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No. 90133-3

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SUPREME COURT
OF THE STATE OF WASHINGTON

JESSE POWERS,

Respondent,

v.

WB MOBILE SERVICES, INC.,

Petitioner.

RESPONDENT JESSE POWERS'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. Introduction

Mr. Jesse Powers, Respondent herein, appealed the dismissal of W.B. Mobile Services, Inc. (Hereinafter “W.B. Mobile”) as a defendant in his personal injury case, where said dismissal was based upon the statute of limitations. The Court of Appeals of the State of Washington, Division II, reversed the trial court and held that Mr. Powers’s claim was timely brought under RCW 4.16.170 and its implementing case law. See *Powers v. W.B. Mobile, Services, Inc.*, 177 Wn. App. 208, 311 P.3d 58 (2013), *review granted*, 328 P.3d 902 (2014). W.B. Mobile submitted a petition for review to this Court and it was subsequently granted.

The Respondent Mr. Jesse Powers hereby submits this brief in answer to the brief of amicus curiae the Washington State Association of Justice Foundation (Hereinafter “WSAJ Foundation”). See RAP 10.1(e); 10.3(f).

II. Argument

- a. **Mr. Powers properly identified John Doe One in his original complaint under CR 10(a)(2), and met the requirements of RCW 4.16.170 for the purposes of Tolling of the Statute of Limitations against John Doe 1/WB Mobile Services, Inc.**

At the time Mr. Powers 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. See CR 10(a)(2). Mr. Powers is in agreement with WSAJ Foundation that this case principally involves interpretation of RCW 4.16.170 and that the Court must revisit its dicta in *Sidis v. Brodie/Dorhman, Inc.* to determine whether this dicta should be affirmed, and furthermore that the Court should affirm and elevate said dicta to precedent. See *Sidis v. Brodie/Dorham, Inc.*, 117 Wn.2d 325, 331, 815 P.2d 781 (1991); Br. of WSAJ Foundation at 3-4.

The rationale of the WSAJ Foundation's brief is in line with the *Sidis* decision, and it is just as true or more so in situations with a multi-defendant action where John Does are named, in that, "It is arguably unfair to require a plaintiff to serve all defendants within a set limitation period, when it may be difficult or impossible to determine the actual location of some defendants before discovery is underway." *Sidis*, at 330.

Because this case is determinative on whether RCW 4.16.170 applies to John Does defendants, the plaintiff under CR 10(a)(2) should be presumed to have been ignorant of the identity of the later named defendant. The WSAJ Foundation correctly states that there is no diligent requirement in CR 10(a)(2), RCW 4.16.170, nor *Sidis*. Additionally, if the Court elevates the *Sidis* dicta to precedent to include John Doe defendants, Mr. Powers contends that he has met the "reasonable particularity" requirement, as he

distinguished the John Doe from other named defendants. The “reasonable particularity” test should be met when the complaint specifies the wrongful acts of omissions allegedly committed by the John Doe defendant, and thus this would avoid the argument “that plaintiffs might attempt to evade the name requirement by naming numerous "John Doe" defendants but only serving one easy target such as the State, resulting in what arguably might be considered an abuse of process.” *Sidis*, at 331. Simply naming an “easy target” such as the State or John Does without “reasonable particularity” was not the case here, nor does the plaintiff believe doing so would or should meet the test as mentioned herein.

b. The Court of Appeals and the WSAJ Foundation Amicus Curiae Brief are correct that in such circumstances under RCW 4.16.170 and *Sidis*, that the Court does not need to reach CR 15(c).

Mr. Powers contends that the Court of Appeals was correct in their decision. Mr. Powers agrees that CR 15(c) in these types of circumstances is inappropriate, but suggests that while CR 15(a) should normally apply in amendments involving John Doe Pleadings, under the facts of this case a simple change of caption should suffice. Under *Sidis*, an original pleading contains all named defendants it reasons that once the remaining named defendants are served according to RCW 4.16.170 there is no need to “amend” said pleading, but what remains to be completed is the service

requirement. Here, when RCW 4.16.170 and *Sidis* is applied, once the original pleading was served on the John Doe Defendant/W.B. Mobile the requirements were satisfied. Normally, a Plaintiff would then need to amend the pleading and serve the John Doe defendant. But the John Doe defendant, ie. W.B. Mobile, in this case was named with “reasonable particularity” and it received notice and was served with the original complaint already. Thus it was solely a matter of housekeeping to change the caption of the original pleading once the true name of the John Doe was discovered. Because Mr. Powers served one named defendant, it tolled the statute as to the John Doe defendant named with “reasonable particularity.”

As stated in the WSAJ Foundation Amicus Curiae Brief, it is unnecessary to engage in a CR 15(c) analysis in this case because Mr. Powers amended the complaint according to CR 15(a) and was simply correcting the caption in the original complaint to include the real name of the defendant, not amending the original complaint to change the party under CR 15(c). Br. of WSAJ Foundation at 10. The specificity of CR 10(a)(2) does not include the requirement that the amendment must relate back under CR 15(c). Here, the correct party was served and named with “reasonable particularity” and the only deficiency was in the actual name of the defendant. Under these circumstances, the amendment was merely correcting the party's description and did not entail the actual “changing” of

the party and thus, it should be allowed under CR 10(a)(2) and CR 15(a). Further support under Federal practice would apply even if it fell under CR 15(c),

“A misnomer is involved when the correct party was served so that the party before the court is the one plaintiff intended to sue, but the name or description of the party in the complaint is deficient in some respect. Under those circumstances, it has been argued that an amendment merely correcting the party's description does not entail the actual “changing” of the parties and it should be allowed as a matter of course as long as it satisfies the transaction standard in Rule 15(c)(1)(B).”

6A Wright & Miller, Fed. Prac. & Proc. Civ. § 1498.2 (3d ed.) The case below also discusses a change to a caption and while it references Fed. R. Civ. P. 15(c), it allows such changes and is in line with the facts of this case as well,

“Defendant's contention that the Court should quash the Summons and service thereof on the grounds that the service is improper because the caption is in error as to the name of the Defendant does not constitute grounds for dismissal. Rule 15(c), Federal Rules of Civil Procedure, permits such errors to be corrected by the use of amendments to the pleadings and such error may be corrected at the pretrial conference.”

Hatridge v. Seaboard Sur., 74 F.R.D. 6, 7 (E. D. Okla. 1976). Therefore, Mr. Powers substantially agrees with the contentions of the WSAJ Foundation Amicus Curiae Brief with minor deviations as noted herein.

//

III. Conclusion

For the reasons stated herein, Respondent Mr. Jesse Powers respectfully request that the Court affirm the decision of the Court of Appeals in this matter, fully find in Respondent Jesse Powers' favor, and allow the case to proceed at superior court for trial on the merits against the petitioner/defendant W.B. Mobile Services, Inc.

Respectfully submitted this 30th day of September, 2014.

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DECLARATION OF SERVICE

I, Cameron T. Riecan, hereby declare under penalty of perjury under the laws of the State of Washington that on September 30, 2014, I filed with the Court, the original of Respondent Jesse Powers's Answer to Brief of Amicus WSAJ Foundation and caused to be served true copies of the same upon:

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Attached for filing and service, please find the following:
Respondent Jesses Powers's Answer to Brief of Amicus Curiae Washington State Association of Justice Foundation and attached Declaration of Service by email.

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