IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ZAYNAB FAROLE, a single woman,	)	NO. 65645-7-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
CHANDA PRATT and JOHN DOE PRATT, wife and husband, and the marital community thereof,	)	UNPUBLISHED OPINION
	)	
	)	FILED: August 29, 2011
	)	
Respondents.	)	
	)	

Lau, J. —When a plaintiff mistakenly names the wrong defendant in a complaint filed on the last day of the 3-year statute of limitations period, a subsequent amended complaint relates back to the date of the original complaint if CR 15(c)'s requirements are met. Here, because (1) the negligent driver and the vehicle's insurer had timely notice about the accident and lawsuit, (2) the driver learned about the amended complaint within 90 days of the 3-year limitations period, (3) the driver suffers no prejudice by defending on the merits, and (4) the plaintiff's conduct was excusable, the court erred by denying relation back and granting the driver's summary judgment

motion. We reverse.

FACTS

The material facts are undisputed.[1] On June 23, 2005, while driving her friend Chanda Pratt's car, Jennifer Gilliam rear ended a vehicle driven by Zaynab Farole and owned by Farole's father. Farole exchanged information with Gilliam and recorded Gilliam's information on a Farmers Insurance Company "what to do in case of an accident" form (accident form).

Based on this information, Farole contacted Unitrin Property and Casualty Insurance Group, which insured the Pratt vehicle. Unitrin opened a claim file, estimated the repair damage, and paid for the Farole vehicle repair shortly after the accident. The damage estimate, dated six days after the accident, listed its insured as "Chanda Pratt." A Unitrin check stub paying for the vehicle damage also listed the insured as "Chanda E. Pratt."

On December 2, 2006, Farole retained attorney Don Morgan to represent her on the accident-related personal injury claim. Farole gave Morgan the Farmers accident

[1] For summary judgment, the parties stipulated to the following chronology:

Date of accident	6-23-2005
3-year statute of limitations expired	6-23-2008
Original complaint filed	6-23-2008
Amended complaint filed	8-13-2008
Declaration of counsel	8-13-2008
Service of process on wrong Ms. Gilliam	8-28-2008
Service of process on Chanda Pratt	9-12-2008
Statute of limitations plus 90 days	9-21-2008
Service of process on defendant Gilliam	12-3-2008

form, medical bills, correspondence from Farmers and Unitrin, and the vehicle damage estimate. Morgan asked Farole to leave these documents with him, saying his staff would copy and return her originals. Morgan wrote a representation letter to Unitrin claims adjuster Sean McGuire, which included the accident date and the Unitrin claim number. The letter stated that Farole had suffered personal injuries and property damage caused by a Unitrin insured's negligent act and that Farole would be "looking to your insured for damages." Several days later, Morgan returned the original documents to Farole. Farole gave the documents to her father, who subsequently lost them.

On May 5, 2008, with approximately 2 1/2 months remaining before the 3-year limitations period expired, Morgan sent a letter to Farole withdrawing as her attorney and explaining that he "was beginning to draft the Summons and Complaint to the person who caused your accident and injuries." Morgan told Farole that documents included with the withdrawal letter included her entire case file. But these documents included no copies of the information exchanged at the accident scene. The documents showed only the Unitrin claim number and the date of the accident, not the responsible vehicle owner or driver's name.

Farole then contacted attorney Steven Sitcov, who declined to represent her. But he asked Farole for the driver's name, and she stated from memory "Chappa Pratt." Sitcov prepared a pro se summons and complaint to be filed in case Farole could not retain an attorney.

Farole called David Richardson on June 9, 2008. She and her father met with

Richardson on June 16, 2008, and gave him the documents returned from Morgan. Farole also gave Richardson the draft pro se summons and complaint prepared by Sitcov naming "Chappa Pratt" as the defendant.

With no documents identifying the defendant other than the draft complaint, Richardson asked Farole for the defendant's name and she responded "Chappa Pratt." Richardson then drafted a summons and complaint that alleged Chappa Pratt was the vehicle's driver. He filed the complaint in King County Superior Court on June 23, 2008, the last day of the 3-year limitations period.

On June 24, 2008, Richardson mailed Unitrin adjuster Sean McGuire a representation letter and a copy of the summons and complaint. Richardson also asked McGuire to send him Unitrin's claim file. He received no response. On July 28, 2008, Richardson commenced efforts to serve the complaint within the 90-day period remaining after filing, which expired on September 21, 2008.

Richardson also requested Morgan's entire case file. He received several documents not provided to Farole with Morgan's withdrawal letter, including a damage estimate that named the insured under the Unitrin policy as "Chanda Pratt." Richardson then searched public records databases and discovered records indicating listings for a "Chanda Pratt" at four different addresses in the Seattle area. He found no "Chappa Pratt" in the Seattle area. In the additional documents received from Morgan, Richardson also found a Unitrin check stub showing a vehicle repair payment made to its insured, "Chanda E. Pratt."

On July 29, 2008, Richardson called Farmers' personal injury protection

representative Vicky Gandara. Gandara provided him post office box and telephone numbers for Chanda Pratt and said that Pratt's friend, Jennifer Gilliam, may have been driving the vehicle when the accident occurred.

Based on this investigation, Richardson filed an amended summons and complaint on August 13, 2008, correcting "Chappa Pratt" to "Chanda Pratt." This complaint also alleged that either Chanda Pratt or Jennifer Gilliam owned or drove the responsible vehicle. On September 12, 2008, Chanda Pratt was personally served with the amended summons and complaint and Richardson's five page declaration describing the circumstances surrounding amendment of the complaint. Pratt then called Gilliam and left her a message. "Later in the week," Pratt spoke to Gilliam by telephone and told her that she received court papers regarding the accident. She also said Gilliam's name "was on the papers." On September 23, 2008, two days after the limitations period plus 90 days expired, Unitrin attorney Eric Freise appeared on behalf of defendants Chanda Pratt and Jennifer Gilliam. Richardson served Gilliam on December 3, 2008.

On April 22, 2010, defendants Pratt and Gilliam moved for summary judgment dismissal, claiming that the statute of limitations barred Farole's lawsuit. On May 21, 2010, the trial court granted Jennifer Gilliam's motion. Although the court's order states no grounds for dismissing the claim, Unitrin principally argued that because Farole's conduct constituted inexcusable neglect,[2] the amended complaint did not relate back

[2] Farole later consented to the entry of summary judgment and dismissal of Chanda Pratt, and the court dismissed Pratt from the case. Farole does not appeal that decision.

under CR 15(c).

ANALYSIS

Farole argues that because the amended complaint relates back to the original complaint under CR 15(c), her claim against Gilliam is timely. Gilliam responds that the trial court correctly granted summary judgment dismissal because Farole failed to meet CR 15(c)'s requirements and her amended complaint was therefore time barred.

Standard of Review

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). We construe facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 795, 64 P.3d 22 (2003).

The parties dispute whether we apply an abuse of discretion or a de novo standard when reviewing a trial court's CR 15(c) relation back determination. We recently rejected the abuse of discretion standard and held, "[A]ppellate courts do not refer to a determination of relation back as being discretionary with the trial court; rather the question is whether the requirements of CR 15(c) have been met." Perrin v. Stensland, 158 Wn. App. 185, 193, 240 P.3d 1189 (2010). In Perrin, we cited with approval the United States Supreme Court's approach to the parallel federal rule:

"[T]he Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion." Krupski v. Costa Crociere SpA, ___ U.S. ___, 130 S. Ct. 2485, 2496, 177 L. Ed. 2d 48 (2010).[3] In accordance with this approach, we review the CR 15(c) ruling to determine whether the requirements of the rule were satisfied.

CR 15(c)

The parties agree that if the amended complaint relates back to the original complaint, Farole's lawsuit is timely commenced because Farole served one defendant—Pratt—within 90 days of the original complaint. Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991) (the effect of serving one defendant in a multidefendant case is to stop the statute of limitations from running for unserved defendants). Therefore, the core issue here is whether Farole's amended August 13, 2008 complaint relates back to the original June 23, 2008 complaint under the requirements of CR 15(c).

CR 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he

[3] We explained in Perrin, "Some opinions do refer to abuse of discretion as the standard for reviewing a decision under CR 15(c), probably because the issue often arises in connection with a motion for leave to amend." Perrin, 158 Wn. App. at 192.

And federal authority is persuasive in interpreting language of a state court rule that parallels a federal rule. Beal for Martinez v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998).

> 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.

And the party relying on CR 15(c) must also demonstrate that any neglect was excusable. Perrin, 158 Wn. App. at 197-99.

CR 15(c) is to be liberally construed on the side of allowance of relation back of an amendment that adds or substitutes a new party after the statute of limitations has run, particularly where the opposing party will be put to no disadvantage. Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. Craig v. Ludy, 95 Wn. App. 715, 718-19, 976 P.2d 1248 (1999) (quoting Lind v. Frick, 15 Wn. App. 614, 617, 550 P.2d 709 (1976)).

Our Supreme Court adopted this guiding principle in DeSantis v. Angelo Merlino & Sons, Inc., 71 Wn.2d 222, 427 P.2d 728 (1967) (relying on commentary in Moore's Federal Practice concerning the analogous federal rule (citing 3 James Wm. Moore et al., Moore's Federal Practice § 15.15 cmt. at 1041 (n.d.))). The original personal injury complaint in DeSantis named as defendants Angelo Merlino and his wife, doing business as a sole proprietorship. The Merlino business was actually a corporation in which Merlino was a vice president and five percent stockholder. Merlino accepted service and notified the corporation and its insurance company about the claim. Merlino filed an answer denying the allegations in the complaint, including the allegation that the defendant was a proprietorship. This clue went unnoticed by the plaintiff, who entered into extended settlement negotiations. After the statute of limitations ran, Merlino successfully moved to dismiss based on the defect in parties.

The Supreme Court reversed, applying the predecessor rule to CR 15(c). Because no prejudice to the substituted party could result from relation back, refusing to allow it "would be to sanction manifest injustice." DeSantis, 71 Wn.2d at 225. The focus of the inquiry is on what the defendant knows or should have known, not the plaintiff's diligence. See Perrin, 155 Wn. App. at 188; see also Krupski, 130 S. Ct. at 2490 ("We hold that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading.").

With the policy of liberal construction in mind, we consider whether the requirements of CR 15(c) have been met in this case. Farole undisputedly meets CR 15(c)'s same conduct, transaction, or occurrence factor. Both the original and amended complaint arise out of the same vehicle accident and the alleged negligence of the following driver. The conduct in the amended complaint constituted the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." CR 15(c) (emphasis added).

CR 15(c)'s notice factor provides, "[W]ithin the period provided by law for commencing the action against him, the party to be brought in by amendment . . . has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits . . . ."[4] (Emphasis added.) Farole argues that Gilliam and Unitrin knew about the accident well before the statute of limitations

[4] The parties do not dispute that here, "the period provided by law for commencing the action" means the 3-year limitations period, plus 90 days.

expired. And Gilliam had actual knowledge of the suit against her within 90 days of the 3-year limitations period. Gilliam counters that she first received knowledge when she was served more than 90 days after the limitations period expired.

Gilliam does not dispute that a defendant must receive notice about the institution of the action within the 3-year limitations plus 90-day period. See Respondent's Br. at 3, 4, 10. When a plaintiff seeks to bring an additional defendant into an action by amended complaint, the new defendant normally must receive notice about the institution of the action within the statute of limitations plus 90 days period. See LaRue v. Harris, 128 Wn. App. 460, 465-66, 115 P.3d 1077 (2005). Also, an insurer's management of an insurance claim before the lawsuit's actual filing is relevant to whether the defendant had notice and would suffer prejudice under CR 15(c). See, e.g., LaRue, 128 Wn. App. at 465 ("Farmers had notice and knowledge since at least 1998 [two years prior to the lawsuit's filing], and because it shared a community of interest with the Estate, its notice and knowledge were imputable to the Estate.").

Under this community of interest principle, "timely notice may be imputed to a defendant added in an amended complaint if there is a community of interest between the originally named defendant and the party to be added, as with insurance carriers and the estates of their insureds." Perrin, 158 Wn. App. at 196. We have also imputed notice in circumstances not involving an estate. See Nepstad v. Beasley, 77 Wn. App. 459, 465, 892 P.2d 110 (1995) (where mother improperly named as defendant although daughter was vehicle's actual driver in accident and mother and daughter had a "very close communicative relationship," daughter had sufficient notice of the lawsuit and

would not be prejudiced in defending on the merits) (internal quotation marks omitted); DeSantis, 71 Wn.2d at 225 (finding knowledge and no prejudice where, after original complaint incorrectly named Merlino individually as a defendant rather than corporation, insurer provided counsel for both Merlino and the corporation).

Here Farole filed the original summons and complaint on the last day of the 3-year limitations period. But Pratt, Gilliam, and Unitrin knew about the accident long before this limitations period expired. After the accident, Gilliam returned the vehicle to Pratt and told her about the accident. Within days of the accident, Farole contacted Unitrin about the accident and damaged vehicle. Unitrin assessed the damage 6 days later and paid Farole for the vehicle repair. About two and one-half years after the accident, attorney Morgan wrote to Unitrin's adjuster notifying him about Farole's personal injury claim and legal representation. Five months later, attorney Richardson filed the original summons and complaint. He also sent a letter of representation to Unitrin's adjuster and enclosed a copy of the original summons and complaint. He also requested Unitrin's claim file but received no response.

On September 12, 2008, Pratt was personally served with the amended summons and complaint naming Pratt and Gilliam as defendants. Within the week, she notified Gilliam about the court papers and said Gilliam's name was on the papers. They also discussed the validity of Farole's claim. After Gilliam was served, she talked to Unitrin and its attorneys. Unitrin provided an attorney to represent Gilliam (its insured) and Pratt as a permissive drive under the policy's coverage terms.[5] The

[5] Under the parallel federal rule, notice may be imputed to parties who are

events discussed above all occurred before the 3 year limitations plus 90-day period expired. Unitrin's attorney then filed a notice of appearance on behalf of Pratt and Gilliam on September 30, 2008, 18 days after service of the amended complaint on Pratt and 9 days after the 3-year limitations plus 90-day period expired.

Under the circumstances here, we conclude the notice requirement is satisfied. Pratt and Gilliam had actual knowledge about the accident and Farole's lawsuit before September 21, 2008, the last day provided by law for commencing this action. In addition, Pratt's insurer Unitrin had notice about the accident, the lawsuit, and the permissive driver Gilliam long before September 21, 2008. And because of the community of interest between Pratt (the insured), Gilliam (the permissive driver), and Unitrin (who provided Pratt and Gilliam with coverage for the accident claim), we conclude timely notice to Pratt was sufficient notice to Gilliam under CR 15(c) so that Gilliam will not be prejudiced in defending this lawsuit.[6] And "[c]ounsel retained by the insurer would have been required to defend this suit whether for [Pratt] or [Gilliam]. Due to this community of interest, the notice to the insurer is imputed to [Gilliam]." Schwartz v. Douglas, 98 Wn. App. 836, 840, 991 P.2d 665 (2000). Gilliam demonstrates no prejudice.[7]

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represented by the same attorneys. Hendrix v. Mem'l Hosp., 776 F.2d 1255, 1257-58 (5th Cir. 1985).

[6] We reject Gilliam's prejudice challenge because she fails to establish prejudice from defending on the merits. CR 15(c); LaRue, 128 Wn. App. at 465.

[7] We also note that Farole's counsel represented to the trial court and to this court that Farole offers to settle the case for the $25,000 insurance policy limits to avoid reaching Gilliam's personal assets.

CR 15(c)'s mistaken identity factor requires that "within the period provided by law for commencing the action against him, the party to be brought in by amendment . . . 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." (Emphasis added.) Farole argues that Gilliam knew she was driving the vehicle that rear-ended Farole, and learned about the amended complaint when she spoke to Pratt within the 3-year limitations plus 90-day period. Gilliam counters that "there was no mistake, but simply a lack of information." Resp't's Br. at 14.

Under the plain meaning of "mistake," Farole's action incorrectly identifying the vehicle's driver as "Chappa Pratt" rather than Jennifer Gilliam constitutes "a mistake concerning the identity of the proper party." CR 15(c). In Krupski, the United States Supreme Court explained the meaning of "mistake" under the parallel federal rule. Krupski, who suffered injuries on a cruise ship, incorrectly named Costa Cruise as a defendant instead of Costa Crociere.

> That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant-call him party A-exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Krupski, 130 S. Ct. at 2494.

Like in Krupski, Farole made a mistake with respect to the driver's identity.

Gilliam knew she rear-ended Farole while driving Pratt's vehicle. As soon as Pratt was served with timely notice that is imputed to Gilliam, there could be no doubt that Gilliam would have been named defendant but for Farole's mistake in believing, when she commenced the lawsuit, that Pratt was the driver. Gilliam also had actual notice about the lawsuit as discussed above.

Excusable Neglect

Gilliam argues that Farole is guilty of inexcusable neglect because Farole had the information about the driver's identity and simply lost it. Farole counters that a reason exists in the record explaining the error on the initial complaint—her first attorney failed to return to her copies of the information exchanged at the accident scene with the case file and her father lost the originals while moving.[8]

"Inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." South Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). And in Perrin, we explained that a number of the cases finding inexcusable neglect involved a plaintiff's strategic choice rather than a mistake. E.g., Veradale Valley Citizens' Planning Comm. v. Bd. of County Comm'rs of Spokane County, 22 Wn. App. 229, 238, 588 P.2d 750 (1978) (failure to join

[8] Farole also argues that an inexcusable neglect analysis does not apply "when an amendment changing a party corrects a misidentified party . . . ." Appellant's Br. at 42 (formatting omitted). He relies on dicta in Nepstad, 77 Wn. App. at 467, in which Division Two of this court questioned whether the inexcusable neglect doctrine applies "to bar relation back where a party has incorrectly identified the defendant." But because we recently addressed the issue and held that "inexcusable neglect has become firmly embedded in Washington case law," the doctrine applies. Perrin, 158 Wn. App. at 198.

landowners in challenge to decision granting plat approval constituted an apparent deliberate strategy). "[I]nexcusable neglect, added by the court [to the CR 15(c) requirements] was not intended to alter the rule favoring relation back, but rather to prevent harmful gamesmanship. . . . A broad construction of the inexcusable neglect standard undermines [CR 15(c)] and interferes with the resolution of legitimate controversies." Gildon v. Simon Props. Group, Inc., 158 Wn.2d 483, 492 n.10, 145 P.3d 1196 (2006).[9]

Here, there was no reason to believe Farole made a strategic choice to avoid naming Gilliam, no concern about adequate notice to Gilliam, and no identified prejudice to Gilliam. Farole's first attorney failed to return to her a copy of the driver information that she had written down, and her father lost the original. Relying solely on her memory, she told attorney Richardson the driver's name was "Chappa Pratt." Richardson conducted a diligent investigation to determine the proper parties. The focus is not on how quickly Farole moved to correct her mistake about the proper defendant. We reasoned in Perrin:

> The focus under CR 15(c) is upon what the new defendant knew or should have known before the limitations period expired, not upon the diligence of the plaintiff in amending the complaint. The driver's estate had notice of the pending action by way of timely service upon the driver's widow, who had insurance coverage under the same policy as the driver. The estate was not prejudiced in its defense and should have known that the action would have been brought against the estate had the plaintiff not mistakenly believed the driver was still alive. Under these circumstances, where all the prerequisites for relation back were met, the trial court should have denied the motion to dismiss.[10]

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[9] Gilliam relies heavily on Bresina v. Ace Paving Co., 89 Wn. App. 277, 948 P.2d 870 (1997). But this case is inapposite because it does not address CR 15(c)'s relation back rule and excusable neglect.

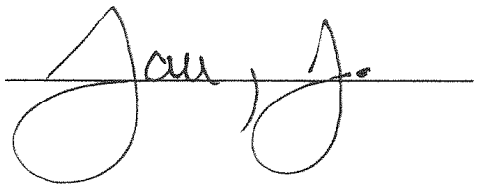
Gilliam also relies on Dixie Ins. Co. v. Mello, 75 Wn. App. 328, 877 P.2d 740 (1994). But Dixie concerns the evidentiary requirements for an under insured motorist claimant, not relation back under CR 15(c), and therefore does not apply here.

Perrin, 158 Wn. App. at 188-89.

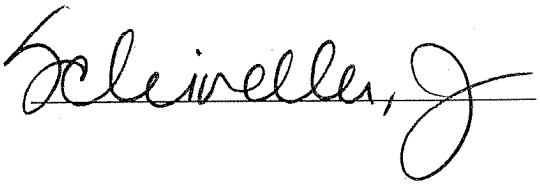
We conclude that the record establishes a satisfactory reason why Farole initially failed to name Gilliam as the defendant driver. Thus, Farole's conduct constitutes excusable neglect.

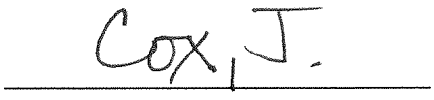
CONCLUSION

In summary, we conclude the requirements of CR 15(c) were met and Farole's delays did not amount to inexcusable neglect. Relation back under these circumstances is required. The action is not time barred. We reverse and remand for proceedings consistent with this opinion.



WE CONCUR:





[10] In Perrin, the estate maintained that plaintiff was guilty of inexcusable neglect for failing to notice the process server's designation of Hattie as "spouse/widow" on the service return and for failing to notice Hattie's interrogatory response indicating "widow." Had plaintiff acted diligently, he would have discovered the driver was dead and timely served the personal representative.