
IN THE
Supreme Court of Virginia

RECORD NO. 150192

LINDA RICHMOND,

Appellant,

v.

KATHERINE E. VOLK, f/k/a KATHERINE E. CRAFT,
a/k/a KATHERINE E. CORNETT,

Appellee.

REPLY BRIEF OF APPELLANT

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Argument

- I. **Defendant Katherine E. Volk concedes that the 2011 Complaint’s use of “Katherine E. Cornett” was a misnomer, as Volk was the right party, wrongly named. Both the 2011 and 2012 cases were therefore against the same party, making the 2012 case timely under Code § 8.01-380(A) and -229(E)(3).**

Confronted with the Virginia Supreme Court’s dichotomous analysis of whether Richmond’s 2011 Complaint suffered from misjoinder (“wrong party, rightly named”) or a misnomer (“right party, wrongly named”), the defendant Katherine E. Volk (f/k/a Katherine E. Craft) concedes that “Katherine E. Cornett” was a misnomer for her as the right party. See Brief of Appellee (“Opp. Brief”) 2, 9-10, 18. Volk thus necessarily acknowledges that the trial court erred to the extent it ruled that “Cornett” was not a misnomer, but a “mistaken identification” of an altogether different person—a misjoinder. See J.A. 58. Volk argues instead that because Richmond never amended the 2011 case to correct the mistake, the 2011 case somehow never tolled the statute of limitations against her, even though she was the party defendant from its commencement.

Conspicuously absent from Volk’s brief is a lucid explanation how the 2011 case could at all times be “against” Volk (the right party, by a misnomer), yet not be “against the same party” as the 2012 case that named Volk correctly, under Code §§ 8.01-380(A) and -229(E)(3). Volk

does not expressly dispute that Richmond's compliance with the plain language of Code §§ 8.01-380(A) and -229(E)(3) would toll the 2011 case against her and make the 2012 case timely. But Volk mentions Code §§ 8.01-380(A) and -229(E)(3) only briefly, dismissing them as immaterial. See Opp. Brief at 18-19. Those statutes are central, and establish absolute rights that are dispositive of this appeal.

Volk does not dispute that a misnomer involves the right party being before the court by the wrong name. Volk also concedes that the 2011 case suffered from a misnomer, not misjoinder, and that she was the intended defendant. So Volk also concedes by implication that she was the party defendant in the 2011 case under the wrong last name, and in the 2012 case by the right one.

But Volk's impossible premise is that "Katherine E. Cornett" was conceptually a "party" distinct from Volk for the purpose of the nonsuit and savings statutes, even though she admits "Cornett" was a misnomer for Volk as the correct party. Her argument rests upon an untenable obfuscation of otherwise simple concepts, specifically disclaiming the well-established tolling effect of a valid action, simply because it contains an amendable defect of form.

Specifically, Volk argues that for the purpose of Code § 8.01-380's reference to "against the same party," the only "party" in the 2011 case at the time of nonsuit was somehow "Katherine E. Cornett." Opp. Brief. 19. Her sole basis is the circular declaration "that Katherine E. Volk was not 'Katherine E. Cornett,' either at the time of the original filing or subsequently." *Id.* This conjures the same fallacy as the trial court's ruling that Volk was not the "same person" as Katherine E. Cornett, apparently because Volk never used that last name. J.A. 58. Both treat a misnomer as if it creates a different "party" altogether, rather than crediting the definition of "right party, wrongly named."

This would be a new (and confusing) legal concept that eliminates any practical distinction between misjoinder and misnomer. It makes no sense. Volk cites no cases, and ignores the authorities that Richmond cites in her opening brief that a misnomer occurs when the *right party* is the party defendant, but *incorrectly named*. See Appellant's Opening Brief (AOB) at Arg. II-B. Misnomer law makes no distinction whether the mistake is a single letter or a whole last name, or whether the defendant has used that name.

Volk never really disputes that she was the defendant described correctly as the driver in the 2011 Complaint, other than being misnamed

“Cornett.” Of course, as Richmond has also pointed out, Volk expressly admitted to being the defendant when she moved as the defendant “erroneously identified in the caption” to quash service and later endorsed the nonsuit order as “Defendant.” J.A. 43, 47. She certainly knew she was the intended defendant, which makes her argument about a distinct and purely hypothetical “party” named “Cornett” seem like a bare effort to obfuscate a simple legal concept because it is inconvenient. AOB 14-15.

Faced with the plaintiff’s authorities demonstrating that misnomers are mere defects in form of naming the right party, Volk suggests that Virginia courts somehow view a misnomer as a fatal pleading error that results in voiding an underlying action, unless amended during the pendency of the action. At one point, Volk even claims that the Virginia Supreme Court “does not use, or sanction the use of, a ‘substance-over-form’ analysis of a misnomer issue.” Opp. Brief at 11 (discussing *Peyton v. James*). But of course, that is exactly what Virginia courts do. See AOB Arg. II-A.

At some point, Volk needs to address the logical conundrum she poses—how can Volk admit that in the 2011 case, she was the misnamed “party” driver that the Complaint correctly described, yet not also be the “same party” identically described in the 2012 case by her correct, married

last name, for the purposes of the nonsuit and savings statutes? The bottom line is both suits are against the same party, and Code §§ 8.01-380(A) and -229(E)(3) make the 2012 case timely.

II. Whether Richmond utilized Code § 8.01-6 to correct the misnomer of Volk's name does not affect the absolute rights of tolling and timeliness established by Code §§ 8.01-380(A) and -229(E)(3).

It is axiomatic that in the case of a misnomer, the right party is before the court by the wrong name. As a result, filing the case necessarily tolls the statute of limitations against that party as a matter of law, because the action is valid and against the right party when commenced. Volk disputes this premise, arguing that absent a Code § 8.01-6 amendment to correct a mistake in name, there is never tolling against the intended but misnamed party defendant. Opp. Brief, Arg. III.

Volk divides this argument into three unsupportable premises, with no case authority for any one of them. First, Volk claims that when Richmond filed the 2011 Complaint against Volk by a misnomer, the commencement did not itself toll the statute of limitations against Volk. Opp. Brief at 13. Volk next argues that Code § 8.01-6 is Virginia's mandatory and exclusive means to remedy such a defect, essentially superseding the rights established by Code § 8.01-380(A) and 229(E)(3) in misnomer cases, in violation of numerous Virginia decisions warning against implying such

limitations against those rights. Opp. Brief at 16 (arguing that the Virginia Code “provides no mechanism other than Code § 8.01-6 for correcting the misnomer involved here.”). Finally, as to the plaintiff’s claim that Code § 8.01-380(A) and 229(E)(3) permit the timeliness of the 2012 case, Volk declares: “A nonsuit... cannot, of its own force, cure a misnomer, and it cannot cure the statute of limitations problem a misnomer creates.”

In essence, Volk is at all times treating a misnomer of the right defendant as if it makes an action a nullity or void, just as naming an “estate” as an improper defendant was an effective nullity in *Swann v. Marks*, 252 Va. 181, 476 S.E.2d 170 (1996). But *Swann* announced the primary rule: “To toll the statute of limitations, a suit must be filed against a proper party.” *Id.*, 252 Va. at 184. And it is well-established that in the case of a misnomer, the suit is against the “proper party,” even if there is a mistake in that party’s name. See *Baldwin v. Norton Hotel*, 163 Va. 76, 82, 175 S.E. 751, 753 (1934) (where complaint showed that plaintiff had instituted his action against the operator of the Norton Hotel by misnomer, “the real defendant... through whose negligence plaintiff alleged he had been injured.”); *Cf. Estate of James v. Peyton*, 277 Va. 443, 455, 674 S.E.2d 864, 869 (2009) (“whether a party named in a caption is a proper party to the action is to be determined not merely by

how that party is identified in the caption of the pleading, but by the allegations set forth within a pleading that identify that party more specifically.”).

Swann ultimately ruled that because the complaint named an estate—a real entity but improper defendant—the action was a nullity and did not toll the statute of limitations. The only remedy would have been a change of parties, but the Court took care to distinguish this from a misnomer, which *would* have tolled the statute of limitations: “the substitution of a personal representative for the ‘estate’ is not the correction of a misnomer.” *Id.* The inverse side of *Swann’s* ruling is that in cases commenced against the right party by a misnomer, the action is valid and tolls the limitation against the proper party when filed.

If the 2011 case contained a misnomer of Volk as the right defendant, she was the party for tolling purposes at the time Richmond commenced that case. It was at all times a valid action against Volk, over which the court had subject matter jurisdiction, *irrespective of the amendable defect of a misnomer*. There is no authority to support what Volk presumes: that a case with a misnomer is a non-tolling nullity *until* an amendment under Code § 8.01-6 magically converts it into a valid action that tolls the limitation against the same party defendant.

Nor was the plaintiff required to use Code § 8.01-6 as her only salvation for a misnomer. Volk's argument is that because Code § 8.01-6 provided Richmond a procedure to amend her 2011 Complaint to correct the misnomer, this must also be her mandatory and exclusive remedy. Volk effectively argues that by virtue of its supposed exclusivity, Code § 8.01-6 is an exception to the "absolute" rights that Richmond's compliance with the plain terms of Code §§ 8.01-380(A) and -229(E)(3) would otherwise grant.

There are several problems with this. First, nothing about Code § 8.01-6's plain language or nature demonstrates that it is mandatory or exclusive. While it may be the most specific procedure for amending a pleading to correct a misnomer, this does not mean that the General Assembly intended to make it the only means to do so, particularly to the extent that it would effectively supersede Code § 8.01-380(A) in cases involving misnomers.

Many defendants have tried similar arguments that a plaintiff's failure to utilize or comply with a specific procedural requirement in a first action somehow limited her rights to nonsuit that action under Code §§ 8.01-380(A) and recommence under Code § 8.01-229(E)(3). In every case, this Court has held that as long as the trial court had subject matter

jurisdiction over the nonsuited action, and the plaintiff complied with the plain terms of those statutes (same cause of action, against the same party, within six months), the plaintiff had absolute rights to nonsuit and recommence—even in the face of a pending motion to dismiss for otherwise fatal errors. See *Morrison v. Bestler*, 239 Va. 166, 173, 387 S.E.2d 753, 758 (1990). Efforts to imply that other rules create limitations on a plaintiff’s rights under those statutes—such as Volk attempts to do by arguing that Code § 8.01-6 is an exclusive pathway to tolling the first case—have consistently failed. See *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995); *Berry v. F & S Fin. Mktg., Inc.*, 271 Va. 329, 334, 626 S.E.2d 821, 824 (2006).

III. The cases that look at analogous postures of a nonsuit of a case with a misnomer, followed by recommencement under a savings statute, hold that the first case tolls the limitation. Volk has not distinguished these, or presented contrary authority.

Richmond acknowledges that her appeal presents an unusual procedural posture, and this appeal reflects that Virginia courts have not ruled upon this precise scenario. But several cases in other jurisdictions actually have addressed the “same party” issue in the exact same context of a plaintiff nonsuiting a first case with a misnomer intact, and then recommencing a timely action that corrects it. They uphold the same reasoning and result that Richmond argues to the Court.

The plaintiff has previously cited *Motorcycle Stuff, Inc. v. Bryant*, 182 Ga. App. 554, 356 S.E.2d 521 (Ga. Ct. App. 1987), where the first case was nonsuited with the plaintiff's misnomer intact, and then "renewed" with the correct name. The Court concluded that since the amendment of a misnomer would not have involved substituting in a new party, then it did not matter that the amendment never took place, because the first suit involved the right party, misnamed, and "was not void." *Id.*, 182 Ga. App. At 555. When the plaintiff refiled with the correct name, the Court held that "the parties here are the same as in the original suit," meaning that Georgia's analogous "renewal" statute granted a right to timely recommencement.

Volk offered no legitimate answer to the Georgia Court of Appeals' reasoning, scraping together immaterial observations of a "very slightly misnamed" party plaintiff and the context of a misnomer involving corporate trade names, neither of which define a misnomer. Opp. Brief 28. But lest there be any doubt, Georgia's Supreme Court has also applied the same principles to substantial mistakes in an individual defendant's name in *Hobbs v. Arthur*, 264 Ga. 359, 361, 444 S.E.2d 322, 324 (Ga. 1994). There, the Court reviewed a personal injury case in which the plaintiff originally sued a defendant driver under the misnomer "Arthur Douglas

Ficklen.” The plaintiff then voluntarily dismissed his case, and recommenced under Georgia’s “renewal” statute against the same defendant by his correct name, “Douglas F. Arthur.” *Hobbs v. Arthur*, 209 Ga. App. 855, 855, 434 S.E.2d 748, 749 (Ga. Ct. App. 1993), *rev’d*, 264 Ga. 359, 444 S.E.2d 322 (Ga. 1994). The defendant moved to dismiss the second action as time-barred, and the trial court agreed.

Applying the rules of *Motorcycle Stuff, supra*, the Georgia Court of Appeals held that the amendable defect of a misnomer did not void the first action, so that it tolled the statute of limitations against the intended party defendant in the first case. That party, correctly named in the second case, was “the same defendant” for the purpose of the renewal statute. *Id.*, 434 S.E.2d at 749. The Georgia Supreme Court then upheld this aspect of the holding, confirming the second case was timely. *Hobbs, supra*, 444 Ga. at 324, fn. 2 (“The Court of Appeals correctly determined that the misnomer was an amendable defect which did not void the action.”).

The Missouri Court of Appeals reviewed another analogous scenario in *Deane v. S.F. Pizza, Inc.*, 229 S.W.3d 223, 226 (Mo. Ct. App. 2007). Deane sued a pizza restaurant for a fall injury. The restaurant’s name was S.F. Pizza, Inc., but in the first petition, the defendant was “incorrectly named as ‘Imo’s Pizza’ and service was never obtained on Defendant S.F.

Pizza, Inc., either under its correct or incorrect name.” *Id.*, 229 S.W.3d at 224. The plaintiff nonsuited without correcting the misnomer, then filed his second case against “S.F. Pizza, Inc.,” the restaurant’s correct name.

Missouri Code § 516.230 (“Further savings in cases of nonsuits”) provided, analogous to Virginia’s statutes, that following a nonsuit, a plaintiff may commence a new action within a year if “the parties defendant in the second suit are the same as the parties defendant in the first suit.” *Deane*, 229 S.W.3d at 224 (quoting statute). In ruling the second case to be timely, Missouri reasoned:

“A name is a means of identity; but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued, but the person to whom it is applied.”

“A misnomer does not destroy the effectiveness of a petition.” The correction of a misnomer relates back to the filing date of the original petition. The fact that an incorrect name is used is immaterial if the corporate defendant is not misled by the name designation and there is no intention on the part of a plaintiff to sue a different entity.

Deane, 229 S.W.3d at 225-6 (citations omitted, emphasis added).

Pertinent to Volk’s argument here that the plaintiff was required to use Code § 8.01-6 to amend the misnomer before the nonsuit, the Missouri Court expressly ruled that the use of the nonsuit and recommencement to achieve the same result as an amendment was perfectly reasonable:

This court perceives no difference between the situation in this case in which nonsuit was taken and the case was refiled within the one-year savings period, and a case in which a petition is amended to correct a corporate defendant's name as part of the originally filed suit. The correction of the misnomer in the petition filed within one year following the nonsuit in the first suit relates back to the filing of the original lawsuit.

Id., 229 S.W.3d at 226 (emphasis added).

The same principles of Virginia law provide that in a misnomer situation, the right party is before the court for tolling purposes from the commencement of the lawsuit, irrespective of a defect in her name. When a plaintiff nonsuits the case and recommences against that same person in her correct name, the suit is still against the same party defendant. It does not matter that Richmond could alternatively have amended the 2011 case under Code § 8.01-6 while it was pending, because Code § 8.01-380(A) and -229(E)(3) established her absolute rights to recommence a timely action against the same party—Volk—after a nonsuit of the 2011 case.

Conclusion

When Richmond's 2011 Complaint described the driver-defendant Katherine E. Volk but misnamed her "Katherine E. Cornett, it described only one, potential person. Volk does not dispute that she knew she was the intended defendant, and acknowledged this during the 2011 case. Yet she asks the Court to abandon well-established principles as to misnomer,

adopt a form-over-substance analysis of party identity, embrace strained fallacies about party identity, and imply exceptions into the plain language of the nonsuit and savings statutes. Richmond filed her 2011 case against Volk, by a misnomer. Her 2012 case was against the same party, and it was timely as a matter of law.

Respectfully submitted,
Linda Richmond

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CERTIFICATE

I, Devon Munro, counsel for the Appellant Linda Richmond, hereby certify that this reply brief complies with Rule 5:26 in length (under 15 pages) and timeliness, and that on July 10, 2015, I have filed a an electronic (.pdf) copy with the Clerk of the Virginia Supreme Court at scvbrieffs@courts.state.va.us, filed the correct number of copies with the Court, and mailed the correct number of copies to Appellee's counsel: John Eure and Brian Brydges, Johnson, Ayers & Matthews, PLC, P.O. Box 2200, Roanoke, Virginia 24009.

s/ Devon J. Munro