68132-6

68132-0

No. 68132-0-I

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

NINA L. MARTIN, individually, and as Personal Representative of the ESTATE OF DONALD R. MARTIN, RUSSELL L. MARTIN, THADDEUS J. MARTIN, and JANE MARTIN,

Appellants,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and SIEMEN DEMATIC; GENERAL CONSTRUCTION COMPANY dba/fka WRIGHT SCHUCHART HARBOR COMPANY; FLETCHER GENERAL, INC., and FLETCHER CONSTRUCTION COMPANY NORTH AMERICA,

Respondents/Cross-Appellant.

BRIEF OF RESPONDENTS FLETCHER GENERAL, INC. AND FLETCHER CONSTRUCTION COMPANY NORTH AMERICA

FLOYD, PFLUEGER & RINGER, P.S.
Francis S. Floyd, WSBA No. 10642
A. Troy Hunter, WSBA No. 29243
Amber L. Pearce, WSBA No. 31626
200 West Thomas Street, Suite 500
Seattle, WA 98119
Telephone: (206) 441-4455
Facsimile: (206) 441-8484

Attorneys for Respondents Fletcher Construction Company of North America, and Fletcher General, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CIVIL RULES

I. INTRODUCTION

This case asks the Court to consider whether the Martin family exercised due diligence to investigate and identify the allegedly correct corporate entities as defendants within the three-year statute of limitations for personal injury/wrongful death. The corporate identities and successor relationships were readily available from numerous public records, including the Secretary of State's corporate records and the *Seattle Times*, however the Martin family never named the proper party.

Respondents Fletcher General, Inc., (FGI) and Fletcher Construction Company North America (FCCNA) contend that under *de novo* review: (1) the Martin family's claims had expired under the three-year statute of limitations; (2) their claims against other entities, including Wright Schuchart Harbor Company, did not toll the statute of limitations with respect FCCNA and FGI; and (3) the merger statute did not apply because the Martin family's claims were not "pending" at the time of any merger, as required by RCW 23B.11.060(1)(d).

Similarly, under a manifest abuse of discretion standard: (1) the Martin family's first and second amended complaints adding FCCNA and FGI did not relate back to the Martin family's original claim against Wright Schuchart Harbor Company under CR 15(c); and (2) they failed to exercise due diligence to identify the correct defendants within the statute

of limitations. Accordingly, the trial court correctly dismissed the Martin family's claims against both FCCNA and FGI.

II. STATEMENT OF FACTS

A. Mr. Martin Died.

The Martin family alleges that on August 13, 2004, Mr. Donald Martin was fatally injured while working for his employer, Kimberly-Clark, at its paper products plant in Everett, Washington. (CP 618-24) Specifically, a dipping conveyor on Tissue Machine #5 (TM #5) was allegedly inadvertently lowered onto Mr. Martin while he was cleaning paper out of a chute below the conveyor. (CP 748)

B. "Wright Schuchart Harbor *Joint Venture*" Installed TM #5 that Is the Subject of the Underlying Litigation.

An entity called "*Wright Schuchart Harbor Joint Venture*" installed TM #5 in 1981. (CP 425-26; emphasis added) A critical fact throughout the underlying litigation that has been repeatedly muddied and conflated is that "Wright Schuchart Harbor *Joint Venture*" was and always has been a separate and distinct corporate legal entity. For example, "Wright Schuchart Harbor *Joint Venture*" is not the same corporate entity as Wright Schuchart *Company* or Wright Schuchart, *Inc.* (CP 425)

C. Sprague Resources Corporation Purchased Wright Schuchart Harbor *Joint Venture.*

Wright Schuchart Harbor *Joint Venture* never merged with any Fletcher entity, including Respondents Fletcher General, Inc. and Fletcher Construction Company North America. (CP 425) Rather, a company called "Sprague Resources Corporation" acquired "Wright Schuchart Harbor *Joint Venture*" in 1987. (CP 426)

To the extent that any assets or insurance exists to cover the Martin family's wrongful death claims, then Sprague Resources Corporation—who acquired Wright Schuchart Harbor *Joint Venture* (the entity that installed TM #5)—is the correct entity.

D. The Fletcher Entities Purchased Wright Shuchart, *Inc.* in 1987.

The Fletcher entities/groups acquired Wright Schuchart, *Inc.* in 1987. (426) Wright Schuchart, *Inc.* is and always has been a distinct and separate corporate entity from Wright Schuchart Harbor *Joint Venture.* (CP 425-46) Stated differently, the Fletcher entities (including Respondents Fletcher General, Inc. and Fletcher Construction Company North America) have absolutely nothing to do with Wright Schuchart Harbor *Joint Venture* (the entity that installed TM #5).

E. The Martin Family Filed a Lawsuit Against "General Construction Company dba/fka Wright Schuchart Company."

On June 29, 2007—nearly three years after Mr. Martin's August 13, 2004 accident—the Martin family filed a lawsuit against seven corporate entities, including "General Construction Company dba/fka Wright Schuchart Company." (CP 3576-85)

F. "General Construction Company dba/fka Wright Schuchart Company Filed A Third-Party Complaint Against Respondent Fletcher General, Inc. in October 2007.

On October 16, 2007, "General Construction Company dba/fka Wright Schuchart Company" filed its Answer and asserted a Third-Party Complaint against Respondent Fletcher General, Inc. (FGI) as a potentially liable party for breach of contract and indemnity. (CP 3543-51)

General Construction Company dba/fka Wright Schuchart Company's October 16, 2007 Answer and Third-Party Complaint *alleges* that "[o]n or about July 27, 2007, General tendered Plaintiffs' claims to Fletcher General and Fletcher Pacific[1] and demanded to be defended, indemnified and help harmless from same." (CP 3550)

Despite knowing as early as *October 16, 2007*, that Fletcher General, Inc. was named as a *potentially liable party*, the Martin family did nothing.

---

[1] For purposes of this appeal, Fletcher Pacific is not a relevant party.

On December 11, 2009, General Construction Company moved for summary judgment dismissal on the grounds that it was not a successor entity to "Wright Schuchart Harbor Company," and was therefore an improper party in this action. (*See* Appellants' Opening Brief at 31; *see also* CP 2436-40)

G. Over Three Years After Fletcher General, Inc. Was Identified as a Potentially Liable Party, and Over Three Years Past the Statute of Limitations, the Martin Family Sued Fletcher Construction Company North America.

Three years later, on January 15, 2010 the trial court granted the Martin family's first motion for leave to amend their complaint to add Fletcher Construction Company North America (FCCNA) as a defendant, although the trial court's order did not address whether the amended complaint would relate back to their original complaint, filed on June 29, 2007. (CP 2409-10)

On January 22, 2010, the Martin family filed their amended complaint adding FCCNA as a defendant, and alleging that General Construction Company, Wright Schuchart Harbor Company, and Fletcher Construction Company North America collectively installed, maintained, designed and/or manufactured the component parts that allegedly caused Mr. Donald Martin's death. (CP 2402-08) FCCNA's Answer raised

affirmative defense that the statute of limitations had expired with respect to the Martin family's claims. (CP 2246)

H. Over Three Years After Fletcher General, Inc. Was Identified as a Potentially Liable Party, and Over Three Years Past the Statute of Limitations, the Martin Family Sued Fletcher General, Inc.

Nearly one year later, in December 2010, the Martin family moved to amend their complaint a second time to add Wright Schuchart, Inc. and Fletcher General, Inc. (FGI) as parties, which the trial court granted on December 8, 2010, with the caveat that "the court reserves ruling on the issues of relation back and the joinder of [another entity] Fletcher Building Ltd."[2] (CP 625-26)

I. The Identity of the Fletcher Entities Was a Matter of Public Record Before the Statute of Limitations Expired.

On June 29, 2007, when the Martin family originally filed their complaint for the August 13, 2004, accident the following *public records* were readily available and on file with the Washington Secretary of State:

1. Articles of Incorporation of Wright Schuchart Inc., May 27, 1976; (CP 722-27)

2. Articles of Amendment Changing name of Wright Schuchart Inc. to Fletcher General Inc., dated March 1, 1993; (CP 729) and

---

[2] For purposes of this appeal, Fletcher Building Ltd. is not a relevant party.

3. Articles of Merger of Fletcher General Inc. to Fletcher Construction Company North America, filed March 29, 2001. (CP 731)

(CP 719-20-731)

Additional public records were available, including a 1993 *Seattle Times* newspaper article that explained in detail the corporate history of the various Wright Schuchart Harbor entities and Fletcher entities. (CP 733-34) Also, the on-line home page of defendant General Construction Company (the defendant that the Martin family initially identified as "General Construction Company dba/fka Wright Schuchart Harbor Company,") contains the corporate history of Wright Schuchart. (CP 736-37)

J. The Trial Court Granted Summary Judgment Dismissal to Respondents Fletcher Construction Company North America and Fletcher General, Inc. Based on the Statute of Limitations.

FCCNA and FGI moved for summary judgment dismissal of the Martin family's claims on the bases that:

(1) the Martin family's claims had expired under the three-year statute of limitations;

(2) their claims against other entities, including Wright Schuchart Harbor Company, did not toll the statute of limitations with respect FCCNA and FGI;

(3) their first and second amended complaints adding FCCNA and FGI did not relate back to the Martin family's original claim against Wright Schuchart Harbor Company under CR 15(c);

(4) the Martin family failed to exercise due diligence to identify the correct defendants within the statute of limitations; and

(5) the merger statute did not apply because the Martin family's claims were not "pending" at the time of any merger, as required by RCW 23B.11.060(1)(d).

K. The Trial Court Granted Summary Judgment Dismissal to the Fletcher Entities.

On January 13, 2011, the trial court heard several hours of extensive oral argument[3] before granting FCCNA's and FGI's motion for summary judgment dismissal of the Martin family's claims. The trial court ruled that "identifying Wright Schuchart Harbor Company as a defendant was not sufficient to be describing with reasonable particularity Wright Schuchart, Inc. or Fletcher General or Fletcher Construction Company of North America." (VRP at 72:13-17)

The trial court also ruled that the Martin family's 2007 lawsuit was not "pending" when Wright Schuchart, Inc. became Fletcher General or when Fletcher General became FCCNA. In fact, "the accident that led to

---

[3] *See* Verbatim Report of Proceedings at 1-77, which was followed by further oral argument in this case among other parties at VRP 77-122.

this cause of action had not even occurred, so it could not have been pending." (VRP at 72:22-73:1-2)

Finally, the trial court ruled that the discovery rule under the Products Liability Act did not apply, and even if it did apply, the Martin family did not exercise due diligence in identifying the correct parties—even after General Construction Company *specifically identified* Fletcher General, Inc. in its Answer and Third-Party Complaint in October 2007—*three years before the Martin family amended its complaint to add FCCNA and FGI.* (VRP 73:23-25 to 75:2; CP 3543-51)

In fact, the trial court found that the record was completely void of any evidence that the Martin family's counsel attempted to investigate, identify, and sue the correct entities.[4] "As I pointed out during argument, there is in fact no information about what plaintiffs actually did in order to ascertain the appropriate entities to sue." (VRP 74:24 to 75:2) Rather, the only thing before the trial court "is information that the defense has provided about what would be available in an internet search and from records from the Secretary of State's office." (VRP 75:5-8)

---

[4] The Fletcher entities have not waived the defense that they are absolutely the wrong parties in this litigation. Accordingly, if the Court of Appeals reverses the trial court's decision dismissing FCCNA and FGI on the statute of limitations defense and remands the case, then FCCNA and FGI will move for dismissal based on evidence that none of Fletcher entities installed TM #5, or purchased assets or assumed liabilities of any entity that did install TM #5.

The trial court acknowledged that the Martin family certainly had the ability to ascertain the correct parties because they had established that General Construction Company had been both a prior and former entity "because they alleged that Wright Schuchart Harbor was doing business and was formerly known as General Construction, which would tend to suggest both past and present." (VRP 75:8-14)

On January 13, 2011, the trial court dismissed FCCNA and FGI, based on the expiration of the statute of limitations and the trial court's finding that the Martin family's amended complaints adding FCCNA and FGI did not relate back to their original filing. (CP 133-34)

L. The Trial Court Denied Reconsideration.

The Martin family moved for reconsideration, explaining that General Construction Company's July 24, 2007 tender of defense and indemnity letter was evidence that FGI had "notice" of their wrongful death claim, and accordingly FCCNA/FGI "knew that but for a mistake concerning the identity of the proper party" the original complaint would have named FCCNA as a defendant. (CP 53-54)

On March 9, 2011, the trial court denied the Martin family's motion for reconsideration. In a written order, the trial court ruled that the Martin family did not meet the CR 15(c) requirements for relation back of amendments "the record in no way supports such a finding" that FCCNA

or FGI could have known "before the statute of limitations ran that but for a mistake concerning identity it would have been named in the Original Complaint." (CP47)

In fact, the trial court acknowledged that FCCNA "claims that *it believes the work in question was not performed by a company that merged into FCCNA, but by a wholly separate entity, Wright Schuchart Harbor Joint Venture,* ***whose assets and liabilities were never merged into any Fletcher entity***." (CP 48 (emphasis added)) Thus FCCNA would have no reason to know or believe that it could have been named or could be liable for any damages to Plaintiffs.

Finally, the trial court ruled that even if all of the requirements of CR 15(c) were met, "the Plaintiffs must demonstrate they exercised due diligence in investigating and identifying the proper defendants to the action in order to have the Amended Complaints naming new defendants relate back." (CP 48) The trial court concluded that the plaintiffs "have presented some evidence of why they might have been confused despite information in the public record from which the correct parties could be determined as demonstrated by the Fletcher Defendants, but have not presented any evidence of what investigation they actually performed, what information was revealed by that investigation, or why they did not name the Fletcher Defendants." (CP 49)

III. ARGUMENT

A. The Standard of Review is *De Novo* for the Statute of Limitations, the Tolling Statute, and Corporate Merger Statute.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); *Green v. A.P.C.,* 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (the Martin family) attempting to resist a summary judgment "may not rely on speculation, argumentative assertions that unresolved factual matters remain," rather "the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), *rev. denied* 108 Wn.2d 1008 (1987).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Standard of Review for Applying the "Relation Back" Doctrine Under CR 15(c) Is Manifest Abuse of Discretion.

"A determination of relation back under CR 15(c) rests within the trial court's discretion and will not be disturbed on appeal absent manifest abuse of discretion." *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986), *rev. denied* 108 Wn.2d 1004 (1987). Accordingly, the "burden of proof is on the party seeking to have an amendment relate back to the original action." *Foothills*, 46 Wn. App. at 375. The moving party also has the burden of proving that any mistake in failing to amend in a timely fashion was excusable. *Foothills*, 46 Wn. App. at 375; *see also Teller v. APM Terminals Pac.*, 134 Wn. App. 696, 705-706, 142 P.3d 179 (2006).

C. The Statute of Limitations is Three Years.

Actions for personal injury in Washington are subject to a three-year statute of limitations. RCW 4.16.080(2) states as follows:

> *The following actions shall be commenced within three years*:

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, *or for any other injury to the person or rights of another not hereinafter enumerated*;

RCW 4.16.080(2) (emphasis added)

Here, Donald Martin died on August 13, 2004. Accordingly, his family's wrongful death claims expired on August 13, 2007. However, the Martin family did not obtain leave from the trial court to add FCCNA as a defendant until January 15, 2010, nor did the order contain language allowing the amended complaint to relate back to its original filing. (CP 2409-10)

D. RCW 4.16.170 Did Not Toll Statute of Limitations.

When Courts are asked to analyze whether an unnamed defendant can be added after the expiration of the statute of limitations, two arguments commonly arise: (1) whether the tolling statute, RCW 4.16.170, applies; and (2) whether the relation back doctrine under CR 15(c) applies. When approaching these issues, the Courts must analyze both arguments. For example in *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 870 (1997), *rev. denied* 135 Wn.2d 1010 (1998), the plaintiff conceded the added unnamed party did not relate back to the original complaint, however, the court continued with arguments concerning the applicability

of RCW 4.16.170. Here, the Martin family's arguments are unpersuasive on both points. (*See generally* Martins' Opening Brief at 32-34)

1. The Martin Family's Reliance on Dicta in *Sidis v. Brodie Dohrmann* Is Misguided.

The Martin family had three full years to investigate the entities allegedly responsible for Mr. Donald Martin's wrongful death. The Martin family contends that naming "Wright Schuchart Harbor Company" in their Complaint sufficed to toll the statute of limitations with respect to unnamed and unidentified Fletcher entities. However, this argument fails because the Martin family did not identify FCCNA or FGI with "reasonable particularity" as required by Washington law.

The Martin family's reliance on *Sidis v. Brodie/Dorhmann*, 117 Wn.2d 325, 815 P.2d 781 (1991) is misguided. (*See* Appellants' Opening Brief at 32-33) Our Washington Supreme Court in *Sidis* contemplated whether, under RCW 4.16.170, service of process on one defendant tolls the statute of limitation as to un-served defendants that were *properly named* at the time of service of one named defendant. The opinion *does not* decide the issue with respect to unnamed defendants as it was not at issue in the fact patterns considered by the Supreme Court:

> It has been argued 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. There is no such abuse here and, therefore, a ruling on this issue can await another time.

Id. at 331. The Court commented in dicta as follows:

> 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. This statement is mere dicta and not binding on the Courts.

The Martin family also relies on *Iwai v. State*, 76 Wn. App. 308, 313, 884 P.2d 936 (1994), *aff'd* 129 Wn.2d 84 (1996), and *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 870 (1997), *rev. denied* 135 Wn.2d 1010 (1998) for the proposition that courts recognized "reasonable particularity" as law. This is a flawed analysis.

First, *Iwai v. State* relied on *Mergenthaler v. Asbestos Corp. of Am.*, 500 A.2d 1357, 1363 n.11 (Del. Super. Ct. 1985) and *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (1986), *review denied,* 107 Wn.2d 1021 (1987) in their holding, not *Sidis* as the Martin family asserts. *Iwai v. State* Wn. App. at 312. (Appellants' Opening Brief n.12)

Second, *Bresina v. Ace Paving Co.* acknowledged that the *Sidis* comment is dicta and not authority, and assumed it was valid when analyzing *Sidis* and the holding in *Iwai*:

> As we read this language, it does not clearly show whether Division Three [in *Iwai*] (a) rejected the *Sidis* dictum or (b)

> assumed the validity of the *Sidis* dictum while holding that its requirements were not met by Iwai's description of WAM.

Bresina v. Ace Paving Co., 89 Wn.App. at 281-82. No comment or analysis was made in *Sidis, Iwai*, or *Bresina* to support tying an unnamed defunct business entity to an existing entity for the purpose of tolling the statute of limitations as the Martin family urges this Court to do.

2. Applying the *Sidis* Decision.

Although the Supreme Court in *Sidis* did not rule on the application of RCW 4.16.170 to unnamed defendants, such as those at issue in this appeal, the *Bresina* Court assumed the Supreme Court's comment regarding "reasonable particularity" as law and applied it to the fact pattern where an unnamed defendant was added and served after expiration of the statute of limitations. *See Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948P.2d 870 (1997). The *Bresina* Court acknowledged that a myriad of factors contribute to whether an unnamed party is identified with reasonable particularity. *Id.* at 282. However, the only factor considered by the Court was the opportunity to discover the defendant "...[A] major factor is the nature of the plaintiff's opportunity to identify and accurately name the unnamed defendant[.]" *Id.* at 282.

If the Court were to apply *Sidis*'s "reasonable particularity" rule as stated and relied upon in *Bresina*, then there is no question that the Martin

family and their counsel had ample opportunity to identify the Fletcher entities during the three years that the statute of limitations applied to their claim. For example, a simple internet search of "Wright Schuchart Harbor Company" reveals a *Seattle Times* article outlining the history of "Wright Schuchart Harbor Company" and identifies FCCNA as an entity related to "Wright Schuchart." (CP 733-34) Second, the Articles of Incorporation of Wright Schuchart, the amendment changing the name to Fletcher General Inc., and Articles of Merger to FCCNA were all available from the Washington Secretary of State and were all a matter of public record. (CP 719-37)

Accordingly, *Iwai* and *Bresina* support FGI's and FCCNA's position. In *Iwai*, the Court of Appeals affirmed the trial court's ruling dismissing an unnamed lessee to State land added after the statute of limitations had run. *Iwai v. State*, 76 n. App. 308, 884 P.2d 936 (1994). The Court observed that if the plaintiff had performed a simple title search on the property at issue, she would have discovered that it was owned by the State, and thus plaintiff would have been able to identify the lessee that caused her damages before the statute had run. *Iwai*, 76 Wn. App. at 313-14.

Likewise in *Bresina*, the Court stated that a simple investigation would have clearly revealed the unnamed defendant's identity during the

three years Bresina had to obtain the defendant's name. *Bresina*, 89 Wn. App. at 282. Under the dicta rule of the *Sidis* Court as applied in *Bresina*, neither FGI nor FCCNA were identified with "reasonable particularity" before expiration of the statute of limitations. The trial court's dismissal should be affirmed.

E. The "Relation Back" Doctrine Does Not Apply.

The trial court did not abuse its discretion in finding that the Martin family's claims did not relate back. CR 15(c) does not apply to relate the Martin family's January 2010 first amended complaint against FCCNA, or their December 2010 second complaint against FGI back to their original complaint filed in July 2007. Likewise, the Martin family has not produced any evidence that FCCNA or FGI had notice of the complaint by August 14, 2007, when the statute of limitations expired.

CR 15(c) provides in relevant part as follows:

> An amendment changing the party against whom a claim is asserted relates back if...*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) (emphasis added); *Iwai v. State*, 76 Wn. App. 308, 313, 884 P.2d 936 (1994). Additionally, the burden of proof is on the party seeking to

have an amendment relate back to the original action. *Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 705, 142 P.3d 179 (2006), (*citing Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986)).

Here, the Martin family has wholly failed to meet their burden to establish that *within the three-year statute of limitations,* FCCNA and FGI received *notice* of the institution of the action *and* that FCCNA and FGI *knew or should have known* that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.

As the trial court ruled, the Martin family did not satisfy their burden of proof. The undisputed evidence demonstrates that FCCNA and FGI had absolutely no reason to know of the Martin family's claims since Wright Schuchart Harbor *Joint Venture* never merged with any Fletcher entity, including Respondents Fletcher General, Inc. and Fletcher Construction Company North America. (CP 425) Rather, a company called "Sprague Resources Corporation" acquired "Wright Schuchart Harbor *Joint Venture*" in 1987. (CP 426)

As such, the Martin family's first and second amended complaint do not "relate back" to the filing of the original complaint. The Court of Appeals should affirm the trial court's dismissal of FCCNA and FGI on this basis because the trial court did not abuse its discretion.

F. The Martin Family's Failure to Identify FCCNA or FGI from the Public Records Within Three Years Is Inexcusable Neglect.

In *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984), the Supreme Court explained that an amendment adding a party will relate back to the date of the original pleading if three conditions are met. "First, the added party must have had notice of the original pleading so that he will not be prejudiced by the amendment. Second, the added party must have had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him." *Id.* (citation omitted). Last, "the plaintiff's failure to timely name the correct party cannot have been 'due to inexcusable neglect.'" *Id.* (quoting *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 635 P.2d 721 (1981), *rev'd on other grounds by Sidis v. Brodie/Dorhmann*, 117 Wn.2d 325 (1991)).

As the Supreme Court held in *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987), "[i]n cases where leave to amend to add an additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion." *Id.*, *appeal dismissed sub nom. Am. Express Travel Related Servs. Co. v. Wash. Pub. Power Supply Sys.*, 488 U.S. 805(1988).

"Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *Haberman*, 109 Wn.2d at 174. "If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable." *Teller v. APM Terminals Pac.*, 134 Wn. App. 696, 706-07, 142 P.3d 179 (2006).

The Martin family's and their attorney's conduct in this matter fits squarely within the example of "inexcusable neglect" set forth in *Teller:* "where the omitted party's identity is a matter of public record." *Id.* at 707 (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d at 174). Here, the identity of the Fletcher entities was a matter of public record with the Washington Secretary of State, in local newspaper articles and on a public website. If a reasonable investigation had been conducted by Martins' counsel, they would have discovered and identified both FGI and FCCNA.

Teller further explains "the cases that have found 'inexcusable neglect' generally considered the actions of a party's attorney, who is presumably charged with researching and identifying all parties who must be named in an action and with verifying information that is available as a matter of public record." *Teller*, 134 Wn. App. at 707 (citing *Nepstad v. Beasley*, 77 Wn. App. 459, 467, 892 P.2d 110 (1995)). The Martin family

failed to provide an excuse to the trial court for their inability to locate a Fletcher entity within the three-year statute of limitations. Under well-settled case law, this is inexcusable neglect. The trial court did not abuse its discretion in making this finding.

G. Washington's Corporation Merger Statute Does Not Authorize the Martin Family to Maintain a Lawsuit Against FGI or FCCNA Because their Lawsuit Was Not Pending at the Time of Merger.

Although the Martin family verbatim quotes RCW 23B.11.060(1)(d) in their opening brief, their analysis conveniently disregards a key word within the statute: pending. (*See* Appellants' Opening Brief at 33-34)

RCW 23B.11.060(1)(d) allows a plaintiff to continue a lawsuit filed and served against a defunct entity that was merged into a surviving corporation, *provided that the lawsuit was pending at the time of the merge*:

> (1) When merger takes effect:
>
> (d) A proceeding *pending* against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;
>
> RCW 23B.11.060(1)(d) (emphasis added).

Even if the Court were to disregard all of FGI's and FCCNA's arguments, and were to accept the Martin family's assertion that FCCNA

is a "mere continuation" of Wright Schuchart Harbor *Company*, then application of this statute does not revive the Martin family's action. Their 2007 lawsuit was not "pending" when any merger took effect. The most recent entity merger took effect in 2001 when FGI merged with FCCNA. (CP 731) The Martin family filed their lawsuit six years after the merger took effect. Consequently, their lawsuit was not *pending* at the time the merger took effect, and the accident itself had not even occurred at the time of the last merger, therefore RCW 23B.11.060(1)(d) does not apply.

H. The Product Liability "Discovery Rule" Does Not Apply to FCCNA.

The Martin family's reliance on the product liability discovery rule with respect to FGI and FCCNA is misplaced. The discovery rule applies to claims "in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant." *Hibbard v. Gordon Thomas*, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992). The Martin family's allegations do not fall within these parameters. Here, Donald Martin was killed in a work-related injury when crushed by a machine he had worked around for several years. He did not die from an occupational disease and it has not been alleged that any information concerning the cause of his death has been concealed.

The product liability discovery rule only applies to manufacturers and sellers of products that will be introduced into the stream of commerce. RCW 7.72.010(3). The Martin family has proffered no evidence that FCCNA or FGI (much less a correctly identified successor) manufactured or sold the conveyor or platform or any other equipment at issue here therefore this discovery rule does not apply. *See* RCW 7.72.010(3); *Garza v. McCain Foods, Inc.,* 124 Wn. App. 908, 103 P.3d 848 (2004); *Graham v. Concord Const.*, 100 Wn. App. 851, 856, 999 P.2d 1264 (2000).

Moreover, the unnamed entity that likely installed TM #5 is Wright Schuchart Harbor *Joint Venture*. It was an equipment installer, not a seller or manufacturer. Similarly, there is no evidence in the record that Wright Schuchart Harbor *Company* was a seller or manufacturer.

Even if the product liability discovery rule applied here, which it does not, the Martin family and their counsel did not exercise diligence in determining the identity of any Fletcher entity. Even after General Construction Company asserted a third-party complaint against a Fletcher entity on October 19, 2007, the Martin family waited until January 20, 2010, to add FCCNA as a party. A plaintiff must exercise reasonable diligence to learn the identity of the defendants in order to invoke the rule. *Orear v. Int'l Paint Co.*, 59 Wn. App. 249, 257, 796 P.2d 759 (1990),

review denied, 116 Wn. 2d 1024, 812 P.2d 103 (1991). The Martin family also bears the burden of showing "that the facts constituting the tort were not discovered or could not have been discovered by due diligence within the three-year period." *G.W. Constr. Corp. v. Professional Serv. Indus.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993), *review denied*, 123 Wn.2d 1002, 868 P.2d 871 (1994). Here, the Martin family could have availed themselves to the readily available public records with the Secretary of State's office from 2004 to 2007.

Under Washington law, when a plaintiff invokes the discovery rule to counter the statute of limitations defense, it is the plaintiff's burden to show that facts constituting the cause of action were not discovered or could not have been discovered by due diligence within the limitations period. *Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 443, 449-50, 6 P.3d 104 (2000) *rev. denied* 143 Wn.2d 1005 (2001) ("to invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier."). Here, the Martin family hired lawyers to perform the due diligence necessary for filing their complaint. Any assertion that their lawyers could not have ascertained the information necessary to identify the proper defendants is unsupported. As the trial court stated, the record is completely void of any effort by the Martin family to ascertain the identity of one Fletcher entity.

V. CONCLUSION

For the foregoing reasons, FCCNA and FGI respectfully request that the Court affirm the trial court's dismissal of all claims against both entities. However, if the Court reverses and remands this case to the trial court, FCCNA and FGI will immediately move for dismissal based on the fact that they were never the correct corporate entities and had nothing, whatsoever, to do with the Kimberly-Clark paper plant before, during, or after Mr. Martin's accident.

Dated this 25th day of June, 2012.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

By _____

Francis S. Floyd, WSBA No. 10642
A. Troy Hunter, WSBA No. 29243
Amber L. Pearce, WSBA No. 31626
Attorneys for Respondents Fletcher Construction Company of North America, Fletcher General, Inc., Fletcher Building, Ltd.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 26th day of June, 2012, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

John Budlong
100 Second Avenue South, Ste 200
Edmonds, WA 98020-3551

Douglas A. Hofmann
Williams, Kastner & Gibbs, PLLC
Two Union Square, Ste 4100
Seattle, WA 98101-1368

David C. Groff
Michael P. Grace
Daniel C. Carmalt
Groff Murphy, PLLC
300 East Pine
Seattle, WA 981222029

Bruce Ainbinder
Littleton Joyce Ughetta Park & Kelly
The Centre at Purchase
One Manhattanville Road, Ste 302
Purchase, NY 10577

George M. Ahrend
Ahrend Albrecht, PLLC
100 E. Broadway Ave.
Moses lake, WA 98837

Tracy A. Carey
Legal Assistant