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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.*

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

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## I. INTRODUCTION

This appeal concerns whether and under what circumstances a plaintiff may properly substitute a named defendant for a “John Doe” defendant who was named in an original, timely complaint after the expiration of the statute of limitations.

This personal injury action arises out of a construction site accident that occurred on or about June 2, 2006. Respondent Jesse Powers claims that, while in the course of his employment as an awning installer, he was walking along a handicap access ramp and the ramp collapsed, causing him injury. The ramp, along with a mobile office structure, was rented to Premier Communities by Pacific Mobile Structures for use at a construction site managed by Premier. Pacific subcontracted with Petitioner W.B. Mobile Services, Inc. to install the ramp.

Powers filed suit on May 28, 2009, just five days before the expiration of the statute of limitations. Powers identified Premier and Pacific by name and named two “John Doe” defendants, one of which was alleged to be the builder of the ramp (“John Doe One”). Premier and Pacific were timely served. However, Powers did not seek to amend his complaint to substitute W.B. Mobile for the “John Doe One” defendant until February 2011, some 20 months after the statute of limitations expired.

The trial court granted W.B. Mobile's motion for summary judgment on statute of limitation grounds. Division II reversed, holding that Powers had identified "John Doe One" with reasonable particularity such that Powers's timely service on Premier and Pacific tolled the statute of limitations against W.B. Mobile under RCW 4.16.170. Division II declined to consider whether Powers's amended complaint substituting W.B. Mobile related back under CR 15(c). This Court accepted W.B. Mobile's petition for review.

W.B. Mobile asks this Court to decide three issues:

**One**, should this Court adopt its dictum in *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), suggesting that the statute of limitations may be tolled under RCW 4.16.170 as to a "John Doe" if the "John Doe" is identified with reasonable particularity?

**Two**, if the *Sidis* dictum is adopted as law, what constitutes "reasonable particularity" sufficient to toll the statute of limitations?

**Three**, if the *Sidis* dictum is adopted as law, must a plaintiff who identifies a "John Doe" with reasonable particularity also satisfy the requirements of CR 15(c) for relation back to substitute a named defendant for the "John Doe"?

## II. SUMMARY OF ARGUMENT

**The Tolling Statute.** The Court of Appeals erred in holding that the statute of limitations was tolled as to W.B. Mobile under RCW 4.16.170. Relying on this Court's dictum in *Sidis* as applied by *Bresina v. Ace Paving Co., Inc.*, 89 Wn. App. 277, 948 P.2d 879 (1997), the Court of Appeals held that Powers's amended complaint was timely because Powers had identified "John Doe One" with reasonable particularity before the expiration of the statute of limitations.

The Court of Appeals improperly adopted the *Sidis* dictum as law. RCW 4.16.170 does not provide for tolling as to fictitious defendants. An amended complaint that substitutes a named defendant for a "John Doe" constitutes an amendment changing the parties and is governed by CR 15(c).

Even if the *Sidis* dictum is adopted as law, the Court of Appeals still erred because it improperly applied the "reasonable particularity" requirement. Powers's identification of the role W.B. Mobile played in the incident is insufficient identification when Powers did not present any evidence of any efforts he made pre-filing to determine W.B. Mobile's identity.

**The Relation Back Rule.** The Court of Appeals erred in failing to consider whether Powers's amended complaint substituting W.B. Mobile

for the “John Doe” defendant related back to the date on which Powers originally filed his action. The court apparently believed it did not need to reach the relation back issue because it held that the statute of limitations had been tolled under RCW 4.16.170. This is contrary to CR 10(a)(2), which provides that when the true name of a “John Doe” defendant is discovered, “the pleading . . . may be *amended* accordingly.” (Emphasis added.) This is also contrary to the holding of *Kiehn v. Nelsen’s Tire Co.*, 45 Wn. App. 291, 724 P.2d 434 (1986), *rev. denied*, 107 Wn.2d 1021 (1987), which holds that “the 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*, 45 Wn. App. at 295 (internal citations omitted).

The trial court’s dismissal of W.B. Mobile should be affirmed because Powers cannot satisfy the requirements of CR 15(c). W.B. Mobile did not have notice of Powers’s lawsuit prior to the expiration of the statute of limitations and Powers’s failure to name W.B. Mobile in his original complaint was inexcusable neglect.

### **III. STATEMENT OF THE CASE**

W.B. Mobile respectfully refers this Court to its Statement of the Case set out in its petition for review. The underlying facts and procedural

history are also set out in *Powers v. W.B. Mobile Services, Inc.*, 177 Wn. App. 208, 311 P.3d 58 (2013), a copy of which is found in the Petitioner’s Supplemental Appendix at **Tab 1**.

#### IV. SUPPLEMENTAL ARGUMENT

##### A. Standard of Review and Burdens of Proof

This is an appeal from an order granting W.B. Mobile a summary judgment order of dismissal on statute of limitations grounds. “The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

W.B. Mobile, the moving party, bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). As the defendant, W.B. Mobile satisfies this burden by showing there is an absence of evidence to support an essential element of the plaintiff’s case. *Id.*, and *n. 1*.

“The statute of limitations is an affirmative defense, and the defendant carries the burden of proof. A plaintiff, however, 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.2d 753 (2008) (internal citations omitted).

With respect to CR 15(c), Powers, as the party seeking relation back of an amendment, has the “burden of proof . . . to prove the conditions precedent under CR 15(c).” *Foothills Development Co. v. Clark County*, 46 Wn. App. 369, 375, 730 P.2d 1369 (1986). Powers also “has the burden of proving that the mistake in failing to amend in a timely fashion was excusable.” *Id.*

**B. The Court of Appeals Erred in Holding that the Statute of Limitations Was Tolled as to W.B. Mobile.**

The statute of limitations for Powers’s personal injury claim is three years. RCW 4.16.080(2). Powers alleges that the incident giving rise to this action occurred on June 2, 2006. Thus, to be timely, any negligence claims arising out of that incident had to have been filed no later than June 2, 2009. Powers did not file his claims against W.B. Mobile until February 18, 2011, approximately 20 months after the statute of limitations expired.

There is no dispute that Powers did not timely file his claims against W.B. Mobile. Nonetheless, the Court of Appeals held that the statute of limitations had been tolled under RCW 4.16.170 pursuant to this Court’s dictum in *Sidis* as applied by Division II in *Bresina*. In *Sidis*, this Court held that, under RCW 4.16.170, service on one defendant in a multi-defendant action within 90 days from the date of filing tolls the statute of

limitations as to remaining, unserved defendants. *Sidis*, 117 Wn.2d at 331.

In doing so, this Court observed:

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. . . . We note, however, 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. This Court did not identify to which cases such a rule might apply, nor did it define the phrase "reasonable particularity."

This dictum has caused confusion among each of the three appellate divisions. In *Iwai v. State*, 76 Wn. App. 308, 884 P.2d 936 (1994), affirmed on other grounds by 129 Wn.2d 84, 915 P.2d 1089 (1996), Division III affirmed the trial court's dismissal of a defendant who was substituted for a "John Doe" after the expiration of the statute of limitations. Division III declined to apply the *Sidis* dicta and agreed with the pre-*Sidis* decision in *Kiehn*, which "concluded the statute [of limitations] was not tolled in circumstances in which a named party was later substituted for a fictitious one. Instead, the plaintiff had to comply with the requirements of CR 15(c) for relation back." *Iwai*, 76 Wn. App. at 312. Because the plaintiff could not show that the late-added defendant knew or should have known of the existence of her claim and because the plaintiff did not demonstrate that her failure to name the defendant was the

result of excusable neglect, Division III held that plaintiff's amended complaint did not relate back to her original filing. *Id.* at 313-14.

Division II next considered the issue in *Bresina, supra*. In that case, the plaintiff sought to substitute a named defendant (Ace Paving) after the expiration of the statute of limitations for the fictitiously named "ABC CORPORATION" in her original, timely complaint. 89 Wn. App. at 279-80. The plaintiff acknowledged that her amended complaint did not relate back to her original complaint under CR 15(c) because – like here – the named defendant did not receive notice of the lawsuit "within the period provided by law for commencing the action[.]" *Id.* at 280 (quoting CR 15(c)). The plaintiff did contend, though, that the time for commencing her action against Ace Paving had not expired because she had served a different named defendant. *Id.*

Division II rejected this argument. Assuming the validity of the *Sidis* dictum, the court held that the plaintiff did not sufficiently identify Ace Paving in her original complaint:

'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 cases, that the plaintiff's degree of particularity was 'reasonable.'

Here, [plaintiff] had three years to obtain Ace's true name, and she offers no reason for not doing so. It is apparent that she could have obtained Ace's name at almost any time during the three years by proper investigation, or, if necessary by filing a complaint and seeking discovery. Given these circumstances, naming 'ABC Corporation' did not involve a degree of particularity that was 'reasonable,' and the trial court did not err by ruling that the statute of limitation was not tolled.

*Id.* at 282 (internal footnote omitted).

Finally, in *Martin v. Dematic*, 178 Wn. App. 646, 315 P.3d 1126 (2013)<sup>1</sup>, the plaintiffs sought to add a successor corporation as a defendant in a products liability case after the expiration of the statute of limitations, arguing *inter alia* that the *Sidis* dictum allowed them to toll the statute of limitations as to the successor corporation based on their having timely filed and served their initial complaint against other defendants. Rejecting this argument, Division I observed that “[n]o court in Washington has explicitly stated that the *Sidis* dictum is law or recognized the statute of limitations as being tolled as to a defendant who is neither named in the complaint nor served within the limitations period.” *Id.* at 663. The court held that because the plaintiffs “neither named [the successor corporation] as a defendant in the original complaint nor served the company, serving

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<sup>1</sup> This Court granted plaintiff's Petition for Review in *Martin* on April 30, 2014. *Martin v. Dematic*, 180 Wn.2d 1009, 325 P.3d 914 (2014). In its order granting W.B. Mobile's Petition for Review, this Court directed the clerk to set this case as a companion case with *Martin*. Both *Martin* and this case are set for oral argument on October 14, 2014.

the named defendants did not toll the statute of limitations as to [the successor corporation].” *Id.*

The *Martin* court also rejected the plaintiffs’ argument that their amended complaint related back under CR 15(c). *Id.* at 667-68. The court held that the plaintiffs failed to demonstrate excusable neglect in part because they “provide[d] no evidence of actions that they took to determine the correct parties before the statute of limitations expired or what information any investigation revealed.” *Id.* at 667.

In light of these holdings, this Court should decline any invitation to adopt the *Sidis* dicta as law. Nothing in the language of RCW 4.16.170 suggests that the statute of limitations is properly tolled when a named defendant is substituted for a fictitious defendant. CR 10, the rule allowing a plaintiff to name an unknown defendant, makes clear that the appropriate vehicle for substituting a named defendant is amendment, not tolling:

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, and when his true name shall be discovered, the pleading or proceeding may be *amended* accordingly.

CR 10(a)(2) (emphasis added). This is further reinforced by the *Kiehn* decision, which held that “the substitution of a true name for a fictitious party 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*, 45 Wn. App. at 295.

The statute of limitations is designed to “protect parties against stale claims because they are more likely to rely upon untrustworthy evidence than are fresh claims, and to instill a measure of certainty and finality into one’s affairs by eliminating the fear of threatened litigation.” *Wakeman v. Lommers*, 67 Wn. App. 819, 822-23, 840 P.2d 232 (1992), *rev. denied*, 121 Wn.2d 1010 (1993). But allowing a plaintiff to toll the statute of limitations against a defendant by naming a “John Doe” neither encourages plaintiffs to diligently pursue their claims, nor does it protect defendants from stale claims. Employing the relation back analysis in CR 15(c) balances the competing interests of plaintiffs (in preserving claims) and defendants (in timely notice).

If the *Sidis* dictum is adopted, special care should be given to the “reasonable particularity” component. As noted above, the *Bresina* court identified the “major factor” in determining whether the plaintiff identified the “John Doe” with reasonable particularity as “the nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant[.]” *Bresina*, 89 Wn. App. at 282. Here, the Court of Appeals ignored this language and held that Powers identified W.B. Mobile with “reasonable particularity” because he “described the role of the unnamed

defendant as it related to the lawsuit and distinguished it from the named defendants.” *Opinion at 6 (Tab 1)*.

The *Bresina* court’s approach is the better one. The naming of a “John Doe” implies that the plaintiff does not know the identity of a defendant. *See Jacobsen v. Osborne*, 133 F.3d 315, 321 (5th Cir. 1998) (naming a “John Doe” is not a “‘mistake’ in identifying the correct defendant; rather, the problem was not being able to identify that defendant”).<sup>2</sup> At a minimum, there should be some expectation that a plaintiff will make a concerted effort to discover the names of the defendants prior to the expiration of the statute of limitations. *See, e.g., Bresina*, 89 Wn. App. at 282 n.10 (reasonableness of degree of particularity in naming defendant should be judged by length of statute of limitations). Allowing a plaintiff to circumvent the statute of limitations by merely alleging the role of a “John Doe” runs counter to the function of the tolling statute, which is simply to allow a plaintiff additional time to serve all necessary parties. To be sure, this Court has held that the tolling statute “does not extend the time for naming all necessary parties; any such party not named in the original timely complaint can only be added

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<sup>2</sup> The majority of federal courts do not allow an amended complaint substituting a named party for a “John Doe” defendant to relate back under FRCP 15(c). *See Jacobsen*, 133 F.3d at 320-21. The Federal Rules of Civil Procedure, though, do not have a rule that corresponds to Washington’s CR 10(a)(2).

thereafter under CR 15(c).” *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984).

Powers cannot satisfy the *Bresina* standard and, thus, the Court of Appeals should be reversed. Powers did not submit any evidence of what, if any, efforts he made prior to the expiration of the statute of limitations to determine the identity of the person or entity responsible for installing the ramp.<sup>3</sup> Instead, Powers merely claimed that he could not determine the true identity of “John Doe” until he engaged in discovery with the other named defendants, but does not offer any explanation as to why this was the case. He also did not offer any explanation why he waited until October 2010 – some sixteen months after the expiration of the statute of limitations – to obtain a discovery response from Pacific identifying W.B. Mobile as the installer of the ramp.<sup>4</sup> Nor did he explain why he then waited an additional four months before filing his amended complaint in February 2011. In the absence of such evidence, there can be no dispute that Powers did not identify “John Doe” with reasonable particularity

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<sup>3</sup> There is a reference in the record to Powers having been told by his employer that Pacific installed the ramp. (CP 255-56 [Powers deposition testimony at page 23:16-26:4]). However, there is no indication when this conversation took place and this evidence was not submitted by Powers in opposition to W.B. Mobile’s motion for summary judgment.

<sup>4</sup> Powers did not make his discovery request or Pacific’s response part of the record in the trial court.

sufficient to justify tolling the statute of limitations against W.B. Mobile for nearly two years.

RCW 4.16.170 is designed to provide protection to plaintiffs in multi-defendant actions from the “harsh effects of the statute of limitations.” *Sidis*, 117 Wn.2d at 330. As to “John Doe” defendants, though, nothing in *Sidis* or the statute suggests that a plaintiff is entitled to this protection as a matter of right. There must be some evidence in the record to justify the need for tolling. If such a need exists, it will be revealed by, as in *Bresina*, focusing on “the nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant[.]” *Bresina*, 89 Wn. App. at 282. If this Court adopts the *Sidis* dictum as law, Powers should be held to the *Bresina* standard for reasonable particularity. Because he cannot meet this standard, the Court of Appeals should be reversed and the trial court’s order of dismissal reinstated.

**C. The Court of Appeals Erred in Not Considering Whether Powers’s Amended Complaint Naming W.B. Mobile Related Back under CR 15(c).**

Even assuming that a plaintiff can toll the statute of limitations by naming a “John Doe” with reasonable particularity, any subsequent amended complaint must satisfy the relation back requirements of CR 15(c). As this Court has previously held, 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, supra*, 103 Wn.2d at 223. However, the Court of Appeals held: “With our decision that Powers’s claim against W.B. Mobile was timely under RCW 4.16.170, we do not reach the separate question whether the amended complaint related back to the date of the initial complaint under CR 15(c).” *Opinion at 7 (Tab 1)*. This was in error.

In *Kiehn*, Division II held that “CR 10(a)(2) must be read in conjunction with CR 15(c),” meaning that “the substitution of a true name for a fictitious party 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.” *Id.* at 294-95. Furthermore, the language of CR 10 makes clear that the substitution of a named defendant for a “John Doe” is accomplished via amendment. CR 10(a)(2) (“ . . . and when his true name shall be discovered, the pleading . . . may be amended accordingly”). In other words, Powers’s right under CR 10(a)(2) to designate a defendant by a fictitious name does not relieve him of the requirements of CR 15(c).

The trial court’s order of dismissal should be reinstated because Powers’s amendment substituting W.B. Mobile does not meet the

requirements of CR 15(c). Under that rule, “an amendment changing the party against whom a claim is asserted relates back [to the date of the original pleading] if” the claim asserted in the amended pleading arose out of the same transaction or occurrence set forth in the original pleading

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.

CR 15(c)(1)-(2) (emphasis added).

It is undisputed in this case that W.B. Mobile did not receive notice of this action until nearly two months after the statute of limitations expired. And even then, such notice was not due to any efforts on the part of Powers to identify W.B. Mobile, but rather was a tender letter from Pacific.<sup>5</sup> This letter is of no consequence, though, because it was not received by W.B. Mobile prior to the expiration of the statute of limitations and because it did not provide W.B. Mobile with any notice that a “mistake” concerning W.B. Mobile’s identity had been made.

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<sup>5</sup> In *Martin*, the late-added defendant also purportedly received first notice of the lawsuit via a tender letter from a named defendant. *See Martin*, 178 Wn. App. at 665. That tender letter, though, was sent *prior to* the expiration of the statute of limitations. *Id.*

Powers cannot meet his burden of proof to satisfy the requirements for relation back.

Additionally, under CR 15(c), “a party’s failure to timely name a necessary party cannot be remedied if the failure resulted from ‘inexcusable neglect.’” *Watson v. Emard*, 165 Wn. App. 691, 700, 267 P.3d 1048 (2011). Powers has the burden of proof to show that any mistake in failing to timely amend was excusable. *Id.* He cannot meet this burden and the trial court’s order of summary judgment should be affirmed.

It is well-established in Washington law that “inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” *Stansfeld v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). Furthermore, if a party’s identity is “ascertainable upon reasonable investigation, the failure to name [it] will be inexcusable.” *Teller v. APM Terminals Pacific Ltd.*, 134 Wn. App. 696, 706, 142 P.3d 179 (2006).

Powers has not put any evidence into the record of any efforts he made prior to filing this action to ascertain the identity of the individual or entity responsible for the installation of the ramp. This is not a case where the plaintiff mistakenly believed that he had named the proper party, such as mistaken identity or a deceased defendant. Aware that he did not know

the identity of the installer of the ramp, Powers named a “John Doe” defendant but then apparently made no effort to determine the John Doe’s identity before filing suit. Powers’s failure to make any effort to ascertain W.B. Mobile’s identity was inexcusable neglect. His amended complaint cannot relate back and the trial court correctly dismissed his claims against W.B. Mobile.

## V. CONCLUSION

A statute of limitation “is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts.” *Davis v. Rogers*, 128 Wash. 231, 235, 222 Pac. 499 (1924).

This [C]ourt has long and consistently held that the defense of the statute of limitations is not unconscionable, but is entitled to the same consideration as any other defense. Statutes of limitation are now considered as wide and beneficial in their purpose. The statute is a legislative declaration of public policy which the courts can do no less than respect.

*Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572-73, 403 P.2d 880 (1965)  
(internal citations and quotation marks omitted).

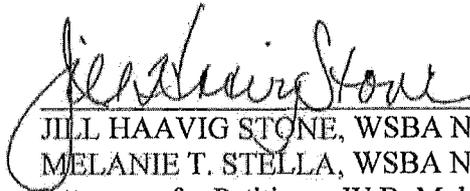
RCW 4.16.170 allowed W.B. Mobile to perfect the action he commenced against Premier and Pacific within 90 days. Powers should not be allowed to circumvent the statute of limitations – either under RCW 4.16.170 or CR 15(c) – by naming a “John Doe” defendant. This is

particularly true when he did not submit any evidence of any effort made pre-filing to determine the unknown defendant's identity.

Because W.B. Mobile was not named in the original complaint and because Powers's amended complaint does not relate back, the trial court properly dismissed Powers's claims against W.B. Mobile. W.B. Mobile respectfully asks this Court to reverse the Court of Appeals and reinstate the trial court's order dismissing W.B. Mobile.

Submitted this 8 day of August, 2014.

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**PETITIONER'S SUPPLEMENTAL APPENDIX**

**TAB 1**

FILED  
COURT OF APPEALS  
DIVISION II

2013 OCT 15 AM 8:55

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

JESSE POWERS,  
  
Appellant,  
  
v.  
  
WB MOBILE SERVICES, INC., and JOHN  
DOE TWO,  
  
Respondents,  
  
And  
  
PREMIER COMMUNITIES, INC., a  
Washington Corporation; PACIFIC MOBILE  
STRUCTURES, INC., a Washington  
Corporation,  
  
Defendants.

No. 42797-4-II

PUBLISHED OPINION

BJORGEN, J. — Jesse Powers appeals the dismissal of W.B. Mobile as a defendant in his personal injury case based on the statute of limitations. Powers argues that his claim was timely under RCW 4.16.170 and CR 15(c) because (1) he properly identified W. B. Mobile as “John Doe One” in his original complaint, (2) W.B. Mobile had actual notice of Powers’s claim, and (3) Powers’s service on the other defendants tolled the statute for 90 days. We hold that Powers’s claim was timely brought under RCW 4.16.170 and its implementing case law, but do not reach whether his amended complaint relates back under CR 15(c). Accordingly, we reverse and remand for trial on the merits.

FACTS

I. INJURY

Premier Communities Inc. and Pacific Mobile Structures Inc. entered into a contract for Pacific to provide numerous mobile structures at Premier's residential construction sites. Premier decided to relocate one of the mobile structures, along with an accompanying handicap ramp, from one construction project to another. Unknown to Premier, Pacific subcontracted with W.B. Mobile to install the ramp after the structure was relocated. After spending a day installing the ramp, Russ Williams, the owner and sole employee of W.B. Mobile realized that he lacked sufficient materials to complete the job. Williams strung yellow caution tape around the incomplete ramp and "wire tied" some boards across the ramp. Clerk's Papers (CP) at 98. He then left the site to obtain additional ramp pieces for the project from Pacific and did not return until the next morning.

Premier also contracted with Awning Solutions to install an awning on the same relocated mobile structure. Awning Solutions assigned its employee, Powers, to carry out the installation. On June 2, 2006, the ramp's platform collapsed when Powers stepped forward on it while carrying an awning. Powers fell backward with the awning.

When Williams returned, he discovered that someone had torn off the caution tape and removed the boards he had placed across the incomplete ramp. He completed the job, and then taped and boarded the ramp up again so that no one would use it before Pacific could backfill the area. Williams did not know that Powers had been there.

## II. PROCEDURE

Powers filed suit on May 28, 2009, five days before expiration of the three-year statute of limitations, alleging that the collapse of the handicap access ramp caused him severe, permanent, and disabling injuries. Powers identified two defendants by name, Premier and Pacific, along with two "John Doe" defendants.<sup>1</sup> CP at 185-86. The complaint identified "John Doe One" as:

The Defendant, JOHN DOE CONSTRUCTION COMPANY is believed to be a corporation or partnership whose true name and capacity is unknown to Plaintiff. That when the true name and capacity of JOHN DOE CONSTRUCTION is ascertained by Plaintiff, Plaintiff pray [sic] for leave to amend this complaint to so state reasons that JOHN DOE CONSTRUCTION COMPANY is believed to be the builder of the handicap access ramp where the incident occurred.

CP at 186. The complaint identified "John Doe Two" as the corporation or individual "responsible for the maintenance and safety for the premises where [Powers] sustained injuries involved in this lawsuit." CP at 186.

Unknown to Powers, Pacific sent a letter to Williams in July 2009, attaching a copy of the complaint and formally tendering Pacific's defense to W.B. Mobile. Williams forwarded the letter to W.B. Mobile's insurer, which denied the tender. Before receiving Pacific's letter, Williams did not know that Powers had been injured or that he had filed a lawsuit.

Pacific answered Powers's complaint in July 2009, alleging as affirmative defenses that nonparties' negligence may have caused Powers's injuries and that Powers may have failed to join indispensable parties. In December 2009, Pacific filed a witness disclosure, stating that it might call an employee of W.B. Mobile to testify at trial "about the terms of the contract

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<sup>1</sup> CR 10(a)(2) provides:

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, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

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between W.B. Mobile and Pacific Mobile as well as about who installed the ramp where [sic] the plaintiff alleges failed.” CP at 337.

Shortly thereafter, in January 2010, Powers testified in his deposition that his employer told him that Premier had installed the handicap ramp. In response to Powers’s October 2010 discovery request, however, Pacific identified W.B. Mobile as the installer of the ramp. Four months later, in February 2011, Powers filed an amended complaint, substituting W.B. Mobile for “John Doe One,” and stating that he believed W.B. Mobile was “the builder and/or installer of [the] handicap access ramp” that caused his injury. CP at 378.

W.B. Mobile moved to dismiss Powers’s claims against it under the statute of limitations. The trial court granted the motion and dismissed those claims with prejudice. The trial court also denied Powers’s motion for reconsideration. Powers appeals.<sup>2</sup>

## ANALYSIS

### I. STANDARD OF REVIEW

We review a summary judgment order de novo, performing the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is appropriate 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 moving party is entitled to judgment as a matter of law. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 759, 265 P.3d 207 (2011), *review denied*, 173 Wn.2d 1035, 277 P.3d 669 (2012).

### II, RCW 4.16.170

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<sup>2</sup> Powers, Premier, and Pacific stipulated that they had satisfactorily settled the complaint, and the court dismissed Powers’s claims against both parties. Neither Premier nor Pacific are parties to this appeal.

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Powers argues that under RCW 4.16.170, the time period for commencing a negligence action includes the 90 days after the plaintiff files or serves the complaint. W.B. Mobile responds that RCW 4.16.170 does not extend the statute of limitations. We hold that Powers's claim against WB Mobile was timely brought under RCW 4.16.170, which provides:

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 the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. 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.

In *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991) (quoting RCW 4.16.170), our Supreme Court read the phrase “[o]ne or more of the defendants” from this statute unambiguously to require that only one of the defendants need be served within the 90-day period to toll the statute of limitations against all defendants. The *Sidis* Court disapproved of language in *North St. Ass'n v. City of Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981), to the extent that *North St. Ass'n* interpreted RCW 4.16.170 to require a petitioner to serve all necessary parties within the 90-day period. *Sidis*, 117 Wn.2d at 331-32. Further, the *Sidis* Court noted in dictum that although the issue of unnamed defendants was not before it:

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. . . . We note, however, that 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.

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In *Bresina v. Ace Paving Co., Inc.*, 89 Wn. App. 277, 282, 948 P.2d 870 (1997), we assumed the validity of the *Stidis* dictum: that a plaintiff can toll the period for suing an unnamed defendant by timely filing and serving a named defendant, if the plaintiff identifies the unnamed defendant with “reasonable particularity” before the period for filing suit expires. We noted that “reasonable particularity” depends on a variety of factors, including the “nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant.” *Bresina*, 89 Wn. App. at 282. Applying this principle, we held that *Bresina* had not met its requirements.

The plaintiff in *Bresina* identified the unnamed defendant as “ABC CORPORATION, whose true identity is unknown,” while alleging in her complaint that “ABC CORPORATION . . . may have the same responsibilities described in paragraph III above.” *Bresina*, 89 Wn. App. at 279. The *Bresina* Court concluded that merely naming “ABC Corporation” after three years in which to ascertain the party’s true name, “did not involve a degree of particularity that was reasonable.” *Bresina*, 89 Wn. App. at 282. Therefore, “the trial court did not err by ruling that the statute of limitation was not tolled.” *Bresina*, 89 Wn. App. at 282.

In contrast to the lack of particularity observed in *Bresina*, Powers’s original complaint did not merely name a John Doe without distinguishing him from the named defendants. Rather, Powers’s complaint specified that “John Doe One” referred to the “builder of the handicap access ramp.” CP at 186. This ably described the role of the unnamed defendant as it related to the lawsuit and distinguished it from the named defendants. Under *Bresina*, Powers identified the unnamed defendant with reasonable particularity before the three-year statute of limitations expired.

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The *Sidis* dictum, as applied by *Bresina*, also requires that at least one of the named defendants be served in a timely manner. In *Bresina*, 89 Wn. App. at 279, at least one of the named defendants was served within the three-year statute of limitations, which did not occur here. However, *Sidis* required only that one of the defendants be served *within the 90-day period* to toll the statute against all defendants, consistently with the requirement of RCW 4.16.170 that “one or more of the defendants” be served within 90 days of filing. *Sidis*, 117 Wn.2d at 329-32. The *Sidis* dictum, and *Bresina*’s application of it, must be read consistently with this core holding of *Sidis*.

Powers filed suit against Premier Communities, Pacific Mobile Structures, and John Doe One, described as carrying out the role of W.B. Mobile, within the three-year statute of limitations. Powers served Premier Communities and Pacific Mobile Structures within 90 days of filing. Under RCW 4.16.170, as interpreted by *Sidis* and *Bresina*, this tolled the statute of limitations against W.B. Mobile.

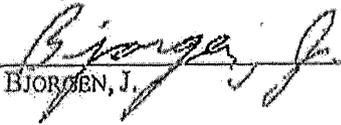
### III. CR 15(c)

With our decision that Powers’s claim against W.B. Mobile was timely under RCW 4.16.170, we do not reach the separate question whether the amended complaint related back to the date of the initial complaint under CR 15(c).

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IV. CONCLUSION

We reverse and remand for trial on the merits.

  
BJORGEN, J.

We concur:

  
HUNT, P.J.

  
PENKYLK, J.

**DECLARATION OF SERVICE**

I, Melanie T. Stella, hereby declare under penalty of perjury under the laws of the State of Washington that on August 8, 2014, I filed with the Court, the original of W. B. Mobile Services, Inc.'s Supplemental Brief of Petitioner and caused to be served true copies of the same upon:

<b>Attorney for Plaintiff</b>  <b>Cameron T. Riecan</b> Tacoma Injury Law Group, Inc. P.S. 3848 S Junett Street Tacoma, WA 98401 P.O. Box 1113 Tacoma, WA 98401	<b>[X] Via email to</b> <a href="mailto:cameron@tacomainjurylawgroup.com">cameron@tacomainjurylawgroup.com</a> <a href="mailto:doug@tacomainjurylawgroup.com">doug@tacomainjurylawgroup.com</a> <b>per Stipulation for Electronic Service</b> <input type="checkbox"/> Via U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Via messenger
<b>Co-Counsel for Plaintiff</b>  <b>Tamara S. Clower</b> Attorney at Law 1105 Tacoma Avenue South Tacoma, WA 98402	<b>[X] Via email to</b> <a href="mailto:tamaraclower@yahoo.com">tamaraclower@yahoo.com</a> <b>per</b> <b>Stipulation for Electronic Service</b> <input type="checkbox"/> Via U.S. Mail, postage prepaid <input type="checkbox"/> Via facsimile <input type="checkbox"/> Via messenger

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of August, in Tacoma, Washington.

  
\_\_\_\_\_  
MELANIE T. STELLA  
Attorney at Law

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Attached for filing and service: Supplemental Brief of Petitioner, Supplemental Appendix, and Declaration of Service

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

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