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No. 90133-3

SUPREME COURT
OF THE STATE OF WASHINGTON

JESSE POWERS,

Respondent,

v.

W.B. MOBILE SERVICES, INC.,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT JESSE POWERS

Cameron T. Riecan, WSBA# 46330
Tamara S. Clower, WSBA# 20208
TACOMA INJURY LAW GROUP, INC., P.S.
A Professional Services Corporation
Attorneys at Law
3848 S. Junett St.
Tacoma, WA 98409
P.O. Box 1113
Tacoma, WA 98401
Ph: (253) 472-8566
Fax: (253) 475-1221
Cameron@tacomainjurylawgroup.com
Tammy@tacomainjurylawgroup.com

 ORIGINAL

Attorneys for Respondent, Jesse Powers

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I. Statement of the Case

Jesse Powers, Respondent herein, appealed the dismissal of W.B. Mobile Services, Inc., as a defendant in his personal injury case 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.

The Respondent incorporates by reference the applicable facts contained in its Court of Appeals brief ("Brief of Appellant") pp. 1-9.

II. Argument

1. THE COURT OF APPEALS WAS CORRECT WHEN IT HELD THAT MR. POWERS IDENTIFIED THE "JOHN DOE" DEFENDANT WITH REASONABLE PARTICULARITY BEFORE THE LIMITATIONS PERIOD EXPIRED AND THUS, THE FILING OF ACTION AND SERVICE OF PROCESS ON THE NAMED PARTIES TOLLED THE LIMITATIONS PERIOD AS TO THE JOHN DOE/INSTALLER OF THE RAMP.

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/W.B. Mobile Services, Inc.

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.

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. Pursuant to discovery propounded on named defendant Pacific Mobile, the discovery responses received by Mr. Powers on October 21, 2010 disclosed W.B. Mobile Services, Inc. (Hereinafter "W.B. Mobile") for the first time as a "sub-contractor hired to do a set up" of the handicap ramp in question. It was at this juncture that Mr. Powers actually became aware of the true identity of the installer of the ramp, so as to allow the 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's action in tort. The trial court allowed the amendment, and the amended summons and complaint were 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.

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.

Mr. Powers's 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*, the Washington State Supreme Court held that the service upon one defendant tolled the statute of limitations as to the remaining named defendants. *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. Service on one defendant within that time frame effectively commences the action and tolls the limitations period beyond 90 days as to all remaining defendants. *Id.* At 329-30. This rule gives plaintiffs in multi-defendant actions extra protection from the harsh effects of the statute of limitations, and avoids the unfairness that would result from requiring them

to serve all defendants within the limitations period. *Id.* at 330. As in a typical construction site case there exists multiple defendants, as is true in this case, where there was not a clear connection between defendants. A convoluted employment relationship existed that connected some sub-contractors with other sub-contractors, and the general contractor with some sub-contractors but not all sub-contractors. Moreover, unbeknownst to Respondent Mr. Powers, his employer Awning Solutions, and the general contractor, another subcontractor Pacific Mobile hired W.B. Mobile to set up the mobile structure and the ramp. All parties but one, the sub-contractor who hired W.B. Mobile, did not know of W.B. Mobile's involvement. In fact Mr. Powers was led to believe from his own employer that Pacific Mobile was the ramp installer. This was because Pacific Mobile subcontracted its job duty to W.B. Mobile without the knowledge of the General Contractor.

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 (i.e. W.B. Mobile, as it was properly named with reasonable particularity) was tolled. Additionally, Mr. Powers specifically identified "John Doe One" in the original complaint as having been the party "believed to have built the

handicap access ramp” that caused Mr. Powers’s injuries. This was a very particularized role and a specific identification of W.B. Mobile, was not overbroad, nor was it applied to all named defendants in the generic manner as was the case in *Bresina*. See *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 80 (1997).

Because RCW 4.16.170 tolled the statute, and per the decision and rationale given by the Court of Appeals in this matter, the court did not need to address the issue of CR 15(c). *Powers v. W.B. Mobile Services, Inc.*, 177 Wn. App. 208, 311 P.3d 58, (2013), *review granted*, 328 P.3d 902 (2014). However, assuming *arguendo*, that Mr. Powers must also show he met the requirements of CR 15(c), for the reasons stated in Mr. Powers’ briefs and herein, the amended complaint under CR 15(c) was proper and thus relates back to the original complaint. See Court of Appeals Brief of Appellant and Reply Brief of Appellant. The facts remain that the defendant W.B. Mobile received actual notice on or about July 28, 2009 of Mr. Powers’s 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).

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

If the Court were to find that Mr. Powers must go beyond showing that he timely brought his claim under RCW 4.16.170 and its implementing case law, then Mr. Powers posits that he has indeed met the requirements of CR 15(c). First, there is no dispute that the amended complaint arose out of the conduct, transaction, and occurrence set out in the original pleading. Further 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 prior to the expiration of the time period for service of process. W.B. Mobile also knew or should have known that it was not named as a defendant in the original complaint only because of Mr. Powers's misunderstanding and mistake about which entity was in charge of building the handicap ramp, and as W.B. Mobile knew it was the builder of the ramp (as John Doe One was described in original complaint), but for the mistake the action would have brought against it.

Now, having received notice and actual possession of the original complaint, 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.

2. POWERS IS DISTINGUISHABLE FROM THE COMPANION CASE, *MARTIN V. DEMATIC*, BECAUSE POWERS IDENTIFIED W.B. MOBILE WITH “REASONABLE PARTICULARITY” AND DID NOT EXHIBIT “INEXCUSABLE NEGLIGENCE” IN DISCOVERING THE IDENTITY OF W.B. MOBILE AND AMENDING THE COMPLAINT

a. Powers Did Not Incorrectly Name The Defendant But Rather, Identified An Unnamed Defendant With Reasonable Particularity Within The Three-Year Statute Of Limitations.

Unlike the circumstances in *Martin*, this is not a case of mistaken identity. As recognized by the Court of Appeals, the dictum in *Sidts* supports the conclusion that “if identified with reasonable particularity, ‘John Doe’ defendants may be appropriately ‘named’ for purposes of RCW 4.16.170.” *Powers*, at 214 (quoting *Sidts v. Brodie/Dohrmann, Inc.*, 117 Wn.2d at 331). The decisions in both this case and in *Martin* do not conflict with this standard.

In *Martin*, the plaintiffs named a predecessor corporation as the defendant in the original complaint, not an unnamed “John Doe” defendant. *Martin v. Dematic*, 178 Wn. App. 646, 666, 315 P.3d 1126 (2013) review granted, 180 Wn.2d 1009, 325 P.3d 914 (2014). The plaintiffs argued that RCW 23B.11.060(1), which allows a pending proceeding against a defunct corporation to continue against a surviving corporation following the merger, supports the proposition that naming the predecessor corporation in an action that occurs years after the merger takes place effectively identifies

the successor corporation with reasonable particularity. *Id.* at 662-63. However, since the plaintiffs' action was not pending at the time of any merger, the court concluded that naming the predecessor corporation, WSH, did not identify the successor, FCCNA, with reasonable particularity so as to allow FCCNA to be substituted for WSH in the amended complaint. *Id.* at 663. Therefore, the court determined that, since the dictum in *Sidis* did not apply, serving the named defendants did not toll the statute of limitations as to the successor corporation as it was "neither named in the complaint nor served within the limitations period." *Id.*

In contrast, Mr. Powers *did* properly identify the unnamed defendant with reasonable particularity in the original complaint so as to constitute a naming of the defendant before the statute of limitations expired. Mr. Powers's naming of "John Doe One" as the "builder of the handicap access ramp," distinguished it from and prevented confusion with the named defendants. CP at 186. Unlike *Martin*, there was no mistake as to the defendant Mr. Powers intended to name.

Furthermore, the courts are not as divided on the application of the *Sidis* dictum as the petitioner would suggest. Rather, the decisions in both *Iwai* and *Bresina* help to clarify the reasonable particularity standard by excluding overly broad references to a John Doe defendant such as, "negligent or otherwise responsible," *Iwai* at 312, or "ABC

CORPORATION, whose true identity is unknown.” *Bresina*, 89 Wn. App. at 279; *Iwai v. State*, 76 Wn. App. 308, 884 P.2d 936 (1994). Likewise, *Martin* further defines the boundaries of this standard by preventing parties from identifying a successor corporation by instead naming the “defunct corporation well after the statute of limitations expire[s], and long after a merger [takes] place.” *Martin*, at 663.

Additionally, in *Martin*, the court noted that the plaintiffs failed to provide evidence satisfying the second requirement of relation back under CR 15(c)—that the new party knew or should have known that but for a mistake concerning its identity, it would have been named in the original complaint. Contrary to the plaintiffs’ arguments in *Martin*, the court noted that FCCNA had no reason to know “that it was mistakenly omitted from the original complaint” based on naming the predecessor company when it asserted that an entity that “never merged with any Fletcher entity” was responsible for performing the work at issue, and when FCCNA had filed a certificate of dissolution shortly before the plaintiffs filed their initial complaint. *Martin*, at 666.

Here, however, Powers provided adequate evidence to satisfy this requirement of CR 15(c). The fact that W.B. Mobile knew or should have known that, but for a mistake, it would have been named in the original complaint was evidenced by W.B. Mobile’s statement under oath that it

received a letter from Pacific Mobile with an attached summons and complaint well within the 90 days required for service. Powers Appellant Br. at 8.

b. Unlike The Plaintiffs In *Martin*, Powers Satisfied The Additional Requirement Of Relation Back Under CR 15(C), As Articulated By The Washington State Supreme Court In *North Street Ass'n V. City Of Olympia*, When He Provided Evidence That He Lacked "Inexcusable Neglect."

The Court has articulated the requirements of relation back under CR 15(c) to include that "the plaintiff's delay in adding the new party was not due to 'inexcusable neglect.'" *Segaline v. State of Washington, Dep't of Labor & Indus.*, 169 Wn.2d 467, 476-77, 238 P.3d 1107, 1112 (2010) (quoting *Stansfield v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002)). "[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984).

In *Martin*, the court concluded that the plaintiffs failed to demonstrate excusable neglect as 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." *Martin*, at 666-67. The court emphasized that the plaintiffs had multiple opportunities for discovering the identity of the correct parties, including public records of the mergers, a newspaper article, and the answer and third

party complaint filed by the named corporation asserting claims against the successor corporations. *Id.*

The court's decision in *Martin* is consistent with those in *Bresina* and *Iwai* where the plaintiffs did not have a reason for failing to obtain the true identity of the defendant, *Bresina* at 280, and when a title search would have provided the plaintiff with information that would have led to the discovery of the unnamed defendant's identity. *Iwai*, at 313-14. *See also Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174-75, 744 P.2d 1032 (1987) (no excuse where identities of omitted defendants was readily available from a variety of public sources) *Tellinghuisen v. King County*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (no excuse where identity of omitted parties was matter of public record).

Here, however, Mr. Powers *was* able to demonstrate a lack of "inexcusable neglect." In the absence of public records that would have revealed the name of the defendant, Mr. Powers obtained the identity of the installer of the ramp, W.B. Mobile, by filing a complaint and seeking discovery, which is an appropriate means of obtaining the identity of a John Doe defendant as mentioned by the court in *Bresina*. *See Bresina*, at 277. In fact, the identity and role of W.B. Mobile was disclosed for the first time in the responses to discovery received at the end of October 2010. Following this disclosure, the previously "named defendants" and Mr. Powers

stipulated to amend the complaint so as to properly name W.B. Mobile. The trial court allowed the amendment (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 deposition of Russell Williams, the agent and owner of W.B. Mobile. This deposition was taken on May 5, 2011.

This is in contrast to the situation in *Martin*, where the court noted that the named defendant's third party claims against the successors in interest in its answer and third party complaint filed in October 2007 should have provided notice to the plaintiffs of the potential liability of those parties; instead, the Martins did not file an amended complaint naming the proper parties until January 2010. *Martin*, at 667.

3. MR. POWERS ASKS THE COURT TO DECIDE WHETHER "INEXCUSABLE NEGLIGENCE" SHOULD LOSE ITS PLACE AS AN INDEPENDENT BASIS FOR DENYING RELATION BACK UNDER CR 15(C), OR IN THE ALTERNATIVE NARROW THE APPLICATION OF THE "INEXCUSABLE NEGLIGENCE" PRONG UNDER CR 15(C).

- a. The Inexcusable Neglect Prong Under CR 15(C) Should Lose Its Place As An Independent Basis For Denying Relation Back Because Its Divergence From The Analogous Federal Rule Is At Odds With The Guiding Principle Of Liberal Construction Announced By This Court In *Desantis v. Angelo Merlino & Sons, Inc.***

Finally, in the recent case of *Perrin* the court went into an analysis to determine if there had been inexcusable neglect, as is the standard in Washington courts. *Perrin v. Stensland*, 158 Wn. App. 185, 197, 240 P.3d 1189 (2010). This case is important because *Perrin* decided not to follow the *Krupski* case based upon state law grounds (*Krupski Supra*). The *Perrin* court further stated, this issue 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) nor 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, “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). As in this case, Mr. Powers did not strategically make a choice to avoid naming W.B. Mobile and given

the facts there should be no issue about adequate notice to W.B. Mobile, Mr. Powers' actions are explainable and do not rise to the level of inexcusable neglect, and thus, there is no arguable prejudice to W.B. Mobile.

Furthermore, a requirement of "excusable neglect" does not appear in the test of CR 15(c) nor in the parallel federal rule, Fed.R.Civ.P. 15(c). *Perrin*, 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.* This places Washington State in a minority of jurisdictions that apply this requirement. *See* 6A Wright & Miller, Et. al., Fed. Prac. & Proc. Civ. § 1498.3 n.17 (3d. ed.) (citing cases in only eleven U.S. District Courts that apply the inexcusable neglect requirement).

However, a broad construction of inexcusable neglect has become a favorite argument and issue of much litigation in our courts. The inexcusable neglect requirement seems to be at odds with both this court's guiding principle that CR 15(c) is to be liberally construed and with the modern usage of said rule. *See Perrin*, 158 Wn. App. at 188; *see also, DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn.2d 222, 225, 427 P.2d 728 (1967). The Respondent Powers posits that the inexcusable neglect prong, as analyzed in *North Street Ass'n* and its progeny, was premised on now

outdated justifications and case law, and the Court should re-analyze whether the inexcusable neglect prong should still be followed. See CR 15(c); Fed.R.Civ.P 15(c); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S.Ct. 2485, 177 L.Ed.2d. 48 (2010); *North Street Ass'n v. City of Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981) (citing *Upshaw v. Equitable Life Assurance Soc'y of United States*, 85 F.R.D. 674 (E.D. Ark. 1980); *Morse v. Michaelson, Rabig & Ramp*, 101 ILL. App.2d 366, 243 N.E.2d 271 (1968); 3 J. Moore, *Federal Practice* ¶ 15.15, at 15-231 (1980)). 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. *Craig 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. *Perrin*, 158 Wn. App. at 188.

b. Inexcusable Neglect Falls Within The Exceptions Of Stare Decisis Because It Is An Amorphous Concept Leading To Instability And Unpredictable Results.

The doctrine of stare decisis provides stability and predictability and it imposes a strict standard that “requires a clear showing that an established

rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). However, the Court has stated that “[the court] cannot yield to it when to yield is to overthrow principle and do injustice.” *Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997) (quoting *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980)). Likewise, in *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953), this Court also pointed out that the doctrine is subject to exceptions when it stated:

It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question.

Hutton at 785 (quoting *Rumsey v. New York & N. E. R. Co.*, 133 N.Y. 79, 30 N.E. 654, 655, 15 L.R.A. 618, 28 Am.St.Rep. 600).

The inexcusable neglect prong of the rule was added by the court in *North Street Ass'n* based on 3 Moore's Federal Practice P 15.15, at 15-231 (2d ed. 1979) as quoted in *Upshaw v. Equitable Life Assur. Soc'y of United States*, 85 F.R.D. 674 (E.D.Ark.1980). The court in *Upshaw* quoted the text as saying: “Plaintiff's inexcusable neglect continues to be a proper consideration in Rule 15(c) determinations.” *Upshaw*, at 678. However, in

the most recent edition of Moore's Federal Practice, this language has been changed to state:

If the delay is particularly egregious, some decisions shift the burden to the moving party to show that its delay was due to oversight, inadvertence, or excusable neglect before the court will allow the amendment. These decisions do not explicitly explain the initial allocation of a burden of production in amendment cases. Presumably, the liberal ethos of amendment means that the party opposing amendment bears a burden of production to come forward with reasons or evidence to deny leave to amend. These decisions would then shift the burden to the movant to come forward with reasons justifying an especially lengthy delay in moving to amend.

3 James W. Moore, Moore's Federal Practice, § 15.15 (3d. ed. 2010). "Excusable neglect" is mentioned in this section of Moore's Federal Practice, which discusses prejudice to the non-moving party as a result of the movant's delay in requesting leave to amend. Under this prong of the CR 15(c) test "[p]rejudice may result from delay by the movant in requesting leave to amend." *Id.* In general, "a court will deny leave to amend only if the non-moving party is in fact prejudiced by the delay." *Id.* The text adds that "[i]f delay is unduly excessive, however, the court may deny leave based on that factor alone," which suggests that courts may impose a presumption of prejudice leading to a denial of leave in cases where there is an egregious delay. *Id.* Furthermore, at least in some jurisdictions, such a presumption can be rebutted by the moving party with evidence of excusable neglect. *Id.* n.12. Thus, as indicated by the text in Moore's Federal

Practice, rather than creating an additional requirement for a moving party to meet, inexcusable neglect is inherently a part of the prejudice prong of the CR 15(c) test. Therefore, following the same text that the court previously relied upon in *North Street Ass'n*, with its updated analysis of the factors used in a 15(c) determination, demonstrates that a continued use of the inexcusable neglect requirement in Washington State would be a misapplication of the law, which brings it within the exceptions to stare decisis.

Likewise, although the courts have attempted to shape the “inexcusable neglect” prong by determining its applicability on a case-by-case basis, it is an amorphous concept that falls within the exceptions of stare decisis. This vague requirement lends itself to the instability and unpredictability that stare decisis seeks to avoid and will continue to raise questions as to what exactly constitutes inexcusable neglect and precisely what criteria will be determinative. The explicit requirements found within the language of the rule can be fairly applied through a determination of whether a party has or has not met the requirements of relation back to the date of the original complaint. However, defining all of the scenarios that the inexcusable neglect requirement potentially does or does not apply to has proven to be a task that causes confusion and yields unpredictable results. As it stands now, plaintiffs and courts are forced to, at best, decipher

and, at worst, guess as to exactly how much investigation is enough and exactly how long is too long for an amended complaint to be filed that names the proper party before the plaintiff will not be deemed as exhibiting inexcusable neglect. Such a standard puts plaintiffs in the position of casting a wide net that names parties who may be witnesses or those that turn out to not be defendants so as to avoid the appearance of inexcusable neglect. It is common for plaintiffs attorneys to get boilerplate answers with every possible affirmative defense and witness lists that include numerous “witnesses” which likely will never be called. While it is common for both parties to assert numerous claims, defenses, and witnesses so as to not waive something which may be important later, it adds to the time needed and careful thought of each party to decipher and narrow the issues. Furthermore, continued application of this requirement inheres in it the risk of creating a chilling effect on the representation of plaintiffs whose cases are reaching the statute of limitations when there is a chance that the identity and/or role of one or more defendants will not be readily ascertainable before the expiration of the statute of limitations.

Therefore, Mr. Powers respectfully requests that this Court look to Fed.R.Civ.P. 15(c), other jurisdictions (See *Buran v. Coupal*, 87 N.Y.2d 173, 180, 661 N.E.2d 978, 638 N.Y.S.2d 405 (1995)), secondary sources, the *Perrin* case, and the recent United States Supreme Court decision of

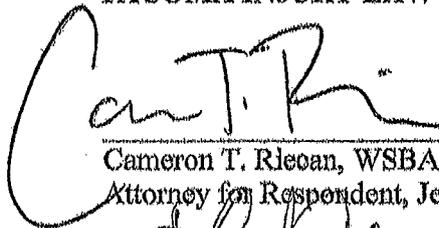
Krupski, and decide whether “inexcusable neglect” should lose its place as an independent basis for denying relation back under CR 15(e) under Washington State case law. See, *Krupski*, 130 S.Ct at 2485. This judicially added requirement subverts the purpose of relation back, because it upends the balance 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.

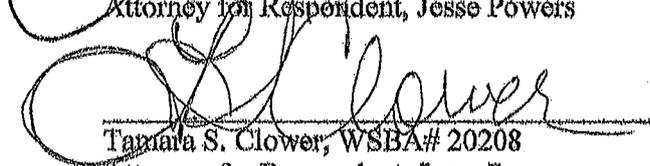
VI. Conclusion

For the reasons stated above, Mr. Powers respectfully requests that the Court affirm the decision of the Court of Appeals, find fully 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.

Respectfully submitted this 8th day of August, 2014.

TACOMA INJURY LAW GROUP, INC., P.S.


Cameron T. Riegan, WSBA# 46330
Attorney for Respondent, Jesse Powers


Tamara S. Clower, WSBA# 20208
Attorney for Respondent, Jesse Powers

DECLARATION OF SERVICE

I, Cameron T. Riecan, 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 Jesse Powers's Supplemental Brief of Respondent and caused to be served true copies of the same upon:

VIA electronic mail per Stipulation for electronic mail

Attorneys for Petitioner:

Jill Haaving Stone,
Melanie T. Stella
Stadium Law Group, LLC
705 S. 9th Street, Suite 106
Tacoma, WA 98405
jill@snlawllc.com
melanie@snlawllc.com
priscilla@snlawllc.com

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



CAMERON T. RIECAN, WSBA# 46330
Attorney-at-Law

OFFICE RECEPTIONIST, CLERK

To: Cameron Riecan
Cc: jill@snlawllc.com; melanie@snlawllc.com; priscilla@snlawllc.com; Doug Lopez; 'Tamara Clower'
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Attached for filing and service, please find the following: Supplemental Brief of Respondent Jesse Powers and Declaration of Service by email.

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

Person filing documents: Cameron T. Riecan, WSBA No.: 46330
(253) 472-8566
Cameron@tacomainjurylawgroup.com

Please confirm receipt. Thank you.

Very Truly Yours,

Mr. Cameron T. Riecan
Attorney at Law
Tacoma Injury Law Group, Inc., P.S.
P.O. Box 1113
Tacoma, WA 98401-1113
Ph: (253) 472-8566
Fax: (253) 475-1221
www.tacomainjurylawgroup.com

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