

NO. A09-1893

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State of Minnesota  
*In Court of Appeals*

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Metro Building Companies, Inc.,  
*Plaintiff/Respondent,*

vs.

RAM Buildings, Inc.,  
*Defendant/Appellant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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## STATEMENT OF THE ISSUES

- 1. Whether the District Court correctly denied RAM Building, Inc.'s motion to dismiss, which was based solely on the fact that there was a typographical error in Metro Building & Painting Companies' name as it appeared in the original Complaint.**

The District Court correctly denied RAM Building, Inc.'s motion to dismiss, properly rejecting RAM Building, Inc.'s argument that Metro Building & Painting Companies lacked standing or lacked the capacity to maintain this lawsuit based on a typographical error in Metro Building & Painting Companies' name as it appeared in the original complaint.

Most Apposite Authority:

*Johnson v. Soo Line Railroad Co.*, 463 N.W.2d 894 (1990)

*Block v. Voyager Life Insurance Co.*, 303 S.E.2d 742 (Ga. 1983)

Minn. R. Civ. P. 17.01

- 2. Whether the District Court properly exercised its discretion in granting Metro Building & Painting Companies' motion to amend its Complaint to correct the typographical error in its name as it appeared in the original Complaint.**

The District Court properly exercised its discretion to grant Respondent Metro Building & Painting Companies' motion to amend its Complaint to correct the typographical error appearing in its name in the original Complaint.

Most Apposite Authority:

Minn. R. Civ. P. 15.01

Minn. R. Civ. P. 17.01

## STATEMENT OF THE CASE AND THE FACTS

This appeal arises out of the District Court's denial of Appellant RAM Building, Inc.'s ("RAM") motion to dismiss Respondent Metro Building & Painting Companies' ("Metro") original Complaint. RAM's motion, which was converted to a motion for summary judgment because matters beyond the pleadings were considered, was based entirely on a typographical error in Metro's name as it appeared in the original Complaint: the words "& Painting" were missing from Metro's name. The District Court correctly rejected RAM's arguments that this typographical error resulted in Metro lacking standing to bring this action or lacking the capacity to maintain this lawsuit against RAM for breach of contract and negligence arising out of RAM's faulty construction of a horse riding arena. The District Court also properly exercised its discretion in granting Metro's motion to amend its Complaint to correct the typographical error appearing in its name.

On December 11, 2008, Metro commenced this action by serving RAM with a Summons and the original Complaint. (AA1-5.)<sup>1</sup> Plaintiff Metro was identified as "Metro Building Companies, Inc." in the caption and the first paragraph of the original Complaint. (AA2.) These references contained a typographical error. Metro Building's corporate name as registered with the Minnesota Secretary of State is "Metro Building & Painting Companies." (AA18-19.) Metro had also registered the assumed names "Metro Building Companies #1" and "Metro Building Companies #2." (AA19.) Thus, Metro

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<sup>1</sup> "AA \_\_" refers to pages in Appellant's Appendix. "AD \_\_" refers pages in Appellant's Addendum. "RA \_\_" refers to pages in Respondent's Appendix.

had inadvertently omitted the “& Painting” from its corporate name in the caption and first paragraph of its original Complaint, and instead it brought this action under its trade name Metro Building Companies, Inc.<sup>2</sup>

As the District Court correctly noted, the “misdescription of Metro’s name” was the result of “a clerical error.” (AD9.) Importantly, RAM has made “no claim of prejudice in any manner” as a result of this clerical error. (AD9.) Instead, RAM “knew who was suing [it] and why” when it was served with Metro’s Summons and original Complaint. (AD9.) There was absolutely no doubt as to who had sued RAM, the project upon which it had been sued, what Metro’s claims were, and what, if any, defenses RAM may have to those claims. (AD9.) In short, “[t]here was no confusion.” (AD9.)

Metro Building’s substantive claims in its complaint against RAM were for negligence and breach of contract arising from RAM’s defective construction of Manahan Stables’ horse riding arena. (AA2-5.) Metro Building acted as the general contractor in the construction of a riding arena for Krishna Brutoco, one of the named Third-Party Defendants. (AA89, 92-93.) RAM was one of Metro Building’s subcontractors in the construction of the riding arena. (AA89-90.)

After the horse riding arena was completed, Manahan Stables noticed condensation in and around the building’s lighting fixtures and contacted Metro Building. (AA90, 95.) Metro Building engaged the engineering firm Karges-Faulconbridge, Inc., to investigate the problems in the new arena, and Karges-Faulconbridge concluded that

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<sup>2</sup> For example, Metro’s May 8, 2007 correspondence to RAM was written on letterhead bearing Metro’s trade name “Metro Building Companies, Inc.” (AA98) and RAM’s

“the original building design did not provide adequate ventilation to the building.” (AA90, 97.) Metro Buildings notified RAM of the defects. (AA90, 98.) Despite due demand, RAM Buildings unjustifiably failed and wrongfully refused to remedy its defective work or to otherwise pay Metro Building for the costs to repair the same. (AA90, 99.)

In December 2008, Metro Building and Ms. Brutoco agreed that Metro Building would pay for repairs to the arena in exchange for a release of liability of Metro Building by Ms. Brutoco “from all responsibility for my horse barn.” (AA90, 100.) Metro Building then commenced this lawsuit against RAM for breach of contract and negligence to recover its damages and costs to repair RAM Building’s defective work on the horse riding arena. (AA91; 2-5.)

On April 22, 2009, RAM served and filed its motion to dismiss Metro’s original Complaint arguing that Metro lacked standing and capacity to sue based on the typographical error appearing in Metro’s name in the original Complaint. (AA10-20.) In response, Metro requested that RAM agree to stipulate to an amendment to the Complaint to add “& Painting” to the name of Plaintiff in the pleadings. (AA26, 28.) RAM refused to so stipulate. (AA45.) Accordingly, Metro served and filed is memorandum in opposition to RAM’s motion to dismiss. (AA21-25.) Because the District Court considered matters outside the pleadings, the District Court treated RAM’s motion to dismiss as a motion for summary judgment. (AA-8-14); Minn. R. Civ. P. 12.02.

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response to this letter was addressed to “Metro Building Companies, Inc.” (AA99.)

On May 22, 2009, Metro served and filed its motion to amend its Complaint to correct the typographical error in its name as it appeared in the original Complaint. (AA178-179.) Specifically, Metro sought to add “& Painting” to the designation of its name in the caption and first paragraph of the Complaint to correct the typographical error. (AA180-187.) RAM opposed Metro’s motion to amend its Complaint. (AA188-198.) Metro then submitted its reply memorandum of law in support of its motion to amend its Complaint. (RA1-8.)

On May 26, 2009, the District Court, the Honorable P. Hunter Anderson presiding, heard RAM’s motion to dismiss. (AD8.) On July 21, 2009, Judge Anderson heard Metro’s motion to amend its Complaint. (AD8.)

In an Order dated August 28, 2009, and filed September 2, 2009, the District Court denied RAM’s motion to dismiss the Complaint and granted Metro’s motion to amend its Complaint to correct the typographical error appearing in its name. (AD8-14.) In doing so, the District Court noted that Metro’s “corporate name is Metro Building & Painting Companies, not Metro Building Companies, Inc.” as it appeared in the original Complaint. (AD9.) The District Court accurately described this “misdescription of Metro’s name” in the original Complaint as “a clerical error.” (AD9.) The District Court also correctly noted that “RAM makes no claim of prejudice in any manner” as a result of this “misdescription.” (AD9.) In fact, RAM “knew who was suing [it] and why. There was no confusion.” (AD9.)

Accordingly, the District Court noted in its Order that this case “does not deal with changing or substituting parties, rather it deals with the misdescription of Metro’s name”

in the original Complaint. (AD10.) “At all times, RAM knew who was suing it and knew the gravamen of the Complaint. The misdescription of Metro’s name in the caption is merely a clerical error; the type of misnomer under the Rule permitting relation back amendments to the date of filing.” (AD10-11.) Thus, the District Court reasoned that denying RAM’s motion and granting Metro to amend its Complaint would simply allow for correction of this a “misnomer of a party who is actually before the court at all times,” although under a name other than its registered corporate name. (AD11) (quoting *Thune v. Hoka Cheese Co.*, 149 N.W.2d 176, 178 (Iowa 1967)). The District Court rejected RAM’s arguments that the typographical error in Metro’s name resulted in the lawsuit being a nullity. (AD11-12.) Instead, the District Court ruled that when, as is the case here, the defendant knows exactly who is suing it and why, a misnomer in the plaintiff’s name as it appears in the original Complaint may be corrected through amendment to the pleading. (AD10-12.) Therefore, the District Court denied RAM’s motion and granted Metro’s motion to amend the Complaint.

#### **SUMMARY OF ARGUMENT**

The District Court correctly denied RAM’s motion to dismiss Metro’s original Complaint and property granted Metro’s motion to amend the Complaint to correct the typographical error appearing in Metro’s name. Metro has standing and does not lack capacity to maintain this action for breach of contract and negligence by RAM in constructing the horse riding arena. The District Court properly rejected RAM’s arguments to the contrary and properly applied well established Minnesota law allowing

for the correction of misnomers in a party's name by denying RAM's motion and granting Metro's request to amend the Complaint.

## ARGUMENT

### I. Standard of Review.

The District Court reviewed matters outside the pleadings in ruling on RAM's motion to dismiss Metro's original Complaint. Accordingly, the motion was treated as a motion for summary judgment and this Court applies a summary judgment standard of review. See Minn. R. Civ. P. 12.02; *Faegre & Benson, LLP v. R&R Investors*, 772 N.W.2d 846, 856 (Minn. Ct. App. 2009); *Carlson v. Lilyerd*, 449 N.W.2d 185, 187 (Minn. Ct. App. 1989). "The standard of review for summary judgment is whether the [district] court erred in applying the law and whether there are any genuine issues of material fact." *Harbal v Fed. Land Bank of St. Paul*, 449 N.W.2d 442, 446 (Minn. Ct. App. 1989).

This Court reviews the District Court's grant of Metro's motion to amend its Complaint to correct the typographical error in its name as it appeared in the original Complaint under the abuse of discretion standard. *Ag Services of America, Inc. v. Schroeder*, 693 N.W.2d 227, 235 (Minn. Ct. App. 2005). "The district court should liberally grant motions to amend pleadings when justice requires and doing so will not result in prejudice to the adverse party." *Id.*; Minn. R. Civ. P. 15.01. "Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not reverse absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

**II. The District Court Correctly Denied RAM's Motion to Dismiss and Granted Metro's Motion to Amend its Complaint to Correct the Typographical Error Appearing in its Name.**

RAM's arguments that Metro lacks standing and lacks capacity to sue are based entirely on the fact that there is a typographical error appearing in Metro's name in the original Complaint. RAM's theory is that because the "& Painting" was left out of Metro's name as it appeared in the original complaint, "the named Plaintiff is not a natural or artificial person and the suit is therefore a nullity, i.e.[.] the Plaintiff does not exist." (AD10.) However, as the District Court correctly observed, "this argument assumes its conclusion and is therefore fallacious" for numerous reasons. (AD10.)

First, RAM's argument ignores well settled Minnesota law that "a civil action is generally commenced when personal service is made upon a defendant as prescribed by law," and that the district court "acquires jurisdiction—even though an amendment might be necessary to correct a defect—if the Summons fully informs the defendant of the nature of the claims." *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 643 (Minn. Ct. App. 2004) (citing *Doerr v. Warner*, 247 Minn. 98, 76 N.W.2d 505, 511 (1956)); *Nelson v. Glenwood Hills Hospital*, 240 Minn. 505, 513, 62 N.W.2d 73, 78 (1953). It is the substance, not the form, that matters when commencing litigation. As the Minnesota Supreme Court explained in *Nelson*, under Minnesota Rule of Civil Procedure 15.01:

If service of summons and complaint results in an intended defendant being fully informed as to the circumstances of the action, the court has acquired sufficient jurisdiction over that defendant, even though an amendment is necessary to correct a misnomer. Under this rule, an

amendment to a complaint or petition setting up no new cause of action will relate back to the commencement of the action, and where plaintiff's amendment merely restates his original cause of action, a plea of limitations cannot be interposed thereto.

*Nelson*, 240 Minn. at 513-14, 62 N.W.2d 78-79.

This Court applied this logic in *Save Our Creeks* and held that service a summons and complaint on behalf of a corporation that are not signed by an attorney are still sufficient to both properly commence a lawsuit and is sufficient for the district court to acquire jurisdiction over the action, despite the fact that all corporate entities are required to be represented by counsel in Minnesota state court proceedings. 682 N.W.2d at 643-46.

There can be no dispute here that the Summons and original Complaint meet these minimum requirements—RAM was fully informed of the nature of Metro's claims against it because, as the District Court properly noted, RAM knew who was suing it and why. Thus, contrary to RAM's claims, the District Court acquired jurisdiction over this action when Metro commenced this lawsuit by properly serving RAM with the Summons and original Complaint, despite any typographical error in the name of the plaintiff. The lawsuit was not a "nullity"; it was a properly commenced action. And Metro did not lack standing because Metro had clearly been injured in fact by RAM's breach of contract and negligent construction.

Thus, when a complaint is commenced with a typographical or clerical error, as occurred here, the District Court is not stripped of jurisdiction. Instead, Minnesota law allows for the correction of a misspelling or misdescription of an intended party—a

“misnomer”—in a party’s name by liberally allowing the amendment of pleadings to correct such a misnomer. *See, e.g., Johnson v. Soo Line Railroad Co.*, 463 N.W.2d 894, 896 (1990). The Minnesota Supreme Court explained in *Johnson* that “the common law is well settled that ‘misnomers’ may be corrected *nunc pro tunc* notwithstanding the correction is made after the statute of limitations has expired.” 463 N.W.2d at 896 (citing *Nelson v. Glenwood Hills Hospital, Inc.* 240 Minn. 505, 62 N.W.2d 73 (1953); *Wise v. Chicago, B. & O. R.R. Co., Relief Dept.*, 133 Minn. 434, 158 N.W. 711 (1916)). Thus, although typographical errors in court documents may be common, they are not fatal under Minnesota law. *See e.g. Stein v. Kelly*, 173 Minn. 613, 614, 216 N.W. 792, 793 (1927). A mistake in a complaint that is “so clearly a mistake” merits no notice. *Id.* (mistake in complaint as to the year the bond was excused).

This Court has previously rejected a “form over substance” argument similar to RAM’s argument in the case of *In re the Marriage of Clark*, 2002 WL 1751179 (Minn. Ct. App. July 30, 2002). In *Clark*, a child support magistrate mistakenly named a Richard W. Clark as the respondent in the caption, rather than Richard N. Clark, the actual child support obligee. This Court found the mother’s argument that the child support magistrate erred and named a fictitious party was “pointless, frivolous, and without merit.” *Id.*

Like the Mother in *Clark*, RAM attempts to argue that Plaintiff lacks standing or the capacity to sue because “Metro Building Companies, Inc.” is not a natural or artificial entity. There is no question that RAM knows Metro is an artificial entity that has the capacity to sue. Indeed, this is evidenced by the Secretary of State Entity Search RAM

submitted in support of its motion to dismiss to the District Court. The first name on the list is Metro's registered corporate name, "Metro Building & Painting Companies." (AA19.) This entity has the same registered street address as that asserted for Metro in the original Complaint. Again, RAM has always known who has sued it and why. This Court should reject RAM's form over substance arguments as it did in *Clark*.

RAM's form over substance arguments also ignore Minnesota's well settled policy that cases should be decided on their merits rather than on technical pleading rules. This Court and the Minnesota Supreme Court have repeatedly held that cases should be decided on the merits rather than on technicalities, and that rules governing service of process should be liberally construed to avoid depriving a litigant of its day in court. *See, e.g., Pederson v. Clarkson Lindley Trust*, 519 N.W.2d 234, 235 (Minn. Ct. App. 1994); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (it is contrary to the spirit of the rules of civil procedure for a decision on the merits to be avoided on the basis of technicalities). As this Court explained in *Save Our Creeks*, "technical defects [in pleadings] are not grounds for dismissal unless the adverse party is substantially prejudiced." 682 N.W.2d at 644 (citing *Becker v. Montgomery*, 532 U.S. 757, 767 (2001)). Accordingly, in *Save Our Creeks*, this Court expressly rejected an argument that dismissal of a complaint was required when it was not signed by an attorney because such dismissal "would also contravene the policy favoring adjudication of cases on the merits." 682 N.W.2d at 645.

RAM's argument further ignores the fact that courts in many other jurisdictions have held that a plaintiff's complaint may be amended to correct a misnomer appearing in

the plaintiff's name. See, e.g., *Block v. Voyager Life Insurance Co.*, 303 S.E.2d 742, 744 (Ga. 1983); *Weeks Grain & Livestock Co. v. Ware & Leland*, 155 N.W. 233, 234-35 (Neb. 1915). The Georgia Supreme Court has expressly held that "where the party plaintiff named in a complaint is not a legal entity but is reasonably recognizable as a misnomer for a legal entity which is the real party plaintiff, the misnomer may be corrected by amendment," and the lower court's "holding that the action is void and a nullity" was reversed. *Block*, 303 S.E.2d at 744.

In *Block*, two lawsuits were brought in the name of the "Estate of Frank G. Bagley" as plaintiff against the Voyager Life Insurance Company seeking to recover the proceeds of two credit life insurance policies. The Georgia Court of Appeals reversed a ruling in favor of plaintiff, noting that, under Georgia law, an estate was not a legal entity which could be a party plaintiff to a legal proceeding and that therefore each lawsuit was "mere nullity, and therefore, with no party plaintiff, there is no case in court, and consequently nothing to amend by" when the plaintiffs sought to amend their complaint to name the proper party, the named personal representative. *Id.* at 743. Thus, the Georgia Court of Appeals essentially applied the same rule as sought by RAM in this appeal.

However, the Georgia Supreme Court reversed the Court of Appeals, noting that under Georgia Civil Act, which contained a provision identical to Minnesota Rule of Civil Procedure 17, a complaint may be amended to substitute the real party in interest for an incorrectly named plaintiff. *Id.* at 743-44. In doing so, the Georgia Supreme Court noted that "the pleadings are not an end in themselves but only a method to assist in

reaching the merits of the case” therefore “court shall construe the pleadings as to do substantial justice.” *Id.* (internal citations and quotations omitted.) The court also stressed that the defendant would suffer no prejudice from this amendment because the defendant life insurance company knew at all times who was suing it and on what basis—that the claims were brought on behalf of the deceased individual seeking recovery on the credit life insurance policies. Therefore, there was no basis to disallow any amendment based on any claimed prejudice since defendant could not show any prejudice. The holding and logic of *Block* should be applied here to uphold the District Court’s Order and reject RAM’s arguments.

Similarly, in *Weekes Grain & Livestock Co., et al, v. Ware & Leland*, 155 N.W. 233 (Neb. 1915), the Nebraska Supreme Court held that a plaintiff could amend its complaint after the action was originally started in the name of a corporation whose corporate charter had been dissolved. The Court allowed the pleadings to be amended to name certain of the managing directors and trustees of the defunct corporation to be substituted as plaintiffs. 155 N.W. at 234-35.

Many other courts have also recognized that an action may be commenced by or brought against a corporation using a name under which the corporation transacts business. For example, in *Davis v. Tex-O-Kan Flour Mills Co.*, 186 F.2d 50 (5th Cir. 1950), the Fifth Circuit held that it is well established that a corporation can bring a lawsuit under its assumed name. Similarly, in *Hy-Grade Inv. Corp. v. Robillard*, 196 So.2d 558, 560 (La. App. 1967), the fact that the suit was filed in the name of Hy-Grade Investment Corp. instead of Hy-Grade Investment, Inc. was not fatal to the suit where the

identity of the corporation was shown and the defendant was not misled. Likewise, in *Sam's Wholesale Club v. Riley*, 527 S.E.2d 293, 296 (Ga. App. 1999), the Court held a corporation could sue or be sued under its trade name. Under all of these cases, the courts held that a corporation may be sued under a trade name or assumed name as long as the defendant is not misled by who is bringing the suit. Of course, in this appeal, RAM has not been misled by who is bringing the lawsuit—RAM has always known who was suing it and why.

Many secondary authorities also recognize that a lawsuit may be brought by or against a corporation using a name under which it transacts business rather than its registered name. See *9A Fletcher Cyc. Corp.*, § 4494.50 (2009) (“A suit by or against a corporation generally may be brought under the name in which it transacts business, including an assumed, fictitious or trade name.”); *59 AmJur 2d, Parties*, § 414 (2009) (“Indeed, courts generally permit amendments to give the real name of a party suing or being sued under a trade name, whether individual or corporation.”).

There are, of course, many good reasons for these straightforward rules allowing lawsuits to be commenced under the names used by corporations to do business, rather than dismissing such actions because of clerical errors appearing in the name of a corporate party. As the South Carolina Court of Appeals observed, “a corporation may be known by several names in the transaction of its business,” and therefore “a misnomer of a corporation” may be corrected by an amendment of the pleadings. *Griffin v. Capital Cash*, 423 S.E.2d 143, 146 (S.C. Ct. App. 1992). Such a misnomer in a corporation’s name “does not invalidate the process or the judgment where the misnomer causes the

corporation no prejudice.” *Id.* This is based on the following obvious, but important, principle:

A suit at law is not a children’s game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it named them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

*Id.* (internal quotation omitted.)

Here, Metro has done business under the name Metro Building Companies. Indeed, Metro Building Companies #1 and Metro Building Companies #2 are assumed names registered by Metro. Metro conducted its business with RAM under its assumed name. As the District Court correctly noted, there is absolutely no confusion as to the identity of the Metro. RAM knew who was suing and why. As such, the original Complaint is not a nullity and Metro’s request for leave to amend the Complaint was properly granted by the District Court.

Even if Metro Building Companies was not an assumed name or was unable to sue under its assumed name, the inadvertent omission of “& Painting” in Metro’s name in the original Complaint did not prohibit the amendment of the Complaint to correct the clerical mistake. Pursuant to Minn. R. Civ. P. 15.01, a party may amend its pleading at any time by leave of Court and “leave shall be freely given when justice so requires.” *See Crum v. Anchor Casualty Co.*, 264 Minn. 373, 384, 199 N.W.2d 703, 710 (1963) (noting that “[u]nder our modern system of pleading and practice, the amendment of pleadings is liberally allowed even after judgment has been entered”). The overriding

consideration in determining whether to grant leave to a party to amend its pleading is the prejudice that may result to the other party, if any. *McDonald v. Stonebraker*, 225 N.W.2d 817, 830 (Minn. 1977) (holding that “burden of proving prejudice is on the objecting party”). RAM suffered no such prejudice here, and the District Court properly granted the motion to amend Metro’s Complaint.

RAM argues that Minn. R. Civ. P. 15.03 does not allow relation back in this case because a lawsuit was not properly commenced. RAM is wrong. Initially, Rule 15.03 expressly allows for the relation back of all amendments which arise out of the same conduct, transaction, or occurrence set forth in the original complaint, unless the party against who the claim is asserted is changed. Minn. R. Civ. P. 15.03 (“Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”) Here, there was no change in the party against whom Metro was asserting its claims—RAM was the defendant in the original Complaint and remained so for the amended Complaint. Thus, Rule 15.03 does not bar the amendment; it allows it.

Further, even if Rule 15.03 applied, it only prevents the amendment if the error in the initial complaint has substantially prejudiced the defendant. Mistakes and irregularities in the form of the summons or other process may be readily corrected unless “it clearly appears that substantial rights of the person against whom the process issued would be prejudiced thereby.” *Tharp v. Tharp*, 36 N.W. 1, 2 (Minn. 1949) (construing statute prescribing contents of summons liberally “to avoid defeating an action on

account of technical and formal defects which could not reasonably have misled or prejudiced the defendant”); *Schultz v. Oldenburg*, 277 N.W. 918, 921 (Minn. 1938.) (providing that “a summons in a civil action may be amended upon proper application”); *Save Our Creeks*, 682 N.W.2d at 644-46 (technical defect in a summons or complaint is not a fatal defect and is not grounds for dismissal unless the adverse party is substantially prejudiced.) In the absence of prejudice to the opposing party, any technical defects are amendable.

The original Complaint in this case notified RAM that it had been sued by Metro under the theories of negligence and breach of contract due to RAM’s failure to construct the horse arena free from construction defects. There is absolutely no confusion as to the identity of the plaintiff—Metro sued RAM under the same name that it used when it conducted its business with RAM. Additionally, the summons correctly notified RAM that it was required to answer or judgment would be entered against it. The summons and complaint were sufficient to commence an action against RAM. Thus, using its assumed name did not prejudice RAM and is, therefore, correctable by amendment under Minn. R. Civ. P. 15.03.

The only cases cited by RAM where a summons or complaint were fatally flawed were ones where the documents failed to notify a defendant of his statutory rights, i.e., were prejudicial to the defendant. *See, e.g., Tharp*, 36 N.W. 1 (summons is fatally defective if it fails to inform the defendant of his statutory right to serve and file an answer within 20 days.) The majority of the other cases cited by RAM hold that a minor defect in the complaint (*i.e.* one that is not prejudicial to the defendant) is amendable.

*Save Our Creeks*, 682 N.W.2d 639 (the lack of an attorney's signature on a pleading is not fatal when no doubt exists about the nature of the claims and the theory on which the claims are based); *Gifford v. Bowling*, 200 N.W.2d 379 (S.D. 1972) (the lack of an attorney's signature on a pleading is a defect that can be remedied). As stated above, there is no prejudice to RAM and thus, Metro's complaint is amendable.

RAM's attempt to liken this case to cases brought under the wrongful death act is incongruous. RAM cites *Ortiz v. Gavenda*, 590 N.W.2d 119, 123 (Minn. 1999), in support of its position that the original complaint is a nullity. *Ortiz*, however, is distinguishable from this case. In *Ortiz*, the Minnesota Supreme Court held that a wrongful death suit will not relate back if the plaintiff fails to commence the action as a court-appointed trustee within the statutory time limit. Unlike the wrongful death act, which requires the appointment of a trustee as a condition precedent to filing a wrongful death action, Metro's breach of contract and negligence claims do not require a company to be incorporated as a condition precedent to filing suit. In the wrongful death act, it is the appointment of the trustee that forms the legal capacity for a successor of the deceased to bring or to continue the action for wrongful death. The successor is not the real party in interest until he or she is appointed as trustee. That is not the case here—Metro has always been the plaintiff and has always had the capacity to sue. As such, the wrongful death act cases do not apply and Metro's motion to amend was properly granted by the District Court.

Finally, RAM's argument completely ignores the plain text of Rule 17 of the Minnesota Rules of Civil Procedure which expressly allows the very amendment to the

original Complaint allowed by the District Court. Rule 17.01 provides: "Every action shall be prosecuted in the name of the real party in interest. ... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party of interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; a such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Minn. R. Civ. P. 17.01. Thus, Rule 17.01 forbids an action from being dismissed on the ground that it is not prosecuted in the name of a real party in interest until a reasonable time has been allowed to ratify, join, or substitute the real party in interest. Minn. R. Civ. P. 17.01.

The record here establishes that, immediately upon learning of the typographical error by way of RAM's motion to dismiss, Metro's counsel sent RAM's counsel a proposed Stipulation to Amend the Complaint, correcting the caption and paragraph one of the Complaint to add "& Painting" to Metro's name. Defendant failed to respond to Plaintiff's request. Accordingly, the District Court correctly denied RAM's motion to dismiss and granted Metro's motion to amend the complaint because Metro immediately attempted to correct the error so that the real party in interest was asserting the claims for breach of contract and negligence against RAM. This result was correct under Rule 17.01, and this Court should affirm the District Court's Order.

### CONCLUSION

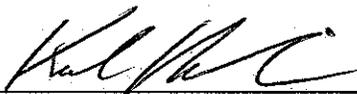
For the reasons set forth above, Metro Building respectfully requests that this Court affirm the District Court's Order denying RAM's motion to dismiss Metro's

Complaint and granting Metro's Motion to amend the Complaint to correct the typographical error appearing in Metro's name.

Respectfully submitted,

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Dated: December 14, 2009

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## CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,387 words. This brief was prepared using Microsoft Word 2003.

**HELLMUTH & JOHNSON, PLLC**

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