

No. 89924-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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NINA L. MARTIN, individually and as Personal Representative of the
ESTATE of DONALD R. MARTIN, RUSSELL L. MARTIN,
THADDEUS J. MARTIN, and JANE MARTIN,

Plaintiffs/Petitioners,

vs.

DEMATIC d/b/a f/k/a RATISTAN, INC., MANNESMANN DEMATIC,
and SIEMENS DEMATIC; GENERAL CONSTRUCTION COMPANY;
WRIGHT SCHUCHART HARBOR COMPANY; and FLETCHER
CONSTRUCTION COMPANY NORTH AMERICA,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890
OID #91108

Gary N. Bloom
WSBA No. 6713
W. 422 Riverside, Suite 1300
Spokane, WA 99201
509-624-4727

On Behalf of

Washington State Association for Justice Foundation

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Clerk *bjh*

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of the "discovery rule" for statutes of limitations, and proper interpretation and application of CR 15(c), regarding the relation back of amendments.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This case provides the Court with the opportunity to confirm that the "discovery rule" for statutes of limitation includes a plaintiff's knowledge (actual or constructive) of the identity of a defendant, and to

¹George M. Ahrend, a member of the WSAJ Foundation Amicus Committee and customarily co-counsel on amicus curiae submissions, is a co-counsel for plaintiffs/petitioners in this case. As a result, Mr. Ahrend has not participated in the determination by WSAJ Foundation whether to seek amicus curiae status in this case, or in the case linked for oral argument, Powers v. W.B. Mobile Services, Inc. (S.C. #90133-3). Further, Mr. Ahrend has not participated in the preparation of this amicus curiae brief, or the one submitted in Powers.

clarify the extent to which the CR 15(c) case law requirement that a plaintiff demonstrate lack of “inexcusable neglect” applies to an amendment involving an alleged successor-in-interest to a named party.

This review arises out of a timely wrongful death and survival action brought by plaintiffs/petitioners Nina L. Martin, as personal representative of the estate of her husband, Donald Martin, et. al. (Martin), against Dematic d/b/a f/k/a Ratistan, Inc. and other defendants. The underlying facts are drawn from the Court of Appeals opinion. See Martin v. Dematic, 178 Wn.App. 646, 315 P.3d 1126 (2013), *review granted*, 180 Wn.2d 1009 (2014).

More than three years after the death of the decedent in an industrial accident, Martin amended the complaint to join Fletcher Construction Company North America (FCCNA) as a party defendant. The superior court granted FCCNA’s motion for summary judgment of dismissal on the grounds that the action against it was untimely under the discovery rule, and because the amended complaint did not relate back under CR 15(c). Martin appealed and the Court of Appeals, Division I, affirmed. See Martin, 178 Wn.App. at 650, 653.

This appeal gives rise to two legal issues discussed in this brief. These issues were addressed in some fashion by the Court of Appeals, and are now before this Court on review: First, whether the “discovery rule” is met as to FCCNA or whether the statute of limitations lapsed as to this defendant as a matter of law. The Court of Appeals affirmed the superior

court dismissal. It concluded Martin was on inquiry notice that FCCNA was a successor-in-interest to a named defendant more than three years before Martin amended the pleadings to substitute FCCNA as a defendant, and thus the statute of limitations lapsed. See Martin, 178 Wn.App. at 658-60; Martin Pet. for Rev. at 1.² Second, whether the CR 15(c) case law requirement that plaintiff demonstrate lack of inexcusable neglect applies when the basis for the amendment is that the substituted defendant is a successor-in-interest to a named defendant. See Martin at 658, 664-65; Martin Pet. for Rev. at 2. The Court of Appeals affirmed the superior court on this issue, rejecting Martin's argument. See Martin at 665. This Court granted review.³

III. ISSUES PRESENTED

1.) Does the statute of limitations "discovery rule" apply to the identity of a defendant?

² A 3-year limitations period applies in this case, although it is unclear whether the governing statute is RCW 4.16.080(2), regarding personal injury actions, or RCW 7.72.060(3), governing product liability claims. The Court of Appeals appears to have applied RCW 4.16.080(2). See Martin, 178 Wn.App. at 657. Martin suggests either statute may apply, while FCCNA suggests RCW 4.16.080(2) applies. See Martin Supp. Br. at 14 n. 17 (indicating applicable statute of limitations may be determined by whether claim is under the common law or product liability act); FCCNA Supp. Br. at 11-13 (suggesting RCW 4.16.080(2) applies). The current versions of RCW 4.16.080 and RCW 7.72.060 are reproduced in the Appendix of this brief.

³ The superior court rejected Martin's argument that the claim against FCCNA was timely because the statute of limitations was tolled after service of the summons and complaint on other defendants, presumably refusing to apply RCW 4.16.170 and this Court's dicta in Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.2d 781 (1991). The Court of Appeals affirmed, Martin at 660-63, and this question is also before this Court on review. See Martin Pet. for Rev. at 1-2. This question is not addressed in this brief.

2.) Does the “inexcusable neglect” case law requirement of CR 15(c) apply to an amendment substituting an alleged successor-in-interest to a named defendant?

IV. SUMMARY OF ARGUMENT

Re: Discovery Rule

This Court should confirm that the discovery rule applies to knowledge of the identity of a defendant under either of the statutes of limitations implicated in this case – RCW 4.16.080(2) and RCW 7.72.060(3). It is elemental that a plaintiff must have knowledge, either actual or constructive, regarding *who* may be legally responsible for injuries resulting from tortious conduct. The discovery rule applies regardless of whether the claim is based upon a latent or traumatic injury.

Re: CR 15(c) & Inexcusable Neglect

Consistent with the required liberal construction of CR 15 and the goal of promoting disposition of claims on the merits, when a plaintiff seeks to substitute a successor-in-interest to a named party defendant, and the express requirements of CR 15(c) are otherwise met, a showing of lack of “inexcusable neglect” should not be required.

V. ARGUMENT

Introduction

This brief addresses issues regarding application of the discovery rule and CR 15(c). These mechanisms are alternative means for rendering

an action timely for statute of limitation purposes. A key difference is that factual disputes bearing on the discovery rule may be resolved by a jury at trial, while factual disputes involving CR 15(c) are a matter for the court. Compare Martin, 178 Wn.App. at 659 & n. 16 (recognizing issue for jury on factual dispute regarding discovery rule) and Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (recognizing jury decides factual dispute regarding statute of limitations), with Segaline v. Labor & Indus., 169 Wn.2d 467, 477-78, 238 P.3d 1107 (2010) (recognizing CR 15(c) fact determinations made by court).

A.) The Discovery Rule Applies To The Identity Of A Defendant, Under Both RCW 4.16.080(2) And RCW 7.72.060(3).

In their respective briefing, the parties dispute whether Martin had constructive knowledge of FCCNA's potential liability more than three years before Martin sought to add FCCNA as a party. See FCCNA Supp. Br. at 13-15; Martin Supp. Br. at 15-17. In its opinion, the Court of Appeals viewed the record on summary judgment as establishing constructive knowledge as a matter of law. See Martin, 178 Wn.App. at 659-60. Unstated, but implicit in the Court of Appeals analysis, is the premise that the discovery rule applies to the identity of a defendant. See id. at 658-60.

This Court should take this occasion to expressly confirm that the discovery rule applies to the identity of a defendant, regardless of whether the three-year limitation period is governed by RCW 4.16.080(2) or RCW

7.72.060(3), and irrespective of whether the underlying facts involve a latent or traumatic injury.

The history of the discovery rule and the metes and bounds of this rule are well known, and not restated here. See generally Ruth v. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969); Estates of Hibbard, 118 Wn.2d. 737, 826 P.2d 690 (1992). The Court of Appeals opinion in Orear v. International Paint Co., 59 Wn.App. 249, 796 P.2d 759 (1990), *review denied*, 116 Wn.2d 1024 (1991), contains an extensive explication of the discovery rule and how it is applied. Orear is unique in addressing directly application of the discovery rule to identity of a particular defendant. Its analysis should be adopted by this Court.

In Orear, which involved a toxic tort claim applying either the RCW 4.16.080(2) or RCW 7.72.060(3) limitation periods, the court categorically found the discovery rule necessarily included knowledge of the identity of a defendant. See 59 Wn.App. at 252-57. Following a comprehensive overview of the discovery rule covering both RCW 4.16.080(2) and RCW 7.72.060(3), the court held:

Although no Washington court has explicitly decided whether knowledge or imputed knowledge of a particular defendant's identity is necessary for the plaintiff's cause of action against that defendant to accrue, we hold that such knowledge is necessary, absent countervailing statutory language.

59 Wn.App. at 255.

Orear correctly states the law. FCCNA's attempt to limit Orear to latent injury cases should be rejected. See FCCNA Supp. Br. at 14. While

Orear notes the application of the discovery rule is “particularly compelling” in latent injury products liability cases, it does not limit its holding to this context. Orear at 256-57. Instead, the court plainly states that the discovery rule requires knowledge of *who* is responsible for an injury, concluding that “the justification for the discovery rule as applied to unknown injury applies with equal force to unknown defendants.” Id. at 257; see also North Coast Air v. Grumman Corp., 111 Wn.2d 315, 319, 323, 759 P.2d 405 (1988) (rejecting interpretation of RCW 7.72.060(3) in traumatic death case that would require plaintiffs to bring suit before actual or constructive knowledge of possible legal responsibility of particular defendant).

Re: RCW 4.16.080(2).

Regarding RCW 4.16.080(2), as noted in Orear, 59 Wn.App. at 253, this Court has previously intimated that knowledge of a defendant’s identity is part of discovery rule analysis, and a necessary requirement for a cause of action to accrue. See Reichelt v. Johns-Manville Corp., 107 Wn.2d. 761, 771-72, 733 P.2d 530 (1987) (indicating knowledge of identity as to some potential defendants would allow suit against them for wrongdoing). In this context, the discovery rule is read into RCW 4.16.080(2) by case law. See North Coast Air, 111 Wn.2d at 326 (analyzing common law rule in comparison to discovery rule under RCW 7.72.060(3)).

Re: RCW 7.72.060(3).

With respect to the Washington Product Liability Act, Ch 7.72 RCW, and its limitation period codified in RCW 7.72.060(3), the Court of Appeals below did not comment upon application of the discovery rule in this context. See Martin at 657. Because Martin asserts that this statute of limitations may apply, the Court should also confirm that a defendant's identity is necessarily part of the discovery rule in RCW 7.72.060(3). This statute of limitations itself is framed in terms of a discovery rule – “no claim under this chapter may be brought more than three years from the time the claimant *discovered or in the exercise of due diligence should have discovered the harm and its cause.*” RCW 7.72.060(3) (emphasis added).

The discovery rule codified in RCW 7.72.060(3) is essentially the same as that applied to RCW 4.16.080(2), and likewise extends to the identity of particular defendants. As noted in North Coast Air, 111 Wn.2d at 322-28, RCW 7.72.060(3) does not alter the discovery rule analysis developed in this Court's case law. See also Orear, 59 Wn.App. at 255 (concluding discovery rule embodied in the term “cause” in RCW 7.72.060(3)).⁴ As with Reichelt, implicit in the analysis in North Coast Air is the notion that the discovery rule involves the identity of a particular defendant. In North Coast Air, this Court found an unresolved fact question as to whether plaintiff exercised due diligence in determining that

⁴ The term “harm” is defined in RCW 7.72.010(6) as relating to the damages sustained by a claimant.

the manufacturer of an aircraft was potentially liable for a plane crash that had been attributed to pilot error. See 111 Wn.2d at 317-18.

Under the foregoing analysis, in the course of resolving the discovery rule issue in this case, the Court should expressly confirm for the benefit of bench and bar that the rule applies to the identity of a defendant in cases governed by either RCW 4.16.080(2) or RCW 7.72.060(3). As a matter of common sense, a plaintiff must have sufficient knowledge, actual or constructive, as to *who* may be responsible for tortious acts or omissions causing injury before a cause accrues as to such person or entity.

B.) The Inexcusable Neglect Requirement Under CR 15(c), Imposed By Case Law, Should Not Apply To Amendments Involving Alleged Successors-In-Interest Of A Named Party.

CR 15, governing amendment to complaints, is required to be liberally construed to facilitate disposition of claims on the merits. See Herron v. Tribune Publishing Co., 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Subsection (c) of CR 15 governs the relation back of amendments to the date of the original pleading, thereby impacting application of the statute of limitations.⁵ This subsection has three express requirements: Initially, the claim asserted in the amended pleading must relate to that set forth in the original pleading. If the amendment involves “changing the party” it must be established that within the limitation period the substituted defendant 1) received such notice of the action that it would

⁵ The current version of CR 15 is reproduced in the Appendix to this brief.

not be prejudiced in maintaining a defense on the merits, and 2) knew or should have known that, but for a mistake concerning identity of the proper party, an action would have been brought against it.⁶

Assuming for purposes of argument that the above elements are met here and apply to amendments involving the substitution of a successor-in-interest, the question is whether, under these circumstances, a plaintiff must also show a lack of “inexcusable neglect” for the amendment to relate back to the original pleading for statute of limitations purposes. The inexcusable neglect requirement has been read into CR 15(c) by this Court’s cases. See generally Perrin v. Stensland, 158 Wn.App. 185, 240 P.3d 1189 (2010) (collecting cases). However, under the teachings of this Court in Beal v. City of Seattle, 134 Wn.2d 769, 776-84, 954 P.2d 237 (1998), this case law requirement should not be applied when the amendment involves substituting a successor-in-interest for a party defendant.

In Beal, which involved interpretation of both CR 15(c) and CR 17(a) (regarding joinder or substitution of the real party in interest), the Court held that, in a wrongful death action, the substitution of a personal representative for a guardian that had improperly commenced the action did not require a showing of lack of inexcusable neglect. See Beal, 134 Wn.2d at 776-84. In so doing, the Court determined, inter alia, that, when the express requirements of CR 15(c) are otherwise met, the purposes

⁶ The Court of Appeals concluded the second enumerated element of CR 15(c) was not met by Martin. See Martin 178 Wn.App. at 666.

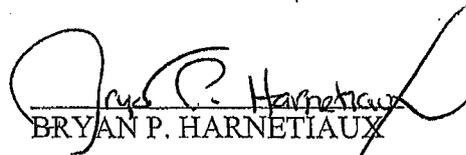
underlying the statute of limitations are not subverted and the technical bar of inexcusable neglect is unjustified. See id. at 780-83. Imposing this requirement under these circumstances would undermine the goal of determining legitimate controversies on the merits. See id.

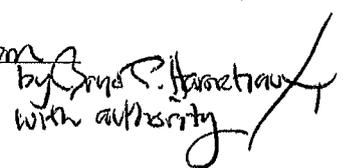
The sensibilities expressed in Beal seem equally relevant here, when a plaintiff seeks to substitute a successor-in-interest of a named party, correcting a technical mistake that otherwise does not prejudice the substituted party. See also Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 492 n. 10, 145 P.3d 1196 (2006) (commenting on scope of CR 15(c) and holding in Beal); Perrin, 158 Wn.App. at 100-01 (recognizing Beal involves a narrowing of the inexcusable neglect requirement).⁷

VI. CONCLUSION

The Court should consider the arguments advanced in this brief in resolving the issues on review.

DATED this 29th day of August, 2014.


BRYAN P. HARNETIAUX


GARY N. BLOOM
by 
with authority

On Behalf of WSAJ Foundation

⁷ In its briefing, Martin urges that if the Court decides to reexamine its CR 15(c) “inexcusable negligent” jurisprudence, it should consider the extended discussion in Perrin, 158 Wn.App. at 198-202. See Martin Supp. Br. at 17-18 n. 20. The Perrin analysis of the uneven nature of this Court’s jurisprudence on this subject seems well taken, and worthy of consideration.

Appendix

RCW 4.16.080

Actions limited to three years.

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

Notes:

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;"

RCW 7.72.060

Length of time product sellers are subject to liability.

(1) Useful safe life. (a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

- (i) The product seller has warranted that the product may be utilized safely for such longer period; or
- (ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or
- (iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

(2) Presumption regarding useful safe life. If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) Statute of limitation. Subject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitation, no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.

[1981 c 27 § 7.]

RULE CR 15
AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(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.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

[Adopted effective July 1, 1967; Amended effective September 1, 2005.]
