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STATE OF WASHINGTON
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No. 90133-3

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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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 REPLY MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE**

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Petitioner W.B. Mobile Services, Inc. submits the following reply memorandum in support of its motion to strike pursuant to RAP 17.4(e).

The question of whether “excusable neglect” should be abandoned as an element of CR 15(c) relation back analysis is not properly before this Court. In its petition for review, W.B. Mobile asked this Court to decide whether, if the statute of limitations as to a “John Doe” defendant is tolled under RCW 4.16.170, a plaintiff must also satisfy the requirements of CR 15(c) in order to substitute a named defendant for the “John Doe.” If the Court answers in the affirmative, then the only remaining question is whether the necessary elements – including excusable neglect – for relation back have been met.

Powers suggests it is “reasonable” to allow him to argue that excusable neglect does not belong in a CR 15(c) analysis simply because W.B. Mobile has challenged whether he can satisfy that element. He is incorrect. Powers is asking this Court to change the law and overrule its previous decisions in *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981); *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 691 P.2d 575 (1984); *Stansfield v. Douglas County*, 146 Wn.2d 116, 43 P.3d 498 (2002); among others, without having to make any showing under RAP 13.4(b). A request to overrule long-standing decisions is not the type of issue that can be raised for the first time in a supplemental brief.

It is true that Powers asked the Court of Appeals to eliminate excusable neglect from a CR 15(c) analysis, but he also acknowledged that “inexcusable neglect has become a fourth ground for denying relation back in Washington case law[.]” *Powers App. Brief at 25 and 27*. Indeed, Powers went to great lengths to argue that his conduct did not amount to inexcusable neglect. *Powers App. Reply Brief at 17-23*. Regardless, nothing in Powers’s Court of Appeals briefing excuses his failure to raise the question of whether excusable neglect should be law in an answer to W.B. Mobile’s petition for review, for two reasons. One, this is not a proper argument to have made to the Court of Appeals. *See, e.g., Perrin v. Stensland*, 158 Wn. App. 185, 200, 240 P.3d 1189 (2010) (“Only our Supreme Court can decide that the ‘inexcusable neglect’ factor should lose its place as an independent basis for denying relation back under CR 15(c).”). Two, this argument was not reasonably developed below because the Court of Appeals ultimately determined that CR 15(c) was not applicable given its holding that the statute of limitations had been tolled.

Finally, a determination of whether excusable neglect is properly part of a CR 15(c) analysis is not necessary to reach a proper decision in this matter. W.B. Mobile has asked this Court to decide whether CR 15(c) applies in this case and, if so, whether Powers has met the elements, including excusable neglect, for relation back. Accordingly, this Court

need only decide whether Powers has demonstrated excusable neglect, not whether excusable neglect should be considered in the first instance.

Powers did not file an answer to W.B. Mobile's petition for review. He may not raise a new issue (particularly an issue that requires a change in the law) in his supplemental brief and deprive W.B. Mobile of the opportunity to address it. W.B. Mobile respectfully requests that this Court grant its motion to strike and decline to consider the issues raised in section II(3) of Powers's supplemental brief.

Dated this 3rd day of September, 2014.

STADIUM LAW GROUP, LLC



JILL HAAVIG STONE, WSBA No. 24256
MELANIE T. STELLA, WSBA No. 28736
Attorneys for Petitioner W.B. Mobile

DECLARATION OF SERVICE

I, Melanie T. Stella, hereby declare under penalty of perjury under the laws of the State of Washington that on September 21, 2014

I filed with the Court the original of:

Petitioner's Reply Memorandum in Supp. of Motion to Strike

and caused to be served true copies of the same upon:

<p>Attorney for Respondent Cameron T. Riecan Tacoma Injury Law Group, Inc., P.S. 3848 S Junett Street Tacoma, WA 98401 P.O. Box 1113 Tacoma, WA 98401</p>	<p><input checked="" type="checkbox"/> Via email to <u>cameron@tacomainjurylawgroup.com</u> and <u>doug@tacomainjurylawgroup.com</u> per Stipulation for Electronic Service <input type="checkbox"/> Via U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Via messenger</p>
<p>Attorney for Respondent Tamara S. Clower Attorney at Law 1105 Tacoma Avenue South Tacoma, WA 98402</p>	<p><input checked="" type="checkbox"/> Via email to <u>tamaraclower@yahoo.com</u> per Stipulation for Electronic Service <input type="checkbox"/> Via U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Via messenger</p>
<p>WSAJ Foundation Bryan Harnetiaux 517 E 17th Avenue Spokane, WA 99203</p> <p>Gary Bloom W 422 Riverside, Suite 1300 Spokane, WA 99201</p>	<p><input checked="" type="checkbox"/> Via email to <u>sandi@dctpw.com</u> and <u>garyb@hblaw2.com</u> per electronic service agreement <input type="checkbox"/> Via U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Via messenger</p>

DATED this 21st day of September, in Tacoma, Washington.



 MELANIE T. STELLA

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Subject: Powers v. W.B. Mobile Services, Inc. (No. 90133-3)

Attached for filing and service: Petitioner's Reply Memorandum in Support of Motion to Strike and Declaration of Service

Case name and number: *Powers v. W.B. Mobile Services, Inc.* (Supreme Court Cause No. 90133-3)

Person filing document: Melanie T. Stella, WSBA No. 28736
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Please confirm receipt. Thank you very much.

Melanie T. Stella, Attorney

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