THE SHIFTING SANDS OF VIRGINIA'S MISNOMER-MISJOINDER JURISPRUDENCE

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The Supreme Court of Virginia has long drawn a clear distinction between misnomer and misjoinder: A misnomer arises when the plaintiff sues the right person under the wrong name, while a misjoinder arises when the plaintiff sues the wrong person under the right name.[1] This distinction is important because the statutes allowing plaintiffs to correct misnomers and misjoinders by amendment distinguish the circumstances under which the corrected pleading will relate back to the original pleading, thereby tolling the statute of limitations.[2] So whether the pleading defect is considered a misnomer or a misjoinder often controls whether the corrected pleading relates back to the original pleading—and is consequently saved from the statute of limitations.

But a few years ago, in *Hampton v. Meyer*,[3] a sharply divided Court blurred the distinction, firmly drawn in its precedents, between misnomer and misjoinder by holding that the plaintiff's naming of a car's owner instead of its driver in a car-accident case was a misnomer, not a misjoinder, even though the owner was not the right person sued under the wrong name.[4] And because this pleading defect was deemed a misnomer rather than a misjoinder, the Court further held that the plaintiff's corrected pleading naming the driver instead of the owner related back to the original pleading and thus was not time-barred under the statute of limitations, which had otherwise run.[5] Although this decision seemed inconsistent with its misnomer-misjoinder precedents, the Court did not expressly overrule them.[6] On the contrary, the four-to-three majority claimed that the decision was compelled by stare decisis,[7] while the dissent argued that the majority's reasoning was "defeated by, not justified by, stare decisis."[8]

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1 Estate of James v. Peyton, 277 Va. 443, 452, 674 S.E.2d 864, 868 (2009).

2 *Id.*

3 299 Va. 121, 847 S.E.2d 287 (2020).

4 *Id.* at 134, 847 S.E.2d at 294.

5 *Id.* at 134–35, 847 S.E.2d at 294.

6 *See id.* at 127–35, 847 S.E.2d at 290–94.

7 *Id.* at 132–35, 847 S.E.2d at 293–94.

8 *Id.* at 149, 847 S.E.2d at 302 (Kelsey, J., dissenting).

Since *Hampton*, the Court has addressed misnomer and misjoinder in two cases: *Edwards v. Omni International Services, Inc*.[9] and *Marsh v. Roanoke City*.[10] In *Edwards*, the Court discussed *Hampton* but distinguished it in ruling that while the pleading defect at issue was a misnomer rather than a misjoinder under *Hampton*, the corrected pleading did not relate back to the original pleading and therefore was time-barred by the statute of limitations. The basis of the distinction was that, unlike in *Hampton*, the correct defendant did not have notice of the facts underlying the plaintiff's claim within the limitations period.[11] In so concluding, the Court limited the reach of its holding in *Hampton* "as applying only to cases in which there is no issue of the timeliness of defendant's notice of the facts on which the plaintiff's claim is based."[12] Justices Kelsey and Chafin, both of whom dissented in *Hampton*, concurred in the judgment only, insisting that *Hampton* was wrongly decided and should be overruled.[13]

Two weeks after deciding *Edwards*, the Court handed down *Marsh*. There, the Court made no mention of *Hampton* or *Edwards* in holding that the pleading defect in question was a misjoinder, not a misnomer.[14] Instead, the Court cited its pre-*Hampton* misnomer-misjoinder precedents for support.[15]

After *Edwards*, the future of *Hampton*'s understanding of the difference between misnomer and misjoinder is uncertain. For one thing, the Court signaled in *Edwards* that it was uneasy with the breadth of *Hampton*'s holding and thus narrowed its scope with respect to relation back. And for another, the composition of the Court has changed since *Hampton* was decided. In fact, the author of *Hampton*'s majority opinion, Justice Mims, has taken senior status. His seat is now occupied by Justice Mann who has yet to cast a vote in a misnomer-misjoinder case. The same is true for the Court's other new member, Justice Russell. If Justices Mann and Russell agree with Justices Kelsey and Chafin that *Hampton* was wrongly decided and should be overruled, then its days are likely numbered.

The uncertainty surrounding *Hampton*'s reach and viability presents a challenge for Virginia practitioners facing a potential misnomer or misjoinder. This Article attempts to help those practitioners, offering a guide for navigating the Court's misnomer-misjoinder jurisprudence. It is divided into five parts. Part I gives an overview of misnomer and misjoinder in Virginia. Part II surveys the Court's pre-*Hampton* misnomer-misjoinder cases. Part III examines *Hampton*. Part IV reviews the Court's two post-*Hampton* misnomer-misjoinder cases—*Edwards* and *Marsh*. Part V discusses the future of the Court's misnomer-misjoinder jurisprudence,

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[9] 301 Va. 125, 872 S.E.2d 428 (2022).

[10] 301 Va. 152, 873 S.E.2d 86 (2022).

[11] *Edwards*, 301 Va. at 128–31, 873 S.E.2d at 429–30.

[12] *Id.* at 130, 872 S.E.2d at 430. As discussed in Parts I and IV.A, *infra*, the Court likewise limited its holding in *Richmond v. Volk*, 291 Va. 60, 781 S.E.2d 191 (2016), that a misnomer may be corrected through a nonsuit, to cases where the correct defendant received timely notice of the facts underlying the plaintiff's claim. *Edwards*, 301 Va. at 130, 872 S.E.2d at 430.

[13] *Edwards*, 301 Va. at 131–33, 872 S.E.2d at 430–32 (Kelsey, J., dissenting).

[14] *Marsh*, 301 Va. at 152–55, 873 S.E.2d at 87–89.

[15] *See id.* at 154–55, 873 S.E.2d at 88–89.

advocating for a return to the pre-*Hampton* understanding of the distinction between misnomer and misjoinder. The Article then briefly concludes.

I. Overview of Misnomer and Misjoinder

"The party filing a civil action has the fundamental obligation 'to express … 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 … .'"[16] When "a complaint incorrectly names a party, such an error is either a misnomer or a misjoinder."[17]

"A misnomer 'arises when the right person is incorrectly named, not where the wrong person is named.'"[18] In other words, a misnomer "is a mistake in name, but not person."[19] A misspelled name, however, is not a misnomer.[20] "[T]he party's name is the spoken, not the written word," so "as long as the name *sounds* substantially the same, there is no misnomer."[21] "The law has never regarded [a misnomer] as a serious procedural problem and amendments were freely permitted to correct a name."[22]

A misjoinder, by contrast, occurs "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."[23] Put differently, "'misjoinder' is the joinder in the suit of an improper party."[24] In the past, "misjoinder of a party would frequently be fatal to the suit."[25] But today, misjoinder is "not normally catastrophic" and may be fixed in most cases by amendment.[26]

The General Assembly has enacted statutes, sometimes in response to the Supreme Court of Virginia's decisions, allowing parties to correct misnomers and misjoinders through amendment. But "the statutes distinguish the circumstances under which the permitted correction will relate back to the original filing,

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[16] Ray v. Ready, 296 Va. 553, 558, 822 S.E.2d 181, 184 (2018) (emphasis omitted) (quoting *Estate of James*, 277 Va. at 450, 674 S.E.2d at 867).

[17] *Volk*, 291 Va. at 64, 781 S.E.2d at 193.

[18] Ricketts v. Strange, 293 Va. 101, 110, 796 S.E.2d 182, 187 (2017) (quoting Cook v. Radford Cmty. Hosp., Inc., 260 Va. 443, 451, 536 S.E.2d 906, 910 (2000)).

[19] Rockwell v. Allman, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971), *superseded by statute on other grounds*, Va. Code Ann. § 8.01-229(B)(2)(b).

[20] 1 Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 5.08 (3d ed. 2017) (citing Butler v. News-Leader Co., 104 Va. 1, 51 S.E. 213 (1905) ("Any O'Klay" and "Annie Oakley")).

[21] *Id.*

[22] 14A Michie's Jurisprudence, *Parties* § 18, at 481 (2020).

[23] *Estate of James*, 277 Va. at 452, 674 S.E.2d at 868. A related pleading defect is nonjoinder, which occurs when "a party has been omitted who ought to be joined with an existing party, not substituted for an existing party." Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 173, 118 S.E. 502, 505 (1923). Like misjoinder, nonjoinder may generally be cured by amendment. *See* Va. Code Ann. §§ 8.01-5, 8.01-7.

[24] Friend et al., *supra* note 20, § 5.10 (citing Burks, Pleading and Practice § 72 (4th ed. 1952)).

[25] *Id.*

[26] *Id.*

effectively tolling the statute of limitations."[27] The misnomer statute, Code § 8.01-6,[28] allows relation back in any category of misnomer, while the misjoinder statutes, Code §§ 8.01-5 and -6.2, permit relation back in only "two categories of misjoinder: business trade names and suits against estates."[29]

Under Code § 8.01-6, any party may move to amend a pleading to correct a misnomer by "inserting the right name."[30] Such "[a]n 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" so long as these four protective preconditions are met:

> (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 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.[31]

In *Richmond v. Volk*,[32] the Supreme Court of Virginia held that a plaintiff may also correct a misnomer by taking a nonsuit and then filing a new complaint against the correctly named defendant.[33] The Court reaffirmed this holding in *Hampton v. Meyer* but limited its reach as to relation back in *Edwards v. Omni International Services, Inc.*[34] Under *Edwards*, a plaintiff must establish each of Code § 8.01-6's four protective preconditions for the new complaint to relate back to the date of the original complaint.[35] If the plaintiff is able to do so, then the new complaint will relate back to the original complaint for purposes of tolling the statute of limitations under Code § 8.01-229(E)(3), which allows a plaintiff to recommence

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[27] *Estate of James*, 277 Va. at 452, 674 S.E.2d at 868.

[28] All references to "Code" in this Article are to the Code of Virginia, 1950 Annotated.

[29] *Hampton*, 299 Va. at 146, 847 S.E.2d at 301 (Kelsey, J., dissenting).

[30] Va. Code Ann. § 8.01-6.

[31] *Id.* The General Assembly modeled Code § 8.01-6 after Federal Rule of Civil Procedure 15(c). Tessema v. Moulthrop, No. CL-2021-16927, 2023 WL 8522786, at *9 (Va. Cir. Ct. Dec. 7, 2023). In 2004, "the General Assembly amended Code § 8.01-6 to allow notice to either 'a party or its agent' to meet the requirements outlined under the second prong of § 8.01-6." *Id.* Before "this amendment, § 8.01-6 made no mention of a party's agent, and stated strictly that solely the party must receive notice of a lawsuit under § 8.01-6." *Id.* Given this amendment, providing "notice of the filing of the complaint" to an insurance company acting as an insured's agent would be "adequate notice under § 8.01-6 which could then be imputed onto the insured." *Id.* at *10.

[32] 291 Va. 60, 781 S.E.2d 191 (2016).

[33] *Id.* at 66–67, 781 S.E.2d at 194–95. A plaintiff may take a nonsuit up until "a motion to strike the evidence has been sustained," "the jury retires from the bar," or "the action has been submitted to the court for decision." Va. Code Ann. § 8.01-380(A). Only one nonsuit may be taken "as a matter of right," although the court may allow more. *Id.* § 8.01-380(B).

[34] *Edwards*, 301 Va. at 130, 872 S.E.2d at 430; *Hampton*, 299 Va. at 132–34, 847 S.E.2d at 293–94.

[35] *Edwards*, 301 Va. at 130–31, 872 S.E.2d at 430.

a nonsuited action within six months from the date of the nonsuit order or within the original limitations period, whichever is longer.[36]

Most misjoinders may also be corrected by amendment under Code § 8.01-5, which states:

> No action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant, but whenever such nonjoinder or misjoinder shall be made to appear by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any time as the ends of justice may require.[37]

This statute does not, however, permit an amendment "substitut[ing] a new plaintiff for an original plaintiff who lacked standing to bring the suit,"[38] because such a suit "is a legal nullity."[39] The sole remedy in that situation "is a nonsuit followed by a new action in the name of the proper plaintiff."[40]

While an amendment correcting a misnomer will relate back to the date of the original pleading if all four of Code § 8.01-6's protective preconditions are satisfied, an amendment correcting a misjoinder will not relate back to the original pleading date unless the misjoinder falls within one of the two types of misjoinder addressed in Code § 8.01-6.2—business trade names and suits against estates.[41] Code § 8.01-6.2 provides:

> A. A pleading which states a claim against a party whose trade name or corporate name is substantially similar to the trade name or corporate name of another entity may be amended at any time by inserting the correct party's name, if such party or its agent had actual notice of the claim prior to the expiration of the statute of limitations for filing the claim.
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> B. In the event that suit is filed against the estate of a decedent, and filed within the applicable statute of limitations, naming the proper name of estate of the deceased and service is effected or attempted on an individual or individuals as executor, administrator or other officers of the estate, such filing tolls the statute of limitations for said claim in the event the executor, administrator or other officers

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[36] Va. Code Ann. § 8.01-229(E)(3); *Edwards*, 301 Va. at 129, 872 S.E.2d at 430.

[37] Va. Code Ann. § 8.01-5.

[38] Chesapeake House on the Bay, Inc. v. Virginia Nat'l Bank, 231 Va. 440, 442–43, 344 S.E.2d 913, 915 (1986). *See also Estate of James*, 277 Va. at 453, 674 S.E.2d at 868 ("[E]ven when correction of a misjoinder and nonjoinder is permitted, the amendment is only allowed to bring in a proper defendant. Likewise, a new plaintiff may not be substituted for an original plaintiff who lacked standing to bring the action.").

[39] McClary v. Jenkins, 299 Va. 216, 221, 848 S.E.2d 820, 823 (2020) (quoting Kocher v. Campbell, 282 Va. 113, 119, 712 S.E.2d 477, 480 (2011)).

[40] *Chesapeake House*, 231 Va. at 443, 344 S.E.2d at 915.

[41] *Hampton*, 299 Va. at 146, 847 S.E.2d at 301 (Kelsey, J., dissenting).

> of the estate are unable to legally receive service at the time service was attempted, or defend suit because their authority as executor, administrator or other officer of the estate excludes defending said actions, or their duties as executor, administrator or other officer of the estate had expired at the time of service or during the time of defending said action.[42]

To determine whether the pleading defect is a misnomer or misjoinder, courts "consider the pleading as a whole."[43] So "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."[44] "[W]hen there is an ambiguity in the pleading, whether as a result of a defect in form or lack of clarity in 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."[45] "[T]he determination of whether an incorrectly named party is a misnomer or misjoinder is a question of law."[46]

II. Survey of Misnomer-Misjoinder Precedents before *Hampton v. Meyer*

The Supreme Court of Virginia has wrestled with misnomer and misjoinder for more than a century now. In doing so, it has handed down many decisions developing and refining the framework for distinguishing misnomers from misjoinders, and vice versa. These decisions are fact-intensive and often rely on or distinguish previous precedents. Indeed, in *Hampton v. Meyer*, both the majority and dissent spent numerous pages reviewing, comparing, and contrasting prior misnomer-misjoinder cases in support of their respective positions.

To fully grasp *Hampton*'s significance in the Court's misnomer-misjoinder jurisprudence, then, it is necessary to have a good working knowledge of the Court's misnomer-misjoinder case law. This Part thus provides detailed summaries of the Court's key misnomer-misjoinder decisions. Section A discusses chronologically

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[42] Va. Code Ann. § 8.01-6.2. Before 1991, an action brought against a deceased party was considered a nullity and therefore could not be corrected "by substituting the executor or administrator of the deceased party's estate." *Estate of James*, 277 Va. at 450, 674 S.E.2d at 867. But the General Assembly changed this rule in 1991 by adding subsection (B)(2)(b) to the tolling statute, Code § 8.01-229. *Id.* That subsection provides:

> If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period or within two years after the date such suit papers were filed with the court, whichever occurs later, and such suit papers shall be taken as properly filed.

Va. Code Ann. § 8.01-229(B)(2)(b).

[43] *Estate of James*, 277 Va. at 455, 674 S.E.2d at 869.

[44] *Id.*

[45] *Id.* at 450, 674 S.E.2d at 867.

[46] *Volk*, 291 Va. at 64–65, 781 S.E.2d at 869.

the cases where the Court concluded that the pleading defect in question was a misnomer, while Section B reviews chronologically the cases where the Court held that the pleading defect at issue was a misjoinder.

A. PRE-*HAMPTON* MISNOMER PRECEDENTS

1. *Arminius Chemical Co. v. White's Administratrix* (1911)

In *Arminius Chemical Co. v. White's Administratrix*,[47] the plaintiff sued "Arminius Chemical Company, a corporation created by and existing under the laws of the state of Virginia," for wrongful death of her decedent.[48] Service was executed on the agent for "Arminius Chemical Company, Incorporated."[49] Arminius Chemical Company, Incorporated, appeared and challenged service, arguing that its agent was not authorized to accept service for "Arminius Chemical Company," a West Virginia corporation.[50] According to Arminius Chemical Company, Incorporated, Arminius Chemical Company and Arminius Chemical Company, Incorporated, "were separate and distinct legal entities," and Arminius Chemical Company ceased to exist after it conveyed all its assets to Arminius Chemical Company, Incorporated.[51] The trial court rejected this challenge and allowed the plaintiff to amend her complaint by inserting "Incorporated" after "Company."[52]

On appeal, the Supreme Court of Virginia affirmed, explaining that when the suit was filed there was "but one company which was the Arminius Chemical Company, Incorporated," and "[i]t was the defendant in the suit."[53] Further, the Court added, the plaintiff's complaint was served on Arminius Chemical Company, Incorporated's agent, and the company "was thereby brought before the court."[54]

2. *Baldwin v. Norton Hotel, Inc.* (1934)

In *Baldwin v. Norton Hotel, Inc.*,[55] the plaintiff sued "Norton Hotel, Incorporated" for personal injuries he suffered during his stay at a hotel in Norton, Virginia.[56] Service was executed on "Webb Willitts, as President Norton Hotel Corporation" and "C. Matthews, as Manager of Hotel Norton, Incorporated."[57] At first, an attorney appeared and filed a plea of the general issue on behalf of "Hotel Norton,

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[47] 112 Va. 250, 71 S.E. 637 (1911).

[48] *Id.* at 265–66, 71 S.E. at 642.

[49] *Id.* at 266, 71 S.E. at 642.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] 163 Va. 76, 175 S.E. 751 (1934).

[56] *Id.* at 78, 175 S.E. at 751.

[57] *Id.*

Inc."[58] But then, a different attorney appeared specially on behalf of "Norton Realty Corporation" and moved to dismiss the action, arguing that Norton Realty owned and operated the hotel where the plaintiff was allegedly injured, "not Hotel Norton, Incorporated, and that as there was no such corporation or entity as Norton Hotel Corporation or Norton Hotel, Incorporated, any action instituted against any such defendant should be immediately dissolved and dismissed."[59] Norton Realty conceded, however, that the hotel was known locally as the Hotel Norton and that Matthews and "Willitts are manager and president, respectively, of Norton Realty."[60]

In response to Norton Realty's motion to dismiss, the plaintiff moved to amend his complaint "by inserting the correct name of the defendant therein, to wit: Norton Realty Corporation, in place of the incorrect nomenclature, Norton Hotel, Incorporated."[61] The trial court denied the motion to amend and granted the motion to dismiss.[62] The plaintiff appealed.[63]

The Supreme Court of Virginia reversed and remanded.[64] It began by observing that "[i]t is necessary, in the orderly administration of justice, that the identification of parties to a cause be certain."[65] The Court then framed the question before it as whether the defendant's name could be amended after the parties were at issue on the merits.[66]

In addressing this question, the Court first reviewed the rule for correcting misnomers as enunciated in a Michigan case:

> "[A] misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties. But where the right corporation has been sued by the wrong name and service has been made upon the right party, although by a wrong name, an amendment substituting the true name of the corporation may be permitted."[67]

The Court then recited its own articulation of the misnomer rule from a then-recent case, *Leckie v. Seal*, which also addressed a misnomer-misjoinder issue:

> Where the mistake in the name of the corporation, whether plaintiff or defendant, is slight, and it clearly appears what corporation is meant—or

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[58] *Id.* at 78, 82, 175 S.E. at 751, 753.

[59] *Id.* at 78–79, 175 S.E. at 751.

[60] *Id.* at 79, 175 S.E. at 751.

[61] *Id.*, 175 S.E. at 752.

[62] *Id.*

[63] *Id.* at 78, 175 S.E. at 751.

[64] *Id.* at 83, 175 S.E. at 753.

[65] *Id.* at 80, 175 S.E. at 752.

[66] *Id.* at 81, 175 S.E. at 752.

[67] *Id.* (quoting Parke, Davis & Co. v. Grand Trunk Ry. Sys., 174 N.W. 145, 146 (Mich. 1919)).

> as it is sometimes expressed, where the pleading incorrectly *names* a corporation, but correctly describes it—the mistake is amendable, and can be taken advantage of only by plea in abatement. But where the error is so material (especially, it is said, in the name of the defendant) that *no such* corporation exists, it is fatal at the trial.[68]

Applying these principles, the Court found that the plaintiff's use of the name "Norton Hotel, Incorporated" instead of the correct name "Norton Realty Corporation" was a misnomer, which could be corrected by amendment.[69] As the Court reasoned, "[t]here was no substitution of parties, no one was misled … , both parties recognized the fact that the plaintiff had instituted his action against the operator of the Norton Hotel."[70] What is more, the Court wrote, "[t]he proper officers of the party conducting this hostelry, were served with process; after which a plea to the merits, with the name, Hotel Norton, Inc. signed thereto, was filed."[71] Moreover, the Court added, "[a]s soon as plaintiff was informed that … he had incorrectly named the defendant, who was then before the [trial] court, he immediately asked permission to amend by inserting the right name."[72]

3. *Jacobson v. Southern Biscuit Co.* (1957)

In *Jacobson v. Southern Biscuit Co.*,[73] the plaintiffs initially sued "Southern Biscuit Company, Incorporated" for not paying for vehicle rentals.[74] Two days after filing and serving their complaint on "A. B. Childress, Asst. Sectry. Southern Biscuit Co., Inc.," the plaintiffs sought and obtained an order from the trial court allowing them to file an amended complaint, correcting the defendant's name to "Weston Biscuit Company, Inc.," a Delaware corporation doing business in Virginia under the name "Southern Biscuit Company."[75] Except for this change in the defendant's name, the amended complaint was "in the identical language and with the identical exhibit as the original."[76]

After being served through the Secretary of the Commonwealth, Weston Biscuit Company moved to strike the amended complaint and quash service, arguing that the amended complaint "was in fact the institution of a new action, and the substitution of one sole defendant for another sole defendant."[77] It also moved

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[68] *Id.* at 81–82, 175 S.E. 752–53 (quoting Leckie v. Seal, 161 Va. 215, 223, 170 S.E. 844, 846 (1933)). For a summary of *Leckie*, in which the Court held that the pleading defect was a misjoinder, not a misnomer, see *infra* Part II.B.1.

[69] *Baldwin*, 163 Va. at 82–83, 175 S.E. at 753.

[70] *Id.* at 82, 175 S.E. at 753.

[71] *Id.*

[72] *Id.* at 83, 175 S.E. at 753.

[73] 198 Va. 813, 97 S.E.2d 1 (1957).

[74] *Id.* at 814, 97 S.E.2d at 2.

[75] *Id.*

[76] *Id.* at 814–15, 97 S.E.2d at 2.

[77] *Id.* at 815, 97 S.E.2d at 2.

to quash service of the original complaint on Childress.[78] According to Weston Biscuit Company, two years before the vehicle rentals, Southern Biscuit Company was dissolved and all its assets were transferred to Weston Biscuit Company, and Weston Biscuit Company appointed the Secretary of the Commonwealth as its statutory agent and filed a certificate proposing to do business in Virginia under the name Southern Biscuit Company.[79]

At the hearing on Weston Biscuit Company's motions, Childress testified that the Weston Biscuit Company maintained the same location and same plant as Southern Biscuit Company "had operated and continued to conduct its general business in this area without change in sales policies, manufacturing methods or distributions."[80] He also testified that he held the same office with Weston Biscuit Company as he did with Southern Biscuit Company and that when he was served with the original complaint, "he was familiar with the fact that the plaintiffs were asserting a claim against Southern Biscuit Company involving the items shown on the account."[81]

The trial court granted Weston Biscuit Company's motions and struck the amended complaint, quashed service of the amended and original complaints, and dismissed "the original action and the amended action of the plaintiffs."[82]

On appeal, the Supreme Court of Virginia reversed and remanded.[83] It first surveyed the rules and statutes governing pleading amendments in Virginia and other jurisdictions, and then recited the misnomer rule: "If the right party is before the court although under a wrong name, an amendment to cure a misnomer will be allowed, notwithstanding the running of the statute of limitations, provided there is no change in the cause of action originally stated."[84]

Next, the Court examined its decision in *Baldwin v. Norton Hotel, Inc.*, finding it analogous to this case.[85] In *Baldwin*, the Court recounted, "while plaintiff had used the wrong name in describing the defendant, it was a name by which the defendant was known to the public and when process was served the real defendant knew it was the party against whom the action was instituted."[86] The Court then observed that the same situation was presented in *Jacobson*. "[T]he real defendant," it wrote, "was the corporation which owed the account for which the suit was brought. That account was against Southern Biscuit Company, the trade name used by Weston," and was for vehicle rentals after Weston Biscuit Company had absorbed Southern Biscuit Company and gave notice that it was using the trade name Southern

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[78] *Id.*

[79] *Id.*, 97 S.E.2d at 2–3.

[80] *Id.*, 97 S.E.2d at 3.

[81] *Id.* at 816, 97 S.E.2d at 3.

[82] *Id.*

[83] *Id.* at 819, 97 S.E.2d at 5.

[84] *Id.* at 817, 97 S.E.2d at 4 (citing 39 Am. Jur. *Parties* § 124; 124 A.L.R. 86, 124, 136).

[85] *Id.* For a summary of *Baldwin*, see *supra* Part II.A.2.

[86] *Jacobson*, 198 Va. at 817–18, 97 S.E.2d at 4.

Biscuit Company.[87] Further, the Court noted, Childress, who was served with the original complaint, "knew that the plaintiffs were asserting a claim on a contract made by Weston in its trade name and that Weston was the corporation intended to be sued."[88]

Under these facts, the Court concluded that "[t]he amendment which the [trial] court allowed and then struck worked no change in the cause of action sued on, the party which it substituted bore a real relation of interest to the original party to the suit, and nobody was misled or prejudiced by the mistake."[89] Accordingly, the Court held that the plaintiffs' naming of Southern Biscuit Company instead of Weston Biscuit Company was a misnomer and that the trial court therefore erred in striking the amended complaint and dismissing the action.[90] In so holding, the Court noted, without elaboration, that the statement in *Leckie v. Seal* "to the effect that where the error in naming a defendant corporation is so material 'that *no such* corporation exists, it is fatal at the trial,' is not a categorical rule of unqualified application and is not applicable in the circumstances of this case."[91]

4. *Richmond v. Volk* (2016)

In *Richmond v. Volk*,[92] the plaintiff was injured when her car was rear-ended by a car being driven by "Katherine E. Volk."[93] The car that Volk was driving was owned by "Jeannie Cornett."[94] Since Volk was a permissive user of the car, she was covered under Cornett's insurance policy.[95] Nearly two years after the accident, the plaintiff sued to recover for her injuries.[96] Her complaint, however, named "Katherine E. Cornett" as the defendant—not Volk.[97] Initially, a copy of the complaint was sent to Cornett's insurance carrier but not served.[98]

After failing to reach a settlement with Cornett's insurance carrier, the plaintiff directed the clerk to serve process on "Katherine E. Cornett a/k/a Katherine Craft" and provided the clerk with Cornett's address instead of Volk's.[99] Process was then posted at Cornett's home.[100] Soon thereafter, the insurance carrier learned that

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87 *Id.* at 818, 97 S.E.2d at 4.

88 *Id.*

89 *Id.*, 97 S.E.2d at 4–5.

90 *Id.*, 97 S.E.2d at 5.

91 *Id.* (quoting *Leckie*, 161 Va. at 223, 170 S.E. at 846).

92 291 Va. 60, 781 S.E.2d 191 (2016).

93 *Id.* at 62, 781 S.E.2d at 192.

94 *Id.* at 62–63, 781 S.E.2d at 192.

95 *Id.* at 63, 781 S.E.2d at 192.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

process had been served on the wrong address and reached out to the plaintiff to discuss the case.[101]

Volk moved to quash service because it was served on the wrong address.[102] In her motion, she did not dispute that she was the proper defendant.[103] Rather, she maintained that she was "erroneously identified in the caption of [the] complaint as 'Katherine E. Cornett.'"[104] In response to the motion, the plaintiff moved to nonsuit the case.[105] The trial court granted the nonsuit, and Volk's counsel endorsed the order, which listed Volk as "Katherine E. Cornett," as "Counsel for Defendant."[106] About a month later, the plaintiff filed a new complaint, this time naming "Katherine E. Volk, f/k/a Katherine E. Craft, a/k/a Katherine E. Cornett" as the defendant.[107] Process was then served on Volk at her home.[108]

Because more than two years had passed from the date of the accident and the date of the new complaint, Volk filed a plea in bar, asserting that the plaintiff's claim was time-barred by the applicable two-year statute of limitations.[109] Volk argued that the new complaint did not relate back to the date of the original complaint because the plaintiff had failed to meet the requirements of the misnomer statute, Code § 8.01-6.[110] As a result, Volk submitted, the original complaint did not toll the statute of limitations.[111]

The trial court agreed and sustained Volk's plea in bar, dismissing the case with prejudice.[112] It first ruled that "Volk 'is not the same person or entity as Katherine E. Cornett.'"[113] The trial court then held that the plaintiff could not rely on Code § 8.01-6 for relation back because she had not sought to correct the misnomer in the original complaint within the time period set forth in that statute.[114] The plaintiff appealed.[115]

In a four-to-three decision, the Supreme Court of Virginia reversed and remanded, with Justice Powell writing for the majority.[116] The majority first

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101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* "[E]very action for personal injuries, whatever the theory of recovery," must " be brought within two years after the cause of action accrues." VA. CODE ANN. § 8.01-243(A).

110 *Volk*, 291 Va. at 63, 781 S.E.2d at 192.

111 *Id.*

112 *Id.* at 64, 781 S.E.2d at 193.

113 *Id.*

114 *Id.*

115 *Id.* at 62, 781 S.E.2d at 192.

116 *Id.* at 67, 781 S.E.2d at 195. Justice Powell was joined by then-Chief Justice Lemons and Justices Mims and Roush. *Id.* at 61, 781 S.E.2d at 192.

addressed whether the plaintiff's pleading defect was a misnomer or a misjoinder.[117] Although the parties agreed that the plaintiff's use of the name "Katherine E. Cornett" in the original complaint was a misnomer, the majority stated that it was not bound by the parties' agreement because "whether an incorrectly named party is a misnomer or misjoinder is a question of law."[118] The majority then noted that "[t]he key distinction between a misnomer and misjoinder is whether the incorrectly named party in the pleading is, in fact, a correct party who has been sufficiently identified in the pleadings."[119]

To determine whether the plaintiff's pleading defect was a misnomer or a misjoinder, the majority considered not only the original complaint's caption but also its allegations.[120] In doing so, the majority concluded that the plaintiff's use of the name "Katherine E. Cornett" was a misnomer because "the pleading, when considered as a whole, clearly identifie[d] Volk as the proper party to the action."[121] Significantly, the majority explained, "the facts laid out in the [original] complaint establish that the intended defendant was the driver of a specific vehicle that was in a specific location at a specific time and that the driver of that vehicle committed a specific act."[122] Since "Volk is the only person that fits this description," the majority reasoned, "it is readily apparent that she was the person against whom the action was intended to be brought."[123]

After deciding that the plaintiff's pleading defect was a misnomer, the majority discussed what effect, if any, the failure to correct that misnomer before taking a nonsuit had on the timeliness of her claim.[124] Volk argued that Code § 8.01-6 is the only method for correcting a misnomer and that the failure to correct a misnomer under that statute precluded Code § 8.01-229(E) from tolling the statute of limitations.[125] The majority rejected this contention, holding that when the plaintiff took a nonsuit, the statute of limitations was tolled under Code § 8.01-229(E).[126] It first explained that "the failure to correct a misnomer under Code § 8.01-6 does not prevent the operation of Code § 8.01-229(E) upon the taking of a nonsuit," because "the plain language of Code § 8.01-6 indicates that any amendment made under the statute 'relates back to the date of the *original pleading*.'"[127] But the taking of a nonsuit "puts an end to the original action, and the recommenced action stands independently of any prior nonsuited action."[128] Accordingly, the

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117 *Id.* at 64, 781 S.E.2d at 193.

118 *Id.* at 64–65, 781 S.E.2d at 193.

119 *Id.* at 65, 781 S.E.2d at 193.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 65, 781 S.E.2d at 194.

125 *Id.* at 65–66, 781 S.E.2d at 194.

126 *Id.* at 67, 781 S.E.2d at 194–95.

127 *Id.* at 66–67, 781 S.E.2d at 194.

128 *Id.* at 67, 781 S.E.2d at 194 (internal quotation marks and citations omitted).

majority reasoned that "there [was] no 'original pleading' to relate back to for the purposes of Code § 8.01-6."[129]

The majority also found that Code § 8.01-229(E) tolls the statute of limitations independently of Code § 8.01-6.[130] For Code § 8.01-229(E)'s tolling provisions to apply, "'there must be an identity of the parties' in the initial action and the recommenced action."[131] Since a misnomer "only speaks to the name of a party, not the identity of a party," the majority explained that "where, as here, the name of a party is changed in a subsequent action for the purpose of correcting a misnomer that existed in the initial action, there has been no change in the identity of the parties."[132] The majority therefore held that the plaintiff had met "the identity requirement of Code § 8.01-229(E) … and the tolling effect of the statute applie[d]" to save her claim from the statute of limitations.[133]

Joined by then-Justice (now Chief Justice) Goodwyn and Justice McClanahan, Justice Kelsey dissented.[134] He agreed with the majority that the plaintiff's pleading defect was a misnomer but disagreed that it could be corrected by taking a nonsuit.[135] Justice Kelsey first observed that rather than following the procedure for correcting a misnomer set out in Code § 8.01-6, "the plaintiff simply nonsuited the action, guessing (correctly, it turns out) that the nonsuit would provide a risk-free cure for her misnomer without the trouble of complying with Code § 8.01-6."[136] But under Code § 8.01-6, he argued, "*only a court* can correct 'a misnomer or otherwise' in a plaintiff's complaint."[137] And neither the nonsuit statute, Code § 8.01-380, nor "its related tolling statute, Code § 8.01-229(E)(3), implies that a plaintiff can unilaterally correct a misnomer with a new pleading—thereby rendering Code § 8.01-6 irrelevant."[138] So, according to Justice Kelsey, the majority's decision ran "afoul of established maxims counseling that [the Court] accord[s] each statute, insofar as possible, a meaning that does not conflict with any other statute, and declaring that, if the harmonizing effort does not resolve the conflict, the more specific enactment prevails over the more general."[139]

He also disagreed with the majority that the statute of limitations on the plaintiff's claim was tolled by Code § 8.01-229(E).[140] While "[t]he majority correctly recognize[d]" that there must be an identity of the parties for the statute

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129 *Id.*

130 *Id.*

131 *Id.* (quoting Casey v. Merck & Co., 283 Va. 411, 417, 722 S.E.2d 842, 846 (2012)).

132 *Id.*

133 *Id.*

134 *Id.* at 68, 781 S.E.2d at 195 (Kelsey, J., dissenting).

135 *Id.* at 68–72, 781 S.E.2d at 195–97.

136 *Id.* at 71, 781 S.E.2d at 197.

137 *Id.*

138 *Id.*

139 *Id.* (internal quotation marks and citations omitted).

140 *Id.* at 68–70, 781 S.E.2d at 195–96.

to apply, he maintained that there was no identity of the parties between the plaintiff's original complaint and her refiled complaint: "[T]he plaintiff filed her first complaint against Katherine E. Cornett. After that action was nonsuited, the plaintiff filed a new complaint against Katherine E. Volk … . Volk has never had the name 'Cornett' and has never been known by that name."[141] Thus, Justice Kelsey wrote, "Katherine E. Cornett is not now, and never has been, the 'identity of the [defendant].'"[142]

Justice Kelsey further pointed out that the plaintiff's (and, by extension, the majority's) position rested on a false "assumption that an amendment correcting a misnomer, by definition, does not change the party against whom the claim is asserted."[143] The General Assembly, he explained, "expressly rejected" that assumption in "Code § 8.01-6, which governs any 'amendment *changing the party* against whom a claim is asserted, *whether to correct a misnomer or otherwise*."[144] This language, he continued, makes clear that an amendment to correct a misnomer is "just one example, among others, of 'changing the party' for purposes of Code § 8.01-6."[145] Because a "'misnomer' amendment" is treated as "changing the party against whom the claim is asserted" under Code § 8.01-6, he submitted that "the notoriously illusive distinction between changing a party and misspelling a party's name should play no role in determining whether an amendment should be allowed. The same standard governs both situations."[146]

In closing, Justice Kelsey lamented that the majority extended the scope of the nonsuit—which was already "'a powerful tactical weapon' found exclusively 'in the arsenal of a plaintiff'"—by allowing it to be "used … to remedy unilaterally 'a misnomer or otherwise' defect involving the identity of a defendant, a subject specifically addressed by Code § 8.01-6."[147] In Justice Kelsey's view, "[e]xpanding the nonsuit's reach in this manner involves a policy judgment that the legislature, not the judiciary, should make."[148]

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[141] *Id.* at 68, 781, S.E.2d at 195.

[142] *Id.* at 68–69, 781 S.E.2d at 195 (alteration in original) (quoting *Casey*, 283 Va. at 447, 722 S.E.2d at 846).

[143] *Id.* at 70, 781 S.E.2d at 196.

[144] *Id.* (quoting Va. Code Ann. § 8.01-6).

[145] *Id.*

[146] *Id.*, 781 S.E.2d at 196–97 (footnotes omitted).

[147] *Id.* at 72, 781 S.E.2d at 197 (quoting INOVA Health Care Servs. v. Kebaish, 284 Va. 336, 344, 732 S.E.2d 703, 707 (1989)).

[148] *Id*. Virginia appellate lawyer and commentator Steven Emmert has pushed back against Justice Kelsey's suggestion that the nonsuit gives plaintiffs "a get-out-of-trouble-free card" that defendants do not have under Virginia law. L. Steven Emmert, *Analysis of January 28, 2016 Supreme Court Opinion*, Virginia Appellate News & Analysis, https://virginia-appeals.com/analysis-of-january-28-2016-supreme-court-opinion/ (last visited Apr. 21, 2024). In his write-up on *Volk*, Emmert observed that although a nonsuit "goes a long way toward inoculating plaintiffs (but not defendants) from many of the adverse consequences associated with missing filing deadlines or violating other procedural rules governing litigation," it does not save them if they file outside the applicable statute of limitations, even if they establish a good-faith excuse for the delay. *Id.* But if defendants fail to answer on time and go into default, then Virginia Supreme Court Rule 3:19(b) provides relief from that default "for good cause shown." *Id.* Accordingly, Emmert submitted that while "the nonsuit statute is a single-edge sword," so too "is the statute of limitations." *Id.*

B. PRE-*HAMPTON* MISJOINDER PRECEDENTS

1. *Leckie v. Seal* (1933)

In *Leckie v. Seal*,[149] two creditors obtained default judgments against "Bluefield Mattress Company," the trade name of "Graham Manufacturing Corporation."[150] The creditors sought to enforce their judgments against Graham Manufacturing, but the trial court ruled that the judgments were void against Graham Manufacturing, and thus did not constitute valid liens against its property, even though Graham Manufacturing's president testified that the company "recognized the debts on which those two suits were brought as debts of the Graham Manufacturing Corporation."[151] The creditors appealed.[152]

The Supreme Court of Virginia affirmed.[153] It first recognized that there was "an array of authority from other States" supporting the creditors' argument that "where the right party is sued by the wrong name and makes no objection, the judgment against him by the wrong name is binding."[154] But the Court then stated the rule in Virginia:

> Where the mistake in the name of the corporation, whether plaintiff or defendant, is slight, and it clearly appears what corporation is meant—or as it is sometimes expressed, where the pleading incorrectly *names* a corporation, but correctly describes it—the mistake is amendable, and can be taken advantage of only by plea in abatement. But where the error is so material (especially, it is said, in the name of the defendant) that *no such* corporation exists, it is fatal at the trial.[155]

In accordance with this rule, the Court concluded that the creditors' judgments could not be saved by amendment.[156] The creditors, the Court wrote, "had the opportunity to sue the true owner, Graham Manufacturing Corporation, and to introduce evidence that [Bluefield] Mattress Company was in reality the corporation," but they failed to do so.[157] As a result, the Court reasoned, the creditors "obtained judgments against a non-existent corporation," and "[i]t is now too late to correct the fatal omission of averring in the pleadings and sustaining by proof … that the Bluefield Mattress Company and Graham Manufacturing Corporation were one and the same."[158]

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[149] 161 Va. 215, 170 S.E. 844 (1933).

[150] *Id.* at 219–20, 170 S.E. at 845–46.

[151] *Id.* at 217–22, 170 S.E. at 844–46.

[152] *Id.* at 217–18, 170 S.E. at 844–45.

[153] *Id.* at 227, 170 S.E. at 848.

[154] *Id.* at 222, 161 S.E. at 846.

[155] *Id.* at 223, 161 S.E. at 846 (quoting 1 VA. L. REV. 548).

[156] *Id.* at 224–25, 161 S.E. at 847–48.

[157] *Id.* at 225, 161 S.E. at 847.

[158] *Id.*

2. *Rockwell v. Allman* (1971)

In *Rockwell v. Allman*,[159] the plaintiff was injured when his truck collided with a car being driven by "Jacie Arbell Underwood Shotwell," who died from injuries suffered in the accident.[160] On the plaintiff's motion, the trial court appointed "[Roanoke] City Sergeant, Kermit E. Allman," as the administrator of Shotwell's estate.[161] The plaintiff then sued Allman seeking damages for his injuries, and Allman responded.[162]

On the day of trial, about three and a half years after the accident, Allman presented evidence showing that Shotwell had lived in Botetourt County, not Roanoke City as the police report had indicated, and that her daughters had qualified as the administrators of her estate in Botetourt County shortly after the accident.[163] Given this evidence, Allman moved for summary judgment, arguing that "his appointment as administrator was void because the [trial] court lacked jurisdiction to make the appointment."[164] In response, the plaintiff moved to amend his complaint "'to correct a misnomer' by substituting [Shotwell's daughters] as the party defendant in lieu of Allman."[165] The trial court denied the plaintiff's motion to amend and granted Allman's motion for summary judgment.[166]

On appeal, the Supreme Court of Virginia affirmed, holding that the plaintiff's pleading defect was a misjoinder, not a misnomer.[167] Since Allman's appointment was void, the Court reasoned, "[a]ny judgment rendered against him as Ms. Shotwell's administrator would be a nullity," and the actual administrators whom the plaintiff sought to substitute for Allman bore "no relation of interest to [him] and were never served with process."[168] As a result, the Court concluded that the plaintiff's mistake was not in name but in person and that it could not "be corrected … by labeling it a misnomer."[169]

In reaching this conclusion, the Court distinguished *Jacobson v. Southern Biscuit Co.*[170] There, it explained, the plaintiffs were allowed to amend their complaint "because the right party was before the court 'although under a wrong name.'"[171] But in *Rockwell*, the Court continued, "the party before the court, Kermit E.

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159 211 Va. 560, 179 S.E.2d 471 (1971).

160 *Id.* at 560, 179 S.E.2d at 472.

161 *Id.*

162 *Id.* at 560–61, 179 S.E.2d at 472.

163 *Id.* at 561, 179 S.E.2d at 472.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* For a summary of *Jacobson*, see *supra* Part II.A.3.

Allman, Administrator, was not the right party because his appointment was void."[172]

3. *Swann v. Marks* (1996)

In *Swann v. Marks*,[173] the plaintiff was injured when the car he was riding in was involved in an accident with a car driven by "William L. Wild."[174] Wild died a few months later "from causes unrelated to the accident."[175] After learning of Wild's death, the plaintiff filed suit against the "Estate of William L. Wild" seeking to recover for his injuries.[176] About two years later, "Steven L. Marks qualified as the personal representative of Wild's estate."[177]

In an *ex parte* proceeding, the trial court permitted the plaintiff to amend his complaint by substituting "Steven L. Marks, personal representative of the estate of William L. Wild, for the named defendant 'Estate of William L. Wild.'"[178] In its order, the trial court stated that the amendment was "to correct [a] misnomer" and that it related back to the original complaint under the misnomer statute, Code § 8.01-6.[179] Yet, for reasons unknown, the plaintiff then moved for a nonsuit, which the trial court granted.[180] Following the nonsuit, the plaintiff filed a new complaint "naming 'Steven L. Marks, Esq., Personal Representative of the Estate of William L. Wild and as Administrator C.T.A. of This Estate' as the defendant."[181]

Marks filed a plea in bar asserting that the plaintiff's new complaint was time-barred by the applicable two-year statute of limitations.[182] The trial court agreed and sustained the plea, dismissing the new complaint.[183] The plaintiff appealed.[184]

The Supreme Court of Virginia affirmed.[185] It first tackled the plaintiff's contention that his original complaint against the "Estate of William L. Wild" was timely and tolled the statute of limitations.[186] The Court rejected this argument because a suit against an "estate" is a nullity.[187] "To toll the statute of limitations,"

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172 *Rockwell*, 211 Va. at 561, 179 S.E.2d at 472.

173 252 Va. 181, 476 S.E.2d 170 (1996).

174 *Id.* at 182, 476 S.E.2d at 170.

175 *Id.*

176 *Id.* at 182–83, 476 S.E.2d at 171.

177 *Id.* at 183, 476 S.E.2d at 171.

178 *Id.*

179 *Id.* (alteration in original).

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 185, 476 S.E.2d at 172.

186 *Id.* at 184, 476 S.E.2d at 171.

187 *Id.*

it explained, "a suit must be filed against a proper party," and "Virginia statutes do not authorize an action against an 'estate.'"[188]

The Court also disagreed with the plaintiff that "the substitution of a personal representative for the 'estate' [was] the correction of a misnomer."[189] Citing *Rockwell v. Allman*, the Court first observed that a "[m]isnomer arises when the right person is incorrectly named, not where the wrong defendant is named."[190] It then explained that "[t]he personal representative of a decedent and the decedent's 'estate' are two separate entities; the personal representative is a living individual while the 'estate' is a collection of property."[191] So, the Court concluded, "one [could not] be substituted for another under the concept of correcting a misnomer."[192]

4. *Cook v. Radford Community Hospital, Inc.* (2000)

In *Cook v. Radford Community Hospital, Inc.*,[193] the plaintiff sued a hospital and two doctors for medical malpractice.[194] Approximately two years earlier, however, the plaintiff was declared incapacitated and her husband was appointed as her guardian.[195] The defendants moved to dismiss, "arguing that, because a guardian had been appointed for [the plaintiff], Code § 37.1-141 required that her guardian prosecute the action."[196] The trial court agreed and ruled that the plaintiff "was not entitled to amend her pleadings under either the misnomer statute, Code § 8.01-6, or the misjoinder statute, Code § 8.01-5, and dismissed [her complaint]."[197]

On appeal, the Supreme Court of Virginia affirmed.[198] It first addressed whether the plaintiff could sue in her own name even though she had a guardian, concluding that she could not because "Code § 37.1-141 requires that the fiduciary prosecute any suit to which the ward is a party."[199]

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188 *Id.*

189 *Id.*

190 *Id.*, 476 S.E.2d at 172 (citing *Rockwell*, 211 Va. at 561, 179 S.E.2d at 472). For a summary of *Rockwell*, see *supra* Part II.B.2.

191 *Swann,* 252 Va. at 184, 476 S.E.2d at 172.

192 *Id.*

193 260 Va. 443, 536 S.E.2d 906 (2000).

194 *Id.* at 446, 536 S.E.2d at 907.

195 *Id.*

196 *Id.* Code § 37.1-141 is now Code § 64.2-2025, which states:

> Subject to any conditions or limitations set forth in the order appointing the fiduciary, the fiduciary shall prosecute or defend all actions or suits to which the incapacitated person is a party at the time of qualification of the fiduciary and all such actions or suits subsequently instituted after 10 days' notice of the pendency of the action or suit. Such notice shall be given by the clerk of the court in which the action or suit is pending.

197 *Cook*, 260 Va. at 446, 536 S.E.2d at 907.

198 *Id.* at 451, 536 S.E.2d at 910.

199 *Id.*

The Court then considered whether the plaintiff could amend her complaint to add or substitute her guardian as the named plaintiff as either a misjoinder or a misnomer.[200] It found that Code § 8.01-5 did not apply because "a new plaintiff may not be substituted for an original plaintiff who lacked standing to bring the suit. Statutes relating to misjoinder and nonjoinder are not applicable in such situations"—the only "remedy is a nonsuit followed by a new action brought in the name of a proper plaintiff."[201] The Court also concluded that Code § 8.01-6 was inapplicable, since the plaintiff did not name the right person under the wrong name.[202] "In this case," the Court wrote, "the 'right person' was [the plaintiff's] guardian. The 'right person' was not incorrectly named; the 'wrong person," [the plaintiff herself], was named."[203] Accordingly, the Court held that "the trial court correctly refused to allow amendment of the pleadings to add or substitute [the plaintiff's] guardian."[204]

5. *Miller v. Highland County* (2007)

In *Miller v. Highland County*,[205] two sets of plaintiffs filed declaratory-judgment actions against "Highland County, Virginia," and others, challenging the decision of the County's Board of Supervisors granting a conditional use permit for the construction of a wind turbine project.[206] The trial court ruled against the plaintiffs on the merits, and an appeal ensued.[207]

The Supreme Court of Virginia affirmed in part and reversed in part.[208] Among other issues, it considered whether the naming of Highland County as the party defendant instead of the County's governing body, the Board of Supervisors, by one set of plaintiffs was appropriate.[209] The Court held that it was not because "in an action … contesting a decision of a local 'governing body,' that body is a required party defendant"—not the locality.[210] Even so, the plaintiffs argued that they should be allowed to change the name of the party defendant from Highland County to the Board of Supervisors under the misnomer statute, Code § 8.01-6.[211] The Court was unpersuaded, concluding that the plaintiffs' pleading defect was

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200 *Id.*

201 *Id.* (quoting *Chesapeake House*, 231 Va. 442–43, 344 S.E.2d at 915).

202 *Id.*

203 *Id.*

204 *Id.*

205 274 Va. 355, 650 S.E.2d 532 (2007).

206 *Id.* at 360–62, 650 S.E.2d at 533–34.

207 *Id.* at 363, 650 S.E.2d at 534–35.

208 *Id.* at 372–73, 650 S.E.2d at 540.

209 *Id.* at 363–68, 650 S.E.2d at 535–37.

210 *Id.* at 367, 650 S.E.2d at 537.

211 *Id.* at 367–68, 650 S.E.2d at 537.

a misjoinder, not a misnomer.[212] The plaintiffs, it explained, "did not incorrectly name the right entity, but named a different entity."[213]

6. *Estate of James v. Peyton* (2009)

In *Estate of James v. Peyton*,[214] the plaintiff was injured in a car accident.[215] To recover for his injuries, the plaintiff sued the driver of the other car, "Robert Judson James," but he had died more than a year earlier from his own injuries suffered in the accident.[216] Accordingly, the plaintiff moved to amend his complaint to "substitute 'the Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq.' for the Defendant, Robert Judson James."[217] The proposed amended complaint "styled the defendant as 'the Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq.,' and included allegations that "Defendant, Robert Judson James, was a resident of Brandy Station, Virginia"; that "James died on Mach 1, 2003"; and that "[o]n June 28, 2004, Mr. Edwin F. Gentry, Esq. qualified as the Administrator of the Estate of Robert Judson James."[218]

The trial court granted the plaintiff's motion to amend, and the clerk "issued a notice of amended motion for judgment to be served on Gentry."[219] A few weeks later, "an answer and grounds of defense … was filed," admitting that "Gentry qualified as the administrator of James' estate."[220] It was signed "Estate of Robert Judson James," by counsel.[221] The plaintiff also served the amended complaint on his uninsured motorist carrier, which filed its own response and grounds of defense.[222]

Several years later, "a motion for summary judgment was filed on behalf of 'the Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq."[223] Citing *Swann v. Marks*, the motion argued that the plaintiff's "action was a nullity because the named defendant was an estate."[224] It further contended that the plaintiff's reference to the personal representative in the amended complaint's caption was insufficient because the "[t]he personal representative and the estate are two

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212 *Id.* at 368, 650 S.E.2d at 537.

213 *Id.*

214 277 Va. 443, 674 S.E.2d 864 (2009).

215 *Id.* at 447, 674 S.E.2d at 865.

216 *Id.*

217 *Id.* at 447–48, 674 S.E.2d at 865.

218 *Id.* at 448, 674 S.E.2d at 865 (all caps omitted).

219 *Id.*

220 *Id.*

221 *Id.*, 674 S.E.2d at 865–66 (all caps omitted).

222 *Id.*, 674 S.E.2d at 866.

223 *Id.*

224 *Id.* at 448–49, 674 S.E.2d at 866. For a summary of *Swann*, see *supra* Part II.B.3.

different entities,' and, thus, 'naming the estate is not a misnomer' which could be cured by a further substitution of the personal representative of the estate."[225]

Initially, the trial court agreed that the amended complaint had failed to properly identify Gentry as the estate's administrator and therefore granted the motion for summary judgment.[226] But upon reconsideration, the trial court went the other way, concluding that while the amended complaint's caption "was not worded as one might expect," Gentry was "correctly named as the administrator," and "he was personally served with process."[227] As a result, the trial court denied the motion for summary judgment.[228]

On appeal, the Supreme Court of Virginia reversed and entered final judgment against the plaintiff.[229] It began by noting that before 1991, an action brought against a deceased party was a nullity and that the mistake could not be fixed "by substituting the executor or administrator of the deceased party's estate 'because the personal representative was a person distinct from the decedent, the mistaken naming of the decedent was not a misnomer and substitution of the personal representative did not relate back to the initial filing of the lawsuit.'"[230] But in 1991, the Court continued, an amendment of the tolling statute, Code § 8.01-229, "adding subsection (B)(2)(b) altered this long-standing rule 'by providing that [an action] filed against a defendant who was deceased when the action was filed could be amended to substitute the decedent's personal representative.'"[231]

Next, the Court explained that while the plaintiff's motion to amend "was clearly authorized" under the amended Code § 8.01-229, it "remained 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 and upon what basis the party is liable to the plaintiff."[232] The plaintiff acknowledged that the proper format for identifying a personal representative "is to list the personal representative by name followed by a description of the capacity in which he or she is being sued," but argued that the "'syntactical difference' between the proper form for such pleadings and the form used in the caption of his amended motion for judgment [was] of no moment," since the words "Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." had the same meaning as "Edwin F. Gentry[,] Esq., Administrator, Estate of Robert Judson James."[233]

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225 *Estate of James*, 277 Va. at 449, 674 S.E.2d at 866.

226 *Id.*

227 *Id.*

228 *Id.* at 449–50, 674 S.E.2d at 866.

229 *Id.* at 456, 674 S.E.2d at 870.

230 *Id.* at 450–51, 674 S.E.2d at 867 (quoting Parker v. Warren, 273 Va. 20, 24, 639 S.E.2d 179, 181 (2007)).

231 *Id.* at 451, 674 S.E.2d at 867 (alteration in original) (quoting *Parker*, 273 Va. at 24, 639 S.E.2d at 181).

232 *Id.*

233 *Id.* at 451–52, 674 S.E.2d at 867–68 (second alteration in original).

The Court rejected this contention. It first observed that there was "patent ambiguity between the caption of the amended motion for judgment and the allegations within that pleading."[234] While the caption identified the "Estate of Robert Judson James, Administrator, Edwin F. Gentry, Esq." as the party defendant," the allegations referred to "Defendant, Robert Judson James."[235] For instance, the Court pointed out, "when the term 'defendant' [was] used in the allegations of fact, the term clearly refer[red] to James, as when … it [was] alleged that [the plaintiff's] vehicle was struck by 'Defendant's vehicle.'"[236] Given this and other references to James, the Court determined that "the most straightforward reading of the amended motion for judgment identifie[d] 'the Estate of Robert Judson James' as the party defendant."[237] The Court therefore held that the trial "court erred in ruling that the amended motion for judgment identified Gentry, in his capacity as administrator of James' estate, as the party defendant."[238]

Recognizing the possibility of this result, the plaintiff also argued that the pleading defect was a misnomer, and thus subject to correction by amendment, because unlike *Swann*, "where the named party was only identified as the estate without reference to a personal representative in the original action filed," his amended complaint "identified Gentry as the personal representative in both the caption and the body of the pleading, and Gentry had actual notice of the action."[239] The Court disagreed. Finding *Swann* indistinguishable, the Court explained that the plaintiff could not correct the pleading defect under the misnomer statute, Code § 8.01-6, because he had named the wrong defendant (James's estate), which was a misjoinder and not a misnomer.[240]

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[234] *Id.* at 455, 674 S.E.2d at 869–70.

[235] *Id.*, 674 S.E.2d at 870.

[236] *Id.*

[237] *Id.* (all caps omitted). Although neither party raised Code § 8.01-6.2(B), which, as discussed in Part I, *supra*, tolls the statute of limitations for a suit filed against an estate instead of its fiduciary so long as the fiduciary was unable to legally receive service when attempted, the Court noted that it was "inapplicable in this case because Gentry was legally able to receive service of the suit under the proper name of James' estate." *Id.* at 453 n.3, 674 S.E.2d at 868 n.3.

[238] *Id.* at 455, 674 S.E.2d at 870.

[239] *Id.* at 452, 674 S.E.2d at 868.

[240] *Id.* at 456, 674 S.E.2d at 870. To address the situation presented in both *Swann* and *Estate of James*, the General Assembly enacted Code § 8.01-6.3, which prescribes the form for naming fiduciaries and creates a safe harbor for errors. *Ray*, 296 Va. at 559, 822 S.E.2d at 184. That statute states:

> A. In any action or suit required to be prosecuted or defended by or in the name of a fiduciary, including a personal representative, trustee, conservator, or guardian, the style of the case in regard to the fiduciary shall be substantially in the following form: "(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship)."
>
> B. Any pleading filed that does not conform to the requirements of subsection A but otherwise identifies the proper parties shall be amended on the motion of any party or by the court on its own motion. Such amendment relates back to the date of the original pleading.

VA. CODE ANN. § 8.01-6.3. "As observed in Friend's Virginia Pleading and Practice: 'If this legislation is successful, it may well obviate the fatal statute of limitations problems that have previously arisen with improper naming of parties or representatives in such cases.'" *Ray*, 296 Va. at 560, 822 S.E.2d at 185 (quoting FRIEND ET AL., *supra* note 20, § 6.03).

7. *Ricketts v. Strange* (2017)

In *Ricketts v. Strange*,[241] the plaintiff was injured in a car accident.[242] Roughly two weeks before the applicable two-year statute of limitations was to expire, she filed suit to recover for her injuries against the driver of the other car, "Charlie Edward Strange," alleging negligence.[243] Strange moved for summary judgment, arguing that the plaintiff lacked standing to pursue her negligence claim because about six months after the accident, she filed a Chapter 7 bankruptcy and failed to properly exempt the claim sued upon from the bankruptcy estate.[244] Strange thus maintained that the negligence claim remained an asset of the bankruptcy estate and could be asserted only by the bankruptcy trustee.[245]

The trial court agreed with Strange and granted the motion for summary judgment.[246] At that time, the statute of limitations on the plaintiff's negligence claim had already run, and there was no tolling "because, without standing, [the plaintiff's] suit was a nullity."[247] To escape the statute-of-limitations bar, then, the plaintiff moved to amend her complaint to change the named plaintiff from herself to the bankruptcy trustee "due to the misnomer," in accordance with the misnomer statute, Code § 8.01-6.[248] The trial court denied the motion, and the plaintiff appealed.[249]

The Supreme Court of Virginia affirmed.[250] After determining that the plaintiff did not properly exempt her negligence claim from the bankruptcy estate and thus lacked standing to pursue it against Strange, the Court turned to her motion to amend.[251] It began its analysis by reciting the misnomer rule as articulated in its prior cases, including *Swann v. Marks*, *Cook v. Radford Community Hospital, Inc.*, and *Richmond v. Volk*: "A misnomer 'arises when the right person is incorrectly named, not where the wrong person is named.'"[252] Applying this rule, the Court held that the plaintiff could not change the named plaintiff from herself to the bankruptcy trustee under Code § 8.01-6, because the pleading defect was not a misnomer but a misjoinder.[253] It reasoned that "[t]he 'right person' was [the bankruptcy trustee], but he was not incorrectly named. Rather, the 'wrong person,' [the plaintiff], was named."[254]

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241 293 Va. 101, 796 S.E.2d 182 (2017).

242 *Id.* at 104, 796 S.E.2d at 184.

243 *Id.*, 796 S.E.2d at 183–84.

244 *Id.*, 796 S.E.2d at 184.

245 *Id.*

246 *Id.* at 105, 796 S.E.2d at 184.

247 *Id.*

248 *Id.*

249 *Id.* at 106, 796 S.E.2d at 184.

250 *Id.* at 112, 796 S.E.2d at 188.

251 *Id.* at 110–11, 796 S.E.2d at 187.

252 *Id.* at 110, 796 S.E.2d at 187 (quoting *Cook*, 260 Va. at 451, 536 S.E.2d at 910). For summaries of *Swann*, *Cook*, and *Volk*, see *supra* Part II.A–B.

253 *Ricketts*, 293 Va. at 111, 796 S.E.2d at 187.

254 *Id.*

III. Blurring the Line between Misnomer and Misjoinder: Examination of *Hampton v. Meyer*

In *Hampton v. Meyer*,[255] the Court considered whether the plaintiff's naming of a car's owner instead of its driver in a car-accident case was a misnomer or a misjoinder.[256] It concluded by a four-to-three vote that this pleading defect was a misnomer and that the plaintiff's new complaint, filed after a nonsuit, therefore related back to the date of his original complaint and was saved from the applicable two-year statute of limitations.[257] Section A of this Part recounts the case's material facts and procedural history. Section B then examines the majority and dissenting opinions.

A. Material Facts and Procedural History

The plaintiff was injured when the Chevrolet Malibu he was riding in was struck by a GMC Suburban.[258] Nearly two years after the accident, the plaintiff filed suit seeking damages for his injuries against "Michael Patrick Meyer" as the driver of the Suburban.[259] In his complaint, the plaintiff alleged that Michael "carelessly, recklessly, and negligently operated his vehicle, disregarding a red light, and crashing into the front of the [Malibu]," thereby causing him "to sustain serious and permanent injuries and other damages."[260] The complaint's allegations were limited to the Suburban's driver; it "alleged no cause of action connected in any way to the ownership of the Suburban by any person acting in the capacity of its owner."[261]

Roughly a month later, Michael's insurance carrier notified the plaintiff that while the police report had identified Michael as the driver of the Suburban at the time of the accident, Michael's son "Noah J. Meyer" was the one who was actually driving then.[262] Michael co-owned the Suburban with "Patricia Lynn Meyer," presumably his wife.[263]

Upon receiving this information, the plaintiff nonsuited his complaint and filed a new one against Noah.[264] In his new complaint, the plaintiff "explain[ed] that he had filed the [original] complaint naming Michael as the driver based on the erroneous police report and that he had nonsuited that complaint upon learning the true name of the driver."[265] He also asserted that under *Richmond v. Volk*, "the use of the wrong name in his [original] complaint was merely a misnomer rather than a misjoinder."[266]

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255 299 Va. 121, 847 S.E.2d 287 (2020).

256 *Id.* at 127–28, 847 S.E.2d at 289–90.

257 *Id.* at 134–35, 847 S.E.2d at 294.

258 *Id.* at 124, 847 S.E.2d at 288.

259 *Id.* at 125, 847 S.E.2d at 288.

260 *Id.* (internal quotation marks omitted).

261 *Id.*, 847 S.E.2d at 289.

262 *Id.* at 126, 847 S.E.2d at 289.

263 *Id.* at 125–26, 847 S.E.2d at 289.

264 *Id.* at 126, 847 S.E.2d at 289.

265 *Id.*

266 *Id.* For a summary of *Volk*, see *supra* Part II.A.4.

Except for "changing the first name of the driver from Michael to Noah, the factual allegations in [the plaintiff's new] complaint about what the driver of the Suburban had done were substantially the same as in his [original] complaint."[267]

Noah filed a plea in bar, arguing that the plaintiff's new complaint was time-barred by the applicable two-year statute of limitations.[268] Relying on *Volk*, the plaintiff opposed the plea in bar, maintaining that his use of the wrong name for the Suburban driver "in the original complaint was merely a misnomer."[269] He thus asserted that, as in *Volk*, there had been no change in the parties from the original complaint to the new complaint, and the statute of limitations had been tolled under the tolling statute, Code § 8.01-229(E).[270]

The trial court sustained the plea in bar and dismissed the new complaint, "ruling that naming Michael in the [original] complaint was a misjoinder, not a misnomer, because Michael and Noah were separate individuals and that Michael's name was not a misspelling of Noah's."[271] The plaintiff then filed a motion to reconsider, which was denied.[272] In its final order, the trial court explained that what was "*determinative* [was] that Michael Meyer, by [the plaintiff's] own admission in his complaint, is a real person … . Because of this, Michael Meyer was the improper party to be named and sued in the original action because he is a separate individual from Noah Meyer."[273]

The plaintiff appealed.[274]

B. MAJORITY AND DISSENTING OPINIONS

In a four-to-three decision, the Supreme Court of Virginia reversed and remanded, holding that the plaintiff's pleading defect of naming Michael instead of Noah in his original complaint was a misnomer, not a misjoinder, and thus his new complaint was not time-barred by the statute of limitations under *Richmond v. Volk*.[275]

1. Majority Opinion

Justice Mims authored the majority opinion.[276] After first reviewing the differences between a misnomer and a misjoinder as set forth in the Court's prior decisions, including *Swann v. Marks*, *Estate of James v. Peyton*, and *Richmond v.*

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[267] *Hampton*, 299 Va. at 126, 847 S.E.2d at 289.

[268] *Id.*

[269] *Id.* at 126–27, 847 S.E.2d at 289.

[270] *Id.* at 127, 847 S.E.2d at 289.

[271] *Id.* at 127, 847 S.E.2d at 289–90.

[272] *Id.*, 847 S.E.2d at 290.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 134–35, 847 S.E. at 294.

[276] *Id.* at 124, 847 S.E.2d at 288. Justice Mims was joined by then-Justice (now Chief Justice) Goodwyn and Justices Powell and McCullough.

Volk,[277] the majority addressed Noah's argument that the trial court had properly distinguished this case from *Volk*, where "the plaintiff's original complaint named the defendant incorrectly by concatenating the first name of the person who drove the vehicle at the time of the collision with the surname of the vehicle's owner."[278] In Noah's view, the pleading defect in *Volk* was a misnomer because the plaintiff named a person who did not exist.[279] But here, the plaintiff named a person—Michael—who did exist.[280] Indeed, he was one of the vehicle's owners.[281]

Rejecting this contention, the majority clarified that the Court's decision in *Volk* was not based on the possibility that the name created when the plaintiff "coupl[ed] the driver's first name with the owner's surname" did not exist,[282] nor driven by the parties' concession that the pleading defect was a misnomer, not a misjoinder.[283] Instead, the majority wrote, "the plaintiff's use of that incorrect name was a misnomer because the complaint, read as a whole, contained sufficient allegations to identify the proper party defendant even though the incorrect name had been used."[284] Those allegations, the majority explained, "establish[ed] that the intended defendant was the driver of a specific vehicle that was at a specific location at a specific time and that the driver of that vehicle committed a specific act."[285]

The majority found the same was true here because it was clear from the plaintiff's original complaint "what the cause of action was and who—in terms of the performance of the tortious conduct alleged, from which his claim arose—was the correct defendant for such a cause of action: the driver of the Suburban who allegedly operated it negligently, thereby causing his injuries."[286] In the majority's view, then, the plaintiff "sued the correct person—the driver—but used the wrong name, the one shown in the incorrect police report."[287] As a result, the majority concluded, there was "no mistake of parties, only one of name"—or, in other words, there was a misnomer, not a misjoinder.[288]

Next, the majority discussed Noah's claim that *Ricketts v. Strange*, not *Volk*, controlled, since *Ricketts* came after *Volk* and held that naming an incorrect party was a misjoinder, not a misnomer.[289] The majority dispensed with this argument,

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[277] For summaries of *Swann*, *Estate of James*, and *Volk*, see *supra* Part II.A–B.

[278] *Hampton*, 299 Va. at 128, 847 S.E.2d at 290.

[279] *Id.* at 128–29, 847 S.E.2d at 290.

[280] *Id.* at 129, 847 S.E.2d at 290.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 130 n.2, 847 S.E.2d at 291 n.2.

[284] *Id.* at 129, 847 S.E.2d at 291.

[285] *Id.* (alteration in original) (quoting *Volk*, 291 Va. at 65, 781 S.E.2d at 193).

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.* at 130–31, 847 S.E.2d at 292. For a summary of *Ricketts*, see *supra* Part II.B.7.

finding *Ricketts* distinguishable.[290] In that case, it explained, there was a misjoinder, not a misnomer, because the plaintiff and the bankruptcy trustee who had standing to bring the cause of action "did not just have different names, they were separate legal entities—they acted in different and separate capacities."[291] The plaintiff, then, "could not cure the defect that she lacked standing to bring the cause of action by *changing the entity* in whose name it had been brought."[292] But in this case, the majority observed, "the defendant in [the plaintiff's] cause of action is a single entity—the driver of the Suburban—regardless of his or her name."[293]

The majority was also unpersuaded by Noah's contention that reversing the trial court would encourage gamesmanship by future plaintiffs.[294] Such a reversal, according to Noah, would "permit a personal injury plaintiff to file a complaint alleging specific facts about his or her claims but purposefully naming an incorrect defendant to conceal the case until the statute of limitations had elapsed, then take a nonsuit and refile using the correct name to the defendant's prejudice."[295] The majority found this concern overblown for two reasons. First, "the record indicate[d] that naming Michael as the driver in the [original] complaint was the result of good-faith reliance on the police report."[296] And second, "[w]hile some plaintiff [could] be tempted to adopt" the tactic in Noah's hypothetical, "acting on it would require a daring interpretation of Code § 8.01-271.1's requirement that the party or attorney signing such a complaint against a purposefully misnamed defendant certify that 'to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact.'"[297]

Finally, the majority addressed Noah's invitation to revisit its holding in *Volk* that Code § 8.01-229(E)(3) tolls the statute of limitations when a plaintiff takes a nonsuit to cure a misnomer.[298] In declining this request, the majority first observed that the General Assembly had taken no action to amend the misnomer statute, Code § 8.01-6, the nonsuit statute, Code § 8.01-380, or the tolling statute, Code § 8.01-229(E)(3), since *Volk* was handed down, and thus the Court's construction of those statutes was "presumed to be sanctioned by the legislature."[299]

The majority also felt compelled to uphold *Volk* under stare decisis.[300] "Beyond workability," it wrote, considering "whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and

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290 *Hampton*, 299 Va. at 131, 847 S.E.2d at 292.

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.* at 132, 847 S.E.2d at 292.

297 *Id.*

298 *Id.*, 847 S.E.2d at 292–93.

299 *Id.*, 847 S.E.2d at 293 (quoting Daniels v. Warden of Red Onion State Prison, 266 Va. 399, 401 n.2, 588 S.E.2d 382, 383 n.2 (2003)).

300 *Id.* at 133–34, 847 S.E.2d at 293–94.

of course whether the decision was well reasoned."[301] Although *Volk* was neither an "ancient precedent" nor unanimous, the majority found its "holding that there is no change of parties when one complaint is nonsuited after a misnomer and new complaint is filed to cure it, so the earlier complaint tolls the statute of limitations, [was] not unworkable."[302] The majority further viewed the plaintiff's reliance interests "to be particularly compelling."[303] When the plaintiff discovered that the name of the Suburban's driver was wrong "in his [original] complaint, he responded promptly by doing exactly what [the Court] said in *Volk* that plaintiffs could do, in a case where the facts were materially the same: he nonsuited the complaint that used the incorrect name and filed a new complaint using the correct one."[304] So, the majority concluded, overruling *Volk* "would be retroactive and punish [the plaintiff] simply for believing [the Court]," and "[s]uch an outcome would be unjust."[305]

2. Dissenting Opinion

Justice Kelsey, joined by then-Chief Justice Lemons and Justice Chafin, dissented.[306] He first took issue with the Court's reliance on *Richmond v. Volk*, in which he also dissented.[307] There, he noted, the parties conceded that the pleading defect was a misnomer, and the Court examined their "concession de novo and agreed with it."[308] According to Justice Kelsey, *Volk* involved "three unique facts" not found in any of the Court's previous misnomer-misjoinder cases: (1) the summons identified the defendant by one of her true names (Katherine Craft) as an a/k/a of her mistaken name (Katherine E. Cornett); (2) the defendant filed a motion to quash contesting service but admitting that she was identified, albeit erroneously, in the caption of the complaint; and (3) the defendant's counsel signed the nonsuit order as "Counsel for the Defendant" when the defendant was identified by a mistaken name (Katherine E. Cornett).[309] These facts, Justice Kelsey submitted, confirmed the parties' concession that the plaintiff's use of the name Katherine E. Cornett was a misnomer, and he was unpersuaded by the majority's assurance that the concession played no part in the Court's ruling in *Volk* that the pleading defect was a misnomer, not a misjoinder.[310]

In any event, Justice Kelsey explained, the central legal issue in *Volk* was not whether the pleading defect was a misnomer or a misjoinder, but rather whether

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[301] *Id.* at 132–33, 847 S.E.2d at 293 (quoting Citizens United v. Federal Election Comm'n, 558 U.S. 310, 362–63 (2010)).

[302] *Id.* at 133, 847 S.E.2d at 293.

[303] *Id.*

[304] *Id.*

[305] *Id.* at 134, 847 S.E.2d at 293–94.

[306] *Id.* at 135, 847 S.E.2d at 294 (Kelsey, J., dissenting).

[307] *Id.* at 135–40, 847 S.E.2d at 294–97.

[308] *Id.* at 136, 847 S.E.2d at 295.

[309] *Id.* at 136–37, 847 S.E.2d at 295.

[310] *Id.* at 137, 847 S.E.2d at 295.

a misnomer could be corrected by a nonsuit.[311] So while he "accept[ed] the *Volk* holding that a misnomer tolls the statute of limitations when a nonsuit is taken to cure the misnomer" under the doctrine of stare decisis, he rejected the majority's conclusion that "the stare decisis tailwind of *Volk* compel[led the Court] to hold that a plaintiff commits a mere misnomer when he sues a vehicle owner instead of its driver in a personal injury suit arising from a vehicle accident" because "*Volk* did not address that question at all."[312] Thus, in Justice Kelsey's view, "[t]he fact pattern of *Volk*, the arguments of the parties in *Volk*, and the holding of *Volk* [should] inform—but … not dictate—[the Court's] independent analysis in the present case."[313]

Justice Kelsey next examined many of the Court's prior misnomer-misjoinder precedents, including: *Arminius Chemical Co. v. White's Administratrix*, *Baldwin v. Norton Hotel, Inc., Jacobson v. Southern Biscuit Co.*, *Rockwell v. Allman*, *Swann v. Marks*, *Cook v. Radford Community Hospital, Inc.*, *Miller v. Highland County*, *Estate of James v. Peyton*, and *Ricketts v. Strange*.[314] These precedents, he wrote, "uniformly use the same definitional structure" for distinguishing between a misnomer and a misjoinder: "Suing the *correct* person, while *incorrectly* stating his name, constitutes a misnomer. Suing the *incorrect* person, while *correctly* stating his name, constitutes a misjoinder."[315] He then noted that the General Assembly has intervened in the Court's misnomer-misjoinder precedents sparingly, enacting exceptions for only two categories of misjoinder—business trade names and suits against estates—in Code § 8.01-6.2.[316] These limited exceptions, according to Justice Kelsey, proved the general rule that suing the right person under the wrong name is a misnomer, while suing the wrong person under the right name is a misjoinder.[317]

Lastly, Justice Kelsey addressed what he called the defendant-got-lucky factor in the majority's analysis.[318] Under the majority's view, he observed, "if the intended target of litigation somehow learns of the plaintiff's misjoinder by mistake, either by happenstance or from reading the complaint, then the mistake is no longer a misjoinder"—it becomes a misnomer.[319] If this were correct, Justice Kelsey reasoned, then "a plaintiff could mistakenly sue Honda for a product defect in a Camry," and "[a]s long as Toyota learned of the suit and remembered that it, not Honda, manufactured the Camry, then what was an obvious misjoinder would be downgraded to a mere misnomer."[320] The majority, he argued, fully adopted this

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311 *Id.* at 138–39, 847 S.E.2d at 296.

312 *Id.* at 139, 847 S.E.2d at 296.

313 *Id.*

314 *Id.* at 141–46, 847 S.E.2d at 298–301. For summaries of *Arminius Chemical*, *Baldwin*, *Jacobson*, *Rockwell*, *Swann*, *Cook*, *Miller*, *Estate of James*, and *Ricketts*, see *supra* Part II.A–B.

315 *Hampton*, 299 Va. at 141, 847 S.E.2d at 298 (Kelsey, J., dissenting).

316 *Id.* at 146, 847 S.E.2d at 301.

317 *Id*.

318 *Id.* at 146–49, 847 S.E.2d at 301–02.

319 *Id.* at 146, 847 S.E.2d at 301.

320 *Id.*

"simple fallacy" because its conclusion that the plaintiff "sued the correct person—the driver—but used the wrong name … is no different from saying, to use the Toyota-Honda hypothetical, that the plaintiff sued the 'correct' manufacturer—Toyota—but used the 'wrong name.'"[321] Moreover, Justice Kelsey submitted, if the "right person" knowing that "his legal adversary had mistakenly sued the 'wrong person' … were legally dispositive," then the Court incorrectly decided several prior misnomer-misjoinder cases, including *Swann*, *Miller*, and *Estate of James*, where this fact was clearly present.[322]

For these reasons, Justice Kelsey concluded that the plaintiff "correctly named but incorrectly sued the 'wrong person'—the vehicle owner—which by definition was a misjoinder," not a misnomer, and that "[t]he majority's reasoning to the contrary [was therefore] defeated by, not justified by, stare decisis."[323]

IV. Review of Misnomer-Misjoinder Precedents after *Hampton v. Meyer*

The Supreme Court of Virginia has revisited misnomer and misjoinder twice since handing down *Hampton v. Meyer*, first in *Edwards v. Omni International Services, Inc.* and then in *Marsh v. Roanoke City*. Section A of this Part discusses *Edwards*, in which the Court held that the pleading defect in question was a misnomer. Section B then examines *Marsh*, in which the Court concluded that the pleading defect at issue was a misjoinder.

A. *Edwards v. Omni International Services, Inc.* (2022)

In *Edwards v. Omni International Services, Inc.*,[324] the plaintiff sued "Company X, Inc., a Virginia Corporation, purportedly doing business as The Club at Lake Gaston Resorts, a/k/a The Club, a/k/a Lake Gaston Resort" for personal injuries she sustained from a fall at Lake Gaston Resort.[325] Upon learning that she "erred in naming the defendant," the plaintiff nonsuited the case and filed a new one against "Omni International Services, Inc."[326] Omni "had been the sole owner and operator of the Lake Gaston Resort since its inception."[327] While Company X had done some marketing work for Omni, it "was a completely different corporate entity" that "did not share any staff, employees or bank accounts" with Omni.[328] But Omni was the registered agent for Company X.[329]

Since more than two years had passed from when the plaintiff fell and when she initiated the second case, Omni filed a plea in bar, arguing that her claim

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[321] *Id.* at 146–47, 847 S.E.2d at 301.

[322] *Id.* at 148, 847 S.E.2d at 302.

[323] *Id.* at 149, 847 S.E.2d at 302.

[324] 301 Va. 125, 872 S.E.2d 428 (2022).

[325] *Id.* 127–28, 872 S.E.2d at 429.

[326] *Id.* at 128, 872 S.E.2d at 429.

[327] *Id.*

[328] *Id.*

[329] *Id.* at 130, 872 S.E.2d at 430.

was time-barred by the applicable two-year statute of limitations.[330] The plaintiff responded that her second filing was timely under *Richmond v. Volk* and *Hampton v. Meyer*, because her error in correctly naming the defendant was a misnomer, not a misjoinder.[331] The trial court sided with Omni and dismissed the case as time-barred, finding that "Omni and Company X were two separate and distinct entities rather than a single defendant originally misnamed."[332] Accordingly, the trial court held that the plaintiff's "filing against Omni, made outside the applicable statute of limitations period, did not relate back to the date of the original filing against Company X."[333] The plaintiff appealed.[334]

The Supreme Court of Virginia affirmed, although on a different ground.[335] All six Justices who heard the case agreed on this result but disagreed on the reasoning.[336] Speaking through Senior Justice Russell,[337] the majority had no trouble concluding that the plaintiff's error in naming the defendant was a misnomer, rather than a misjoinder as the trial court had found, because "[a]s the record owner of the premises at the time of the plaintiff's alleged injury, Omni was … an entity against whom the action could or was intended to be brought.'"[338]

Since the plaintiff's pleading defect was a misnomer, not a misjoinder, the majority next reviewed the two options for correcting a misnomer.[339] A plaintiff may either move to amend under the misnomer statute, Code § 8.01-6, or take a nonsuit and file a new action correctly naming the defendant, as allowed by *Volk* and *Hampton*.[340] "The latter course," the majority observed, "gives the plaintiff the advantage of an additional six months after the nonsuit order is entered to file a new action pursuant to Code § 8.01-229(E)."[341]

Although the plaintiff sued Omni within six months of nonsuiting her original case against Company X, the majority declined to find relation back.[342] It first noted that unlike the correct defendants in *Volk* and *Hampton*, Omni did not learn of the underlying accident until after the statute of limitations had run.[343]

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330 *Id.* at 128, 872 S.E.2d at 429.

331 *Id.* For a summary of *Volk*, see *supra* Part II.A.4, and for a summary of *Hampton*, see *supra* Part III.

332 *Edwards*, 301 Va. at 128, 872 S.E.2d at 429.

333 *Id.*

334 *Id.* at 127, 872 S.E.2d at 428.

335 *Id.* at 131, 872 S.E.2d at 430.

336 *Compare id.* 128–31, 872 S.E.2d at 429–30, *with id.* at 131–33, 872 S.E.2d at 430–32 (Kelsey, J., concurring).

337 *Id.* at 126, 872 S.E.2d at 428. Senior Justice Russell was joined by Chief Justice Goodwyn and Justices Powell and McCullough. *Id.*

338 *Id.* at 129, 872 S.E.2d at 429 (internal quotation marks omitted).

339 *Id.*, 872 S.E.2d at 429–30.

340 *Id.*, 872 S.E.2d at 430.

341 *Id.*

342 *Id.* at 131, 872 S.E.2d at 430.

343 *Id.* at 130, 872 S.E.2d at 430. While Omni was Company X's registered agent, and presumably received a copy of the plaintiff's first filing in that capacity, the majority determined that it "would be conjecture at best" to infer that Omni knew of the plaintiff's claim at that time because a "registered agent has no duty to read or interpret" any pleading attached to the summons "or warn or give legal advice to the principal." *Id.*

Given this late notice, the majority believed that Omni would be prejudiced in preparing a defense on the merits—something that the correct defendants in *Volk* and *Hampton* could not claim because they were involved in the underlying accidents as drivers.[344] For this reason, the majority determined that "there would be a danger of serious injustice to [Omni] if the rulings … made in *Volk* and *Hampton* were to be extended to apply to the facts of this case."[345] So the majority "distinguish[ed] those cases as applying only to cases in which there is no issue of the timeliness of defendant's notice of the facts on which the plaintiff's claim is based."[346]

The majority next discussed the interplay between Code §§ 8.01-6 and 8.01-229(E).[347] While "Code § 8.01-229(E) applies to nonsuits generally," it noted, "Code § 8.01-6 is more narrowly focused, applying only to the correction of misnomers."[348] The majority observed that the General Assembly has had many opportunities "to amend or repeal Code § 8.01-6 since *Volk* and *Hampton* were decided, but it has declined to do so."[349] Thus, the majority "conclude[d] that there was no legislative intent to impair the protective preconditions that section provides to a newly added defendant when a plaintiff corrects a misnomer, whether by amending the complaint or by taking a nonsuit and then filing a new complaint against the correctly named defendant."[350]

Because the plaintiff could not show that Omni had notice of her claim within the applicable two-year limitations period or that Omni would not be prejudiced in maintaining a defense on the merits—two of the four requirements for relation back under Code § 8.01-6—the majority held that her second filing against Omni did not relate back to her original filing against Company X and was therefore time-barred by the statute of limitations.[351]

Justice Kelsey, joined by Justice Chafin, concurred in the result only.[352] He first noted that before *Hampton*, the answer to the plaintiff's argument that her failure to sue the correct party "should be overlooked as a mere misnomer … because she had intended to sue the right party but was confused as to who that was" would have been easy: "Under Virginia law, '[a] misnomer 'arises when the right person is incorrectly named, not where the wrong person is named.'"[353] And

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[344] *Id.* at 129–30, 872 S.E.2d at 430.

[345] *Id.* at 130, 872 S.E.2d at 430.

[346] *Id.*

[347] *Id.*

[348] *Id.* This characterization of Code § 8.01-6's scope is not entirely accurate because, as Justice Kelsey observed in his *Volk* dissent, "Code § 8.01-6 governs any 'amendment changing the party against whom a claim is asserted, whether to correct a misnomer *or otherwise*.'" *Volk*, 291 Va. at 70, 781 S.E.2d at 196 (Kelsey, J., dissenting) (emphasis altered) (quoting Va. Code Ann. § 8.01-6). Accordingly, "[a] 'misnomer' amendment is just one example, among others, of 'changing the party' for purposes of Code § 8.01-6." *Id.*

[349] *Edwards*, 301 Va. at 130, 872 S.E.2d at 430.

[350] *Id.*

[351] *Id.* at 130–31, 872 S.E.2d at 430.

[352] *Id.* at 131, 872 S.E.2d at 430 (Kelsey, J., concurring).

[353] *Id.* at 131–32, 872 S.E.2d at 431 (alteration in original) (quoting *Ricketts*, 293 Va. at 110–11, 796 S.E.2d at 187).

after *Hampton*, Justice Kelsey continued, "the answer is still easy but completely different: A misnomer is suing the wrong party while mistakenly thinking it was the right party."[354]

Although Justice Kelsey acknowledged that the majority's holding that the plaintiff's suit against Company X was a misnomer, not a misjoinder, was consistent with *Hampton*, he argued that it was inconsistent with all prior Virginia cases distinguishing misnomers from misjoinders.[355] Since *Hampton* did not expressly overrule those cases, Justice Kelsey believed that they were still entitled to stare decisis effect and should have controlled the outcome of this case rather than *Hampton*.[356] Applying the Court's pre-*Hampton* misnomer-misjoinder precedents, Justice Kelsey concluded that the plaintiff's pleading defect was a misjoinder, not a misnomer, because "Company X, Inc. was not the right party incorrectly named. It was the wrong party correctly named."[357] He therefore would have affirmed on that basis.[358]

B. *MARSH V. ROANOKE CITY* (2022)

In *Marsh v. Roanoke City*,[359] the plaintiffs, residents of an unincorporated neighborhood association in the City of Roanoke, alleged that a company was violating the zoning ordinance by running a halfway house in their neighborhood.[360] Both the Zoning Administrator and Board of Zoning Appeals disagreed, so the plaintiffs filed a petition for a writ of certiorari in the circuit court.[361] The petition named "Roanoke City" as a necessary party but not the "Roanoke City Council," the governing body of the City, as required under Code § 15.2-2314.[362] The defendants thus moved to dismiss based on the plaintiffs' failure to name a necessary party, the Council, within the applicable 30-day deadline.[363] In response, the plaintiffs moved to amend their petition to correct what they considered a misnomer, arguing that they had intended to name the Council as a party-defendant, not the City.[364]

The circuit court denied the plaintiffs' motion to amend and granted the defendants' motions to dismiss.[365] It "explained that a locality is a distinct entity from its governing body and, therefore, 'Roanoke City and the City of Roanoke

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354 *Id.* at 132, 872 S.E.2d at 431.

355 *Id.* at 132–33, 872 S.E.2d at 431–32.

356 *Id.* at 133, 872 S.E.2d at 432.

357 *Id.*, 872 S.E.2d at 431–32.

358 *Id.*, 872 S.E.2d at 432.

359 301 Va. 152, 873 S.E.2d 86 (2022).

360 *Id.* at 152, 873 S.E.2d at 87.

361 *Id.*

362 *Id.* at 152–53, 873 S.E.2d at 87.

363 *Id.* at 153, 873 S.E.2d at 87.

364 *Id.*, 873 S.E.2d at 87–88.

365 *Id.*, 873 S.E.2d at 88.

are not misnomers for the City Council for the City of Roanoke.'"[366] As a result, the circuit court found that it lacked jurisdiction to allow the plaintiffs to amend their petition to include the Council as a party-defendant.[367]

On appeal, the Supreme Court of Virginia affirmed.[368] It first noted that a party seeking review of a decision by the Board of Zoning Appeals under Code § 15.2-2314 must "name '[t]he governing body' of a locality as a necessary part[y] to the proceedings in the circuit court," and that the failure to do so requires dismissal of the petition when timely raised.[369] "Compliance with this requirement," the Court wrote, "does not impose a heavy burden on the petitioner" because he or she "can name the governing body in a separate heading or caption or name it in the body of the petition, so long as a 'reasonable reader would understand from the petition's text or context that the [necessary party] is being mentioned … as the party against whom the appeal is being taken."[370] The Court also explained that simply referring to a locality is insufficient under Code § 15.2-2314, since "[a] locality and its 'governing body' are not interchangeable but have separate legal identities that must be observed in initiating an action against either as a party defendant in a legal action."[371]

Upon reviewing the plaintiffs' petition, the Court determined that the plaintiffs had failed to satisfy Code § 15.2-2314, because no reasonable reader could understand that the Council was a party-defendant to the petition—which did not use the word *council* a single time—under Code § 15.2-2314.[372] Instead, based on the petition's multiple references to the "City of Roanoke" and "Roanoke City," the Court concluded that "a reasonable reader could only interpret the petition as an action against the City, not the Council."[373]

The Court further held that the plaintiffs' failure to name the Council was not a misnomer and therefore could not be corrected under the misnomer statute, Code § 8.01-6.[374] "'Roanoke City' is a misnomer for the City, not the Council," the Court wrote, and "the City is not the proper party to the petition."[375] The Court thus found that the petition's repeated references to "Roanoke City" amounted to a misjoinder, which could not be fixed under Code § 8.01-6.[376] In reaching this conclusion, the Court did not mention, much less rely on, *Hampton v. Meyer* or

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366 *Id.*

367 *Id.*

368 *Id.* at 152, 873 S.E.2d at 87. The Court made its decision by published order, which is not attributed to a particular Justice, but the case was heard by Chief Justice Goodwyn; Justices Powell, Kelsey, McCullough, and Chafin; and Senior Justices Russell and Millette. *Id.*

369 *Id.* at 153, 873 S.E.2d at 88 (alterations in original) (quoting Va. Code Ann. § 15.2-2314).

370 *Id.* (alteration in original) (quoting Boasso Am. Corp. v. Zoning Adm'r of City of Chesapeake, 293 Va. 203, 210, 796 S.E.2d 545, 549 (2017)).

371 *Id.* at 154, 873 S.E.2d at 88 (quoting *Miller*, 274 Va. at 367, 650 S.E.2d at 537).

372 *Id.*

373 *Id.*

374 *Id.* at154–55, 873 S.E.2d at 88–89.

375 *Id.* at 155, 873 S.E.2d at 89.

376 *Id.*

Edwards v. Omni International Services, Inc.[377] Rather, it looked to *Richmond v. Volk* for the dividing line between a misnomer and a misjoinder.[378]

V. The Future of Misnomer and Misjoinder after *Hampton v. Meyer*

Before *Hampton v. Meyer*, the Supreme Court of Virginia analyzed misnomers and misjoinders using a well-established definitional structure: A misnomer arises when the right person is sued under the wrong name, and a misjoinder arises when the wrong person is sued under the right name.[379] Although the majority in *Hampton* professed to follow this structure, its holding that the naming of a car's owner instead of its driver in a car-accident case is a misnomer rather than a misjoinder muddled the distinction between misnomers and misjoinders established by decades of the Court's misnomer-misjoinder precedents.[380]

Under the Court's pre-*Hampton* misnomer-misjoinder cases, the pleading defect at issue in *Hampton* was a misjoinder, not a misnomer. In *Hampton*, the plaintiff did not name the right party (the driver) incorrectly.[381] Rather, he named the wrong party (the owner) correctly.[382] The mistake, then, was not in name but in person, which the Court had consistently held constituted a misjoinder rather than a misnomer before *Hampton.* Take, for instance, *Miller v. Highland County.* There, the plaintiff named the locality instead of the governing body.[383] The Court concluded that this was a misjoinder, not a misnomer, because the plaintiff "did not incorrectly name the right entity, but named a different entity."[384] Similarly, in *Estate of James v. Peyton*, the Court held that the plaintiff's naming of the estate rather than its administrator was a misjoinder, not a misnomer, because the estate was the wrong defendant.[385] The Court reached this conclusion even though the caption of the plaintiff's complaint identified the administrator.[386]

In finding the plaintiff's pleading defect a misnomer rather than a misjoinder in *Hampton*, the majority changed the Court's well-defined test for distinguishing between misnomers and misjoinders by considering the plaintiff's subjective intent—whether the plaintiff sued the wrong party mistakenly thinking that it was the right party.[387] Since the plaintiff in *Hampton* sued the wrong defendant (the owner) mistakenly thinking he was the right defendant (the driver), the majority

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377 *See id.* at 154–55, 873 S.E.2d at 88–89

378 *Id.* at 155, 873 S.E.2d at 89.

379 *Ricketts*, 293 Va. at 110–11, 796 S.E.2d at 187; *Estate of James*, 277 Va. at 452, 674 S.E.2d at 868.

380 *See Hampton*, 299 Va. at 134–35, 847 S.E.2d at 294.

381 *See id.* at 124–26, 847 S.E.2d at 288–89.

382 *See id.*

383 *Miller*, 274 Va. 355, 363–68, 650 S.E.2d at 535–37. For a summary of *Miller*, see *supra* Part II.B.5.

384 *Miller*, 274 Va. at 368, 650 S.E.2d at 537.

385 *Estate of James*, 277 Va. at 455–56, 674 S.E.2d at 869–70.

386 *Id.* at 455, 674 S.E.2d at 870.

387 *See Hampton*, 299 Va. at 127–31, 847 S.E.2d at 290–92; *Edwards*, 301 Va. at 131–32, 872 S.E.2d at 431 (Kelsey, J., dissenting).

held that the pleading defect was a misnomer, not a misjoinder, even though there was no mistake in name—only in person. In reaching this conclusion, the majority was influenced by the right defendant (the driver) being aware that the plaintiff had mistakenly sued the wrong defendant (the owner).[388] But, as Justice Kelsey observed in his dissent, this fact was present in many of the Court's prior misnomer-misjoinder cases but did not, "by itself, change the legal nature of the mistake from a misjoinder into a misnomer."[389]

In *Hampton*, the defendant warned that the majority's expanded definition of misnomer would encourage gamesmanship among plaintiffs, because a plaintiff could file a complaint alleging facts about his or her accident but intentionally name the wrong defendant in an effort to hide the case until the statute of limitations had run, then take a nonsuit and refile naming the correct defendant, thereby prejudicing the correct defendant.[390] The majority brushed this concern aside because the correct defendant (the driver) in *Hampton* had identified no prejudice due to the plaintiff's pleading defect, and because Code § 8.01-271.1 requires "the party or attorney signing such a complaint against a purposefully misnamed defendant certify that 'to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact."[391]

While perhaps *Hampton* has not led to the gamesmanship that the defendant there feared, its holding had to be limited just two years later in *Edwards v. Omni International Services, Inc.*, to mitigate its prejudicial effects.[392] In *Edwards*, the majority applied *Hampton*'s broadened definition of misnomer in finding that the plaintiff's suit against the wrong party was a misnomer, not a misjoinder, because she had meant to sue the right party but was confused as to which entity that was.[393] The majority, however, broke with *Hampton* and *Richmond v. Volk* on the issue of relation back.[394] It held that the plaintiff's corrected pleading filed after taking a nonsuit did not relate back to her original pleading—and thus was time-barred by the applicable two-year statute of limitations—because she failed to establish all the protective preconditions of the misnomer statute, Code § 8.01-6, for relation back.[395] In doing so, the majority distinguished *Hampton* and *Volk* as applying only when there is no dispute that the correct defendant received timely notice of the facts on which the plaintiff's claim is based.[396]

Before *Volk*, a misnomer could be corrected only by amendment under Code § 8.01-6.[397] That statute allows such an amendment to relate back to the original

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[388] *See Hampton*, 299 Va. at 127–32, 847 S.E.2d at 290–92.

[389] *Id.* at 299 Va. at 149, 847 S.E.2d at 302 (Kelsey, J., dissenting).

[390] *Id.* at 131–32, 847 S.E.2d at 292.

[391] *Id.* at 132, 847 S.E.2d at 292.

[392] For a summary of *Edwards*, see *supra* Part IV.A.

[393] *See Edwards*, 301 Va. at 127–29, 872 S.E.2d at 429; *id.* at 131–32, 872 S.E.2d at 431 (Kelsey, J., dissenting).

[394] *Id.* at 130–31, 872 S.E.2d at 430.

[395] *Id.* For a summary of *Volk*, see *supra* Part II.A.4.

[396] *Edwards*, 301 Va. at 130, 872 S.E.2d at 430.

[397] *See id*. at 129, 872 S.E.2d at 430.

pleading, thereby tolling the statute of limitations, but only if the plaintiff can show (among other things) that the new party or its agent "received notice of the institution of the action" within the applicable limitations period and that the new party "will not be prejudiced in maintaining a defense on the merits."[398] In *Volk*, however, the Court held that a misnomer may also be corrected by taking a nonsuit and then filing a new complaint, and that the statute of limitations is tolled for an additional six months from the nonsuit, pursuant to Code § 8.01-229(E).[399] The Court reaffirmed this holding in *Hampton*.[400]

The Court showed no concern in either *Volk* or *Hampton* with permitting a plaintiff to correct a misnomer through a nonsuit without satisfying Code § 8.01-6's protective preconditions for relation back.[401] Indeed, in *Volk*, the Court concluded that Code § 8.01-6 was inapplicable when a plaintiff elected to correct a misnomer by nonsuit instead of amendment, because "Code § 8.01-229(E) tolls the statute of limitations independent of Code § 8.01-6."[402] By not requiring a plaintiff to satisfy Code § 8.01-6's protective preconditions for relation back, the Court, as Justice Kelsey noted in his dissent, judicially enhanced the potency of the nonsuit, creating "a risk-free cure for [a plaintiff's] misnomer mistake without the trouble of complying with Code § 8.01-6."[403]

While the Court in *Edwards* was not interested in overruling either *Volk* or *Hampton*—and, in fact, doubled-down on *Hampton*'s expansive view of misnomer—it was understandably troubled by the prejudicial consequences resulting from their holdings allowing a plaintiff to correct a misnomer through a nonsuit without satisfying Code § 8.01-6's protective preconditions for relation back.[404] Unlike in *Volk* and *Hampton*, there was no credible evidence that the correct defendant in *Edwards* was on notice of the facts underlying the plaintiff's claim within the applicable limitations period.[405] As a result, the Court believed that the correct defendant would be prejudiced in its ability to prepare a defense on the merits.[406] The "Court's concern with notice in *Edwards* underlines that [t]he linchpin [of relation back] is notice, and notice within the limitations period."[407] Accordingly, "[t]he requirement of notice, whether through nonsuit or via § 8.01-6, is an obligatory safeguard because notice 'serves as a yardstick for evaluating

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398 Va. Code Ann. § 8.01-6. For a discussion of all four protective preconditions for relation back under Code § 8.01-6, see *supra* Part I.

399 *Volk*, 291 Va. at 65–67, 291 S.E.2d at 194–95.

400 *Hampton*, 299 Va. at 132–34, 847 S.E.2d at 292–94.

401 *See Volk*, 291 Va. at 65–67, 781 S.E.2d at 194–95; *Hampton*, 299 Va. at 132–34, 847 S.E.2d at 292–94.

402 *Volk*, 291 Va. at 67, 781 S.E.2d at 194.

403 *Id.* at 71–72, 781 S.E.2d at 197.

404 *Edwards*, 301 Va. at 129–31, 872 S.E.2d at 430.

405 *Id.* at 130, 872 S.E.2d at 430.

406 *Id.*

407 *Tessema*, 2023 WL 8522786, at *8 (alterations in original) (quoting Schiavone v. Fortune, 477 U.S. 21, 31 (1986)).

whether or not amending the complaint will cause the new defendant to suffer prejudice if he or she is forced to defend the case on the merits.'"[408]

Although the Court did much to blunt the prejudicial effects of *Hampton* in *Edwards*, it did not establish a standard for determining whether the correct defendant received sufficient notice of the plaintiff's claim within the applicable limitations period for relation back under Code § 8.01-6.[409] That statute provides that the new party or its agent must "receive[] notice of the institution of the action."[410] In *Edwards*, however, the Court discussed whether the correct defendant received "notice of the facts on which the plaintiff's claim is based," which is different from "notice of the institution of the action."[411] "[A] civil action is commenced by the filing of a complaint in the clerk's office."[412] Under Code § 8.01-6, then, the new party or its agent must receive notice of the filing of the plaintiff's complaint, not just notice of the facts underlying the plaintiff's claim.[413] Moreover, while the Court in *Edwards* found that the correct defendant would be prejudiced in maintaining a defense on the merits due to the late notice of the facts on which the plaintiff's claim was based, it provided no standard for determining the level of prejudice necessary to preclude relation back under Code § 8.01-6.[414] These are just some of the issues that litigants and lower courts are facing and will continue to face in the wake of *Edwards* until the Court provides further guidance.[415]

In future misnomer-misjoinder cases, the Court will have the opportunity not only to address the questions left unanswered in *Edwards*, but also to revisit the viability of *Hampton*'s expanded definition of misnomer. In *Edwards*, Justices Kelsey and Chafin made no bones about wanting to overrule *Hampton* as inconsistent with the Court's previous misnomer-misjoinder cases.[416] And since *Hampton* was handed down, Justice Mims who authored the majority opinion has taken senior status, and Justices Mann and Russell have joined the Court. If Justices Mann and Russell share Justices Kelsey and Chafin's contempt for *Hampton*, then it is likely not long for this world.[417]

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[408] *Id.* (quoting Lacedra v. Donald W. Wyatt Det. Facility, 334 F. Supp. 2d 114, 129 (D.R.I. 2004)).

[409] *Edwards*, 301 Va. at 129–31, 872 S.E.2d at 430.

[410] Va. Code Ann. § 8.01-6.

[411] *Edwards*, 301 Va. at 130, 872 S.E.2d at 429–30.

[412] Va. Sup. Ct. R. 3:2(a).

[413] As explained in note 31, *supra*, giving "notice of the institution of the action" to an insurance company acting as an insured's agent may be sufficient to satisfy Code § 8.01-6. *Tessema*, 2023 WL 8522786, at *8–10.

[414] *See Edwards*, 301 Va. at 129–31, 872 S.E.2d at 429–30.

[415] *See, e.g.*, *Tessema*, 2023 WL 8522786, at *7–11 (considering "whether the communication of the threat of litigation to an insurer [was] sufficient to meet notice under § 8.01-6" and concluding that it was not, because the insurer did not receive "notice of the institution of the action that would be imputed onto [the insured] for purposes of satisfying § 8.01-6(ii)").

[416] *See Edwards*, 301 Va. at 132–33, 872 S.E.2d at 431 (Kelsey, J., dissenting).

[417] Although overruling a recent decision is generally difficult to justify, the Court has done it on occasion, either through a subsequent decision or rule change. For example, the Court overruled *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003)—a four-to-three decision "apply[ing] the 'same evidence test' to evaluate the identity of the cause of action' element of [the Court's] then-controlling res judicata analysis"—by enacting Virginia Supreme Court Rule 1:6. *Hampton*, 299 Va. at 134 n.5, 847 S.E.2d at 294 n.5 (citing Rhoten v.

To be sure, it was not always an easy task to figure out whether a pleading defect was a misnomer or a misjoinder under the Court's pre-*Hampton* misnomer-misjoinder precedents. "After all," as one legal commentator has observed, "if you mean to sue John Smith but you sue John Jones, which situation is that?"[418] But the Court's pre-*Hampton* framework for evaluating misnomers and misjoinders, developed and refined over decades, proved workable and led to fairly predictable, albeit sometimes seemingly harsh, results.[419] *Hampton*'s broadened definition of misnomer, on the other hand, is anything but predictable, since it introduced a subjective element into the inquiry. Before *Hampton*, it was clear that if a plaintiff sued Company A under the correct name but should have sued Company B, then the defect was a misjoinder rather than a misnomer. But *Edwards* has shown that under *Hampton*'s expansive view of misnomer, a plaintiff may be able to sue the wrong company under the right name and then have the mistake excused as a misnomer. Thus, a return to the pre-*Hampton* understanding of the distinction between misnomer and misjoinder would likely lead to more consistent and predictable results in what can already seem like a "field … fraught with ambiguity."[420]

Conclusion

For decades, Virginia's misnomer-misjoinder jurisprudence was settled, with the line dividing misnomer from misjoinder well defined. But then, the Supreme Court of Virginia blurred that line in *Hampton v. Meyer*, expanding the definition of misnomer. While the Court reaffirmed *Hampton*'s understanding of the distinction between misnomer and misjoinder in *Edwards v. Omni International Services, Inc.*, it narrowed *Hampton*'s reach. Even though the Court applied *Hampton*'s broadened definition of misnomer in *Edwards*, Justices Kelsey and Chafin were poised to overrule *Hampton*. *Hampton*'s viability, then, depends on whether Justices Mann and Russell, neither of whom took part in either *Hampton* or *Edwards*, view *Hampton* as wrongly decided like Justices Kelsey and Chafin do. It is thus unclear whether *Hampton*'s effect on misnomer and misjoinder will last past the next case. But it is clear that Virginia's misnomer-misjoinder jurisprudence is now unsettled.

Commonwealth, 286 Va. 262, 270, 750 S.E.2d 110, 114 (2013)). There is no reason why the Court could not do the same with respect to *Hampton* in a future case or rule amendment and make the change prospective only so as not to affect already pending litigation, just as the Court did with the enactment of Rule 1:6. *See id.*

418 Emmert, *supra* note 148.

419 The General Assembly has shown itself more than capable of changing the law in response to the Court's misnomer-misjoinder cases in order to save litigants' claims from the statute of limitations because of a misjoinder, and it certainly could do so in the future, which would be preferable to the Court changing the line between misnomer and misjoinder. *See, e.g.*, Va. Code Ann. § 8.01-6.2 (permitting an amendment to correct a misjoinder involving a business trade name or the naming of an estate instead of the executor or administrator to relate back to the original pleading); *id.* § 8.01-229(B)(2)(b) (allowing an amendment to substitute the executor or administrator of a deceased party's estate to relate back to the original pleading).

420 Emmert, *supra* note 148.