No. 42797-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JESSE POWERS, Appellant,

v.

PREMIER COMMUNITIES, INC., a Washington Corporation, PACIFIC MOBILE STRUCTURES, INC., a Washington Corporation d/b/a PACIFIC MOBILE and WB MOBILE SERVICES, INC., and JOHN DOE TWO, Respondent.

REPLY BRIEF OF APPELLANT

Robert S. Allen, WSBA #35958
Cameron T. Riecan, APR 9 ID #9128132
GEORGE M. RIECAN & ASSOCIATES, INC., P.S.
A Professional Services Corporation
Attorneys at Law
3848 S. Junett St.
Tacoma, WA 98409
P.O. Box 1113
Tacoma, WA 98401
Ph: (253) 472-8566
Fax: (253) 475-1221

Tamara S. Clower, WSBA #20208
TAMARA S. CLOWER, LLC
Attorney at Law
1105 Tacoma Avenue South
Tacoma, WA 98402
Ph: (253) 383-5346
Fax: (253) 572-6662

Counsel for Appellant, Jesse Powers

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I. REPLY ARGUMENT

A. The Trial Court Erred in Granting Summary Judgment to Respondent W.B. Mobile Because Appellant Mr. Powers's Claims are Not Barred by the Statute of Limitations.

Respondent W.B. Mobile Services, Inc. (Hereinafter "W.B. Mobile") argues that because the statute of limitations under Washington law for a personal injury action is three years from the date of injury and because Appellant Jesse Powers (Hereinafter "Mr. Powers) did not file a complaint specifically naming Respondent as "W.B. Mobile" within those three years, his amended complaint properly naming W.B. Mobile is barred under RCW 4.16.080(2). *Respondent's Brief at 7.* Respondent W.B. Mobile's argument in this regard is without merit and fails to address the proper question in this appeal, which is, whether Mr. Powers's substitution of W.B. Mobile W.B. Mobile in for "John Doe One" in the amended complaint "relates back" under CR 15(c) to Mr. Powers's original complaint.

The original complaint was undisputedly filed and served within the three year period following Mr. Powers's injury. If W.B. Mobile's argument was valid in this regard there would be no basis for CR 15 or for the "relation back doctrine," both of which by their very nature imply that a defendant **can** be effectively brought in as a party defendant even after the statute of limitations has passed. CR 15 is to be liberally construed on the

side of allowing the relation back of an amendment adding or substituting a new party after the statute of limitations has run, particularly where the opposing party is not put to any disadvantage. See *Krupski v. Costa Crociere S.p.A.*, 130 S.Ct 2485 (2010), *Perrin v. Stensland*, 158 Wn. App. 185, 240 P.3d 1189 (2010), *LaRue v. Harris*, 128 Wn. App. 460, 465, 115 P.3d 1077 (2005).

In *Tellinghuisen v King County Council*, the Plaintiffs contested the County's having granted the defendants a variance to change their property use from "residential" to "manufacturing" in order to allow them to continue operating a welding shop out of their home. *Tellinghuisen v King County Council*, 38 Wn. App 24, 684 P.2d 748 (1984). Plaintiffs had opposed the variance due to the loud noise emanating from that shop and filed a petition for a writ of review of that decision, which was served on the county, the county council, and the attorney that had represented defendants. However, due to plaintiffs' mistake the defendants and the welding shop were not personally named as party-defendants in the original writ that was filed within the statutory period. Plaintiffs then attempted to join the defendants for the first time during the 90-day tolling period under RCW 4.16.170. The trial court dismissed the plaintiffs' writ, finding that plaintiffs had failed to join all necessary parties within the applicable time limit. The Court of Appeals reversed the trial court, finding that the plaintiffs could

add the defendants during the 90-day period by an amendment "relating back" under CR 15(c) to the date of the original writ. In its opinion the Court of Appeals noted that the procedures for commencing actions allow service of process as a matter of right after the statutory period but during the 90-day tolling period under RCW 4.16.170, given that filing within the statutory period tolls the statute for 90 days. The court further noted that a requirement of 'relation back' under CR 15 had never been imposed on this statutorily prescribed method of commencing legal actions. In that regard the Court of Appeals stated:

> "Serving a party added by amendment after the statutory period but within the 90 days cannot be distinguished from serving within the 90 days a party named in the original complaint. **Both may receive their first notice of the action after the statutory period. The relation-back provisions of CR 15(c) apparently serve no useful purpose in Washington under factual patterns such as we have here where a petitioner seeks to add new parties during the 90-day period. It thus appears that CR 15(c) would be required only where amendment is sought after the 90-day period has expired."** (emphasis added).

Id., at 27 (overruled on other grounds). However, the Washington State Supreme Court accepted review of the Court of Appeal's decision in *Tellinghuisen v King County Council* and noted that it had "implicitly" rejected the Court of Appeals reasoning with regard to the court of appeals' notion that CR 15(c) is only required when the amendment is sought after

the 90 day tolling period expired. *Tellinghuisen v King County Council,* 103 Wn.2d 221, 691 P.2d 575 (1984). By "implicitly rejecting" that analysis, the State Supreme Court implied that a plaintiff can utilize CR 15(c)'s "relation back" doctrine by providing the notice of the action to the defendant as required in CR 15(c)(1) during the 90 day tolling period, just as Mr. Powers did in this instant case. *Id.* at 223.

In *Tellinghuisen,* the Washington State Supreme Court further noted that in one of the consolidated cases it had decided in *North St. Ass'n v. Olympia*, the aggrieved party there, like the plaintiffs in *Tellinghuisen*, attempted to join a necessary party pursuant to CR 15(c) after the prescribed filing period, but within the 90-day statutory service period. The Court stated that in *North St. Ass'n*, "[W]e nonetheless upheld the trial court's dismissal of that action *because the failure timely to join the necessary party was due to inexcusable neglect*. *Tellinghuisen*, 103 Wn.2d. at 223, citing *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 362, 367-69, 635 P.2d 721 (1981), *overruled on other grounds*. Of significance, the Court's upholding the dismissal in *North St.* was not because the plaintiffs gave the notice per CR 15(c) to a new defendant during the 90-day tolling period. The dismissal was based on the fact that the plaintiffs were undisputedly aware of the identity of the plaintiffs prior to filing the original complaint and failed to name them. In fact, the State Supreme Court went on to note that

an amendment adding a party will relate back to the date of the original pleading if three conditions are met:

> "First, the added party must have had notice of the original pleading, so that he will not be prejudiced by the amendment. CR 15(c)(1). Second, the added party must have had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him. CR 15(c)(2). Finally, the plaintiff's failure to timely name the correct party cannot have been "due to inexcusable neglect."

Id. at 223, the Court citing to *North St. Ass'n v. Olympia*, supra at 368. In that opinion, the Court did <u>not</u> find that a plaintiff cannot provide the defendant with notice of the suit pursuant to CR 15(c)(1) within the 90-day tolling period. In *Sidis v. Brodie/Dohrmann, Inc.*, the State of Washington Supreme Court specifically noted that "[t]he simple existence of statutes of limitation does not mean exceptions thereto are never appropriate." *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 330, 815 P.2d 781 (1991). In rejecting the Court of Appeals' finding that allowing a plaintiff to serve one defendant to toll the statute of limitations against other un-served defendants "runs counter to fundamental notions of fairness . . . [and] would effectively negate the purpose of a statute of limitations," the Supreme Court acknowledged:

> "Strictly speaking, any tolling statute effectively negate[s] the purpose of a statute of limitations. Here, the Legislature could well

> have reasoned that plaintiffs in multi-defendant actions should receive this extra protection from the harsh effects of the statute of limitation. Moreover, the question of fairness raised by the Court of Appeals is a 2-edged sword. **It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is underway.**" (emphasis added). *Id.*

The Washington State Supreme Court's above-referenced analysis in *Sidis* is applicable in this matter where Mr. Powers was provided with incorrect information from his own employer as to who actually built the ramp at issue (CP 214), W.B. Mobile received a copy of the original complaint within the 90 days required for service (CP 170, 193), and all parties testified of not knowing W.B. Mobile's identity until after discovery. CP 271. Under these circumstances it would be unfair, and to manifest an injustice, to find that Mr. Powers's amended complaint does not relate back to the original complaint. Mr. Powers has plainly met all of the requirements set out by the Washington State Supreme Court in *Tellinghuisen* for relation back of the amended complaint naming W.B. Mobile as a defendant under CR 15(c).[1]

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[1] The Supreme Court's reversal of the Court of Appeals in *Tellinghuisen* was based on the finding that the plaintiffs' failure to name the defendants in the original writ was due to inexcusable neglect and the Court's reversal of *North St.*, supra, was based on the Court of Appeals incorrectly having found that service upon one defendant did not toll the statute of limitation as to the remaining named defendants.

B. The Trial Court Erred in Granting W.B. Mobile's Summary Judgment Because Mr. Powers Meets the Requirements of CR 15 (c) for "Relation Back" of the Amended Complaint.

The parties agree that Civil Rule 15(c) governs the relation back of amendments to pleadings and that the issue on this appeal is whether Mr. Powers's amended complaint substituting W.B. Mobile W. B. Mobile in for "John Doe 1" of the original complaint relates back to the original complaint. CR 15(c) provides:

> (c) Relation Back of Amendments: Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

When Mr. Powers amended his complaint to add W.B. Mobile as a defendant in the case, that claim arose out of the 'same transaction or occurrence' set forth in Mr. Powers's initial complaint, i.e. the severe injuries sustained by Mr. Powers on June 2, 2006 when the ramp constructed by the W.B. Mobile collapsed. Moreover, after Mr. Powers's injury occurred on June 2, 2006, he timely filed his original complaint on May 28, 2009. In that original complaint he specifically named "John Doe

One" as the unknown party who constructed the ramp at issue and it remains uncontroverted that W.B. Mobile was in fact the builder of the ramp at issue in this matter that was the cause of Mr. Powers's severe injuries on June 2, 2006. Thus, there is no dispute that the amended complaint arose out of the conduct, transaction, and occurrence set out in the original pleading as required by CR 15(c).

W.B. Mobile does not dispute receiving the original summons and complaint well within the 90 days following filing of the original complaint on May 28, 2009. CR 10(a)(2) provides:

> *Unknown Names.* 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).

Mr. Powers properly designated the unknown defendant (i.e. W.B. Mobile) in the original complaint as "John Doe One" and properly stated that once the true identity of the unknown defendant was discovered, the pleading or proceeding would be timely amended. In that original complaint W.B. Mobile was identified by Mr. Powers with 'reasonable particularity' as follows:

> Identification of John Doe One: 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 CONSTRUCITON is ascertained by Plaintiff, Plaintiff prays 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 69.

When W.B. Mobile received a copy of the complaint that unequivocally identified "John Doe One" as an 'as of yet' unknown defendant who was "**the builder of the handicap access ramp where the incident occurred**" it is unreasonable to conclude that W.B. Mobile did not have the requisite notice under CR 15(c) of Mr. Powers's cause of action at that time. Furthermore, it is not reasonable to conclude that W.B. Mobile also did not have at a minimum, constructive notice, that it was in fact the unknown "John Doe One" defendant. The initial complaint could not have identified W.B. Mobile at that time with any more particularity than was done.[2] W.B. Mobile's receipt of the original complaint well within 90 days of its having been filed satisfies the requirements of CR 15(c)(1), which provides that the party to be added must have had notice of the action within the period provided by law for commencing the action against him. Still further, for the very same reason that W.B. Mobile had timely notice under

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[2] The fact W.B. Mobile was the party that built the ramp causimg Mr. Powers's injuries, was not and could not have been known, by Mr. Powers at the time of the original complaint because Defendant Pacific Mobile had—unbeknownst to Defendant Premier or any other defendant—subcontracted W.B. Mobile to construct the ramp. CP 86. In fact, Mr. Powers's own employer advised Mr. Powers that it was Defendant Pacific Mobile that had built the ramp. That information was incorrect. CP 214.

CR 15(c) of Mr. Powers's original complaint and that W.B. Mobile was indeed the proper party identified as "John Doe One," pursuant to CR 15(c)(2), W.B. Mobile knew or should have known that it was not named as a defendant in that original complaint only because of Mr. Powers's misunderstanding and mistake about which entity was in charge of building the handicap ramp—clearly a "mistake concerning the proper party's identity." CR 15(c)(2).

1. ***W.B. Mobile has failed to demonstrate that it did not receive notice of the original complaint and lawsuit within the period provided by law for commencing the action against him as required by CR 15(c)(1).***

An amendment under CR 15(c) changing the party against whom a claim is asserted relates back to the original cause of action, if 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..." Under RCW 4.16.170, the time period for "commencing" a negligence action logically includes the 90 days after a complaint is filed or served. The statute provides that without the perfection of either filing and/or service of the complaint within the 90 days that follows, the cause of action is **not** deemed to have been "commenced" for purposes of the statute of limitations. Accordingly, the "commencement" of an action as referenced

in CR 15 does not just include the three year statute of limitations but also includes the 90 day tolling period if the filing/service was timely. Mr. Powers's original complaint was filed on May 28, 2009, clearly within the three years following his June 2, 2006 injury. Under RCW 4.16.170 the 90-day tolling period following filing of the complaint did not end until August 25, 2009.

As noted above, W.B. Mobile undisputedly received not only a copy of the original summons and complaint within that 90-day period, it is reiterated that W.B. Mobile was actually **tendered the defense of the original lawsuit by Defendant Pacific Mobile on July 28, 2009**. CP 43.

W.B. Mobile's reliance on the case of *Kiehn v Nelsen's Tire Co.* for the premise that W.B. Mobile did not receive notice of this action "within the period allowed for commencement" of a personal injury suit in Washington is misplaced. *Kiehn v Nelsen's Tire Co.*, 45 Wash. App. 291, 724 P.2d 434 (1986). In *Kiehn*, the plaintiff/decedent's family filed a lawsuit in November of 1980 against fictitious parties (who were responsible for maintaining the tractor wheels) for wrongful death damages after the decedent was killed when his tractor lost a wheel and crashed. The plaintiff Estate attempted to amend the complaint to add the proper Defendant into the suit in place of a fictitious "John Doe" defendant named

in the original complaint. While the original action had been commenced in accordance with the time period for timely effectuating the suit, the "John Doe" Defendant that was added to the suit pursuant to CR 15 was not even aware of the lawsuit until 4 ½ years after the decedent's death. Contrast that with the fact that in the present case, where W.B. Mobile was undisputedly aware of Mr. Powers's suit within the time period allowed for perfecting commencement of the Mr. Powers's suit. The key difference between the *Kiehn* case and this case is that the Defendant in *Kiehn*, who was named in an amended complaint pursuant to CR 15(c), did not have notice of the plaintiff's action within three years of the plaintiff's death, ***nor* did that Defendant have notice within the 90 day tolling period following the filing of the initial complaint**. In fact, the defendant in *Kiehn* had been subjected to an involuntary petition in bankruptcy in December of 1980—which bankruptcy occurred during the 90 day tolling period allowed for perfecting commencement of the plaintiff's suit. Plaintiff filed the amended complaint adding the defendant as a party in July of 1982, at which time the automatic bankruptcy stay was still in place. After Plaintiff was apprised that the amended complaint violated the bankruptcy stay, the plaintiff petitioned the court for a lift of the stay, which finally occurred in October of 1982.

Plaintiff Keihn's argument was that because CR 10(a)(2), which as

noted above allows a plaintiff to name a "fictitious defendant" if the true identity is unknown when the complaint is filed, places no time restrictions on amending the pleadings to follow through and provide a defendant's proper and correct name. Plaintiff Kiehn reasoned that given the lack of a time restriction in CR 10, a plaintiff is allowed to amend the pleadings indefinitely with the amendment relating back to the date the complaint was originally filed. In other words, Kiehn argued that the automatic bankruptcy stay tolled the statute of limitations *indefinitely* under CR 10 until the plaintiff obtained relief from the bankruptcy stay.

Division II of The Court of Appeals, however, found that CR 10 must be read in conjunction with CR 15(c) and that the amended complaint against the Defendant did not relate back to the original action pursuant to CR 15(c). With regard to the element under CR 15 requiring that the party to be added be provided with notice of the institution of the action within the period provided by law for commencing the action against him, the court emphasized that not only did the Defendant not receive any notice of the plaintiff's lawsuit within the allowable time period under CR 15(c), the Defendant also did not have actual or constructive knowledge under CR 15(c)(2) that but for a mistake concerning Defendant's not having been properly identified in the original complaint, the action would have been brought against it. In addition, the Court of Appeals also found that CR 15

also requires that allowing the amendment to relate back to the original pleading cannot prejudice the new party in maintaining a 'defense on the merits.' The record in *Kiehn* indicated that the Defendant experienced difficulty in defending the case because pertinent business records had been destroyed, this was an additional basis for the court's denial of the relation back of the plaintiff's amended complaint. *Id.* Given all of the foregoing, the court in *Kiehn* found that the Plaintiff had not satisfied CR 15(c) and the amended complaint did not relate back to the original complaint. Thus, the facts in *Kiehn* are very dissimilar to those in the present case. But here, W.B. Mobile undisputedly received notice of the action within the 90 days following the filing of the original complaint and, further, there has been no allegation by W.B. Mobile that it would suffer prejudice in defending against this claim upon relation back under CR 15(c).

W.B. Mobile's argument that Mr. Powers is attempting to "take advantage" of the fact that a co-defendant, Defendant Pacific Mobile, provided W.B. Mobile with the original summon and complaint within the 90-day tolling period is a red herring. *W.B. Mobile's Brief*, at 13-14. Nowhere in CR 15(c) does that rule specify the manner or means in which the Defendant to be added must receive such notice of the underlying action. The rule simply provides that the Defendant to be added by amendment must have received such notice, which W.B. Mobile undisputedly did during

the applicable time period. W.B. Mobile further argues that Mr. Powers should not benefit from a co-defendant seeking indemnification from the party to be added by the amendment. To the contrary and as a matter of equity, W.B. Mobile should not benefit from the fact that the notice that it undisputedly received of the Mr. Powers's original complaint was not provided by Mr. Powers. W.B. Mobile's simultaneous notice of this action along with the fact that Mr. Powers was seeking the proper identity of the party that built the handicap access ramp cannot be "nullified" or ignored just because it was not provided directly by Mr. Powers. Washington law does not support such an argument, and W.B. Mobile has provided no authority for the same.

W.B. Mobile's reliance on *Bresina v Ace Paving Co.* is injudicious because the plaintiff in that case did not seek to have an amended complaint relate back pursuant to CR 15(c). *Bresina v Ace Paving Co.*, 89 Wn. App 277, 948 P.2d 80 (1997). Rather, plaintiff claimed the statute of limitations had been tolled pursuant to RCW 4.16.170 because she had effectively served "one or more of the defendants" in that case, thereby tolling the statute and allowing her to name the correct defendant after the statute expired. The court in *Bresina*, however, found that in order to toll the statute of limitations on that basis the plaintiff would have had to have named the mistakenly named defendant with "reasonable particularity" in the original

complaint before the time for commencing the action expired. *Bresina*, at 282. The facts in that case with respect to whether or not the unnamed defendant was identified with "reasonable particularity" are not 'strikingly similar' to this instant case as asserted by W.B. Mobile. *Respondent's Brief* at 14. In *Bresina*, the plaintiff sought to add a defendant after the statute of limitations and the 90 day tolling period had both expired, and when that defendant had not received any notice of the plaintiff's action within that time period. In addition, when the plaintiff in *Bresina* filed the original complaint, she broadly and generically identified all defendants in the case (both identified and unidentified defendants), alleging that they all *"constructed and/or owned and/or controlled and/or had some legal responsibility for the area where the fall occurred."* With regard to the originally unidentified defendant she later tried to add (after the expiration of the time period allowed for purposes of commencing an action), the plaintiff had merely identified in the original complaint a defendant *"ABC Corporation,"* stating that it "*may* have the same responsibilities" the she had iterated as to all of the properly named defendants. *Id.*

Division III of the Court of Appeals confirmed in *Bresina* 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. The court found that the plaintiff in *Bresina* had not provided the degree of particularity that was "reasonable" when she had simply named an unidentified defendant in the original complaint and made the same overbroad litany of allegations against all defendants that they "constructed and/or owned and/or controlled and/or had some legal responsibility for the area where the fall occurred."

Conversely, in the present case Mr. Powers specifically identified "John Doe One" in the original complaint as having been the party *"believed to have built the handicap access ramp"* that caused the plaintiff's injuries. This very particularized and specific identification of W.B. Mobile's involvement in the case was not overbroad, nor was it applied to all named Defendants in the generic manner as was the case in *Bresina.* Thus, in this instant case W.B. Mobile was named with "reasonable particularity" in Mr. Power's original complaint, and the statute of limitations was tolled pursuant to RCW 4.16.170 once proper service was had on one or more of the other Defendants in this case.

2. W.B. Mobile Has No Basis to Claim that Mr. Powers's Delay in Naming Defendant in the First Amended Complaint Was Due to Inexcusable Neglect.

W.B. Mobile's alleges that Mr. Powers did not use due diligence in timely determining the identity of W.B. Mobile. *W.B. Mobile's Brief* at 17. In that regard W.B. Mobile asserts that within the actual discovery request

and response wherein W.B. Mobile was identified by another defendant as the installer of the ramp, "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." *Respondent's, at 5.* In other words, W.B. Mobile alleges inexcusable negligence on the part of Mr. Powers in determining W.B. Mobile's identity sooner through written discovery than it did but offers no basis for such accusations.

The focus of the inquiry is on what the defendant knows or should have known, not the plaintiff's diligence. (emphasis added). See *Perrin v. Stensland,* 158 Wn. App. 185, 188, 240 P.3d 1189 (2010). The record reflects that Mr. Powers was not aware of W.B. Mobile's identity prior to filing suit and that it was of no fault of Mr. Powers. All of the named defendants in this case have asserted through discovery that they were not aware of plaintiff's injuries until they were served with the suit. CP 271. As it turns out, it remains undisputed in this matter that unbeknownst to all of the parties in the case, including the Mr. Powers, that within 68 days of the filing of the initial complaint, Defendant Pacific sent a letter dated 7/28/09 to W.B. Mobile attaching the summons and complaint and tendering the defense of Mr. Powers's suit to W.B. Mobile. CP 268. Mr. Powers became aware of W.B. Mobile's identity *only after formal discovery had*

commenced and depositions and written discovery were exchanged with the other defendants. CP 176. Given the foregoing, it can hardly be said that Mr. Powers should have known W.B. Mobile's true identity at the time that he filed the original complaint or within the 90 days following that filing or that there was any inexcusable neglect in Mr. Powers filing of the amended complaint.

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. However, most of the cases where the courts have found inexcusable neglect involve some type of legal strategy on the part of the amending party or failure to check public records that easily reveal the defendant's identity. See *Iwai v. State* , 76 Wn. App. 308, 884 P.2d 936 (1994) (failure to check title report to determine owner of property was inexcusable neglect); *Public Util. Dist. No. 1 v. Walbrook Ins. Co*, 115 Wn.2d 339, 797 P.2d 504 (1990) (although plaintiff knew that incorrect insurance company had been named in declaratory judgment action, it delayed joining the correct company until after the motion for summary judgment had been heard and, therefore, the correct insurance company was not party to summary judgment proceedings); *Kitsap County Fire Prot. Dist. No. 7 v. Kitsap County Boundary Rev. Bd.*, 87 Wn.App. 753, 943 P.2d 380

(1997), review denied, 134 Wn.2d 1027 (1998) (failure to name party whose identity and interest in dispute is a matter of public record).

W.B. Mobile cites *Watson v. Emard* in support of its argument that Mr. Powers's failure to timely name W.B. Mobile in the original complaint does not relate back. However, that case actually supports Mr. Powers's argument that there was no "inexcusable negligence" on his part in naming W.B. Mobile. *Watson v. Emard*, 165 Wn. App. 691, 267 P.3d 1048 (2011).

In *Watson*, the plaintiff sued for personal injuries sustained in a motor vehicle accident. The driver of the at-fault vehicle was a minor who was insured as a driver under an automobile policy held by his father. As a result of misinformation provided by the minor immediately after the collision, the plaintiff believed that the minor's father was the driver of the vehicle. The plaintiff contacted the father's insurer and, during a recorded statement, gave the father's name when identifying the driver of the at-fault vehicle. The insurer sent six letters to the plaintiff listing the father as "our insured." At that point the plaintiff retained counsel. For the next year, plaintiff's counsel and the insurer communicated regarding the claim, with all correspondence referring to the father as the insured. After sending the insurer a copy of the complaint that she intended to file, plaintiff's counsel filed and served the complaint on the father and his wife at the home they shared with their son, who had been the actual driver. At no time before the

statutory time limitation on the action expired did the plaintiff or counsel ask about the identity of the driver. After the statute of limitations expired, the named defendant, the father of the driver, filed his answer, specifically alleging as an affirmative defense that his son, a minor, was the nonparty at fault. The father then moved for summary judgment on the ground that he was not the driver of the vehicle involved in the accident. The plaintiff moved to amend her complaint to add the Defendant's son as an additional defendant and to add a claim against the father but the trial court denied the motion.

In determining whether or not the plaintiff was guilty of "inexcusable neglect" for failing to determine the identity of the actual driver prior to the expiration of the statute of limitations, the court found that while there was some neglect, it did not rise to the level of "inexcusable" neglect. In that regard the court found that:

> [Plaintiff] clearly could have done more to learn the identity of the driver of the car. But nothing in the record shows that she actually did know Miles was the driver, or that she had information that would compel the conclusion that someone other than Michael was the driver. Michael does not dispute that Miles showed a Safeco card identifying his father as the insured. Nor does he contend that Miles gave Watson his own name. Finally, Safeco consistently referred to Michael as the insured in corresponding with Watson and her counsel. We find Watson's failure to name Miles in her original complaint to be excusable neglect. *Watson*, supra, at 702.

Ultimately, the Court of Appeals found that the trial court abused its discretion when it failed to explain its denial of Plaintiff's motion to amend, simply having concluded that plaintiff could have sent interrogatories, filed a complaint, taken a deposition "or something." *Id.* In finding an abuse of discretion on the part of the trial court the Court found:

> Yet the core issues were whether the [defendant] would be prejudiced by the late amendments and whether [plaintiff] knew before the statute of limitations ran that [the son] was the driver. The trial court's comments suggested only that it found inexcusable neglect by counsel's failure to commence early discovery. [Defendant], however, first gave [plaintiff] notice that he was not the driver when he filed his answer after the statute of limitations had run.

Watson, supra, at 702. The Court of Appeals concluded that plaintiff's leave to amend the complaint to add the defendant should have been "freely given as the rules require." *Id.*

While W.B. Mobile argues that Mr. Powers failure to name W.B. Mobile within the original complaint was due to "inexcusable negligence," **the focus of the inquiry is on what the defendant knows or should have known, not the plaintiff's diligence**. (Emphasis added). *Perrin v. Stensland*, 158 Wn. App. 185, 188, 240 P.3d 1189 (2010). "[I]nexcusable neglect exists when **no reason for the initial failure** to name the party appears in the record." *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). Under the same rubric, "**a**

conscious decision, strategy or tactic" prevents relation back of an amendment adding a party. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.*, 115 Wn.2d 339, 349, 797 P.2d 504 (1990). There is absolutely no allegation or evidence to support a claim that Mr. Powers made a conscious decision to not name W.B. Mobile in the original compliant, nor was there any "strategy or tactic" on Mr. Powers part.

There is no abuse of discretion in granting a motion to amend when the only prejudice suffered by the opposing party is the inconvenience of meeting a new claim. Something more is required." *Thomas v. French*, 30 Wn. App. 811, 817, 638 P.2d 613 (1981), reversed on other grounds, 99 Wn. 2d 95 (1983). The record in this matter is completely devoid of W.B. Mobile providing any basis, whatsoever, to support a claim that it would suffer prejudice by having Mr. Powers's amended complaint relate back to the original complaint. Additionally, whether an amendment involves new claims or new parties, CR 15(c) must be **liberally construed** to permit the amendment to relate back to the original pleading if the proposed party will not be disadvantaged. *Olson v. Roberts & Schaeffer Co.*, 25 Wn.App. 225, 227, 607 P.2d 319, review denied, 93 Wn.2d 1023 (1980).

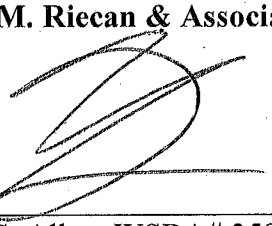
II. CONCLUSION

Based upon the foregoing, Mr. Powers respectfully requests that the Court reverse the trial court's May 31, 2011 order granting the W.B.

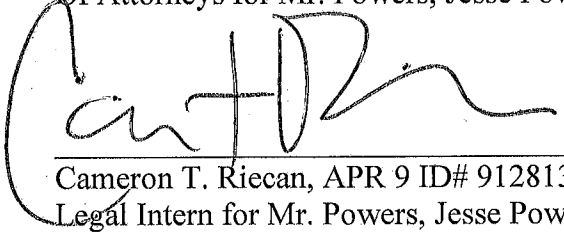
Mobile's motion for summary judgment/dismissal. Mr. Powers further requests that this Court issue a finding that Mr. Powers has met all of the necessary requirements of CR 10 and CR 15(c) and that the W.B. Mobile had sufficient notice of the lawsuit within the period of time provided by law for commencing the actions against him pursuant to CR 15(c), and that the amendment adding W.B. Mobile as a defendant relates back to the original filing of the complaint. This matter should be reversed and remanded to the superior court for trial on the merits against W.B. Mobile.

Respectfully submitted this 29th day of August, 2012.

George M. Riecan & Associates, Inc., P.S.

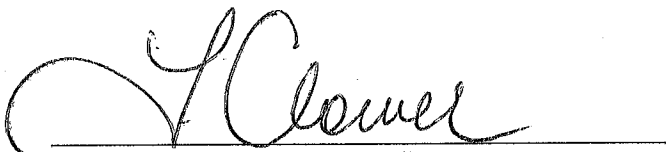


Robert S. Allen, WSBA# 35958
Of Attorneys for Mr. Powers, Jesse Powers



Cameron T. Riecan, APR 9 ID# 9128132
Legal Intern for Mr. Powers, Jesse Powers

Tamara S. Clower, LLC



Tamara S. Clower, WSBA# 20208
Of Attorneys for Mr. Powers, Jesse Powers

GEORGE M RIECAN & ASSOCIATES

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