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No. 90133-3

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JESSE POWERS,

Respondent,

vs.

W.B. MOBILE SERVICES, INC.,

Petitioner.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT No. 09-2-
09464-6 AND DIVISION II, COURT OF APPEALS No. 42797-4

**PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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I. INTRODUCTION

Petitioner W.B. Mobile Services, Inc., (W.B. Mobile) submits the following brief in answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation (WSAJ).

It should be noted at the outset that WSAJ has misstated what is at issue in this case. It is not, as WSAJ suggests, about the interpretation of RCW 4.16.170. *WSAJ Brief at 1*. Rather, this case is about whether and under what circumstances a plaintiff may substitute a “true name” defendant (to borrow WSAJ’s phrase) for a “John Doe” defendant after the expiration of the statute of limitations. RCW 4.16.170 speaks to the tolling of the statute of limitations, but does not directly address any issues involving unnamed defendants or the amendment of pleadings to add new parties after the expiration of the statute of limitations.

WSAJ makes three main arguments. First, WSAJ posits that this Court’s dictum in *Sidis v. Brodie/Dohrman, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), should be “elevated to precedent” because it constitutes a “deliberate expression” on the meaning of RCW 4.16.170. *WSAJ Brief at 6-7*. Second, WSAJ suggests that plaintiffs should be relieved of any obligation to make any reasonable effort to identify all proper defendants prior to the expiration of the statute of limitations and should instead be “presumed” to have done so by naming a John Doe defendant. *Id. at 8-9*.

Third, WSAJ argues that CR 15(c) does not apply to RCW 4.16.170 and the amendment of a complaint involving a John Doe defendant. *Id. at 9-10*.

WSAJ's first two arguments should be rejected out of hand because they were not made by the parties. *See In re Matter of J.S.*, 124 Wn.2d 689, 702, 880 P.2d 976 (1994) ("We do not generally consider issues raised first and only by amicus."). Even if all arguments are considered, they are not supported either by the law or by the facts in this case. RCW 4.16.170 does not allow for the tolling of the statute of limitations as to "John Doe" defendants. It is well-established by the plain language of CR 10(a)(2) and case law that the substitution of a "true name" defendant for a "John Doe" defendant is an amendment changing the parties governed by CR 15(c). If tolling is authorized, a late-added defendant is nonetheless entitled to the minimal protections of notice, lack of prejudice, and excusable neglect provided by CR 15(c).

II. ARGUMENT

WSAJ is incorrect when it argues that the *Sidis* dictum constitutes a "deliberate expression" of the meaning of RCW 4.16.170. *See State v. Nikolich*, 137 Wash. 62, 66, 241 Pac. 664 (1925) ("deliberate expression of the court on the meaning of the statute" should not be disregarded even if not involved in the case before it). The *Sidis* Court's reference to John

Doe defendants did not relate to any issue before the Court and was unnecessary to decide the case. *See Grundy v. Thurston County*, 155 Wn.2d 1, 9-10, 117 P.3d 1089 (2005); *see also Sidis*, 117 Wn.2d at 331 (“Respondents assert there is no valid reason to distinguish between named and unnamed defendants for purposes of the tolling statute. That issue is not, however, part of this case.”). The full text of the relevant passage is this:

We note, however, than in some cases, if identified with reasonable particularity, ‘John Doe’ defendants may be appropriately ‘named’ for purposes of RCW 4.16.170.

Sidis, 117 Wn.2d at 331. These comments do not offer any insight into the meaning of the statute, but rather are how the statute might (“in some cases”) apply to a hypothetical situation (“‘John Doe’ defendants”) if another, undefined condition (“if identified with reasonable particularity”) is fulfilled. This is not a basis for adopting the dictum as law.

This is particularly true given the plain language of CR 10(a)(2), which WSAJ does not address. The rule states (with emphasis added) that when a plaintiff discovers the true name of an unknown defendant, “the pleading . . . may be *amended* accordingly.” Thus, the provisions of CR 15 for amending pleadings are the proper procedure by which a “true name” defendant is substituted. To be sure, this has long been the law in Washington with respect to unnamed defendants:

- “[T]he *substitution of a true name for a fictitious name constitutes an amendment* substituting or changing parties. When that is the case, CR 15(c) is triggered and the amended complaint must meet the specific requirements of the rule.” *Kiehn v. Nelsen’s Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (1986), *rev. denied*, 107 Wn.2d 1021 (1987) (emphasis added).
- “*When a party is added or substituted upon amendment of a complaint*, the amended complaint relates back to the date of the original pleading for purposes of a statute of limitations *if* (1) the new party received notice of the institution of the action so that he or she will not be prejudiced in making a defense on the merits; (2) the new party knew or should have known that, but for a mistake concerning identity of the proper party, the plaintiff would have brought the action against him or her; and (3) the plaintiff’s delay in adding the new party was not due to ‘inexcusable neglect.’” *Segaline v. State*, 169 Wn.2d 467,

476-77, 238 P.3d 1107 (2010) (first emphasis added; second emphasis in original; internal citations omitted).¹

- RCW 4.16.170 “does not . . . extend the time for naming all necessary parties; *any such party not named in the original timely complaint can only be added thereafter under CR 15(c).*” *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) (emphasis added).

Civil Rule 15(c) is the proper procedural mechanism by which a named defendant is substituted for a John Doe defendant after the expiration of the statute of limitations. This is true even if the *Sidis* dictum is adopted as law because tolling the statute of limitations is only one component of the analysis. WSAJ suggests that “a CR 15(c) analysis is unnecessary because the timeliness of a ‘true name’ amendment for statute of limitations purposes is governed by RCW 4.16.170.” *WSAJ Brief at 8*. There are two problems with this argument. One, WSAJ does not cite any authority for this proposition that it appears to have fashioned out of whole cloth. Two, determining “timeliness” to be the sole

¹ In its paraphrase of the CR 15(c) requirements, the *Segaline* Court omitted the rule’s qualifying phrase, “within the period provided by law for commencing the action[.]” It is undisputed in this case that W.B. Mobile did not have any notice of Powers’s claims until after the expiration of the statute of limitations. *See* CP 7-8, 65.

consideration to the exclusion of all others begs the question because timeliness is the conclusion, but not the only premise.

Civil Rule 15(c) provides important protections to unnamed defendants whom plaintiffs attempt to bring into the case after the expiration of the statute of limitations. Indeed, this Court identified the requirements of this rule as essential to upholding “the policies of the statute of limitations.” *Haberman v. WPPSS*, 109 Wn.2d 107, 173, 744 P.2d 1032 (1987). Thus, an amendment adding or substituting a party is timely (*i.e.*, relates back) only if the requirements of notice and prejudice have been met. See *Stansfield v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). Additionally, “[a]dding a new party requires a showing that it was not due to ‘inexcusable neglect’ because ***amendment of a complaint is not intended to serve as a mechanism to circumvent or extend a statute of limitations.***” *Segaline*, 169 Wn.2d at 477 n.9 (emphasis added).

WSAJ tries to work around these concerns by suggesting that any amendment to substitute a true name for a “John Doe” defendant in a case involving multiple defendants is “seemingly governed by CR 15(a)[.]” Again, WSAJ does not cite any authority for this proposition. Moreover, this argument reveals a fundamental misunderstanding of the function of CR 15. Subsection (a) and subsection (c) are not two separate rules that

apply independent of each other depending on the circumstance. Rather, subsection (a) identifies the manner in which an amendment may be made: as a matter of course, by agreement of the parties, or by leave of court. Subsection (c) identifies when the amendment takes effect, either on the date of the amendment or on the date of the original pleading. Accordingly, when leave to amend is sought after the expiration of the statute of limitations, subsection (a) cannot be read separately from subsection (c).

This is illustrated by *Stansfield, supra*. In that case, the plaintiff sought to amend his complaint to add additional causes of action. This Court noted that because the defendant had not yet answered the original complaint, the plaintiff was entitled to amend as a matter of course. 146 Wn.2d at 122. However, because the amendment was made after the expiration of the statute of limitations, this Court had to decide whether the amendment related back:

Whether an amended pleading relates back under CR 15(c) is a separate question from whether the amendment should be allowed under CR 15(a). . . . An amended pleading adding new claims relates back if it meets the requirements of the first sentence of CR 15(c).² An amended pleading adding new parties relates back if it meets the requirements

² The first sentence of CR 15(c) reads: "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."

of the second sentence of CR 15(c)³ and the delay in making the amendment is not due to inexcusable neglect or a conscious decision, strategy, or tactic.

Id. at 121, 123. The plaintiff was held to have properly met the requirements for relation back to add a new claim. *Id.* at 123.

Tolling the statute of limitations under RCW 4.16.170 against a “John Doe” defendant cannot serve as a substitute for CR 15(c) when the plaintiff seeks to substitute the true name defendant after the statute of limitations. To allow otherwise would encourage abuse of CR 10(a)(2) and create different rules for late-added defendants depending on whether the plaintiff named a “John Doe” in his or her original complaint.

If mere tolling of the statute is sufficient, then special care must be given to the circumstances under which the statute is tolled. To this end, WSAJ’s argument that a plaintiff should not have to prove diligence in attempting to identify the proper defendants should be rejected. *See WSAJ Brief at 8*. It is the law in Washington that “[a] plaintiff . . . carries the burden of proof if he or she alleges that the statute was tolled and does not bar the claim.” *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). WSAJ does not offer any reason for absolving a

³ The second sentence of CR 15(c) reads: “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.”

plaintiff from any responsibility to show his or her efforts to identify all proper defendants prior to the expiration of the statute of limitations or for impermissibly shifting the burden of proof to the defendant to prove a negative. WSAJ's position is especially problematic because, even if adopted, it would be difficult – if not impossible – for a defendant to ever meet that burden since any evidence regarding plaintiff's "diligence" in identifying parties would likely be privileged or protected work product.

WSAJ is correct that CR 10(a)(2) does not contain a diligence requirement, which is precisely why WSAJ's suggestion that CR 11 will assuage concerns of abuse of the rule is unworkable. Nonetheless, if a plaintiff is allowed to toll the statute of limitations by naming a John Doe defendant, this right must be reconciled with the fact that while "RCW 4.16.170, literally read, tolls the statute of limitation for an *unspecified* period, that period is not *infinite*[".]” *Sidis*, 117 Wn.2d at 329 (emphasis in original). It cannot reasonably be argued that a plaintiff, charged with the responsibility of the statute of limitations and knowing he has an unknown defendant, does not have any obligation to diligently pursue the identity of that defendant. To allow otherwise does not encourage plaintiffs to, as the *Sidis* Court required, "proceed with their cases in a timely manner" and only works toward the prejudice of defendants who would otherwise be entitled to rely on the protections of the statute of limitations.

This concern is well illustrated by the facts of this case, which WSAJ, for the most part, chooses to ignore. There is no evidence in the record of this appeal of any effort Powers made prior to the expiration of the statute of limitations to identify the installer of the handicap ramp. Two months after he filed his complaint, Powers was notified by one of the named defendants that his injuries may have been caused by the negligence of non-parties and that he may have failed to join indispensable parties (CP 328, 331), but Powers did nothing. Five months later, W.B. Mobile was identified as a potential witness to testify at trial regarding the installation of the ramp (CP 337), but Powers did nothing. At Powers's deposition, it was suggested that W.B. Mobile may have installed the ramp *and it was specifically noted that W.B. Mobile was not a party to the lawsuit*, but – still – Powers did nothing. In fact, the only evidence in the record of Powers's efforts to ascertain W.B. Mobile's identity is the allegation that his counsel sent out a discovery request that was not responded to until October 2010 (approximately 16 months after the expiration of the statute of limitations) and that purportedly identified W.B. Mobile as the installer of the ramp. (CP 171) However, Powers did not make the request or its response part of the record and it is thus impossible to make any determination of diligence from this mere statement. Even then, Powers inexplicably waited an additional four

months before filing his amended complaint. (CP 378) All told, approximately 20 months had passed after the expiration of the statute of limitations before W.B. Mobile was brought into this case.

If mere tolling is allowed, these facts reinforce the need for a stringent “reasonable particularity” requirement. WSAJ suggests that this requirement can be satisfied simply by identifying “the wrongful acts or omissions allegedly committed by the John Doe defendant.” *WSAJ Brief at 9*. Certainly, a plaintiff should do at least this, but it should not be the only condition to satisfy. This Court should also consider the following language from Division II in *Bresina v. Ace Paving Co., Inc.*, 89 Wn. App. 277, 948 P.2d 870 (1997), which assumed the validity of the *Sidis* dictum:

‘Reasonable particularity’ depends, obviously, on a variety of factors. A major factor is the nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant; if a plaintiff identifies a party as ‘John Doe’ or ‘ABC Corporation,’ after having three years to ascertain the party’s true name, it will be difficult to say, at least in the vast majority of the cases, that the plaintiff’s degree of particularity was ‘reasonable.’

Id. at 282.

It is axiomatic that it is the plaintiff’s responsibility to determine the proper parties to sue and to do so before the expiration of the statute of limitations. Allowing a plaintiff to circumvent the statute of limitations by naming a John Doe – without any consideration to what, if any, efforts the

plaintiff made to determine the John Doe's identity – runs contrary to the law and to fundamental notions of fairness. *Cf. Bunko v. City of Puyallup Civil Serv. Comm'n*, 95 Wn. App. 495, 500, 975 P.2d 1055 (1999) (“Once a party meets the notice and prejudice requirements of CR 15(c), relation back does not contravene fundamental notions of fairness. But when adding a defendant by amendment, the moving party must also show that its failure to name the party was by excusable neglect.”).

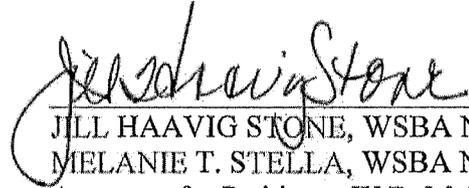
If a plaintiff timely names a John Doe defendant in a complaint and later seeks to substitute the true name defendant after the expiration of the statute of limitations, he or she must comply with the requirements of CR 15(c). Even if the statute of limitations is tolled by virtue of the plaintiff having identified the John Doe defendant with “reasonable particularity,” CR 15(c) must still be satisfied in order to ensure that a late-added defendant is afforded the minimum protections of notice, lack of prejudice, and excusable neglect contemplated by the relation back doctrine. If mere tolling of the statute of limitations is sufficient, then the circumstances under which a John Doe is identified with reasonable particularity must be carefully identified, again, in order to ensure that a late-added defendant is afforded these minimum protections. The arguments advanced by WSAJ do not adequately address any of these concerns and should be disregarded.

III. CONCLUSION

For the reasons stated above, W.B. Mobile respectfully requests that this Court reject the arguments made by WSAJ. This Court should reverse the Court of Appeals and reinstate the trial court's order of dismissal.

Dated this 30 day of September, 2014.

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DECLARATION OF SERVICE

I, Melanie T. Stella, hereby declare under penalty of perjury under the laws of the State of Washington that on September 30, 2014

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DATED this 30th day of September, in Tacoma, Washington.



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