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S. Ct. No. 89924-0

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Ct. App., Div. I, No. 681320

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and
SIEMENS DEMATIC; GENERAL CONSTRUCTION COMPANY;
WRIGHT SCHUCHART HARBOR COMPANY; and FLETCHER
CONSTRUCTION COMPANY NORTH AMERICA,

Respondents.

PETITIONERS' ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION FOR JUSTICE

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Petitioners Nina Martin, individually and as Personal Representative of the Estate of Donald R. Martin, Russell L. Martin, Thaddeus J. Martin, and Jane Martin (the Martins) submit the following answer to the amicus curiae brief filed by the Washington State Association for Justice Foundation (WSAJ Foundation or Foundation):

I. WSAJ Foundation is correct that accrual of a claim based on discovery of the identity of the proper defendant is implicit in this Court's prior decisions in *North Coast Air v. Grumman Corp.* and *Reichelt v. Johns-Manville Corp.*

WSAJ Foundation notes that accrual based on discovery of the identity of the proper defendant is implicit in this Court's decision in *North Coast Air v. Grumman Corp.*, 111 Wn. 2d 315, 319, 323, 759 P.2d 405 (1988), involving a product liability claim, and intimated by this Court's decision in *Reichelt v. Johns-Manville Corp.*, 107 Wn. 2d 761, 771-72, 733 P.2d 530 (1987), involving a non-product liability claim. *See* WSAJ Fdn. Am. Br., at 7-9.¹

¹ In its statement of the case, WSAJ Foundation notes apparent disagreement between the Martins and FCCNA regarding the applicable statute(s) of limitations, and, on this basis, states that it is unclear whether this case is subject to the general personal injury statute of limitations, RCW 4.16.080(2), or the product liability statute of limitations, RCW 7.72.060(3), is at issue. *See* WSAJ Fdn. Am. Br., at 3 n.2. The Martins have alleged *both* product liability and non-product liability claims against Wright Schuchart Harbor Company (WSH) and its corporate successor, Fletcher Construction Company North America (FCCNA), and, as a result, both statutes of limitations are at issue. *See* CP 2405-07 (first amended complaint, ¶¶ 3.4-4.2); CP 619-23 (second amended complaint, ¶¶ 3.7-4.2). Nonetheless, WSAJ Foundation is correct that the analysis of the discovery rule is the same under both statutes. *See* Martin Br., at 28-31; Martin Reply Br., at 37-40; Martin Pet. for Rev., at 9; Martin Supp. Br., at 14 n.17.

In *North Coast*, the Court held that there was a question of fact when a product liability claim accrued against an airplane manufacturer where the official investigation concluded the cause of an airplane crash was pilot error and the plaintiff did not learn until 11 years later that the crash may have resulted from a defect in the airplane. The Court rejected the defendant's proposed rule regarding accrual of the claim that "would require plaintiffs to begin a suit before they either had or should have had any knowledge of a possible legal responsibility of *this defendant*." 111 Wn. 2d at 323 (emphasis added). Instead, the Court held that actual or constructive knowledge of the causal connection between the manufacturer's product and the harm is necessary before the plaintiff's claim would accrue. *See id.* at 327-28. In reaching this result, the Court explained that the statute of limitations

is intended to give the plaintiff a fair chance to ascertain the harm and its cause. Protection to the defendant is afforded by the provision that plaintiff may be barred if plaintiff did not exercise due diligence in discovering the harm and its cause. This standard of reasonable inquiry placed upon the plaintiff serves the policy reasons underlying statutes of limitation. Our interpretation is consistent with the legislative declaration of purpose to treat all parties in a balanced fashion and without unduly impairing the rights of one injured as a result of an unsafe product.

Id. at 328.

Applying similar principles in an asbestos case involving non-product liability claims,² the Court in *Reichelt* affirmed dismissal of a plaintiff's complaint in part because he knew or should have known the identities of the culpable asbestos manufacturers more than three years before filing suit. *See* 107 Wn. 2d at 768-73; *cf. Winbun v. Moore*, 143 Wn. 2d 206, 18 P.3d 576 (2001) (adopting individualized application of the discovery rule to each health care provider who treats the plaintiff under RCW 4.16.350).

It is a small step from the reasoning and results in *North Coast* and *Reichelt* to a rule of accrual based on discovery of the identity of the proper defendant. The Court of Appeals has already followed the logic of these decisions to their natural conclusion in *Orear v. International Paint Co.*, 59 Wn. App. 249, 253, 796 P.2d 759 (1990) (discussing *Reichelt*), *rev. denied*, 116 Wn. 2d 1024 (1991); *id.* at 255 (discussing *North Coast*). As advocated by both WSAJ Foundation and the Martins, this Court should approve of *Orear* and formally adopt a rule of accrual based on discovery of the identity of the proper defendant, and apply the rule in this case.

² The plaintiff in *Reichelt* also alleged product liability claims, but those claims were apparently abandoned before this Court. *See* 107 Wn. 2d at 771-72. The product liability claims arose before the effective date of the Washington Product Liability Act, Ch. 7.72 RCW, and were subject to the general personal injury limitations period in any event. *See id.* at 769.

FCCNA received notice that it was the proper defendant when General Construction Company (GCC) tendered the defense of the Martins' claims to a related company on July 24, 2007, within the 3-year limitations periods applicable to this case. *See* CP 62-63. FCCNA subsequently acknowledged its status as a successor to WSH when it forwarded the GCC tender letter to its insurer. *See* CP 401-02.

FCCNA's relationship to WSH is not a matter of public record and its liability as a successor is based solely on the terms of a private stock purchase agreement. *See* CP 62-63 (regarding stock purchase agreement); FCCNA Supp. Br., at 6 (admitting it is successor to claims against WSH); Martin Supp. Br., at 1-8 (discussing available records). The tenders from GCC to FCCNA and from FCCNA to its insurer and the private stock purchase agreement on which the tenders were based were initially hidden from the Martin family and the trial court below. *See, e.g.*, CP 743 (FCCNA summary judgment motion, stating "[t]here is no evidence in the record that FCCNA received notice of this claim ... within the 3-year statute of limitations"; brackets & ellipses added).

For their part, the Martins did not discover, nor did they have the ability to discover, FCCNA's identity or its relationship to WSH until alerted to its status as a successor in a summary judgment motion filed by GCC. *See* CP 2439-40. Accordingly, their claims against FCCNA did not

accrue until that time. Because they amended their complaint to identify FCCNA within a matter of weeks afterward, their claims against the company are timely.

II. WSAJ Foundation is correct that a showing of lack of inexcusable neglect should not be required for an amendment substituting a successor-in-interest to a named party defendant, based on this Court's decision in *Beal v. City of Seattle*.

WSAJ Foundation acknowledges that the inexcusable neglect requirement for party amendments to relate back to the date of the original complaint for statute of limitations purposes has been read into CR 15(c) by case law. *See* WSAJ Fdn. Am. Br., at 10.³ However, based on this Court's decision in *Beal v. City of Seattle*, 134 Wn. 2d 769, 776-84, 954 P.2d 237 (1998), the Foundation urges that "this case law requirement should not be applied when the amendment involves substituting a successor-in-interest for a party defendant." WSAJ Fdn. Am. Br., at 10.

³ To the extent that a showing of a lack of inexcusable neglect is required, the Martins have argued elsewhere that the inexcusable neglect requirement should, at a minimum, be limited to cases where the omission of a defendant was a strategic choice rather than the result of mistake or ignorance. *See* Martin Br., at 40-41; Martin Reply Br., at 47-49; Martin Pet. for Rev., at 14-15; Martin Supp. Br., at 17-18 n.20. Both the Martins and WSAJ Foundation have pointed out that this Court may need to revisit its inexcusable neglect jurisprudence, as suggested by the Court of Appeals decision in *Perrin v. Stensland*, 158 Wn. App. 185, 201, 240 P.3d 1189 (2010). *See* WSAJ Fdn. Am. Br., at 11 n.7; Martin Reply Br., at 48 n.15; *see also* *Nepstad v. Beasley*, 77 Wn. App. 459, 467-68, 892 P.2d 110 (1995) (questioning "whether the 'inexcusable neglect' case law applies to bar relation back where a party has incorrectly identified a defendant[.]" as distinguished from mere failure to name additional parties).

In *Beal*, the Court held that a showing of lack of inexcusable neglect is not required for an amendment changing the representative capacity of the plaintiff because such a showing would be contrary to the purpose and language of CR 15 and 17. *See* 134 Wn. 2d at 782-83. In particular, the purpose of CR 15(c) is to permit amendment provided the defendant is not prejudiced and has notice. *See Beal*, 134 Wn.2d at 782. These requirements adequately ensure that relation back does not subvert the policies of the statute of limitations. *See id.* at 780 (citing *Haberman v. WPPSS*, 109 Wn. 2d 107, 173, 744 P.2d 1032 (1988)).

CR 15(c) does not contain an express inexcusable neglect requirement. *See Beal*, 134 Wn. 2d at 782. This requirement has been added by case law where necessary “to prevent harmful gamesmanship.” *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn. 2d 483, 492 n.10, 145 P.3d 1196 (2006). It is “not intended to alter the rule favoring relation back,” and “[a] broad construction of the inexcusable neglect standard undermines this rule and interferes with the resolution of legitimate controversies.” *Id.*, 158 Wn. 2d at 492 n.10 (discussing *Beal*).

Accordingly, in the wrongful death action that was the subject of *Beal*, the Court permitted an amendment substituting the personal representative of the decedent’s estate for the guardian ad litem of the beneficiaries of the estate, and held that the amendment related back to the

date of the original complaint for purposes of the applicable limitations period, without requiring a showing of lack of inexcusable neglect. *See* 134 Wn. 2d at 784 (stating “[i]n summary, we find that CR 17(a) and CR 15(c) do not bar amendment of the complaint and relation back in this case ...”). The Court reached this result notwithstanding the fact that the original complaint was filed with knowledge of the defect in the representative capacity of the plaintiff. *See id.* at 775-77, 781; *see also id.* at 789 & n.2. (Talmadge, J., dissenting, noting plaintiff’s lawyer appeared to have misled the trial court).

Although there are several distinctions between *Beal* and this case, none of them are material. *Beal* came before the Court upon a motion to substitute parties under CR 17(a) rather than a motion to amend under CR 15(c), but the Court held that the standards set forth in CR 15(c) are properly considered under CR 17(a) and went on to apply the standards set forth in CR 15(c). *See* 134 Wn. 2d at 778-81. To the extent this case involves an amendment changing defendants, the same standards are at issue.⁴

Beal also involved a party amendment involving a plaintiff rather than a defendant, but the Court recognized that CR 15(c) is phrased in

⁴ As noted *infra*, the Martins also believe that an amendment identifying the corporate successor to a named defendant does not actually change the party against whom the claim is asserted within the meaning of CR 15(c).

terms of an amendment changing the party against whom a claim is asserted—i.e., a defendant—and indicated that the rule applies by analogy in the case of newly added plaintiffs. *See id.* 779-80. To the extent this case involves an amendment changing defendants, it involves a direct application of CR 15(c) rather than an invocation of the rule by analogy.

Following *Beal*, this Court has held that an amendment substituting a bankruptcy trustee for a debtor plaintiff after expiration of the applicable limitations period related back to the date of the original complaint under CR 15(c). *See Miller v. Campbell*, 164 Wn. 2d 529, 536-39, 192 P.3d 352 (2008). The Court characterized the amendment in *Miller* as being similar to *Beal*, involving a change in the representative capacity of the parties, even though a bankruptcy trustee is actually a successor to the debtor.⁵ In this way, *Miller* applies the rule of *Beal* in a factual context that is more analogous to the one presented here.

WSAJ Foundation’s briefing and this Court’s analysis in *Beal* are entirely compatible with the Martins’ contention that no showing of a lack of inexcusable neglect should be required in this case, although the

⁵ *See Thomas v. Coast Carton Co.*, 143 Wash. 660, 664, 255 P. 1041 (1927) (describing bankruptcy trustee as “successor in interest” to debtor); *Cochran v. Nelson*, 26 Wn. 2d 82, 89, 173 P.2d 769 (1946) (quoting with approval interpretation of statutory language referring to “legal successor or representative” of a seller as including “the trustee in bankruptcy of any insolvent seller”); *In re International Fibercom, Inc.*, 503 F.3d 933, 944 (9th Cir. 2007) (noting Chapter 7 bankruptcy trustee is generally considered successor in interest to debtor).

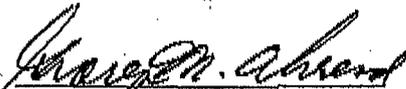
arguments have a slightly different focus. WSAJ Foundation argues that under *Beal* no showing of a lack of inexcusable neglect should be required for relation back of the amendment identifying FCCNA as a corporate successor to WSH, even if the amendment is deemed to be a party amendment, i.e., one changing the party against whom the Martins' claim is asserted. To the same effect, the Martins have urged that inexcusable neglect requirement is inapplicable because an amendment identifying a successor corporation is *not* a party amendment, given the identity of interest between a named defendant and its corporate successor. See Martin Br., at 37-39; Martin Reply Br., at 43-44; Martin Supp. Br., at 17-19. Whichever approach is followed by the Court in this case, no showing of a lack of inexcusable neglect should be required.

Respectfully submitted this 30th day of September, 2014.

THE BUDLONG LAW FIRM

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For 
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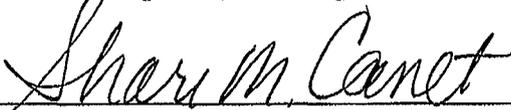
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