90133-3

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.

BRIEF OF APPELLANT

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I. Assignment of Errors

1. The trial court erred in granting W.B. Mobile Services, Inc.'s motion for summary judgment ("motion to dismiss") on May 31, 2011, based upon a misapplication of CR 10, CR 15(c), and the tolling provision in RCW 4.16.170. CP 259 – 261.

II. Statement of Issues

1. Whether the appellant/plaintiff, Jesse Powers, has met all of the necessary requirements of CR 10, CR 15(c), and RCW 4.16.170, in that the dismissed respondent/defendant, W.B. Mobile Services, Inc., had, in fact, sufficient notice of the lawsuit in question, was named with particularity, and had a reasonable opportunity to investigate and prepare its inevitable defense, all "within the period of time provided by law for commencing the actions against him" as that phrase is used in CR 15(c), and therefore, that the amendment relates back to the original filing of the complaint and this matter should be remanded back to the trial court for adjudication on the merits. (Assignment of Error 1).

III. Statement of the Case

1. Procedural History

On May 28, 2009 the appellant/plaintiff, Mr. Jesse Powers, (hereinafter Mr. Powers) filed a complaint in the Superior Court of the State of Washington in and for the County of Pierce under cause no. 09-2-

09464-6. CP 321 – 327. The original complaint named defendants, Premier Communities, Inc., acting as a general contractor, Pacific Mobile Structures, Inc., acting as a sub-contractor, John Doe One, an unknown construction company, and John Doe Two, an owner/operator. CP 321 - 327. On July 23, 2009, defendant Pacific Mobile Structures, Inc., (hereinafter Pacific Mobile) filed an answer, affirmative defenses and cross claims against Premier Communities, Inc. CP 328 - 334. Pacific Mobile filed a disclosure of possible primary witnesses on December 18, 2009. CP 335 – 370. An answer by defendant Premier Communities, Inc., (hereinafter Premier) to Mr. Powers' complaint was filed on January 13, 2010. CP 371 – 375. On February 18, 2011, Mr. Powers moved the trial court to amend his original complaint substituting respondent/defendant W.B. Mobile Services, Inc., (hereinafter W.B. Mobile) in place of John Doe One (i.e. "first amended complaint for personal injuries and damages in tort.") CP 376 - 382.

Pacific Mobile filed a motion for summary judgment on April 22, 2011. CP 9-41. On May 16, 2011 W.B. Mobile filed a response to Pacific Mobile's motion for summary judgment. CP 107 – 113. Mr. Powers filed an opposition to Pacific Mobile's motion for summary judgment on May 16, 2011. CP 150 – 167. Additionally, Premier filed a response to Pacific Mobile's motion for summary judgment on May 16, 2011. CP 85 – 91. On

May 23, 2011, Pacific Mobile filed a summary judgment motion rebuttal brief. CP 213 – 228. The trial court filed an order on May 27, 2011 denying defendant Pacific Mobile's motion for summary judgment. CP 383 – 386.

W.B. Mobile filed a motion to dismiss on April 15, 2011, in which Pacific Mobile filed a response and opposition to W.B Mobile's motion on May 2, 2011, and Premier filed a joinder in Pacific Mobile's opposition on May 25, 2011. CP 1-6, 42-74, and 257-258. On May 16, 2011, Mr. Powers filed a response and opposition to W.B. Mobile's motion to dismiss. CP 168 – 193. W.B. Mobile filed a reply memorandum in support of its motion to dismiss on May 23, 2011. CP 194 – 210. On May 31, 2011, the trial court filed an order granting W.B. Mobile's motion for summary judgment/motion to dismiss. CP 259 – 261.

On June 10, 2011, Mr. Powers filed a motion for reconsideration of the May 31, 2011 order granting defendant W.B. Mobile's motion to dismiss. CP 264 – 276. On June 22, 2011, W.B. Mobile filed a response to Mr. Powers' motion for reconsideration. CP 288 – 291. On June 24, 2011 the trial court granted an order denying the motion for reconsideration of the trial court's order of May 31, 2011 dismissing all claims against W.B. Mobile. CP 294 – 295.

On October 4, 2011 a stipulation for and order of dismissal was filed as to Mr. Powers' claims against Pacific Mobile and Pacific Mobile's cross claims against Premier only. CP 296 – 299. On October 18, 2011 a stipulation for and order of dismissal was filed as to Mr. Powers' claims against Premier communities only. CP 300 – 303.

A notice of appeal to the Court of Appeals, Division II, was filed on November 14, 2011, to seek review by the designated appellate court of the order granting W.B. Mobile's motion for summary judgment entered on May 31, 2011. CP 304 – 317. The designation of Clerk's Papers were filed on December 13, 2011. CP 318 – 320, and 387 – 389.

2. Statement of Facts

a. <u>The Appellant/Plaintiff, Mr. Jesse Powers' Injuries</u>

This lawsuit arises out of an accident on June 2, 2006, in which the appellant/plaintiff, Jesse Powers (hereinafter Mr. Powers), was injured while walking on a handicap ramp that was attached to a mobile sales office structure at a residential construction site in Spanaway, WA. CP 151. Mr. Powers went to the jobsite as directed, and was given instructions to install a small awning over a doorway at a modular home. CP 151. Mr. Powers took the awning and carried it to the platform, set it down, and then stepped up to the platform. CP 151. He then picked up the awning and when he stepped forward with his right leg or foot, "it fell-it

collapsed", and Mr. Powers fell backwards with the awning. CP 151. The access ramp, which was defective in one or more respects including, but not limited to improper installation, created an unsafe condition causing the ramp to collapse resulting in severe, permanent and disabling injuries to Mr. Powers. CP 187.

Mr. Powers was an employee of Awning Solutions, a company contracted by Defendant General Contractor Premier Communities, Inc., (hereinafter Premier), to install an awning on a mobile sales structure that had been moved from one of Premier's construction projects to another construction project, to wit: from the "Breckenridge" site to the "Wyndham Ranch" site, where the injury to Mr. Powers occurred. CP 151. Mr. Powers was invited onto the premises for business purposes in a common work area as an employee of subcontractor Awning Solutions by Premier. CP 151. The Wyndham Ranch residential construction site was located at 14th Ave. S. & 175th Ave. S., in the City of Spanaway, County of Pierce, Washington State. CP 152. Premier had contracted with defendant Pacific Mobile Structures, Inc., (hereinafter Pacific Mobile) to build numerous mobile structures per Premier's specifications to be used as either sales offices and/or job site offices at its residential construction sites, including the Wyndham Ranch project. CP 152. Premier also requested that Pacific Mobile supply handicap ramps for the sales office

mobile structures. CP 153. On June 3, 2005, Pacific Mobile entered into an operating rental agreement with Premier, in which Premier rented mobile unit #05210 and a handicap access ramp from Pacific Mobile. CP 86. Prior to the date that Mr. Powers arrived to install the awning, Premier had subcontracted with Pacific Mobile to move a mobile sales office structure from one construction site to the Wyndham Ranch construction site. CP 153.

b. Respondent/Defendant W.B. Mobile Services, Inc.

Without Premier's knowledge, Pacific Mobile had subcontracted with another subcontractor, the respondent/defendant herein this appeal W.B. Mobile Services, Inc. (hereinafter W.B. Mobile), to set up the mobile structure (mobile unit #05210), i.e. attach the handicap ramp, balance the structure and attach the tie downs and the skirting. CP 86, 153 – 154. Premier was not notified that Pacific Mobile had hired W.B. Mobile to install the handicap ramp. CP 86. Mr. Powers testified that he believed the handicap ramp was installed by Pacific Mobile. CP 214. Mr. Powers was given this information by his employer; he did not know who the installer was himself. CP 214. The information given to Mr. Powers was incorrect. CP 214.

On or about May 26, 2006, Russell S. Williams (hereinafter Mr. Williams), owner and sole employee of W.B. Mobile, began the

installation of the handicap ramp on unit #05210. CP 86. Following the delivery of the mobile structure to the Wyndham Ranch project, Mr. Williams partially installed the handicap ramp and realized that he needed additional ramp pieces to complete the installation. CP 97, 214. He taped and boarded off the ramp to indicate that it was not yet safe to use. CP 214. He contacted Pacific Mobile to make arrangements to pick up the additional ramp pieces to complete the installation of the ramp and drove to two separate sites, one in Seattle, WA and another in Buckley, WA to pick up these parts. CP 95. Mr. Williams returned to the site the next day with additional equipment, and saw that his tape and boarding had been removed. CP 214. Mr. Williams completed the installation, and again taped and boarded off the ramp because the backfill was not yet finished and the handicap ramp was not yet safe to use. CP 214. Between the time Mr. Williams left (after his second taping off of the ramp) and Mr. Power's accident on June 2, 2006, the warning tape and boards were removed again by persons unknown. CP 214.

c. <u>Service of Process and Notice of the Personal Injury Action upon Defendants</u>

Following the filing of the suit, Mr. Powers caused the summons and complaint to be personally served (timely) on the registered agent of Pacific Mobile on June 5, 2009, and on the registered agent of Premier on

June 12, 2009. CP 169 – 170. After service of process was perfected, the named defendants, Premier and Pacific Mobile, appeared through their respective attorneys. CP 170. On July 28, 2009, Pacific Mobile sent a letter through its legal counsel to W.B. Mobile attaching a copy of the Mr. Powers' original summons and complaint. CP 65, 170. Mr. Williams, owner of W.B. Mobile, stated that he first received notice that Mr. Powers had filed suit in late July 2009-early September 2009 when he received a letter dated July 28, 2009, from the attorney representing Pacific Mobile. CP 7 – 8, 86. However, Mr. Williams has confirmed under oath that he received a letter from Pacific Mobile, "...probably a few days..." after July 28, 2009, well within the 90 days required for service, with an attached original summons and complaint. CP 170, 193. This letter, attached with a copy of the complaint, also sought to tender the defense of the claims against Pacific Mobile to W.B. Mobile. CP 8, 65. Mr. Williams forwarded the letter to his insurance company, who later denied the tender. CP 8.

After the original complaint was filed and served, discovery was then commenced between the then named parties in the form of depositions, written interrogatories and production demands. CP 170. Through this process of discovery, Mr. Powers became aware of the true identity of John Doe One (i.e. W.B. Mobile) on or about the end of

October 2010. CP 170. On February 18, 2011, Mr. Powers moved the Superior Court to amend his complaint substituting W.B. Mobile in place of John Doe One. CP 170.

IV. Standard of Review

The appellate court reviews summary judgment *de novo*, taking all facts in the light most favorable to the nonmoving party. *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007). In reviewing an order of summary judgment, an appellate court engages in the same inquiry as the trial court. *Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 269, 40 P.3d 686 (2002). Summary judgment is proper if, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. CR 56(c); *Ellis v. City of Seattle*, 142 Wn.2d., 450, 458, 13 P.3d 1065 (2001). In reviewing a summary judgment, this court engages in the same inquiry as did the superior court. Where there are no factual disputes, the case is ripe for summary judgment. *Craig v. Ludy*, 95 Wn. App. 715, 717, 976 P.2d 1248 (1999), *review denied,* 139 Wn.2d 1016, 994 P.2d 844 (2000).

Some opinions refer to abuse of discretion as the standard for reviewing a decision under CR 15(c), probably because the issue often arises in connection with a motion for leave to amend. *See, e.g., Nepstad*

v. Beasley, 77 Wn. App. 459, 468, 892 P.2d 110 (1995) (all the requirements of CR 15(c) were satisfied by plaintiff's request for leave to amend; denial of this request did not rest on tenable grounds); *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs,* 46 Wn. App. 369, 374, 730 P.2d 1369 (1986), *review denied,* 108 Wn.2d 1004 (1987). A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 399, 858 P.2d 1054 (1993).

More typically, however, appellate courts do not refer to a determination of relation back as being discretionary with the trial court; rather, the question is whether the requirements of CR 15(c) have been met. *See, e.g., Tellinghuisen v. King County Council,* 103 Wn.2d 221, 223, 691 P.2d 575 (1984). This was the approach taken by the United States Supreme Court in a recent decision authoritatively construing Civil Rule 15(c) of the Federal Rules of Civil Procedure, the parallel rule of Washington State's CR 15(c), by stating, "Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion." *Krupski v. Costa Crociere S. p. A.,* - U.S. -, 130 S.Ct. 2485, 2496, 177 L.Ed.2d. 48 (2010).

V. Argument

1. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/DISMISSAL BECAUSE THE PLAINTIFF MET ALL THE ELEMENTS OF CIVIL RULE 15(c).

The amended complaint relates back to the original complaint under CR 15(c), therefore Mr. Powers' claim against the respondent/defendant, W.B. Mobile, is timely. In the instant matter, the trial court erred in granting W.B. Mobile's Motion for Summary Judgment/ Dismissal, contrary to existing law. Substantial injustice will be done if W.B. Mobile is permitted to be dismissed from this suit. It is uncontroverted that W.B. Mobile had actual notice of the pending lawsuit well within 90 days of the filing of the complaint and no prejudice has been shown by W.B. Mobile in defending this lawsuit due to the "relation back doctrine" when it is added as a party by the amended complaint.

a. Mr. Powers properly identified John Doe One in his original complaint under CR 10(a)(2)

At the time he filed the original complaint, Mr. Powers was "ignorant of the name of the defendant" and pursuant to CR 10(a)(2), *Unknown Names*, so stated in his pleading not knowing the correct name or identity of defendant John Doe One who was believed to be the builder and/or installer of the handicap ramp that was at issue in this litigation. CR 10(a)(2) Form of Pleading and Other Papers 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, <u>and when his true name shall be discovered, the pleading or proceeding may be amended accordingly</u>. (Emphasis added).

Mr. Powers properly designated the unknown defendant in the pleading as a 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. Mr. Powers was unable to obtain the true identity of the John Doe defendants prior to engaging in discovery. All named defendants have testified through their agents and/or employees that they were not aware of Mr. Powers' accident or his injuries prior to the commencement of the legal action on May 28, 2009. Pursuant to responses to discovery in this litigation, named defendant Pacific Mobile, mailed discovery responses on October 18, 2010, and said responses were received by Mr. Powers on October 21, 2010. In these responses to discovery, W.B. Mobile was disclosed for the first time as a "sub-contractor hired to do a set up" of the handicap ramp in question in this litigation. It was at this juncture that Mr. Powers became aware of the true identity of the installer of the handicap ramp, so as to allow the addition and/or substitution of a properly named alleged culpable party, to wit: W.B. Mobile. Following this disclosure, the previously "named

defendants" and Mr. Powers stipulated to amend the complaint so as to properly name a potential culpable party in Mr. Powers' action in tort for injuries stated in the original Complaint. The trial court allowed the amendment and the amended summons and complaint was then subsequently filed on February 18, 2011. The amended summons and complaint were timely served upon all named defendants, including Russell Williams, owner and proprietor of W.B. Mobile. Subsequent thereto, Mr. Powers scheduled the depositions of Michael J. Moceri of Pacific Mobile, and Russell Williams the agent and owner of W.B. Mobile. These depositions were taken on May 5, 2011.

b. CR 15(c), Relation Back of Amendments

Under CR 15(c), there are essentially three elements that must be met so that a complaint can be properly amended and thus relate back to the original cause of action. The first, located in the preface of the rule, being that the amended pleading arose out of the conduct, transaction, or occurrence in the original pleading. 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. (Emphasis added).

CR 15(c) is to be liberally construed on the side of allowance of relation back of an amendment that adds or substitutes a new party after the statute of limitations has run, particularly where the opposing party will be put to no disadvantage. Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. *Criag v. Ludy,* 95 Wn. App. 715, 718-710, 976 P.2d 1248 (1999) (quoting *Lind v. Frick*, 15 Wn. App. 614, 617, 550 P.2d 709 (1976)). The focus of the inquiry is on what the defendant knows or should have known, not the plaintiff's diligence. *See Perrin v. Stensland*, 158 Wn. App. 185, 188, 240 P.3d 1189 (2010).

The preface of CR 15(c) requires the newly added defendant, W.B. Mobile, who was initially alleged under the name of John Doe One, to have engaged in the same negligent actions that arose out of the conduct, transaction, or occurrence set forth in the original pleading filed with the trial court. As such, a properly amended complaint would relate back to the date of the original pleading if the basic requirements of CR 15(c) are

met. Under CR 15(c), a "relation back" is allowed as long as (1) the late-added party receives such notice of the institution of the action such that there would be no prejudice (to the newly added party) in maintaining a defense on the merits; and (2) the newly added party either 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. *See* CR 15(c).

In this case, W.B. Mobile, the previously named John Doe One, received a copy of the original summons and complaint, attached to the July 28, 2006 letter from Pacific Mobile, which was well within 90 days of the filing of the original complaint, thus satisfying the requirements of CR 15(c)(1). W.B. Mobile's receipt of the original complaint within the 90 days provided it with actual notice, and but for the mistake of the identity of W.B. Mobile the action would have been brought against it as it was with the originally named defendant, thus satisfying the requirements of CR 15(c)(2). After Mr. Powers had become aware of the true identity of W.B. Mobile through discovery with the originally named defendants, an amended complaint was filed and W.B. Mobile was timely served within 90 days.

c. RCW 4.16.170, Tolling of the Statute of Limitations

Under RCW 4.16.170, the time period for commencing a negligence action includes the 90 days after a complaint is filed and

served. RCW 4.16.170 states:

> 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. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint... If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170.

Mr. Powers' original complaint was filed on May 28, 2009 and therefore the time period for commencing an action against any person or entity required service within 90 days later, on or about August 25, 2009. However, in the case of *Sidis v. Brodie/Dohrmann, Inc.,* the Washington State Supreme Court held that the <u>service upon one defendant tolled the statute of limitations as to the remaining named defendants</u>. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 331, 815 P.2d 781 (1991) (Emphasis added). The Court noted, "...that in some cases, if identified with reasonable particularity, 'John Doe' defendants may be appropriately 'named' for purposes of RCW 4.16.170." *Id* at 331. Here, Mr. Powers filed suit against Premier, Pacific Mobile, John Doe One and John Doe Two on May 28, 2009 and timely served the registered agents for Pacific

Mobile on June 5, 2009 and Premier on June 12, 2009. Therefore the statute of limitations for the remaining named "Doe" defendants (ie. W.B. Mobile) was tolled. Because RCW 4.16.170 tolled the statute, the amended complaint under CR 15(c) was proper and thus relates back to the original complaint. The facts remain that the defendant W.B. Mobile received actual notice of Mr. Powers' original lawsuit within the required 90 days from the date that the original complaint was filed (May 28, 2009), thus eliminating "prejudice in its defense" as a viable reason for what is essentially a summary dismissal. CR 15(c).

d. Jesse Powers, has met all of the necessary requirements of CR 15(c), and relation back is proper

The issue before this Court is whether, applying CR 15(c), W.B. Mobile had, prior to August 25, 2009, (1) "such notice" of Mr. Powers' lawsuit that it will not be prejudiced, and (2) knew or should have known that, but for a mistake concerning the proper party's identity, Mr. Powers would have brought suit against W.B. Mobile.

The evidence shows that Pacific Mobile through its Legal Counsel, mailed a letter to W.B. Mobile to Attn: Russ Williams on July 28, 2009 tendering Pacific Mobile's defense to W.B. Mobile. That letter advised W.B. Mobile, among other things, that a lawsuit had been served upon Pacific Mobile and enclosed a copy of Mr. Powers' original complaint

along with a purchase order for work done by W.B. Mobile installing the handicap ramp involved in Mr. Powers' accident. The letter further informed W.B. Mobile that Mr. Powers was claiming injuries caused by the collapse of a ramp installed by W.B. Mobile, identified the date of loss as June 2, 2006, and advised as to the location of the loss as "the Wyndham Ranch Project."

Applying CR 15(c), it is undisputed that W.B. Mobile not only had actual notice that a lawsuit had been filed, but had in its possession an actual copy of the complaint itself prior to the expiration of the time period for service of process on or about August 25, 2009; it received an actual copy of that lawsuit. Now, having received notice and actual possession of the original complaint in its hands, within the time period for commencing an action, W.B. Mobile cannot claim prejudice in maintaining its defense on the merits. In fact, W.B. Mobile had been *tendered* the defense of the original lawsuit per the July 28, 2009 aforementioned letter.

Mr. Powers respectfully asks this Court to consider the trend of recent rulings concerning CR 15, in which courts have liberally construed CR 15 on the side of allowing "relation back," particularly if the opposing party is not disadvantaged. *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 the instant matter, W.B. Mobile had actual knowledge of the lawsuit within the 90 days of Mr. Powers' filing of the lawsuit. There has been no showing that W.B. Mobile has been prejudiced in sustaining a defense on the merits.

The respondent, W.B. Mobile, has repeatedly relied on the case of *Kiehn v. Nelsen's Tire Co.*, in which the *Kiehn* court concluded that the amended complaint did not relate back. *Kiehn v. Nelsen's Tie Co.*, 45 Wn. App. 291, 296, 724 P.2d 434 (1986). In *Kiehn*, the wife of a deceased truck driver filed a claim against a tire maintenance company. *Id.* at 292. Jack Kiehn, the truck driver, died on December 2, 1977 when a "White Tractor" he was operating allegedly lost its left wheel and crashed. *Id.* On November 26, 1980, Keihn's wife, Gail, on behalf of herself, her children and as a personal representative of her husband's estate commenced an action in Pierce County Superior Court against multiple defendants, including multiple John Does. *Id.* The defendant in *Keihn*, Nelsen's Tire, was not named originally as a defendant in that complaint. *Id.* After discovery, in July 1982, the complaint was amended to include Nelsen's Tire as a defendant, and in August of that year, Nelsen's Tire was served with a summons and amended complaint. *Id.* The court, applying CR 15(c), concluded that the amended complaint did not relate back because

the only relation back element that was present was that the amended pleadings arose out of the same transaction. *Id.* at 296. The court reasoned that because Nelsen's Tire did not receive notice of the action within the 3-year statue of limitations period and had no knowledge that the action would have been brought against it, but for mistake, the amended complaint did not relate back. *Id.* at 296. The court further stated that, while lack of prejudice is arguable, the record did indicate that Nelsen's Tire experienced difficulty in defending the case because pertinent business records had been destroyed. *Id.* The court relied heavily on the fact that the defendant was not named in the original complaint, was not served within the 3-year statute of limitations, and did not receive notice within 90 days after the complaint was filed or served upon the first party in finding that the amended complaint did not relate back. Additionally, the court in their analysis noted that the 90 days provided for in RCW 4.16.170 allowed Kiehn only to perfect the action it had filed on November 26, 1980. *Id.* at 298. The 90 day notice requirement was the ultimate demise in the *Kiehn* case for the plaintiff, which is entirely distinguishable from the facts in the present case.

In the present action, W.B. Mobile received actual notice of the litigation including an actual copy of the original summons and complaint which were included in the aforementioned July 28, 2009 letter. After this

date, unbeknownst to all of the other parties and within approximately 68 days of the filing of the original complaint, Pacific Mobile sent a letter (i.e. Actual Notice), through its' legal counsel to W.B. Mobile and attached a copy of the original summons and complaint. Therefore, W.B. Mobile had actual notice by possession of the original complaint and summons well within the 90 days provided by RCW 4.16.170. *See LaRue*, 128 Wn. App. at 460, 465, 466. The defendant in *Keihn* did not have notice until almost a year and a half after the original complaint was filed and the 90 day tolling of the statute. 45 Wn. App. at 298. Conversely, W.B. Mobile had notice well within the 90 days normally required for service of process even if a few extra days are added for the purpose of tallying in postal service delivery. It is uncontroverted that W.B. Mobile had actual notice of the pending lawsuit well within 90 days of the filing of the complaint and that no prejudice has been shown by W.B. Mobile in defending this lawsuit due to "relation back" based upon adding them in the amended complaint making this case clearly distinguishable from *Keihn*. Mr. Powers has satisfied the element vital to the holding in *Keihn,* and thus asks this Court to reverse the trial court's order dismissing W.B. Mobile from this claim.

Furthermore, the case at hand is more analogous to that of *Perrin v. Stensland.* 158 Wn. App. 185, 240 P.3d 1189 (2010). In *Perrin*, the

plaintiff was injured in a collision on August 15, 2003 and commenced a personal injury suit on July 3, 2006, shortly before the statute of limitations expired, naming the driver of the other vehicle as a defendant. *Id.* at 188, 189. Unknown to the plaintiff, the named defendant had died since the collision. On July 24, 2006, a process server personally served the summons and complaint on the defendant's wife at their home. *Id.* at 189. The attorney for plaintiff Perrin did not notice that the process server's declaration of service listed the defendant's wife as "Spouse/Widow." *Id.* In August, Perrin, still unaware of the defendant's death, sent interrogatories directed to both the defendant and his wife. *Id.* at 190. The defendant's wife responded on September 28, 2006, and wrote, after her address and other particulars, that she was a "widow as of March 20, 2006." *Id.* Perrin and his attorney did not notice that answer. *Id.* Perrin did not learn of the defendant's death until December 20, 2006. *Id.* On February 1, 2007, Perrin filed an amended summons and complaint substituting the personal representative of the defendant's estate as defendant in place of the deceased defendant. *Id.*

The *Perrin* court concluded the requirements of CR 15(c) were met and Perrin's delays did not amount to inexcusable neglect, therefore the action was not time barred, and "relation back" under these circumstances was required. *Id.* at 202. In coming to this conclusion, the court found the

first requirement of CR 15(c) was met because the claim that was asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. *Id.* at 194. Similarly, this Court should find that Mr. Powers has met this requirement because the claim asserted in both Mr. Powers' original complaint and amended complaint arises out of the same 2006 injury and the alleged negligence of W.B. Mobile. The *Perrin* court then looked to the second requirement in a CR 15(c) analysis, which was whether within the period provided by law for commencing the action against it, did the party to be brought in by amendment, defendant's estate, receive such notice of the commencement of the action that it will not be prejudice in maintaining its defense on the merits. *Id.* at 195. The *Perrin* court concluded that because of the community of interest between the defendant's wife, her husband's estate, and the insurer who provided them with coverage for the claim, timely notice to the defendant's wife was sufficient notice to the estate under CR 15(c) so that the estate would not be prejudiced in defending the action. *Id.* at 196. The court looked to three prior Washington State Court of Appeals opinions which held the amendment related back under a theory of imputed notice. *Id.* at 196. In our case, the second element is satisfied, as W.B. Mobile had actual notice. Assuming *arguendo*, if this Court finds that W.B. Mobile did not have actual notice, then it had constructive or

imputed notice, according to the record, then the second requirement of the CR 15(c) analysis has been met.

The *Perrin* court then went on to state that the third requirement had been met; that within the period provided by law for commencing the action against it, the estate knew, or should have known, that the action would have been brought against it but for mistake concerning the identity of the proper party. *Id.* at 197. The mistake was "obvious" to the *Perrin* court, because as soon as the widow was served with timely notice that is imputed to the estate, there could be no doubt that the estate would have been named defendant but for Perrin's mistake in believing, when he commenced the action, that the defendant was still alive. *Id.* at 197. Likewise, as soon as W.B. mobile's agent and owner, Russell S. Williams, received a letter dated July 28, 2009, that was attached with the original summons and complaint, there could be no doubt that W.B. Mobile would have been included as a named defendant, instead of John Doe One, but for Mr. Powers' mistake. Therefore, as in *Perrin*, Mr. Powers has met the requirements for relation back that are explicitly mentioned in CR 15(c).

Finally, the *Perrin* court went into an analysis to determine if there had been inexcusable neglect. *Id.* at 197. This is not to be confused with "inexcusable neglect" as that term is used in deciding a motion to vacate a default judgment, and our Supreme Court has not treated relation back

under CR 15(c) as a matter left to the trial court's equitable discretion. *Id.* at 201. A requirement of "excusable neglect" does not appear in the test of CR 15(c) or in the parallel federal rule, Fed.R.Civ.P. 15(c). *Id.* at 198. Nevertheless, inexcusable neglect has become a fourth ground for denying relation back in Washington case law and in this respect diverges from the analogous federal rule as articulated in *Krupski*. *Id.* It is important to note however, that the Washington State Supreme Court has stated that "inexcusable neglect, added by the court was not intended to alter the rule favoring relation back, but rather to prevent harmful gamesmanship...A broad construction of the inexcusable neglect standard undermines and interferes with the resolution of legitimate controversies." *Gildon v. Simon Props. Group, Inc.,* 158 Wn.2d 483, 492 n.10, 145 P.3d 1196 (2006).

The *Perrin* court found that there was no reason to believe the plaintiff Perrin made a strategic choice to avoid naming the estate; there was no concern about adequate notice to the estate; and there was no identified prejudice to the estate. *Id.* at 202. The estate in *Perrin* maintained that Perrin was guilty of inexcusable neglect for failing to notice the process server's designation of Hattie as "Spouse/Widow" on the return of service in July 2006, and for failing to notice Hattie's interrogatory response for the next month, "widow as of March 20, 2006." *Id.* at 198. The *Perrin* court stated that the trial court erroneously

interpreted the case law as calling for an exercise of equitable discretion to evaluate whether Perrin moved quickly enough to correct his mistake about the identity of the proper defendant and that this view was inconsistent with liberal construction of the rule. *Id.* at 202. As a result, the *Perrin* court concluded that the requirements of CR 15(c) were met and that Perrin's delays did not amount to inexcusable neglect and that relation back under these circumstances was required. *Id.*

As in our case, Mr. Powers did not strategically make a choice to avoid naming W.B. Mobile; given the facts there should be no issue about adequate notice to W.B. Mobile; and thus there is no arguable prejudice to W.B. Mobile. Opposing counsel has tried to argue that Pacific Mobile's disclosure of possible primary witnesses on December 18, 2009 gave Mr. Powers' adequate notice of W.B. Mobile as a party. This was a list of "possible" witnesses and included others that did not become a party in this action; it would not be wise for any attorney to amend a complaint to add "possible witnesses" as a party to a lawsuit based solely on a list of witnesses that may never be called to testify. Discovery was necessary. The *Perrin* court explicitly stated as the facts related to the failure to notice the process server's designation and interrogatories, that Perrin's delays did not amount to inexcusable neglect, and this singular example by Mr. Powers does not rise to the level of inexcusable neglect. *Id.* at 198.

Accordingly, there is no inexcusable neglect and the amendment should relate back to the original complaint.

Additionally, Mr. Powers respectfully requests that this Court look to the parallel federal rule (Fed.R.Civ.P. 15(c)) and the recent United States Supreme Court decision of *Krupski* for policy reasons and decide that the "inexcusable neglect" element should lose its place as an independent basis for denying relation back under CR 15(c) under Washington State case law. See, *Krupski*, 130 S.Ct at 2485. This judicially added requirement subverts the purpose of relation back, because it upends the balance of interest of the defendant to be protected by the statute of limitations and the preference embodied in the civil rules for resolving disputes on their merits.

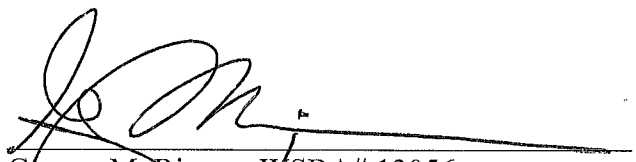
VI. Conclusion

For the reasons stated above, the plaintiff respectfully requests that the Court reverse the trial court's May 31, 2011 order granting the defendant's motion for summary juedgment/dismissal. Furthermore, the plaintiff respectfully requests that this Court issue a finding that the plaintiff, Jesse Powers, has met all of the necessary requirements of CR 10 and CR 15(c) and that the defendant, W.B. Mobile, had sufficient notice of the lawsuit and a reasonable opportunity to investigate and prepare its inevitable defense, "within the period of time provided by law for

commencing the actions against him" as that phrase is used in CR 15(c), and therefore, that the amendment does relate 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 the defendant W.B. Mobile.

Respectfully submitted this 30th day of May, 2012.

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



George M. Riecan, WSBA# 12056
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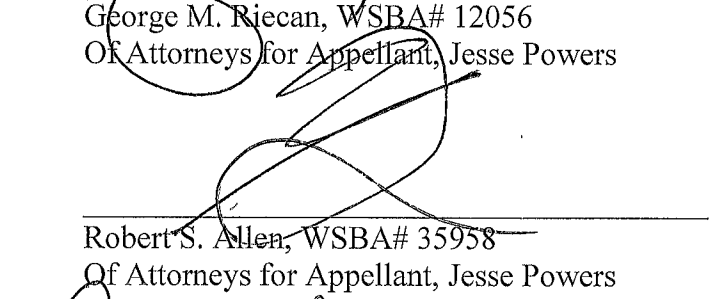

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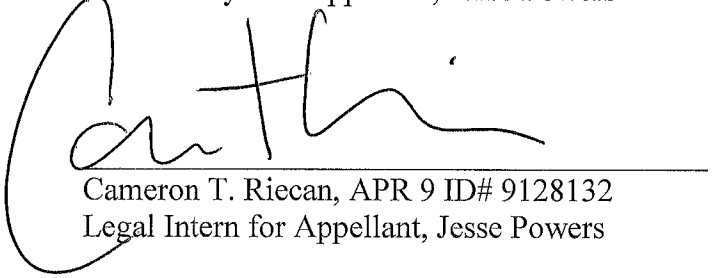

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GEORGE M RIECAN & ASSOCIATES

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