

NO. A09-1893

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State of Minnesota  
**In Court of Appeals**

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Metro Building Companies, Inc.,

*Respondent,*

vs.

RAM Buildings, Inc.,

*Appellant.*

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REPLY BRIEF OF APPELLANT RAM BUILDINGS, INC.

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## SUMMARY OF ARGUMENT

In order for a court to obtain jurisdiction, the named plaintiff must exist; it must be a natural or artificial person. If the plaintiff is neither, it will lack standing and the court will lack jurisdiction. Absent jurisdiction, a court is powerless and the lawsuit is a nullity.

Corporations are artificial persons which have no existence other than that which the legislature confers. Corporate existence is, by its very nature, a creature of formalities. When those formalities are not observed the artificial entity has no existence at all.

In our case, the named plaintiff is neither a natural nor an artificial entity, which deprived the district court of jurisdiction. Instead of dismissing plaintiff's lawsuit for lack of standing, the district court allowed an existing entity to be substituted for a nonexistent entity plaintiff to "cure" a fatal jurisdictional defect after the statute of limitations had expired. In doing so, the district court clearly erred in its application of law.

## ARGUMENT

### **I. THE DISTRICT COURT DID NOT OBTAIN JURISDICTION OVER THE NON-EXISTENT CORPORATE PLAINTIFF WHEN DEFENDANT WAS SERVED WITH A SUMMONS AND COMPLAINT.**

The following facts are undisputed:

- "Metro Building Companies, Inc." is not a corporation and has never existed.
- RAM raised Metro's lack of standing and capacity in a timely manner.
- The statute of limitations has expired on Metro's claims.

- The language of Minnesota Statute § 302A.161, subd. 3 is clear and unambiguous.
- Pursuant to the clear and unambiguous language of Minnesota Statute § 302A.161, subd. 3, if a corporation elects to commence a lawsuit, it must do so in its corporate name. Minn. Stat. § 302A.161, Subd. 3 (AD.1-6);
- In its Complaint, Metro erroneously alleged that the named plaintiff was an existing corporation;
- In its Answers to Interrogatories, Metro erroneously stated under oath that the named plaintiff was an existing corporation.

*See* Respondent's Brief.

Despite these concessions, and for the first time on appeal<sup>1</sup>, Metro argues that the district court allegedly had jurisdiction over the non-existent corporate plaintiff, because RAM was served<sup>2</sup> with a summons and complaint. *See* Respondent's Brief p. 9. Such an argument is legally unsupported and, if accepted, would reverse over 100 years of jurisprudence and rewrite Minnesota corporate law.

First, Metro argues that the district court had jurisdiction over the non-existent corporate plaintiff based on the *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639 (Minn. App. 2004), *Nelson v. Glenwood Hills Hospital*, 240 Minn. 505, 62 N.W.2d 73 (1953), and *In re the Marriage of Clark*, 2002 WL

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<sup>1</sup> Because these arguments were not presented to the district court, they should not be considered on appeal. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666 (Minn. 2001).

<sup>2</sup> RAM does not concede that it was properly served, because the lawsuit was commenced by a non-existent corporate entity and therefore was a nullity.

1751179 (Minn. App. July 30, 2002) decisions<sup>3</sup>. These cases clearly do not support that position.

In *Save our Creeks*, the Minnesota Court of Appeals held that a complaint signed by a non-lawyer on behalf of an existing corporation was a curable non-jurisdictional defect. *Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 641 (Minn. App. 2004). Unlike our case, the named plaintiff in *Save our Creeks* was an existing corporate entity. This fact was very important to the Court of Appeals' analysis:

Unlike the wrongful death act, which requires the appointment of a trustee as a condition precedent to filing an action, Minn. Stat. § 116D.04, subd. 10, does not require that a corporation be represented by counsel as a condition precedent for bringing a declaratory judgment action challenging the denial of an environmental-impact statement. Unlike the appointment of a trustee in the context of a wrongful-death action, the signature requirement is a common-law requirement and has no bearing on the validity of an action under Minn. Stat. § 116D.04, subd. 10.

The fundamental difference between the wrongful-death cases and this case is that in wrongful-death cases, it is the appointment of the trustee that forms the legal capacity for a successor of the deceased to bring or continue the action for wrongful death. Minn. Stat. § 573.02, subs. 1, 3 (2002). A corporation, in contradiction, is an existing entity with a legal capacity to sue and be sued. Minn. Stat. § 302A.161, subd. 3 (2002). Thus the absence of an attorney's signature on a pleading is a failure of agency not an absence of an entity.

*Save Our Creeks v. City of Brooklyn Park*, 682 N.W.2d 639, 648 (Minn. App. 2004). (Emphasis Added).

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<sup>3</sup> Unpublished decisions are of no precedential value. Minn. Stat. § 480A.08, subd. 3(c); *see also Vlahos v. R & I Constr.*, 676 N.W.2d 676 n.3 (Minn. 2004).

Because the error was one of agency, and because the named plaintiff was an existing corporate entity, the Minnesota Court of Appeals found that the district court did not err in allowing the complaint to be amended after the statute of limitations had expired. *Id.*

Unlike the *Save Our Creeks* decision, in our case the named plaintiff is a non-existent entity, which deprived the district court of jurisdiction to allow a new plaintiff to be added after the statute of limitations had expired. Had the plaintiff entity lacked “the legal capacity...to bring or continue the action” there is no doubt that *Save Our Creek* would have reached an entirely different result.

The *Nelson* decision is simply irrelevant; it does not support Metro’s position at all. In *Nelson*, the Minnesota Supreme Court held that a misnomer in the corporate name of a defendant can be amended after the statute of limitations has expired:

...[W]here there is a misnomer as to the corporation to be named as defendant and where the officer of the named defendant on whom a summons and complaint is served is also the officer of the intended defendant corporation who would ordinarily be served, it has been held that the intended corporation-defendant has received actual notice of the claim which service of the summons and complaint intended to impart and that the misnomer can should be corrected by an amendment naming the one intended to be sued as defendant in place of the one actually named as such, subject to such necessary safeguards as will enable the corporation to substitute as defendant to prepare and assert its defense to the claim.

*Nelson v. Glenwood Hills Hospital*, 240 Minn. 505, 514, 62 N.W.2d 73, 79 (1953). (Emphasis Added).

The issue in our case isn't notice, it is standing to sue and the capacity to sue and be sued. A non-existent corporate entity lacks that standing and capacity. Where standing is the issue jurisdiction is at stake, a consideration *Nelson* never addressed. Therefore, the *Nelson* decision is not controlling and is irrelevant to the issues here.

Even if the unpublished *Clark* decision was precedential it would be equally irrelevant. In *Clark*, after hearing a motion to modify a child support obligation, the district court used the wrong middle initial in the obligee's name on its order ("Richard W. Clark" instead of "Richard N. Clark"). The Minnesota Court of Appeals found that the error in the order could be cured pursuant to Minn. R. Civ. P. 60.01.

Unlike the *Clark* case, we are not dealing with a wrong middle initial on an order issued in a case over which the court indisputedly had jurisdiction. We are dealing with no jurisdiction at all. As such, the *Clark* decision has no bearing on the issues on appeal here.

Clearly, the *Save Our Creek*, *Nelson*, and *Clark* decisions do not support Metro's position that the district court had jurisdiction over the non-existent corporate plaintiff. In fact, as discussed above, if anything these decisions actually provide further support for RAM's appeal. Simply put, Metro has failed to produce any binding precedent to support its position. Moreover, if this Court finds that a district court has jurisdiction over a non-existing corporate plaintiff after the statute of limitations has expired, the repercussions will be monumental.

For over a hundred years, a party had to be a natural or artificial person to be entitled to sue in Minnesota. *St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37*, 94 Minn. 351, 357, 102 N.W. 725, 726 (1905).

In Minnesota, it always has been the rule that unless a lawsuit is brought in the name of a natural or an artificial person it is a nullity. *I.R. Galob v. Sanborn*, 281 Minn. 58, 61, 160 N.W.2d 262, 265 (1968); *J.C. Peacock, Inc. v. Hasko*, 184 Cal.App.2d 142, 7 Cal.Rptr. 490, 496 (1960).

In Minnesota, a corporation is considered an artificial person and a creature of statute. *Di Re v. Central Livestock Order Buying Company*, 246 Minn. 279, 283, 74 N.W.2d 518, 523 (1956). As a creature of statute, a corporation has only the powers and capacities expressly granted to it by law. *In re Trusteeship of First Minnesota Trust Co. v. First Minneapolis Trust Co.*, 202 Minn. 187, 194, 277 N.W. 899, 903 (1938). In Minnesota Statute Section 302A.161, the Minnesota Legislature listed the powers specifically granted to Minnesota corporations. Minn. Stat. § 302A.161. (AD.1-5). In subdivision 3 of this statute, Minnesota corporations were given strict guidelines to follow in order to have standing and capacity to sue and be sued:

A corporation may sue and be sued, complain and defend and participate as a party or otherwise in any legal, administrative, or arbitration proceeding, **in its corporate name.**

Minn. Stat. § 302A.161, Subd. 3. (Emphasis Added). (AD.1)

Commencing a lawsuit in the corporate name is not a recent requirement, but has long been the rule in Minnesota:

A corporation is a **distinct entity** from its stockholders. All corporate powers, franchises, and rights are vested in the corporation and not in the stockholders. **Among such powers is that of suing and defending in its corporate name.**

*Singer v. Allied Factors*, 216 Minn. 443, 445, 13 N.W.2d 378, 380 (1944).

(Emphasis Added).

A judicial decision conferring jurisdiction over a plaintiff that is a non-existing corporate entity after the statute of limitations has expired is an unprecedented misappropriation of legislative authority that cannot be allowed to stand.

**II. THERE IS NO MINNESOTA PRECEDENT FOR THE SUBSTITUTION OF A NON-EXISTENT CORPORATE PLAINTIFF FOR AN EXISTING CORPORATION AFTER THE STATUTE OF LIMITATIONS HAS EXPIRED.**

Without coming right out and saying it, Metro concedes that there is no Minnesota authority that allows the substitution of an existing corporate plaintiff for a non-existing one after the statute of limitations has expired. *See* Respondent's Brief. Instead, Metro argues that decisions from foreign jurisdictions provide the district court with authority. *See* Respondent's Brief pp. 11-13; *see also Block v. Voyager Life Insurance Co.*, 303 S.E.2d 742 (Ga. 1983) and *Weeks Grain & Livestock Co. v. Ware & Leland*, 155 N.W. 233 (Neb. 1915). These cases, in fact, are fundamentally different from our case on appeal.

In *Block*, the Georgia Supreme Court had to decide whether, under Georgia's Civil Practice Act, a legal entity can be substituted for a plaintiff which is not a legal entity. *Block v. Voyager Life Insurance Co.*, 303 S.E.2d 742, 743

(Ga. 1983). The court held that, because the defendant never questioned the named plaintiff's standing or capacity until after summary judgment was granted, and because the defendant had no objection to the substitution, the existing legal entity could be substituted as plaintiff. *Id.* at 744. There is no such waiver in our case.

Unlike the defendant in *Block*, it is undisputed that RAM raised Metro's lack of standing and capacity on a timely basis. *See* Order (AD.8). Unlike the plaintiff in *Block*, Metro sought substitution after the statute of limitations had run. Unlike the defendant in *Block*, RAM has never stipulated to any substitution. And unlike *Block*, there is no Minnesota statutory or legal authority that allows a non-existent corporate plaintiff to be substituted for an existing corporate plaintiff after the statute of limitations has expired. For these reasons, *Block* is not even persuasive authority.

In *Weeks Grain*, the Nebraska Supreme Court held that a corporate plaintiff whose charter had been forfeited for nonpayment of a required fee could be substituted for its managing officers pursuant to the following Nebraska Code provision:

The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case.

*Weeks Grain & Livestock Co. v. Ware & Leland*, 155 N.W. 233, 234 (Neb. 1915) (*citing* Rev. St. 1913, § 7712). Unlike the plaintiff in *Weeks Grain*, "Metro

Building Companies, Inc.” never existed. Unlike the plaintiff in *Weeks Grain*, Metro sought substitution after the statute of limitations had run. And unlike *Weeks Grain*, there is no Minnesota statutory or legal authority that allows a non-existent corporate plaintiff to be substituted for an existing corporate plaintiff after the statute of limitations has expired. Like *Block*, *Weeks Grain* is irrelevant.

Metro has completely failed to produce any binding or persuasive authority that would allow the district court to substitute an existing corporate plaintiff for “Metro Building Companies, Inc.” (a non-existent corporate entity) after the statute of limitations has expired. Therefore, the district court clearly erred in its application of law when it allowed such a substitution.

**III. THE NAMED PLAINTIFF IS NOT AN ASSUMED NAME, COULD NOT BE AN ASSUMED NAME, AND THERE IS NO AUTHORITY IN MINNESOTA TO SUE UNDER AN ASSUMED NAME ANYWAY.**

Next, Metro asserts that “Metro Building Companies, Inc.” is an assumed name, and as such, Metro is allowed to commence a lawsuit under its assumed name in Minnesota. Metro is wrong on both counts.

First, there is absolutely no evidence that “Metro Building Companies, Inc.” is a registered assumed name in Minnesota. *See* Record on Appeal. In fact, we know that “Metro Building Companies, Inc.” cannot be a registered assumed name, pursuant to the Minnesota statute governing commercial assumed names:

No person shall hereafter carry on or conduct or transact a commercial business in this state under any designation, name, or style, which does not

set forth the true name<sup>4</sup> of every person interested in such business unless such person shall file in the Office of the Secretary of State, a certificate setting forth the name and business address under which the business is conducted or transacted, or is to be conducted or transacted, and the true name of each person conducting or transacting the same, with the address of such person. **The name of the business must not include any of the following phrases or their abbreviations; corporation, incorporated, limited, chartered, professional association, cooperative, limited partnership, or professional limited liability partnership,** except to the extent that an entity filing a certificate would be authorized to use the phrase or abbreviation [.]

Minn. Stat. § 333.01. (Emphasis Added). Based on this statute, we know that the Minnesota Secretary of State would never accept an assumed name that has “Inc.” in it. Therefore, it is impossible for “Metro Building Companies, Inc.” to be an assumed name as alleged by Metro. *Id.*

Second, even if “Metro Building Companies, Inc.” was an assumed name, Metro has failed to produce any Minnesota authority allowing a Minnesota corporation to commence a lawsuit under its assumed name. *See* Respondents Brief. That’s because there isn’t any such Minnesota authority.

As a result, Metro resorts to citing cases interpreting Georgia, Louisiana and Texas laws that specifically allow a corporation to sue under an assumed name. *See Sam’s Wholesale Club v. Riley*, 241 Ga. App. 693, 527 S.E.2d 293 (1999); *Hy-grade Investment Corporation v. Robillard*, 196 So.2d 558 (La. App. 1967); and *Davis v. Tex-O-Kan Flour Mills Co.*, 186 F.2d 50 (5<sup>th</sup> Cir. 1950). Because we are dealing with a Minnesota corporation, and a corporation is created

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<sup>4</sup> “True name” means, if referring to a corporation, the full corporate name. Minn. Stat. § 333.001, subd. 3.

and empowered by state law, these cases have no bearing on the issues presented on appeal.

Again, Metro has failed to produce any evidence that “Metro Building Companies, Inc.” is a registered assumed name, and even if it did, Metro has failed to produce any Minnesota authority that would allow the present lawsuit to be commenced under a properly registered assumed name. As a result, the district court clearly erred in its application of law.

**IV. NAMING A NON-EXISTENT CORPORATION AS PLAINTIFF IS NOT A “TYPOGRAPHICAL ERROR” OR A “CLERICAL MISTAKE”.**

Anticipating the failure of its argument that “Metro Building Companies, Inc.” is not an assumed name, and because a corporation cannot commence a lawsuit under an assumed name in Minnesota, Metro now claims that naming a non-existent corporate plaintiff is simply a “typographical” or “clerical” error, which should be cured pursuant to Minnesota Rules of Civil Procedure 15. Clearly standing and capacity are not clerical errors, and Minn. R. Civ. P. 15.03 does not allow for the substitution of a plaintiff, particularly after the statute of limitations has expired.

**A. Standing and Capacity are Not Clerical Errors.**

Throughout its entire brief, Metro has emphasized the importance of “substance over form.” *See* Respondent’s Brief. Without citing any authority in support, Metro wants this Court to believe that naming a non-existent corporate plaintiff is a clerical error, and allowing that error to be corrected elevates

substance over form. *Id.* Because standing, capacity and jurisdiction are not mere formalities, nothing could be further from the truth.

A “clerical mistake” refers to an error in **form**, while a “non-clerical mistake” refers to an error of **substance**. *Egge v. Egge*, 361 N.W.2d 485, 488 (Minn. App. 1985). (Emphasis Added).

Standing is a jurisdictional issue. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989); *R.A., Inc. v. Anheuser-Busch, Inc.*, 556 N.W.2d 567, 572 (Minn. App. 1996), *rev. denied* (Minn. Jan. 29, 1997). And capacity concerns a party’s right to maintain an action. *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429, 433 (Minn. App. 1995), *rev. denied* (May 31, 1995). Without jurisdiction, a court is powerless. Without standing or capacity, a plaintiff is powerless. Clearly, these are substantive issues in the bedrock of our judicial system. Their absence cannot be blamed on hitting the wrong key on a keyboard.

Furthermore, how can Metro maintain in good conscience that naming a non-existent corporate plaintiff is a “clerical mistake”, and claim that it can be easily fixed because RAM “knew who was suing it”? RAM never waived its jurisdictional defense and consistently contested jurisdiction. *See* Order (AD.8). Metro repeatedly asserted that the name it sued under was the name of a duly authorized legal corporate entity. Under Minnesota law, the named plaintiff had no existence at all. A lawsuit that has no right to be brought in the first place cannot be fixed after the statute of limitations has run, as RAM has argued all

along. Rather than “knowing who was suing” RAM has consistently maintained that it was being sued by no one with standing to sue at all.

**B. Changing the Plaintiff is not Allowed to Relate Back Under Minnesota Rule of Civil Procedure 15.03.**

Metro claims that the district court did not err by allowing a new plaintiff to relate back to the original complaint after the statute of limitations had expired. *See* Respondent’s Brief p. 17. To reach this conclusion, Metro is asking the court to ignore the plain language of Minn. R. Civ. P. 15.03, along with its Advisory Committee Note.

Minnesota Rule of Civil Procedure 15.03 states in relevant parts;

...An amendment **changing the party against whom a claim is asserted relates back** if the foregoing provision is satisfied and, **within the period provided by law for commencing the action against the party**, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced **in maintaining a defense on the merits**, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, **the action would have been brought against that party**.

Minn. R. Civ. P. 15.03. (Emphasis Added) (AD.7). The language of this rule is clear and unambiguous. An amendment changing the **defendant** will relate back – not an amendment changing the **plaintiff**. *Id.* (AD.7). And relation back cannot occur after “the period provided by law for commencing the action” has expired.

Moreover, the Advisory Committee note for Rule 15.03 states in unequivocal terms, “[t]he relation back of amendments changing plaintiff is not expressly provided for in Rule 15.03.” *See* Advisory Committee Note – 1968.

(AD.7). Clearly, it would not be implicitly provided if the statute of limitations has run.

Therefore, based on the unambiguous language of the rule, along with its Advisory Committee note, the district court erred when it allowed an exchange of a non-existent plaintiff for an existing plaintiff after the statute of limitations had expired.

### CONCLUSION

Suit was not brought under any duly registered name of this corporation.

Where jurisdiction is the issue, it is not a matter of form over substance.

If the action has been defectively commenced, once the statute of limitations has run relation back is not possible regardless of party.

Cases from other jurisdictions with different statutory schemes do not authorize substitution of plaintiffs under Minnesota law when the statute of limitations has run.

The assertion of no prejudice is an outright falsehood when the claim time-barred.

As a result, the district court's order should be reversed and this case should be dismissed with prejudice. The district court erred in its application of law by denying RAM's motion for summary judgment and by allowing a non-existent plaintiff to be changed to an existing plaintiff in order to cure its lack of jurisdiction after the statute of limitations had expired.

Dated: December 21, 2009.

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STATE OF MINNESOTA  
COURT OF APPEALS

APPELLATE COURT CASE NO: A08-986

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Metro Building Companies, Inc.,

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vs.

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Appellant.

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**CERTIFICATE OF BRIEF LENGTH**

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I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a Times New Roman font. The length of the brief is 3,696 words. I certify that the word processing program has been applied to specifically include all text, including headings, footnotes, and quotations. This brief was prepared using Office Word.

Dated: December 21, 2009.

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