# Misnomer – What Happens if a Plaintiff Gets Its Own Name Wrong?

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In *Dealer's Choice Preferred Collision Centre Inc. v. Kircher*, 2020 ONSC 7557, the Court considered the applicable test when a motion is brought to amend the named *plaintiff* pursuant to the doctrine of misnomer.

Motions based on the doctrine of misnomer are typically brought to correct an improperly named defendant. In this decision, Master Graham considers the applicable test in the uncommon situation where a plaintiff seeks to correct its own name in the title of proceedings.

***Background***

The plaintiff, Dealer's Choice Preferred Collision Centre Inc. ("Dealer's Choice"), and the defendants entered into an agreement whereby the defendant would refer all customers requiring body and collision services to Dealer's Choice for 10 years (the "Agreement").

Dealer's Choice commenced an action alleging breach of the Agreement for failing to refer customers as outlined in the Agreement. The defendants counterclaimed for breach of contract, damage to reputation, loss of goodwill, and interference with their economic, business and contractual relations.

Three years after the litigation was commenced, and well beyond the expiration of the limitation period, it came to light that the party named in the Agreement, and as the plaintiff in the action, "Dealer's Choice Preferred Collision Centre Inc.", was not an incorporated entity and did not have legal status.

Accordingly, the plaintiff brought a motion to amend the title of proceedings to correct the alleged misnomer by substituting "Downtown Auto Collision Centre Inc. o/a Dealer's Choice Preferred Collision Centre Inc." for the presently named plaintiff "Dealer's Choice Preferred Collision Centre Inc."

***Analysis***

Master Graham noted that the vast majority of the law on misnomer was developed in the context of a plaintiff seeking to amend the name of a defendant. However, the issue of when a claim may be amended to substitute a plaintiff on the basis of misnomer was addressed by the Court in *Corp. of Township of North Shore v. Grant*, 2018 ONSC 503.

In that decision, the Court outlined the following legal principles applicable to circumstances where a plaintiff seeks to amend its own name in the title of proceedings:

- The jurisprudence is clear that an amendment will be permitted where there is a coincidence between a plaintiff's intention to sue the correct party and the intended defendant's knowledge of the plaintiff's intention, despite the passage of the limitation period to correct the misdescription or misnomer.[1]

- Thus, an amendment to add the name of one or more plaintiffs to a statement of claim should be permitted notwithstanding the expiry of a limitation period where the court is satisfied that the plaintiffs sought to be added to an action were the intended plaintiffs prior to the expiration of the limitation period, that the defendant knew that they were intended plaintiffs, and where no prejudice arises that cannot be compensated for in costs.[2]

Master Graham summarized the applicable test as follows:

> Where a plaintiff seeks to amend or substitute another entity for itself, the issue is whether the "new" plaintiff was an intended plaintiff when the action was commenced ***and*** the defendant reasonably ought to have been aware of which entity was pointing its litigating finger in its direction [emphasis in original].

Applying the test to the facts of this case, Master Graham noted that the entirety of the plaintiff's claim was based on the Agreement. Importantly, while negotiating the Agreement, the defendant's solicitor sent correspondence to the plaintiff's solicitor stating that they would not agree to adding Downtown Auto Collision Centre Inc. as a party to the Agreement and that, as far as the defendants were concerned, Downtown Auto Collision Centre Inc. was not a party to whom they refer auto body work.

[1] *Corp. of Township of North Shore v. Grant*, 2018 ONSC 503 at para 21; citing *Lloyd v Clark*, 2008 ONCA 343.
[2] *Ibid* at para 23.

The correspondence further stated that the inclusion of Downtown Auto Collision Centre Inc. was unacceptable due to the fact that the manufacturers and insurers had on-going concerns about that entity. As a result of this objection by the defendant, Downtown Auto Collision Centre Inc. was not added as a party to the agreement.

On these grounds, Mater Graham found that the defendants would have had no reason to think that the intended plaintiff was different than the contracting party, i.e. Dealer's Choice Preferred Collision Centre Inc.

Master Graham further stated that it would defy logic for the plaintiff to suggest that the defendants might reasonably have thought that they were being sued on the Agreement by an entity that their counsel had specifically said could not be a party to the Agreement and which was specifically excluded from it.

Master Graham also noted other contextual factors which supported the position that the defendants could not have known that Downtown Auto was the actual intended plaintiff. First, the agreement stipulated that the referrals were to be made to Dealer's Choice and not to Downtown Auto; and, second, the defendants could not have been expected to know that Dealer's Choice had no legal status when the plaintiff was not aware of this fact until after the litigation had been commenced.

Master Graham dismissed the motion and awarded costs against the plaintiff in the amount of $39,000.

***Takeaway***

Where, as is typical, a party seeks to correct the name of a defendant pursuant to the doctrine of misnomer, the test is whether the plaintiff clearly intended to sue the proposed defendant. The pleading must be drafted with sufficient particularity, such that, on an objective and generous reading, the "litigation finger" would be pointing at the proposed defendant.[3]

In circumstances where a plaintiff seeks to correct its own name in the title of proceedings, the test is:

1. The "new" plaintiff must have been an intended plaintiff when the action was commenced, and
2. The defendant reasonably ought to have been aware of which entity was pointing the litigating finger in its direction.

[3] *Reimer v. Toronto (City)*, 2020 ONSC 1661 at para 15.

In both situations, the court also examines whether there is prejudice that cannot be compensated by costs or an adjournment. Moreover, the court retains residual discretion to refuse to permit an amendment where the mistake in naming the party involves more than a mere irregularity or in any particular case with exceptional circumstances.