

CITATION: Stekel v. Toyota Canada Inc., 2011 ONSC 6507
COURT FILE NO.: 06-CV-309553PD1
DATE: 20111101

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Karen Stekel and Maurice Stekel v. Toyota Canada Inc., 1216809 Ontario Ltd., carrying on business as Scarborough Lexus Toyota and Toyota Credit Canada Inc.

BEFORE: Mr. Justice Kenneth L. Campbell

COUNSEL: *Jason Beitchman* and *Timothy Pinos*, for the Appellant, Toyota Motor Corp.
Theodore P. Charney, for the Respondents/Plaintiffs, Karen and Maurice Stekel

DATE HEARD: October 4, 2011

ENDORSEMENT

INTRODUCTION

[1] The legal issue on this appeal relates to whether or not the master erred in permitting the plaintiffs to add the Toyota Motor Corporation (TMC) as an additional party defendant in their ongoing action, under rule 5.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and s. 21(2) of the *Limitations Act, 2002*, S.O. 2002, chap. 24, sch. B, notwithstanding the fact that the limitation period in relation to the plaintiffs' claim against TMC had expired. The plaintiffs had mistakenly believed that Toyota Canada Inc. (TCI) had manufactured the motor vehicle that they assert malfunctioned and caused the accident that led to their damages. In fact, TCI was only the distributor of the vehicle. The vehicle was manufactured by TMC. By the time the plaintiffs discovered their mistake, the limitation period against TMC had expired.

[2] TMC argues that the master erred in adding it as a defendant, as the order is contrary to s. 21(1) of the *Limitations Act, 2002*, which provides that if a limitations period in respect of a claim against a person has expired, the claim "shall not be pursued by adding the person as a party to any existing proceeding." The plaintiffs contend, however, that the master did not err as TMC was added as a defendant under the exception to this rule provided by s. 21(2) of the *Limitations Act, 2002*, which permits "the correction of a misnaming or misdescription of a party."

[3] For the reasons that follow, I respectfully agree with the master that while the limitation period in respect of the plaintiffs' claim against TMC had expired, s. 21(2) of the *Limitations*

Act, 2002 permitted the plaintiffs to correct their “misnomer” with respect to the manufacturer of their vehicle and add TMC as a defendant to the litigation. The plaintiffs had always intended to include the manufacturer of the vehicle as a defendant in their action. Indeed, the plaintiff’s claim against the manufacturer of the vehicle appears to be the center-piece of the action. Equally importantly, TMC knew that the plaintiffs were pointing their “litigation finger” at the manufacturer of the vehicle, even though they had misnamed the manufacturer. In these circumstances, the master was quite correct in permitting the proposed amendment. Accordingly, in the result, and for the following reasons, the appeal by TMC must be dismissed.

THE BACKGROUND FACTS

[4] On April 21, 2005, the plaintiff, Karen Stekel, was driving the Lexus ES330 that had been leased by her husband, Maurice Stekel, from the defendant, 1216809 Ontario Ltd., carrying on business as Scarborough Lexus Toyota (SLT). According to Mrs. Stekel, at one point the vehicle suddenly hesitated, and then quickly lurched forward, causing her to lose control of the vehicle and strike a tree. She suffered significant physical injuries in the accident.

[5] This was not the first time that the vehicle had malfunctioned in this way. In June of 2004, Mr. and Mrs. Stekel had leased two of these vehicles, and they had subsequently experienced problems with sudden hesitation and sudden acceleration with both vehicles. Indeed, they had been back to the SLT dealership no less than seven times complaining of this problem and hoping to have the vehicles repaired.

[6] In the Statement of Claim issued on April 12, 2006, the plaintiffs commenced an action against three defendants, namely, TCI, Toyota Credit Canada Inc. (TCCI) and SLT, seeking damages in the amount of \$1,100,000. In this Statement of Claim the plaintiffs alleged, among other things, that TCI was at all material times engaged in the business of “manufacturing, servicing and selling automobiles” and was the manufacturer of the plaintiff’s motor vehicle involved in the accident.

[7] In point of fact, TCI was *not* engaged in the business of manufacturing automobiles, and did *not* manufacture the plaintiff’s vehicle. The Vehicle Identification label on the plaintiff’s vehicle indicated that the car was made in Japan where it was manufactured by the “Toyota Motor Corporation.” In the Statement of Defence, the defendants denied the plaintiffs’ assertion to the contrary, and expressly indicated that TCI was, at all materials times, the “exclusive distributor of Toyota automobiles and accessories” including the plaintiff’s vehicle that was involved in the accident.

[8] The plaintiffs did not immediately appreciate the significance of the assertion by TCI that it was not the manufacturer of the plaintiff’s vehicle, but was only its distributor. Indeed, it was not until September 8, 2008, that the plaintiffs, during the course of the examination for discovery process, came to appreciate that TCI was not, in fact, the manufacturer, but rather that TMC manufactured the vehicle. Eventually, in January of 2011, Master Abrams heard the motion brought by the plaintiffs under rule 5.04(2) seeking to add TMC as a party defendant to these proceedings.

THE DECISION OF THE MASTER

[9] On April 6, 2011, Master Abrams released an *Endorsement* explaining the reasons why she was granting the motion by the plaintiffs, and permitting the plaintiffs to “correct the misnaming of the manufacturer” pursuant to rule 5.04(2). See: *Stekel v. Toyota Canada Inc., et al.*, 2011 ONSC 2211. The Order that was entered in accordance with this *Endorsement* granted the plaintiffs “leave to add Toyota Motor Corporation as a defendant to this proceeding” and to amend their statement of claim accordingly.

[10] In her detailed *Endorsement* Master Abrams drew all of the following conclusions:

- In the Statement of Defence from the defendants there was “no affirmative defence” expressly “informing the plaintiffs” that it was TMC, and not TCI, that was the manufacturer of the vehicle. Indeed, while it was not the manufacturer, in the Statement of Defence TCI addressed and denied the plaintiffs’ allegations of “negligent manufacture” of the vehicle.
- Under rule 5.04(2), the legal test for determining whether there has been a “misnomer” that can be remedied is whether a reasonable person, receiving the Statement of Claim, would know that the plaintiffs meant to commence the action against him or her, but simply got their name wrong. Said another way, the case is one involving a curable “misnomer” if a representative of TMC knew or ought to have known that the plaintiffs “erred in their identification” of the manufacturer of the vehicle. See: *Ormerod et al. v. Strathroy Middlesex General Hospital et al.* (2009), 97 O.R. (3d) 321 (C.A.).
- Counsel for the defendants advised the plaintiffs that the “correct corporate name” for Toyota Credit Canada Ltd. (as it was described in the Statement of Claim), was actually Toyota Credit Canada Inc. (TCCI). By their conduct in the early stages of the litigation, the plaintiffs were “lulled into a false sense of security that they had sued the correct corporate entities.”
- The plaintiffs had leased five previous Lexus vehicles over the course of the past 10 years. Moreover, Mr. Stekel inspected the vehicle driven by his wife after the accident. While the plaintiffs admitted that, on the compliance label on the driver’s door and in the owner’s manual inside the vehicle, the manufacturer of the vehicle was expressly identified as TMC, the plaintiffs credibly claimed that they never gave any thought to who manufactured the vehicle, and never reviewed the compliance label or owner’s manual.
- It is likely that TMC knew or ought to have known about the claim by the plaintiffs. There is no evidence that they were not aware of the claim.
- The fact that TCI was sued in two capacities, namely, as both manufacturer and distributor of the vehicle does not mean that the plaintiffs “ought to be precluded

from correcting their misdescription or misnomer” despite the elapsed limitation period. Indeed, having learned that TCI wore only one of these two “hats,” the plaintiff ought to be able to correct their error.

- As the plaintiffs clearly intended to sue for “negligent manufacture” and TCI defended against that claim of negligent manufacture, “without disabusing the plaintiffs of their mistaken belief” that TCI was the manufacturer, this militates in favour of permitting the plaintiffs to add TMC notwithstanding the fact that the “limitation period herein has elapsed,” as there is no evidence of “real and non-compensable prejudice” to TMC. In short, the plaintiffs erred, but the error is, in all of the circumstances, “understandable and excusable.”

THE GOVERNING STANDARD OF APPELLATE REVIEW

[11] The standard of appellate review to be applied by a single judge sitting on appeal of a decision by a master was set out in *Zeitoun et al. v. The Economical Insurance Group* (2008) 91 O.R. (3d) 131 (Div.Ct.) at p. 142; *Affirmed*: (2009), 96 O.R. (3d) 639 (C.A.). According to this standard, the decision of the master may only be set aside “if the master made an error of law or exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error.” Where the master erred in relation to a question of law, however, the standard of review is correctness. See also: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 3-6, 10-20; *Equity Waste Management of Canada v. Halton Hills* (1997), 35 O.R. (3d) 321 (C.A.); *Toronto Standard Condominium Corp. No 1703 v. 1 King West Inc. et al.*, [2010] O.J. No. 1675 (Div.Ct.) at para. 11-12.

THE PROVISIONS OF THE LIMITATIONS ACT, 2002

[12] The provisions of the *Limitations Act, 2002* control the outcome of this case. The general rule outlined in s. 21(1) of the *Act* is that, if a limitations period in respect of a claim against a person has expired, the claim “shall not be pursued by adding the person as a party to any existing proceeding.” However, this general rule is not absolute. Indeed, s. 21(2) of the *Act* expressly provides that this general rule does not prevent “the correction of a misnaming or misdescription of a party.”

[13] Section 21(1) of the *Limitations Act, 2002* purposefully articulates an important general rule. If the limitation period in respect of a claim against someone has expired, the claim “shall not” be pursued by “adding” that person to an existing proceeding. The language of this rule is mandatory, and admits of no discretionary application. It appears to be designed to ensure that the expiry of a limitation period against a potential defendant is not somehow procedurally overcome by the simple expedient of adding that person as defendant to some proceeding already commenced within the limitation period. At the same time, the exception to the general rule, outlined in s. 21(2), is just as clear and equally important. The general rule does not prevent the “correction of a misnaming or misdescription of a party.” Accordingly, legitimate cases of “misnomer” can be properly corrected, notwithstanding the expiry of a limitation period.

THE RULES OF CIVIL PROCEDURE

[14] The *Rules of Civil Procedure* cannot properly be applied so as to effectively expand the ability of plaintiffs, through court order, to add party defendants to claims after the expiration of limitation periods.

[15] Rule 5.04 (2) provides that, at any stage of a proceeding, the court may “add, delete or substitute a party” or “correct the name of a party incorrectly named,” on such terms as are just, “unless prejudice would result that could not be compensated for by costs or an adjournment.” Rule 26.01 provides that, at any stage of an action, the court “shall grant leave to amend a pleading” on such terms as are just, “unless prejudice would result that could not be compensated for by costs or an adjournment.”

[16] Prior to the enactment of the *Limitations Act, 2002*, these rules had been judicially interpreted so as to allow a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where there were “special circumstances” to justify the order. See, for example: *Basarsky v. Quinlan*, [1972] S.C.R. 380; *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.).

[17] In *Joseph v. Paramount Canada’s Wonderland* (2008), 90 O.R. (3d) 401, however, the Court of Appeal, faced with the enactment of the *Limitations Act, 2002* and interpreting its provisions, concluded that this common law discretion to extend limitation periods under the rules in “special circumstances” could no longer be applied. Feldman J.A., delivering the judgment of the Court, held that that s. 21(1) of the *Limitations Act, 2002*, “which precludes the addition of parties to an existing action after the expiry of a limitation period” had to be given proper effect, and could not be undermined by the former application of the rules. More specifically, Feldman J.A. stated, at pp. 406-407:

No specific provision in the new Act refers to the doctrine of special circumstances, or specifically allows a court to extend or suspend the running of the limitation period based on special circumstances. *To the contrary, s. 21 of the Act precludes the addition of parties to an existing action after the expiry of a limitation period.* The late addition of parties to an existing action was one of the main situations where the doctrine of special circumstances was traditionally applied at common law and under Rule 5.04(2).

* * * * *

In accordance with s. 66(3) [of the *Courts of Justice Act*, R.S.O. 1990, chap. C.43], rules 5.04 and 26.01 must not conflict with the new Act, or with the former Act. These rules apply to the amendment of pleadings and the addition of parties at any stage of proceedings. *They do not by their terms apply to extend the statutory limitation periods provided in the new Act, nor could they.* But they have been used for that purpose through the application of the common law doctrine of special circumstances.

* * * * *

I am reinforced in my view by s. 21 of the new Act, which *specifically prohibits the addition of parties to an existing action after the expiry of the limitation period*. Section 20 would conflict with s. 21 if it were interpreted to extend to the incorporation of the common law special circumstances doctrine, thereby allowing the possible addition of parties after the expiry of the limitation period where special circumstances exist, in conflict with s. 21.

* * * * *

I conclude that s. 20 does *not* refer to the extension of a limitation period under the new Act through the application of the common law doctrine of special circumstances to the *Rules of Civil Procedure*. Rules 5.04(2) and 26.01 must now be applied giving effect to the new Act.

[emphasis added]

[18] The practical effect of this important decision is to give full effect to s. 21(1) of the *Limitations Act, 2002*, by precluding the “addition” of parties to an existing action after the expiry of a limitation period, unless the court is truly correcting “the name of a party that has been incorrectly named” within the meaning of s. 21(2) of the *Limitations Act, 2002*.

[19] While rule 5.04(2) of the *Rules of Civil Procedure* formulates the general procedural rule for the addition, deletion, or substitution of other parties somewhat differently, this general rule cannot properly be applied so as to effectively change the interpretation of s. 21 of the *Limitation Act, 2002*. In short, in circumstances where a limitation period has expired, rule 5.04(2) cannot be employed by the court to add a party to an ongoing proceeding unless it is only to “correct the name of a party incorrectly named” within the meaning of s. 21(2) of the *Limitations Act, 2002*.

ANALYSIS

1. Overview of the Issues

[20] Accordingly, the two important questions that need to be determined in this case are as follows. First, has the limitation period expired in respect of any potential claim by the plaintiffs against TMC in relation to the April 21, 2005 motor vehicle accident? Second, if this limitation period has expired, can TMC be added as a party defendant to the ongoing action by the plaintiffs in order to correct the “name of a party incorrectly named”?

2. Has the Limitation Period Expired?

[21] There is no gainsaying the fact that the limitation period in this case has expired in connection with any potential claim by the plaintiffs against TMC in relation to the April 21, 2005 motor vehicle accident involving Mrs. Stekel. The master clearly accepted this fact, and counsel for the plaintiffs did not contend otherwise.

[22] The applicable limitation period was, according to s. 4 of the *Limitations Act, 2002*, two years in duration, as measured from the date the claim was discovered. The claim was “discovered” according to the statutory definition of that term under s. 5(1) of the *Limitations Act, 2002*, within a short period of time after the accident. Given that the plaintiffs started their action in this case on April 12, 2006, and it clearly included a claim against the alleged manufacturer of the vehicle, the claim against TMC was “discovered” no later than April 12, 2006. See: *Fekrta v. Siavikis*, [2008] O.J. No. 4281 (S.C.J.); *Affirmed*: [2009] O.J. No. 2702 (C.A.). Accordingly, the two year limitation period on that claim would have expired no later than April 12, 2008. The plaintiffs did not discover their error in relation to the manufacturer of the vehicle until September of 2008. By that time, the limitation period in relation to TMC had long since expired.

3. ***Misnomer - Is the Plaintiff Trying to Correct the Name of a Party Incorrectly Named?***

a. **Introduction**

[23] In my view Master Abrams was correct in concluding that the plaintiffs were seeking to correct the name of a party that had been incorrectly named. While this “misnomer” with respect to the true manufacturer of the vehicle required that TMC be added as a party defendant to the litigation after the expiration of the limitation period, in my view this was done in accordance with s. 21(2) of the *Limitations Act, 2002*.

b. **The Law on Misnomer: The Two-Part Legal Standard**

[24] The Court of Appeal for Ontario has made it clear that a plaintiff’s pleading will be viewed as reflecting a correctible “misnomer” in respect of a defendant where it is apparent: (1) that the plaintiff intended to name the defendant; and (2) that the intended defendant knew it was the intended defendant in relation to the plaintiffs claim. Moreover, such a misnomer can be corrected notwithstanding that it requires that the defendant be added to the litigation after the expiry of the limitation period. See: *Ormerod (Litigation Guardian) v. Strathroy Middlesex General Hospital*, [2009] O.J. No. 4071 (C.A.) at para. 20-25; *Lloyd v. Clark*, [2008] O.J. No. 1682 (C.A.) at para. 4; *Spirito v. Trillium Health Centre*, [2008] O.J. No. 4524 (C.A.) at para. 15; *Kitchener et al. v. Queensway General Hospital et al.* (1997), 44 O.R. (3d) 589 (C.A.). See also: *Ladouceur v. Howarth*, [1974] S.C.R. 1111; *Leesona Corp. v. Consolidated Textile Mills Ltd.*, [1978] 2 S.C.R. 2; *J.R. Sheet Metal & Manufacturing Ltd. v. Prairie Rose Wood Products*, [1986] A.J. No. 7 (C.A.).

[25] For example, in *Lloyd v. Clark*, the plaintiff was involved in a motor vehicle accident. Precisely two years later, the plaintiff commenced an action for damages against two specific municipalities, the Towns of Ajax and Whitby. Shortly thereafter these two defendants advised the plaintiff that the accident actually took place in the Regional Municipality of Durham. Subsequently, and after the expiry of the two year limitation period, the plaintiff brought a motion to substitute the Regional Municipality of Durham for the Towns of Ajax and Whitby. The motions judge concluded that this was not simply a “misnomer”, and refused to make the proposed substitution of defendants, as the plaintiff had deliberately named the parties he wanted

as defendants. See: *Lloyd v. Clark* (2006), 40 C.P.C. (6th) 104 (Ont.S.C.J.). The Court of Appeal reversed this decision, concluding that the motions judge ought to have permitted the title of the proceedings be “corrected” to name the Regional Municipality of Durham as a defendant in place of the Towns of Ajax and Whitby “pursuant to s. 21(2) of the *Limitations Act, 2002*.” After quoting both ss. 21(1) and (2) of the *Limitations Act, 2002*, the court stated, at para. 3-4:

We agree with the submission that on a fair reading of the statement of claim, it was clear that the *plaintiff intended to name the Municipality having jurisdiction* over and responsibility for the maintenance of the road on which the accident occurred. Moreover, there was clear evidence that *Durham immediately knew that it was the intended defendant* given the letter sent by Durham’s insurance adjustor to the plaintiff’s solicitor upon receipt of the statement of claim.

The case law amply supports the proposition that *where there is a coincidence between the plaintiff’s intention to name a party and the intended party’s knowledge that it was the intended defendant, an amendment may be made despite the passage of the limitation period to correct the misdescription or misnomer*.

[emphasis added]

c. Applying the Two-Part Test for Misnomer

i. Introduction

[26] This two-part legal standard for “misnomer” dictated by the governing authorities has been met, in that: (1) the plaintiffs clearly intended to name the “manufacturer” of their vehicle, and thought they had in their Statement of Claim; and (2) TMC knew full well, nearly from the very outset of the litigation, that it was the intended defendant in relation to the plaintiffs’ claim against the manufacturer of the vehicle.

ii. The Plaintiffs Intended to Include Manufacturer in their Claim

[27] There can be no doubt that the plaintiffs intended to include the manufacturer of their vehicle as a defendant in their claim. Indeed, as I have indicated, a review of their Statement of Claim suggests that the center-piece of their claim was that the defendants “designed, manufactured and distributed an unsafe vehicle” that had many “defective” components. It was this collection of defects that caused the vehicle to “suddenly lurch forward” when it should not have, and caused the accident which led to the damages suffered by the plaintiffs. The plaintiffs alleged that this unsafe vehicle was designed, manufactured and distributed by the defendants in “contravention of the generally accepted design and safety standards within the automobile industry,” and that they failed to warn the plaintiffs of the “risk of injury and property damage” posed by the defects inherent in the vehicle. The plaintiffs contended that the defendants “knew or ought to have known that there was a defect in the design, manufacture, repair and/or inspection” of the vehicle. Finally, the plaintiffs asserted that the vehicle was “inherently defective” and that the defendants breached their duty of care “in manufacturing a vehicle that was defective.” While the plaintiffs were clearly mistaken in their allegation that TCI was the

manufacturer of the vehicle, there was no doubt that the plaintiffs intended to name the manufacturer of the vehicle in their Statement of Claim.

[28] In the event that there was any doubt on this issue from a consideration of the Statement of Claim alone, that doubt is removed by reference to the Affidavit of Mr. Stekel wherein he credibly stated that “we always intended to sue the manufacturer of the vehicle.” “Further, it is apparent that Master Abrams accepted his evidence in this regard, noting that it was “credible.”

iii. TMC Knew the Plaintiffs Were Pointing Their “Litigating Finger” in its Direction

[29] It is also clear that TMC, as the true manufacturer of the plaintiff’s vehicle, knew that it was the intended defendant in relation to the plaintiffs’ claim against the manufacturer.

[30] First, the evidence in the record strongly suggests that TMC knew that the plaintiffs were pointing their “litigating finger” in its direction. More particularly:

- When counsel for the plaintiffs first wrote to TCI and SLT in early June of 2005, counsel made it clear that the plaintiffs alleged that the accident took place as a “result of a mechanical defect” that was known to “the manufacturer, the distributor and the dealer.” Accordingly, this was, from the very outset, a product liability claim by the plaintiffs.
- The response came from Ms. Nicola Briggs, Senior Counsel in the TCI Legal Department. Throughout her response, she did not distinguish between any potential defendant, but appeared simply to be working on behalf of “Toyota.” Further, in her initial response, Ms. Biggs was primarily interested in ensuring the preservation of the damaged vehicle so that it could be inspected. In other words, counsel for “Toyota” knew that this was a product liability claim by the plaintiffs.
- Subsequently, Ms. Biggs confirmed that she was acting on behalf of all of the named defendants, and could accept service of any documents to be provided to them. In this regard, Ms. Biggs was, in fact, acting for “Toyota” in a more general sense.
- When the defendants subsequently retained their litigation counsel, from the firm Cassels Brock, counsel for the plaintiffs was expressly advised by counsel for the defendants that they had “improperly named” Toyota Credit Canada Inc. as “Toyota Credit Canada Ltd.” in the Statement of Claim. Counsel for the defendants said nothing, however, about the manner in which the plaintiffs had described the manufacturer of the vehicle.
- The three defendants in this action are closely related to TMC. TCCI is a wholly owned subsidiary of TMC. It is difficult to understand how TCCI could have failed to advise TMC about the details of the plaintiffs’ product liability suit and, more particularly, about the plaintiffs’ allegations that the “manufacturer” of the vehicle had designed and manufactured a dangerous and unsafe vehicle. While TCI is not a wholly owned subsidiary, but rather is a 50:50 joint venture between TMC and Mitsui

& Co. Ltd., drawing the same inference is very difficult to resist, especially given the reality that TCI is the exclusive importer and distributor in Canada of vehicles manufactured by TMC.

- There is some evidence in the record that the plaintiffs' complaint about their vehicle was passed, predictably, to others higher in the Toyota/Lexus chain of command. More particularly, on April 26, 2005, the Service Manager at the SLT dealership where the plaintiffs purchased their vehicle received a complaint from Mr. Stekel. This complaint was reduced to a written "dealer alert," which was passed along to the territorial dealership representative, and then on to the Customer Relations Center at TCI. While there is no direct evidence in the record, it is hard to imagine, given the nature of the plaintiff's complaint, that it would not have been passed on, in one form or another, to TMC.
- This action by the plaintiffs was part of a larger problem with these vehicles, which was viewed by some in the organization as "franchise threatening," given the numbers of complaints and "buy backs" that were being experienced.
- When TMC became involved in this litigation, which occurred when the plaintiffs sought to add it to the action as a defendant, TMC retained the same firm, Cassels Brock, that acted for the other defendants. This would suggest that TMC knew the unity of their collective interests in relation to this litigation.

[31] Second, as the master accurately noted, in contrast to this circumstantial evidence that cumulatively suggests that TMC knew that the plaintiffs were pointing their "litigation finger" at the manufacturer of the vehicle, there is absolutely no evidence on the record that suggests that TMC did not know about the plaintiffs' claim. Of course, if it were true, it would have been easy enough for TMC to provide direct evidence that it had always been oblivious to the fact that the plaintiffs were intent on suing the manufacturer of their vehicle. The complete absence of any evidence from TMC on this issue speaks loudly as to its corporate knowledge of the plaintiffs claim.

[32] Third, while the three defendants did, in their Statement of Defence, deny the allegation that TCI was the manufacturer of the vehicle, and state that TCI was the exclusive distributor, they also defended the "product liability" claim on its merits. More specifically, the defendants contended that the vehicle had been "properly designed" and "properly manufactured" in a way that "complied with all regulatory and industry standards," and that, at the time of its "design, manufacture and distribution," the vehicle was not "dangerous, defective or unsafe." At no point did the defendants expressly indicate TMC was the manufacturer of the vehicle. Further, none of the documents that were exchanged between the parties in connection with the litigation identified TMC as the manufacturer of the plaintiffs' vehicle. As the master concluded, as a matter of fact, the plaintiffs were "lulled into a false sense of security" that they had commenced their action against the "correct corporate entities."

[33] As the master observed, in all of the circumstances of this case, it is more credible than not (and more likely than not), that TMC knew all about the plaintiffs' claims.

iv. The Position of TMC – No Adding Parties

[34] TMC argues that, as the plaintiffs are not seeking to “substitute” TMC for one of the originally named defendants, but rather are seeking only to “add” another defendant, the amendment to the Statement of Claim can not be made under s. 21(2) of the *Limitations Act, 2002* after the expiration of the limitation period. The argument by TMC, reduced to its essentials, is that, after the limitation period has expired, the number of defendants can not be increased, otherwise a defendant will have been “added” contrary to s. 21(1) of the *Limitations Act, 2002*. In my view the master correctly rejected this argument in the following terms, at para. 18-19:

[Counsel for TMC] argues that because the plaintiffs do not wish to substitute Toyota Canada Inc. with Toyota Motor Corporation but seek to have both corporate entities named as parties defendant, it cannot be said that the plaintiffs are simply correcting the misnaming or misdescription of a party within the meaning of s. 21(2) of the *Limitations Act*. In my view, the fact that Toyota Canada Inc. was sued in the first instance *qua* manufacturer **and** distributor does not mean that the Stekels ought to be precluded from correcting their misdescription or misnomer (this, despite an elapsed limitation period).

Toyota Canada Inc. was named as a party wearing two hats. The Stekels have now learned that it wore only one hat and that the second hat was worn by another entity related to and easily confused, in the particular circumstances here at play, with Toyota Canada Inc. The plaintiffs ought to be permitted to correct their error. This is particularly so given that there is nothing before me to suggest that Toyota Motor Corporation was in any way misled by the plaintiffs or did not, before this motion was brought, know of the plaintiffs' claims.

[emphasis in original]

[35] I agree with the master. The proper application of the “misonomer” test cannot be reduced to a simple exercise of counting the number of parties in an effort to ensure that there is the same number of defendants before and after the proposed amendment to the Statement of Claim. Instead, as the authorities suggest, the governing legal analysis requires more nuance, and is focused upon whether there exists a coincidence between the plaintiff's intention to name the defendant and the defendant's knowledge that it was the intended defendant. If, as a result of that “misonomer” analysis and the making of the proposed amendment, the number of defendants actually increases, then that is a legal result contemplated by s. 21(2) of the *Limitations Act, 2002*. I note, however, as did Master Abrams, that in this case there is a real “substitution” in the Statement of Claim as a result of the amendment, in that Toyota Canada Inc. is *removed* as the alleged *manufacturer* of the vehicle, and Toyota Motor Corporation is *inserted in its place* in that

capacity. The fact that TCI still remains as a defendant in the action in its capacity as *distributor* is due only to the fact that it was originally alleged to be liable in *two* different capacities.

d. No Prejudice

[36] To the extent that the issue of potential prejudice to TMC must be considered in determining whether or not the proposed amendment can appropriately be made under s. 21(2) of the *Limitations Act, 2002* and/or under rule 5.04(2) of the *Rules of Civil Procedure*, the evidence fails to establish any such prejudice. While being added as a defendant to this ongoing action deprives TMC of a limitations period defence, as I have sought to outline and as the master correctly concluded, this amendment of the Statement of Claim is in accordance with s. 21(2) of the *Limitations Act, 2002*. As this is, accordingly, precisely the type of “prejudice” contemplated by s. 21(2) of the *Limitations Act, 2002*, it can not properly be relied upon to defeat a proposed amendment that is otherwise in accordance with the provision. Moreover, TMC has not suggested, by way of affidavit evidence on the motion before the master or otherwise that it has suffered, or will suffer, any other type of prejudice as a result of the amendment adding it as a defendant in this action. The absence of any such evidence of prejudice also supports the decision of the master in this case.

e. Conclusion

[37] In the result, I conclude that the learned master did not err in permitting TMC to be added as a defendant to this litigation. The master applied the correct legal standard for “misnomer”, and reached the correct conclusion in applying that legal standard in the factual circumstances of this case. In the language used by the Court of Appeal for Ontario in *Lloyd v. Clark*, at para. 4, “there is a coincidence between the plaintiff’s intention to name” the manufacturer of the vehicle, and TMC’s “knowledge that it was the intended defendant” in this litigation as the manufacturer of the vehicle. Accordingly, an amendment may be made despite the passage of the limitation period to correct the “misnomer” of the manufacturer of the vehicle. Accordingly, I would dismiss the appeal.

COSTS

[38] At the conclusion of oral argument, counsel helpfully agreed on the issue of costs, jointly suggesting that the successful party on the appeal should be awarded their costs for the appeal, fixed in the total amount of \$5,000 (including disbursements and HST). I accept this jointly advanced position as fair and reasonable. Accordingly, I fix the costs of this motion at \$5,000 (including disbursements and HST). This amount shall be paid by Toyota Motor Corporation to the plaintiffs within 30 days of the release of this judgment.

Kenneth L. Campbell J.

DATE: November 1, 2011