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NO. 67534-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Marie and Robert Geary,

Appellants,

v.

Home Depot, USA, Inc. and Gerard Scott & Cheryl Scott,

Respondents.

BRIEF OF RESPONDENTS GERARD & CHERYL SCOTT

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I. INTRODUCTION

Appellants Marie and Robert Geary (“plaintiffs”) timely filed their original complaint which named as defendants Respondent Home Depot (“Home Depot”) and John and Jane Doe. Eight months after the statute of limitations expired, plaintiffs filed an amended complaint which substituted Respondents Gerard and Cheryl Scott (“Gerard Scott” or “the Scotts”) for John and Jane Doe. The Scotts moved for summary judgment on the grounds that they were not added or served until eight months after the statute of limitations expired, the amended complaint did not relate back to the original complaint under Civil Rule 15(c) and plaintiffs’ delay was the result of inexcusable neglect. Their motion was granted. The Scotts respectfully request that this Court affirm the Superior Court’s June 1, 2011 order granting the Scott’s Motion for Summary Judgment.

II. STATEMENT OF THE CASE

More than seven months after the statute of limitations expired plaintiffs filed their First Amended Complaint, which for the first time alleged that on June 15, 2007 Respondent Gerard Scott pushed a four-wheeled merchandise cart into plaintiff Marie Geary. (CP 20). The original Complaint, filed on June 7, 2010, named Home Depot and John and Jane Doe as defendants; it did not name Gerard and Cheryl Scott. (CP 1-4).

On June 15, 2007, neither Marie nor Robert Geary asked for the name of the other customer involved in the accident. (*See* CP 81-82). Within three weeks after the alleged incident, by July 2, 2007, they retained counsel. (CP 229). Over the course of the next two years and nine months, plaintiffs did nothing to determine the identity of the Scotts. (*See* CP 70-82). Less than two months before the statute of limitations was set to expire, plaintiffs reportedly contacted Sedgwick Claims Management, a third party administrator for Home Depot, and inquired about the identity of the Scotts. (CP 79). Plaintiffs did not take any other actions to identify the Scotts before the three year statute of limitations expired. (*See* CP 70-82).

Instead, plaintiffs waited another two months until eight days before the statute of limitations expired and filed a complaint naming as defendants Home Depot and “John and Jane Doe.” (CP 80). Four months after they initiated the action, on October 4, 2011, plaintiffs served discovery on Home Depot. (CP 80). Plaintiffs learned the identity of Gerard Scott on November 3, 2010 from Home Depot’s responses to discovery. (CP 80).

Three months later, on February 4, 2011, counsel for plaintiffs and for Respondent Home Depot, signed a stipulation purporting to allow plaintiffs to amend their complaint to substitute the Scotts for the Doe

defendants. (CP 18). No order was ever entered by the trial court authorizing this amendment. (See CP). Plaintiffs filed their First Amended Complaint the same day. (CP 19). Nearly four years after the accident Gerard and Cheryl Scott learned of the lawsuit when they were served with the summons and amended complaint on February 13, 2011. (CP 27, 57-60). Due to the passage of time, Gerard Scott recalled very little regarding the subject incident. (CP 57-58).

On May 4, 2011, the Scotts filed a motion for summary judgment. (CP 28-39). In brief, the motion argued that they should be dismissed because they were not served until eight months after the statute of limitations expired, the amended complaint adding them as defendants was filed without a court order, and the amended complaint did not relate back to the original complaint under Civil Rule 15(c) and plaintiffs' delay was the result of inexcusable neglect. (CP 28-39).

In opposition, plaintiffs argued that pursuant to the dictum in *Sidis v. Brodie/Dohrmann, Inc.* and the Court of Appeals decisions in *Iwai v. State* and *Bresina v. Ace Paving Co.*, the statute of limitations was tolled when plaintiffs timely served Home Depot. (CP 70-78). Plaintiffs further argued that pursuant to *Sidis*, plaintiffs were not required to satisfy the elements for relation back set forth in Civil Rule 15(c) when they amended

their complaint to substitute named defendants for fictitious ones. (CP 70-78).

In reply, the Scotts noted the rule proposed by plaintiffs was not adopted by the Court in *Sidis* or by any other Washington court. Even if the *Sidis* dictum had been adopted, plaintiffs failed to meet the reasonable particularity requirement. (CP 137-142). Further, there is no authority for ignoring Civil Rule 15(c)'s requirements. (CP 137-142).

After a hearing on June 1, 2011, the trial court granted the Scott's motion and entered an order dismissing them from the case. (CP 145-147). Subsequent to the Scott's dismissal from the lawsuit, plaintiffs noted the deposition of Mr. Scott.

On May 27, 2011, Respondent Home Depot moved for summary judgment arguing that plaintiffs could not establish essential elements of their negligence claim. (CP 83-99). Home Depot's motion was granted on July 18, 2011. (CP 209-211). The Scott's and Home Depot's summary judgment motions involve completely distinct legal and factual issues.

III. ARGUMENT

1. Standard of Review

"In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Questions of

law are also reviewed de novo. *Id.* An appellate court “may sustain a lower court’s judgment upon any theory established by the pleadings and supported by the proof.” *Mt. Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

“Matters referred to in an appellate brief but not included in the record cannot be considered on appeal.” *State v. Dunaway*, 109 Wn.2d 207, 220-21, 743 P.2d 1237 (1987). Should Appellants seek to raise new issues in their reply, it is too late and they should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 338, 35 P.2d 383 (2001). The Court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* In opposing a motion for summary judgment, a party may not rely on mere speculation and unsupported assertions. *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31 (1994); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988).

The purpose of the statute of limitation is to prevent stale claims. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). Where a motion for summary judgment is based on expiration of the statute of limitations, the Court may grant the motion “if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced.” *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 110, 802 P.2d 826 (1991). That is the case here and summary judgment should be affirmed.

2. The Parties Agree That Gerard and Cheryl Scott Were Not Served Within the Limitations Period and that the Amended Complaint Adding them as Parties Does Not Relate Back Under Civil Rule 15(c)

The statute of limitations in a personal injury action is three years. RCW 4.16.080. Plaintiffs’ cause of action against Gerard and Cheryl Scott accrued on June 15, 2007, the date of the accident at issue. (CP 20, 28-31, 70-78). The parties agree that absent tolling, the statute of limitations expired on June 15, 2010. (CP 20, 28-31, 70-78). The parties further agree that the Scotts were not served until eight months after the statute of limitations expired, on February 13, 2011. (CP 20, 27, 28-31, 57-60, 70-78).

The requirements of Civil Rule 15(c) apply in situations where a new entity is substituted for a fictitious one, i.e., John and Jane Doe. *Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (Div. 2 1986) (holding that Civil Rule 10(a)(2) must be read in conjunction with Civil Rule 15(c) and the Civil Rule 15(c) requirements must be satisfied where a true name is substituted for a fictitious party). Pursuant to Civil Rule 15(c), an amendment adding a party may be deemed to relate back only if the plaintiff can show:

(1) the amended pleading arose out of the transaction set forth in the original pleading; (2) the new party received notice of the action within the statute of limitations; (3) the new party has received such notice that he will not be prejudiced in maintaining a defense on the merits; and (4) the new party 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.

Anderson v. Northwest Handling Sys., 35 Wn. App. 187, 190, 665 P.2d 449 (1983) (citation omitted) (emphasis added); Civ. R. 15(c). In addition, where a plaintiff seeks to add a new defendant, she must also show that the delay in adding that defendant was not the result of inexcusable neglect even if the other criteria are met. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032 (1987) (as amended).

The burden of proof is on the party seeking relation back to prove compliance with Civil Rule 15(c) and to prove that the failure to amend in a timely fashion was not the result of inexcusable neglect. *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986). The absence of any of the CR 15(c) elements is fatal to the relation back of an amended complaint, as is the existence of inexcusable neglect. *Kiehn*, 45 Wn. App. at 296; *Haberman*, 109 Wn.2d at 174.

Plaintiffs concede that the First Amended Complaint in this matter does not meet the requirements for relation back under Civil Rule 15(c). (June 1, 2011 RP 13-14; CP 76-77).¹ Plaintiffs did not argue that the First Amended Complaint related back in their pleadings and conceded it did not at the June 1, 2011 hearing. (*Id.*)

Plaintiffs could not establish any elements for relation back except that the amended pleading arose out of the transaction set forth in the original pleading. As to the second and fourth requirements for relation back, the Scotts did not have notice of the instant action until they were served with a summons and the First Amended Complaint on February 13, 2011, eight months after the statute of limitations expired. (CP 27, 57-60).

¹ All references to the "RP" contained in this brief are to the Verbatim Report of Proceedings from June 1, 2011.

Because they were not aware of the lawsuit, the Scotts also did not know that but for some mistake concerning the identity of the proper party, the action would have been brought against them. There is no reason the Scotts should have known about the lawsuit or should have believed that they should have been a party to the lawsuit.²

As to the third requirement for relation back, the Scotts will be prejudiced if forced to maintain a defense on the merits. The Legislature determined that in this type of case the appropriate limitations period is three years. RCW 4.16.080. Statutes of limitation serve a valuable purpose by promoting certainty and finality, and protecting against stale claims. *Kiehn*, 45 Wn. App. at 299 (citing *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 486-87, 585 P.2d 812 (1978)). See also *In re Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992) (citation omitted) (recognizing that “society benefits when it can be assured that a time comes when one is freed from the threat of litigation.”); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813 (1991) (“The policy behind statutes of limitation is ‘protection of the defendant, and the courts, from

² The Scotts did not have a relationship with plaintiffs or Home Depot such that they would have learned of the lawsuit. During the summer of 2010 Mr. Scott was called by a man who identified himself as an attorney from Home Depot. The man asked Mr. Scott about the incident but based on this conversation Mr. Scott did not have any idea that he could be sued. (CP 57-58)

litigation of stale claims...”). “[C]ompelling one to answer a stale claim is in itself a substantial wrong.” *In re Estates of Hibbard*, 118 Wn.2d at 745 (citation omitted).

This case involves an accident at a Home Depot store where the plaintiffs allege that Mr. Scott struck plaintiff with a cart. What occurred during the incident is highly relevant to the issues of liability, causation and damages. As such, the testimony of plaintiff, Mr. Scott and other witnesses will be incredibly important for the Scotts in preparing a defense in this matter. Plaintiffs had over three years to preserve witness testimony and other evidence. However, by the time the Scotts became aware of the action the claim was nearly four years old. As the Legislature and Courts have recognized, with the passage of time memories go stale and evidence gets lost. *See Douchette*, 117 Wn.2d at 813 (“The policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.”). Here, witness testimony is particularly important, however, Mr. Scott did not make any attempt to preserve his memory or contact other witnesses regarding the incident. (CP 57-58).

Plaintiffs failed to establish Civil Rule 15(c)’s requirements for relation back. They did not contest this argument in their brief and they

conceded at the June 1, 2011 hearing that Civil Rule 15(c)'s requirements were not met in this case. They also did not contest the factual basis asserted by the Scotts in support of why they were prejudiced by plaintiffs' dilatory delay in identifying and naming them in this lawsuit. Further, relation back requires that the delay in naming the new entities not be the result of inexcusable neglect. As is discussed in depth in the next section, plaintiffs failed to exercise due diligence in identifying and serving the Scotts.

3. Plaintiffs Failed to Exercise Due Diligence in Identifying and Serving the Scotts

Plaintiff was aware of her alleged injuries on June 15, 2007. (CP 20). At that time she knew that she would have to learn the identity of the person pushing the cart at the time of the incident. (CP 81). Within three weeks from the accident, plaintiffs retained legal counsel. (CP 229). On July 2, 2007, plaintiffs' counsel recognized that the Home Depot customers involved in the incident may have some liability. (CP 229).

Knowing that they still needed to identify the customers at Home Depot and that the statute of limitations expired three years later on June 15, 2010, plaintiffs did absolutely nothing for 2 years and 10 months to identify the Scotts. (CP 79-82). Then, on April 17, 2010, less than two months before the statute of limitations was set to expire, plaintiffs

reportedly asked Home Depot's third party administrator for the identity of the customer involved in the accident. (CP 79). According to plaintiffs' counsel, the third party administrator told him that the customers' identities were unknown. (CP 79). The record is devoid of any evidence that the plaintiff made any further effort to identify the Scotts until well after the statute of limitation expired.

Plaintiffs could have asked the third party administrator for certification that the customers' identities were unknown or they could have pursued the issue with Home Depot itself. Plaintiffs also could have filed their lawsuit earlier and submitted discovery with their complaint. If they wanted to wait to file a complaint, they could have served a summons and complaint on Home Depot and proceeded with discovery under Civil Rules 30 and 33.³ Instead plaintiffs did nothing to discover the identity of the Scotts. Rather, they waited for another two months, until eight days before the statute of limitations expired, then filed a complaint naming as defendants Home Depot and John and Jane Doe. (CP 80). Another four months later, on October 4, 2011, they served discovery on Home Depot. (CP 80). Plaintiffs learned the identity of the Scotts on November 3, 2010 from Home Depot's responses to discovery. (CP 80).

³ Civil Rules 30 and 33 provide for taking depositions and serving interrogatories "after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur."

If plaintiffs had acted diligently, the Scotts could have been identified and served within the period of limitations. Instead, plaintiffs asked the trial court and are now asking this court to shift the consequences of their inaction to the Scotts, thereby depriving them of their right to rely on the three year statute of limitations.

4. No Court has Applied RCW 4.16.170 Tolling to Unnamed Defendants

Plaintiffs agree that the Scotts were not served with any process in this matter until eight months after the statute of limitations expired and that the amended complaint does not relate back pursuant to CR 15(c). (RP 13-14; CP 20, 27-31, 57-60, 70-78). Instead they argue that pursuant to *Sidis v. Brodie/Dohrmann*, 117 Wn.2d 325, 815 P.2d 781 (1991) the statute of limitations was tolled as to the Doe defendants by filing the complaint within the three year limitation period and serving Home Depot within 90 days thereafter. However, no Washington Court has held this to be the rule.

The three cases cited by plaintiffs – *Sidis v. Brodie/Dohrmann*, 117 Wn.2d 325, 815 P.2d 781 (1991), *Iwai v. State*, 76 Wn. App. 308, 88 P.2d 936 (Div. 3 1994), *aff'd*, 129 Wn.2d 84, 915 P.2d 1089 (1996), and *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 870 (Div. 2 1997) – do not provide authority for such a rule. In *Sidis*, the Washington

Supreme Court adopted a literal interpretation of RCW 4.16.170 and held that **as to all named defendants** the statute of limitations is tolled when a complaint is filed within the limitations period and one of the defendants is served within 90 days of filing. *Sidis*, 117 Wn.2d at 327, 331. The Supreme Court specifically stated that its ruling does **not** apply to unnamed fictitious defendants:

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. All defendants were named. . . therefore, **a ruling on this issue can await another time.**

Id. at 331 (emphasis added). If the Washington Supreme Court believed that a literal interpretation of RCW 4.16.170 would also toll the statute of limitations as to unnamed defendants, they could have so held. They did not. *Sidis* does not establish precedent for this case.

Plaintiffs assert “[t]he Supreme Court’s decision in *Sidis*, including dicta regarding application of RCW 4.16.170’s tolling provision to fictitiously-named defendants, has been cited and applied in several subsequent decisions of the Court of Appeals.” (Brief of Appellant at 18). This is incorrect. Plaintiffs cite two purported examples – *Iwai v. State*, 76 Wn. App. 308, 88 P.2d 936 (Div. 3 1994), and *Bresina v. Ace Paving Co.*, 89 Wn. App. 277, 948 P.2d 870 (Div. 2 1997). Both Courts discussed the dictum in *Sidis* but declined to adopt it.

The *Iwai* Court explicitly rejected the *Sidis* dictum stating:

Mrs. Iwai urges us to extend the holding in *Sidis* to unnamed “John Doe” defendants, such as she designated in her original complaint. **We decline to do so.**

Iwai, 76 Wn. App. at 312 (emphasis added). The Court further stated:

As noted by the court in *Mergenthaler v. Asbestos Corp. of Am.*, 500 A.2d 1357, 1363 n.11 (Del. Super. Ct. 1985) “even in jurisdictions which permit a fictitious name practice it is not universally held that the statute of limitations is tolled until the true identity of the defendant is discovered . . .”.

Id.

The Court noted that even assuming the validity of the *Sidis* dictum, the plaintiff did not identify the Doe defendants with reasonable particularity such that tolling would be justified in that case. *Id.* The Court then stated:

Our view is supported by *Kiehn v. Nelsen’s Tire Co.*, 45 Wn. App. 291, 295, 724 P.2d 434 (1986), *review denied*, 107 Wn.2d 1021 (1987). Although decided before *Sidis*, *Kiehn* concluded the statute 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 of amendments.

Id. In holding that a plaintiff must comply with the requirements of Civil Rule 15(c) in substituting named defendants for fictitious ones, the Court in *Kiehn* noted: “[t]he fact that federal courts have interpreted their rule

15(c), which his identical to ours, to apply in unknown party complaints supports our position.” *Kiehn*, 45 Wn. App. at 295.

In the other case cited by plaintiffs, *Bresina*, Division 2 of the Court of Appeals noted: “we assume that a plaintiff can toll the period for suing an unnamed defendant.” *Bresina*, 89 Wn. App. at 282 (emphasis added). It did not hold that the *Sidis* rule should be extended. *Id.* Rather, the Court held that even if the rule applied, the Doe defendants were not identified with reasonable particularity in that case. *Id.* In fact, despite opportunities, including in *Sidis* itself, no court has held that service on a named defendant within the limitations period tolls the statute of limitations as to unnamed defendants.

Plaintiffs cite the *Sidis* Court’s analysis of RCW 4.16.170 and its dictum regarding Doe defendants. Importantly, although the Court found the language of RCW 4.16.170 was straightforward and unambiguous, it did not hold that it tolls the statute of limitations as to unnamed defendants. *Sidis*, 117 Wn.2d at 329-31. The Court could have included fictitious defendants in its 1991 ruling. It chose not to. In the 20 year interim no court has adopted the *Sidis* dictum. For good reason, there are important distinctions between named and unnamed defendants that should preclude extension of *Sidis* to unnamed defendants.

For example, unless a co-defendant who has not been served has a relationship with another defendant, it will not likely be aware that it has been sued. Where a defendant has been named, it can at least search case records online and discover the lawsuit. An unnamed defendant, on the other hand, has no means of determining whether an action has been filed against him.⁴

Also, tolling the statute of limitations as to unnamed defendants where a named defendant has been served creates the possibility of abuse of process and harmful gamesmanship. In a case such as this, where witness testimony regarding how an accident occurred is paramount, a defendant whose memory has gone stale is at a disadvantage. A stale claim may cause evidence to be lost and important facts to be forgotten. Also, a jury may give more credence to testimony of witnesses with better recollection of the subject events. If *Sidis* is extended to unnamed fictitious defendants, a plaintiff could abuse the system by serving an easily identifiable target and letting additional time pass before identifying and serving Doe defendants so that memories will fade and plaintiffs have

⁴ In addition, even if a named defendant is served, no action has been commenced against the unnamed defendant for there to be tolling. Rather, no action is commenced against the unnamed defendant until an amended complaint substituting him is filed and served. As such, even if the original action against Home Depot was tolled, it should not be tolled as to the unnamed defendants unless the amended complaint relates back pursuant to CR 15(c).

a possible advantage. Plaintiffs could interview witnesses before filing the lawsuit and depose those witnesses after serving one defendant but before identifying and serving the Doe defendants. In such an instance, by the time the Doe defendant gets the opportunity to depose the witness, his or her memory will have faded. Again, a jury may be much more impressed and give more credibility to the testimony elicited by the plaintiffs earlier on when the witness' memory was fresher.

Further, a rule that service of a complaint on a named party tolls the statute of limitations as to fictitious defendants circumvents the Civil Rules, the policy behind the statute of limitations, and the Washington Supreme Court's continued emphasis on the exercise of due diligence by the injured party. *See, e.g., In re Estates of Hibbard*, 118 Wn.2d at 747 (recognizing generally that the Washington Supreme Court "continues to emphasize the exercise of due diligence by the injured party."). A plaintiff could voluntarily neglect his or her claims against certain defendants without consequence and instead a Doe defendant who has relied on the protection of the statute of limitations will be forced to defend a stale claim. The defendant will be forced to bear the burden of the plaintiff's dilatory behavior, while the plaintiff gains a tactical advantage.

5. Even if the Ruling in *Sidis* Were Extended to Fictitious Defendants, Tolling Is Not Warranted in this Case Because the Scotts Were Not Named with Reasonable Particularity

The *Sidis* Court in declining to extend its holding to fictitious defendants noted in dictum 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. Even if this Court were to extend the holding of *Sidis* to fictitious defendants, the Doe defendants were not identified with reasonable particularity in this case.

The *Bresina* Court “assumed” that a plaintiff can toll the period for suing an unnamed defendant “if but only if” the plaintiff identified the unnamed defendant with “reasonable particularity” before the limitations period expired. *Bresina*, 89 Wn. App. at 282. It found that “[a] major factor” in determining whether a Doe defendant was identified with “reasonable particularity” “is the nature of the plaintiff’s opportunity to identify and accurately name the unnamed defendant.” *Id.* The Court stated:

[I]f 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.”

Bresina, 89 Wn. App. at 282. In finding no reasonable particularity, the

Court reasoned:

Bresina had three years to obtain Ace’s true name, and she offers no reason for not doing so. It is apparent 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. (internal footnote omitted).

Plaintiffs contend *Bresina*’s holding “amounted to unwarranted conflation of the *Sidis* test (identification with ‘reasonable particularity’) with tests used to determine ‘inexcusable neglect’ in the context of CR 15(c) ‘relation back’ of amendments changing a party.” (Brief of Appellants at 21). Plaintiffs’ self-serving assumption does not provide a basis for disregarding the reasoned holding in *Bresina*. To the contrary, the Court was very clear in its application of this factor of reasonable particularity. Other Courts have similarly interpreted *Sidis*. For example, in *Bunko v. City of Puyallup Civil Service Comm’n*, 95 Wn. App. 495, 975 P.2d 1055 (Div. 2 1999) (as amended), Division 2 of the Court of Appeals seemed to assume validity of the *Sidis* dictum and noted “[u]nder *Sidis*, as long as the action is timely pursued and a party is omitted by **excusable**

neglect, the statute of limitations is tolled.” *Id.* at 500 n.6. (Emphasis added.)

Furthermore, *Bresina*’s reasonable particularity analysis comports with the Washington Supreme Court’s continued emphasis on due diligence by the injured party and the protection of defendants and the courts from stale claims where a plaintiff has slept on her rights and evidence may have been lost. *See Douchette*, 117 Wn.2d, 805, 813, 818 P.2d 1362 (Nov. 14, 1991) (“The policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.”); *In re Estates of Hibbard*, 118 Wn.2d, 737, 747, 826 P.2d 690 (1992) (recognizing generally that the Washington Supreme Court “continues to emphasize the exercise of due diligence by the injured party.”); *Haberman*, 109 Wn.2d at 174 (noting that “in cases where leave to amend to add additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion.”). The *Sidis* Court itself also suggested that “Plaintiffs must proceed with their cases in a timely manner as required by the court rules.” *Sidis*, 117 Wn.2d at 329.

Here, as is discussed in section 3 above, plaintiffs cannot establish the reasonable particularity test laid out in *Bresina*. The subject incident

occurred on June 15, 2007. In a letter dated July 2, 2007 plaintiffs' counsel recognized that the Home Depot customers involved in the incident may have some liability. (CP 229). Nonetheless, in the following thirty-three months, plaintiffs took no action whatsoever to determine the customers' identities.⁵ (See CP 71, 79-82). On April 17, 2010, plaintiff's counsel states that he asked Lisa Goodson of Sedgwick Claims Management (not Home Depot) for the customer's identity. (See CP 79-80). She reportedly responded that their identity was unknown. (See *id.*). Plaintiffs could have pursued the issue with Ms. Goodson, they could have asked for certification from Ms. Goodson that the customers' identities were unknown, or they could have pursued the issue with Home Depot itself. Plaintiffs also could have filed their lawsuit earlier and submitted discovery with their complaint. If they wanted to wait to file a complaint, they could have served a summons and complaint on Home Depot and proceeded with discovery under Civil Rules 30 and 33. Sending one letter and making one phone call in a three year period is not reasonable.

Because plaintiffs do not meet the reasonable particularity test articulated in *Bresina*, they argue that a different test of their own creation

⁵ The declarations of Marie and Robert Geary both say that they were "not provided and did not learn" Gerard Scott's name after the June 15, 2007 incident. (CP 81-82). Notably absent from their declarations is any assertion that they ever asked for the identity of Mr. Scott or made any other effort whatsoever. (See *id.*).

should apply. Plaintiffs propose that they identified the Scotts with reasonable particularity because they stated “the exact time, place, and details of his actions.” (Brief of Appellants at 24). However, plaintiffs’ statement in the complaint regarding “the exact time, place, and details of his actions” is merely an allegation of fact of what plaintiffs believe occurred. Plaintiffs alleged in the original complaint:

Defendant John Doe was also a prospective customer in the store and was pushing a heavy four-wheeled merchandise cart on which lumber was stacked. As Defendant Doe emerged from a merchandise aisle, he pushed the cart into plaintiff Marie, striking her and causing her injury.

(CP 2). These actions were alleged to have occurred “[o]n or about June 15, 2007” and no time was specified. Plaintiffs’ allegations fail to meet their own definition. Further, what is to happen under plaintiffs’ definition if the allegations regarding the Doe defendant’s actions are inaccurate? What if it is determined that the Doe defendant did not emerge from a merchandise aisle and was pulling the cart when the accident occurred, such that plaintiff’s identification is not accurate?

Plaintiffs’ proposed definition of reasonable particularity is a slippery slope. Under their definition it would be sufficient if a plaintiff knew the identity of one proper defendant, sat on her claims until the statute of limitations was about to expire, then generically identified catchall entities in the complaint. For example, identification of “ABC

Corporation is an unknown entity that owned the area where the fall occurred on the date of the subject incident” meets plaintiffs suggested criteria. Such description identifies the party’s nature, character, role, acts, omissions or relationship to the premises. Under plaintiff’s definition, the unnamed defendant in *Bresina* was arguably named with reasonable particularity. *Bresina*, 89 Wn. App. at 279 (“[The plaintiff argued [] that she had identified Ace with ‘reasonable particularity’ because she had sued ABC Corporation as ‘an unknown entity’ that ‘constructed and/or owned and/or controlled and/or had some legal responsibility for the [] area where the fall occurred.’”). However, the Court in *Bresina* did not find the plaintiff had identified the unknown entity with reasonable particularity.

Furthermore, as the Scotts argued before the trial court, such a description does not provide any identifying information. Reasonable particularity would arguably exist in a case where the plaintiffs were diligent and named, for example, the defendant and Jane Doe, and the marital community comprised thereof, such that the wife’s identity could be readily determined. Unlike this example, the Scotts’ identities cannot be readily ascertained from plaintiffs’ description in this case.

Adoption of plaintiff’s definition of reasonable particularity would circumvent the Civil Rules, the policy behind the statute of limitations,

and the Washington Supreme Court's continued emphasis on the exercise of due diligence by the injured party. A plaintiff could voluntarily neglect his or her claims without consequence and instead a Doe defendant who justifiably relied on the protection of the statute of limitations will be forced to bear the burden of the plaintiff's dilatory behavior.

6. Post-*Sidis* Washington Courts Have Required Compliance With CR 15(c) Where a Named Party is Later Substituted for a Fictitious One And That the Delay In Adding the Defendant Not Be the Result of Inexcusable Neglect

Plaintiffs concede that the First Amended Complaint in this matter does not meet the requirements for relation back under Civil Rule 15(c). (RP 13-14; CP 76-77). Instead they argue that *Sidis* makes relation back under CR 15(c) irrelevant. (Brief of Appellants at 25-27). In making this argument, plaintiffs simply reiterate the *Sidis* Court's analysis of RCW 4.16.170 and legislative intent. (*See id.*). Importantly, despite their consideration of the text of RCW 4.16.170 and the Legislature's intent, the *Sidis* Court did not simply hold that the statute of limitations is tolled as to both named and unnamed defendants by service on a proper party. Instead, the Court held only that it was tolled as to named defendants. *Sidis*, 117 Wn.2d at 331. Furthermore, because the plaintiff in *Sidis* had not named any fictitious defendants and was not seeking to substitute a named defendant for an unnamed one, the relation back requirement of CR

15(c) was not an issue and was not considered. Similarly, because the plaintiff in *Sidis* was not seeking to add any additional defendants, the Court did not consider the inexcusable neglect doctrine. Plaintiffs do not cite any other authority.

Nothing about the ruling in *Sidis* indicates that the relation back requirement of CR 15(c) or the inexcusable neglect doctrine should not apply in a situation where a plaintiff seeks to amend a complaint to substitute a named defendant for an unnamed one even where a proper defendant has been timely served. To the contrary, *Kiehn v. Nelsen's Tire Co.* specifically held that CR 10(a)(2) regarding the naming of fictitious defendants must be read in conjunction with CR 15(c). *Kiehn*, 45 Wn. App. at 295. Further, the Court in *Iwai*, in discussing *Sidis*, supported its decision with citation to *Kiehn v. Nelsen's Tire Co.*'s holding that the plaintiff was required to comply with CR 15(c)'s relation back requirements. *Iwai*, 76 Wn. App. at 312. The *Iwai* Court went on to apply the relation back requirements to the facts of that case. *Id.* at 313.

In addition, in *Bunko*, Division 2 of the Court of Appeals, citing RCW 4.16.170 and *Sidis*, noted: "the doctrine of relation back also applies where a plaintiff serves a party after the applicable statute of limitations has run, if one proper defendant was served within the limitations period." *Id.*, 95 Wn. App. at 500 n.6. The Washington Supreme Court, post-*Sidis*,

has also recognized that CR 15(c) applies where a defendant is being substituted for a Doe defendant after the statute of limitations has run. *See, e.g., Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 490 & n.5, 145 P.3d 1196 (2006). Further, where a plaintiff seeks to amend his complaint to add a claim, even though such an amendment does not subvert the policy of the statute of limitations, compliance with the first sentence of CR 15(c) is nonetheless required. *Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002).

During the June 1, 2011 hearing, Judge Steven Gonzalez asked plaintiffs' counsel "how do we resolve what could be construed as a conflict, then, between the statute and the tolling and the relation back under 15(c)?" (RP 16-17). Plaintiffs' counsel argued in response that the trial court should simply ignore the requirements of CR 15(c) because the statute of limitations was tolled by service on Home Depot. (RP 17). Plaintiffs' argument makes CR 15(c) irrelevant and is therefore contrary to the rules of construction. "Apparent conflicts between a court rule and a statutory provision should be harmonized and both given effect, if possible." *State v. Thomas*, 121 Wn.2d 504, 511, 851 P.2d 673 (1993). "Where rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme." *Petrarca v. Halligan*, 83 Wn.2d 773, 776, 522 P.2d 827 (1974)

(finding that the mandatory language of RCW 11.40.100 was superseded by the permissive language of CR 25(a)(1)); *Jones v. Stebbins*, 122 Wn.2d 471, 478, 860 P.2d 1009 (1993) (citing *Petrarca* and concluding that CR 4(d)(4) could be harmonized with RCW 4.16.170); *see also* Civ. R. 81. “Statutes of limitation are procedural rules.” *Sidis*, 117 Wn.2d at 330.

Were this Court to hold that tolling by service on a proper defendant should be extended to fictitious defendants, it should interpret CR 10(a)(2), CR 15(c) and RCW 4.16.170 to give them each effect. If any conflict cannot be harmonized, the civil rules supersede RCW 4.16.170, a procedural statute. Plaintiff’s position effectively nullifies CR 15(c) any time a proper defendant is served. On the other hand, all of the rules and statutes can be given proper effect by following the plain language and requiring the elements of CR 15(c) be met any time a plaintiff seeks to amend her complaint to change the party against whom a claim is asserted. Such a reading is not contrary to the civil rules or to RCW 4.16.170.

7. The Scotts Were Prejudiced by Plaintiffs Delay in Identifying and Notifying Them of the Lawsuit

Plaintiffs argue that the Scotts were not prejudiced by being served with process on February 13, 2011 because service on February 13, 2011 would have been timely and authorized by RCW 4.16.170 if they had been accurately named in the original complaint. (Appellants Brief at 27-28).

The fact that service would have been considered timely had plaintiffs accurately named the Scotts in their initial complaint does not create an inference that the Scotts were not prejudiced by plaintiffs' delay in notifying them of the lawsuit.

The plaintiffs in *Fittro v. Alcombrack*, 23 Wn. App. 178, 596 P.2d 665 (1979), cited by plaintiffs, and *Sidis* did not name any Doe defendants and did not seek to amend a complaint to substitute named defendants for fictitious ones. Accordingly, those cases did not involve consideration of the requirements of CR 15(c) and the courts did not otherwise consider whether the named parties were prejudiced. The fact that the cases cited by plaintiff did not consider prejudice does not create an inference that the Scotts will not be prejudiced in this case.

Furthermore, by being named as John and Jane Doe rather than by their true names, the Scotts could not have searched court files and found that there was an action pending against them. The unserved but named defendants in *Sidis*, on the other hand, could have searched the court files and seen that there was a lawsuit pending against them.

The Scotts submitted evidence to the trial court that demonstrated how they were prejudiced by plaintiffs' failure to timely serve them. (*See* CP 33-34, 57-58, 140-141). Plaintiffs did not contest this. (*See* CP 70-78). This case involves an accident at a Home Depot store where the

plaintiffs allege that Mr. Scott struck plaintiff with a cart. What occurred during the incident is highly relevant to the issues of liability, causation and damages. As such, the testimony of plaintiff, Mr. Scott and other witnesses will be incredibly important for the Scotts in preparing a defense in this matter. Plaintiffs have had over three years to preserve witness testimony and other evidence. However, by the time the Scotts became aware of this action the claim was nearly four years old. Here, Mr. Scott did not make any attempt to preserve his memory or contact any witnesses regarding the incident and his recollection of the incident has faded. (CP 57-58). Plaintiffs sat on their rights and as a result the Scotts will be prejudiced if required to defend themselves in this action.

8. Plaintiffs and Home Depot's "Stipulation of Parties Re Amendment of Summons and Complaint for Damages" is Void Because It Did Not Comply With the Requirements of CR 15

On February 4, 2011, a "Stipulation of Parties Re Amendment of Summons and Complaint for Damages" signed by counsel for plaintiffs and for Home Depot was filed with the trial court. (CP 18). Civil Rule 15(a) governs amendment of pleadings. After a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given

when justice so requires.” Civ. R. 15(a).⁶ Here, the stipulation was not endorsed by the trial court or consented to by the other (truly) adverse party, the Scotts.

Allowing stipulations among parties makes sense in instances where a plaintiff wants to add a claim against an entity that is already a party, all of the parties have already been added and the intent is to clean up claims prior to trial, or other housekeeping matters, e.g., stipulations for medical records or stipulations to liability in a rear-end auto accident case. It does not make sense in instances such as this where the current parties seek to add a new party to the action. Requiring an order of the Court serves to protect the non-party’s interests, particularly where, as here, the statute of limitations has expired. Accordingly, the Scotts submit that because the Court’s leave or stipulation by the Scotts was not obtained, plaintiffs’ First Amended Complaint is void and should be stricken.⁷

⁶ There is also authority that once a matter is set for trial, permission of the trial court is required before an amended pleading can be filed. *Wolfe v. Legg*, 60 Wn. App. 245, 251, 803 P.2d 804 (1991) (“[O]nce a matter is set for trial, permission of the trial court is required for the filing of an amended pleading, regardless of whether a responsive pleading has been filed.”).

⁷ Because the served defendant (Home Depot) was dismissed on July 18, 2011 (CP 209-211) before proper amendment of the action to name the Scotts as parties, it is appropriate for this Court to uphold the dismissal of the Scotts with prejudice. *See Sidis*, 117 Wn.2d at 329-330 (“A plaintiff who fails to serve each defendant risks losing the right to proceed against unserved defendants if the served defendant is dismissed.”) (citing *Fittro*

IV. CONCLUSION

For the reasons stated above, Gerard and Cheryl Scott respectfully request that the Court affirm Judge Steven Gonzalez' June 1, 2011 Order Granting Defendants Gerard T. Scott and Cheryl Scott's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 28 day of November, 2011.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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v. Alcombrack, 23 Wn. App. 178, 180, 596 P.2d 665, review denied, 92 Wn.2d 1029 (1979)).

COURT OF APPEALS, DIVISION I
OF THE STATE WASHINGTON

MARIE AND ROBERT GEARY,)	
)	
Appellants,)	No. 67534-6-I
)	
v.)	
)	
HOME DEPOT USA, INC., and)	
GERARD T. & CHERYL SCOTT,)	
)	
Respondents.)	
_____)	

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That I arranged for service of the foregoing Brief of Respondents Gerard T. & Cheryl Scott to the court and to the parties to this action as follows:

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STATE OF WASHINGTON

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DATED at Seattle, Washington this 29th day of
November, 2011.


Jill Martin, Legal Assistant

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