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.

**BRIEF OF APPELLEE KATHERINE E. VOLK,
f/k/a KATHERINE E. CRAFT**

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

LINDA RICHMOND,	)	
	)	
Appellant,	)	**BRIEF OF APPELLEE**
	)	
	)	**Record No. 150192**
KATHERINE E. VOLK, f/k/a	)	
KATHERINE E. CRAFT, a/k/a	)	
KATHERINE E. CORNETT,	)	
	)	
Appellee.	)	

PRELIMINARY STATEMENT

The plaintiff in this personal injury action arising out of an auto accident filed suit against "Katherine E. Cornett." This misnomer was a conflation of the first name and middle initial of the vehicle's driver, Katherine E. Craft (later changed by marriage to Katherine E Volk), with the last name of vehicle's owner, Jeannie Cornett. The plaintiff further confused matters by using the vehicle owner's address as the address for service of process.

It is stipulated that the driver, the intended defendant, has never been known as "Katherine E. Cornett," and has never lived at the Cornett address where process was originally served. The stipulated facts establish that neither the driver nor her agent received notice of the

institution of the action until after the applicable two-year statute of limitations expired.

The plaintiff asserts that the garbled name was a misnomer. Virginia Code § 8.01-6, the only statute that addresses "misnomer" in the civil context, expressly governs how misnomers in civil actions are corrected. It permits an amendment, which relates back to the date of original filing only if, among other requirements, the correct party or its agent received notice of the institution of the action within the prescribed limitations period. Under the stipulated facts, the plaintiff cannot satisfy that requirement.

The issue on appeal is whether, by using this admitted misnomer in her original filing, without amending and without the benefit of the relation back provisions in Code § 8.01-6, the plaintiff nevertheless, with that original filing, tolled the running of the statute of limitations as to Volk, the individual she intended to sue. The trial court correctly held that "Katherine E. Cornett" was not the same person as Katherine Volk, and that the original filing did not toll the statute as to Volk. When, three years and eight months after the accident, the plaintiff first named Volk as a defendant, that filing was untimely as to Volk.

The plaintiff, while maintaining that the garbled name in her original complaint is a misnomer, disclaims reliance on the relation back provisions

of Code § 8.01-6. She does not even discuss those provisions on brief. Instead, she simply asserts, without authority, that in suing "Katherine E. Cornett" she in fact and in law sued Volk, thus tolling the running of the statute of limitations. She argues that, by nonsuiting original action filed against "Katherine E. Cornett," she further tolled the statute of limitations as to Volk, and that the dismissal of her refiled action as untimely as to Volk abridged her nonsuit rights.

Those arguments are unsound. The trial court's ruling did not abridge the plaintiff's nonsuit rights or deprive her of tolling under Code § 8.01-229 (E) (3). The issue in this case does not rest on Code § 8.01-229 (E) (3) tolling. Instead, it hinges on the plaintiff's inability to satisfy the requirements for "relating back" an amendment correcting her misnomer. There is no conflict between Code §8.01-6 and the nonsuit statutes. This is simply a case where the tolling afforded by the nonsuit statutes could not save the plaintiff's claim.

SUPPLEMENTAL STATEMENT OF THE CASE

This case was decided on an agreed stipulation of facts. (J.A. 29-50.)[1]

[1] The original stipulation attached four exhibits: the police report of the

On April 12, 2009, the plaintiff allegedly was rear-ended by a vehicle owned by Jeannie Cornett and insured under an auto insurance policy issued by State Farm Mutual Automobile Insurance Company. The driver and sole occupant of the Cornett vehicle was, according to the police report, Katherine Earlene Craft, who was a permissive user and thus an additional insured under Cornett's State Farm policy. Craft married on August 24, 2010, changing her surname to Volk. This brief will refer to her as "Volk." (Stip. ¶¶ 1-4, 8, J.A. 29-30.)

According to the police report, Volk's address on the accident date was 3166 Berry Lane, Apt. 121, Roanoke, Virginia 24018. The address of the vehicle owner, Cornett, was 2869 Gum Springs, Salem, Virginia 24153. (Stip. ¶¶ 2, 3 and Exh. 1, J.A. 29, 35.)

On February 28, 2011, the plaintiff filed an action for personal injuries arising out of the April 12, 2009 accident, naming "Katherine E. Cornett" as the sole defendant (Stip. ¶ 7 and Exh. 2, J.A. 30, 39-40), but did not immediately request service. It is stipulated that Katherine E. Volk has never been known as "Katherine E. Cornett." (Stip. ¶ 5, J.A. 30.)

4/12/2009 accident, the 2/28/2011 original complaint, the 1/26/2012 summons, and the 11/9/2012 order of nonsuit. (J.A. 29-44.) A fifth exhibit, the 2/21/2012 motion to quash service of process, was added following the August 15, 2014 hearing. (J.A. 45-50.)

Plaintiff's counsel sent a copy of the complaint to State Farm, which State Farm received on or about April 13, 2011, two years and one day after the accident. (Stip. ¶ 9, J.A. 30.)

On January 26, 2012, eleven months after filing, the plaintiff had the Clerk issue a summons to "Katherine Cornett a/k/a Katherine Craft," to be served at the Cornetts' Gum Springs, Salem address. (Stip. ¶ 10 and Exh. 3, J.A. 30, 41.) Process was served by posting at the Gum Springs address on January 31, 2012. (Stip. ¶ 11, J.A. 31.) On February 1, 2012, Jeannie Cornett notified State Farm of the posted service at the Gum Springs address. (Stip. ¶ 19, J.A. 32.)

It is stipulated that Volk never resided at the Gum Springs address. When this process was posted at the Gum Springs address, Volk resided at 2125 Fallon Avenue, SE, Apt. 5, Roanoke, Virginia 24013, where she and her husband had lived since August 2011. (Stip. ¶¶ 12-13, J.A. 31.)

It is stipulated that Volk first learned of the filing of the plaintiff's action on February 7, 2012, when she spoke for the first time with a State Farm claims representative. (Stip. ¶ 20, J.A. 32.) This was two years and approximately ten months after the date of the accident. It is stipulated that Volk never received a copy of the plaintiff's original complaint and that she

never received the process issued in that action that was posted at the Gum Springs address. (Stip. ¶ 18, J.A. 32.)

Because the summons named Katherine Craft, on February 21, 2012, defense counsel responded to the summons by filing a motion to quash service of process on behalf of "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. 47-51.) Defense counsel filed no other pleadings, and appeared on Volk's behalf solely for the limited purpose of moving to quash, on the grounds that, to the extent the plaintiff was attempting to serve Volk with process, the process was defective and invalid because the residence address where the process was posted was not, and never had been, Volk's usual place of abode. (Stip. ¶ 14 and Exh. 5, J.A. 31, 47-50.)

The motion to quash expressly stated that the complaint and the summons contained a misnomer. This statement was not a concession that Volk had been properly identified as "Katherine E. Cornett," or that Volk and "Katherine E. Cornett" were the "same person" for purposes of legal analysis, or that Volk herself had been named in the original complaint, or that Volk was a party defendant to the plaintiff's action from

the date of original filing. The identification of the misnomer contained in the summons and the complaint was only that – notice to the plaintiff of the misnomer.

Under the stipulated facts, when this motion to quash identifying the misnomer was filed on February 12, 2012, it was already too late for the plaintiff to take any action that could have allowed her to satisfy Code §8-01-6's requirement that the intended party or its agent have received notice of the institution of the action within the two year limitations period. That limitations period had expired on April 12, 2011.

On November 9, 2012, the circuit court granted the plaintiff a voluntary nonsuit. At no time before that nonsuit did the plaintiff seek leave to amend the complaint to name Volk as the defendant in place of "Katherine E. Cornett." (Stip.¶¶ 15-17 and Exh. 4, J.A. 31-32, 42-43.)

On December 11, 2012, three years and eight months after the plaintiff's cause of action accrued, the plaintiff filed the present complaint, styled *Linda E. Richmond v. Katherine E. Volk, f/k/a Katherine E. Craft, a/k/a Katherine E. Cornett,* and requested service on Volk at her 2125 Fallon Avenue, SE, Roanoke address. (J.A. 1-3.) In response, Volk's

counsel filed a special plea asserting the bar of the statute of limitations. (J.A. 6-23.)

The parties stipulated the facts (J.A. 29-51) and briefed and argued the issues. At an August 15, 2014, hearing (J.A. 65-108), plaintiff's counsel characterized the case as "a misnomer situation" (J.A. 83) but unequivocally disclaimed any intent to seek an amendment that would relate back to the filing of the original complaint (J.A. 87, 90. 97) and said that "notice [to Volk or her agent] is not at issue." (J.A. 82).[2]

By letter opinion dated September 25, 2014, the circuit court ruled that Katherine E. Volk, the person named in the present action, "is not the same person or entity as Katherine E. Cornett. As a result, the initial 2011 suit was not filed against the same defendant as was the suit filed in 2012." (Op. at 4, J.A. 58.) The court also ruled that, under the stipulated facts, the plaintiff could not meet Code § 8.01-6's requirements and was not entitled to the relation back benefit conferred by that statute. (J. A. 59-60.) The

[2] Shortly before the 8/15/14 hearing, the plaintiff sought leave to amend to correct the misnomer in the refiled action, but did not pursue that motion. At the hearing, plaintiff's counsel expressly disclaimed relying on that motion (J.A. 87), and said it was filed "just to do away with any misnomer in the caption. That's not necessary. I think it's a prophylactic thing … but that's only if the Court overrules the plea in bar. Otherwise, we're not going to amend this complaint if it's not timely." (J.A. 90.)

court sustained Volk's special plea of the statute of limitations and dismissed the complaint. (J.A. 52-60.)

ARGUMENT AND AUTHORITIES

The circuit court correctly dismissed the action against Volk as barred by the statute of limitations.

I. Standard of Review.

"Whether a pleading has adequately identified the proper party to be sued is a question of law" that is reviewed *de novo* on appeal. *Estate of James v. Peyton*, 277 Va. 443, 447 (2009).

II. Volk was not "Katherine E. Cornett," which was a misnomer, and the correct defendant could not be determined from the plaintiff's pleading.

The plaintiff's theory of this case is that her original filing against "Katherine E. Cornett," an admitted "misnomer," without more tolled the running of the statute of limitations as to the intended defendant, Katherine E. Volk. This argument rests on erroneous factual and legal premises. The erroneous factual premise is that "Katherine E. Cornett" in fact is Volk and is clearly and unambiguously identifiable as Volk from the language in the original

complaint. The erroneous legal premise is that when a party files a complaint containing a misnomer as to the defendant, the mere fact that a misnomer has been used *ipso facto* tolls the statute of limitations as to the intended defendant, and Code § 8.01-6, permitting a motion to amend to correct the misnomer and specifying the limited circumstances under which the amendment relates back for limitations analysis, is irrelevant.

The trial court properly rejected the plaintiff's factual premise. It is stipulated that Katherine E. Volk has never been known as "Katherine E. Cornett." Nothing in the original complaint (J.A. 39-40) would allow a neutral observer to discern from that pleading that the plaintiff meant to sue Volk. That only becomes apparent when extrinsic information, such as that contained in the police report, is adduced.

In resisting this conclusion, the plaintiff (Br. at 10-14) misconstrues this Court's language and the focus of the analysis in *Estate of James v. Peyton*, *supra*. In *Peyton* this Court ruled that a plaintiff is obligated:

> to express … the identity of the party against whom [the claim] is asserted in clear and unambiguous language … [and] has the burden to show that **the pleading is sufficient to identify … the party alleged to be liable** ….:
>
> * * *

> [A motion for judgment is] subject to the rule requiring **the motion** to be clear and unambiguous in expressing the identity of the party the plaintiff intends to name as the defendant …
>
> * * *
>
> 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.

277 Va. at 450, 451, 455 (emphases added).

In *Peyton* the plaintiff misnamed the defendant in attempting to sue the estate of a deceased alleged tortfeasor, a situation now addressed by Code § 8.01-6.3. After examining the pleading as a whole – but not any extrinsic sources – this Court held that the pleading did not clearly identify the administrator in his representative capacity as the party being sued. Indeed, there was "a patent ambiguity between the caption of the amended motion for judgment and the allegations within that pleading." 277 Va. at 455. Thus, a judgment entered on the defective pleading was reversed and final judgment given for the defendant. This Court reached this result even though it was painfully apparent how the plaintiff <u>should</u> have named the appropriate defendant.

Peyton does not use, or sanction the use of, a "substance-over-form" analysis of a misnomer issue. (*See* Br. at 10-11.) *Peyton's* injunction to

consider the pleading as a whole is of no help to the plaintiff here. Here, the initial pleading, standing alone, contains no indication whatsoever that Volk was the proper defendant. Only by adducing matters outside the pleading does the mistake become apparent.

The insufficiency of the plaintiff's initial pleading to clearly and unambiguously identify Volk could not be remedied by the plaintiff's subsequent efforts to convert "Katherine E. Cornett" into "Katherine E. Volk" by unilaterally and incrementally changing the defendant's name as the litigation progressed. The February 28, 2011 complaint named "Katherine E. Cornett, Defendant." The January 26, 2012 summons was directed to "Katherine E. Cornett a/k/a Katherine Craft" at the Cornett's Gum Springs, Salem address. The December 11, 2012, refiled complaint expanded the named defendant to "Katherine E. Volk, f/k/a Katherine E. Craft, a/k/a Katherine E. Cornett." Simply asserting in the summons that "Katherine E. Cornett" was "also known as Katherine Craft" did not make that true. Asserting in the refiled complaint that Volk was "also known as Katherine E. Cornett" did not make that true. It is stipulated that Volk was never known as "Katherine E. Cornett."

III. A complaint misnaming the defendant does not toll the statute of limitations as to the intended defendant unless the misnomer is corrected pursuant to Code § 8.01-6 and unless the correction relates back to the original date of filing pursuant to that statute.

The plaintiff's position also rests on a faulty legal premise. Effectively, the plaintiff asserts that Code § 8.01-6 and its relation back provisions are irrelevant to the limitations analysis here and may be ignored. On brief, the plaintiff repeatedly states that this case involves a "misnomer" and mentions the statute by number at several points. But the plaintiff never addresses the substance of the statute, or her decision not to amend her original pleading, or her inability to satisfy the statutory requirements for relating back.

The plaintiff's response to Code § 8.01-6 is to assert that "a misnomer case necessarily tolls the statute of limitations against the right party from the time it is commenced." (Br. at 16.) In other words, and ignoring the language and import of Code § 8.01-6, the plaintiff insists that the use of a misnomer, in and of itself and without more, simultaneously names the intended defendant for purposes of the statute of limitations. The plaintiff cites no authority for this proposition, and there is none.

Code § 8.01-6 is part of Chapter 2, Article 1 of Title 8.01 of the Code, which contains "general provisions" dealing with "parties" to civil litigation.[3] Code § 8.01-6 is the statute that deals generally with misnomers. It permits the right name to be substituted upon motion for an amendment. It specifies the circumstances under which such an amendment correcting a misnomer relates back to the date of original filing. In light of the plaintiff's argument, the text of this statute must be examined.

> **§ 8.01-6. Amending pleading; relation back to original pleading.** – A misnomer in any pleading may, on the motion of any party, and on affidavit of the right name, be amended by inserting the right name. An amendment changing the party against whom a claim is asserted, ***whether to correct a misnomer or otherwise***, ***relates back to the date of the original pleading if*** (i) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) ***within the limitations period prescribed for commencing the action against the***

[3] Code §§ 8.01-5 and 8.01-7 deal with the nonjoinder and misjoinder of parties plaintiff and defendant, and with adding new parties to an action. Code § 8.01- 6.1 addresses when an amendment of a pleading changing or adding a claim or defense relates back to the date of the original pleading for purposes of the statute of limitations. Code § 8.01-6.2 addresses two circumstances in which issues arise with party names. Subsection A deals with confusions in trade names and corporate names, and specifies when an amendment to correct a name relates back for limitations purposes. Subsection B deals with suits against estates and their fiduciary representatives. Code § 8.01-6.3 specifies the form for naming a fiduciary in litigation and permits an amendment that relates back.

> ***party to be brought in by the amendment, that party or its agent received notice of the institution of the action***, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that 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 that party. (Emphases added.)

Several points about this statute bear emphasis:

- "Misnomer" is a technical legal term. Virginia Code § 8.01-6 is the only Virginia statute that addresses "misnomer" in the civil context.[4] It directly addresses the specific pleading error that the plaintiff herself identifies here. No citation of authority is required for the proposition that a directly applicable statute cannot be ignored.

- Through a 1996 amendment, 1996 Acts c. 693, the legislature added a phrase making this statute and its relation back provisions expressly applicable to "an amendment changing the party against whom a claim is asserted, *to correct a misnomer or otherwise.*" The italicized language, added by the amendment, made it clear that correcting a misnomer is a form of "changing the party against whom the claim is asserted" that is governed by this statute.

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[4] Code § 19.2-226, the only other Code section that uses the term "misnomer," addresses the concept in criminal indictments.

- The statute permits correction of a misnomer by motion for an amendment. Here, it is stipulated that the plaintiff made no motion to correct the misnomer in the original case. The plaintiff filed but abandoned such a motion in the refiled case.

- The statute prescribes four conditions that must be met before an amendment correcting a misnomer relates back to the date of the original pleading. One is the requirement that "within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action." Here it is stipulated that neither Volk nor State Farm, to the extent State Farm could be considered Volk's agent in these circumstances, received notice within the two-year limitations period. As the trial court recognized, under the stipulated facts, the plaintiff could not obtain the benefit of relating an amendment back to the date of the original filing.

- The Code provides no mechanism other than Code § 8.01-6 for correcting the misnomer involved here. The Code provides no other applicable mechanism for relating back the correction of a misnomer to the date of the original filing. If there is no duty to correct a misnomer,

and no consequences flow from failing to do so, then Code § 8.01-6 is pure surplussage and can be read out of the Code.

The plaintiff is asking this Court to ignore a directly applicable statute, and to create a wholly unprecedented new rule that violates the fundamental rules of pleading. In Virginia, "[a] civil action shall be commenced by filing a complaint in the clerk's office." Rule 3:2 (a). *Peyton*, *supra*, establishes that a plaintiff filing a complaint must clearly and unambiguously identify the party to be sued. Using a misnomer violates this duty. Inherent in these governing principles is the proposition that a misnamed but intended party is not, in fact, a party defendant when a complaint is filed that does not properly name that defendant. An action has been commenced, but the intended defendant has not been named. This error can be corrected, and in certain circumstances the correction will relate back to the original filing date, but the sole mechanism for achieving this result is Code § 8.01-6.

The plaintiff may respond that Code § 8.01-6 is merely permissive, in that it says that a misnomer "may," on motion, be amended. Procedural statutes do not compel a litigant to follow proper procedure in a timely way. The result of failing to do so, however, is the failure to maintain a viable

action. The result is not a grant of freedom to make up one's own rules that flout the rules established by the legislature and this Court.

IV. The trial court's ruling does not abridge the right to tolling after a nonsuit. The plaintiff's reliance on the cases regarding a plaintiff's right to nonsuit before serving the defendant is misplaced.

On brief, the plaintiff relies on the law establishing a plaintiff's right to take a nonsuit where the defendant has not yet been served. (Br. at 9-10, 22-26.) That law has not been disturbed by the trial court's ruling. The plaintiff's nonsuit of her original filing containing the uncorrected misnomer, which was taken before obtaining effective service, and her refiling using an expanded style within the 6 months allowed by Code § 8.01-229 (E)(3), are facts of this case. They are material to the statute of limitations analysis, however, only in a very limited way. Only with her refiling three years and eight months after the accrual of the plaintiff's cause of action did the plaintiff first file a pleading naming Volk as a defendant. As the trial court recognized, that filing was untimely as to Volk, and the claim against her was barred by the statute of limitations.

The plaintiff had an absolute right to take a nonsuit as to her initial action naming "Katherine E. Cornett," an admitted misnomer, as the sole defendant. There is no dispute about the propriety of that nonsuit. In

accordance with Code §§ 8.01-380 and 8.01-229 (E) (3), she was entitled to refile on "the same cause of action" "against the same party" – that is, against "Katherine E. Cornett" – within six months. This she did. Upon refiling she reinstated her action against "Katherine E. Cornett." Had the plaintiff wished to pursue that action, she could have done so.

The cases on which the plaintiff relies affirm that tolling under Code § 8.01-229 (E) (3) applies even if the plaintiff has not served the defendant before the nonsuit. While that circumstance is part of the fact pattern here, it is not in controversy, and the trial court's ruling did not abridge that principle. The plaintiff's statute of limitations problem does not arise from the nonsuit, refiling, and subsequent service on Volk. It arises from the fact that Katherine E. Volk was not "Katherine E. Cornett," either at the time of the original filing or subsequently. Thus, the original filing did not toll the running of the statute as to Volk. The misnomer itself could have been cured by a motion to amend either action. Under the stipulated facts, and in light of the requirements of Code § 8.01-6, however, the statute of limitations problem as to Volk could not be cured, either during the pendency of the original action or after the refiling.

A nonsuit can, in certain circumstances, give a plaintiff a second chance to correct a variety of problems with a pleading or with the

prosecution of the action. It can cure a failure to serve the defendant within the prescribed one year. It can allow a plaintiff to more fully allege a cause of action imperfectly asserted in an initial pleading. But it cannot, of its own force, cure a misnomer, and it cannot cure the statute of limitations problem a misnomer creates. That requires a motion to amend under Code § 8.01-6 and an analysis of the relation back issue pursuant to the requirements of that statute.

The trial court's ruling here presents no conflict between the nonsuit statutes and Code § 8.01-6. The nonsuit statutes speak only to nonsuits and resulting tolling as to the same cause of action and the same party previously nonsuited. Those statutes have been given full effect here. Those statutes say nothing about misnomers, or about how to correct them, or about whether and when a corrected misnomer relates back for purposes of limitations analysis.

V. Volk did not waive her motion to quash, or concede that she was the same person as "Katherine E. Cornett," or waive her ability to claim the protection of Code § 8.01-6 or the statute of limitations, or appear generally as the actual defendant in the initial action.

On brief, the plaintiff repeatedly suggests that that Volk's motion to quash service of process, and defense counsel's endorsement on the order of nonsuit, somehow waived or conceded Volk's position that she

had not been properly served and was not before the court as a defendant in the original action, or waived or conceded her position that she was not the same person as the "Katherine E. Cornett " named in the compliant, or constituted impermissible approbation and reprobation as to these issues. (Br. at 4, 6, 7, 8, 14-15, 20-22.) These suggestions are without merit.

In Virginia, "[w]aiver is the voluntary and intentional abandonment of a known legal right, advantage, or privilege." *Cashion v. Smith*, 286 Va. 327, 334 (2013) (quoting prior authorities). Virginia law does not recognize any form of implied waiver. *Employers Commercial Union Ins. Co. v. American Ins. Co.*, 214 Va. 410, 412-13 (1973) ("Since knowing intent to waive is an essential element of true waiver, it can never arise constructively or by implication"). In *Cashion*, this Court's review of its decisions on the subject of waiver by endorsement demonstrated that, under Virginia law, endorsements in the forms "seen," "seen and agreed," "seen and consented to," and "we ask for this" are not waivers of previously stated legal positions. *Id*. at 333-37.

The context in which Volk responded to the summons in the plaintiff's initial action is crucial. The plaintiff filed her initial complaint naming only "Katherine E. Cornett" as the defendant. (J.A. 16.) When, some months later, she attempted posted service at the Cornett's address,

her summons unilaterally re-named the party to be served as “Katherine Cornett a/k/a Katherine Craft.” (J.A. 18.) The Cornetts, who are State Farm insureds, gave the summons to State Farm.

Volk did not file any pleading responding to the complaint itself. To the extent that this summons, on its face, could be construed to have been properly directed to Katherine Craft (who had, by that point, married and become Katherine Volk), it was felt that a response to the summons and the attempted service of process was required. This was accomplished by filing a timely motion to quash service of process, filed solely in the name of Katherine E. Volk, formerly known as Katherine E. Craft, pointing out that Volk did not live at the service address. (J.A. 47-51.) Filing a motion limited to quashing service of process is expressly permitted by Code § 8.01-277 (A).

The motion to quash did not in any respect respond to the initial complaint. It addressed only the inadequate service of process as to Volk. Nothing in this pleading can be construed as conceding that Volk had been properly named as the defendant in the original complaint, or was before the trial court as the defendant in that action, or that Volk had receive timely notice of the initial complaint. The motion to quash expressly identified the misnomer, but identifying the plaintiff’s error did not

constitute a concession that Volk was, in fact, “Katherine E. Cornett.” Identifying that error did not constitute volunteering Volk to be substituted as the defendant. Identifying that error did not waive Volk’s rights under the circumstances, including her right to the protections afforded by Code § 8.01-6 and her right to plead a statute of limitations defense at an appropriate time. Appearing specially on behalf of Volk (and not for “Katherine E. Cornett”) for the sole purpose of contesting personal jurisdiction by moving to quash service of process was the minimum appropriate response to the service of a summons that, varying from the style of the actual complaint, named “Katherine Craft” as a person to be served.

The plaintiff places great stress on the fact that counsel who had filed the motion to quash on behalf of Volk endorsed the nonsuit order as “seen” over a signature block that included the words “Counsel for Defendant.” The nonsuit order, which was prepared by plaintiff’s counsel, followed a customary form for such orders, including the customary descriptive terms for the counsel signing the order. Even though Volk’s counsel had appeared only for the limited purpose of the motion to quash, he was the only other counsel in the case, and thus the only other counsel whose endorsement, per Rule 1:13, was needed on the order.

With the benefit of perfect hindsight, it would have been more precise for counsel to have struck through the preprinted words "for Defendant." But endorsing this uncontroversial order as "seen" cannot be construed as a voluntary, intentional relinquishment of Volk's known legal rights, advantages, or privileges. It cannot be construed as an abandonment of counsel's limited appearance on Volk's behalf and the substantive position advanced in the motion to quash, or as a concession that Volk was in fact before the court as a defendant properly named in the compliant, or as a statement that Volk was voluntarily substituting herself for "Katherine E. Cornett" and relinquishing the protections afforded her by Code § 8.01-6 and the statute of limitations.

VI. The other authorities cited by the plaintiff do not support her position.

Several cases cited by the plaintiff deserve brief discussion. None supports the plaintiff's position here.

In *Baldwin v. Norton Hotel, Inc.*, 163 Va. 76 (1934) (*see* Br. at 16-17 19), the misnamed defendant elected to answer and defend, thus waiving the misnomer. That factor fully distinguishes *Baldwin* from the case at bar. *Baldwin* holds that when a corporate entity is sued using a trade name that it actually employs, and the defendant is served, answers and defends on

the merits, the plaintiff should be allowed to amend to correct the misnomer. The plaintiff in *Baldwin* actually sought leave to amend once the misnomer was brought to light, something the plaintiff here declined to do. Variations in corporate naming and the use of trade names, which are now addressed in part by Virginia Code § 8.01-6.2, have no bearing on the present case. In particular, *Baldwin* does not speak to the misnaming of an individual where that person has never used the asserted "misnomer," was not served, did not answer generally and defend, and where the plaintiff did not move to amend to correct the deficiency.

In the course of the analysis, this Court in *Baldwin* cited earlier Virginia authority to the effect that "where the error [in naming a corporate defendant] is so material (especially, it is said, in the name of the defendant) that *no such* corporation exists, it is fatal at the trial." 163 Va. at 82. Thus, to the extent *Baldwin* speaks to a misnomer that, as here, is so material that no such individual exists, it teaches that the error was not curable (at least, prior to the enactment of Code § 8.01-6).

The plaintiff's reliance on the circuit court opinion in *Whelan v. DavCo Restaurants, Inc.*, 38 Va. Cir. 105 (Fairfax County 1995) (*see* Br. at 18-20), is misplaced. In *Whelan*, the plaintiff sued "Wendy's Restaurant" and served "Wendy's International, Inc." The actual owner and operator of the

defendant premises was “DavCo Restaurants, Inc.” There was no such entity as “Wendy’s Restaurant,” and the franchisor, “Wendy’s International, Inc.” had no involvement in the action. DavCo did not learn of the pendency of the action until after the two-year statute of limitations had expired. The plaintiff, learning of her error, moved to amend under Code § 8.01-6 to correct a misnomer, and over DavCo’s objection the trial court allowed an amendment.

Whelan, as a circuit court opinion, is not binding precedent. Neither is it persuasive or helpful to the plaintiff. First, the plaintiff in *Whelan*, unlike the plaintiff here, moved to amend under Code § 8.01-6. Second, *Whelan* was decided under an earlier, materially different version of Code § 8.01-6 that lacked the present language specifying that the statute applies to any corrective amendment “whether to correct a misnomer or otherwise.” The trial court interpreted that earlier version so that the second sentence of the section, specifying the conditions under which an amendment relates back to the original pleading, was inapplicable to the correction of a misnomer. The General Assembly rejected this 1995 interpretation through its 1996 statutory amendment expressly making the second sentence applicable to the correction of misnomers. Third, *Whelan* deals with corporate trade

name confusion, which offers the plaintiff no support here, where Volk, an individual, was never known as "Cornett."

The plaintiff's reliance on *Snow v. Walker*, 80 Va. Cir. 194 (Albemarle County 2010) (*see* Br. at 17-18), is curious because that decision dismisses a complaint after applying Code § 8.01-6 to a misnomer situation in which the plaintiff named "Maggie Walker" as the defendant, instead of "Ann Maggie Walker." The plaintiff apparently moved to amend. Analyzing the situation under the current version of Code § 8.01-6, the court ruled that there was no evidence that either the intended defendant or her agent received notice of the action before the statute of limitations expired. This decision directly supports the trial court's ruling here.

The plaintiff's out-of-state authorities provide her no support. In *Johnson v. Huntington Moving & Storage*, 239 SE 2d 128 (W.Va. 1977) (*see* Br. at 15-16, 20, 28-29), the West Virginia court applied essentially the same analysis regarding slight variations in corporate naming that this Court applied in *Baldwin, supra,* to a situation in which the corporate defendant appeared and defended, thus waiving any objection to the misnomer.

Motorcycle Stuff v. Bryant, 356 S.E. 2d 521 (Ga. App. 1987) (*see* Br. at 26-28), involved a corporate plaintiff that very slightly misnamed itself ('Motorcycle Stuff"' instead of 'Motorcycle Stuff, Inc.,"), as a consequence of which its action was dismissed. The statute of limitations had run by the time the plaintiff refiled, and the trial court dismissed the second action. The Georgia intermediate appellate court reversed, relying on case law that applied a Georgia tolling statute differently as between void actions and merely voidable ones. The facts in *Motorcycle Stuff* are not parallel to the situation here, where Volk, an individual, was never known as "Cornett." The decision is also inapplicable because Georgia apparently has no analogue to Va. Code § 8.01-6; because the case deals with Georgia's construction of a Georgia statute that does not apply to the present action; and because the case involves a very minor and technical corporate name variation that, on the face of the original pleading, could not and did not mislead anyone as to the identify of the true plaintiff.

CONCLUSION

For the foregoing reasons, the appellee, Katherine E. Volk, requests this Court to affirm the judgment of the trial court in her favor.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John D. Eure, hereby certify, in accordance with Rule 5:26, that the appropriate copies of the foregoing Brief of Appellee were mailed or delivered to the Clerk of the Supreme Court of Virginia and to C. Richard Cranwell, Esquire, and Devon J. Munro, Esquire, both of CRANWELL & MOORE, P.L.C., Post Office Box 11804, Roanoke, Virginia 24022-24179, counsel for the Appellant, this 26th day of June, 2015.

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