NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Pam Frazier vs. Red Robin International, Inc., et al.*, Case No. CL-2017-12281

Dear Counsel:

The issue before the Court is whether Plaintiff Pam Frazier, who timely named a defendant as "Kathy (last name unknown)" in her original Complaint, and who substituted that name in her Amended Complaint to "Kat Clavelli" after the relevant limitation period had expired, can relate the substituted name to the original Complaint and keep Ms. Clavelli as a party defendant.

This Court holds that an amendment from a name fragment can relate back to the filing date of that fragment if the plaintiff can prove that she knew the defendant's identity, but not her name, and can prove that the defendant meets all the statutory requirements of Virginia Code §

OPINION LETTER

8.01-6(i)–(iv). The Court further holds that a name fragment can be deemed a "mistake" for the purposes of that statute. For the reasons that follow, Ms. Clavelli's Plea in Bar cannot be resolved as a matter of law. Ms. Frazier is entitled to an evidentiary hearing for the Court to determine if she knew Ms. Clavelli's identity at the time of her initial filing despite not knowing her name.

I. Background.

Ms. Frazier initially brought this claim against Defendants Red Robin International, Inc. ("Red Robin"), Kathryn Leeker, "Kathy (last name unknown)," and "Jane Doe" on August 31, 2017. In Ms. Frazier's Complaint, she alleged that while she had lunch at Red Robin's restaurant on October 12, 2015, an umbrella covering an outdoor seating area fell and struck her on the head, ultimately causing a traumatic brain injury. In addition to naming Red Robin as a defendant, Ms. Frazier included purported Red Robin employees "Kathryn Leeker," "Kathy (last name unknown)," and "Jane Doe" individually, alleging that they breached their duty to maintain the premises in a reasonably safe condition.

Based on Ms. Frazier receiving what she believed to be identifying information on "Kathy (last name unknown)," she asked that she be granted leave to file an Amended Complaint. She did so pursuant to this Court's February 23, 2018 Order, substituting "Kat Clavelli" as a defendant in place of "Kathy (last name unknown)." On April 13, 2018, this Court heard arguments relating to Ms. Clavelli's Plea in Bar. Ms. Clavelli asserted that all of Plaintiff's claims against her were barred by Virginia's two-year statute of limitations for personal injury actions. Virginia Code § 8.01-243(A). She argued that because Ms. Frazier added her as a defendant after October 12, 2017, her claims were time-barred. She further argued that the relation-back provision of Virginia Code § 8.01-6 was inapplicable as a matter of law in the instant case because that statute concerns misnomers, which is distinguishable from a "Jane Doe" pleading.

Ms. Clavelli reasoned that she was improperly added as a defendant because the original Complaint listed her, effectively, as a "Jane Doe." She cited *Doe v. Beutler*, for the proposition that there is no statutory basis for a "Jane Doe" pleading other than in uninsured motorist cases under Virginia Code § 38.2-2206(E). 94 Va. Cir. 166 (Fairfax 2016). She asserted that "Kathy (last name unknown)" is just as fictitious as "Jane Doe," and is not a misnomer permitted to be corrected using Virginia Code § 8.01-6. As with a "pure Jane Doe" listing, "Kathy (last name unknown)" shows that Ms. Frazier did not know her identity. Ms. Clavelli also argued that the Complaint violated proper pleading rules by failing to include the names of all the parties.[1]

Ms. Frazier opposed the Plea in Bar and demanded a jury[2] to determine whether the four requirements in the relation-back provisions of Virginia Code § 8.01-6 applied – such as the

[1] Ms. Clavelli cites Va. Sup. Ct. R. 3:2(b) ("The complaint shall be captioned with the name of the court and the full style of the action, which shall include the names of all the parties.").
[2] Ms. Frazier subsequently waived her right to a jury on the Plea in Bar in open court on May 25, 2018.

defendant's knowledge of the pending lawsuit.[3] Ms. Clavelli, relying on her impermissible "Jane Doe" argument, asserts that no evidence is necessary and that this case should be decided in her favor as a matter of law.

II. Analysis.

A Plea in Bar shortens litigation by reducing it to a distinct issue of fact which, if proven, bars a plaintiff's right of recovery. The moving party carries the burden of proof on that issue of fact. *See Campbell v. Johnson*, 203 Va. 43, 47 (1961). Where no evidence is taken in support of the plea, the trial court must rely solely upon the pleadings in resolving the issue presented. *Weichert Co.. v. First Commercial Bank*, 246 Va. 108, 109 (1993). However, if a court finds that there are no disputed facts, it may decide the Plea in Bar as a matter of law. *Norfolk Cmty. Servs. Bd. v. Berardi*, 84 Va. Cir. 310, 311-12 (Norfolk, 2012).

The controlling statute in this case is Virginia Code § 8.01-6, which states in full:

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

Reading the statute plainly, the amended name can correct a "misnomer or otherwise" and "relates back" to the date of the original pleading if (1) the claim asserted in the amended pleading arose out of the circumstances of the original pleading, (2) the party added by amendment was notified of the action during the original limitations period, (3) the party added by amendment would not be prejudiced in maintaining a defense on the merits, and (4) the party added by amendment knew or should have known that but for a mistake concerning his identity the action would have been brought against him.

A. The Breadth of Virginia Code § 8.01-6's "or otherwise" Provision.

Two items in this statute are particularly noteworthy as applied to the instant case. The first is the breadth of the statute. It permits relation-back treatment for correcting a "misnomer" or "otherwise." This inherently means that the amendment can correct more than just a

[3] Ms. Frazier proffered that she would prove knowledge through Red Robin's knowledge of the lawsuit. This Court makes no decision on whether Ms. Frazier can prove this element or not.

misnomer.[4] Presumably, it was this plain reading of the statute that led this Court to implicitly rule in *Hendrix v. Legovini* that it was immaterial whether that case involved a misnomer or a misjoinder, as Virginia Code § 8.01-6 applied in either scenario. 2017 Va. Cir. LEXIS 340, *5. A question that this Court must address is how broadly the "or otherwise" provision reaches.

First, it is worth demonstrating what a misnomer is as it relates to Virginia Code § 8.01-6. This Court has recently spoken on that issue in *Sparks v. Lucas*. 2018 Va. Cir. LEXIS 43. In that case, involving a car accident, the plaintiff erroneously sued "Jose Vasquez" instead of "Eddy Lucas" because Mr. Lucas had given him that wrong name at the scene. *Id.* at *4. This Court held that the plaintiff sued the right person by the wrong name, resulting in a misnomer. However, the plaintiff was unable to comply with section (iv) of Virginia Code § 8.01-6, dealing with notice of the lawsuit to the misnamed defendant. *Id.*

On the other end of the spectrum, Ms. Clavelli argues and this Court agrees, that in the instance of what this Court calls a "pure Jane Doe," Virginia Code § 8.01-6 categorically cannot apply. This is so because neither the Rules of the Supreme Court of Virginia nor the legislature contemplate Jane Doe pleadings, aside from the narrow exception for uninsured motorists. *Conley v. Bishop*, 32 Va. Cir. 236, 237 (Fairfax 1993). This Court's recent opinion in *Beutler v. Doe* provides a good example of what a "pure Jane Doe" is. In that case, the plaintiff registered a domain name and used it in connection with his various businesses. 94 Va. Cir. 154, 156 (Fairfax 2016). While the plaintiff was trying to resolve renewal issues with the domain name registrar, a John Doe accessed the plaintiff's account and transferred the domain name to a registrar based in the United Kingdom. *Id.* In that instance, the plaintiff had no idea as to the identity of the person who accessed his account – just that it must have been "someone."

The facts alleged in the instant case fall somewhere in between these two examples. For the purposes of this opinion, this Court need not decide whether "Kathy (last name unknown)" is a true misnomer, but rather need only decide whether or not this is a "pure Jane Doe" pleading. If it is, Virginia Code § 8.01-6 cannot apply. If it is not, it can fit into Virginia Code § 8.01-6's "or otherwise" provision, and the Court can move onto the statute's four relation-back requirements.

Ms. Clavelli offers a federal case from a magistrate of United States District Court for the District of New Mexico, which found it logical to treat a first name unknown or last name unknown defendant "like a Doe defendant for the purpose of the relation-back doctrine because they share a similar function." *Butchard v. Cty. of Dona Ana*, 287 F.R.D. 666, 671 (D.N.M. 2012). This Court finds this case unpersuasive. It is possible that when Ms. Frazier filed her initial Complaint, "Kathy (last name unknown)" was not a "pure Jane Doe," or a mysterious, unknown person who existed in cyberspace like in *Beutler*. Evidence may show that Ms. Frazier knew exactly who she was, albeit without knowing her name.

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[4] A misnomer is a mistake in name but not person. *Rockwell v. Allman*, 211 Va. 560 (1971). As the Supreme Court of Virginia has elaborated, a "[m]isnomer arises when the right person is incorrectly named, not where the wrong defendant is named." *Swann v. Marks*, 252 Va. 181, 184 (1996).

This case involves an analogous situation to *Sparks* where a plaintiff may know the identity of a defendant, but does not have the correct name. In such a case as this, if a plaintiff can prove knowledge of the defendant, the fact that the defendant was named using a wrong or incomplete name is a circumstance contemplated by Virginia Code § 8.01-6. Thus, the wrong or incomplete name can be corrected, and the correction will relate back to the date of the original filing if the plaintiff can meet the four statutory requirements of Virginia Code § 8.01-6. The reason for this is that the plaintiff is not suing an unknown "Jane Doe," she is suing a specific individual who may be described with particularity, albeit without knowing an exact name. For instance, Ms. Frazier may have known what she believed to be a defendant's first name, in addition to her exact employment location. She may have even known further details which can come to light during an evidentiary hearing.

Simply put, one can know the *identity* of a person without knowing her *name*. The material substance of a person - her being - is greater than simply her name. For this reason this Court disagrees with the rationale of *Butchard.* There is a difference between a "Jane Doe" and a "Jane (last name unknown)" if the plaintiff truly knows the identity of the person sued in the latter instance, but not in the former.

B. The Meaning of the Word "Mistake" in Virginia Code § 8.01-6.

The second issue that this Court must address concerns the word "mistake" in the fourth prong of Virginia Code § 8.01-6. Specifically, it concerns whether Ms. Clavelli knew that she would have been named fully in the case but for a mistake in her identity. Ms. Clavelli asserts that Ms. Frazier's naming of "Kathy (last name unknown)" in place of "Kat Clavelli" cannot be a "mistake." Rather, she argues, that when Ms. Frazier named her as "Kathy (last name unknown)," she was surrendering to the fact that she simply did not know who Kathy was, not that she had named the wrong person.

On this point, Ms. Clavelli cites a United States Court of Appeals for the Eighth Circuit opinion, which held that naming a "Jane Doe" defendant is not a "mistake." *Heglund v. City of Grand Rapids*, 871 F.3d 572, 579 (8th Cir. 2017). In that case Jennifer Heglund and her husband sued numerous Minnesota cities, counties, state officials, and hundreds of "John and Jane Does" alleging that police officers had improperly accessed their private information in the State's driver's license database. The Heglunds later amended their Complaint to replace one of the "John Does" with "Frank Scherf," a former chief of police. *Id.* at 575. The court cited a string of dictionary definitions to show that a "mistake" implies inadvertence or a sincere but wrong belief, which is distinguishable from a "John Doe" pleading where the petitioner knows for a fact that "John Doe" is not the defendant. It held that the Heglunds intentionally sued "John Doe" knowing that he was not the proper defendant and, therefore, their act was not a "mistake" -- it was an intentional misidentification. *Id.* at 580.

What Ms. Clavelli seems to overlook is that in *Heglund*, the court was relying on the Supreme Court of the United State's definition of the word "mistake" in interpreting an analogous federal rule with almost identical language as that contained in Virginia Code § 8.01-

6.[5] *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010). That definition includes "a wrong action or statement proceeding from faulty judgment, *inadequate knowledge*, or inattention." *Id.* at 548-49 (emphasis supplied).

Ms. Clavelli's interpretation of *Heglund* fails to consider the Supreme Court precedent in *Krupski*. In interpreting Federal Rule of Civil Procedure 15(c)(1)(C)(ii), the Supreme Court held that the relevant question "is not whether [the plaintiff] knew or should have known the identity of [the defendant] as the proper defendant, but whether [the defendant] should have known that it would have been named as a defendant but for an error." 560 U.S. at 548. The Supreme Court went on to state, with its prior definition of "mistake" in mind, "[t]hat a plaintiff know[ing] of a party's existence does not preclude her from making a mistake with respect to that party's identity." *Id.* at 549.

While the Eighth Circuit tried to rein in the Supreme Court's *Krupski* ruling, at least one federal court has argued that this was in error. In *Haroon v. Talbott*, the United States District Court for the Northern District of Illinois noted that "the traditional John Doe rule treats plaintiffs 'with inadequate knowledge' much more harshly than plaintiffs 'who list the wrong defendant in an original complaint.'" 2017 U.S. Dist. LEXIS 158522, *19 (quoting *Heglund*, 871 F.3d at 580-81). The court in *Haroon* argued that after *Krupski*, the plaintiff focused analysis should no longer apply.

The reasoning of *Krupski* and *Haroon* is also sound in policy as it relates to Virginia Code § 8.01-6. If a plaintiff can prove that a defendant meets all the statutory requirements of Virginia Code § 8.01-6, why should a prospective defendant who has full knowledge that she is the one who should be involved in the case be able to hide behind the statute? This Court holds that a name fragment, such as "Kathy (last name unknown)" for "Kat Clavelli" could be such a mistake from inadequate knowledge if the plaintiff can prove that she knew the *identity* of the defendant, but just did not know her *name* until later.

III. Conclusion.

Is "Kathy (last name unknown)" the same person as "Kat Clavelli?" If Ms. Frazier can prove she is, and can prove the four prongs of Virginia Code § 8.01-6, then her amended name can relate back to the time she originally sued "Kathy." This Court disagrees with Ms. Clavelli that this issue is a matter of law that requires no evidence. Evidence for this Plea in Bar is necessary. The Court needs to consider whether "Kat Clavelli" and "Kathy" are in fact the same person and whether Ms. Frazier can prove it. It also needs to consider whether the statutory requirements of Virginia Code § 8.01-6 have been met. For example, can Ms. Frazier prove that Kat Clavelli knew or should have known that but for a mistake concerning her identity, the action would have been brought against her? Virginia Code § 8.01-6(iv). Of equal importance,

[5] The Supreme Court interpreted Fed. R. Civ. P 15(c)(1)(C)(ii). That rule states that an amendment to a pleading can relate back to the original pleading when the party "knew or should have known that the action would have been brought against it, but for a mistake concerning the party's identity."

can Ms. Frazier show that Kat Clavelli or her agent received notice of the institution of this action? Virginia Code § 8.01-6(ii). The Court must make factual findings at an evidentiary hearing.

An Order directing the parties to schedule an evidentiary hearing is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Pam Frazier **Plaintiff,**	)	
	)	**CL-2017-12281**
v.	)	
Red Robin International, Inc., et al. **Defendants.**	)	

ORDER

THIS MATTER CAME BEFORE THE COURT on Defendant Kat Clavelli's Plea in Bar; and

IT APPEARING THAT the Court considered the arguments of both parties, as further explained in its written opinion; it is

ORDERED, ADJUDGED, and DECREED that Defendant Kat Clavelli's Plea in Bar cannot be decided as a matter of law based on the pleadings and will require an evidentiary hearing.

This Court directs the parties to Calendar Control to set the matter for an evidentiary hearing.

Entered this 1st day of June 2018.

[redacted]

David A. Oblon
Judge, Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRIGINIA.