# Amending the Defendant's Name: Correcting a Misnomer or Adding a New Defendant?

A hypothetical: Mr. Stone filed a tort action against a nearby grocery store after he was injured in the dairy aisle. A week later—just after the statute of limitations expired—Mr. Stone's attorney discovered that the complaint and summons misstated Defendant's name. The attorney moved to amend the complaint and summons to change the store's name from "Brightline Foods, Inc." to "Brightline Foods NC, Inc.," and the court allowed it. Now Brightline Foods, NC, Inc. moves to dismiss the suit, arguing that Mr. Stone did not sue it before the statute of limitations expired. Should the trial court grant the dismissal? The answer lies in whether Mr. Stone actually corrected a "misnomer" of the original Defendant or named a new Defendant altogether.

Rule 15 of the North Carolina Rules of Civil Procedure states that courts should freely allow amendments to complaints "when justice so requires." If the statute of limitations has run on a new claim, Rule 15(c) allows it to "relate back" in time to the original complaint *if* "the original pleading…[gives] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." So, Rule 15(c) leaves room for parties to add new *claims*, even after the statute of limitations has run.

Unlike *Federal* Rule 15(c), however, North Carolina's Rule 15(c) makes *no* mention of adding new *parties*. In *Crossman v. Moore*, our Supreme Court made clear that the North Carolina Rule does not operate like the Federal Rule: **"[T]his rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party."** 341 N.C. 185, 187-88 (1995). In *Crossman*, therefore, when the plaintiff—who had originally sued and served Van Dolan Moore—discovered after the limitations period that the proper defendant was the son, Van Dolen Moore II, it was too late to add him. Citing *Crossman*, similar results were reached in:

- *Estate of Rivas v. Fred Smith Constr., Inc.*, 812 S.E.2d 867 (N.C. Ct. App. 2018). Plaintiff was not allowed to change the defendant from "Fred Smith Company, Inc. to "FSC II LLC d/b/a Fred Smith Company" after statute of limitations had run where the two companies were separate and distinct entities.
- *Williams v. Advance Auto Parts, Inc.*, 795 S.E.2d 647, 649 (N.C. Ct. App.), *denied*, 369 N.C. 563 (2017). Plaintiff who sued Advance Auto Parts, Inc. (Parts) was not allowed to amend the complaint to name Advance Stores Company, Inc. (Stores), a separate legal entity, even where Stores had notice of original complaint. *See also Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 34–35, *aff'd*, 342 N.C. 404 (1995) (amendment of "Winn–Dixie Stores, Inc." to "Winn–Dixie Raleigh, Inc." not allowed where both were Florida corporations authorized to do business in North Carolina; case not decided under *Crossman* but with harmonious rationale).
- *Azar v. Town of Indian Trail Bd. of Adjustment*, 809 S.E.2d 17, 21 (N.C. Ct. App. 2017).

Plaintiff who originally named "Town of Indian Trail Board of Adjustment" could not amend the petition to name the "Town of Indian Trail" after the 30-day statute of limitations had run. *See also Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293 (2000) (not allowed to substitute Hertford County as defendant).

- *Treadway v. Diez*, 365 N.C. 289 (2011) (reversing *per curiam* the decision in 209 N.C. App. 152, 156–57 for the reasons stated in the dissent). Plaintiffs could not substitute "Van Duncan, Sheriff of Buncombe County," when they originally named "Buncombe County Sheriff's Department", even where the Sheriff had been served the original complaint: "Although the Sheriff received actual notice of plaintiffs' lawsuits in the cases *sub judice,* our Supreme Court has held that such notice is immaterial with respect to the operation of amendments to pleadings pursuant to Rule 15(c)."
- *Bob Killian Tire Inc. v. Day Enterprises, Inc.*, 131 N.C. App. 330 (1998). The trial court properly denied Plaintiff's motion to add corporate Defendant, "Day Enterprises, Inc.", when the original defendant was "Troy Day t/a Day Enterprises," "a citizen and resident of Cabarrus County."
- *Rogerson v. Fitzpatrick*, 121 N.C. App. 728 (1996). Plaintiff filed claims against officers in their individual capacities. After the statute of limitations ran, the trial court properly denied Plaintiff's motion to amend the complaint to name the officers in their *official See also Estate of Fennell ex rel. Fennell v. Stephenson*, 354 N.C. 327, 334 (2001) (claims against trooper in his official capacity could not proceed where complaint filed five years prior only named him in his individual capacity).

By contrast, when a plaintiff does not in fact name a separate person, corporate entity, town, or "capacity" but instead merely "correct[s] a misnomer," amendment is possible even after the statute of limitations expires. *Williams*, 795 S.E.2d at 652–53 (N.C. Ct. App. 2017); *see also* N.C. R. Civ. Pro. 4(i). The Court of Appeals has explained that: "[a]n amendment to correct a misnomer in the description of a party defendant may be granted after the expiration of the Statute of Limitations if (1) there is evidence that the intended defendant has in fact been properly served, and (2) the intended defendant would not be prejudiced by the amendment." *Liss v. Seamark Foods*, 147 N.C. App. 281, 286 (2001). The court has described a "misnomer" as "mistake in name; giving an incorrect name to the person in accusation, indictment, pleading, deed, or other instrument," *Pierce*, 154 N.C. App. 34, 39 (2002), and that it is "technical in nature[.]" *Liss*, 147 N.C. App. at 285. To borrow a straightforward example an older case: Correcting the complaint to name "Sherrie Sapp Whitaker," when it should have been "Shirley Sapp Whitaker" (where Shirley herself had been served) was properly permitted because there was never any confusion about who plaintiff had been trying to sue. *Jones v. Whitaker*, 59 N.C. App. 223 (1982).

A more complex example comes from *Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179 (2008). The plaintiff sued "Four Seasons Hospice & Palliative Care, Inc.," and soon thereafter moved to amend the name to "Hospice of Henderson County, Inc. d/b/a Four Seasons Hospice & Palliative Care." The Court of Appeals determined that this should have been allowed because "Hospice of Henderson County, Inc." did in fact do business under the name "Four Seasons

Hospice & Palliative Care," and the North Carolina Secretary of State's records revealed that there was no North Carolina entity known as "Four Seasons Hospice & Palliative Care, Inc." Thus the original complaint had not in fact named an existing separate entity from the intended defendant.

And then there is the situation where a plaintiff simply operates under both names. The Court of Appeals dealt with this in *Liss*, where the plaintiff originally sued "Seamark Foods" after a jar of the company's oysters landed him in the local medical center. After the limitations period expired, the plaintiff moved to correct defendant's name to reflect defendant's official corporate name "Seamark Enterprises, Inc." The record was clear, however, that Seamark Enterprises, Inc. operated under the assumed name Seamark Foods, as shown by a Certificate of Assumed Name filed with the Dare County Register of Deeds. In addition, Timothy Walters, president of Seamark Enterprises, Inc., had received service of the original complaint against "Seamark Foods" at Seamark Enterprises, Inc.'s proper corporate address. The court concluded that "here, we are concerned with only one legal entity which uses two names, not an 'attempt to substitute one legal entity for another as defendant.' Plaintiff did not add or substitute a new defendant to the action, he merely corrected a misnomer in the summons and complaint." *Liss v. Seamark Foods*, 147 N.C. App. 281, 286 (2001) (citations omitted).

So, to return to our hypothetical, will the trial judge dismiss Mr. Stone's amended complaint against Brightline Foods NC, Inc.? If, as in *Taylor* and *Liss*, the intended defendant, "Brightline Foods NC, Inc.," in fact operated as "Brightline Foods, Inc."; or if Brightline Foods, Inc. does not exist and Brightline Foods NC, Inc., had notice of the original action, the plaintiff may be positioned to amend. On the other hand, if there is an existing, separate entity called "Brightline Foods, Inc." the court may be compelled to follow *Crossman*, *Treadway*, and others and dismiss the action because it effectively names a new defendant.