NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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RE: *Isaias Tessema v. Catherine Ann Moulthrop*
Case No. CL-2021-16927

Dear Counsel:

The Court has before it the central question of apparent first impression, whether a complaint containing a misnomer could be cured via nonsuit without complying with the

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requirements of the misnomer statute, Virginia Code § 8.01-6, specifically notification to Defendant of the institution of the action within the statute of limitations period. Further, if such nonsuit does not excuse compliance with the four prongs of § 8.01-6, the Court must determine whether any notice afforded to Defendant's insurer satisfies the requirements of notice envisioned under the misnomer statute. Plaintiff maintains strict compliance with the requirements of § 8.01-6 is excused by Supreme Court of Virginia precedent, which he argues has, by way of example, seemingly allowed such cure via nonsuit under § 8.01-380 without detailing timely direct notification to defendants of the institution of the action. Defendant responds that compliance with all the conditions in § 8.01-6 remains a prerequisite to curing a misnomer by nonsuit, while failing to delineate for this Court how to blend interpretation of superficially contradictory precedent into one consistent applicable principle.

Before resolving the core question stated hereinabove, the Court is required to decide whether a prior order of another judge of this Court allowing Plaintiff's amendment of Defendant's name under § 8.01-6 is binding in the instant litigation, whether Plaintiff's misnaming of the driver of the vehicle in the suit for negligence is in fact a misnomer, and whether amendment of the name met the requirements of § 8.01-6 to toll the statute of limitations. In analyzing such questions, the Court is required to harmonize the nonsuit and misnomer statutes with applicable precedent.

The Court finds the prior order of this Court was at most voidable, and may not be set aside collaterally by virtue of the twenty-one-day time limit imposed by Supreme Court of Virginia Rule 1:1. However, that ruling is not binding upon Defendant Catherine Ann

Moulthrop, because she was denied the opportunity to be heard on the merits as a consequence of Plaintiff nonsuiting his case before adjudication of Defendant's then-pending Plea in Bar. This Court further finds the mistaken naming of Defendant in the original Complaint was merely a misnomer because the facts described therein were sufficient to identify Defendant as the focus of the suit.

Although there is Supreme Court precedent allowing amendment of a misnomer via nonsuit without mention of express notice to defendants of the institution of the action within the period allotted for the filing of suit, in seeming contradiction, the Supreme Court has also stated in its most recent applicable case that there must be compliance with the requirements of § 8.01-6 for such amendment to relate back to the date of the filing of the original pleading. The two cases affording cure of misnomers by nonsuit cited by Plaintiff are distinguishable from the instant case in one important aspect: in each such case the defendant's insurer apparently had notice of the filing of the complaint within the statute of limitations period. In divining a consistent rule from such precedent where the Supreme Court implicitly found notice to the insurer to be adequate, the doctrine of identity of interest informs that such notice to an insurer is sufficient to comply with § 8.01-6. In this case, Plaintiff never provided timely notice of the institution of the action either to Defendant or her insurer, such as by mailing a copy of the Complaint or a letter, sending an e-mail, or even by making a phone call.

In full consideration of the record, Plaintiff failed to meet his attendant burden of proving under § 8.01-6 the requisite notice and lack of prejudice to Defendant, and thus his amendment correcting the name of Defendant does not relate back to the date of filing

of the original Complaint. Accordingly, Plaintiff's claim is barred by the affirmative defense of statute of limitations, and Defendant's Plea in Bar shall be granted, requiring this cause be dismissed with prejudice. However, because of the novelty of the holding expressed herein, the Court shall suspend dismissal of the action for ninety days, during which time Plaintiff may, if so inclined, subpoena relevant records of State Farm, Defendant's insurer, and of Erie Insurance Exchange, Plaintiff's uninsured motorist carrier, and conduct discovery, to determine if State Farm obtained notice of the institution of Plaintiff's suit within the period afforded by the statute of limitations. To the extent State Farm possessed such timely knowledge, Plaintiff may then seek reconsideration of this Court's ruling; otherwise, the suspending order shall expire, and the Court's ruling shall become final.

BACKGROUND

On April 4, 2019, a complaint was filed by Plaintiff Isaias Tessema, alleging that "Katherine A. Illingworth," otherwise referred to as "Katherine A. Multhrop" in the Complaint, recklessly and negligently struck Plaintiff with her car at an intersection in Herndon, Virginia on April 15, 2017. Illingworth, née Moulthrop,[1] a woman residing in Colorado with no relation to the accident at issue, was served on January 2, 2020. The next day, Illingworth notified Plaintiff's counsel she was not the correct party in the suit. On January 31, 2020, Plaintiff filed a Motion for Leave to Amend Complaint and Correct Misnomer, along with a corresponding Affidavit that outlined the investigatory steps

[1] Though having her correct name, Plaintiff's then-counsel misspelled Illingworth's maiden name as "Multhrop" instead of "Moulthrop" in the original pleading.

Plaintiff's counsel took to correctly identify the proper defendant. By letter dated June 15, 2017, Defendant's insurer, State Farm, denied liability while correctly naming Ms. Moulthrop as "Our insured: Catherine A. Moulthrop." In his Motion, Plaintiff argued the incorrect defendant had been named in the original Complaint due to a private investigator identifying the wrong person as the driver and argued that such a mistake qualified as a misnomer under § 8.01-6. Plaintiff's supporting affidavit did not detail whether express notice had been given to the correct defendant of the filing of the original Complaint within the two-year statute of limitations period provided for personal injury claims, nor did this affidavit address the issue of prejudice as required by the statute.

On February 5, 2020, another judge of this Court granted Plaintiff's Motion to Amend and ordered that "Plaintiff's Amended Complaint shall be deemed filed on Feb. 5th, 2020, and relate back to the original April 10, 2019, filing date."

On or about April 15, 2020, the Amended Complaint was served on Catherine Ann Moulthrop, the correct defendant. On August 7, 2020, Defendant Moulthrop filed a Plea in Bar arguing that Plaintiff's Motion to Amend, and incidentally this Court's prior order, incorrectly concluded the name error was a misnomer, further averring that because it was not a misnomer, it did not relate back to the original pleading, and the statute of limitations thus barred Plaintiff's claim. A hearing was set for June 24, 2021, but Plaintiff nonsuited his case by agreed order prior thereto.

On December 10, 2021, a new case was filed, the instant action, naming Catherine Ann Moulthrop as Defendant. She was served on October 29, 2022, and subsequently filed her Plea in Bar, which is the subject of this opinion.

The parties appeared before this Court on September 28, 2023, upon Defendant Moulthrop's and Erie Insurance's joint Plea in Bar to Plaintiff's refiled action, again asserting Moulthrop's argument that the instant case is barred by the statute of limitations, in that because she was not afforded the opportunity to litigate her prior Plea in Bar in the original case, she retained the right to do so in the instant case. Specifically, Defendant asserts: (1) this Court's prior order was not binding on the present Court because Plaintiff's mistake in naming the proper defendant was a misjoinder rather than a misnomer qualifying for relation back under § 8.01-6, and (2) even if this Court were to find the mistake to be a misnomer, Plaintiff did not meet his burden of proving notice and lack of prejudice to Defendant under § 8.01-6(ii)-(iii) in order to secure the right to amend his complaint, thus preventing any relation back to the date of filing the original Complaint, either through amendment or by nonsuit. Among Plaintiff's responses was the assertion that his nonsuit cured the misnomer defect. He also complained about State Farm's withholding its case file, which might have shed light on the timing of notice of the institution of the action possessed by Defendant.

ANALYSIS

I. This Court May Adjudicate Defendant's Plea in Bar Based on the Affirmative Defense of Statute of Limitations Despite the Court Order Granting Amendment to Defendant's Proper Name in the Prior Nonsuited Action, and the Finding Such Amendment Relates Back to the Date of Filing of the Original Complaint Is Not Binding on Defendant Who Was Without the Opportunity to Object to Such Modification of the Complaint

The first issue before this Court is how, if at all, this Court's prior Order granting amendment of the original Complaint and Plaintiff's subsequent nonsuit of the prior case,

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which raised identical issues to those in the instant case, affect the current action and this Court's decision. Defendant in this case now asks this Court to revisit the prior 2020 Order, outside the twenty-one-day jurisdictional limitation of Rule 1:1. Defendant avers such order must be vacated on the ground that the previous Court incorrectly concluded the amendment met the requirements of § 8.01-6 and was void ab initio.

The Supreme Court of Virginia has guided that

> [a]n order is void [ab initio] if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could "not lawfully adopt."

Singh v. Mooney, 261 Va. 48, 51-52 (2001). "In contrast, an order is merely voidable if it contains reversible error made by the trial court. Such orders may be set aside by motion filed in compliance with Rule 1:1 or provisions relating to the review of final orders." *Id.* at 52. "'[W]hether an alleged error by a trial court renders its order void ab initio or merely voidable turns on the subtle, but crucial, distinction deeply embedded in Virginia law' between two very different but semantically similar concepts: subject matter jurisdiction and, for lack of a better expression, active jurisdiction." *Cilwa v. Commonwealth*, 298 Va. 259, 266 (2019) (quoting *Jones v. Commonwealth*, 293 Va. 29, 46 (2017)).

This Court possessed subject matter jurisdiction in the nonsuited case over the tort that allegedly occurred within Fairfax County; therefore, only active jurisdiction needs be addressed. Active jurisdiction is a court's "'jurisdiction to err,'" or its power to adjudicate a case correctly and consistently with the law governing the issue. *Id.* at 266-67 (quoting *Farant Inv. Corp. v. Francis*, 138 Va. 417, 427, 436 (1924)). Defendant contends that in February 2020 the Court did not properly inquire into the statutory requirements of

§ 8.01-6, specifically on the issue of notice, and mistakenly allowed Plaintiff's amendment to relate back to the original 2019 Complaint. A Court's "mistake" regarding notice to a party renders the order voidable, rather than void ab initio. *See Hicks ex rel. Hicks v. Mellis*, 275 Va. 213, 219-20 (2008) (the trial court's failure to provide notice to the party in interest under Virginia Code § 8.01-355(B) was voidable error); *Nelson v. Warden*, 262 Va. 276, 285 (2001) (failure to notify father in a juvenile proceeding was error that rendered judgment voidable rather than void ab initio); *Whiting v. Whiting*, 262 Va. 3 (2001) (per curiam) (failure to provide notice of a final decree in violation of Rule 1:13 is "merely voidable"). Thus, in accordance with Virginia precedent, if the Court erred in granting the unopposed amendment, assuming for the sake of argument the misnomer did violate the statutory requirements of notice, such error produced at most a voidable order, not one which was void ab initio, and therefore it may not be vacated due to the jurisdictional limitations of Rule 1:1.

However, Plaintiff's nonsuit of the prior case does not preclude this Court from hearing the matter of the Plea in Bar in the instant case, despite the similarity in claims between the prior and the present case. "The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense . . . . *No statutory limitation period shall have jurisdictional effects.*" Va. Code § 8.01-235 (emphasis added). "[T]he bar of the statute of limitations is an affirmative defense asserted by" a defendant who has "the burden of both alleging and proving a state of facts which would establish it." *See Roberts v. Coal Processing Corp.*, 235 Va. 556, 562 (1988). The Court in the first case did not have the chance to rule whether it had jurisdiction over

Plaintiff's claim. Such opportunity would only have come into play upon adjudication of Defendant's Plea in Bar when the affirmative defense of statute of limitations and whether it survived application of the misnomer amendment under § 8.01-6 would have been heard. Plaintiff's nonsuit foreclosed such a hearing. "'The effect of a nonsuit is simply to put an end to the present action, but is no bar to a subsequent action for the same cause.'" *Thomas Gemmell, Inc. v. Svea Fire & Life Ins. Co.*, 166 Va. 95, 97 (1936) (superseded on other grounds) (quoting *Burks' Pleading and Practice* (3d Ed.), p. 580). For a final decree – such as a nonsuit – to preclude a party from bringing a similar claim in a subsequent suit, and thus triggering res judicata, requires that the decree was entered "on the merits." *See Payne v. Buena Vista Extract Co.*, 124 Va. 296, 314 (1919). A nonsuit, which merely "put[s] an end all to further proceedings in that case," does not decide a case "on the merits" and does not bar a party from bringing a subsequent similar action or defenses thereto. *Id.*

In the prior case, consideration of Defendant Moulthrop's Plea in Bar ended before it began. Moulthrop was prevented from presenting argument to the Court on her Plea in Bar as Plaintiff nonsuited his case before a hearing could be conducted.[2] It is axiomatic that "'[a] day in court, an opportunity to be heard, is an integral part of due process of law,'" which includes a circuit court "listen[ing] to all the evidence and argument presented

[2] Ancillarily, Moulthrop's counsel signing the nonsuit order as "seen and agreed" is not a waiver of Moulthrop's due process rights and her ability to raise a similar Plea in Bar in the instant case. *See Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23 (1998) (endorsing a pretrial order as "seen and agreed" after having previously filed a memorandum of law and orally argued the contrary position does not evince "intent to abandon"); *see also Cashion v. Smith*, 286 Va. 327 (2013); *Rhoten v. Commonwealth*, 286 Va. 262, 268 (2013).

by the parties." *Tidwell v. Late*, 67 Va. App. 668, 687 (2017) (quoting *Venable v. Venable*, 2 Va. App. 178, 181 (1986) and *Menninger v. Menninger*, 64 Va. App. 616, 621 (2015)). "[Res judicata], which literally means a 'matter adjudged,' precludes relitigation of a cause of action once a final determination on the merits has been reached by a court of competent jurisdiction." *CDM Enterprises, Inc. v. Commonwealth/Manufactured Hous. Bd.*, 32 Va. App. 702, 709 (2000). To deny Moulthrop's current Plea in Bar on the grounds of res judicata would impermissibly deny her an opportunity to be heard *on the merits* of her statute of limitations defense. Furthermore, after the February 5, 2020 Order was issued by this Court, three novel opinions were published by the Supreme Court of Virginia, which clarified the dividing line between misjoinders and misnomers in tort cases, requiring this Court hear argument on the new binding precedent and address this issue on the merits.

II. Plaintiff's Misnaming of Defendant Was a Misnomer, Not a Misjoinder

Having determined the Court can fully adjudicate the issue presented, this Court must consider whether the mistake made by Plaintiff was a misnomer or a misjoinder. This issue is outcome determinative of this case because

> [i]t is permissible by amendment of the deficient pleading to correct a misjoinder under Virginia Code § 8.01-5, a misnomer under § 8.01-6, and a nonjoinder under §§ 8.01-5 and 8.01-7. However, the statutes distinguish the circumstances under which the permitted correction will relate back to the original filing, effectively tolling the statute of limitations.

Est. of James v. Peyton, 277 Va. 443, 452 (2009). The correction of a misnomer relates back to the original complaint and tolls the statute of limitations, as outlined under § 8.01-6. A misjoinder is not applicable under § 8.01-6 and does not relate back to the

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original complaint. *Id.* at 456. "[A] misnomer occurs where the proper party to the underlying action has been identified, but incorrectly named." *Richmond v. Volk*, 291 Va. 60, 64 (2016). A misjoinder arises when "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." *Est. of James*, 277 Va. at 452. "[T]he determination of whether an incorrectly named party is a misnomer or misjoinder is a question of law." *Volk*, 291 Va. at 64-65.

To determine whether a mistake in name is a misnomer or misjoinder, the Court must "consider the pleading as a whole." *Est. of James*, 277 Va. at 455. Whether the misnamed person "exists" is of no weight to the analysis; rather, it only matters whether "the complaint, read as a whole, contained sufficient allegations to identify the proper party defendant even though the incorrect name had been used." *Hampton v. Meyer*, 299 Va. 121, 129 (2020). A misnomer, rather than a misjoinder, is "readily apparent" when the plaintiff alleges in their pleading with enough certainty that a "reasonable reader" would understand who the plaintiff intended the defendant to be in fact. *Compare Volk*, 291 Va. at 65 (a misnomer occurred where the facts laid out in the original complaint established the correct defendant, Volk, was the driver of a specific vehicle in a specific location at a specific time, and Volk was the only person that fit the description) *with Marsh v. Roanoke City*, 301 Va. 152, 154-55 (2022) (residents naming the defendant in their original complaint as the "City" rather than Roanoke City Council, without more specific facts identifying the intended correct defendant, was a misjoinder).

In the instant case, the description in the original Complaint minimally, but sufficiently, identified Plaintiff's intent to sue Defendant, albeit through a combination of a

similar, but misspelled, first and last name, the approximate time of the collision, and the name of the path upon which it occurred, making the misidentification of Defendant merely a misnomer. Throughout the original 2019 Complaint, Plaintiff referred to the actor committing the alleged negligence as "Defendant", and four times in the Complaint identified the "Defendant" as "Katherine A. Illingworth AKA Katherine A. Multhrop." Nowhere in the original Complaint did Plaintiff identify "Defendant" solely as "Katherine A. Multhrop," but always used the name in conjunction with "Katherine A. Illingworth." Plaintiff alleged in the original Complaint that "Defendant" negligently hit him with her vehicle on April 15, 2017, at 11:00 a.m. while Plaintiff was traveling southbound on his bicycle on Old Dominion Trail (though the collision was incorrectly specified as occurring at mile marker twenty-five instead of the thereto distant intersection with Ferndale Avenue).

Under *Hampton*, this is sufficient identifying information to qualify this misnaming mistake as a misnomer. In that case, the Supreme Court held that where a plaintiff clearly alleged a singular driver of a specific vehicle who operated that vehicle on a specific date and location and caused a specific injury, the misnaming of that party was a misnomer because the plaintiff "sued the correct person – the driver. . . . Thus, there is no mistake of parties, only one of name." *Hampton*, 299 Va. at 129.

Defendant in the current Plea in Bar argues that because Moulthrop's deposition taken on June 13, 2023, contradicts Plaintiff's facts set out in the original Complaint and Plaintiff did not specify the make of the vehicle or exact street on which the accident occurred, Plaintiff failed to identify sufficiently the intended defendant in order to classify

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the mistake as a misnomer. However, both arguments are misplaced. First, as reiterated throughout Virginia case law, it is the original complaint that is to be taken as a whole to determine a misnomer, not any evidentiary findings after the filing of the original complaint. Second, neither *Hampton* nor any subsequent case concerning misnomers requires a specific model of vehicle or exact pinpoint location be detailed in the original complaint to identify sufficiently the intended party defendant.

Moulthrop does raise the question of whether the fact the names "Katherine Multhrop" and "Catherine Mouthrop" correspond to two different, living persons, rather than a simple misspelling of one person's name, transforms the mistake into a misjoinder. In *Volk* and *Hampton*, the Court found misnomers where the driver of a car was misidentified due to another person's name being listed in the police reports and both misnamed defendants had a degree of connection with the correct defendant. *See Volk*, 291 Va. at 62-63 (the owner of the vehicle was Jeannie Cornett, and the driver was misnamed as "Katherine E. Cornett," when the actual driver was "Katherine E. Volk," a friend of the owner who was borrowing her car); *Hampton*, 299 Va. at 126 (the owner of the vehicle, Michael Meyer, was named as the driver but the actual driver of the car, Noah Meyer, was the son of the owner). However, this case differs from *Volk* and *Hampton* in that Plaintiff had the correct spelling of Defendant's name in a letter from her insurer, State Farm, the police accident report Plaintiff failed to timely obtain contained the accurate monicker, and the two parties (Illingworth, née Katherine A. Moulthrop and Catherine A. Moulthrop) are located in completely different states with no relation to each other. The fact Plaintiff incorrectly located a Katherine A. Illingworth, née Moulthrop,

residing in Colorado, due to a private investigator's incorrect conclusions is irrelevant in this case because Virginia case law requires this Court look to the facts alleged within the original complaint, not at how a party committed the mistake or was able to realize their mistake after filing their pleading.

Hampton imparts that a driver, as compared to an owner of a vehicle or passenger, is an individual entity and a misnaming as to that entity does not transform a mistake into a misjoinder. *See Hampton*, 299 Va. at 131 ("the defendant in Hampton's cause of action is a single entity – the driver of the [vehicle] – regardless of his or her name"). So long as the intended entity to be identified in an automobile accident is the driver and the complaint sufficiently alleges the driver solely committed the tort, any mistake in name is a misnomer. Plaintiff in this case identified the correct entity in the original Complaint – the driver – and alleged all tortious activities were against that single entity. Thus, the Complaint identified the correct entity with enough specificity to conclude Plaintiff intended to bring the cause of action against the driver who allegedly injured him on April 15, 2017, therefore categorizing the misnaming as a misnomer.

III. Plaintiff's Nonsuit Did Not Cure His Failure to Comply With the Requirements of the Misnomer Statute, § 8.01-6

Next, the Court must grapple with the question of whether the plaintiff must still meet the four prongs of § 8.01-6, where the plaintiff corrects his misnomer mistake through both an amendment under § 8.01-6 and by nonsuiting the original case.

When a party makes a misnomer mistake there are two options to cure the defect: nonsuit the original complaint under § 8.01-380 or file an amendment of the original complaint under the authority of § 8.01-6. *See Edwards v. Omni Int'l Servs., Inc.*, 301 Va.

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125, 129 (2022) ("A plaintiff seeking to correct a misnomer has two options. He may move to amend his pleading pursuant to Code § 8.01-6 . . . . Alternatively, he may nonsuit and file a new action correctly naming the defendant"). A benefit of choosing a nonsuit over § 8.01-6 is that the plaintiff gains "an additional six months after the nonsuit order is entered to file a new action pursuant to Code § 8.01-229(E)." *Edwards*, 301 Va. at 129-30; *see also Volk*, 291 Va. at 67 ("When [the plaintiff] took a voluntary nonsuit, the statute of limitations was tolled for an additional six months from the date of the nonsuit by operation of Code § 8.01-229(E)(3)").

However, regardless of whether a plaintiff chooses to cure a misnomer through nonsuit or amendment, the statutory prongs of § 8.01-6 must be met. In *Edwards*, the Supreme Court of Virginia made clear "there was no legislative intent to impair the protective preconditions that [§ 8.01-6] provides to a newly added defendant when a plaintiff corrects a misnomer, whether by amending the complaint or by taking a nonsuit," Therefore "the plaintiff [of a nonsuited case] ha[s] the burden of showing each of the four protective preconditions of Code § 8.01-6 has been satisfied." *Edwards*, 301 Va. at 130-31.

The Court in *Edwards*, seemingly in direct contradiction with *Volk* and *Hampton*, was not interested in overturning such prior decisions; rather, the Court was concerned with two policy implications of § 8.01-6: notice and prejudice. *Id.* at 130 ("We therefore distinguish [*Volk* and *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"). The Court drew this distinction to address a point aptly noted in Justice Kelsey's dissent in

Volk, that not requiring a curative nonsuit to incorporate the protective measures outlined in § 8.01-6 would allow such nonsuits to create a "risk-free cure for [a plaintiff's] misnomer mistake without the trouble of complying with Code § 8.01-6." *Volk*, 291 Va. at 71 (Kelsey, J., dissenting). Thus, regardless of the curative action taken, Plaintiff was required to meet the preconditions of § 8.01-6 to correct his misnomer and effectively toll the statute of limitations.

IV. Plaintiff's Amendment of the Complaint to Defendant's True Name Does Not Satisfy the Required Proof of Notice and Absence of Prejudice to Defendant Under § 8.01-6

After categorizing the mistaken name in this case as a misnomer, which must meet the statutory requirements of § 8.01-6, the Court now addresses the prerequisites of notice and absence of prejudice to Defendant under § 8.01-6 against the factual backdrop of this case and whether such misnomer will relate back to the original Complaint. This Court is allowed to address this issue, inasmuch as the judge entering the February 2020 Order did not have an opportunity to do so, as discussed hereinabove. Section 8.01-6 states an amended pleading arising from a misnomer relates back to the original complaint if:

> (i) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations 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.

The party "opposing a plea in bar based upon a relation-back effect from a nonsuit followed by a refiling of the complaint changing the name of the defendant" has the burden

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of proving each of the four statutory requirements of § 8.01-6 has been met. *Edwards*, 301 Va. at 130. The parties in this case do not quarrel over the first and last qualifiers, but dispute whether Defendant Moulthrop received sufficient notice of the action and whether Defendant Moulthrop would be prejudiced in maintaining a defense on the merits due to the misnomer—the second and third prongs of the test. The Court will address only these two issues.

A. *Volk*, *Hampton*, and *Edwards*: Understanding Notices and Misnomers

Understanding the Supreme Court of Virginia's subsequent declaration in *Edwards* that there were no issues of notice or prejudice in *Volk* or *Hampton,* but that there were issues of notice in *Edwards,* requires a closer examination of the facts of each case. Beginning with *Volk*, Linda Richmond was injured in an auto accident on April 12, 2009. 291 Va. at 62. On February 28, 2011, Richmond filed a negligence action against "Katherine E. Cornett," alleging she was the liable driver, effecting service by posting at the address of the owner of the vehicle, Jeannie Cornett. *Id.* at 62-63. On April 13, 2011, the complaint was also sent to State Farm, Cornett's insurer. *Id.* at 63. On February 7, 2012, State Farm, learning process had been served on the wrong address, contacted Katherine E. Volk, the actual driver in the accident. *Id.* On February 12, 2012, Volk filed a motion to quash challenging only service of process on the wrong address. *Id.* "Notably, Volk never claimed that she was not the person identified in the lawsuit." *Id.* Volk instead admitted knowing she had been "erroneously identified in the caption of [Richmond's] complaint as 'Katherine E. Cornett.'" *Id.* After learning of this mistake, Richmond

nonsuited on November 9, 2012, and refiled a new case on December 11, 2012, outside of the statute of limitations, this time properly naming and serving Volk. *Id.*

Similarly in *Hampton*, on December 11, 2018, the plaintiff, Hampton, filed a complaint against the owner of a vehicle, Michael Meyer, rather than against the driver, Noah Meyer, with the statute of limitations expiring at the end of that calendar year. 299 Va. at 125-26. On January 18, 2019, the Meyers' insurer informed Hampton through counsel that Noah Meyer had been driving the vehicle at the time of the collision, and the mis-served Michael Meyer identified in the police report as the driver was actually Noah's father and a co-owner of the vehicle. The "insurer had not provided this information earlier, despite communicating with Hampton about the collision in December 2016 and September 2017." *Id.* at 126. Again, after the complaint was filed and after the statute of limitations had run, the insurer of the owner, who also insured the driver, confirmed who had been the actual driver at the time of the accident. *Id.* The plaintiff nonsuited on February 6, 2019, and refiled a new complaint on February 6, 2019, naming the correct driver. *Id.*

In contrast, in *Edwards*, the plaintiff was injured at a lake resort on June 25, 2017. *Edwards*, 301 Va. at 128-29. On February 6, 2019, the plaintiff filed a negligence action against "Company X" and served notice on Company X's registered agent, Omni International Services. *Id.* On February 10, 2020, the plaintiff nonsuited the case after learning Omni International Services, rather than Company X, owned and operated the lake resort. Edwards then refiled against "Omni International Services, Inc." on March 6, 2020. *Id.* at 128.

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The Court in *Edwards* settled that in both *Volk* and *Hampton* sufficient notice of the suit was provided to the driver, but it did not explicitly divulge how notice was effected. Additionally, the Court emphasized that unlike the defendants in *Volk* and *Hampton*, where the drivers knew of the actions they "had participated in," Omni International could not have been aware of the plaintiff's injury in 2017 because "Omni was the registered agent for Company X, not the reverse. A registered agent's sole duty is to forward to its principal, at its last known address, any process served upon it as registered agent." *Id.* at 130. The Court continued that notice was not satisfied because a "registered agent has no duty to read or interpret any attached pleadings or warn or give legal advice to the principal." *Id.* The Supreme Court's conspicuous focus on "duty" reveals the notice to the defendants in *Volk* and *Hampton*, although tacitly endorsed by the Court in those cases, was found sufficient, in part, due to the relationship and duty between an insurer and its insured in a motor vehicle accident. Implicit from the facts and rulings in *Volk* and *Hampton* is that at least the insurer was aware of the timely institution of the action and of the misnomer in both cases.[3]

B. The Doctrine of Identity of Interest Harmonizes Why Notice of the Institution of the Action to the Defendants in *Volk* and *Hampton* Was Satisfied by the Defendants' Insurance Companies' Apparent Possession of Timely Notice of the Institution of Each Suit

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[3] The Court in *Hampton*, because it apparently found notice to the defendant sufficient, did not reach the issue of whether an insurer who either actively or by omission misleads a plaintiff as to the identity of its insured driver, could thereby waive the required notice of the institution of the action under § 8.01-6 on behalf of their insured. It is also not clear whether the plaintiff in *Hampton* asked the insurer to confirm the identity of the driver or whether plaintiff was merely misled by omission. "'To raise an estoppel from silence there must have been some duty to speak, and the failure to do so must have operated to mislead.'" *See Hayes v. Ins. Co.*, 198 Va. 670, 674-675 (1957) (quoting *Hughes v. John Hancock Mutual Life Ins. Co.*, 163 Misc. 31, 33 (N.Y. Mun. 1937)). The duty of disclosure by an insurance company is generally by contract to their insured. At the same time, while not creating a private right of action, an insurer "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue" may be subject to regulatory action by the Virginia State Corporation Commission. *See* Va. Code §§ 38.2-510; 38.2-515.

The Supreme Court's concern with notice in *Edwards* underlines that "[t]he linchpin [of relation back] is notice, and notice within the limitations period." *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). The requirement of notice, whether through nonsuit or via § 8.01-6, is an obligatory safeguard because notice "serves as a yardstick for evaluating 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." *Lacedra v. Donald W. Wyatt Det. Facility*, 334 F.Supp.2d 114, 129 (D.R.I. 2004). Given the Supreme Court's *Volk* and *Hampton* decisions, the question follows whether notice on Defendant Moulthrop's insurer during the period within which the original Complaint had to be filed meets the requirement of § 8.01-6.

The doctrine of identity of interest is rooted in the Federal Rules of Civil Procedure, after which § 8.01-6 was modeled. An identity of interest exists where a party, due to the nature of its relationship or business operations, has a duty to communicate or advise another party of the facts of a possible lawsuit. *See Beury v. Davis*, 111 Va. 581, 588 (1910); *see also Olech v. Vill. of Willowbrook*, 138 F.Supp.2d 1036, 1045 (N.D. Ill. 2000) ("Parties share an identity of interest when there is a relationship so close that a court can conclude that a defendant had notice of a new party's potential claims and thus would not suffer any prejudice by the party's addition").

Section 8.01-6 was "modeled after FRCP 15(c)," and the General Assembly drafted § 8.01-6 "to allow an amendment substituting a different person as defendant and relating the amended pleading back to the date of the original filing for limitations purposes, under certain specified circumstances." *Corcoran v. Denny's Rests., Inc.*, No.

CL95-249, 1995 WL 1055999, at *2 (Va. Cir. Ct. Oct. 13, 1995). Notably, one of the more significant changes to § 8.01-6 occurred in 2004 when the General Assembly amended § 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. Prior to 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. *Compare* HB 1418, 1996 Gen. Assemb., Reg. Sess. (Va. 1996) *with* HB 705, 2004 Gen. Assemb., Reg. Sess. (Va. 2004). The General Assembly's addition of the phrase "or its agent" to the second prong requiring notice echoes the reasoning in *Jacobson*, in that a person, other than the party to be substituted, could be noticed of a lawsuit first and such notice would not prejudice the later substitution of the party. *Jacobson, et al. v. Southern Biscuit Co., et al.*, 198 Va. 813, 818 (1957).

The puzzle of why the Supreme Court in *Volk* and *Hampton* deemed notice of the institution of the action within the period afforded by the statute of limitations implicitly sufficient to satisfy § 8.01-6 in those cases, may be explained by resort to the doctrine of identity of interest. The inferable reliance of the Supreme Court on an identity of interest between insurer and insured to meet notice requirements aligns with the plain language of § 8.01-6 and the policy implications of "relation back." In *Volk* and *Hampton*, like in the instant case, the related facts do not suggest the defendants received personal notice of the institution of the action within the limitations period. Yet, one difference is that in each of those cases the defendants' insurance companies did appear to have timely notice of the filed suits. Thus, the Supreme Court in *Volk* and *Hampton* apparently relied on the principle that where a sufficient nexus or identity of interest exists between parties, notice

may properly be imputed from one to the other to allow one of the parties to be substituted into a suit due to a misnomer. *See Jacobson, et al.*, 198 Va. at 817 ("Where the substituted party bears *some relation of interest* to the original party and to the suit, and there is no change in the cause of action, a substitution may be allowed") (quoting *Cox v. Bender*, 84 S.W.2d 297, 299 (Tex. Civ. App. 1935) (emphasis added)).

C. While Notice of the Filing of a Complaint to an Insurer in Motor Vehicle Accident Cases May Be Imputed to the Insured Defendant to Satisfy the Notice Required by § 8.01-6, in the Instant Case, the Record Is Devoid of Sufficient Evidence Defendant's Insurer Knew of the Institution of the Action Within the Period for Filing the Original Complaint

In the instance of motor vehicle accident cases and misnomers, *Volk* and *Hampton* make clear some privity exists between an insurer and its insured. *See Hampton*, 299 Va. at 126 ("The insurer had not provided this information [about the insured] earlier, despite communicating with [the plaintiff] about the collision in December 2016 and December 2017"). Other state courts have clarified such privity imparts an identity of interest exists between an insurer and its insured, and notice to the insurer may be imputed onto the insured without any prejudice to the insured. *See Sellers v. Kurdilla*, 377 P.3d 1, 13-14 (Alaska 2016) (holding an insurance company had an "identity of interest" with a permissive driver of the vehicle where the insurance company mailed a claim acknowledgment letter naming both the mistaken party and driver as "our insured" and responded to plaintiff's attorney's inquiry about the accident, stating both possible defendants were insured by the company); *Pan, et al. v. Bane, et al.*, 141 P.3d 555, 561-62 (2006) (an "identity of interest" existed where a minor child driving her parents' vehicle when the accident occurred was insured by the same carrier which knew about

the accident from the outset); *Denver v. Forbes*, 26 F.R.D. 614, 616 (E.D. Pa. 1960) ("[T]he same insurance company is involved no matter whether the mother or daughter is sued. That the insurance company was aware of the actual facts well within the two-year period after the accident, and that no harm will be done if the daughter is substituted for the mother as defendant in the action is plainly evident").

As discussed in *Edwards*, the issue of notice between parties with an identity of interest turns on the duty owed between the parties. *Edwards*, 301 Va. at 130 ("The registered agent has no duty to read or interpret any attached pleadings or warn or give legal advice to the principal"). The Supreme Court of Alaska in *Sellers* clarified an insurance company's notice of a lawsuit may be imputed onto its insured because, in accordance with a state's traffic code, an insurer maintains a duty to its insured during any possible litigation. *Sellers,* 377 P.3d at 14. Virginia Code §§ 38.2-510(A)(3) and 38.2-510(A)(6), mirroring the traffic code of Alaska, provide insurers are required to "adopt and implement reasonable standards for the prompt investigation of claims" and must attempt "in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Va. Code § 38.2-510(A)(3)-(6). It follows "the insurer's obligation begins before the insured is named as a defendant in a lawsuit and even if suit is never filed. The insurer is required to promptly investigate insurance claims and offer equitable settlements when liability is reasonably clear," thus creating an "identity of interest" duty between the insured and insurance company that allows notice to be imputed onto another. *Sellers*, 377 P.3d at 14. This Court finds such a duty exists

between insurers and their insureds in Virginia, and that insurers in Virginia share an identity of interest with their insureds.

The question for this Court then becomes, even where an "identity of interest" exists between an insurer and the insured, at what point must an insurer's knowledge of the existence of a filed, legal case be sufficient "notice" under § 8.01-6 which can then be imputed onto its insured? Under § 8.01-6(ii), a party or its agent must have timely notice of the "institution of the action." Under Rule 3 of the Supreme Court of Virginia, the word "institution" is used interchangeably with "commencement," providing "[a] civil action is commenced by filing a complaint in the clerk's office." Va. Sup. Ct. R. 3:2; *see also* Va. Sup. Ct. R. 3:5(e).

The Court in *Volk* and *Hampton* did not state whether the communication of the threat of litigation to an insurer is sufficient to meet notice under § 8.01-6, because in both cases the insurance company apparently had been timely aware a complaint had been filed. However, the plain language of § 8.01-6 makes clear a party's agent, or the insurance company, must have notice of the filing of the complaint to have adequate notice under § 8.01-6 which could then be imputed onto the insured. The cornerstone of the analysis turns on what the insurer knew concerning the facts of the complaint filed and whether that would demonstrate it was "on notice" of an action initiated against one of its insured. For example, in *Sellers*, the Supreme Court of Alaska found the insurance company had sufficient notice of the "institution of an action" where, not only was the insurance company originally sent a claim immediately after the accident naming two possible drivers, but twenty-two days after the plaintiff's attorney initiated an action

against the incorrect driver and before valid service was effected, the insurance company contacted an attorney to review the complaint that was originally filed apparently to determine which of their two insured would be liable. *Sellers*, 377 P.3d at 12-13. The insurer's timely actual notice of the institution of the action was imputed to their insured driver, the object of the suit, under an "identity of interest" theory. *Id.* at 14. Similarly, in *Hampton*, the Court noted the insurance company knew, prior to the complaint being filed, who was the correct driver in the accident, and it was aware the plaintiff's counsel had mistaken the identity of the driver, even though it did not disclose this to the plaintiff until after the statute of limitations ran. *Hampton*, 299 Va. at 126.

In the instant case, the accident occurred on April 15, 2017. On June 14, 2017, after receiving a claim inquiry from Plaintiff's attorney naming "Catherine A. Moulthrop" as the driver in the accident, State Farm responded it "d[id] not believe our insured was legally liable for your damages. In the absence of legal liability, we would not be justified in making a settlement. Therefore, we must deny payment of this claim." Unlike in *Hampton,* the insurer explicitly confirmed the correct name of Defendant and did not mislead Plaintiff by omission. Plaintiff further alleges that at some point after the accident, Defendant Moulthrop provided a recorded statement to State Farm. Similar to the insurance company's letter in *Sellers*, here, State Farm's use of the words "our insured," coupled with the duties imposed on insurance companies in the Virginia traffic code, creates an "identity of interest" between State Farm and Moulthrop. However, as previously discussed, the analysis does not end there for only that notice which the insurer

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possessed timely may be imputed onto its insured to defeat an affirmative defense of statute of limitations.

On April 9, 2019, the suit was commenced by the filing of the original Complaint naming the incorrect party, "Katherine A. Illingworth AKA Katherine A. Multhrop," as the driver in the accident. After the correct party, Catherine Ann Moulthrop, had been served with the amended Complaint, and before nonsuiting, Moulthrop's counsel, Brendan J. Mullarkey, who was employed by State Farm, filed a Plea in Bar asserting the claim was barred by the statute of limitations. It is unproven from the record that State Farm was aware Plaintiff had identified the incorrect driver from the onset, or was notified Plaintiff had the incorrect driver through Moulthrop's recorded statement, or purposefully withheld such information from Plaintiff, or contacted Mullarkey at some point after the filing of the original Complaint to confirm their knowledge of the facts of the Complaint, or was at all privy to the filing of the original lawsuit prior to the expiration of the statute of limitations period. Therefore, without additional evidence, it cannot be concluded the insurance company received sufficient notice of the institution of the action that could then be imputed onto Defendant Moulthrop for purposes of satisfying § 8.01-6(ii). Plaintiff hence failed to meet his burden of proving this protective precondition of timely notice required by § 8.01-6 was met prior to entry of the February 5, 2020 Order allowing amendment of the original Complaint.

D. Defendant Was Prejudiced by Plaintiff's Amended Complaint Under § 8.01-6

Due to the lack of any indicia of timely notice to Moulthrop or her insurer, and the lapse of time between the events that gave rise to the suit and the service of the amended

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complaint on Moulthrop, Defendant would suffer prejudice in defending herself on the merits.

Section 8.01-6(iii) provides an amended pleading may toll the statute of limitations and relate back to the original complaint if the Court finds the added party "will not be prejudiced in maintaining a defense on the merits." Va. Code § 8.01-6. The plain language of § 8.01-6 is silent regarding the level of prejudice a plaintiff must demonstrate to meet this prong. This silence creates an ambiguity, which compels the Court to resort to determining the General Assembly's intent concerning the meaning of "prejudice" within the broader statutory scheme. "In addition to a law's text, courts may consider surrounding statutes to infer legislative intent." *Commonwealth v. Burkard*, No. FE-2021-475, 2023 Va. Cir. LEXIS 20, at *13 (Cir. Ct. Feb. 16, 2023) (citing *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957) ("statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement")). But when the legislature omits language from a statute present in surrounding statutes, it is "'an unambiguous manifestation of a contrary intention.'" *Cuccinelli v. Rector & Visitors of the Univ. of Virginia*, 283 Va. 420, 428 (2012) (quoting *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (2004)).

The statute immediately following § 8.01-6 describes that an amendment which adds a claim or defense relates back to the original pleading where "the parties opposing the amendment will not be *substantially* prejudiced in litigating on the merits as a result of the timing of the amendment." Va. Code § 8.01-6.1(iii) (emphasis added). In comparison, § 8.01-6 does not include the word "substantially" or any modifiers to the

word "prejudiced." As discussed in the prior section, § 8.01-6 was amended in 1996, in the same session as § 8.01-6.1. Thus, the General Assembly's omission of the word "substantial" in § 8.01-6 is presumed not to be accidental but is a manifest intention to describe a lower burden of prejudice than that required for § 8.01-6.1.

Substantial prejudice, in the context of "relating back," "contemplates actual prejudice, like the loss of evidence, not the ordinary inconvenience and expense which is an incident to the defense of any claim." *Wallace v. Zoller*, 52 Va. Cir. 80, 84 (Cir. Ct. 2000). In contrast, other courts have determined the prejudice caused by a misnomer refers to harm "suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale." *Nelson v. Cnty. of Allegheny*, 60 F.3d 1010, 1015 (3d Cir. 1995) (quoting *Curry v. Johns-Manville Corp.*, 93 F.R.D. 623, 626 (E.D. Pa. 1982)); *see also Shadid v. Estabrooks*, 61 Va. Cir. 724, 725-26 (Va. Cir. Ct. 2002) ("[W]ithin the limitations period prescribed for this claim, [the correct defendant] must have received notice of this action so as not to be prejudiced in maintaining a defense"); *Davidson v. Dunnagan*, 110 Va. Cir. 51, at *6 (Va. Cir. Ct. 2022) (finding that defendant would suffer prejudice as envisioned under § 8.01-6 where three years have passed since the expiration of the original statute of limitations period and where the statute is aimed at protecting against "the failing memory of witnesses") (quoting *Starnes v. Cayouette*, 244 Va. 202, 211-12 (1992)).

Where an ambiguity exists concerning a statute addressing the protections of the statute of limitations, "any doubt . . . should be resolved in favor of the operation of the

statute of limitations." *Westminster Inv. Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 547 (1989). This is evident in *Edwards* where the Supreme Court concluded the passage of time, lack of notice, and a party's fading memory was sufficient prejudice under § 8.01-6 to deny an amendment relating back. *Edwards*, 301 Va. at 130 ("Because of the prejudice to the defendant's ability to prepare a defense on the merits after a lapse of two years and eight months, there would be a danger of serious injustice to the defendant"). Thus, the prejudice suffered by a defendant under § 8.01-6 need not be substantial; rather, the prejudice suffered simply must demonstrate it contravenes the public policy of the statute of limitations.

Here, it is likely Defendant Moulthrop would suffer prejudice in maintaining a defense on the merits. By the time Moulthrop received notice of the action against her, three years had elapsed since the accident and one year had passed after the expiration of the statute of limitations. Defense counsel avers Moulthrop is also unable to recall details of the accident, as demonstrated in her June 13, 2023 deposition. It is hard to envision the General Assembly intended § 8.01-6 to penalize Defendant where she was only provided misnomer notice of the action against her three years after the incident, outside the statute of limitations, and now must defend against an otherwise stale claim. Therefore, resolving the statutory ambiguity in favor of the public policy behind the statute of limitations, Plaintiff has not met his burden to show the absence of prejudice to Defendant under § 8.01-6(iii) for his correction of the name in his Complaint to relate back to the original filing date.

CONCLUSION

The Court has considered the conundrum of Plaintiff choosing to exercise cumulative curative options to correct a misnomer by both filing a motion to amend under § 8.01-6 and taking a nonsuit, without first having effected notice on Defendant of the institution of the action within the period afforded by the statute of limitations. The issues raised before the Court were whether such a misnomer nonsuit precludes a subsequent court from hearing objections to a misnomer amendment granted in the prior case, whether a complaint containing a misnomer can be cured via nonsuit without strict adherence to § 8.01-6, and how the statutory prongs of § 8.01-6 must be met in the circumstances where the driver of a vehicle has been misnamed in a filed tort action.

First, this Court's prior Order granting an amendment to correct a misnomer where it is unclear from the record if the statutory requirements of § 8.01-6 were met, particularly notice, is voidable error and does not preclude this Court from hearing the matter. Where Defendant was denied an opportunity to be heard on the merits concerning the amendment due to a nonsuit, this Court is authorized to reconsider the issue as a matter of due process. Second, this Court finds Plaintiff's nonsuit to correct a misnomer mistake is not a shelter from the protective statutory requirements of the misnomer statute, § 8.01-6, and Plaintiff must meet the requirements of notice and lack of prejudice to Defendant under the statute to cure a misnomer, whether by nonsuit or amendment. Third, a plaintiff suing a driver for negligence can meet the burden of proving misnomer notice under § 8.01-6(ii) by application of the doctrine of identity of interest. Specifically, a plaintiff may meet his burden by imparting notice of the initiation of an action to the

driver's insurer such that the insurer possesses sufficient knowledge of the institution of the action to be imputed onto its insured.

In this case, the record available to the Court does not show Plaintiff ever provided such timely notice of the institution of suit either to Defendant or to her insurer, such as by mailing a copy of the Complaint or otherwise demonstrating how Defendant or her insurer were aware of the commencement of the action within the statute of limitations period allotted for the filing of the original Complaint. This lack of notice not only is deficient under § 8.01-6(ii) but prejudiced Defendant in contravention of § 8.01-6(iii), and therefore Plaintiff failed to meet his attendant burden to permit correction of the misnomer under § 8.01-6. Consequently, Plaintiff's amendment correcting the name of Defendant does not relate back to the filing of the original Complaint, and therefore, Plaintiff's claim is barred by the affirmative defense of statute of limitations. Defendant's Plea in Bar must thus be granted, requiring this cause to be dismissed with prejudice. However, because of the novelty of the holding expressed herein, the Court shall suspend dismissal of the action for ninety days, during which time Plaintiff may, if so inclined, subpoena relevant records of State Farm, Defendant's insurer, and of Erie Insurance Exchange, Plaintiff's uninsured motorist carrier, and conduct discovery, to determine if State Farm obtained notice of the institution of Plaintiff's suit within the period afforded by the statute of limitations. To the extent State Farm possessed such timely knowledge, Plaintiff may then seek reconsideration of this Court's ruling; otherwise, the suspending order shall expire, and the Court's ruling shall become final.

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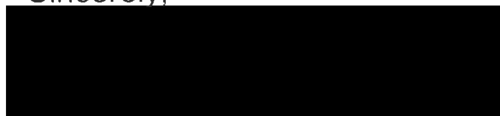
The Court shall enter a separate order incorporating the ruling herein, and until such time this cause continues and is not final.

Sincerely,



David Bernhard
Judge, Fairfax Circuit Court

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