NO. 42797-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JESSE POWERS,
Appellant,

v.

W.B. MOBILE SERVICES, INC., a Washington Corporation,
Respondent,

and

PREMIER COMMUNITIES, INC., a Washington Corporation;
PACIFIC MOBILE STRUCTURES, INC., a Washington Corporation
d/b/a PACIFIC MOBILE; and JOHN DOE TWO,
Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In this appeal, Appellant Jesse Powers waited until nearly 20 months after the statute of limitations had expired to substitute respondent W.B. Mobile for a "John Doe" defendant named in the original complaint. Powers did not provide any evidence of what he did either before or after the statute expired to determine W.B. Mobile's identity, and chose instead to wait until a co-defendant identified W.B. Mobile as the proper party before seeking to amend his complaint. The trial court granted W.B. Mobile's motion for summary judgment and dismissed Powers's claims as untimely. This Court should affirm because, on these undisputed facts, W.B. Mobile did not have notice of the action prior to the expiration of the statute and Powers's failure to timely amend was inexcusable neglect.

II. COUNTER-STATEMENT OF FACTS

This matter arises out of an incident that allegedly occurred on a construction site on June 2, 2006. (CP 323-24) Appellant Jesse Powers claims that, while in the course of his employment as an awning installer, he was walking along a handicap access ramp and the ramp collapsed, causing him injury. (Id.)

The ramp, along with a mobile office structure, was rented to Premier Communities (Premier) by Pacific Mobile Structures (Pacific Mobile) for use at a construction site managed by Premier. (CP 26) Pacific Mobile subcontracted with respondent W.B. Mobile to install the ramp. (Id.) The ramp was installed by W.B. on or about May 26-27, 2006. (CP 86, 101)

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 Mobile. (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 Mobile. (CP 102) It is presumed that Powers was injured between the hours when Williams left the site to pick up additional materials and when he returned the following morning. (CP 87, 131, 148)

Powers filed suit on May 28, 2009, just five days before the three-year statute of limitations was set to expire. (CP 321) Powers identified

two defendants by name (Premier and Pacific Mobile) 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 COMPANY 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 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 Mobile sent a letter to Williams in July 2009, attaching a copy of the complaint and formally tendering Pacific Mobile's defense to W.B. Mobile. (CP 65) This letter was Williams's first notice that a lawsuit had been filed. (CP 7-8) 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 Mobile filed its answer to Powers's complaint. (CP 328) As affirmative defenses, Pacific Mobile alleged that Powers's injuries may have been caused by the negligence of non-parties and that Powers may have failed to join indispensable parties. (CP 331) Pacific Mobile then filed a witness disclosure in December 2009, which identified W.B. Mobile and stated that an employee of W.B. Mobile 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)

Shortly thereafter, the deposition of Powers was taken by counsel for Pacific Mobile. (CP 212) The following exchange occurred:

> Q [By counsel for Pacific Mobile] Now, my client does not know, without having – there's an identification tag that apparently was on this mobile home that would help my client figure out whether it was their employees who installed the ramp and the – and the platform, or whether it was Premier Construction [*sic*].
>
> A [By plaintiff] Premier Communities.
>
> Q Premier Communities, whether their employees installed the ramp and the awning, or whether it was a company called – just a second – WB Mobile. And WB Mobile is not a party to this – to this suit.
>
> So we're trying – my – we're trying to figure out who was it that installed the ramp. Now, you told me it wasn't you?
>
> A It wasn't – obviously wasn't me.

(CP 212)

During this time, there is no evidence 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 Mobile 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. It is thus impossible to determine the wording of the actual request, when the request was sent, whether the request could have been sent out earlier, or whether the response could have been served earlier.

Powers then 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 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) In response to the motion, Powers made two arguments. One, he argued that his amended complaint was

timely because W.B. received notice of it (via Pacific Mobile's tender letter) within 90 days of the filing of his original complaint. (CP 173) Two, he claimed that he "was only ***made aware*** of W.B. Mobile's existence after discovery commenced and depositions and written discovery were exchanged with the other named defendants." (CP 176; emphasis added) Powers did not offer any evidence of any efforts that he himself made (as opposed to relying on the named co-defendants) to identify W.B. Mobile, either before or after he filed his action.

The trial court granted W.B.'s motion and dismissed Powers's claims against it with prejudice. (CP 259) Powers filed a motion for reconsideration (CP 264), which was also denied (CP 294). In October 2011, Powers apparently settled his claims against Premier and Pacific Mobile and entered stipulated orders dismissing his claims against these defendants. (CP 296-302) Powers then filed this appeal, seeking review by this Court of the trial court's order dismissing W.B. Mobile. (CP 304)

III. RESPONSE ARGUMENT

A. Standard of Review.

The standard of review of a summary judgment order is *de novo*, with the appellate court 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 where, viewing all facts and resulting

inferences most favorably to the nonmoving party, there is no genuine issue of material fact 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). A case is ripe for summary judgment where there are no factual disputes. *Perrin v. Stensland*, 158 Wn. App. 185, 192, 240 P.3d 1189 (2010).

B. The Trial Court Correctly Granted Summary Judgment Because Powers's Claims Are Barred by the Statute of Limitations.

The statute of limitations for a personal injury action (such as this one) is three years. *See* **RCW 4.16.080(2)**. Powers alleges that the incident giving rise to this action occurred on June 2, 2006. Thus, to be timely, any negligence claims arising out of that incident had to have been filed no later than June 2, 2009. Powers did not file his claims against W.B. Mobile until February 18, 2011, approximately 20 months after the statute of limitations had expired. Powers's claims against W.B. were not timely and were properly dismissed on summary judgment.

C. The Trial Court Correctly Granted Summary Judgment Because Powers Cannot Meet the Requirements of CR 15 for "Relation Back" of the Amended Complaint.

Powers claims that his amended complaint naming W.B. Mobile as a defendant "relates back" to the date on which his original complaint was filed, thus making his claims against W.B. Mobile timely. *Brief at 11.*

This claim fails because Powers cannot meet the necessary elements under **CR 15**.

Civil Rule 15(c) governs the relation back of amendments. It provides that "an amendment changing the party against whom a claim is asserted relates back [to the date of the original pleading] if" the claim asserted in the amended pleading arose out of the same transaction or occurrence set forth in the original pleading

> and, ***within the period provided by law for commencing the action against him***, the party to be brought in by amendment (1) has received such notice of the institution of the action that he 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 property party, the action would have been brought against him.

CR 15(c)(1)-(2) (emphasis added).

Further, the plaintiff's failure to timely name the correct party cannot have been due to "inexcusable neglect." *North St. Ass'n v. City of Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981).

> 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 are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable.

Haberman v. WPPSS, 109 Wn.2d 107, 174, 744 P.2d 1032 (1987).

As the party seeking relation back, Powers has the burden of proof to prove the conditions precedent of **CR 15(c)**. *Foothills Development*

Co. v. Clark County, 46 Wn. App. 369, 375, 730 P.2d 1369 (1986). He must also prove that his failure to timely amend was excusable. *Id.* "The absence of any of the **CR 15(c)** elements is fatal to the relation back of an amended complaint." *Id.* A party's failure to meet its burden of proving that its failure to amend its complaint in a timely fashion is, by itself, a sufficient basis for dismissal. *Id.*

Powers cites **CR 10**, and appears to suggest that his burden under **CR 15** is somehow lessened because he identified W.B. as a "John Doe" in his original complaint because he "was unable to obtain the true identity of the John Doe defendants prior to engaging in discovery." *Brief at 12.* **Civil Rule 10** allows a plaintiff to designate a defendant by a fictitious name "[w]hen the plaintiff is ignorant of the name of the defendant[.]" **CR 10(a)(2)**. This rule does not, however, relieve a plaintiff of any obligations under **CR 15** – the substitution of a true name for a fictitious party constitutes an amendment substituting or changing parties under **CR 15(c)**. *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (1986). Powers must satisfy all elements of **CR 15(c)** and the "excusable neglect" standard, notwithstanding the fact that W.B. was originally identified as a "John Doe."

1. The First Amended Complaint Is Not Timely Because W.B. Did Not Have Notice of the Action or Knowledge

That, But For a Mistake, the Action Would Have Been Brought Against Him Within the Statute of Limitations.

The notice and knowledge requirements found in **CR 15(c)(1)** and **(2)** are preceded by an additional requirement that such notice and knowledge must have occurred "within the period provided by law for commencing the action against him[.]" By its plain language, the rule thus requires that notice and knowledge must have occurred within the statute of limitations. In this case, that means prior to June 2, 2009, three years after the date of the incident.

It is undisputed that W.B. did not receive notice of Powers's action until he received Pacific Mobile's tender letter dated July 28, 2009, nearly two months after the statute of limitations had expired. Because W.B. did not have knowledge of the action "within the period provided by law for commencing the action against him," Powers cannot satisfy the requirements of **CR 15(c)** and the amended complaint does not relate back.

To overcome this, Powers argues that the 90-day time period for perfecting a complaint provided for in **RCW 4.16.170** extends the time for "commencing" his action for purposes of **CR 15(c)**. *Brief at 15-16.* This argument fails because Powers misunderstands the purpose and function of **RCW 4.16.170**.

The statute 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." **RCW 4.16.170**. The statute then allows a plaintiff up to 90 days to "perfect" the action by completing the other act, either service or filing. *Id.* However, Washington law is clear that **RCW 4.16.170** does not extend the statute of limitations. *See Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 244, 963 P.2d 907 (1998); *see also Banzeruk v. Estate of Howitz*, 132 Wn. App. 942, 945, 135 P.3d 512 (2006) ("RCW 4.16.170 is a 'tentative commencement' provision."). Rather, the statute simply provides that "either the filing of the complaint or service of the summons will toll the statute of limitations so long as the other act is completed within 90 days." *Margetan*, 92 Wn. App. at 244.

In *Kiehn*, *supra*, this Court considered the interplay between **CR 15(c)** and **RCW 4.16.170**, and ultimately rejected an argument similar to the one made by Powers. In *Kiehn*, a wrongful death action, the plaintiff filed suit against several defendants, including various "Does" who were alleged to have negligently maintained and repaired the wheels of a tractor that allegedly caused the death of the decedent. 45 Wn. App. at 292. Like Powers, the plaintiff filed the action only days before the statute of limitations was set to expire. *Id.* Approximately 19 months

later, the plaintiff amended her complaint to include Nelsen's Tire as a defendant. Nelsen's Tire's motion for summary judgment (to dismiss the claims against it on statute of limitations grounds) was denied and trial proceeded against Nelsen's Tire as the only defendant. *Id.* at 293. Following a verdict in plaintiff's favor, Nelsen's Tire appealed. *Id.*

On appeal, the court concluded that the amended complaint did not relate back. *Id.* at 296. The court noted that the amended complaint did not relate back because Nelsen's Tire did not have either notice of the action or knowledge that the action would have been brought against it but for a mistake "within the 3-year statute of limitations period[.]" *Id.* The court also rejected the plaintiff's claim that the 90-day time period provided for in **RCW 4.16.170** extended the statute of limitations 90 days beyond the filing date of the original complaint, which is precisely the argument made by Powers in this appeal. *Id.* at 296-97. The court held:

> Kiehn misconstrues the purpose of the 90-day time period provided in RCW 4.16.170, as well as its relevance to Nelsen's Tire. The time period provided for in RCW 4.16.170 is not an extension of the statute of limitations. Instead, the 90 days simply allows a plaintiff, who has tentatively commenced an action against a party by filing a complaint just before the pertinent statute of limitations runs, to perfect the commencement of the action by serving that party, even after the statute runs, as long as it is within 90 days of the date the complaint was filed. . . . . The 90 days provided for in RCW 4.16.170 allowed Kiehn only to perfect the action it had filed on November 26, 1980. Because Nelsen's Tire was not named in the original

> complaint, and the amendment naming it did not relate back, as we indicated above, Nelsen's Tire was not a party to the November 26, 1980 action. Therefore, the 90-day time period to serve process has no application to Nelsen's Tire.

Id. at 297-98 (internal citations omitted); *see also Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) (**RCW 4.16.170** "does not . . . extend the time for naming all necessary parties").

Similarly here, **RCW 4.16.170** merely allowed Powers 90 days to perfect the action that he "tentatively commenced" on May 28, 2009 – with a complaint that does not name W.B. Mobile and to which the amended complaint does not relate back because W.B. Mobile did not have notice or knowledge of the action within the 3-year statute of limitations. W.B. Mobile was not a party to the May 28, 2009 action and, as in *Kiehn*, the 90-day time period provided for in **RCW 4.16.170** does not have any application. Just as the plaintiff in *Kiehn* was precluded from taking advantage of Nelsen's Tire's involuntary bankruptcy within the 90-day period, so is Powers precluded from taking advantage of Pacific Mobile's tender to W.B. within the 90-day period to circumvent the applicable statute of limitations.

Indeed, it should not go unnoticed that Powers is attempting to take advantage of an action performed by a co-defendant – completely independent of Powers and without his knowledge – in order to satisfy the

requirements of **CR 15(c)**. It is Powers's (or his counsel's) responsibility to research and identify all parties who must be named in a lawsuit. *See, e.g., Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 707, 142 P.3d 179 (2006). The efforts of a co-defendant to seek indemnification against a claim should not inure to the benefit of Powers, who apparently made no effort during the relevant time period to discover W.B. Mobile's identity.

Powers also cites *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), for the proposition that the statute of limitations was tolled as to the unnamed defendants as soon as he served Pacific Mobile (an original named defendant). *Brief at 16-17.* The *Sidis* court did acknowledge that one of the parties had asserted "there [was] no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute." *Id.* at 331. But the *Sidis* court was also careful to note that this issue was "not . . . part of this case." *Id.* Thus, any comments by the *Sidis* court on this issue are simply dicta and not helpful to this appeal.

In *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 870 (1997), this Court had occasion to consider the *Sidis* dicta, on facts that are strikingly similar to this matter. In *Bresina*, the plaintiff tripped over the edge of a sidewalk in front of a cash machine located outside a grocery

store and was injured. Approximately one week before the statute of limitations was set to expire, she filed suit, naming the owners of the grocery store and "ABC CORPORATION, whose true identity is unknown." *Id.* at 279. She further alleged, like Powers, that she would amend her complaint to properly name "ABC CORPORATION" once its identity was discovered. Approximately one year after the statute of limitations expired, the plaintiff amended her complaint to substitute a paving company for "ABC CORPORATION." *Id.* at 279-80.

This Court "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. As to what constitutes "reasonable particularity" and whether the plaintiff was able to meet that standard, this Court held:

> 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.'
>
> Here, Bresina had three years to obtain Ace's true name, and she offers no reason for not doing so. It is apparent she could have obtained Ace's name at almost any time during the three years by proper investigation, or, if necessary by filing a complaint and seeking discovery.

> Given these circumstances, naming 'ABC Corporation' did not involve a degree of particularity that was 'reasonable,' and the trial court did not err by ruling that the statute of limitation was not tolled.

Id.

Here, Powers does not offer any evidence of what efforts, if any, he made to determine the identity of W.B. Mobile before the statute of limitations expired. He does not offer any excuse or reason for failing to do so. He further did not make any efforts to determine its identity after he filed the lawsuit, other than to serve a discovery request that was not responded to until October 2010, 16 months after the expiration of the statute of limitations. He then does not explain why he delayed an additional four months before filing his amended complaint. Clearly, Powers had ample opportunity to timely identify W.B. Mobile, but he failed to do so. Powers did not identify W.B. Mobile in his original complaint with "reasonable particularity" and he may not now rely on the fact that he named a "John Doe" defendant to overcome his lack of action.

It is undisputed that W.B. Mobile did not have notice of Powers's action within the statute of limitations. It is further undisputed that W.B. Mobile did not have knowledge that, but for a mistake concerning the identity of the proper party, the action would have been brought against him within the statute of limitations. The tolling provision of

RCW 4.16.170 does not extend the statute of limitations, and W.B. Mobile was not particularly identified in the original complaint as a "John Doe" such that service of the original complaint on the named defendants would toll the statute of limitations against W.B. Powers cannot meet his burden under **CR 15(c)** and his claims against W.B. Mobile were properly dismissed on summary judgment.

2. The First Amended Complaint Does Not Relate Back Because Powers's Failure to Timely Name W.B. Mobile Was Due to Inexcusable Neglect.

"[E]ven if CR 15(c)'s requirements are satisfied, a party's failure to timely name a necessary party cannot be remedied if the failure resulted from 'inexcusable neglect.'" *Watson v. Emard*, 165 Wn. App. 691, 700, 267 P.3d 1048 (2011). Here, Powers has the burden of proof to show that any mistake in failing to timely amend was excusable. *Id.* He cannot meet this burden, and his claims against W.B. Mobile were properly dismissed on summary judgment.

Powers appears to argue that his delay in bringing W.B. Mobile into this action is excusable because he "did not strategically make a choice to avoid naming W.B. Mobile." *Brief at 26.* This argument misses the point. As a general rule, inexcusable neglect exists "when no reason for the initial failure to name the party appears in the record." *Haberman, supra*, 109 Wn.2d at 174. If a party's identity is "ascertainable upon

reasonable investigation, the failure to name [it] will be inexcusable." *Teller*, *supra*, 134 Wn. App. at 706.

As noted above, Powers does not offer any evidence of any efforts he made prior to filing this action to ascertain the identity of the individual or entity responsible for the installation of the ramp. He does not explain why Pacific Mobile's identification of W.B. Mobile in its witness disclosure and at his deposition did not prompt further investigation.[1] He claims that "[d]iscovery was necessary" to ascertain W.B. Mobile's identity, but does not explain why. *Brief at 26.* He does not explain why he relied on a co-defendant to reveal W.B. Mobile's identity in a discovery response that was not received until October 2010, 16 months after the expiration of the statute of limitations. And finally, he does not explain why he delayed an additional four months thereafter before filing his amended complaint.

It is important to note that this is not a case of mistaken identity, such as those cases where a plaintiff sues the parent-owner of a vehicle instead of the child-driver, or where the plaintiff files suit after an accident, unaware that the defendant had passed away in the interim. Powers, by naming a "John Doe" defendant, was aware of the existence of

[1] W.B. Mobile does not claim, as Powers suggests, that he should have amended his complaint to include all witnesses identified in the disclosure as defendants in the action. *Cf. Brief at 26.*

the installer of the ramp and was aware that his identity was unknown. Yet, despite this knowledge and despite being advised of W.B. Mobile's identity by Pacific Mobile, Powers failed to timely investigate W.B.'s identity.

These facts are in sharp contrast to the facts recently considered by this Court in *Watson*, *supra*. In *Watson*, the plaintiff was involved in a motor vehicle accident with Miles Emard, who was driving a vehicle owned and insured by his father, Michael Emard. 165 Wn. App. at 695. After the collision, Miles showed the plaintiff an insurance card that identified Michael as the insured. The plaintiff also claimed that she asked Miles, "Your name is Michael Emard?" to which he allegedly responded, "Yes." *Id.* The plaintiff then wrote the name "Michael" along with insurance and address information on the back of a receipt. The plaintiff claimed that she asked to see Miles's driver's license, but that Miles got in his car and drove away. *Id.*

The plaintiff later gave a recorded statement to Michael's insurer and told the insurer that the driver's name was Michael Emard. *Id.* at 695-96. The insurer also sent various items of correspondence about plaintiff's claim, referring to Michael as its insured. *Id.* at 696. The plaintiff filed suit against Michael and the statute of limitations expired approximately 10 days later. In his answer, Michael specifically alleged that Miles was

at fault and then moved for summary judgment on the grounds that he was not the driver. *Id.* The trial court granted Michael's motion and denied the plaintiff's motion to amend her complaint to add Miles as an additional defendant. The plaintiff appealed. *Id.*

The issue on appeal was whether the plaintiff's "failure to add Miles as a party before the statute of limitations ran resulted from inexcusable neglect." *Id.* at 699. This Court held that although the facts showed some neglect, it did not rise to the level of "inexcusable." *Id.* at 701-02. Specifically, this Court noted that the plaintiff did not actually know Miles was the driver and did not have any "information that would compel the conclusion that someone other than Michael was the driver." *Id.* at 702.

In short, the plaintiff, albeit mistakenly, believed she had named the correct defendant based on specific facts showing her efforts to determine the identity of the driver and the reasonableness of her belief. In contrast, Powers knew that he had an unknown defendant but did nothing about it. His lack of effort to identify W.B. Mobile cannot be excused by his choice to wait for a co-defendant to identify necessary parties, particularly since he and his attorney are "charged with researching and identifying all parties who must be named in an action[.]" *Teller*, 134 Wn. App. at 707. Powers's failure to timely name W.B.

Mobile as a defendant in this action resulted from inexcusable neglect and his claims were properly dismissed on summary judgment.

IV. CONCLUSION

W.B. Mobile respectfully requests that this Court affirm the trial court's order dismissing Powers's claims against it. The amended complaint asserting claims against W.B. Mobile was not filed within the applicable statute of limitations and it does not relate back to the date on which the original complaint was filed.

RESPECTFULLY SUBMITTED this 27th day of July, 2012.

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Declaration of Service

I, Deidre M. Turnbull, hereby certify that on the date stated below, I served a copy of foregoing Brief of Respondent in the above-entitled action upon Appellant's counsel as follows:

George M. Riecan Robert S. Allen George M. Riecan & Associates, Inc., P.S. P.O. Box 1113 Tacoma, WA 98401	☒ Via email to *george@riecanlaw.com; bob@riecanlaw.com* ☒ Via U.S. Mail, postage prepaid ☐ Via facsimile ☐ 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 30th day of July, 2012, in Tacoma, Washington.

Deidre M Turnbull
DEIDRE M. TURNBULL
Legal Assistant