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No. 90133-3

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JESSE POWERS,

Respondent,

v.

W.B. MOBILE SERVICES, INC.,

Petitioner.

RESPONDENT JESSE POWERS'S
ANSWER AND RESPONSE TO PETITIONER'S MOTION TO STRIKE

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Attorneys for Respondent, Jesse Powers

ORIGINAL

I. IDENTITY OF RESPONDING PARTY

Jesse Powers, Respondent herein, by and through his attorneys of record, Tacoma Injury Law Group, Inc., P.S., per attorneys Cameron T. Riecan and Tamara S. Clower, hereby submits this answer and response to the Petitioner's (WB Mobile Services, Inc., hereinafter "WB Mobile) Motion to Strike.

II. STATEMENT OF RELIEF REQUESTED

Respondent Jesse Powers respectfully requests that the Court deny WB Mobile's Motion to Strike.

III. STATEMENT OF FACTS RELEVANT TO MOTION

This case stems from an appeal by WB Mobile from a decision of the Court of Appeals of the State of Washington, Division II, which found in favor of Mr. Powers, Respondent herein.

The Petitioner, WB Mobile, filed with the Court a motion to strike on August 22, 2014. The motion requested that this Court strike section II(3)/(Pages 12 through 20) of Respondent's (Mr. Jesse Powers) supplemental brief. Alternatively, in WB Mobile's motion, it asked that if the Court exercises its inherent authority to consider the issue concerning the "inexcusable neglect" standard of CR 15(c) that it be allowed to respond with additional briefing.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Court Should Deny WB Mobile's Motion To Strike Because Mr. Powers Did Not Raise New Issues For Review In His Supplement Brief But, Rather, Responded To Arguments Made In WB Mobile's Petition And Reasonably Developed Issues And Arguments Raised Below.

This Court has refused to strike a part of a party's supplemental brief on the theory that it raised new issues when, as here, the party "[had] not raised new issues for review but ha[d] instead responded to arguments made in [the] petition and reasonably developed issues and arguments raised below. *State v. Miller*, 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005). Likewise, this Court has considered issues not addressed in the parties' Supreme Court briefs when the parties had argued the issue below but the Court of Appeals majority did not address the issue, *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), and when consideration of an "[i]ssue included in the record and discussed in the briefs are necessary to decide the case on the merits, even though review was not granted with respect to that issue." *State v. L.J.M.*, 129 Wn.2d 386, 397, 918 P.2d 898 (1996).

Here, Mr. Powers's request that the Court decide whether inexcusable neglect 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 prong under CR 15(c), is not a new issue raised for the first time. First, Mr. Powers' argument is a response to the

issue WB Mobile raised in its petition asking whether a plaintiff must also comply with the relation back requirements of CR 15(c). WB Mobile Pet. for Review at 2, 16-17. If, as WB Mobile argues, Mr. Powers must comply with the requirements of CR 15(c) it is reasonable that Mr. Powers be allowed to argue that the requirements of CR 15(c) should not include “inexcusable neglect.”

Second, this issue *was* raised below in Mr. Powers’ brief to the Court of Appeals. *See Powers Appellant Br.* at 25-26. However, the court determined that Mr. Powers’s claim against WB Mobile was timely under RCW 4.16.170 and, therefore, did not reach the separate issue of whether Mr. Powers met the requirements for relation back under CR 15(c). *Powers v. W.B. Mobile Servs., Inc.*, 177 Wn. App. 208, 215, 311 P.3d 58 (2013) *review granted*, 180 Wn.2d 1022, 328 P.3d 902 (2014).

Furthermore, in *Powers v. WB Mobiles Services, Inc.* companion case of *Martin v. Dematic*, the petitioner also raised the issue of inexcusable neglect in its Petition for Review acknowledging that “the principal dispute involves the ‘inexcusable neglect’ requirement” and asking this Court to “hold that ‘inexcusable neglect’ for purposes of relation back under CR 15 is limited to a ‘strategic choice’ and does not apply to a mere mistake. *Martin Supplemental Br.* at 17 n.20.

Here, “inexcusable neglect” is also part of the principle dispute and thus, Mr. Powers disputes the necessity of continued adherence to this requirement as part of the relation back test of CR 15(c) that WB Mobile argues Mr. Powers must comply with in order to substitute WB Mobile for a John Doe defendant.

B. WB Mobile’s Motion To Strike Should Be Denied Because Consideration Of The “Inexcusable Neglect” Is Necessary To Reach A Proper Decision.

Assuming *arguendo* that Mr. Powers had failed to raise the argument of inexcusable neglect as argued by WB Mobile, while the court’s review is generally limited to issues raised in the petition for review and the answer,(See RAP 13.7(b)), this Court has recognized its inherent discretionary authority to waive this rule to ““serve the ends of justice.”” *Kruse v. Hemp*, 121 Wn.2d 715, 721, 853 P.2d 1373 (1993) (quoting RAP 1.2(c)). The court has exercised this discretionary authority to reach issues not briefed by the parties when ““those issues are necessary for decision,”” *Blaney v. Int’l Ass’n of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 213, 87 P.3d 757 (2004) (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994)), to “[c]larify case law” and when the issue “[i]s arguably within the scope of the petition.” *State v. Cantu*, 156 Wn.2d 819, 822 n.1, 132 P.3d 725 (2006).

Here, consideration of the issue is necessary to reach a proper decision because the issue of “inexcusable neglect” is intertwined with the question as to whether Mr. Powers has met the requirements of CR 15(c). In *Blaney*, this Court recognized its “[i]nherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision” when it addressed a remedial provision of the WLAD. *Blaney v. Int’l Ass’n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 213, 87 P.3d 757 (2004) (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994)). The court noted that even though “the parties’ petition and answer did not explicitly brief characterization of Ms. Blaney’s requested offset” for the income tax consequences of her jury award as “any other appropriate remedy” under the WLAD, the Court could reach the remedial provision because the parties “expansively defined” the issue. *Id.* The Court added that it could also reach the issue of the remedial provision under the common law exception “[b]ecause the provision [was] necessary to determine whether WLAD entitles prevailing plaintiffs to such an offset.” *Id.*

Similarly, here, even if the “inexcusable neglect” requirement of CR 15(c) was not explicitly briefed by WB Mobile, it also expansively defined the issue as requiring a plaintiff to comply with the relation back requirements of CR 15(c) in order to substitute WB Mobile for a “John Doe”

defendant. WB Mobile Petition for Review at 2, 16. Since WB Mobile argues that Mr. Powers must also comply with all the requirements of CR 15(c), including the “inexcusable neglect” prong, it is necessary for the court to decide whether continued adherence to this requirement is unnecessary and should be abandoned in light of new interpretations and analyses of the rule.

Additionally, the court’s consideration of the necessity of “inexcusable neglect” as an added prong of the CR 15(c) test is essential for purposes of clarifying the case law applying this amorphous prong of the CR 15(c) test. Moreover, the issue is also within the scope of the petition as WB Mobile argues that *Bresina* “reiterates and reinforces the excusable neglect element of a CR 15(c) analyses.” WB Mobile Petition for Review at 16-17.

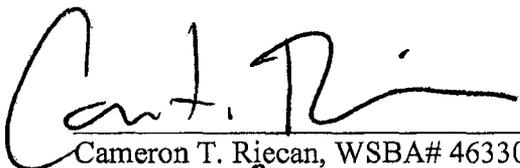
Accordingly, if the Court finds that issue concerning the applicability of the “inexcusable neglect” prong was not raised, then the Court should exercise its inherent discretion and provide an answer to this important question for purposes of providing a necessary guideline for parties and courts to follow in the future, given the significant public policy concerns.

V. CONCLUSION

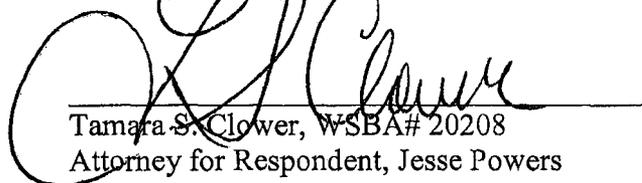
Respondent, Mr. Jesse Powers, by and through his counsel of record, Tacoma Injury Law Group, Inc., P.S., per Attorneys Cameron T. Riecan and Tamara S. Clower, respectfully request that the Court deny Petitioner's (WB Mobile) Motion to Strike.

Respectfully submitted this 28th day of August, 2014.

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



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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 28, 2014, I filed with the Court, the original of Respondent Jesse Powers's Answer and Response to Petitioner's Motion to Strike and caused to be served true copies of the same upon:

VIA electronic mail per Stipulation for electronic mail

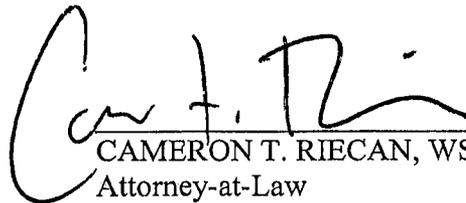
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: Powers v. W.B. Mobile Services, Inc., (Supreme Court Case No. 90133-3)

Attached for filing and service, please find the following: Respondent Jesses Powers's Answer and Response to Petitioner's Motion to Strike and Declaration of Service by email.

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

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Please confirm receipt. Thank you.

Very Truly Yours,

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