IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANDREW L. HERRICK,	)	No. 62947-6-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
ELISABETH LOELIGER,	)	UNPUBLISHED
	)	
Respondent.	)	FILED: December 21, 2009
	)	
	)	

Cox, J. — Andrew Herrick appeals the trial court's order dismissing his suit against Elisabeth Loeliger as time barred. Because this is a case of inexcusable neglect, the trial court did not abuse its discretion in declining to permit relation back of the amended complaint and dismissing the action as untimely. We affirm.

On October 8, 2004, Eli***s***abeth Loeliger[1] was involved in an automobile accident in which her car struck and damaged the rear end of Andrew Herrick's car on I-5 South. The Washington State Patrol investigated the accident and filed a police report. The police report named Eli***s***abeth A. Loeliger as the driver. It also stated her birth date as June 9, 1984, and her address as 910 N.

[1] We emphasize the letters ***"s"*** and ***"z"*** to differentiate the spellings of the names of the two individuals that we discuss in this opinion. We also use first names where necessary to avoid confusion.

85th Street, [Unit] C, Seattle, WA, 98103.

During settlement negotiations with Loeliger's insurance company, counsel for Herrick sent the company a demand letter together with a copy of the police report that was completed at the scene of the accident.[2] After negotiations failed, Herrick filed this action on October 4, 2007, naming Eli***z***abeth Loeliger and Robert Loeliger as defendants. Eli***s***abeth Loeliger was not named in the original complaint. It appears that the named defendants were served at their home in Kent. Eli***z***abeth J. and Robert Loeliger are Eli***s***abeth Loeliger's parents. On October 8, 2007, the statute of limitations for this personal injury action expired.[3]

The record indicates that an amended summons and amended complaint were filed in superior court in mid-October 2007.[4] The amended pleadings name Eli***s***abeth Loeliger, the person involved in the October 2004 car accident. The record also contains a Confirmation of Service, which was filed on October 31, 2007. It indicates that service on this defendant was not yet accomplished. The reason stated was "Investigation needed to be conducted for location of Eli***s***abeth Loeliger."[5]

Eli***s***abeth Loeliger was not served with the amended summons and

---

[2] Clerk's Papers at 37.

[3] RCW 4.16.080(2) (an action for injury to the person of another shall be commenced within three years).

[4] Clerk's Papers at 21-25.

[5] Clerk's Papers at 66 (emphasis added).

amended complaint until December 31, 2007. She filed and served an answer to Herrick's amended complaint.

In December 2008, Eli**s**abeth moved for dismissal, arguing that this action was time barred because the amended summons and amended complaint did not relate back to the original complaint under Rule 15(c). There is no indication in this record whether any party conducted discovery during the period between the answer and the motion. The trial court granted her motion and dismissed the case.

Herrick appeals.

CR 15(c)

Herrick argues that the trial court abused its discretion by dismissing his claim as time barred. We disagree.

CR 15(a) governs amendments generally and allows one amendment before a responsive pleading is served.[6] An amended pleading may relate back to the date the original claim was filed under CR 15(c). An amendment adding or changing the party against whom a claim is asserted may relate back if:

> [W]ithin 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.[7]

---

[6] CR 15(a).

[7] CR 15(c).

In addition to the above requirements of CR 15(c), an amendment adding or changing a party defendant will relate back only if the omission of the new defendant from the original complaint was due to excusable neglect.[8] "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 ascertainable upon reasonable investigation, the failure to name them will be inexcusable."[9] Our supreme court recently reaffirmed that the inexcusable neglect rule must be satisfied in addition to the formal requirements of CR 15(c).[10]

"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."[11] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.[12] The burden of proof is on the party seeking the relation back of his amendment to prove compliance with CR 15(c) and that the failure to amend in a timely

---

[8] S. Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 77, 677 P.2d 114 (1984); Teller v. APM Terminals Pac. Ltd., 134 Wn. App. 696, 706-07, 142 P.3d 179 (2006).

[9] Teller, 134 Wn. App. at 706-07 (citing Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 174, 744 P.2d 1032 (1987)).

[10] Stansfield v. Douglas County, 146 Wn.2d 116, 122, 43 P.3d 498 (2002).

[11] Foothills Dev. Co. v. Clark County Bd. of County Comm'rs, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986).

[12] In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

fashion was not due to inexcusable neglect.[13]

RCW 4.16.080(2) requires that an action claiming personal injury be commenced within three years.[14]

Here, Herrick filed his original summons and complaint before the statute of limitations expired. However, the original complaint did not correctly identify the intended defendant Eli***s***abeth Loeliger. Rather, it identified one of the two named defendants as Eli***z***abeth Loeliger.

Herrick's amended summons and complaint correctly identified the defendant as Eli***s***abeth Loeliger. But they were neither filed nor served until after the statute of limitations expired on October 8, 2007.

Thus, the issue is whether the untimely filing and service of the amended pleadings should relate back under CR 15(c) in the face of Loeliger's motion to dismiss. We conclude that it should not.

Here, it is undisputed that Eli***s***abeth Loeliger had knowledge of Herrick's claim for the purposes of CR 15(c)(1) and knew that she was the intended defendant for the purposes of CR 15(c)(2). The primary dispute before the trial court was whether Herrick's failure to amend his complaint in a timely fashion was due to inexcusable neglect.

Herrick's attorney mistakenly named the defendant's parents rather than the correct defendant, their daughter. This occurred despite the fact that the

---

[13] Foothills Dev. Co., 46 Wn. App. at 375.

[14] RCW 4.16.080(2).

police report in counsel's possession clearly identified Eli**s**abeth A. Loeliger as the driver, including both her home address and birth date. Based on these facts, it was not an abuse of discretion for the superior court to decide that Herrick's failure to name the correct defendant in his original complaint was the result of inexcusable neglect. The case law is clear that inexcusable neglect exists when the correct party is apparent, or ascertainable upon reasonable investigation.[15]

It is undisputed that Herrick's attorney had a copy of the police report, which identified Eli**s**abeth A. Loeliger as the party who rear-ended Herrick, before February 9, 2007. The report also gave Loeliger's address and age at the time of the accident. This was more than six months before the statute of limitations on Herrick's claim expired. Simply double-checking the full name and birth date of the defendant before filing the action would have revealed that Eli**z**abeth Loeliger was not the party named in the police report and that Robert Loeliger was the defendant's father, not her husband. Moreover, there is nothing in the record to explain why, in the face of the police report's statement of Eli**s**abeth's Seattle address, Herrick's counsel believed she should be served in Kent.

Herrick argues that where a plaintiff sues the right party by the wrong name, amendment to correct the spelling of the named party relates back to the commencement of the action.[16] But, our supreme court has held that it is

[15] Teller, 134 Wn. App. at 706-07.

inexcusable neglect to fail to name the correct party where the identity of the correct party is a matter of public record.[17]

Herrick cites Gildon v. Simon Property Group, Inc.,[18] for the proposition that the inexcusable neglect requirement is not intended to bar relation back in cases where the failure to name the correct party is the result of a simple mistake.[19] There, the court stated "[a] broad construction of the inexcusable neglect standard undermines [CR 15(c)] and interferes with the resolution of legitimate controversies." But the court also stated that "the [i]nexcusable neglect standard should not be applied to preclude relation back under CR 15(c) ***where the defendant's actions or misrepresentations mislead the plaintiff***."[20] The parties here do not argue or suggest that Eli***s***abeth Loeliger misled Herrick.

Herrick also cites the case of Nepstad v. Beasley[21] to support his argument that the failure to properly name Eli***s***abeth Loeliger was excusable neglect. While factually similar to this case, Nepstad is distinguishable. As here, in Nepstad, the plaintiff sued the mother of the intended defendant by mistake and then amended the complaint to name the correct defendant after the

---

[16] Brief of Appellant at 6.

[17] S. Hollywood Hills Citizens Ass'n, 101 Wn.2d at 77-78.

[18] 158 Wn.2d 483, 145 P.3d 1196 (2006).

[20] Id. at 492 n.10 (emphasis added).

[21] 77 Wn. App. 459, 892 P.2d 110 (1995).

statute of limitations had expired.[22] The trial court dismissed the case pursuant to the statute of limitations. Division Two of this court reversed, concluding that the requirements of CR 15(c) had been met and that the plaintiff's mistake was excusable neglect.[23]

The significant difference between Nepstad and this case is in ***who*** made the mistake leading to the need to amend the complaint. In Nepstad, the court pointed out that the majority of cases that have found "'inexcusable neglect' have generally considered the neglect of a party's lawyer, who is presumably charged with researching and identifying all of the parties who must be named in a lawsuit, and with verifying information that is available as a matter of public record."[24] In contrast, the mistake in Nepstad was made by the plaintiff, who read the wrong name off of the defendant's insurance card at the scene of the accident.[25] Because the police did not investigate, there was no public record identifying the other driver.

In Nepstad, the court questioned in dicta whether "inexcusable neglect"

---

[22] Id. at 461-63.

[23] Id. at 466-68.

[24] Id. at 467.

[25] Id. at 466.

would apply to bar relation back of an amendment to correct a misidentified defendant, as opposed to an amendment to add a wholly new defendant.[26] In Teller v. APM Terminals Pacific, Ltd.,[27] the court reviewed this dicta from Nepstad and concluded that, in cases where the correct defendant's identity is a matter of public record, "inexcusable neglect" will bar a plaintiff's attempt to amend his complaint to add a previously unidentified party.[28] Nepstad does not control here.

Roberts v. Michaels,[29] another case cited by Herrick, is also unpersuasive. In Roberts, the plaintiff sued her employer for sexual harassment, but used the corporation's fictitious name "Mid-South Vending" rather than the incorporated name of "Midsouth Food Vending Services, Inc." The federal district court dismissed the case because the plaintiff failed to amend her complaint to correct the defendant's name before the statute of limitations expired.

The federal court of appeals applied the "misnomer principle" and allowed

---

[26] Id. at 467.

[27] 134 Wn. App. 696, 142 P.3d 179 (2006).

[28] Id. at 708-12.

[29] 219 F.3d 775 (8th Cir. 2000).

the plaintiff to amend her complaint.[30] This principle applies in situations where "a plaintiff has named and served . . . the right defendant by the wrong name."[31]

Here, despite Herrick's argument, the facts do not indicate a "misnomer" situation. Rather, the facts clearly indicate that Herrick named and served the wrong person before the statute of limitations expired. He served the true defendant's mother at a Kent address that has no apparent relation to the Seattle address of the true defendant that was clearly stated in the police report. Moreover, nothing in this record explains what steps, if any, Herrick took to serve the true defendant at the Seattle address stated in the police report. All that the record reveals with respect to service of the true defendant is the Confirmation of Service that Herrick filed after the running of the statute of limitations, which states, "Investigation needed to be conducted for location of Eli***s***abeth Loeliger."[32] The amended pleading added a new party, Eli***s***abeth Loeliger. It did not correct a previously misnamed party who was timely served.

In addition, even if this is a misnomer case, Herrick cites no authority to indicate that the misnomer rule would relieve Herrick of the burden of proving that his failure to name the correct party was not the result of inexcusable

---

[30] Id. at 778.

[31] Id.

[32] Clerk's Papers at 66 (emphasis added).

neglect. All of the misnomer cases cited by Herrick are federal cases.[33] Herrick cites no case in which the misnomer rule has been applied under the Washington Rules of Civil Procedure. Because this is a Washington case, subject to the additional requirement of the inexcusable neglect rule, not a federal case, we apply Washington CR 15(c) accordingly.

Herrick also cites DeSantis v. Angelo Merlino & Sons[34] as support for the proposition that the inexcusable neglect requirement does not apply to misnomer cases. There, the plaintiff timely sued Angelo Merlino d/b/a Merlino Pure Food Products Company.[35] In fact, Mr. Merlino was a five percent stockholder in Angelo Merlino and Sons, Inc.[36] The statute of limitations expired before the plaintiff amended his complaint and the trial court dismissed the action under the statute of limitations.[37] On appeal, our supreme court allowed the amended

---

[33] Roberts, 219 F.3d 775; Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849 (W.D. La. 1971); Datskow v. Teledyne, Inc., 899 F.2d 1298 (2nd Cir. 1990), cert. denied, 498 U.S. 854, 111 S. Ct. 149, 112 L. Ed. 2d 116 (1990); Montalvo v. Tower Life Bldg., 426 F.2d 1135 (5th Cir. 1970); Travelers Indem. Co. v. United States ex rel. Construction Specialties Co., 382 F.2d 103 (10th Cir. 1967); Shoap v. Kiwi S.A., 149 F.R.D. 509 (M.D. Pa. 1993); Dunham v. Innerst, 50 F.R.D. 372 (M.D. Pa. 1970); Adams v. Beland Realty Corp., 187 F.Supp. 680 (E.D.N.Y. 1960).

[34] 71 Wn.2d 222, 427 P.2d 728 (1967).

[35] Id. at 222.

[36] Id. at 222-23.

[37] Id. at 223.

complaint to relate back under CR 15(c), correcting the designation of the defendant from d/b/a to a corporation. The court reasoned that the parties had "a sufficient identity of interest" so that relation back was not prejudicial because "counsel for the individual Merlino was . . . before the court for the purpose of protecting the interests of the corporation as well, which he also represented."[38]

The exception at issue in DeSantis does not apply here because Herrick is attempting to introduce a new party, not substitute the correct identify of the named party.[39] Herrick did not timely serve Eli**s**abeth Loeliger. Further, there is no indication that there is an "identity of interest" here.

Finally, Herrick cites two cases where the court allowed the plaintiff to file an amendment to substitute the defendant's estate after the defendant died. Neither LaRue v. Harris[40] or Craig v. Ludy[41] is controlling. These cases are factually distinct from the situation presented to this court and do not address the requirement of excusable neglect. Both Larue and Craig instead address the question of whether notice of a lawsuit may be properly imputed to the estate of the deceased tortfeasor for the purposes of CR 15(c).[42] This is simply irrelevant

---

[38] Id. at 224-25.

[39] Veradale Valley Citizens' Planning Committee v. Board of County Comm'rs, 22 Wn. App. 229, 237-37, 588 P.2d 750 (1978).

[40] 128 Wn. App. 460, 115 P.3d 1077 (2005).

[41] 95 Wn. App. 715, 976 P.2d 1248 (1999).

to the question of whether the failure to name the correct defendant is a result of inexcusable neglect.

Herrick also argues that his neglect was excusable because Loeliger's insurer referred to the insured as Robert Loeliger, Jr., rather than as Eli**s**abeth Loeliger. Herrick argues that this led him to believe that Eli**s**abeth was married to Robert. This is not persuasive. Again, the police report identified Eli**s**abeth by her full name and middle initial, by her age, and by her address. These facts were sufficient for Herrick to determine that Eli**z**abeth J. Loeliger was not Eli**s**abeth A. Loeliger. Herrick failed to perform the basic research needed to determine the correct defendant.

Herrick also argues that it would be improper for this court to take judicial notice that there are two people, one named Eli**z**abeth Loeliger and one named Eli**s**abeth Loeliger. Yet, she states in a memorandum opposing the motion to dismiss that "Elisabeth is presumably the daughter of Robert and Elizabeth Loeliger."[43] Without taking judicial notice and relying on the record before us, we conclude that there are two different women, mother and daughter, who have first names that differ in spelling by one letter. But this observation does not alter our conclusion that this is a case of inexcusable neglect.

---

[42] LaRue, 128 Wn. App. at 465; Craig, 95 Wn. App. at 719-20.

[43] Clerk's Papers at 55.

Here, the trial court was well within its discretion to conclude that this is a case of inexcusable neglect. Relation back is, accordingly, barred. The trial court properly dismissed the action.

CR 8(c)

Herrick next argues that Loeliger waived the statute of limitations defense by failing to plead it as an affirmative defense in her answer as required by CR 8(c), and by dilatory and contradictory conduct. We disagree.

CR 8(c) requires parties to plead affirmative defenses in the answer to a pleading.[44] Affirmative defenses that are not properly pleaded are deemed waived.[45] Affirmative defenses may also be waived if the assertion of the defense is either inconsistent with the defendant's prior behavior or dilatory.[46]

Because Loeliger's CR 12(b)(6) motion to dismiss was supported by a declaration of counsel with attached exhibits and treated as a summary judgment motion, the issues on appeal, other than relation back of Herrick's amended

---

[44] CR 8(c) ("Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of frauds . . . and any other matter constituting an avoidance or affirmative defense.").

[45] Rainier National Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

[46] King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (citing Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000)).

complaint, are reviewed de novo.[47]

Herrick's waiver argument is supported by the supreme court's 1955 decision in Boyle v. Clark.[48] But it is not consistent with more recent authority from that court.

Our supreme court explicitly endorsed a more flexible reading of the CR 8(c) requirement in Mahoney v. Tingley.[49] There, the court explained that because the underlying policy of CR 8(c) is to avoid surprise, "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."[50]

Recent cases in the court of appeals have followed the more liberal interpretation of CR 8(c) described in Mahoney. In Bernsen v. Big Bend Electric Cooperative, Inc.,[51] Division Three of this court affirmed the trial court's decision

---

[47] City of Spokane v. County of Spokane, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

[48] 47 Wn.2d 418, 287 P.2d 1006 (1955).

[49] 85 Wn.2d 95, 100, 529 P.2d 1068 (1975).

[50] Id. (citing Tillman v. National City Bank, 118 F.2d 631, 635 (2nd Cir. 1941)).

that the defense of failure to mitigate had not been waived by the defendant even though it was not raised in the pleadings.[52] Likewise, in Hogan v. Sacred Heart Medical Center,[53] the court concluded that the defendant had not waived its ability to assert release as an affirmative defense, despite failing to raise it in the pleadings.[54] Because the plaintiff suffered from neither surprise nor prejudice as a result of the defendant's delay in asserting the defense, the court reasoned that "the failure to plead release did not affect substantial rights of [the plaintiff]."[55]

While the rigid interpretation of CR 8(c) described in Boyle is followed in a number of federal cases cited by Herrick,[56] we follow the more liberal

---

[51] 68 Wn. App. 427, 842 P.2d 1047 (1993).

[52] Id. at 433-34 ("[I]f the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived.").

[53] 101 Wn. App. 43, 2 P.3d 968 (2000).

[54] Id. at 54-55.

[55] Id. at 55.

[56] Harris v. U.S. Dep't of Veterans Affairs, 126 F.3d 339, 341 (D.C. Cir. 1997); Roe v. Sears, Roebuck & Co., 132 F.2d 829, 831 (7th Cir. 1943); Funk v. F & K Supply, Inc., 43 F.Supp.2d 205, 220 (N.D.N.Y. 1999).

interpretation articulated by the Washington courts.

Here, Loeliger put Herrick on notice that she intended to raise the statute of limitations in March 2008, more than a year before the scheduled trial date of March 23, 2009. Because Herrick had notice that Loeliger intended to raise the statute of limitations well before trial, we conclude that Herrick has demonstrated neither surprise nor prejudice and that Loeliger's noncompliance with CR 8(c) is harmless.

Herrick also argues that Loeliger waived the statute of limitations by engaging in contradictory and dilatory conduct. "Th[is] doctrine is designed to prevent the defendant from ambushing a plaintiff during litigation either through delay in asserting the defense or misdirecting the plaintiff away from a defense for tactical advantage."[57]

Here, this argument is not supported by the record. Unlike the cases cited by Herrick,[58] there is no evidence that Loeliger's delay in asserting the defense was either contradictory or dilatory. The fact that Loeliger did not oppose Herrick's motion to dismiss Robert Loeliger and amend the case caption

---

[57] King, 146 Wn.2d at 424.

[58] King, 146 Wn.2d at 423-24 (defense raised after parties engaged in 45 months of litigation and discovery); Lybbert, 141 Wn.2d at 32-33 (defense raised after parties engaged in several months of discovery, during which the defendant failed to timely answer interrogatories specifically asking whether it intended to rely on the defense).

cannot reasonably be construed as abandoning the statute of limitations defense.

We affirm the dismissal order.

Cox, J.

WE CONCUR:

Schindler, CJ

Ellington, J