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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.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Assignment of Error 1

Statement of the Case 1

Statement of Facts 3

Summary of Argument 7

Argument 8

I. This Court conducts a *de novo* review of the trial court's ruling of law, applying the unambiguous nonsuit and tolling statutes to a stipulated record. 8

II. Code §§ 8.01-380(A) and 8.01-229(E)(3) establish as a matter of law that Richmond's 2012 case was filed "against the same party" as the nonsuited 2011 case, and was therefore within the statute of limitations. 9

A. Applying the substantive review of the pleadings that the Virginia Supreme Court commands, Richmond's 2011 and 2012 cases were "against the same party": Katherine E. Volk. 10

B. The 2011 Complaint contained a misnomer of Katherine E. Volk's last name. There was no person named "Katherine E. Cornett," so the case did not involve misjoinder of some other party. 15

C. Because each case was "against the same party," Richmond had an absolute right to recommence the 2012 case against Katherine E. Volk, irrespective of whether she corrected the misnomer before nonsuiting. 22

Conclusion 29

Certificate of Service

TABLE OF AUTHORITIES

CASES

Baldwin v. Norton Hotel,
163 Va. 76, 175 S.E. 751 (1934) 16, 17, 19
Berry v. F & S Finance Marketing, Inc.,
271 Va. 329, 626 S.E.2d 821 (2006) 25
Brake v. Payne,
268 Va. 92, 597 S.E.2d 59 (2004) 12
Bryant v. Rorer,
66 Va. Cir. 226, 228 2004 Va. Cir. LEXIS 353 6
Cangiano v. LSH Building Co.,
271 Va. 171, 623 S.E.2d 889 (2006) 21
Clark v. Butler Aviation-Washington National, Inc.,
238 Va. 506, 385 S.E.2d 847 (1989) 25
David White Crane Serv. v. Howell,
282 Va. 323, 714 S.E.2d 572 (2011) 8
Estate of James v. Peyton,
277 Va. 443, 674 S.E.2d 864 (2009) 11, 12, 13
Jacobson v. So. Biscuit Co.,
198 Va. 813, 97 S.E.2d 1 (1957) 16
Janvier v. Arminio,
272 Va. 353, 634 S.E.2d 754 (2006) 9, 23
Johnson v. Huntington Moving & Storage, Inc.,
160 W. Va. 796, 239 S.E.2d 128 (1977) 16, 20, 28, 29
Laws v. McIlroy,
283 Va. 594, 724 S.E.2d 699 (2012) 9
Leech v. Beasley,
203 Va. 955, 128 S.E.2d 293 (1962) 21
Lucas v. Woody,
287 Va. 354, 756 S.E.2d 447 (2014) 8
McKinney v. Virginia Surgical Associates, P.C.,
284 Va. 455, 732 S.E.2d 27 (2012) 9
McManama v. Plunk,
250 Va. 27, 458 S.E.2d 759 (1995) 23, 24
Motorcycle Stuff Inc. v. Bryant,
182 Ga. App. 554, 356 S.E.2d 521 (Ga. Ct. App. 1987) 26, 27, 28
Snow v. Walker,
80 Va. Cir. 194 (Va. Cir. Ct. 2010) 17, 18

Station #2, LLC v. Lynch,
280 Va. 166, 695 S.E.2d 537 (2010) 9
Swann v. Marks,
252 Va. 181, 476 S.E.2d 170 (1996) 15, 16, 18
Waterman v. Halverson,
261 Va. 203, 540 S.E.2d 867 (2001) 25
Whelan v. DAVCO Restaurants, Inc.,
38 Va. Cir. 105 (Va. Cir. Ct. 1995) 18, 19, 20

STATUTES AND RULES OF COURT

Code § 8.01-6 ..... *passim*
Code § 8.01-380 ..... 23, 24, 25
Code § 8.01-380(A) ..... *passim*
Code § 8.01-229(E)(3) ..... *passim*
Rule 3:3(c) 25
Rule 3:5(e) 25
OCGA § 9-2-61(a) 27

TREATISES

Friend, *Virginia Pleading and Practice,* Vol. 1, § 5.08 (2nd Ed. 2006) 15

Assignment of Error

Linda Richmond sued a negligent driver by the wrong last name. The driver moved to quash service, admitting she was "erroneously identified in the caption of the plaintiff's complaint" by the misnomer. Richmond nonsuited, and then recommenced another suit against the Defendant using both her correct names and the misnomer. The trial court erred by ruling that the two actions were not against the "same party" under Code §§ 8.01-380 and -229(E)(3), and holding the second action barred by the statute of limitations.

See Joint Appendix (hereinafter "J.A.") 58, 60 (Sept. 25, 2014 Opinion), 53-54 (Final Order) (¶ 1 and objection).

Statement of the Case

On February 28, 2011, Linda Richmond filed a timely Complaint in case CL11-298 ("2011 case") claiming that the driver of a 2003 Honda Pilot negligently caused a rear-end collision injuring Richmond on April 12, 2009. *See* J.A. 39 (¶¶ 1-3). The 2011 Complaint misnamed the defendant driver as "Katherine E. Cornett," when her name at the time of the crash was Katherine E. Craft, then changed to Katherine E. Volk by marriage.

Following unsuccessful negotiations, Richmond issued process for service of the 2011 Complaint in the name of "Katherine Cornett, a/k/a Katherine E. Craft," but attempted to serve the driver at a wrong address. J.A. 40. The driver filed a motion to quash service on February 21, 2012, appearing as "Katherine E. Volk, formerly known as Katherine E. Craft, erroneously identified in the caption of the plaintiff's Complaint as

‘Katherine E. Cornett’ and in the summons as ‘Katherine E. Cornett a/k/a Katherine Craft.’” J.A. 47.

At Richmond’s request, and with endorsement of counsel for Volk as the party defendant, the Court nonsuited the 2011 case by Order dated November 9, 2012. J.A. 31, 42, (¶ 15). On December 11, 2012, Richmond recommenced the present case CL12-1631 (“2012 case”) and properly served it on Volk. On December 20, 2012, the Defendant filed a Special Plea in Bar to dismiss the 2012 Complaint based upon the statute of limitations. The parties have entered a Stipulation of Facts with five exhibits. J.A. 29-50.

Richmond also filed a separate motion for leave to amend the 2012 Complaint to remove the misnomer “a/k/a Katherine E. Cornett” from the caption as a housekeeping measure, in the event that the Court overruled the Plea in Bar. J.A. 24.

The trial court heard oral argument on August 15, 2014, and issued its letter opinion sustaining the Plea in Bar on September 25, 2014, with Final Order of dismissal entered November 4, 2014. J.A. 52, 55. The court held that the 2011 and 2012 Complaints were not against the “same party” as Code §§ 8.01-380(A) and 8.01-229(E)(3) require. J.A. 58 (p. 4). The court also ruled that Richmond’s motion for leave to amend the 2012

Complaint to delete the remaining misnomer was moot, due to sustaining the Plea in Bar. J.A. 52 (¶ 2).

Richmond filed her Notice of Appeal on November 6, 2014, J.A. 61. This Court certified the appeal on April 20, 2015.

Statement of Facts

The material facts are undisputed upon a record including the pleadings, Stipulation of Facts, and five exhibits. On April 12, 2009, a 17-year-old named Katherine E. Craft caused a rear-end collision that injured Linda Richmond. J.A. 29, 35 (¶ 1). Katherine E. Craft was the sole occupant of a 2003 Honda Pilot, which was owned by an unrelated person named Jeannie Cornett. J.A. 29, 35 (¶¶ 1, 3). The Defendant later changed her last name from "Katherine E. Craft" to "Katherine E. Volk" by marriage on August 24, 2010. J.A. 30 (¶ 4).

On February 28, 2011, Richmond filed a timely Complaint, in case number CL11-298 ("2011 case"). J.A. 30, 39 (¶¶ 7-8). The 2011 Complaint asserted a cause of action of negligence against the driver, but misnamed her "Katherine E. Cornett" rather than "Katherine E. Craft" or "Katherine E. Volk," as she was now known. The 2011 Complaint otherwise correctly described "Defendant" as the driver of a 2003 Honda Pilot who negligently caused the crash that injured Richmond, accurately detailing Volk's first

name and middle initial, circumstances, location, date and time of the rear end collision, as well as the bases for Volk's negligent operation. J.A. 39 (¶ 1-5).

State Farm, which covered the 2003 Honda, received a copy of the 2011 Complaint (with the misnomer) from Richmond's counsel on April 13, 2011. J.A. 30 (¶ 9). Following unsuccessful settlement negotiations, Richmond requested service of the 2011 Complaint on January 26, 2012 with a summons listing "Katherine E. Cornett a/k/a Katherine Craft," but posted service at the wrong address. J.A. 30, 31 (¶¶ 10, 12). State Farm learned of the attempted service from Jeannie Cornett, the car's owner, and contacted the referenced driver, Volk, about the 2011 Complaint on February 7, 2012. J.A. 32 (¶¶ 19-20).

Volk acknowledged she was the party defendant to the 2011 action on February 21, 2012, when she moved through counsel to quash service of the 2011 Complaint due to its service on the wrong address for her. J.A. 47 (motion), 51 (letter). In her motion, she referred to herself as "Katherine E. Volk, formerly known as Katherine E. Craft, <u>erroneously identified in the caption of the plaintiff's complaint as 'Katherine E. Cornett'</u> and in the summons as 'Katherine E. Cornett a/k/a Katherine Craft.'" J.A. 47 (¶ 1) (emphasis added). Volk acknowledged being the intended recipient, and

that neither she nor anyone named Katherine E. Cornett resided with Jeannie and Robert Cornett. J.A. 49 (¶¶ 7-9). Volk's counsel also wrote the court that he represented Volk, who was "erroneously identified" in the caption of the 2011 Complaint as "Katherine E. Cornett a/k/a Katherine E. Craft." J.A. 51.

In other words, there is no evidence—nor has the defense argued—that the 2011 Complaint misjoined an actual but "wrong" person other than Volk who was actually named "Katherine E. Cornett." No real person by that name was associated with the crash, the automobiles, the car's owner, or any other aspect of this case.

Volk never moved in abatement or filed any other pleading challenging the effect of the misnomer in the 2011 case. Instead, at Richmond's request, and before any briefing or ruling on the motion to quash, the trial entered an Order of Nonsuit at plaintiff's request on November 9, 2012. J.A. 31, 42 (¶ 15). Counsel for Volk, who had appeared as "Katherine E. Volk…. erroneously identified in the caption…" endorsed the Order for Volk as "Defendant" to the 2011 action, without objection. J.A. 42.

About a month after nonsuit, on December 11, 2012, Richmond filed the present case ("2012 case") and properly served the Complaint on Volk

at her home address. J.A. 32 (¶ 21). The allegations of the 2012 Complaint were identical to the 2011 Complaint in every respect, except for adding last names. *See* J.A. 1 (¶¶ 2-4). The 2012 Complaint named the driver as "Katherine E. Volk, f/k/a Katherine E. Craft, a/k/a Katherine E. Cornett"—her correct married name, maiden name, and original misnomer.

In ruling on the defendant's Special Plea in Bar, the trial court characterized using the wrong last name for Volk as equivalent to misidentifying a different "person" altogether, even though there was no one named Katherine E. Cornett. In essence, the trial court concluded that this was misjoinder resulting in a change of parties between the two lawsuits:

> In the instant case, the Plaintiff mistakenly identified the Defendant as Katherine E. Cornett and filed her suit <u>against the person she mistakenly identified.</u> Clearly, "... one defendant cannot be substituted for another under the guise of a misnomer." *See Bryant v. Rorer*, 66 Va. Cir. 226, 228 2004 Va. Cir. LEXIS 353.

Op., at 4 (emphasis added).

The trial court never discussed the facts that Volk appeared as the party "erroneously identified" by the wrong name in the 2011 action, or that her counsel endorsed the nonsuit order for Volk as the "Defendant." The trial court also did not address the fact that Katherine E. Cornett was

not a real but "wrong" person, even though it premised its ruling upon that apparent premise to distinguish Cornett and Volk as two different persons:

> ….the equation of Katherine E. Cornett to Katherine E. Volk, f/k/a Katherine E. Craft is unjustified and the argument of Plaintiff advocating such equation is unpersuasive. Contrary to the allegations contained in the Plaintiffs 2011 complaint, the operator of the 2003 Honda Pilot that was involved in the motor vehicle accident that allegedly resulted in the Plaintiffs injuries was not Katherine E. Cornett. Moreover, Katherine E. Volk has never been known as Katherine E. Cornett and no evidence has been adduced to suggest that Katherine E. Volk has ever used the name of Katherine E. Cornett. Simply put, Katherine E. Volk is not the same person or entity as Katherine E. Cornett.

Op., at 4 (emphasis added).

Summary of Argument

The certified question turns upon the proper application of the plain language of the governing statutes, Code §§ 8.01-380(A)) and 8.01-229(E)(3). Applied to the stipulated facts, these statutes demonstrate that the 2012 case was "against the same party"—the driver, properly named Katherine E. Volk, formerly Katherine E. Craft—as the nonsuited, 2011 case that was also against the same person, but misnamed her Katherine E. Cornett. There was no other, "wrong" party named Katherine E. Cornett that could support a finding of misjoinder, and Volk acknowledged she was the intended defendant to the 2011 case.

The Virginia Supreme Court commands an analysis of the substance of the pleadings to determine the parties. This analysis shows that Volk was the intended and described party defendant in the 2011 case, and the record shows that Volk acknowledged being the defendant. Contrary to the trial court's opinion, a mistake about the driver's last name in the 2011 case did not create a different, legal "person." When Richmond nonsuited her valid first action (2011 case) under Code § 8.01-380(A), then recommenced the case asserting the same cause of action "against the same party" as that statute requires, she recommenced a timely action under Code § 8.01-229(E)(3).

Argument

I. This Court conducts a *de novo* review of the trial court's ruling of law, applying the unambiguous nonsuit and tolling statutes to a stipulated record.

The parties have stipulated to the material facts in this case, so the Court reviews *de novo* the purely legal questions governing the statute of limitations. *See Lucas v. Woody*, 287 Va. 354, 360, 756 S.E.2d 447, 449 (2014). The record for reviewing the trial court's plea in bar ruling on the statute of limitations includes "the pleadings, supplemented by the facts as stipulated by the parties." *David White Crane Serv. v. Howell,* 282 Va. 323, 326, 714 S.E.2d 572, 575 (2011). The defendant carries the burden

of proof on a plea in bar on the statute of limitations. *Station #2, LLC v. Lynch*, 280 Va. 166, 175, 695 S.E.2d 537, 542 (2010).

This appeal reviews the trial court's application of Code §§ 8.01-380(A) and 8.01-229(E)(3). The Virginia Supreme Court has repeatedly confirmed that the plain terms of each statute are unambiguous, and do not permit exceptions: "we cannot, and will not, add words to Code § 8.01–380 in order to impose requirements on a plaintiff … that are not found in the plain language of the statute as enacted by the General Assembly." *Janvier v. Arminio,* 272 Va. 353, 366, 634 S.E.2d 754, 761 (2006) (quotations omitted); *accord Laws v. McIlroy*, 283 Va. 594, 599, 724 S.E.2d 699, 702 (2012) (Code § 8.01-229(E)(3)). "Nor are [courts] permitted to accomplish the same result by judicial interpretation." *Janvier, supra,* 272 Va. at 366. In addition, the Court has also mandated that Code § 8.01-229(E)(3) "must be read together with Code § 8.01–380, the nonsuit statute to which it refers and with which it is *in pari materia*." *McKinney v. Virginia Surgical Associates*, P.C., 284 Va. 455, 459, 732 S.E.2d 27, 29 (2012).

II. Code §§ 8.01-380(A) and 8.01-229(E)(3) establish as a matter of law that Richmond's 2012 case was filed "against the same party" as the nonsuited 2011 case, and was therefore within the statute of limitations.

The plain language of Code §§ 8.01-380(A) and 8.01-229(E)(3) establishes that when a plaintiff nonsuits a valid action, and then timely

recommences a second action on the same cause and "against the same party," the first case tolls the statute of limitations and the second is timely as a matter of law.

The pertinent provisions state:

> If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court....

Va. Code Ann. § 8.01-229(E)(3).

> After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken....

Va. Code Ann. § 8.01-380(A).

Richmond satisfied those plain, statutory requirements. As a result, her 2011 case tolled the statute of limitations against Katherine E. Volk and her 2012 case was timely filed as a matter of law.

A. Applying the substantive review of the pleadings that the Virginia Supreme Court commands, Richmond's 2011 and 2012 cases were "against the same party": Katherine E. Volk.

Virginia Supreme Court precedent compels the conclusion that both of Richmond's suits are against the <u>same party</u>: Katherine E. Volk, formerly Katherine E. Craft, the driver of the 2003 Honda Pilot that collided with Richmond on April 12, 2009. Applying the substance-over-

form analysis commanded by the Virginia Supreme Court, and properly considering the law of misnomer, each Complaint was "against" Katherine E. Volk. While the 2011 Complaint contained a misnomer of her last name, Volk was the party defendant, and even acknowledged that fact in the motion to quash and nonsuit order.

When encountering the classic dispute of whether a complaint suffers from a misnomer or a misjoinder, the Virginia Supreme Court commands courts to examine the substance of the whole pleading to determine the party being described. The trial court in this case focused only upon the form of the captions in the two Complaints, ruling that the mistake of the last name "Cornett" in the 2011 Complaint meant that Volk could not be the same party. A substantive analysis proves that Volk, and Volk alone, was the party to the 2011 case, if by a misnomer.

In *Estate of James v. Peyton,* the Court considered an amended pleading that named "Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." as the defendant. Faced with a caption that appeared to improperly name an estate as the party, the Court framed its choice thusly: "to determine whether the defect in the pleading constituted a misnomer, where the right person or entity was made a party but was incorrectly named in the pleading, or a misjoinder, where

the person or entity identified by the pleading was not the person by or against whom the action could, or was intended to be, brought." *Id.*, 277 Va. 443, 452, 674 S.E.2d 864, 868 (2009).

The Supreme Court surveyed multiple cases in which it had distinguished misjoinder—where the plaintiff sued an actual but incorrect person or entity—from misnomer of the correct party. This Court reiterated a central rule that courts evaluate the actual party to a case by reviewing the entire substance of the pleading:

> In determining the adequacy of a pleading to identify a party, we consider the pleading as a whole. Thus, 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.

Estate of James, supra, 277 Va. at 455; *see also Brake v. Payne,* 268 Va. 92, 597 S.E.2d 59 (2004) (in determining whether two different and successive estate representatives who brought suits were same party for purposes of nonsuit rights, the Court examined whether the two actions involved "substantially the same party" plaintiff).

There is no question that the Court imposes upon Richmond "an obligation to express the nature of the claim being asserted, and the identity of the party against whom it is asserted, in clear and unambiguous language so as to inform both the court and the opposing

party of the nature of the claim being made." *Estate of James, supra,* 277 Va. at 450. But "when there is an ambiguity in the pleading, whether as a result of a defect in form or lack of clarity in the allegations made, the proponent has the burden to show that the pleading is sufficient to identify the claims being asserted and the party alleged to be liable on those claims." *Id.*

The trial court had a duty to review the substance of the 2011 Complaint to determine if it identified the party defendant as Volk, despite a "defect in form" such as a misnomer in the last name, or instead identified some other, misjoined party named Katherine E. Cornett. *See Estate of James, supra*, 277 Va. at 452 ("the courts must determine whether the defect in the pleading constituted a misnomer… or a misjoinder..."). Instead, the trial court elevated the defect in form of the wrong last name to the status of creating a different, misjoined person. But unlike in *Estate of James,* where both the estate and the administrator were real and distinct persons or entities who were potential parties, there is no other person in the record named "Katherine E. Cornett" who could be a party. As a result, the trial court's duty was to examine the 2011 Complaint to determine who it actually described and misnamed.

The 2011 Complaint shows that this could only have been Katherine E. Volk, known at the time of the crash as Katherine E. Craft. To begin with, the Complaint accurately named the driver "Katherine E." and the intended "Craft" from the crash report only varied from Cornett by three letters. But more importantly, the substance of the 2011 Complaint otherwise described Volk in the same accurate, substantive detail: as the driver of a 2003 Honda Pilot, driving west on US 460 near the intersection of Valley Gateway Boulevard in Roanoke, on April 12, 2009 at 5:17 p.m., who rear-ended Richmond. This was identical to the 2012 Complaint, which properly named Volk. *Compare* J.A. 39 (2011 Complaint) (¶¶ 1-3), with J.A. 1 (2012 Complaint) (¶¶ 2-4).

Conversely, there is no *other* person to whom the 2011 Complaint's allegations could refer. Katherine E. Volk (formerly Craft) was the only occupant of the 2003 Honda Pilot. There was no evidence of a different, wrong person named "Katherine E. Cornett" associated with the crash, the parties, or the witnesses. J.A. 26 (¶5). Indeed, Volk has never argued that the 2011 case suffered from misjoinder of a wrong party.

Lest there be any confusion, Volk herself acknowledged she was the intended party during the pendency of the 2011 case. Volk moved as the party defendant to quash service in the 2011 case, describing herself as

"Katherine E. Volk, formerly known as Katherine E. Craft, erroneously identified in the caption of Richmond's 2011 Complaint as 'Katherine E. Cornett' and in the summons as 'Katherine E. Cornett a/k/a Katherine Craft' ('Volk')." J.A. 47. Volk's counsel appeared by letter specifically as counsel for Volk (J.A. 51), and later endorsed the nonsuit order for Volk as "Counsel for Defendant." J.A. 43.

B. The 2011 Complaint contained a misnomer of Katherine E. Volk's last name. There was no person named "Katherine E. Cornett," so the case did not involve misjoinder of some other party.

This substantive analysis of the pleadings, combined with the stipulated record, therefore shows that the 2011 case was against Katherine E. Volk, but suffered from a classic misnomer of Volk's prior (maiden) name, "Craft." "Misnomer arises when the right person is incorrectly named, not where the wrong defendant is named." *See Swann v. Marks,* 252 Va. 181, 184, 476 S.E.2d 170, 172 (1996); *see also* Friend, *Virginia Pleading and Practice,* Vol. 1, § 5.08 (2nd Ed. 2006) ("If a party is identified by the wrong name, this is called a misnomer."). "A misnomer means nothing more than a party is styled in other than his correct name. The law has never regarded this as a serious procedural problem and amendments were freely permitted to correct a name."

Johnson v. Huntington Moving & Storage, Inc., 160 W. Va. 796, 800, 239 S.E.2d 128, 131 (1977) (citations omitted).

Misnomers are amendable defects in an otherwise valid action against a real and proper party. *See Jacobson v. So. Biscuit Co.*, 198 Va. 813, 817, 97 S.E.2d 1, 4 (1957); Va. Code § 8.01-6. Because a misnomer is an amendable defect and not grounds for dismissal or abatement, an action with a misnomer is still a valid action. Whereas a wrongful death action against an estate is a nullity and therefore does not toll the statute against the different, proper party, *see Swann*, 252 Va. at 184, a misnomer case necessarily tolls the statute of limitations against the right party from the time it is commenced.

Applying substantive analyses to mistakes comparable to Richmond's 2011 Complaint, Virginia cases hold that the when there is an apparent mistake in name only and not a mistake of identity with a different person, the right party is before the court by misnomer. In *Baldwin v. Norton Hotel*, 163 Va. 76, 175 S.E. 751 (1934), injured plaintiff Baldwin filed suit against "Norton Hotel Corporation" and "Hotel Norton, Incorporated," but there were no real entities by those names. Norton Realty Corporation was the actual entity that owned the hotel at issue. *Id.*, 163 Va. at 78-79.

Conducting a substantive analysis of the pleadings, the Supreme Court ruled that the corporate entity Norton Realty Corporation was the real party defendant to that lawsuit. Despite the very different names in the pleading, the corporation was properly before the court by a misnomer. The plaintiff was "inaccurate in use of defendant's name in the pleading." *Baldwin, supra,* 163 Va. at 82. Looking to the substance of the pleading, the Court reasoned that "the real defendant was the owner and operator of the Norton Hotel, in the town of Norton, Wise County, Virginia, the party through whose negligence plaintiff alleged he had been injured." *Id.*, 163 Va. at 82. The Court also confirmed that the correction of such a misnomer involved "no substitution of parties," and noted that "no one was misled by these mistakes, [and] both parties recognized the fact that the plaintiff had instituted his action against the operator of the Norton Hotel." *Id.*

In *Snow v. Walker*, 80 Va. Cir. 194 (Va. Cir. Ct. 2010) (Albemarle Co.), the trial court examined a very similar situation in which the complaint misnamed the defendant "Maggie Walker" in the complaint, even though the driver's real name was "Ann Walker," and Maggie was her middle name. The Court further observed the facts that "the vehicle and the driver were properly identified in the complaint. The complaint

further made clear the date on which the accident occurred and that the driver was the defendant… as well as the location of the accident and the make and model of the vehicle." *Id.* Applying the definition from *Swann v. Marks, supra,* the court concluded that the case was a misnomer of the correct party.

The Fairfax County Circuit Court applied this same analysis to a very divergent misnomer in *Whelan v. DAVCO Restaurants, Inc.*, 38 Va. Cir. 105 (Va. Cir. Ct. 1995) (Fairfax Co.). After falling at a Wendy's franchise, Whelan filed a complaint naming "Wendy's Restaurant" as the defendant. But there was no such entity. Indeed, the actual owner of the restaurant and property was a company called DavCo, so the styled name of the defendant was completely wrong. The plaintiff had alleged the injuries occurred "on real property owned by the Defendant," so it was apparent she intended to sue an entity owning the property. *Id.* But Whelan then mistakenly served the complaint upon a different, real but wrong entity called Wendy's International, Inc., which also had no identity with DavCo.

DavCo received its first notice of the complaint after the original statute would have expired, and was never served. DavCo appeared in order to contest the plaintiff's effort to amend the complaint to correct the

misnomer from “Wendy’s Restaurant” to “DavCo.” Allowing the amendment, the Fairfax County Circuit Court reasoned that DavCo was the actual party to the original complaint, wrongly named by a (glaring) misnomer:

> In this case, there can be no doubt that the Motion for Judgment was filed against the owner of Wendy’s Restaurant located at 8353 Leesburg Pike, Vienna, Virginia. Nowhere in the body of the Motion for Judgment is there any allegation or prayer for relief against Wendy’s International Inc.; it was merely the entity upon which plaintiff effected service of process in her action against Wendy’s Restaurant. As Wendy’s International Inc. was never a party defendant to this action, DavCo is not being substituted for Wendy’s International Inc., but is rather being properly named in lieu of Wendy’s Restaurant as the proper party defendant.

Whelan, supra, 38 Va. Cir. 105.

For the exact same reasons, Richmond’s 2011 Complaint commenced against Katherine E. Volk, the driver of the 2003 Honda Pilot involved in the April 12, 2009, rear end collision with Richmond. The 2011 Complaint described Volk and the circumstances of the collision she caused accurately in every respect except her last name. While the Complaint misnamed her “Cornett,” “no one was misled” by that misnomer, and “both parties recognized the fact” that Volk was the person described as the Defendant. *Baldwin, supra,* 163 Va. at 82. There was no “Katherine E. Cornett,” just as there was no entity named

"Wendy's Restaurant" or "Norton Hotel Corporation." And when the complaint described the right defendant under a wrong name, "the statute of limitations on an action is tolled upon the filing of the suit." *Whelan, supra,* 38 Va. Cir. 105.

Even if there could be an inference of doubt that the 2011 Complaint described and intended to sue Katherine E. Volk, the Defendant's own words removed it when she acknowledged she was the intended defendant. The vehicle's insurer contacted Volk about the 2011 case no later than February *7,* 2012, during the year allowed for service of process. J.A. 32 (¶ 20). When moving to quash service, she described herself as the Defendant, "erroneously identified in the caption of the [2011] Complaint as Katherine E. Cornett." J.A. 31 (¶ 14). Volk's own words track the definition of a misnomer: "A misnomer means nothing more than a party is styled in other than his correct name." *Johnson, supra,* 160 W. Va. at 800. Her counsel expressly appeared on her behalf in both the 2011 and 2012 cases. J.A. 51. Her counsel even endorsed the nonsuit order on Volk's behalf as "Counsel for Defendant" in the 2011 case. J.A. 43.

On this premise, any creative argument by the defense now that Volk was somehow not the party defendant to the 2011 case would

violate "the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Leech v. Beasley*, 203 Va. 955, 961, 128 S.E.2d 293, 297 (1962). Stated another way: "A party may not approbate and reprobate. . . Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong." *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006). By appearing as the defendant in the 2011 case, agreeing to the nonsuit order as the defendant, and then pleading in the 2012 case that she was not actually the defendant sued, Volk is trampling this rule into the muck and disrespecting the squarely applicable law of misnomer.

The stipulated record shows there is no person other than Volk who the 2011 Complaint could have intended or described when describing the driver misnamed "Katherine E. Cornett." Nonetheless, defense and the trial court have maintained that the mistake of "Cornett" for "Craft" (Volk's name on the crash report) is still somehow not a misnomer, ostensibly because the mistake of a name differing by three middle letters is just too big a mistake. Yet they never explain how such a mistake escapes the simple definition of a misnomer and falls under the

necessary alternative: a misjoinder of a different person. The definition of a misnomer is also not implicitly limited—as the defense has hypothesized—to mistaken uses of corporate trade names. *See* Brief in Opposition, 15-19 (arguing that misnomer only applies to mistakes of corporate trade names).

When Richmond brought her 2011 Complaint against "Katherine E. Cornett," the statute was tolled against Volk. Volk was—as the substance of the 2011 Complaint shows, and as she acknowledged by appearing and endorsing the nonsuit order as "Defendant" in the 2011 case—the party defendant in both cases.

C. Because each case was "against the same party," Richmond had an absolute right to recommence the 2012 case against Katherine E. Volk, irrespective of whether she corrected the misnomer before nonsuiting.

Code §§ 8.01-380(A) and 8.01-229(E)(3) establish absolute rights; if their plain language makes Richmond's 2012 case timely, there are no implied exceptions. This is important, because Volk has protested at length that the exclusive means for Richmond to cure the defect of a misnomer was to utilize Virginia Code § 8.01-6 to amend the 2011 Complaint to correct the misnomer. *See* Brief in Opposition to Petition, 12-13. Volk argues—with no authority—that using the nonsuit statutes to file a second case that effectively corrects a defect in the nonsuited, first case is

"procedurally unauthorized." *Id.,* at 13. Volk's unsupported premise is that Code § 8.01-6 represents an implied exception to or limitation upon Code §§ 8.01-380(A) and 8.01-229(E)(3). But this Court has consistently ruled that these statutes establish unequivocal rights that have no exceptions, even where the nonsuited case was itself valid but defective at the time of nonsuit.

First, the Virginia Supreme Court has broadly rejected similar attempts by defendants to interpret other statutes or rules to inject additional conditions into Code §§ 8.01-380:

> We have consistently held that "[c]ourts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation. Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning." Accordingly, we cannot, and will not, add words to Code § 8.01–380 in order to impose requirements on a plaintiff … that are not found in the plain language of the statute as enacted by the General Assembly.

Janvier, supra, 272 Va. at 366 (citations omitted).

For the same reasons, *McManama v. Plunk* declared that the savings clause in the companion Code § 8.01-229(E)(3) guarantees the timeliness of a recommenced action if a plaintiff complies with its plain terms, ruling trial courts err by inferring limitations from other sources:

> ….the trial court erroneously placed limitations on the plaintiff's right to the voluntary nonsuit when it ruled that defendant "must first had to have been served with process, must have been before a court with jurisdiction over the defendant's person, and the defendant must have been given notice of hearing and an opportunity to be heard." None of these requirements is found in the applicable statutes, and a court should not add them by judicial fiat. The trial court had subject matter jurisdiction over the first action enabling it to properly enter an order granting plaintiff a voluntary nonsuit. Therefore, the plaintiff's nonsuit of her first action was valid, the two-year statute of limitations was tolled, and the plaintiff properly recommenced her action within six months from the date of the nonsuit order as authorized by Code § 8.01-229(E)(3).

McManama v. Plunk, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995) (emphasis added, citations omitted).

Despite these rules, the defense argues that Code § 8.01-6 is somehow the exclusive way to correct a misnomer. Of course, nothing in the plain terms of Code § 8.01-6 suggests that it would trump corrective action by a properly recommenced case after nonsuit. And the defense cites no authority supporting the necessary premise that a case nonsuited with a misnomer intact somehow fails to toll the statute of limitations against the intended party. Volk's position on Code § 8.01-6 being the exclusive pathway to correct a misnomer patently conflicts with the precedents of the Court by implying limitations upon Code §§ 8.01-380 and 8.01-229.

For instance, in *Clark v. Butler Aviation-Washington Nat., Inc.*, 238 Va. 506, 385 S.E.2d 847 (1989), the Court rejected the defendant's similar argument that because the plaintiff failed to meeting the mandatory one-year deadline for proper service under former Rule 3:3(c) (now Rule 3:5(e)), the plaintiff could not use the nonsuit procedure to cure the resulting defect in the case because violation of the rule mandated dismissal and was a bar to refilling. Like Code § 8.01-6, the rule also provided a procedure for curing the service defect within the original, pending case, which was proof of due diligence to the court. The Court reasoned:

> [T]he proper resolution of the rule-statute dichotomy created by the differing arguments in this case is that Code § 8.01-229(E)(3) tolled the statute of limitations upon Clark's commencement of the original action. But, because Butler was not served with process until more than one year after such commencement, Rule 3:3 forbade entry of any judgment against Butler in that action, and the action ended with entry of the order allowing a nonsuit pursuant to Code § 8.01-380. However, Code § 8.01-229(E)(3) intervened to give Clark a six-month period after entry of the nonsuit order in which to recommence his action. He recommenced the action within the allowed period and thus insulated his claim against a plea of the statute of limitations.

Id., 238 Va. at 510-11; *accord Berry v. F & S Fin. Mktg., Inc.,* 271 Va. 329, 334, 626 S.E.2d 821, 824 (2006); *Waterman v. Halverson*, 261 Va. 203, 206, 540 S.E.2d 867, 868 (2001) (rejecting argument that "the 'only

authority the Court should have is to determine if due diligence was exercised to have timely service effected on the defendants.'").

The stipulated facts establish that Richmond's 2011 case was a valid action over which the trial court had subject matter jurisdiction; it thus tolled the statute against the party it described. Richmond nonsuited the 2011 case on November 9, 2012 with no objection from Volk, who endorsed the Order as "Defendant". Richmond filed the 2012 case about one month later (December 11, 2012), asserting the same cause of action and factual bases. *Compare* J.A. 39 (2011 Complaint) (¶¶ 1-3), with J.A. 1 (2012 Complaint) (¶¶ 2-4). Richmond has therefore satisfied the plain terms of the respective nonsuit and savings statutes, and that is all she has to do. There are no additional requirements beyond their plain terms for her to recommence a timely action against Volk.

The procedural posture of nonsuiting a case involving a misnomer, and then recommencing with the correct name, may be new to Virginia jurisprudence. But a survey of other jurisdictions discloses that the Georgia Court of Appeals applied these very same principles to rule the second lawsuit timely filed. In *Motorcycle Stuff Inc. v. Bryant,* 182 Ga. App. 554, 356 S.E.2d 521 (Ga. Ct. App. 1987), the plaintiff was a corporation misnamed in the first suit. The defendant successfully dismissed the first

case with the misnomer still intact and unaddressed by any amendment effort. The corporation filed a second suit within six months under Georgia's similar "renewal" statute, which allowed recommencement on terms comparable to Virginia's Code § 8.01-229(E)(3).[1] The second lawsuit corrected the plaintiff's corporate name, thus curing the misnomer that was intact when the first case was dismissed—just as the 2012 Complaint here corrected Volk's name after nonsuit.

Reversing the trial court's dismissal of the second suit as untimely, the Court of Appeals validated the same legal arguments that Richmond now makes for timeliness. The Georgia court found that because the first action suffered from a misnomer of the right party, it tolled the limitation for the second action in which the same party was named correctly. In reasoning that guts Volk's argument about Code § 8.01-6, the Georgia Court of Appeals also reasoned that it did not matter that the plaintiff never

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[1] The applicable version of OCGA § 9-2-61(a) provided that "[w]hen any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state ... within six months after the discontinuance or dismissal...." The "renewed" action must be "'<u>by the same party</u> or his legal representative, and against a person from whom relief was prayed in the first suit....' [Cit.]" *Motorcycle Stuff, Inc. v. Bryant*, 182 Ga. App. 554, 554, 356 S.E.2d 521, 522 (1987) (emphasis added).

amended the first lawsuit to correct the misnomer before it was dismissed; it was a valid action for tolling purposes irrespective of any misnomer:

> [T]he first suit initiated by appellant was not void for lack of a legal party plaintiff. Where, as in the original action here, "the party plaintiff named in a complaint is not a legal entity but is reasonably recognizable as a misnomer for a legal entity which is the real party plaintiff, the misnomer may be corrected by amendment." Such an amendment does not introduce a new party. The misnomer of "Motorcycle Stuff" as the plaintiff being an amendable defect in the original suit, it follows that suit was not void. Since the dismissal of the original suit was not on the merits and the cause of action and parties here are the same as in the original suit, appellant was entitled to rely on OCGA § 9-2-61 as applicable authority for the renewal of its suit against appellee. Accordingly, the trial court erred in dismissing appellant's complaint.

Motorcycle Stuff Inc., 182 Ga. App. at 555 (citations omitted, emphasis added).

While not always reviewing nonsuit scenarios, other jurisdictions have consistently looked to the substance of the pleadings to determine that the "same party" was involved in successive lawsuits. In *Johnson v. Huntington Moving & Storage, supra*, the West Virginia Supreme Court applied principles about the identity of parties to reverse the dismissal of several lawsuits. 160 W. Va. at 802-03. The plaintiff first sued the defendant corporation in Ohio to collect rent. The first suit incorrectly named the company, but the plaintiff still received a judgment against that defendant with the misnomer intact. The plaintiff later sued the

same defendant to enforce the judgment in West Virginia, but this time used the correct name.

West Virginia reversed the trial court's dismissals of these subsequent suits. It was clear from "the common items of factual identity existing beneath the different names" that the plaintiff had sued the same party in the Ohio action, even if misnamed. The Court ruled that "[i]n the absence of a specific factual averment that the two companies were not the same, the court had no basis for ignoring the information in the plaintiff's affidavit that they were." *Id.*

For the same reasons cited by these courts, Richmond's 2011 case was a valid action when commenced, and was against the same party defendant as in the 2012 case (Volk). The 2011 case tolled the statute of limitations through nonsuit, even though the misnomer of Volk's last name remained at the time that Volk's counsel endorsed the nonsuit order. Richmond recommenced the 2012 case against the same party, now named correctly. The 2012 Complaint was timely.

Conclusion

The Plaintiff and Appellant Linda Richmond respectfully requests that this Court rule the 2012 case to be timely, reverse the trial court's ruling sustaining the plea in bar for the statute of limitations, and remand

this case with instructions that it proceed against the Defendant Katherine E. Volk.

Respectfully submitted,
Linda Richmond

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CERTIFICATE

I, Devon Munro, counsel for the Appellant Linda Richmond, hereby certify that this brief complies with Rule 5:26 in length (under 50 pages) and timeliness, and that on June 1, 2015, I have filed a an electronic (.pdf) copy with the Clerk of the Virginia Supreme Court at scvbriefs@coourts.state.va.us, filed 15 printed copies with the Court, and mailed three copies to Appellee's counsel: John Eure and Brian Brydges, Johnson, Ayers & Matthews, PLC, P.O. Box 2200, Roanoke, Virginia 24009.

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