Indexed as:

Mazzuca v. Silvercreek Pharmacy Ltd.

Between
Elsa Mazzuca, plaintiff (respondent), and
Silvercreek Pharmacy Limited, defendant (appellant)

[2001] O.J. No. 4567
Docket No. C34882
Also reported at: 56 O.R. (3d) 768

Ontario Court of Appeal
Toronto, Ontario
Laskin, Rosenberg and Cronk JJ.A.

Heard: September 12, 2001.
Judgment: November 27, 2001.
(91 paras.)

On appeal from the orders of Justice Anne M. Molloy dated April 17, 2000.

Counsel:

John D. Strung, for the appellant.
Ryan M. Naimark, for the respondent.

Reasons for judgment were delivered by Cronk J.A., concurred in by Rosenberg J.A. Separate reasons were delivered by Laskin J.A.

¶ 1 **CRONK J.A.**:— This appeal concerns the jurisdiction of a court under the Rules of Civil Procedure to permit the amendment of a pleading, after expiry of a limitation period, to substitute a corporate plaintiff for an individual plaintiff in an action framed in negligence and involving claims for damages arising from a business premises fire. Molloy J. granted the motion to amend the pleading. Silvercreek Pharmacy Limited ("Silvercreek") appeals. For the reasons that follow, I would dismiss the appeal.

BACKGROUND

¶ 2 Silvercreek's principal submission is that this is not a case of "misnomer" and, since the original plaintiff allegedly had no cause of action, it was not open to the motions judge to substitute the corporate plaintiff once the limitation period intervened. To address the misnomer aspect of the appellant's argument, it is necessary to examine the facts in some detail.

¶ 3 On February 8, 1993, a fire occurred at premises leased by Silvercreek. The inventory of an adjacent clothing and lingerie business was damaged by the fire. On June 5, 1998, shortly before expiry of the applicable six-year limitation period under the Limitations Act, R.S.O. 1990, c. L.15, Elsa Mazzuca commenced proceedings against Silvercreek for damages to inventory and for loss of income during a period of business interruption, in the amount of $150,000.

¶ 4 The statement of claim was served on Silvercreek in mid-June 1998. In mid-December 1998, the plaintiff provided the defendant with a copy of a proof of loss form supported by an adjusters' inventory showing a total claim in the amount of $275,588.

¶ 5 In early January 1999, prior to expiry of the limitation period, Silvercreek's solicitor requested receipt of copies of the plaintiff's tax returns and financial statements for the six years prior to the fire. Examinations for discovery were scheduled for August 27 and September 1, 1999. On the day prior to the commencement of the discoveries and more than six months after expiration of the limitation period, financial statements for a company known as "La Gondola Ladies Boutique and Lingerie Ltd." ("La Gondola Ltd.") were produced to Silvercreek's solicitor. Financial statements for the named plaintiff, Elsa Mazzuca, were not provided.

¶ 6 During the discoveries, it emerged that the proper principal claimant for the damages sustained in the fire was La Gondola Ltd. and not Elsa Mazzuca in her personal capacity. It was also confirmed that La Gondola Ltd. owned the store that operated the clothing and lingerie business. Elsa Mazzuca was the sole shareholder, director and officer of La Gondola Ltd.

¶ 7 Silvercreek was involved in several actions arising out of the fire and was aware of heat and smoke damage caused to other businesses or tenants in the area. The fire loss was investigated by Silvercreek's insurer.

¶ 8 The operative policy of insurance relating to the clothing and lingerie business, issued by State Farm Fire and Casualty Company ("State Farm"), referred to "Mazzuca, Elsa [doing business as] La Gondola Ladies Boutique and Lingerie" as the named insured. No reference was made in the insurance policy to an incorporated entity.

¶ 9 Three proof of loss forms were prepared. Two of the forms referred to the business as "Elsa Mazzuca [doing business as] La Gondola Ladies Boutique and Lingerie". The third form identified the named insured only as "Elsa Mazzuca". All three forms were signed by Elsa Mazzuca.

¶ 10 Business records existing prior to or generated in consequence of the fire, and documents created for the purpose of establishing the losses occasioned by the fire, referred variously to "Elsa Mazzuca", "Elsa Mazzuca, [doing business as] La Gondola Ladies Boutique and Lingerie" or La Gondola Ltd. An accounting report in relation to the fire damage, obtained on behalf of State Farm, referenced the claimant as "Elsa Mazzuca, [doing business as] La Gondola Ladies Boutique and Lingerie Ltd." A second report, by adjusters commissioned by Ms. Mazzuca, made no reference to an incorporated entity. Various cheques issued by the business identified either La Gondola Ltd. or "La Gondola Ladies Boutique" as the account holder. Cheques issued by State Farm in respect of the claim

were payable to "Elsa Mazzuca". Invoices from various suppliers to the business were issued under one of several names, including "La Gondola Boutique" and "La Gondola".

¶ 11 As part of an office move in 1995, two years after the fire and three years before the statement of claim was issued, the accountants for the clothing and lingerie business shredded various tax returns, financial statements and supporting documents relating to the business. Subsequently, financial statements and tax returns relating to La Gondola Ltd. were located and provided to Silvercreek; however, the source documents used to prepare the financial statements were no longer available due to their earlier destruction. There was no evidence on the record suggesting that this destruction of records occurred other than in the normal course of business.

¶ 12 According to the evidence of Ms. Mazzuca's solicitor, he had no knowledge that Ms. Mazzuca had incorporated the clothing and lingerie business, and was no longer operating it as a sole proprietorship, until after Ms. Mazzuca's examination for discovery in the fall of 1999. While he acknowledged receipt of the relevant policy of insurance, the various proof of loss forms and the adjusters' report commissioned by Ms. Mazzuca, these documents did not indicate that the business was conducted through an incorporated entity. Upon his receipt of the file in 1994, he also received a copy of the accounting report prepared on behalf of the insurer which did make reference to Elsa Mazzuca doing business as "La Gondola Ltd". The file also contained some cheques which showed the incorporated entity as the account holder. He did not receive any of the financial statements for La Gondola Ltd. prior to the discoveries.

THE DECISION UNDER APPEAL

¶ 13 On February 1, 2000, following her examination for discovery the previous fall, the plaintiff brought a motion seeking an order permitting her to amend the statement of claim to substitute La Gondola Ltd. as the named plaintiff, in her stead. Silvercreek brought a cross-motion in late March 2000 seeking an order dismissing the plaintiff's claim, in the event that she was unsuccessful in obtaining an order permitting the requested amendment, on the basis that Ms. Mazzuca had no cause of action against Silvercreek in her personal capacity. The motions judge granted the plaintiff's motion. In consequence, the premise of Silvercreek's cross-motion disappeared.

¶ 14 The motions judge concluded that the error in naming Ms. Mazzuca as the original plaintiff was a misnomer, Silvercreek had not been misled as to the nature of the claim being advanced against it, and it would not be prejudiced by an amendment to correct a simple error by counsel.

¶ 15 Silvercreek argued before the motions judge that it would be significantly prejudiced by the requested amendment because of the destruction in 1995 of various records of the clothing and lingerie business. In particular, Silvercreek argued that the destroyed records would be useful to it because the value ascribed to the business inventory in the financial statements of La Gondola Ltd. was significantly lower than the value placed on the inventory by independent adjusters shortly after the fire. In disposing of this argument, the motions judge stated:

> ... I accept that the destruction of those documents might give rise to prejudice. However, it is prejudice which arose in 1995, prior to the expiration of the limitation period. Therefore, if the action had been commenced in 1998 by La Gondola (rather than by Ms. Mazzuca), the defendant would be in precisely the same position with respect to those documents as it is now. The prejudice contemplated by the Rules is one arising from the amendment sought: Hanlan v. Sernesky (1996), 39 C. C.L.I. (2d) 107 (Ont. C.A.); Lambkin v. Chapeskie (1983), 37 C.P.C. 158 (Ont. Co. Ct.).

¶ 16 On this appeal Silvercreek advanced various arguments in opposition to the requested amendment. It asserted that:

(i) Rules 26.01 and 5.04(2) are procedural in nature, and cannot be interpreted to deprive a litigant of a statutorily conferred right in the nature of a limitation defence;

(ii) the proper characterization of the error in this case was not "misnomer", in the sense of a misnaming of the right party, but rather, was a mistake of naming the wrong party;

(iii) the decision of this court in W.J. Realty Management Ltd. et al. v. Price et al. (1974), 1 O.R. (2d) 501 (C.A.) was binding on the motions judge and required denial of the amendment. In reliance on this case, Silvercreek argued that no substitution of a plaintiff may be made where the originally named plaintiff had no cause of action against the defendant, and must be denied where non-compensable prejudice is made out; and

(iv) in any event, no such amendment may be made after expiry of a limitation period unless the moving party establishes the existence of "special circumstances" warranting the amendment, which were not made out in this case.

¶ 17 I turn now to consideration of these assertions.

ANALYSIS

¶ 18 As noted, the action in this case is framed in negligence. It is common ground between the parties that a six-year limitation period applies. Accordingly, as the fire occurred in early February 1993, the limitation period expired in February 1999. The statement of claim, naming the wrong plaintiff, was issued in June 1998, more than seven months prior to expiry of the limitation period. The motion to amend the statement of claim was brought five months after discovery of the error, and more than one year after expiry of the limitation period. The issue thus arises whether the amendment should be permitted, notwithstanding the expiration of the limitation period, in the circumstances of this case.

(1) The Framework of the Rules

¶ 19 This issue requires consideration of rules 26.01, 5.04(2) and 1.04(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, and related jurisprudence. Rule 26.01, in its current

form, was introduced in 1984. It provides as follows:

> 26.01 On motion 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.

¶ 20 The mandatory character of Rule 26.01 has been recognized on numerous occasions (see, for example, Barker v. Furlotte et al. (1985), 12 O.A.C. 76 (Div. Ct.)), as has the reality that a Rule 26.01 motion necessarily requires a balancing to give effect to the purposes of statutory limitation periods and, at the same time, to the purposes underlying the power of amendment. A useful articulation of this balancing exercise was provided by Bayda C.J.S. of the Saskatchewan Court of Appeal in G. & R. Trucking Ltd. v. Walbaum, [1983] 2 W.W.R. 622 in connection with a similar, although not identical, rule in that province. He stated at 635-636:

> ... The purpose behind the power of the amendment is to correct an injustice that would otherwise ensue as a result of a mistake, often of an informational or procedural nature, and usually made unwittingly and not by the person most likely to suffer, that is, the litigant. The English courts have adopted a conservative, strict, constructionist approach, placing emphasis on the limitation periods. The Canadian courts, on the other hand - particularly as demonstrated in the more recent cases - have sought to balance the two principles of law involved here and have perhaps adopted a more evenhanded approach. In so doing, they have been more lenient in allowing amendments where no real prejudice resulted to the opposite party (apart from the right to rely on the statute of limitations), but at the same time, have been careful not to unfairly attenuate the exacting force of the limitation periods. That approach, in my respectful view, is the right one.

(See also, Dyck v. Sweeprite Manufacturing Inc. and Boehm, [1990] 1 W.W.R. 673; (1989), 62 Man. R. (2d) 250 (C.A.), per Monnin C.J.M. at 677.)

¶ 21 Although reference to Rule 26.01 was made by counsel for both parties on this appeal, emphasis was placed on subrule 5.04(2) which specifically provides for the addition, deletion or substitution of parties in defined circumstances:

> 5.04(2) At any stage of a proceeding the court may by order 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.

¶ 22 Finally, subrule 1.04(1) provides:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

¶ 23 The rule of interpretation established by subrule 1.04(1) provides the basis for a proper

construction of all the other rules. In my view, the combined effect of Rules 26.01, 5.04(2) and 1.04(1), generally, is to focus the analysis on the issue of non-compensable prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance the interests of timely and cost effective justice in civil disputes.

The Inter-relationship of Rules 26.01, 5.04(2) and 1.04(1)

¶ 24 The issue raised on this appeal requires consideration of the inter-relationship of Rules 26.01 and 5.04(2).

¶ 25 Under both rules, a pleadings amendment is not to be made if non-compensable prejudice would result. In contrast to Rule 26.01, however, the language of subrule 5.04(2) imports a discretionary power rather than a mandatory direction. The inter-relationship of the two rules is described in Holmested and Watson, Ontario Civil Procedure, Volume 2 (Carswell: 1993), at 5-34 to 5-35:

> [Subrule 5.04(2)] is part and parcel of the court's broad power of amendment. The general power is found in rule 26.01. The relationship between rule 26.01 and rule 5.04 (2) and the breadth of the amendment power was dealt with in Seaway Trust Co. v. Markle (1988), 25 C.P.C. (2d) 64 (Ont. Master), affirmed (1990), 40 C.P.C. (2d) 4 (Ont. H.C.) (The same threshold test applies to a motion to amend under either rule 26.01 or rule 5.04(2) and the moving party must demonstrate that no prejudice would result from the amendment that could not be compensated for by costs or an adjournment; once this threshold test is met, under rule 26.01 the granting of leave is mandatory; however, where it is sought to add parties under rule 5.04(2) the court has a discretion whether to allow the amendment, notwithstanding that the threshold test is satisfied; the discretion is to ensure procedural fairness and consideration has to be given to such matters as the state of the action, whether the trial is imminent, whether examinations for discovery of all parties have already been held, whether it would be a proper joinder of a new cause of action, whether the purpose in adding a party defendant was improper (such as simply to obtain discovery of the party added), whether the proposed added party was a necessary or proper party, and whether a variety of special rules were observed such as those respecting class actions, representation orders, trade unions, assignees, insurance, trustees, infants, persons under disability, amicus curiae, accrual of the cause of action and limitations). Rule 5.04(2) is subject to common law restrictions regarding adding parties after the expiry of a limitation period. However, it is frequently possible to add parties after expiry if there are "special circumstances" as discussed in Basarsky v. Quinlan, [1972] S.C.R. 380 (S.C.C.), or if the requirements of s. 2(8) of the Family Law Act are met in cases governed by that statute (e.g. Gatterbauer v. Ballast Holdings Ltd. (1986), 9 C.P. C. (2d) 273 (Ont. Div. Ct.)) .... [Emphasis added.]

¶ 26 As suggested in this passage, the amendment authority under both rules is restricted in application to those cases where the prejudice to be occasioned by the amendment is compensable. The difference in language between the two rules, however, suggests that the drafters of the rules intended to preserve for the courts under subrule 5.04(2) a discretion to permit or deny amendments relating to a

change of parties, while the authority under Rule 26.01 was to be further constrained by the language of mandatory direction. It must be assumed, in my view, that this distinction was purposive. [See Note 1 below] That this is so, is confirmed by examination of the development of the two rules.

Note 1: See, for example, Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), [1972] S.C. R. 471 at 477-8 wherein Laskin J. (as he then was) commented:

> "Legislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended". This interpretation of Rules 26.01 and 5.04(2) is also consistent with the rule of statutory interpretation that the drafters of legislation are assumed to avoid stylistic variation, and to strive for uniform and consistent expression. Thus, it was held by the Supreme Court of Canada in Prassad v. Canada (Minister of Employment and Immigration) (1989), 57 D.L.R. (4th) 663 (S.C.C.), that when the legislature wishes to deprive adjudicators of discretion, it does so by giving them an express and mandatory direction. As Driedger points out in his text Driedger On the Construction of Statutes, 3d ed., (Butterworths: 1994), at 170-171, if the legislature is consistent, it will use the same pattern each time it intends this result. Where it does not do so, the legislature must be taken as not having intended to deprive adjudicators of discretion.

¶ 27 Former Rule 132, the predecessor rule to current Rule 26.01, was discretionary in nature. It provided that an amendment "may be made by leave of the court, or of the judge at the trial, ...". In contrast, upon introduction in 1984, Rule 26.01 provided that leave shall be granted to amend a pleading unless non-compensable prejudice would result. The mandatory language of Rule 26.01 thus signalled a change in the general approach to pleading amendments and narrowed the broad discretion previously afforded the courts regarding amendment requests.

¶ 28 The predecessor rule to subrule 5.04(2) similarly was discretionary in nature. Former subrule 136(1) provided:

> 136(1) The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added or, where an action has through a bona fide mistake been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may order any person to be substituted or added as plaintiff.

¶ 29 In 1980, the Civil Procedure Revision Committee, chaired by the late Walter B. Williston, Q. C., reported on proposed comprehensive changes to the rules and recommended that a new rule concerning misjoinder and non-joinder specifically require that leave be given, on such terms as might seen just, when leave to add, delete or substitute a party was sought, unless non-compensable prejudice

would result. [See Note 2 below] The proposed rule ultimately became subrule 5.04(2). When the new rules were introduced in 1984, including Rule 26.01, this recommendation was not acted upon and, in contrast to Rule 26.01, new subrule 5.04(2) was not expressed in mandatory terms.

Note 2: See, Report of the Civil Procedure Revision Committee, Ministry of the Attorney General (Ontario), June 1980, at 15.

¶ 30 In these circumstances, having regard to the legislative history of Rules 26.01 and 5.04(2), I conclude that in motions under subrule 5.04(2) the courts do retain a discretion to deny an amendment in a proper case, even in the absence of non-compensable prejudice, when it is sought to change the parties to a proceeding.

The Relevance of Special Circumstances

¶ 31 As observed by Holmested and Watson, supra, the caselaw reveals numerous instances in which the rules have been utilized in "special circumstances" to permit a change of parties to a proceeding after the expiry of a limitation period. At common law, it has long been settled that in special circumstances pleading amendments may be permitted by the courts notwithstanding the intervention of a limitation period. This possibility was recognized in the early case of Weldon v. Neal (1887), 19 Q.B.D. 394 and subsequent jurisprudence. In an oft-quoted passage from that case, Lord Esher, M.R. stated at 395:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so. [Emphasis added.]

¶ 32 Thus, as a general rule, amendments to pleadings which had the effect of relieving against a limitation period, were not allowed. This did not mean, however, that in every case such amendments were to be denied.

¶ 33 The exception to the general rule, which contemplated the allowing of an amendment in a proper case notwithstanding the intervention of a limitation period, was expressly recognized by the Supreme Court of Canada in Basarsky v. Quinlan, supra, in which Hall J. observed at 385: "The

adjective `peculiar' in the context of Lord Esher, M.R.'s judgment and at the date thereof may be equated with `special' in current usage". This decision, and the undertaking of a special circumstances analysis, have been followed in numerous subsequent cases. In some instances this has occurred in the context of the operation of particular limitation periods where special considerations may apply, or legislative regimes which expressly provide for the extension of time periods established by statute. In other cases, the analysis of special circumstances has been undertaken when a change of parties is sought, as a discretionary matter, under the rules.

¶ 34 In Swain Estate v. Lake of the Woods Hospital (1992), 9 O.R. (3d) 74 (C.A.), leave to appeal to the Supreme Court of Canada refused (1993), 19 C.P.C. (3d) 25 (note) (S.C.C.), this court considered an amendment request to add two defendants after expiry of the relevant limitation period in a negligence action in which damages were claimed for the death of a 14-year-old patient in a hospital. The case turned on consideration of s. 47 of the Limitations Act, supra, and ss. 38 and 17, respectively, of the Trustee Act, R.S.O. 1980, c. 512 (now R.S.O. 1990, c. T.23) and the Health Disciplines Act, R.S.O. 1980, c. 196, and did not involve the interpretation or application of Rules 26.01 and 5.04(2). In that case, the estate of the deceased patient sued the hospital for damages through her administrators, and various family members sought to advance derivative claims under the Family Law Act, 1986, S.O. 1986, c. 4 (now R.S.O. 1990, c. F.3). The requested amendment, which sought to add two physicians as defendants, was held to be statute-barred, but was permitted in any event because of the existence of special circumstances and the absence of prejudice. Arbour J.A., for the court, concluded that in special circumstances the court has a discretion to permit an amendment to add defendants notwithstanding the expiry of a limitation period.

¶ 35 In the earlier case of Deaville v. Boegeman (1984), 48 O.R. (2d) 725 (C.A.), in which this court considered the particular regime set out under the Family Law Reform Act, R.S.O. 1980, c. 152 for extension of limitation periods to permit dependants' relief claims, MacKinnon A.C.J.O. stated with reference to "special circumstances" at 729-30:

> A number of courts have made rather heavy weather out of the meaning of "special circumstances" and have sought to establish conditions or detailed guide-lines for the granting of relief after the expiry of the limitation period. This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion. While it is true that the discretion is not one that is to be exercised at the will or caprice of the court, it is possible to outline only general guide-lines to cover the myriad of factual situations that may arise.

¶ 36 In Swain Estate v. Lake of the Woods Hospital, supra, various special circumstances were held to apply which, viewed cumulatively, supported the plaintiff's entitlement to the pleadings amendment. Arbour J.A. distinguished between cases in which the circumstances fully explained the failure by the plaintiff's solicitors to sue earlier the parties sought to be added by the amendment, from cases in which the evidence suggested that a deliberate decision had been made by the plaintiff's solicitors not to sue the parties subsequently sought to be added. In the first category of case, the establishment of such circumstances would justify a late amendment of the pleadings in contrast to cases in the latter category, where an amendment would be denied. This approach is consistent with earlier judicial decisions. (See, for example, London (City) Commissioners of Police v. Western Freight Lines Ltd., [1962] O.R. 948 (C.A.), which held that the suggestion of a simple error or

misnomer, as explanation for the failure to name the proper party in the first instance, was defeated in the face of evidence of a deliberate selection by the plaintiff's solicitors among potential defendants at the time of the commencement of the proceedings.)

¶ 37 The decision in Swain Estate v. Lake of the Woods Hospital, supra, confirms that where a change of parties to a proceeding is sought, amendment requests are to be assessed with regard both to evidence of actual prejudice to the party opposing the amendment and in light of any special circumstances which may justify the amendment. The absence of the former will not establish the latter. Further, while neither factor alone will be determinative, taken together these features will dictate a principled outcome. Arbour J.A. stated at 85:

> In the present case, the existence of the third party claim against the doctors has provided them with enough notice and exposure to remove any significant prejudice. The doctors have filed a statement of defence to the third party claim, as well as a statement of defence to the statement of claim of the plaintiffs. In the special circumstances of this case, it would be a vindication of form over substance to allow the doctors to defend without being defendants. I wish to stress that no single factor, neither the lack of real prejudice nor any one of the special circumstances of this case, would have in itself sufficed to displace the defendants' entitlement to rely on the limitation period. However, considering all the circumstances, I think that this is a case where the interests of justice are better served by allowing the amendment.

¶ 38 In the subsequent case of Swiderski et al. v. Broy Engineering Ltd. et al. (1992), 11 O.R. (3d) 594 (Div. Ct.), Adams J. expressed the relationship between the absence of proof of prejudice and the establishment of special circumstances, in the following terms at 601:

> In the facts at hand, Justice O'Brien has noted the candid admission of the defendant's counsel that he cannot claim to be prejudiced despite the statement of MacKinnon A.C. J.O. in Deaville v. Boegeman ... that prejudice may be presumed. Nevertheless, in Swain the Court of Appeal did not equate the absence of prejudice with the presence of special circumstances. Rather, both features are generally required although they may overlap in certain respects. There is no automatic right to an amendment simply because the respondent cannot establish prejudice. Were it otherwise, the expiration of a limitation period would never have any reliable consequence.

¶ 39 In the present case, the motions judge stated as follows with respect to the requirement of "special circumstances":

> ... The courts have refused to add parties to an action after the expiry of a limitation period unless "special circumstances" are shown: Swain Estates v. Lake of the Woods, supra; Swiderski v. Broy, supra; Knudsen v. Holmes (1995), 22 O.R. (3d) 160 (Ont. Ct. Gen. Div.). However, the same considerations do not apply to a person who was formally put on notice of a claim and made a party to an action within the limitation period. In my opinion, it is not necessary to show special circumstances in order to substitute a plaintiff for an existing plaintiff when no prejudice is caused by the amendment. However, if special circumstances are required, they exist in this case. [Emphasis added.]

¶ 40 To the extent that this conclusion suggests, in the absence of proof of actual prejudice to a defendant, that generally it will be less difficult to substitute or add a new plaintiff for an originally named plaintiff than might be the case with respect to the addition of a new or different defendant, I agree. However, I respectfully do not agree that proof of special circumstances will never be required absent proof of prejudice when it is sought under subrule 5.04(2) to add or substitute a new plaintiff. In my view, subrule 5.04(2) contemplates that the existence or absence of special circumstances warranting the amendment should be considered as one of the factors to be taken into account in determining whether a discretionary amendment is to be permitted or denied after expiry of a relevant limitation period. There may well be circumstances where, by virtue of the original plaintiff's conduct or the demonstrated knowledge of counsel at the time of the commencement of the proceedings, an amendment under subrule 5.04(2) should be denied.

(4) Overview

¶ 41 The established principles concerning Rules 26.01 and 5.04(2) confirm the continuing importance, as a base consideration, of the issue of actual prejudice in determining applications to amend pleadings, including those designed to add, delete or substitute parties, after the expiry of a limitation period. The centrality of this issue is also confirmed by the express language of Rules 26.01 and 5.04(2) in their current form. Both the related jurisprudence and the rules themselves thus underscore a simple, common sense proposition: that a party to litigation is not to be taken by surprise or prejudiced in non-compensable ways by late, material amendments after the expiry of a limitation period. If such surprise or actual prejudice is demonstrated on the record, an amendment generally will be denied.

¶ 42 At the same time, proof of the absence of prejudice will not guarantee an amendment. Rather, when a change of parties is sought after the expiry of a limitation period, the circumstances of all affected parties should be examined to determine, on the facts of the individual case, whether sufficient special circumstances are present to support the requested amendment. In those cases where leave is sought to add, delete or substitute a new party, the examination of special circumstances involves consideration of the knowledge of both the moving party and her agents at the time of the commencement of the proceedings regarding the proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced.

(5) Silvercreek's Arguments

(i) The Procedural Nature of the Rules

¶ 43 One of the arguments made by Silvercreek raises a threshold issue. This concerns the suggestion that the Rules of Civil Procedure are procedural in nature and cannot be interpreted to displace a limitation period defence conferred by statute. If this is so, it would dispose of this appeal. However, this argument may be dealt with summarily because, in my opinion, the proposition conflicts with the approach followed by the Supreme Court of Canada in Basarsky v. Quinlan, supra, and with that court's decision in Ladouceur v. Howarth, [1974] S.C.R. 1111, discussed in the reasons which follow. Accordingly, it is not well founded, and I reject it.

¶ 44 I note also that in Ontario, in addition to the common law, the Civil Rules Committee is authorized by s. 66 of the Courts of Justice Act, R.S.O. 1990, c. C.43, to make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings even though such rules may alter the substantive law. Further, under s. 66(3), while such rules cannot conflict with a statute, they may supplement the provisions of a statute in respect of practice and procedure. The joinder of claims and parties, and pleadings, are among the specifically enumerated subjects in relation to which the Committee may make such rules. These provisions provide authority for Rules 26.01, 5.04(2) and 1.04. The entirety of the rules are embodied in regulation form.

¶ 45 Accordingly, it is permissible at law for the rules to provide for the addition, deletion or substitution of parties to a proceeding and the circumstances under which such a change of parties is to be permitted.

(ii) The Concept of Misnomer

¶ 46 Silvercreek also asserted that the error in this case was not "misnomer", in the sense of a misnaming of the right party. For this reason, it argued that the requested amendment could not be permitted.

¶ 47 As noted, subrule 5.04(2) provides, in part:

> At any stage of a proceeding the court may by order ... correct the name of a party incorrectly named, ...

¶ 48 This language addresses misnomer situations and, in the absence of non-compensable prejudice, permits an amendment where it was intended to commence proceedings in one name but, in error, the proceedings were commenced in another name. Similarly, this aspect of the subrule may apply in situations where the plaintiff intended to sue one person but, in error, sued the wrong person. Such cases reflect an irregularity in the nature of a misnomer, which may be relieved against in proper circumstances.

¶ 49 This is not a case of misnomer in the narrow sense of a misdescription of the person suing, but rather, is a case of mistake as to the identity of the person who should have brought suit. However, that

does not end the matter. Properly characterized, the motion in this case sought to delete one party to the action and to substitute another. An amendment request for this purpose engages a different aspect of subrule 5.04(2) which need not depend for success on proof of a misnomer in the nature of a misdescription of a party. Stated differently, the power conferred under subrule 5.04(2) to amend a pleading to change parties is not confined to misnomers of the misdescription type. It extends to the power to substitute parties and, as well, to correct in proper cases the naming of a party by mistake. Silvercreek's argument on this ground, therefore, must fail.

(iii) The Decision in W.J. Realty Management Ltd.

¶ 50 Silvercreek relied upon many cases decided prior to the introduction in 1984 of the mandatory language of Rule 26.01. Such cases must be regarded with caution, as they were decided in a different context, when an exclusively discretionary approach to pre-trial amendments governed the balancing exercise made necessary when a pleadings amendment was sought after the expiry of a limitation period.

¶ 51 As noted, Silvercreek argued that the decision of this court in W.J. Realty Management Ltd., supra, was dispositive of the plaintiff's motion, so as to deny amendment of the statement of claim. That case involved a small claims court action for damages for breach of a lease commenced in the name of the corporate manager of the affected property, rather than in the name of the corporate landlord. The relevant section of the Small Claims Court Act, R.S.O. 1970, c. 439, provided for the addition or substitution of a plaintiff, on a discretionary basis, where the wrong person had mistakenly been named as a plaintiff. Relying on the earlier cases of Colville v. Small (1910), 22 O.L.R. 426 (Div. Ct.) and Croll v. Greenhow (1930), 38 O.W.N. 101 (C.A.), among others, the court held that where the original plaintiff had no cause of action, a new plaintiff who was alleged to have a cause of action could not be substituted for the original plaintiff after expiry of a limitation period. Similar results obtained in Turgeon et al. v. Border Supply (EMO) Ltd. (1977), 16 O.R. (2d) 43 (Div. Ct.) and in the more recent case of T.K. Group and Associates v. Wolfe et al. (1998), 21 C.P.C. (4th) 366 (Ont. Gen. Div.), which followed the decision in W.J. Realty Management Ltd., supra.

¶ 52 In a second line of cases, also developed prior to 1984, the courts emphasized the facts known to the plaintiff, or counsel, at the time of the commencement of the proceedings to determine whether the naming of the incorrect plaintiff was the product of deliberate choice or simple, innocent error. In the latter event, the mistake was characterized as a "misnomer" and an amendment was generally allowed. (See London (City) Commissioners of Police v. Western Freight Lines, supra, and Bank of Montreal v. Ricketts et al. (1990), 44 B.C.L.R. (2d) 95 (B.C.C.A.)).

¶ 53 Thus, in Dill v. Alves, [1968] 1 O.R. 58 (C.A.), proceedings were commenced in the name of the operator of a motor vehicle who had not suffered any injuries as a result of an accident, rather than in the name of the operator's father who was actually the injured party. In permitting the requested amendment to allow substitution of the name of the operator's father as plaintiff, this court set out the relevant test at 59:

> ... The test is whether or not the naming of the plaintiff in the writ and proceedings which are sought to be amended was a misnomer. Clearly on the facts here we think it was a misnomer. That it was such and that it was treated as such is clearly indicated we think, by the conduct of the defendant who knew that no claim was being advanced by the son whose name appears in the writ, who negotiated with respect to the injuries of the father, the injured party, and who, knowing that the named plaintiff had no claim, paid into Court moneys with the defence to answer in reality the claims for injury of the father.

¶ 54 No issue concerning the father's status to sue, or the existence of a cause of action personal to him, was considered. Instead, the lack of prejudice to the defendant to be occasioned by the amendment and the evidence establishing that the defendant had not been misled by the error, governed the outcome.

¶ 55 This approach was followed by the Supreme Court of Canada in Ladouceur v. Howarth, supra, a negligence action similar on the facts to those in Dill v. Alves, supra, in which proceedings were commenced in the name of the father, the owner and operator of a motor vehicle who had not sustained injuries in the relevant accident, rather than in the name of the injured son who had been a passenger in the vehicle at the time of the accident. Once again, the analysis centred on the knowledge of both the named plaintiff's solicitor and the defendant concerning the identity of the proper claimant. The record established that the plaintiff's solicitor knew that he did not act for the father and that the son alone had sustained personal injuries. The defendant's insurer, with whom the plaintiff's solicitor had been dealing, also knew this and continued to negotiate for a compromise of the claim notwithstanding the failure to name the son as the original plaintiff. In reliance on the test propounded in Dill v. Alves, supra, the court concluded that the case was a typical example of a misnomer and the defendant had not been misled by the error. In the result, the amendment was allowed under then subrule 136(1) (now subrule 5.04(2)), after expiry of the applicable limitation period although the originally named plaintiff had no cause of action against the defendant.

¶ 56 In the case on appeal, the motions judge considered this caselaw and concluded:

> In the case before me, the action was mistakenly brought in the name of Ms. Mazzuca. This is not a situation in which a conscious decision was made to sue in her name rather than in the name of her company, La Gondola [Ltd.]. It was simply an error. Counsel always intended, and indeed was instructed, to bring the action to recover damages sustained to the business. The defendant always understood that it was the owner of the business who was suing for damages and defended on that basis. Correcting the misnomer has no impact on the defendant. There is no new cause of action being asserted and no new facts are alleged. [Emphasis added.]

¶ 57 I agree with these conclusions by the motions judge. In my opinion, she considered and properly applied the governing principles in her assessment of these issues.

¶ 58 The motions judge also correctly pointed out that the court in T.K. Group and Associates v. Wolfe, supra, does not appear to have been directed to the binding decisions in Dill v. Alves, supra, and

Ladouceur v. Howarth, supra. To this I would add that Ladouceur v. Howarth, supra, although decided some months prior to W.J. Realty Management Ltd., supra, was not reported until the following year. Perhaps for this reason, it was not considered in the latter case.

¶ 59 To the extent that W.J. Realty Management Ltd., supra, established the principle that a new plaintiff, with a proper cause of action, can never be substituted following expiry of a limitation period for an originally named plaintiff who had no cause of action against the defendant, I conclude that the case and those which subsequently followed it were implicitly overruled by the Supreme Court of Canada in Ladouceur v. Howarth, supra. It follows that Silvercreek's assertion that the former case was dispositive of the plaintiff's motion to amend, is not sustainable.

¶ 60 Of continuing interest, however, is the focus in many of these cases on the issue of proof of actual prejudice to the party opposing the amendment. The issue of prejudice to be occasioned by the amendment sought, and the question whether the defendant was misled by an error in the naming of the original plaintiff, drove the decisions in both Dill v. Alves, supra and Ladouceur v. Howarth, supra. The same theme dominated the analysis in T.K. Group and Associates v. Wolfe, supra. In this important sense, there is no inconsistency in the judicial reasoning in these cases. As indicated by Spence J. in Ladouceur v. Howarth, supra, at 1116, referring to the 1950 decision in Williamson et al. v. Headley, [1950] O.J. No. 36, [1950] O.W.N. 185 and quoting Middleton J. in a still earlier case, it has long been recognized that the prime principle in dealing with irregularities in a style of cause (or, in the current terminology, a style of proceedings) concerns evidence, or lack thereof, of prejudice:

> The general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error.

This principle is expressly confirmed by current Rule 26.01 and recognized by subrule 5.04(2).

¶ 61 Cases decided since 1984 have continued to affirm the base requirement of proof of prejudice to support the denial of amendments. Where the evidence establishes that the party to be affected by the amendment has not been misled, and will not suffer non-compensable prejudice other than that occasioned by the inability to rely on the limitation defence, amendments to pleadings have been permitted following the expiry of limitation periods, including amendments designed to add, delete or substitute plaintiffs or defendants. (See Carachi v. World Cheque Control Inc. (1986), 12 C.P.C. (2d) 43 (Ont. Dis. Ct.); Swain Estate v. Lake of the Woods Hospital, supra; Kings Gate Developments Inc. v. Colangelo (1994), 17 O.R. (3d) 841 (C.A.); and Hanlan v. Sernesky, supra).

¶ 62 Many of the cases also emphasize, even absent proof of prejudice to the party to be affected by the amendment, the requirement that the applicant establish special circumstances to support the amendment sought and to displace the opposing party's entitlement to rely upon a limitation period established by statute.

¶ 63 Having found that the decision in W.J. Realty Management Ltd., supra, does not determine the plaintiff's entitlement in this case to the amendment sought, it remains necessary to address the issues of prejudice and special circumstances in this case.

(iv) Prejudice and Special Circumstances

¶ 64 The prejudice alleged by Silvercreek concerns the destruction in 1995 of various records of the clothing and lingerie business. Copies of most, although not all, of the destroyed records were subsequently located or obtained from other sources and provided to Silvercreek. The only outstanding documentation appears to be the source documents relating to La Gondola Ltd.'s financial statements, which were among the documents destroyed in 1995 and which were not subsequently replicated. I agree with the motions judge's conclusion that, although the destruction of the source documents relied upon for preparation of the financial statements conceivably might give rise to some element of prejudice, this prejudice would have existed, in any event, if the action had named La Gondola Ltd. as plaintiff from the outset. I also agree with her observation that had the proper parties been named at the time of the commencement of the action, Silvercreek's position in respect of the missing records would be precisely the same as it is today. This cannot be viewed as prejudice arising from the requested amendment.

¶ 65 The amendment sought is confined to the substitution of La Gondola Ltd. for the named plaintiff, Elsa Mazzuca, and the addition to the statement of claim of a description of the corporate status of La Gondola Ltd. No alteration of the nature of the claim is proposed, no new facts are alleged, no new causes of action are sought to be added, and no new relief is requested. From initiation of the litigation the claim concerned damages allegedly occasioned to the business adjacent to Silvercreek's premises. This would not change under the proposed amendment. Further, Silvercreek's insurer investigated the fire loss and Silvercreek was involved in other actions arising out of the same fire concerning heat and smoke damage to other businesses or tenants in the area. In all of these circumstances, except for the loss of the ability to rely on the limitation period, it cannot be said that Silvercreek would be prejudiced by the proposed amendment, nor can it be said that Silvercreek has been misled or taken by surprise.

¶ 66 The evidence indicated that the plaintiff's solicitor was retained to recover damages for the losses to the clothing and lingerie business sustained as a result of the fire. This was the claim in fact advanced from the beginning. Most of the documents provided to the plaintiff's solicitor upon receipt of the file, including those related to the fire loss claim, made no reference to operation of the business through an incorporated entity. Although some documents made reference to La Gondola Ltd., most did not, and the plaintiff's solicitor was unaware that the business was actually operated through an incorporated entity until he received, for the purpose of the discoveries, the income tax returns of La Gondola Ltd. There is no evidence that the plaintiff's solicitor appreciated, prior to the fall of 1999, the possibility that Ms. Mazzuca's sole proprietorship had been replaced by a corporation, or that he lent his mind to the issue at all before receipt of the tax returns for La Gondola Ltd. On these facts, it cannot be concluded that the plaintiff's solicitor made a deliberate and informed choice among several known alternatives when initiating the proceedings to sue in the name of Ms. Mazzuca in preference to La Gondola Ltd. I see no reason to interfere, therefore, with the view of the motions judge that the error in the present case was a simple and unintentional mistake.

¶ 67 This action was commenced within the relevant limitation period involving Silvercreek in the same capacity as is now proposed and, as observed by the motions judge, "in respect of exactly the same claim." Further, there is no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings or of delaying in any material sense to seek the required amendment once

the need to do so became apparent at the discovery stage. No deliberate and informed decision to refrain from naming La Gondola Ltd. was made, and the company has a cause of action against Silvercreek. Moreover, as some of the damaged inventory was allegedly purchased by Ms. Mazzuca in her personal capacity, it is not clear that the originally named plaintiff did not also enjoy a cause of action against Silvercreek. She is free, of course, not to seek relief in respect of that cause of action, if such exists. In these circumstances, a sufficient explanation has been advanced for the failure to name La Gondola Ltd. in the first instance. Moreover, viewed cumulatively, these factors constitute sufficient special circumstances to justify the proposed amendment in the interests of justice.

¶ 68 In the result, I would dismiss the appeal with costs.

CRONK J.A.
ROSENBERG J.A. -- I agree.

¶ 69 LASKIN J.A.:-- I have read the thorough reasons of my colleague Cronk J.A. I agree with her that this appeal should be dismissed and I agree with most of her analysis. I disagree, however, with two aspects of her reasons: first, her view that "special circumstances" are relevant on a motion under rule 5.04(2) of the Rules of Civil Procedure; and second, her conclusion that it matters whether the plaintiff's mistake was "deliberate" or "unintentional".

1. Special Circumstances

¶ 70 Cronk J.A. concludes that when a plaintiff wants to add a party or substitute one party for another after the expiry of a limitation period, showing an absence of non-compensable prejudice is not enough. The plaintiff must also show that special circumstances are present to justify the amendment. I take a different view. I accept that unlike rule 26.01 which governs motions to amend proceedings, rule 5.04(2) gives the court discretion to refuse to add or substitute a party even absent non-compensable prejudice. But I see no reason to burden that discretion with a "special circumstances" component. Requiring "special circumstances" is unnecessary, contrary to the underlying philosophy of the rules and in some cases may have impose a heavier burden on the moving party than called for by rule 5.04(2). In my view, courts ought to be guided by the principle that ordinarily an amendment should be granted "where the opposite party has not been misled or substantially injured by the error", or in other words, has not suffered prejudice that cannot be compensated for by costs or an adjournment. See Ladouceur v. Howarth, [1974] S.C.R. 1111 at 1116. Although the court still has discretion to refuse the amendment, that discretion should not often be exercised.

¶ 71 The so-called special circumstances test first arose, in the Canadian context, in the Supreme Court of Canada's decision in Basarsky v. Quinlan, [1972] S.C.R. 380. The prevailing philosophy of the day was that the running of a limitation period was an absolute bar to the granting of an amendment to add a new cause of action. That philosophy was reflected in the lower court decisions in Basarsky. The Supreme Court of Canada broke new ground by developing a test - special circumstances - to allow an amendment despite the expiry of a limitation period. [See Note 3 below]

Note 3: The test is drawn from Weldon v. Neal (1887), 56 L.J.Q.B. 621, 19 Q.B.D. 394.

¶ 72 Basarsky v. Quinlan was an action for damages brought by the estate of a man killed in a car accident. The administrator of the estate sought an amendment to his pleading to add a new cause of action, a claim under The Fatal Accidents Act of Alberta, though the two-year limitation period under that statute had expired. The Supreme Court of Canada held that special circumstances justified the amendment. In practice, these special circumstances amounted to a showing that the defendant would not be prejudiced by the amendment. The plaintiff had pleaded all of the facts relevant to the new cause of action, the defendants had admitted liability for the death, and the defendant's counsel had examined the deceased person's widow on matters relevant to a claim under The Fatal Accidents Act.

¶ 73 Under our current rules, the Basarsky v. Quinlan special circumstances test for adding a new cause of action after the expiry of a limitation period has been displaced by the mandatory provisions of rule 26.01. Absent non-compensable prejudice, an amendment must be granted. The special circumstances test has no role to play. Indeed, the current rules reflect quite a different philosophy from their predecessors, a philosophy captured by the general interpretative principle in rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

¶ 74 Thus, when it comes to amendments under rule 26.01, the focus is on whether non-compensable prejudice would result. And, importantly, the mere expiry of a limitation period by itself is not the kind of prejudice that would defeat an amendment. Instead, the court must evaluate prejudice in light of the two main purposes of a limitation period: first, defendants should have a fair opportunity to prepare an adequate defence and at some point should no longer have to preserve or seek out evidence for that defence; and second, at some point defendants should be free of claims that might affect their economic, social or personal interests. See Garry D. Watson, "Amendment of Proceedings After Limitation Periods" (1975), 53 Can. B. Rev. 237 at 272-73.

¶ 75 Take a case where a plaintiff moves to add a new cause of action after the limitation period has expired. If evidence relevant to the new claim was lost before the motion was brought but after the limitation period expired, that loss of evidence might give rise to non-compensable prejudice sufficient to defeat the proposed amendment. Absent this kind of prejudice, however, the motion under rule 26.01 must be granted. If "special circumstances" refers to something more than the absence of non-compensable prejudice, then a plaintiff need not show them. The rule has done away with this requirement.

¶ 76 But several cases, including some decisions of this court, have invoked the need for special circumstances on motions to add or substitute a party. And they have done so not only on motions under provincial legislation like the Family Law Act, but also on motions under rule 5.04(2), no doubt because the legislation and the rule are discretionary not mandatory.

¶ 77 Unquestionably, the judge or master hearing a motion to add or substitute a party under rule 5.04(2) has a discretion to refuse the amendment even where no non-compensable prejudice would result from allowing it. But, imposing a special circumstances requirement needlessly and improperly fetters that discretion, is inconsistent with the philosophy of the current rules and may, as I said earlier, suggest a more onerous burden on the party seeking the amendment than the rule calls for. If precedent matters, it seems to me, respectfully, that what the cases invoking the special circumstances requirement have overlooked is the controlling authority of Ladouceur v. Howarth, supra, and Witco Chemical Co. Canada Ltd. v. Town of Oakville (1974), 43 D.L.R. (3d) 413, both Ontario cases decided by the Supreme Court of Canada.

¶ 78 Ladouceur is discussed by Cronk J.A. in her reasons. In brief, a father and son were in a car accident. The son was injured but the father was not. The son's lawyer mistakenly started the action in the father's name. After the limitation period had expired, the lawyer realized his mistake and brought a motion to substitute the son as plaintiff. The applicable rule, Ontario rule 136(1) gave the court discretion to substitute or add a person as plaintiff "... where an action has through a bona fide mistake been commenced in the name of the wrong person as plaintiff ...". Although the mistake in Ladouceur was bona fide the local master, a high court judge and this court all refused the amendment. The Supreme Court of Canada, however, allowed the appeal and permitted the son to be substituted as plaintiff. Spence J. relied on the following salutary general principle, at p. 1116: "[t]he general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error."

¶ 79 Spence J. did not suggest that the plaintiff had to show "special circumstances". Indeed, the phrase "special circumstances" does not appear in his judgment. Instead, what the Supreme Court of Canada in effect said was that, in general, the court should add or substitute a plaintiff even after the expiry of a limitation period unless the other side would be prejudiced by the amendment. Implicitly, the court found that the discretion to refuse the amendment, absent prejudice, should rarely be exercised.

¶ 80 To the same effect is Witco, where the plaintiff's lawyer did not realize until after the relevant limitation period that his client had amalgamated with another company under the latter's name. Again, Spence J., writing for the court, allowed the amendment, concluding at p. 418 that "the defendants could not have been in any way misled or prejudiced." Again, he made no mention of any need to show special circumstances.

¶ 81 The approach to motions to add or substitute a plaintiff taken by the Supreme Court of Canada in Ladouceur and Witco is a reasonable approach to motions under rule 5.04(2). Indeed, the case for doing so under the current rule is even stronger because it, unlike former rule 136(1), expressly focuses on whether the proposed amendment would prejudice the other side. This approach strikes an appropriate balance between the interests of the plaintiff and the interests of the defendant.

¶ 82 Admittedly in Ladouceur, Spence J. characterized the plaintiff's lawyer's error as a "misnomer" and this characterization influenced the result in that case. But the general principle invoked by Spence J. should apply regardless of how the error is characterized. As Cronk J.A. points out in her reasons, the court's power under rule 5.04(2) is not limited to correcting misnomers.

¶ 83 I would eliminate "special circumstances" from the lexicon for motions under rule 5.04 (2). Absent non-compensable prejudice, these motions should ordinarily be granted. The court retains a discretion to refuse the motion, but that discretion should not be invoked often. Courts should work out when it is appropriate to do so case by case.

2. Deliberate and Unintentional Mistakes

¶ 84 Typically, as was the case here, motions to add or substitute a party after the expiry of a limitation period arise because a lawyer has mistakenly named the wrong plaintiff. In deciding these motions, the case law has distinguished between different kinds of mistakes: between mistaking the correct name of the plaintiff and mistaking who had the right to sue, and between deliberate and unintentional mistakes. It seems to me that these distinctions are problematic, even confusing, and have not been consistently applied. We should be concerned not with the kind of mistake the lawyer has made but with the effect of the mistake, with whether the mistake has prejudiced the defendant.

¶ 85 The courts have regularly granted relief in cases of "misnomer", that is a misnaming of the correct plaintiff. But as Ladouceur demonstrates, they have also granted relief in cases where the wrong plaintiff was chosen, by characterizing that mistake too as a misnomer. I find it difficult to characterize the mistake in Ladouceur - naming the father instead of the son - as a misnomer, but the Supreme Court of Canada was undoubtedly correct in focusing on the effect of the mistake and in finding that it did not prejudice the defence. Moreover, I agree with my colleague that little turns on the distinction between misnaming the right plaintiff and choosing the wrong plaintiff, because in either case the court may grant an amendment under Rule 5.04(2).

¶ 86 However, in deciding whether an amendment should be granted, Cronk J.A. stresses the importance of considering whether the mistake in naming the wrong plaintiff was unintentional or a "deliberate and informed" decision. If the former, presumably the motion to add or substitute a plaintiff will likely succeed; if the latter the motion will likely fail. Although this distinction has been made in other cases, I do not find the distinction helpful and I do not agree that it should dictate the result. Again, the focus should be on the prejudice caused by the mistake regardless of its characterization.

¶ 87 The idea that a deliberate mistake in naming the plaintiff should defeat a motion to substitute the proper plaintiff seems to have originated with this court's decision in Board of Commissioners of Police of Corporation of Township of London v. Western Freight Lines Ltd. and Ulch, [1962] O.R. 948. In that case, a police car was damaged by a car owned by Western Freight. The plaintiff's lawyer started the action for damage to the police car by naming The Board of Commissioners of Police of the Corporation of the Township of London as the plaintiff. After the limitation period had expired, the lawyer discovered that The Corporation of the Township of London owned the police car and that the Board was merely a bailee. The lawyer brought a motion to substitute the Corporation of the Township as plaintiff.

¶ 88 Although the defendant did not suggest that it was misled or prejudiced by the proposed change, a majority of this court refused to allow the amendment. Writing for the majority, Laidlaw J.A. held that the lawyer was aware of the existence of two separate entities and "deliberately" chose the

wrong one as plaintiff. In his view, this was not an error in naming the plaintiff and the proposed amendment could not be characterized as correcting a misnomer. Mackay J.A. dissented. He would have allowed the amendment because the defendant was always aware of the claim and was not misled or prejudiced by the misnaming of the owner of the damaged car.

¶ 89 The result in the Western Freight case gave effect to the technical pleading arguments that at times held sway in this province 30 to 40 years ago. I cannot conceive that a modern court faced with a similar motion under rule 5.04(2) would reach the same result. The dissenting reasoning of Mackay J. A. is surely correct.

¶ 90 Moreover, how can it be said that the lawyer's mistake in Western Freight was in any real sense "deliberate"? He did not deliberately choose to name a plaintiff that had no cause of action. He made a mistake because he did not appreciate which entity, the Board or the Township, owned the car until after the limitation period had expired, a mistake, I might add, that is perhaps understandable. Was his mistake any more deliberate than the mistake in Ladouceur v. Howarth, where the lawyer was aware of the existence of both the father and the son? Or really any more deliberate than the lawyer's mistake in this case in naming Elsa Mazzuca instead of La Gondola Ltd. as the plaintiff because he did not appreciate who owned the business? I would have thought that the answer to these questions is "no". Holding that motions under rule 5.04(2) may turn on whether the lawyer's mistake is deliberate or unintentional is bound to produce some unjust results, results that in my view would be inconsistent with the philosophy of our current rules.

3. This Case

¶ 91 The reasons of the motions judge Molloy J. and of my colleague Cronk J.A. amply demonstrate that substituting La Gondola Ltd. for Elsa Mazzuca would not prejudice the defendant Silvercreek Pharmacy Limited, and no other considerations warrant refusing the amendment. I too would dismiss the appeal with costs.

LASKIN J.A.

QL Update: 20011129
cp/e/nc/qlrme/qldah