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**Court of Appeals Cause No. 42797-4-II**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JESSE POWERS, Respondent

v.

W.B. MOBILE SERVICES, INC., Petitioner

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Petitioner W.B. Mobile Services, Inc., (W.B. Mobile) the respondent in the Court of Appeals and a defendant in the Pierce County Superior Court proceeding below, seeks review of the decisions designated in Section B, below.

## B. COURT OF APPEALS DECISIONS

W.B. Mobile respectfully requests that this Court review the decision of the Court of Appeals (Division Two) in *Powers v. W.B. Mobile Services, Inc.*, 177 Wn. App. 208, 311 P.3d 58 (2013), filed October 15, 2013, which reversed an award of summary judgment in favor of W.B. Mobile and remanded the case to the trial court. W.B. Mobile filed a timely motion for reconsideration on November 4, 2013, which was denied by the Court of Appeals on March 11, 2014. Copies of the published opinion and the denial of reconsideration are attached at Tabs 1 and 2 of the Appendix, respectively.

## C. ISSUES PRESENTED FOR REVIEW

1. May a plaintiff toll the statute of limitations under RCW 4.16.170 against an unnamed defendant by naming a "John Doe"

defendant with reasonable particularity and by serving at least one named defendant within 90 days of filing?

2. Does a plaintiff, who only alleges the role of a "John Doe" defendant and does not offer any evidence of pre-litigation efforts to determine that defendant's identity, identify the "John Doe" with reasonable particularity sufficient to toll the statute of limitations?

3. If a plaintiff properly tolls the statute of limitations as to an unnamed defendant under RCW 4.16.170, must he also comply with the relation back requirements of CR 15(c) in order to substitute the unnamed defendant for a "John Doe" defendant designated in the original complaint pursuant to CR 10(a)(2)?

## D. STATEMENT OF THE CASE

This matter arises out of Powers's appeal of the trial court's dismissal of his claims against W.B. Mobile on statute of limitations grounds under CR 10 and CR 15. The facts are largely undisputed.

### 1. Factual Background

Jesse Powers was an employee of Awning Solutions, a company hired by Premier Communities (Premier) to install an awning on a mobile trailer at a construction site. (CP 323) Powers claims that, while in the

course of his employment, he was walking up a handicap access ramp attached to the trailer when the ramp collapsed, causing him injury. (CP 323-24) This allegedly occurred on June 2, 2006. (CP 323)

The ramp, along with a mobile office structure, was rented to Premier by Pacific Mobile Structures (Pacific) for use at a construction site managed by Premier. (CP 26) Pacific subcontracted with W.B. Mobile to install the ramp. (Id.) The ramp was installed on or about May 26-27, 2006. (Id.)

Russ Williams is the owner and sole employee of W.B. Mobile. (CP 7) At the end of the first day of work, Williams discovered he did not have sufficient materials to complete the installation of the ramp. (CP 95) Williams strung yellow caution tape around the incomplete ramp and "wire tied" some boards across the ramp, then left the site to obtain additional ramp pieces for the project from Pacific. (CP 95, 98) When Williams returned the following morning, he discovered that the caution tape had all been torn off and the boards had been removed. (CP 98) He completed the job, and then taped and boarded the ramp up again so that the ramp would not be used before the area could be backfilled by Pacific. (CP 102) It is presumed that Powers was allegedly injured sometime after

Williams completed his work and before the area was backfilled by Pacific. (CP 214)

### 2. Procedural History

Powers filed suit on May 28, 2009, which, assuming the injury occurred on June 2, 2006, was just five days before the statute of limitations would have expired. (CP 321) Powers identified two defendants by name (Premier and Pacific) and named two "John Doe" defendants. (Id.) "John Doe One" was identified in the complaint as follows:

> The Defendant, JOHN DOE CONSTRUCTION COMPANY is believed to be a corporation or partnership whose true name and capacity is unknown to Plaintiff. That when the true name and capacity of JOHN DOE CONSTRUCTION is ascertained by Plaintiff, Plaintiff pray[s] for leave to amend this complaint to so state reasons that JOHN DOE CONSTRUCTION COMPANY is believed to be the builder of the handicap access ramp where the incident occurred.

(CP 323) "John Doe Two" was alleged "to be responsible for the maintenance and safety for the premises where [Powers] sustained injuries involved in this lawsuit." (Id.)

Unbeknownst to Powers, counsel for Pacific sent a letter to Williams in July 2009, attaching a copy of the complaint and formally tendering Pacific's defense to W.B. Mobile. (CP 65) Williams forwarded

the letter to W.B. Mobile's insurer, who later denied the tender. (CP 8) Before receiving that letter, Williams did not have any notice of or knowledge that Powers had filed a lawsuit, that the incident alleged in Powers's complaint had occurred, or that Powers claimed to have suffered injury. (Id.).

Also in July 2009, Pacific filed its answer to Powers's complaint. (CP 328) As affirmative defenses, Pacific alleged that Powers's injuries may have been caused by the negligence of non-parties and that Powers may have failed to join indispensible parties. (CP 331) Pacific then filed its witness disclosure in December 2009, which identified employees of W.B. Mobile as possible witnesses who may be called to testify at trial "about the terms of the contract between WB Mobile and Pacific Mobile as well as about who installed the ramp where the plaintiff alleges failed." (CP 337)

During this time, there is no evidence in the record of any efforts made by Powers to determine the identity of the company responsible for the installation of the ramp. The only thing Powers apparently did in this regard was to send out a discovery request to Pacific that was not responded to until October 21, 2010, which purportedly identified W.B. Mobile as the installer of the ramp. (CP 171) The actual discovery

request and response were not made part of the record either at the trial court or in the Court of Appeals. Powers also did not present any evidence of his pre-filing efforts to determine W.B. Mobile's identity. (CP 197)

Despite receiving information that W.B. Mobile installed the ramp in October 2010, Powers inexplicably waited an additional four months before filing an amended complaint. On February 18, 2011, approximately 20 months after the statute of limitations had expired, Powers filed his First Amended Complaint, substituting W.B. Mobile for "John Doe One." (CP 378) Powers alleged that W.B. Mobile was "believed to be the builder and/or installer of [the] handicap access ramp" that he claims collapsed and caused him injury. (Id.)

W.B. Mobile filed a motion to dismiss, asking the trial court to dismiss the claims against it on the grounds that those claims were barred by the statute of limitations. (CP 1-6) The trial court granted that motion and denied Powers's subsequent motion for reconsideration. (CP 259-61; 294-95) Following settlement of his claims against Premier and Pacific, Powers appealed the order dismissing W.B. Mobile. (CP 304-05)

The Court of Appeals reversed the trial court and remanded the case. *Opinion at 1* (App. 1) Relying on this Court's dictum in *Sidis v.*

*Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 331, 815 P.2d 781 (1991), as applied by *Bresina v. Ace Paving Co., Inc.*, 89 Wn. App. 277, 948 P.2d 879 (1997), the Court of Appeals held that Powers's amended complaint was timely because Powers had identified "John Doe One" with "reasonable particularity before the three-year statute of limitations expired." *Id.* at 6. The Court of Appeals reasoned that, because Powers had served Premier and Pacific within 90 days of filing, RCW 4.16.170 effectively tolled the statute of limitations against W.B. Mobile when it was substituted for "John Doe One." *Id.* at 7. The Court of Appeals declined to consider the question of whether Powers's amended complaint related back to the date of his initial complaint under CR 15(c). *Id.*

W.B. Mobile filed a timely motion for reconsideration, which the Court of Appeals denied on March 11, 2014. *Order Denying Motion for Reconsideration* (App. 2). W.B. Mobile now seeks review of these decisions.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review may be accepted by this Court if the decision of the Court of Appeals (1) conflicts with a decision of this Court or (2) conflicts with another decision of the Court of Appeals. RAP 13.4(b)(1) and (2).

This Court should review this matter for two reasons. One, the Court of Appeals' decision that Powers tolled the statute of limitations by naming a "John Doe" defendant based on this Court's dictum in *Sidis* creates a conflict with *Iwai v. State*, 76 Wn. App. 308, 884 P.2d 936 (1994), *affirmed on other grounds by* 129 Wn.2d 84, 915 P.2d 1089 (1996); *Bresina*, *supra*; and *Martin v. Dematic*, ___ Wn. App. ___, 315 P.2d 1126 (2013). Two, the Court of Appeals' decision not to consider whether Powers's amended complaint relates back under CR 15(c) conflicts with *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 724 P.2d 434 (1986).

**1. This Court Should Accept Review to Clarify the Validity and Application of Its Dictum in *Sidis* and to Resolve the Conflicts in the Appellate Court Decisions Interpreting that Dictum.**

In *Sidis*, this Court established that, under RCW 4.16.170, service on one defendant in a multi-defendant action within 90 days from the date of filing the complaint tolls the statute of limitations as to remaining, unserved defendants. 117 Wn.2d at 331. In doing so, this Court observed:

> Respondents assert there is no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute. That issue is not, however, part of this case. . . . We note, however, that in some cases, if identified

> with reasonable particularity, 'John Doe' defendants may be appropriately 'named' for purposes of RCW 4.16.170.

*Id.* at 331. This Court did not define the phrase "reasonable particularity."

This dictum has been subsequently addressed by all three appellate divisions, to somewhat inconsistent results. Division Three first addressed it in *Iwai*, *supra*. In that case, the plaintiff appealed the dismissal of her claims against a defendant added after the statute of limitations expired who had been substituted for a "John Doe" defendant named in her original, timely complaint. Relying upon *Sidis*, the plaintiff argued that the statute of limitations had been tolled because she had served one of the originally named defendants within 90 days of filing. *Id.* at 312. Division Three rejected this argument:

> Mrs. Iwai urges us to extend the holding in *Sidis* to unnamed 'John Doe' defendants, such as she designated in her original complaint. We decline to do so. . . . Mrs. Iwai's broad designation of John Doe defendants allegedly 'negligent or otherwise responsible' does not sufficiently identify WAM so as to justify tolling the statute here.

*Id.*

Approximately three years later, in *Bresina*, *supra*, Division Two addressed both *Sidis* and *Iwai* in yet another case where a plaintiff attempted to substitute a defendant for a previously named "John Doe." The *Bresina* court first noted some confusion surrounding the *Iwai*

decision as to "whether Division Three (a) rejected the *Sidis* dictum or (b) assumed the validity of the *Sidis* dictum while holding that its requirements were not met by Iwai's description of WAM." *Id.* at 281-82. Assuming the latter, Division Two also "assume[d] that 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." *Id.* at 282.

Finally, in *Martin v. Dematic*, ___ Wn. App. ___, 315 P.3d 1126 (2013), Division One had occasion to consider the holdings of *Sidis*, *Iwai*, and *Bresina* in a case involving the plaintiffs' attempt to bring in a successor corporation as a defendant after the expiration of the statute of limitations. Division One held:

> Because the Martins neither named FCCNA [the successor corporation] as a defendant in the original complaint nor served the company, serving the named defendants did not toll the statute of limitations as to FCCNA. No court in Washington has explicitly stated that the *Sidis* dictum is law or recognized the statute of limitations as being tolled as to a defendant who is neither named in the complaint nor served within the limitations period. The filing of the initial complaint did not toll the three-year statute of limitations.

*Id.* at ___; 315 P.3d at 1136.

One day after Division One issued its opinion in *Martin*, the Court of Appeals issued its opinion in the instant case. Applying *Sidis* and *Bresina*, the Court of Appeals held that Powers had identified "John Doe One" with reasonable particularity because he "described the role of the unnamed defendant as it related to the lawsuit and distinguished it from the named defendants." *Opinion at 6*. The Court of Appeals further held that because Powers had served Pacific and Premier within 90 days of filing, the statute of limitations against W.B. Mobile was tolled under RCW 4.16.170. *Id. at 7*.

This case presents this Court with a unique opportunity to address its dictum in *Sidis* and to resolve the conflict among the lower courts surrounding the application of that dictum. Review is warranted in two important respects. One, this Court should decide whether to formally adopt its dictum in *Sidis* that, under certain circumstances, the statute of limitations may be tolled under RCW 4.16.170 as to unnamed defendants. Division One has declined to adopt it, Division Two has adopted and applied it in two cases, and Division Three has addressed, but not expressly adopted, it. These inconsistent decisions should be reconciled with clarification from this Court as to the precedential value, if any, of the *Sidis* dictum.

Two, if the *Sidis* dictum is adopted, this Court should address the circumstances under which an unnamed defendant is identified with "reasonable particularity" for purposes of RCW 4.16.170. In *Bresina*, Division Two adopted the *Sidis* dicta and "assume[d] that a plaintiff can toll the period for suing an unnamed defendant – if, but only if, the plaintiff identifies the unnamed defendant with 'reasonable particularity' before the period for filing suit expires." 89 Wn. App. at 282. As to what constitutes reasonable particularity, Division Two held:

> '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.'

*Id.* at 282 (emphasis added). The *Bresina* court went on to determine that the plaintiff had not identified the unnamed defendant with reasonable particularity based on two circumstances: one, the plaintiff had three years to obtain the defendant's true name and did not offer any reason for failing to do so; and two, the plaintiff could have obtained the defendant's true name by proper investigation or by filing a complaint and seeking discovery. *Id.*

*Bresina* appears to be the only published, post-*Sidis* decision that addresses the meaning of "reasonable particularity." Assuming the validity of the *Sidis* dictum, this Court should accept review because the Court of Appeals' decision in this case conflicts with *Bresina*. In this case, the Court of Appeals held Powers identified "John Doe One" with reasonable particularity because Powers identified the **role** the unknown defendant was believed to have played in the accident. *Opinion at 6* (App. 1) *Bresina*, though, makes clear that the focus is on the **identity** of the unknown defendant and the plaintiff's pre-litigation efforts and ability to determine that identity. *See, e.g.*, 89 Wn. App. at 280 ("Bresina offered nothing to explain or justify her failure to name Ace before April 1994.") and at 282 ("A major factor is the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant[.]").

Here, by finding that Powers's identification of W.B. Mobile's role in the accident satisfied the reasonable particularity standard, the Court of Appeals failed to give consideration to what it had previously termed the "major factor" of reasonable particularity; *i.e.*, "the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant." *Id.* at 282. This holding will allow a plaintiff to toll the statute of limitations against an unknown defendant by simply identifying the role it played in the incident, without having to actually make any attempt to discover that

defendant's identity prior to the expiration of the statute of limitations (provided the other requirements of RCW 4.16.170 are met). This scenario is contrary to the holding in *Bresina*, and to the purposes of a statute of limitation and the tolling statute. RCW 4.16.170 does not extend either the statute of limitations or the time for naming all necessary parties. *See Kiehn*, 45 Wn. App. at 297; *Tellinghuisen v. King County Council*, 102 Wn.2d 221, 223, 691 P.2d 575 (1984).

W.B. Mobile respectfully requests that this Court accept review to resolve the confusion in the appellate courts regarding the *Sidis* dictum and the conflict regarding the "reasonable particularity" standard.

**2. This Court Should Accept Review to Resolve the Conflict between the Court of Appeals' Decision and *Kiehn v. Nelsen's Tire* and Clarify the Relationship between CR 10 and CR 15.**

The Court of Appeals also held that it did not need to reach what it characterized as "the separate question whether the amended complaint related back to the date of the initial complaint under CR 15(c)" because it held that Powers's amended complaint was timely under RCW 4.16.170. *Opinion at 7* (App. 1) This holding directly conflicts with *Kiehn*, *supra.* This Court should accept review to resolve this conflict and to provide

further litigants with guidance and direction regarding the interplay of CR 10(a)(2) and CR 15(c).

In *Kiehn*, the plaintiff timely filed a personal injury lawsuit against various defendants and several "Doe" defendants. 45 Wn. App. 291, 292, 724 P.2d 434 (1986). Approximately one and one-half years after the expiration of the statute of limitations, the plaintiff amended her complaint to name Nelsen's Tire as a defendant. *Id.* The plaintiff argued that her amended complaint was timely under CR 10(a)(2) because she had named several "Doe" defendants. *Id.* at 293-94. Nelsen's Tire countered that an amendment under CR 10(a)(2) necessarily implicates CR 15(c), and thus the two rules must be read in conjunction with each other. *Id.* at 294. Nelsen's Tire argued that "CR 15(c) places limitations on the relation back of an amendment to a fictitious name complaint, and that if CR 15(c) is applied . . . , Kiehn's amended complaint cannot relate back." *Id.*

Prior to *Kiehn*, no Washington court had decided whether CR 15(c) applies to cases involving unknown parties. *Id.* The *Kiehn* court ultimately held:

> [W]e believe that CR 15(c) should have application here. Cases from other jurisdictions that have rules identical or substantially identical to our CR 10(a)(2) and CR 15(c) support the notion that CR 10(a)(2) must be read in conjunction with CR 15(c). These cases stand for the

> proposition that **the substitution of a true name for a fictitious party constitutes an amendment substituting or changing parties**. When that is the case, CR 15(c) is triggered and the amended complaint must meet the specific requirements of the rule.

*Id.* at 294-95 (internal citations omitted; emphasis added).

Thus, even assuming Powers satisfied *Sidis*'s "reasonable particularity" requirement, under *Kiehn* he must still comply with the requirements of CR 15(c) in order to substitute W.B. Mobile for a "John Doe" defendant. Division Two's decision "not [to] reach the separate question of whether the amended complaint related back to the date of the initial complaint under CR 15(c)" creates a direct conflict with the holding of *Kiehn* that must be resolved.[1]

Power's right under CR 10(a)(2) to designate a defendant by a fictitious name does not relieve him of any obligations under CR 15(c). This was explicitly established in *Kiehn* and implicitly recognized in *Bresina*. To be sure, the *Bresina* court's acknowledgment that "if a

[1] It is worth noting that Division I, in two separate unpublished opinions, has followed the *Kiehn* analysis. *See Geary v. Home Depot USA, Inc.*, 172 Wn. App. 1020 (2012) (No. 67534-6-I) at *1 ("Even if a plaintiff describes an unnamed defendant with reasonable particularity for purposes of RCW 4.16.[170], an amended complaint substituting a named defendant for the unnamed defendant must nonetheless comply with CR 15(c)."); *Gallard v. Anderson*, 177 Wn. App. 1033 (2013) (No. 68512-1-I) at *1 ("Where a plaintiff seeks to amend a complaint to add a new defendant after the expiration of the statute of limitations, RCW 4.16.170 does not toll the statute of limitations unless the requirements of CR 15(c) for relation back of the amendment to the original complaint are satisfied."). Pursuant to GR 14.1(a), these cases are not cited as authority, but rather are brought to this Court's attention in order to illustrate how other appellate have defined the issue in similar cases.

plaintiff identifies a party as 'John Doe' . . . 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'" reiterates and reinforces the excusable neglect element of a CR 15(c) analysis.

The Court of Appeals' refusal to consider CR 15(c) effectively creates a different rule for late-added defendants depending on whether the defendant is substituted for a John Doe. But the requirements of CR 15(c) do not make such a distinction. *Cf. Tellinghuisen*, 103 Wn.2d at 223 (RCW 4.16.170 "does not, however, extend the time for naming all necessary parties; any such party not named in the original timely complaint can only be added thereafter under CR 15(c)."). CR 10(a)(2) also contemplates that a defendant substituted for a John Doe will brought in under CR 15:

> When the plaintiff is ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be **amended** accordingly. (Emphasis added)

*Cf.* CR 25 (providing different mechanism for substitution of parties in case of death, incompetency, or transfer of interest).

W.B. Mobile respectfully requests that this Court accept review to resolve the conflict between the Court of Appeals' decision not to address W.B. Mobile's CR 15(c) argument and *Kiehn*.

## F. CONCLUSION

For the reasons set forth above, W.B. Mobile respectfully requests that this Court grant its petition for review.

Respectfully submitted this 10 day of April, 2014.

STADIUM LAW GROUP, LLC

By: _____
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Attorneys for Petitioner W.B. Mobile

## DECLARATION OF SERVICE

I, Priscilla Knopp, hereby declare under penalty of perjury under the laws of the State of Washington that on April 10, 2014, I filed with the Court, the original of W.B. Mobile Services, Inc.'s Petition for Review and caused to be served true copies of the same upon:

| | |
|---|---|
| **Attorney for Plaintiff**<br><br>**Cameron T. Riecan**<br>Tacoma Injury Law Group, Inc. P.S.<br>3848 S Junett Street<br>Tacoma, WA 98401<br>P.O. Box 1113<br>Tacoma, WA 98401 | [ ] Via email to<br><br>[ ] Via U.S. Mail, postage prepaid<br>[ ] Via facsimile<br>[X] Via messenger |
| **Co-Counsel for Plaintiff**<br><br>**Tamara S. Clower**<br>Attorney at Law<br>1105 Tacoma Avenue South<br>Tacoma, WA 98402 | [ ] Via email to<br><br>[ ] Via U.S. Mail, postage prepaid<br>[ ] Via facsimile<br>[X] Via messenger |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of April, 2014 in Tacoma, Washington.

Priscilla Knopp

PRISCILLA KNOPP
Legal Assistant

## APPENDIX

| TAB | DOCUMENT |
|---|---|
| 1 | Published Opinion in *Powers v. W.B. Mobile Services, Inc.*, No. 4279704-II (Wash. Ct. App. October 15, 2013) |
| 2 | Court of Appeals Order Denying Motion for Reconsideration dated March 11, 2014 |

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| JESSE POWERS,<br><br>Appellant,<br><br>v.<br><br>WB MOBILE SERVICES, INC., and JOHN DOE TWO,<br><br>Respondents,<br><br>And<br><br>PREMIER COMMUNITIES, INC., a Washington Corporation; PACIFIC MOBILE STRUCTURES, INC., a Washington Corporation,<br><br>Defendants. | No. 42797-4-II<br><br>PUBLISHED OPINION |

BJORGEN, J. — Jesse Powers appeals the dismissal of W.B. Mobile as a defendant in his personal injury case based on the statute of limitations. Powers argues that his claim was timely under RCW 4.16.170 and CR 15(c) because (1) he properly identified W. B. Mobile as "John Doe One" in his original complaint, (2) W.B. Mobile had actual notice of Powers's claim, and (3) Powers's service on the other defendants tolled the statute for 90 days. We hold that Powers's claim was timely brought under RCW 4.16.170 and its implementing case law, but do not reach whether his amended complaint relates back under CR 15(c). Accordingly, we reverse and remand for trial on the merits.

## FACTS

### I. INJURY

Premier Communities Inc. and Pacific Mobile Structures Inc. entered into a contract for Pacific to provide numerous mobile structures at Premier's residential construction sites. Premier decided to relocate one of the mobile structures, along with an accompanying handicap ramp, from one construction project to another. Unknown to Premier, Pacific subcontracted with W.B. Mobile to install the ramp after the structure was relocated. After spending a day installing the ramp, Russ Williams, the owner and sole employee of W.B. Mobile realized that he lacked sufficient materials to complete the job. Williams strung yellow caution tape around the incomplete ramp and "wire tied" some boards across the ramp. Clerk's Papers (CP) at 98. He then left the site to obtain additional ramp pieces for the project from Pacific and did not return until the next morning.

Premier also contracted with Awning Solutions to install an awning on the same relocated mobile structure. Awning Solutions assigned its employee, Powers, to carry out the installation. On June 2, 2006, the ramp's platform collapsed when Powers stepped forward on it while carrying an awning. Powers fell backward with the awning.

When Williams returned, he discovered that someone had torn off the caution tape and removed the boards he had placed across the incomplete ramp. He completed the job, and then taped and boarded the ramp up again so that no one would use it before Pacific could backfill the area. Williams did not know that Powers had been there.

## II. PROCEDURE

Powers filed suit on May 28, 2009, five days before expiration of the three-year statute of limitations, alleging that the collapse of the handicap access ramp caused him severe, permanent, and disabling injuries. Powers identified two defendants by name, Premier and Pacific, along with two "John Doe" defendants.[1] CP at 185-86. The complaint identified "John Doe One" as:

> The Defendant, JOHN DOE CONSTRUCTION COMPANY is believed to be a corporation or partnership whose true name and capacity is unknown to Plaintiff. That when the true name and capacity of JOHN DOE CONSTRUCTION is ascertained by Plaintiff, Plaintiff pray [sic] for leave to amend this complaint to so state reasons that JOHN DOE CONSTRUCTION COMPANY is believed to be the builder of the handicap access ramp where the incident occurred.

CP at 186. The complaint identified "John Doe Two" as the corporation or individual "responsible for the maintenance and safety for the premises where [Powers] sustained injuries involved in this lawsuit." CP at 186.

Unknown to Powers, Pacific sent a letter to Williams in July 2009, attaching a copy of the complaint and formally tendering Pacific's defense to W.B. Mobile. Williams forwarded the letter to W.B. Mobile's insurer, which denied the tender. Before receiving Pacific's letter, Williams did not know that Powers had been injured or that he had filed a lawsuit.

Pacific answered Powers's complaint in July 2009, alleging as affirmative defenses that nonparties' negligence may have caused Powers's injuries and that Powers may have failed to join indispensable parties. In December 2009, Pacific filed a witness disclosure, stating that it might call an employee of W.B. Mobile to testify at trial "about the terms of the contract

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[1] CR 10(a)(2) provides:

> When the plaintiff is ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

between W.B. Mobile and Pacific Mobile as well as about who installed the ramp where [sic] the plaintiff alleges failed." CP at 337.

Shortly thereafter, in January 2010, Powers testified in his deposition that his employer told him that Premier had installed the handicap ramp. In response to Powers's October 2010 discovery request, however, Pacific identified W.B. Mobile as the installer of the ramp. Four months later, in February 2011, Powers filed an amended complaint, substituting W.B. Mobile for "John Doe One," and stating that he believed W.B. Mobile was "the builder and/or installer of [the] handicap access ramp" that caused his injury. CP at 378.

W.B. Mobile moved to dismiss Powers's claims against it under the statute of limitations. The trial court granted the motion and dismissed those claims with prejudice. The trial court also denied Powers's motion for reconsideration. Powers appeals.[2]

## ANALYSIS

### I. STANDARD OF REVIEW

We review a summary judgment order de novo, performing the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is appropriate if, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 759, 265 P.3d 207 (2011), *review denied*, 173 Wn.2d 1035, 277 P.3d 669 (2012).

### II. RCW 4.16.170

[2] Powers, Premier, and Pacific stipulated that they had satisfactorily settled the complaint, and the court dismissed Powers's claims against both parties. Neither Premier nor Pacific are parties to this appeal.

Powers argues that under RCW 4.16.170, the time period for commencing a negligence action includes the 90 days after the plaintiff files or serves the complaint. W.B. Mobile responds that RCW 4.16.170 does not extend the statute of limitations. We hold that Powers's claim against WB Mobile was timely brought under RCW 4.16.170, which provides:

> 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. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

In *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991) (quoting RCW 4.16.170), our Supreme Court read the phrase "'[o]ne or more of the defendants'" from this statute unambiguously to require that only one of the defendants need be served within the 90-day period to toll the statute of limitations against all defendants. The *Sidis* Court disapproved of language in *North St. Ass'n v. City of Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981), to the extent that *North St. Ass'n* interpreted RCW 4.16.170 to require a petitioner to serve all necessary parties within the 90-day period. *Sidis*, 117 Wn.2d at 331-32. Further, the *Sidis* Court noted in dictum that although the issue of unnamed defendants was not before it:

> Respondents assert there is no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute. That issue is not, however, part of this case. . . . We note, however, that in some cases, if identified with reasonable particularity, "John Doe" defendants may be appropriately "named" for purposes of RCW 4.16.170.

*Sidis*, 117 Wn.2d at 331.

In *Bresina v. Ace Paving Co., Inc.*, 89 Wn. App. 277, 282, 948 P.2d 870 (1997), we assumed the validity of the *Sidis* dictum: that a plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant, if the plaintiff identifies the unnamed defendant with "reasonable particularity" before the period for filing suit expires. We noted that "reasonable particularity" depends on a variety of factors, including the "nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant." *Bresina*, 89 Wn. App. at 282. Applying this principle, we held that Bresina had not met its requirements.

The plaintiff in *Bresina* identified the unnamed defendant as "ABC CORPORATION, whose true identity is unknown," while alleging in her complaint that "ABC CORPORATION . . . may have the same responsibilities described in paragraph III above." *Bresina*, 89 Wn. App. at 279. The *Bresina* Court concluded that merely naming "ABC Corporation" after three years in which to ascertain the party's true name, "did not involve a degree of particularity that was reasonable." *Bresina*, 89 Wn. App. at 282. Therefore, "the trial court did not err by ruling that the statute of limitation was not tolled." *Bresina*, 89 Wn. App. at 282.

In contrast to the lack of particularity observed in *Bresina*, Powers's original complaint did not merely name a John Doe without distinguishing him from the named defendants. Rather, Powers's complaint specified that "John Doe One" referred to the "builder of the handicap access ramp." CP at 186. This ably described the role of the unnamed defendant as it related to the lawsuit and distinguished it from the named defendants. Under *Bresina*, Powers identified the unnamed defendant with reasonable particularity before the three-year statute of limitations expired.

The *Sidis* dictum, as applied by *Bresina*, also requires that at least one of the named defendants be served in a timely manner. In *Bresina*, 89 Wn. App. at 279, at least one of the named defendants was served within the three-year statute of limitations, which did not occur here. However, *Sidis* required only that one of the defendants be served *within the 90-day period* to toll the statute against all defendants, consistently with the requirement of RCW 4.16.170 that "one or more of the defendants" be served within 90 days of filing. *Sidis*, 117 Wn.2d at 329-32. The *Sidis* dictum, and *Bresina*'s application of it, must be read consistently with this core holding of *Sidis*.

Powers filed suit against Premier Communities, Pacific Mobile Structures, and John Doe One, described as carrying out the role of W.B. Mobile, within the three-year statute of limitations. Powers served Premier Communities and Pacific Mobile Structures within 90 days of filing. Under RCW 4.16.170, as interpreted by *Sidis* and *Bresina*, this tolled the statute of limitations against W.B. Mobile.

## III. CR 15(c)

With our decision that Powers's claim against W.B. Mobile was timely under RCW 4.16.170, we do not reach the separate question whether the amended complaint related back to the date of the initial complaint under CR 15(c).

## IV. CONCLUSION

We reverse and remand for trial on the merits.

BJORGEN, J.

We concur:

HUNT, P.J.

PENOYAR, J.

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

JESSE POWERS,
Appellant,
v.

WB MOBILE SERVICES, INC. and JOHN DOE TWO,
Respondents,
And

PREMIER COMMUNITIES, INC., a Washington Corporation; PACIFIC MOBILE STRUCTURES, INC., a Washington Corporation,
Defendants.

No. 42797-4-II

ORDER DENYING MOTION FOR RECONSIDERATION



**RESPONDENT W.B. MOBILE SERVICES, INC.** moves for reconsideration of the Court's **October 15, 2013** opinion. Upon consideration, the Court denies the motion.

Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Hunt, Penoyar, Bjorgen

**DATED** this 11th day of March, 2014.

**FOR THE COURT:**

PRESIDING JUDGE

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