading arose out of the conduct, transaction, or occurrence set forth or  
15 attempted to be set forth in the original pleading, the amendment relates back to  
16 the date of the original pleading. An amendment changing the party against whom  
17 a claim is asserted relates back if the foregoing provision is satisfied and, within  
18 the period provided by law for commencing the action against him, the party to be  
19 brought in by amendment (1) has received such notice of the institution of the  
20 action that he will not be prejudiced in maintaining his defense on the merits, and  
21 (2) knew or should have known that, but for a mistake concerning the identity of  
22 the proper party, the action would have been brought against him.

23 CR 15(c). As the party seeking relation back, plaintiff has the burden of proving  
24 compliance with Rule 15(c). See, e.g., Foothills Dev. Corp. v. Clark County Bd. of  
25 County Comm'rs, 46 Wn. App. 369, 375 (1986).

26 In a case involving similar facts, the Washington Court of Appeals allowed an  
amendment to relate back. In Nepstad v. Beasley, 77 Wn. App. 459 (1995), following a

1 car accident, plaintiff mistakenly sued the insured/owner of the automobile rather than her  
2 daughter, the driver of the vehicle. Permitting the amendment to relate back, the court  
3 found that the daughter/driver “received sufficient notice of the lawsuit within the  
4 applicable statute of limitations that she will not be prejudiced in maintaining her defense  
5 on the merits.” 77 Wn. App. at 465 (finding that defendant knew about the lawsuit within  
6 the limitations period); see also DeSantis v. Angelo Merlino & Sons, Inc., 71 Wn.2d 222  
7 (1967) (holding that the amendment related back when the newly added defendant had  
8 actual knowledge of the claim).

9  
10 In contrast, plaintiff has presented no evidence or even argument that defendant  
11 was aware of the lawsuit during the limitations period. Nor would the assumption of such  
12 knowledge be reasonable because plaintiff filed her lawsuit just one day before the  
13 limitations period expired and did not serve defendant or James Bushyhead during the  
14 limitations period. Moreover, defendant has filed a sworn declaration stating that he was  
15 unaware of the lawsuit during the limitations period. Bushyhead Decl. at ¶ 7 (“I first  
16 became aware of the lawsuit in mid to late November of 2010”); id. at ¶ 4 (explaining that  
17 he has not resided with his father since around June of 2009). That declaration is  
18 uncontroverted.  
19

20 Nevertheless, plaintiff argues that the amendment should relate back because her  
21 neglect was excusable. Even if that were true, it would not save her claim. An  
22 amendment will not relate back if the original omission of the party from the lawsuit  
23 resulted from “inexcusable neglect.” Teller v. APM Terminals Pac., Ltd., 134 Wn. App.  
24 696 (2006) (quoting Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 174  
25

1 (1987)). That rule is “[i]n addition to CR 15’s requirements.” Id. Therefore, the  
2 requirements of Rule 15(c) must still be met, regardless of whether the error resulted from  
3 excusable neglect. Id.; see also Foothills Dev. Corp., 46 Wn. App. at 375 (“The absence  
4 of any of the CR 15(c) elements is fatal to the relation back of an amended complaint.”).  
5 Because plaintiff has not met the requirements of Rule 15(c), her amendment does not  
6 relate back, and her claims against defendant Jesse Bushyhead are untimely.  
7


8 **D. Requests to Strike.**

9 Both parties have moved the Court to strike materials filed by the opposing party.  
10 Defendant’s Reply at p. 4 (requesting to strike plaintiff’s assertions about what a third  
11 party did); Plaintiff’s Surreply (requesting to strike a compact disc, the alleged transcript  
12 of a recorded statement, and argument about that statement). Because those materials  
13 relate to the issue of excusable neglect, which the Court does not reach, the materials are  
14 irrelevant and were not considered in ruling on this motion.  
15

16 **III. CONCLUSION**

17 For all of the foregoing reasons, the Court GRANTS defendant’s motion for  
18 summary judgment (Dkt. #15) and dismisses plaintiff’s claims against defendant Jesse  
19 Bushyhead.

20 DATED this 29th day of June, 2011.

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22   
23 Robert S. Lasnik  
24 United States District Judge  
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