No. 102577-7
SUPREME COURT
STATE OF WASHINGTON

No. 842200
COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

NW HOME IMPROVEMENT AND REPAIR,
PETITIONER,

v.

TERRY CRAWFORD and SUSAN CRAWFORD,
RESPONDENTS.

PETITION FOR REVIEW

SCHEER.LAW PLLC
Jennifer L. Crow, WSBA # 43746
Richard A. Francisco, WSBA # 54444
Attorneys for NW Home Improvement and Repair
2101 Fourth Ave., Suite 830
Seattle, W 98121
(206) 800-4070

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IDENTITY OF PETITIONER

NW Home Improvement and Repair ("NWHI") seeks review of the decision of the Court of Appeals terminating review.

OPINION BELOW

Division I of the Court of Appeals issued an unpublished decision in Cause No. 852272-2-I on October 2, 2023 ("Opinion")[1] and denied reconsideration on October 26, 2023[2].

ISSUES PRESENTED

1. Whether the Opinion of the Court of Appeals conflicts with this Court's decision in *Powers v. W.B. Mobile Servs., Inc.* and Division II's holding in *Bresina v. Ace Paving Co.*, when Respondents failed to make a diligent effort to identify NWHI in the original Complaint.

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[1] App. A-1.
[2] App. A-2.

2. Whether the Opinion of the Court of Appeals conflicts with this Court's decision in *Powers v. W.B. Mobile Servs., Inc.*, when Respondents failed to describe NWHI in the original Complaint with reasonable particularity.

3. Whether the Opinion of the Court of Appeals conflicts with this Court's decision in *Powers v. W.B. Mobile Servs., Inc.*, and would prejudice NWHI by forcing them to defend against an action years after the incident occurred.

STATEMENT OF CASE

I. Factual History

This case arises out of an accident which occurred on June 8, 2017, at the Olympic Skyline Condominiums in Kent, Washington.[3] On February 13, 2017, NWHI contracted with Olympic Skyline Association of Apartment Owners ("OSA") and Targa Real Estate Services ("TRES") to remove and replace

[3] CP 127.

two existing mailbox kiosks located at Olympic Skyline Condominiums.[4] The contract did not contain any ongoing obligations for NWHI, it did not expand a preexisting relationship, nor did it establish a long-term relationship; the contract was a "one-off."[5]

When NWHI arrived on June 8, 2017 to perform the work, the kiosks contained locked mailbox units which NWHI believed still contained mail.[6] As such, NWHI waited to begin working until Respondent Terry Crawford arrived to remove the locks and any leftover mail.[7] Present that day on behalf of NWHI was NWHI's owner, Ron Kukay, and one contract worker, Roberto.[8] After Mr. Crawford arrived, he spoke with NWHI and then began removing the locks and mail.[9]

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[4] CP 199.
[5] *Id.*
[6] CP 164.
[7] CP 162-164, 168.
[8] CP 168, lines 6-11.
[9] CP 169.

As Mr. Crawford was pulling on a particularly stubborn lock, the support legs holding the kiosk snapped and the entire kiosk fell towards him.[10] As the kiosk was falling, Mr. Crawford alleged it struck him causing injury.[11]

II. Procedural History

Respondents filed their original Complaint against OSA and two DOE corporations on April 28, 2020.[12] Four months later, in August 2020, OSA responded to Respondents' First Interrogatories and Requests for Production.[13] OSA' responses repeatedly reference NWHI and NWHI's owner, Ron Kukay, along with providing their contact information.[14] On January 7, 2021, Respondents moved to amend the original Complaint.[15]

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[10] CP 169-170.
[11] CP 127.
[12] CP 1.
[13] CP 185-192.
[14] *Id.*
[15] CP 14.

Respondents' Motion to Amend was originally denied. The Motion to Amend was refiled and granted, though neither Notice of Hearing listed attorneys for NWHI.[16] The Summons and Amended Complaint were filed on April 20, 2021, a year after the original Complaint was filed and almost *four years* after the incident occurred.[17]

On March 31, 2022, NWHI filed a Motion for Summary Judgment arguing Respondents' claim was time barred due to their failure to describe NWHI with reasonable particularity per the test in *Powers v. W.B. Mobile Servs., Inc*.[18] On May 5, 2022, the Superior Court granted NWHI's Motion.[19] Respondents' Motion for Reconsideration was denied on June 2, 2022.[20]

Respondents filed their Notice of Appeal on June 29, 2022, arguing the Superior Court erred in holding their action

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[16] Dkt. 15 and Dkt. 25.
[17] CP 124.
[18] *Powers v. W.B. Mobile Servs., Inc.*, 182 Wn.2d 159, 339 P.3d 173 (2014); CP 144 - 148.
[19] CP 597.
[20] CP 626.

against NWHI was time barred.[21] Division I issued its Opinion on October 2, 2023 reversing the Superior Court's grant of summary judgment.[22] Division I denied reconsideration on October 26, 2023.[23]

ARGUMENT

I. The Court of Appeals' Opinion that Respondents made a diligent effort to identify NWHI in the original Complaint conflicts with this Court's holding in *Powers* and the Division II holding in *Bresina*.

Based upon the governing law, Respondents' negligence action is barred by the statute of limitations. There is a three-year statute of limitations for personal injury actions.[24] Under Wash. Rev. Code § 4.16.170, service on one defendant tolls the statute of limitations as to unserved defendants.[25] However,

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[21] CP 628.
[22] App. A-1.
[23] App. A-2.
[24] Wash. Rev. Code § 4.16.080(2).
[25] Wash. Rev. Code § 4.16.170.

service of one defendant does not toll the statute of limitations as to all defendants indefinitely.[26]

To comply with both the statute of limitations and Wash. R. Civ. P. 10(a)(2), a plaintiff must meet the elements of the *Powers* test and identify an unnamed defendant with reasonable particularity.[27] In so doing a plaintiff must establish:

> (1)(a) from the commencement of the statute of limitations, [they] made a diligent effort to identify the actual defendant given the information reasonably available to [them,] and (b) [they] provided information about the unnamed defendant in the complaint to the greatest extent possible, including describing the unnamed defendant's acts and appearance[,] and (2) the defendant had or should have received such notice of the action that it will not be prejudiced in maintaining a defense on the merits at the time when the placeholder for the defendant . . . is replaced with the defendant's actual name.[28]

The first prong of this test is met only when a plaintiff shows it made a reasonable effort to identify the unnamed

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[26] *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 329, 815 P.2d 781 (1991).
[27] *Powers*, 182 Wn.2d at 164.
[28] *Id*. at 164-65.

defendant *and that the actual naming was unreasonably difficult given the information available*.[29]

In the *Powers* case, the plaintiff was injured when a handicap access ramp collapsed in June 2006.[30] The plaintiff named the company he was working for and the company who supplied the ramp in his complaint filed in May 2009.[31] However, plaintiff used a DOE designation for the company who constructed the ramp, W.B. Mobile.[32] Over one year after filing his complaint, the plaintiff obtained discovery which identified W.B. Mobile as the ramp installer.[33] Four months later, in February 2011, the plaintiff moved to amend his complaint to add W.B. Mobile.[34]

This Court found the plaintiff had satisfied the first prong of the reasonable particularity test, but indicated it was a "close

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[29] *Id.* at 165.
[30] *Id.* at 161.
[31] *Id.* at 162.
[32] *Id.*
[33] *Id.* at 163.
[34] *Id.*

call," and that "such finding is the outer extreme of what may satisfy the first prong of the reasonable particularity standard."[35] This Court noted it believed plaintiff actually naming W.B. Mobile was unreasonably difficult "because [plaintiff's] attempts to ascertain the identity of W.B. Mobile was stymied by inaccurate information from his employer and the lack of an available record showing who installed the ramp."[36]

In essence, the first half of the first prong turns on the definition of "diligence." In the *Powers* case, this Court found the plaintiff made a diligent effort to identify the DOE defendant (a) from the commencement of the statute of limitations, by (b) "[trying] to find out exactly who put the ramp together," and finally (c) by filing a complaint and initiating discovery to ascertain more information after his initial attempts failed.[37] "Powers's [sic] actually naming W.B. Mobile in his complaint

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[35] *Id.* at 166.
[36] *Id.*
[37] *Id.* at 166 (formatting added).

was unreasonably difficult given the information available because Powers's [sic] ***attempts*** to ascertain the identity of W.B. Mobile were stymied . . ."[38]

On the same question, Division II indicated in the "vast majority of cases" the time between the incident and the statute of limitations deadline is sufficient to ascertain a party's name.[39]

> "Reasonable particularity" depends, obviously, on a variety of facts. 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."[40]

In the instant case, the only action Respondents took to identify NWHI during the three-year statutory period was for a non-attorney hired by Respondents to make a single phone call to an unnamed "OSA representative." In its Opinion, Division I

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[38] *Id.* (emphasis added).
[39] *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 282, 948 P.2d 870 (Div. 2 1997).
[40] *Id.*

held that the "representative told the case manager they 'did not know anything about this incident and refused to disclose any further details.'"[41] Thus, Division I held that naming NWHI was unreasonably difficult.[42] To find that a single phone call is sufficient is in direct conflict with the holding in *Powers*.

In *Powers* the first prong was satisfied when the plaintiff made "attempts," plural, to identify the alleged tortfeasor.[43] Further, in reaching that decision, this Court indicated its holding was on the outer extreme of what may satisfy the first prong of the reasonable particularity standard.[44] One phone call is indisputably less.

Unlike *Powers*, Division I held that it would be inherently unreasonable for Mr. Crawford to have "questioned workers on the scene about the various contractual relationships of the

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[41] App. A-1, p.7
[42] *Id.*
[43] *Powers*, 182 Wn.2d at 166.
[44] *Id.*

parties" after allegedly sustaining an injury.[45] This mischaracterizes the information Respondents needed and ignores the circumstances of the day.

When Mr. Crawford arrived that day, "NWHI workers were already at the site," and he "briefly spoke with them."[46] Kukay asked Mr. Crawford if he could start pulling trim on the second kiosk and then proceeded to do so while Mr. Crawford worked on removing the mailboxes from the structure.[47] Then, after the kiosk collapsed, Mr. Crawford stayed onsite for some time, taking several photographs of the fallen kiosk.[48]

It would not have been inherently unreasonable for Mr. Crawford to have simply asked the workers the name of their company considering he was still onsite after the kiosk fell and

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[45] App. A-1, p. 8.
[46] CP 302-303 (Crawford Depo. 109:17-110:17); *see also* CP 169. Also, admitted in Respondent's Division I appellate brief on page 6.
[47] CP 169 and 181.
[48] CP 281 (Crawford Depo. 22:13-16).

Mr. Crawford already knew the workers were there to remove the old mailboxes.[49]

The Respondents' claim that the single phone call met their burden is also a red herring. In addition to simply asking NWHI's employees the name of their company on the day of the incident, Mr. Crawford could have also asked his own employer (USPS) or had his lawyers continue to pursue OSA through additional phone calls or certified mail.

Unlike *Powers*, Mr. Crawford failed to show he even asked his own employer if they had any information regarding NWHI.[50] This is despite the facts that (1) Mr. Crawford testified his management drafted the work order for Mr. Crawford to be onsite that day and (2) USPS undertook an investigation of the

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[49] CP 300 (Crawford Depo. 100:18-101:25).
[50] *Powers*, 182 Wn.2d at 166.

incident which began immediately after the kiosk fell.[51] USPS' investigation included talking to Kukay of NWHI.[52]

Finally, because Respondents failed to provide the name of the alleged "OSA representative" to whom their Case Manager spoke, it is impossible to determine what knowledge, if any, that person had regarding the incident. The allegation the person "refused to disclose any further details" could be indicative of their lack of knowledge instead of their unwillingness to provide information. It is also reasonable to conclude the person did not know who the Case Manager was and was less than forthcoming as a result. Nevertheless, Respondents' attorneys did not try a second time and failed to even so much as send a letter/email to OSA for information in the intervening three years.

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[51] CP 286, 300, and 304 (Crawford Depo. 44:5-17, 100:18-101:25, 114:20-115:7).
[52] CP 391 (Kukay Depo. 50:7-20).

The *Bresina* court indicated three years is enough time to determine a party's name in a vast majority of cases, and this Court in *Powers* indicated multiple stymied attempts were on "the outer extreme" of the minimum necessary effort a plaintiff must show to meet the "diligence" requirement of prong one. If allowed to stand, Division I's Opinion effectively eliminates the diligence determination entirely.

II. The Court of Appeals' Opinion that Respondents described NWHI in the original Complaint with reasonable particularity conflicts with this Court's holding in *Powers*.

The second half of prong one of the *Powers* test requires a plaintiff to, "[provide] information about the unnamed defendant in the complaint to the greatest extent possible, including describing the unnamed defendant's acts and appearance."[53]

In *Powers* the plaintiff identified the DOE company as the "builder of the handicap access ramp where the incident

[53] *Powers*, 182 Wn.2d at 164-65.

occurred." In contrast, Respondents' original Complaint identified DOE CORPORATION II as "the Contractor hired by Defendant OLYMPIC SKYLINE and/or DOE CORPORATION I, to conduct maintenance, repairs and/or construction work at the common property of Olympic Skyline Condominiums. . ."[54] While the "builder of the ramp" is likely limited to the original design builder of the ramp and its installer, Respondents' description could encompass any number of companies hired to conduct routine maintenance and/or repairs on the subject mailbox.

NWHI did not have an ongoing contract to conduct maintenance, repairs, and/or construction on the subject property. Robert Skrbin, former TRES' employee and OSA Community Association Manager for over six years, indicated he would communicate with multiple different contractors on an as-needed basis.[55] Further, Skrbin indicated NWHI may have only

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[54] CP 3.
[55] CP 459 (Skrbin Depo. 14:19-15:6).

been onsite for one other project in his six years.[56] As NWHI was asked to come onto the property for the discrete purpose of replacing the aging mailbox units, it would be unreasonable to conclude Appellants' identification put NWHI on notice.

Division I held Respondents' identification was adequate because Respondents "knew nothing about the business relationship between [OSA] and [NWHI.]"[57] Though Respondents may not have had access to NWHI's contract with OSA/TRES, Mr. Crawford testified he knew NWHI was onsite that day to remove the subject mailboxes.[58]

Mr. Crawford testified he saw the workers working "on the top" of the other kiosk while he was removing the mail and locks, and that he had talked to the NWHI workers about pulling locks on the subject kiosk while they worked on the other kiosk.[59]

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[56] CP 467 (Skrbin Depo. 46:9-14).
[57] App. A-1, p. 8.
[58] CP 300 (Crawford Depo. 100:18-101:25).
[59] CP 308 (Crawford Depo. 130:16-23).

Further, Mr. Crawford stayed onsite for some time after the kiosk collapsed, taking several photographs of the fallen kiosk.[60]

Thus, Respondents had specific knowledge from the day of the incident which they should have used to narrowly tailor their original Complaint as seen in *Powers*. Their failure to do so, combined with OSA/TRES' regular retention of different contractors for the site makes Respondents' Complaint insufficiently vague.

The same issue present in Division I's Opinion regarding diligent effort is present here. By allowing Respondents to utilize such broad language to describe a DOE defendant, Division I's Opinion effectively eliminates the reasonable particularity requirement developed by this Court.

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[60] CP 281 (Crawford Depo. 22:13-16).

III. The Court of Appeals' Opinion that NWHI is not prejudiced conflicts with this Court's holding in *Powers* and involves an issue of substantial public interest.

Finally, Respondents cannot establish the second prong of the *Powers* test: "the defendant had or should have received such notice of the action that it will not be prejudiced in maintaining a defense on the merits at the time when the placeholder for the defendant . . . is replaced with the defendant's actual name."[61]

The purpose of the statute of limitations is to compel prompt litigation "while evidence is accessible and memories are fresh."[62] Not only had Respondents been able to work up their case for over a year prior to NWHI being joined, but 43 months passed from the date of the alleged injury.

The length of time is an issue for a few reasons. First, NWHI performs many jobs per year (Kukay indicated in his

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[61] *Powers*, 182 Wn.2d at 164-65.
[62] *Curtin v. City of East Wenatchee*, 12 Wn. App. 2d 218, 225, 457 P.3d 470 (Div. 3 2020).

deposition that he completes over 100 jobs per year).[63] Details associated with this project will be indecipherably mixed with others, as the *Curtin* court wanted to avoid.

Second, as indicated above, the only workers present onsite on behalf of NWHI that day were Kukay and a temporary employee named Roberto.[64] Kukay testified Roberto was nearby the incident location around the time the kiosk fell.[65] Had NWHI been properly named, they may have been able to keep in contact with Roberto (who is now unlocatable) and obtain his statement.

Third, NWHI is undoubtedly prejudiced by not being named by Respondents until almost four years after the incident due to its inability to fully investigate the incident, as discussed in *Engelstein.*[66] "Indeed a party may be prejudiced where

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[63] CP 393 (Kukay Depo. 57:13-20).
[64] CP 168, lines 6-11.
[65] CP 391-2 (Kukay Depo. 49:6-18, 53:16-54:3).
[66] *Engelstein v. United States Dept. of Agric.*, 2022 U.S. Dist. LEXIS 4736 * 7-8 (W.D. Wash. Jan. 10, 2022).

although it knew about a plaintiff's accident, it did not investigate additional factual issues related to the lawsuit."[67]

In *Engelstein*, the plaintiff suffered a bicycle accident in June 2017 but did not serve two DOE defendants until 2021.[68] Plaintiff argued the statute of limitations tolled under Wash. Rev. Code § 4.16.170 as a named defendant had been served within the statutory period.[69] Both DOE defendants indicated they were unaware of the lawsuit until being served in 2021.[70] The court held the plaintiff failed "to cite any authority that, under Washington law on tolling, the defendant has a duty to make continual inquiries to learn if a plaintiff has made claims against it."[71]

Division I's Opinion indicates the instant case is distinguishable from *Engelstein* because Kukay was present at

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[67] *Id.* at * 9.
[68] *Id.* at * 6.
[69] *Id.* at * 6-7.
[70] *Id.* at * 7.
[71] *Id.* at * 8.

the time the mailbox unit fell.[72] While NWHI was onsite at the time of the alleged injury, it had no reason to believe it would have a lawsuit filed against it. This same point was raised in *Engelstein*.[73] In fact, the *Engelstein* court found prejudice even though one of the defendants investigated the accident the day after it occurred.[74]

Division I also cited to an *Engelstein* defendant's argument that "it did not know the identity of the bicyclist, the type of bicycle, the bicyclist's actions, or why the accident occurred, although it was speculated that grates may have contributed."[75] The instant case is almost identical. NWHI did not know who Mr. Crawford was outside of his employment with USPS, did not directly see Mr. Crawford pull the kiosk over, and was unsure specifically the cause of the kiosk's failure despite

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[72] App. A-1, pp. 8-9.
[73] *Id.* at * 8-10.
[74] *Id.* at * 9.
[75] App. A-1, pp. 8-9; *see also Engelstein*, 2022 U.S. Dist. LEXIS 4736 at * 8.

speculating it may have been due to the rotting of the support posts.[76]

Even with the information it had, NWHI was unaware of Respondents' theory of liability, lacked meaningful information about damages having not participated in the first several months of discovery, and lacked the means to investigate or corroborate those damages until 43 months after the accident.[77] This is identical to *Engelstein*, and that court held the plaintiff's delay prejudiced the DOE defendants as a matter of law.[78]

Finally, within the Division I's Opinion, it references, both in the "FACTS" section as well as the "ANALYSIS" section a certified letter purportedly sent on December 22, 2020 to NWHI.[79] Per R. App. P. 9.12, "[o]n review of an order granting or denying a motion for summary judgment the appellate court

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[76] *Engelstein*, 2022 U.S. Dist. LEXIS 4736 at * 8; *see also* CP 387, 389 (Kukay Depo. 35:16-36:1, 41:22-42:5).
[77] *Engelstein*, 2022 U.S. Dist. LEXIS 4736 at * 9.
[78] *Id.* at * 10.
[79] App. A-1, pp. 3, 7.

will consider only evidence and issues called to the attention of the trial court."[80]

This evidence was neither cited nor argued during the underlying Motion for Summary Judgment or Motion for Reconsideration. It was first referenced to Division I within the *renewed* appellants' Brief. As such, Division I's reference and any reliance upon the same is improper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review of Division I's Opinion and reverse based upon settled precedent.

Per R. App. P. 18.17, this document contains 3,816 words.

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[80] R. App. P. 9.12.

Dated: November 20, 2023.

Respectfully submitted,

/s/ Jennifer L. Crow
Jennifer L. Crow, WSBA # 43746
Richard A. Francisco, WSBA # 54444
Attorneys for NW Home Improvement and Repair

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer.Law PLLC.

At all times hereinafter mentioned, I was a resident of the State of Oregon, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY
CO/ Appellant Liandra Marchan Tiller Andrew Kim Park Chenaur & Association 2505 S. 320th Street, Suite 100 Federal Way, WA 98003 Liandra@parkchenaur.com; andrew@parkchenaur.com	**( ) Via U.S. Mail** **( ) Via Facsimile** **(X) Via E-Service** **(X) Via E-Mail**

DATED this 20th day of November 2023, at Portland, Oregon.

/s/ Daria Sowell
Daria Sowell, Legal Assistant

FILED
10/2/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRY CRAWFORD, individually; TERRY CRAWFORD and SUSAN CRAWFORD, husband and wife and the marital community comprised thereof, Appellants, v. NW HOME IMPROVEMENT AND REPAIR, a Washington Corporation, Respondent, OLYMPIC SKYLINE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation; and TARGA REAL ESTATE SERVICES, a Washington Corporation, Defendants.	No. 85227-2-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Terry and Susan Crawford (collectively Crawford) appeal a summary judgment order dismissing their personal injury claims against Northwest Home Improvement and Repair Inc. (NW Home). Crawford argues that the trial court erred by determining their claims are time barred because the complaint did not describe NW Home with "reasonable particularity" to toll the statute of limitations. We reverse and remand for further proceedings.

FACTS

In February 2017, NW Home contracted with Targa Real Estate Services Inc., an agent of Olympic Skyline Association of Apartment Owners (Olympic

Ass'n), to remove and replace two mailbox kiosks at the Olympic Skyline Condominiums (Olympic Condos). On June 8, 2017, NW Home's owner Robert Kukay and several employees arrived at Olympic Condos to complete the work. Terry,[1] a United States Postal Service employee, arrived a few minutes later. Terry briefly spoke to the NW Home employees and then began removing the mailboxes' locks. One of the locks jammed, and Terry began to pull on it. The mailbox kiosk fell on top of him and pinned him against his mail truck. Terry called for help and several men lifted the kiosk off him.

Soon after, Crawford hired an attorney. On July 14, 2017, a case manager at the attorney's law firm called a representative of Olympic Condos, asking for information about the accident. The representative told the case manager he "did not know anything about this incident and refused to disclose any further details."

On April 28, 2020, Crawford sued and timely served Olympic Ass'n. The complaint also named as defendants "Doe Corporations" I and II. The complaint described the incident and how it occurred. It alleged that Doe Corporation II is "the Contractor hired by Defendant OLYMPIC [ASS'N] and/or Defendant DOE CORPORATION I, to conduct maintenance, repairs and/or construction work at the common property of Olympic [Condos]," and that Olympic Ass'n is obligated "to monitor and maintain the condition and integrity of the roadways, sidewalks and structures contained within, including all cluster mailboxes." Crawford sought personal injury and loss of consortium damages.

[1] We refer to Terry Crawford by his first name when necessary for clarity.

Crawford served their first set of interrogatories and requests for production with the complaint, asking Olympic Ass'n "whether, on the date of the subject incident you retained a third party to conduct maintenance, repairs and/or construction work at the subject property commonly known as Olympic [Condos]." In August 2020, Olympic Ass'n answered that "[a] contractor from NW Home Improvement and Repair, Inc. was on site to replace the mailboxes" and provided Kukay's name and contact information. So, on December 2, 2020, "given the anticipated joinder of an additional defendant," Crawford and Olympic Ass'n jointly moved to continue the trial date for eight months, which the trial court granted. Then, on December 22, 2020, Crawford's attorney sent a certified letter to NW Home at Kukay's attention, informing him of the lawsuit, providing a copy of the complaint, and expressing their intention to add NW Home as a defendant.

On January 7, 2021, Crawford moved under CR 10(a)(2) to amend their complaint to name Targa for Doe Corporation I and NW Home for Doe Corporation II. The court denied the motion without prejudice because Crawford failed to provide proof of service to the attorney for Olympic Ass'n. Crawford renewed their motion on March 12, 2021, and the court granted it on March 26. Crawford filed their amended complaint on April 20, 2021.

On March 31, 2022, NW Home moved for summary judgment, arguing that Crawford did not timely assert their claims under RCW 4.16.080 and .170 and "Washington case law" because Crawford did not "identify [NW Home] with reasonable particularity" to toll the three-year statute of limitations, which expired

on June 8, 2020. On May 5, 2022, the trial court granted NW Home's motion and dismissed Crawford's claims against it.

Crawford appeals.[2]

ANALYSIS

Crawford argues the trial court erred by dismissing their claims against NW Home as time-barred. We agree.

We review orders on summary judgment de novo, engaging in the same inquiry as the trial court. Kim v. Lakeside Adult Fam. Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). "Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rublee v. Carrier Corp., 192 Wn.2d 190, 198, 428 P.3d 1207 (2018); CR 56(c). We consider facts and inferences in a light most favorable to the nonmoving party. Id. at 199.

Under RCW 4.16.170, service on one of two or more codefendants tolls the statutes of limitations as to unserved defendants. Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991). 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.

In Powers v. W.B. Mobile Services, Inc., 182 Wn.2d 159, 164, 339 P.3d 173 (2014), our Supreme Court had occasion to "build on" its holding in Sidis. It explained that for a plaintiff to show that an unnamed defendant is identified with

[2] Olympic Ass'n and Targa are not parties to this appeal.

"reasonable particularity," the plaintiff must show that

> (1)(a) from the commencement of the statute of limitations, the plaintiff made a diligent effort to identify the actual defendant given the information reasonably available to the plaintiff and (b) the plaintiff provided information about the unnamed defendant in the complaint to the greatest extent possible, including describing the unnamed defendant's acts and appearance and (2) the defendant had or should have received such notice of the action that it will not be prejudiced in maintaining a defense on the merits at the time when the placeholder for the defendant, such as "John Doe" or "ABC Corporation," is replaced with the defendant's actual name.

Id. at 164-65. The first prong is satisfied only when the plaintiff shows it made a "reasonable effort to identify an unnamed defendant and that actually naming the defendant was unreasonably difficult given the information available." Id. at 165.

In Powers, the plaintiff was injured while working at a residential construction site when a handicap access ramp platform collapsed. 182 Wn.2d at 161-62. Powers " 'tried to find out exactly who put the ramp together,' " including asking his employer, but his attempts failed. Id. at 162. Three years later and a few days before the statute of limitations ran, Powers timely sued Premier Communities Inc., the owner of the residential property, and Pacific Mobile Structures Inc., the contractor Premier hired to supply the ramp. Id. at 161-62. Because Powers could not identify the entity that built the ramp, he named "John Doe One" as the " 'builder of the handicap access ramp where the incident occurred.' " Id. at 162.

Two months after Powers filed his lawsuit, Premier sent a copy of the complaint to the builder of the access ramp but did not disclose the builder's identify to Powers. Powers, 182 Wn.2d at 162. Over a year after filing his complaint, Powers obtained a discovery response from Pacific identifying W.B.

Mobile Services Inc. as the builder and installer of the ramp. Id. at 163. Four months later, Powers moved to amend his complaint to replace John Doe One with W.B. Mobile. Id. W.B. Mobile then moved to dismiss the claim as time-barred, which the trial court granted. Id.

Division Two determined Powers timely moved to amend the complaint under RCW 4.16.170 and reversed and remanded to the trial court. Powers v. WB Mobile Servs., Inc., 177 Wn. App. 208, 215, 311 P.3d 58 (2013). The Supreme Court affirmed Division Two. Powers, 182 Wn.2d at 167. It held that Powers identified W.B. Mobile with "reasonable particularity" to toll the statute of limitations because he " 'tried to find out exactly who put the ramp together' " and provided information about W.B. Mobile in his complaint "to the greatest extent possible." Id. at 166. It noted that "actually naming W.B. Mobile in his complaint was unreasonably difficult given the information available because Power's attempts to ascertain the identity of W.B. Mobile were stymied by inaccurate information from his employer and the lack of an available record showing who installed the ramp." Id. And W.B. Mobile could not show prejudice because it received a copy of the complaint from Pacific within 90 days of the time Powers filed his complaint. Id. at 167. As a result, W.B. Mobile received timely notice of Power's claim and suffered no prejudice in maintaining its defense on the merits. Id.

Like the plaintiff in Powers, the facts here when viewed in the light most favorable to Crawford show that their complaint identified NW Home with reasonable particularity. Crawford tried to identify the company replacing the

mailboxes that fell on Terry. A month after the incident, a case manager at the law firm representing Crawford called a representative at Olympic Condos to get more information about the incident. But the representative told the case manager that they "did not know anything about this incident and refused to disclose any further details." As a result, naming NW Home in Crawford's complaint was unreasonably difficult. So, Crawford described the unknown defendant in their complaint to the greatest extent possible:

> Defendant DOE CORPORATION II is the business hired by Defendant OLYMPIC [ASS'N] and/or Defendant DOE CORPORATION I to manage maintenance, repairs and/or construction matters at the subject property on its behalf. As Defendant OLYMPIC [ASS'N]'s and/or Defendant DOE CORPORATION I's designated maintenance, repair and/or construction management entity, agent and/or representative, Defendant DOE CORPORATION II also has the obligation to monitor and maintain the condition and integrity of the roadways, sidewalks and structures contained within, including all cluster mailboxes.

Further, in April 2020, Crawford filed the complaint and their first set of interrogatories and requests for production, asking for information about the identity of Doe Corporation II. Olympic Ass'n responded and disclosed NW Home's identity on August 3, 2020. Then, on December 22, Crawford informed NW Home of the lawsuit and provided it with a copy of the complaint. And in January 2021, Crawford moved to amend the complaint to replace Doe Corporation II with NW Home.

NW Home argues that Crawford did not act diligently to identify it as a defendant. It suggests that Crawford could have asked the NW Home employees who were on-site the day of the accident to identify their employer.

But under Powers, a plaintiff must make a diligent effort to identify the actual defendant given the information reasonably available to the plaintiff, which Crawford did. Olympic Ass'n stymied Crawford's attempt to learn NW Home's identity by refusing to discuss the case. And NW Home identifies no other reasonably available source for the information. Its suggestion that Crawford, immediately after allegedly sustaining an injury, should have questioned workers on the scene about the various contractual relationships of the parties is inherently unreasonable.

NW Home also argues that Crawford's identification of NW Home in their complaint is "inadequately vague" because NW Home did not have on ongoing contract with Olympic Ass'n to provide maintenance, repairs, or construction. But Crawford knew nothing about the business relationship between Olympic Ass'n and NW Home. And Crawford's complaint described Doe Corporation II as the business that has "the obligation to monitor and maintain the condition and integrity of . . . all cluster mailboxes." That language, when read in context of the entire complaint, adequately describes the defendant as the business responsible to maintain the condition and integrity of the Olympic Condos cluster mailboxes—the source of his injury on June 8, 2017.

Finally, citing an order on summary judgment in Engelstein v. United States Department of Agriculture, No. C20-916 TSZ, 2022 WL 92981 (W.D. Wash. Jan. 10, 2022), NW Home argues that the "substantial passage of time" prejudiced it in its ability to defend against the lawsuit. In Engelstein, the Western District held that a delay of nearly four years prejudiced a defendant to a

bicycle personal injury lawsuit because "it did not know the identity of the bicyclist, the type of bicycle, the bicyclist's actions, or why the accident occurred." Id. at *3.

This case is different. Kukay and other NW Home employees were present when the mailboxes injured Crawford. NW Home observed the mailbox kiosk and was aware of its condition and how the incident occurred. Further, Crawford amended their complaint just a few months after discovery began. And in anticipation of that motion to amend, they sent NW Home a copy of their complaint and moved to continue the trial date for eight months, which the trial court granted. NW Home offers no compelling explanation of how the delayed notice prejudiced their ability to maintain a defense.

Because Crawford timely served at least one named defendant and their complaint described NW Home with reasonable particularity, the statute of limitations was tolled as to NW Home. We reverse and remand for further proceedings.

Bowman, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

FILED
10/26/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRY CRAWFORD, individually; TERRY CRAWFORD and SUSAN CRAWFORD, husband and wife and the marital community comprised thereof, Appellants, v. NW HOME IMPROVEMENT AND REPAIR, a Washington Corporation, Respondent, OLYMPIC SKYLINE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation; and TARGA REAL ESTATE SERVICES, a Washington Corporation, Defendants.	No. 85227-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Northwest Home Improvement and Repair Inc. filed a motion for reconsideration of the opinion filed on October 2, 2023. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

SCHEER.LAW PLLC

November 20, 2023 - 12:16 PM

Filing Petition for Review

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Appellate Court Case Title:	Terry & Susan Crawford, Appellants v. NW Home Improvement, Respondent (852272)

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