Amendments Curing Defendant Misnomers Under Trial Rule 15(C): A Bright Line Test of Prejudice for Relation Back?

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I. Introduction

Rule 15(C) of the Indiana Rules of Trial Procedure provides that an amended complaint will relate back to the date of the original complaint if the claim asserted in the amendment relates to the same conduct, transaction, or occurrence set forth in the original.[1] Where the amendment changes the nominal defendants, trial rule 15(C) imposes the additional requirements that the re-named defendant must "within the period provided by law for commencing the action against him"[2] (1) have received

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[1]Ind. R. Tr. P. 15(C) provides in full:

(C) Relation Back of Amendments. 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. 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 him, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

The requirement of subsections (1) and (2) hereof with respect to a governmental organization to be brought into the action as defendant is satisfied:

(1) in the case of a state or governmental organization by delivery or mailing of process to the Attorney General or to a governmental executive [Rule 4.6(A)(3)]; or

(2) in the case of a local governmental organization, by delivery or mailing of process to its attorney as provided by statute, to a governmental executive thereof [Rule 4.6(A)(4)], or to the officer holding the office if suit is against the officer or an office.

[2]Prior to its amendment in 1966, Federal Rule of Civil Procedure 15(C) consisted solely of what is now its first sentence: "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." The Advisory Committee's Note to the amendment states that the quoted language means "within the applicable limitations period." 39 F.R.D. 82, 83. The Indiana Supreme Court essentially adopted the amended federal rule with the adoption of the Indiana Rules of Trial Procedure in 1970. *See* Czarnecki v. Lear Siegler, Inc., 471 N.E.2d 299, 300 (Ind. 1984).

notice of commencement of the action such that he will not be prejudiced in defending the claim, and (2) have realized that but for a mistake, the original pleading would have named him as a defendant.

In a number of cases decided during the survey period, Indiana and federal courts have elaborated on the requirements for relation back of an amended complaint to avoid the intervening maturity of an applicable statute of limitations. Two conflicting policy considerations have influenced the decisions under both trial rule 15(C) and the nearly identical Federal Rule of Civil Procedure 15(c).[3] Statutes of limitations generally require commencement of an action within a specified time after its accrual.[4] Federal Rule of Civil Procedure 15(c) is intended to provide a defendant with notice of the institution of an action against him so that he will not be prejudiced in maintaining his defense.[5] Absent the necessity of changing the named parties in the original complaint by amendment, the statute of limitations does not defeat a plaintiff's claim where the complaint is filed on the last day of the applicable limitation period and served, with a summons, on a properly named defendant at some time after the statute has run.[6] Decisions construing the federal and Indiana rules on relation back may be viewed as making a policy choice between the clear

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[3]FED. R. CIV. P. 15(c) provides:

(c) Relation Back of Amendments. 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. 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 him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

[4]For example, IND. CODE § 34-1-2-1 provides that certain enumerated actions must be commenced within six years after they accrue.

[5]*See* Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); Simmons v. Fenton, 480 F.2d 133, 137 (7th Cir. 1973) (citing Martz v. Miller Bros. Co., 244 F. Supp. 246, 253-54 (D. Del. 1965)).

[6]*See* Ingram v. Kumar, 585 F.2d 566, 571 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). In Cooper v. U.S. Postal Service, 740 F.2d 714, 717 (9th Cir. 1984), the court characterized its strict reading of FED. R. CIV. P. 15(c) and denial of relation back as a "seemingly harsh result." *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,* 81 HARV. L. REV. 356, 410 (1967), *quoted in* Schiavone v. Fortune, 106 S. Ct. 2379, 2388 (1986) (Stevens J., dissenting).

language of the Indiana and federal rules and a more equitable, inherently flexible, standard which focuses on whether the defendant, who was first correctly named in an amended complaint served on him after the limitation period has expired, was actually prejudiced.

II. *Schiavone v. Fortune*

In *Schiavone v. Fortune*,[7] the United States Supreme Court adopted the most restrictive possible interpretation of federal rule 15(c), showing its preference for following the rule's clear language.[8] Schiavone commenced a libel action against *Fortune* magazine in the United States District Court for the District of New Jersey. He alleged that certain statements published in the May 31, 1982, issue of *Fortune* defamed him. Under New Jersey law, a libel action must be commenced within one year from the date of its accrual.[9] The Court upheld the lower courts' finding that the cause of action accrued no later than May 19, 1982.[10]

Schiavone filed his complaint on May 9, 1983, within the applicable statute of limitations. He named "Fortune" as the sole defendant. Fortune is merely a trademark and an internal operating division of Time, Incorporated, a New York corporation. Fortune is not a separate legal entity with the capacity to be sued.[11]

Time's New Jersey registered agent received the complaint and summons on May 23, 1983, outside the applicable statute of limitations. The registered agent refused to accept service of process because Time was not named as a defendant in the complaint. Schiavone amended his complaint as of right,[12] changing the name of the defendant to "Fortune, also known as Time, Incorporated."[13] The amended complaint was served on Time by certified mail on July 21, 1983.[14]

The district court granted Time's motion to dismiss the amended complaint.[15] The United States Court of Appeals for the Third Circuit affirmed.[16] The United States Supreme Court affirmed the dismissal of the complaint.[17] The Court stated:

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[7]106 S. Ct. 2379 (1986).

[8]*Id.* at 2385.

[9]N.J. STAT. ANN. § 2A:14-3 (West 1952) provides: "Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." N.J. STAT ANN. § 2A:14-3 (West 1952), *quoted in Schiavone*, 106 S. Ct. at 2381 n.3.

[10]*Schiavone*, 106 S. Ct. at 2384.

[11]*Id.* at 2381 n.2.

[12]*See* FED. R. CIV. P. 15(a), which permits a plaintiff to amend his complaint before the defendant serves an answer.

[13]*Schiavone*, 106 S. Ct. at 2381.

[14]*Id.*

[15]*Id.*

[16]Schiavone v. Fortune, 750 F.2d 15 (3d Cir. 1984).

[17]*Schiavone*, 106 S. Ct. at 2386.

> The first intimation that Time had of the institution and maintenance of the three suits took place after May 19, 1983, the date the Court of Appeals said the statute ran "at the latest."
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> Only on May 20 did petititoner's counsel mail the complaints to Time's registered agent in New Jersey. Only on May 23 were those complaints received by the registered agent, and then refused. Only on July 19 did each petitioner amend his complaint. And only on July 21 were the amended complaints served on Time.
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> It seems to us inevitably to follow that notice to Time and the necessary knowledge did not come into being "within the period provided by law for commencing the action against" Time, as is so clearly required by Rule 15(c). That occurred only after the expiration of the applicable 1-year period. This is fatal, then, to petitioners' litigation. . . . We accept the Rule as meaning what it says.[18]

In *Schiavone*, the Court overruled a line of federal cases construing the language of federal rule 15(c) requiring notice to the target defendant "within the period provided by law for commencing the action" to mean within the statutory period plus a reasonable time for service of process.[19] However, substantial uncertainty still exists as to the interpretation of the identical clause of Indiana Trial Rule 15(C). Indiana courts have yet to consider a case under rule 15(C) in which the complaint was filed within the limitations period and first served on the target, albeit misnamed, defendant a short time after the statute has run.[20] Despite the clear holding of the United States Supreme Court in *Schiavone*, differences between other federal and Indiana rules,[21] dicta in a recent Indiana Supreme Court decision,[22] and two Indiana Court of Appeals decisions[23] call into question the adherence to *Schiavone* by Indiana courts under trial rule 15(C).

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[18]*Id.* at 2384-85 (citations omitted).

[19]*E.g.*, Ringrose v. Englebert Huller Co., 692 F.2d 403, 410 (6th Cir. 1982); Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980); Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978); Clark v. Southern Ry. Co., 87 F.R.D. 356 (N.D. Ill. 1980). *See also Schiavone*, 106 S. Ct. at 2388 n.4 (Stevens J., dissenting).

[20]In Honda Motor Co. v. Parks, 485 N.E.2d 644 (Ind. Ct. App. 1985), the Indiana Court of Appeals considered a fact pattern substantially similar to that in *Schiavone*. The court made no finding, however, as to the date of first service. *Id.* at 646. Since the complaint was filed four days before the statute ran, first service could have been before or after the last day of the statutory period. *Id.* at 645.

[21]IND. R. TR. P. 21(A) states in relevant part: "Incorrect names and misnomers may be corrected by amendment under Rule 15 at any time." FED. R. CIV. P. 21 contains no such provision.

[22]Czarnecki v. Lear Siegler, Inc., 471 N.E.2d 299, 301 (Ind. 1984).

[23]Honda Motor Co. v. Parks, 485 N.E.2d 644 (Ind. Ct. App. 1985); Creighton v. Caylor-Nickel Hospital, Inc., 484 N.E.2d 1303 (Ind. Ct. App. 1985).

III. *Czarnecki v. Lear Siegler, Inc.*

In *Czarnecki v. Lear Siegler, Inc.*,[24] the Indiana Supreme Court readily concluded that the amended complaint did not relate back under the facts presented. The plaintiff truck driver was blinded by fragments from the shattering of a truck cab's rear window. The incident occurred on September 1, 1975. On August 31, 1977, the last day of the limitations period,[25] plaintiff filed suit against several defendants, including "Hinson Cab Company," which plaintiff believed to be the manufacturer of the cab, but which was in fact a nonexistent entity. Plaintiff's attorney could find no address for "Hinson Cab Company," but attempted service by mailing the summons to C.T. Corporation System, the resident agent of another totally unrelated defendant. By coincidence, C.T. Corporation System was also the resident agent for Royal Industries, Inc., the entity that actually manufactured the cab. The parties stipulated that Royal Industries, Inc., never received the original complaint and summons. Hinson Manufacturing Co., Inc., the successor in interest to Royal Industries, Inc., actually received service of the summons and plaintiff's amended complaint first naming it as a defendant on September 12, 1980, more than five years after the occurrence.[26]

The trial court entered summary judgment in favor of the cab manufacturer based on the statute of limitations.[27] The Indiana Court of Appeals reversed,[28] relying on a distinction between amendments that cure a "misnomer" and amendments that actually add an intended defendant.[29] The court of appeals cited Indiana Trial Rule 21(A), a rule with no counterpart in the Federal Rules of Civil Procedure, which states: "Incorrect names and misnomers may be corrected by amendment under Rule 15 at any time."[30] The court of appeals held that changing a misnomer to reflect the actual name of the party is different from changing the party against whom the claim is asserted and therefore distinguished *Simmons v. Fenton*,[31] in which the United States Court of Appeals for the Seventh Circuit denied relation back.[32]

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[24]471 N.E.2d 299 (Ind. 1984).

[25]*See* IND. CODE § 34-1-2-2(1) (1982).

[26]*Czarnecki,* 471 N.E.2d at 300.

[27]*Id.* at 299.

[28]Czarnecki v. Hinson Cab Co., 461 N.E.2d 708 (Ind. Ct. App. 1984).

[29]*Czarnecki,* 471 N.E.2d at 301.

[30]*Id.*

[31]480 F.2d 133 (7th Cir. 1973).

[32]In *Simmons*, plaintiff brought an action for personal injury arising out of an automobile accident. The complaint was filed on the last day of the limitations period. 480 F.2d at 135. The original pleading named as defendant "Teresa D. Fenton," a thirteen year old girl who plaintiff thought was the driver of one of the vehicles involved. The actual driver was "Doris J. Fenton," her mother. Service was first made at the Fenton

The Indiana Supreme Court vacated the decision of the court of appeals and clarified that correction of a misnomer under trial rule 21(A) is dependent upon compliance with the requirements of trial rule 15(C).[33] In doing so, the Indiana Supreme Court expressly noted the near identity between Indiana Trial Rule 15(C) and Federal Rule of Civil Procedure 15(c). The court specifically relied on the Seventh Circuit's decision in *Simmons*.[34] However, in dicta, the Indiana Supreme Court hedged on its adherence to the rationale of *Simmons* that the first notice to the target defendant of commencement of the action must be within the statute of limitations. The court stated:

> Rule 15(C) would relate back here if the summons addressed to Hinson Cab Company had actually been served on Royal Industries, Inc., Hinson Division, and Royal would therefore have been given notice that suit was being brought against the manufacturer of the cab, which, of course, was Royal, and that they were the intended target defendant even though misnamed by the summons served. An amended complaint served after the running of the statute of limitations which properly named Royal Industries, Inc., Hinson Division, as a defendant, would have related back under 15(C) because clearly they would have had notice of the institution of the action and would have known that but for a mistake of misnomer they were the intended target defendant.[35]

Thus, in *Czarnecki,* the Indiana Supreme Court left the door open to acceptance of the rationale adopted in some federal circuits that "the period provided by law for commencement of the action" includes a reasonable period of time for service.[36] This rule was intended to put a plaintiff who misnames his target defendant in the complaint, but effects service of process on the target defendant in the ordinary course of events after the running of the statute, on the same footing as the plaintiff who properly names his target defendant to begin with.[37] However, the dicta in *Czarnecki* is inconsistent with the rationale of *Simmons* that the "prejudice" contemplated by federal rule 15(c) may be the loss of a statute

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family's residence after the running of the statute. *Id.* The court, in holding that the attempted amendment did not relate back, stated:

> Rule 15(c) is not satisfied, since actual service on whoever was served was not effected until . . . at least three weeks after the tolling of the statute of limitations. [T]here is clearly prejudice to her [the mother] if the amendment is allowed. To allow the amendment will be to deprive her of the defense of the statute of limitations. *Id.* at 136.

[33] *Czarnecki*, 471 N.E.2d at 301.

[34] *Id.* at 300.

[35] *Id.* at 301.

[36] *See supra* note 5.

[37] Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

of limitations defense which would be available under a strict interpretation of the rule.[38]

The facts of *Czarnecki* present a clear case for denial of relation back, because the first notice of any kind to the target defendant did not occur until some three years after the running of the statute of limitations. The cab manufacturer was clearly prejudiced in maintaining its defense by the passage of time alone.[39] Therefore, *Czarnecki* should be understood as an easy application of rule 15(C).[40] Neither the dicta nor the citation to *Simmons* was necessary to reach the decision not to permit relation back.

IV. *Creighton v. Caylor-Nickel Hospital, Inc.*

In *Creighton v. Caylor-Nickel Hospital, Inc.*,[41] the Indiana Court of Appeals reversed the trial court's summary judgment, refusing relation back where the facts presented a clear conflict between equitable treatment of a plaintiff who initially misnamed his target defendant and the express language of trial rule 15(C).[42] In *Creighton*, the plaintiff brought an action for medical malpractice[43] which he alleged resulted in his injury from a slip and fall in a shower/tub unit at the Caylor-Nickel Hospital in Bluffton, Indiana. There are three units within the hospital, each bearing the name "Caylor-Nickel": the Caylor-Nickel Research Institute, the Caylor-Nickel Clinic (Clinic), and the Caylor-Nickel Hospital (Hospital).[44] All three are in close proximity, and although the Clinic and Hospital actually occupy different portions of the same building, each of the three is a separate legal entity.[45] The entities' common billing statements and other documents issued to the public also added to the confusion.[46] The alleged injury occurred on February 24, 1978. Creighton's attorney first filed a proposed complaint with the Indiana Patient's Compensation Authority (Authority), a division of the Indiana Department of Insurance (Department), on February 19, 1980, five days before the statute of limitations would have run, naming only the Clinic as a defendant.[47]

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[38]*See Simmons,* 480 F.2d at 136.

[39]*See* Swartz v. Gold Dust Casino, Inc., 91 F.R.D. 543, 548 (D. Nev. 1981) (citing Smith v. Guaranty Service Corp., 51 F.R.D. 289 (N.D. Cal. 1970)); *cf.* Ridge Co. v. NCR Corp., 597 F. Supp. 1239, 1244 (N.D. Ind. 1984) (minimum two-year delay in first notice to target defendant; summary judgment for target defendant).

[40]*See, e.g.*, Ridge Co. v. NCR Corp., 597 F. Supp. 1239 (N.D. Ind. 1984).

[41]484 N.E.2d 1303 (Ind. Ct. App. 1985).

[42]*Id.* at 1308.

[43]Under the Indiana Medical Malpractice Act, IND. CODE §§ 16-9.5-1-1 to 16-9.5-10-3, the patient plaintiff must initially file a proposed complaint for medical malpractice with the Indiana Insurance Commissioner. IND. CODE § 16-9.5-9-1 (1982).

[44]*Creighton,* 484 N.E.2d at 1304.

[45]*Id.*

[46]*Id.* at 1307.

[47]*Id.* at 1304-05, 1307.

The Authority forwarded the proposed complaint naming only the Clinic to Cecil Lockwood, Jr., the risk manager for both the Hospital and the Clinic, on February 22, 1980, two days before the running of the statute of limitations.[48] Lockwood did not receive the proposed complaint until February 28, 1980, four days after the running of the statute.[49] On the same day, the Hospital and Clinic forwarded the proposed complaint to their insurance carrier, pointing out the plaintiff's pleading mistake in Lockwood's cover letter.[50] On February 29, 1980, the Department reported to Creighton's attorney that the Authority had previously provided erroneous information which led Creighton's attorney to believe that the Hospital and Clinic were the same entity.[51] On receiving this information, Creighton's attorney amended his proposed complaint to name the Hospital as a defendant for the first time.[52] The amended proposed complaint was received by the Authority on March 3, 1980, eight days after the statutue of limitations would have expired on the claim.[53] The Hospital filed a motion for summary judgment as to the amended complaint based on the statute of limitations.[54] The trial court granted summary judgment in favor of the Hospital.[55]

The court of appeals noted that the Hospital first received actual formal notice of the institution of the action four days after the running of the statute of limitations, when Lockwood received a copy of the proposed complaint directed against the Clinic.[56] The court of appeals framed the issue as: "whether this minor delay in the receipt of actual notice precluded relation back of the amended complaint."[57]

The court of appeals discussed three factors which compelled relation back under the circumstances, in spite of the fact that the proper target defendant did not receive actual notice of institution of the action until after the running of the statute. First, the court of appeals noted that Creighton's confusion and mistake in determining the correct name was induced by misleading information from the Clinic, Hospital, and Authority.[58] Second, the Hospital and Clinic had the closest imaginable

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[48] *Id.* at 1305.

[49] *Id.*

[50] The letter stated: "We are sure, also, that it is not necessary to call your attention to the fact that the fall which resulted in the *suit* against Caylor-Nickel Clinic occurred on the premises owned and operated by Caylor-Nickel Hospital, Inc. . . . ." *Id.* at 1305.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Several federal and Indiana cases have relied on misleading information supplied by the defendant as an equitable basis for permitting relation back. *See* Ryser v. Gatchel

identity of interests.[59] Finally, the Hospital received constructive notice of institution of the action, since service of the proposed complaint was made upon the Authority, which is the statutory agent for service of process on health care providers under the Indiana Medical Malpractice Act,[60] within the statutory period.

The court of appeals distinguished *Czarnecki* by pointing out that the first notice of the claim upon the cab manufacturer in that case was more than three years after the filing of the original complaint.[61] The court of appeals stated, in justifying relation back under the circumstances:

> [T]he Hospital received actual, formal, seasonable notice and must be deemed to have received constructive notice of the claim against it on the day the action was commenced by filing the original proposed complaint with the Authority, the Hospital's agent for receipt of notice.
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> We think a defendant to be brought in by amendment has received "such notice" as is required by the rule when, as in this case, he has received constructive notice of the claim within the period provided by law and has, thereafter, received actual, formal, seasonable notice of the claim and knew or should have known that "but for a mistake concerning the identity of the proper party, the action would have been brought against him."[62]

By relying on constructive notice, the court appealed to "essential considerations of fairness."[63] The court held:

> [T]he claimant's only duty (under the Medical Malpractice Act) is to file a proposed complaint. The claimant has no duty to serve the named defendant with notice of the claim. That

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151 Ind. App. 62, 278 N.E.2d 320 (1972); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1500 n.28 (1971).

[59]The "identity of interest" exception to the requirement of actual notice to the target defendant within the limitations period is widely recognized. *See* C. WRIGHT & A. MILLER, *supra* note 58, at 516. In *Schiavone*, the Court held that this exception would still require notice to someone within the statutory period. *Schiavone,* 106 S. Ct. at 2384. In *Honda*, the Indiana Court of Appeals implied that the identity of interest exception may be satisfied even if service on the wrong, but related, party is first made outside the limitations period. *See supra* note 20.

[60]Constructive notice to the target defendant or service on the target defendant's agent within the statutory period has been held sufficient notice in a number of cases to permit relation back. *See* C. WRIGHT & A. MILLER, *supra* note 58, at 520 n.21. Here, too, the Court in *Schiavone* stated that service on the *agent* must be within the statutory period. *Schiavone*, 106 S. Ct. at 2384. ("there was no *proper* notice to Fortune that could be *imputed* to Time" *Id.* (emphasis added)).

[61]*Creighton*, 484 N.E.2d at 1308.

[62]*Id.*

[63]*Id.*

responsibility, a ministerial act, rests on the Authority, the health care provider's agent for receipt of notice.[64]

Creighton is probably limited to its factual setting. Its holding is arguably that medical malpractice complaints in Indiana are deemed notice to the defendant (and other related parties) on the date of filing with the Authority. If so, medical malpractice actions do not give rise to the basic problem addressed in this Article: there is no time lag between commencing the action so as to toll the statute of limitations and the notice to the defendant necessary to invoke the relation back doctrine. Therefore, *Creighton* does not resolve the problem of the *Schiavone* fact pattern under trial rule 15(C).

V. *Honda Motor Co. v. Parks*

Honda Motor Co. v. Parks[65] is another recent Indiana case involving the issue of relation back when a complaint is amended under rule 15(C) to substitute a defendant after the statute of limitations has run. However, in this case, the Indiana Court of Appeals raised more questions than it answered by failing to make a finding crucial to a determination under the *Schiavone* analysis. The court engaged in an extensive discussion of prior Indiana precedent, notable for its omission of *Czarnecki*. In reversing a summary judgment for the products liability defendant, the court held that the probable existence of an identity of interest between the original and substituted defendants, the American and Japanese branches of Honda respectively, precluded summary judgment.[66] While it was clear that the complaint was filed within the statutory period, the court made no finding as to the date of original service on American Honda, the erroneously-named manufacturer. It is possible that counsel for the defendant did not raise the issue.

VI. Conclusion

While the dicta in *Czarnecki* and the holdings in *Creighton* and *Honda* would seem to indicate a tendency among Indiana appellate courts to construe trial rule 15(C) liberally, the *Schiavone* fact pattern has yet to come before them for resolution. What is clearly at stake is the availability of summary judgment to the target defendant in such a case. Under the *Schiavone* analysis, the only material fact is the date of first notice to the defendant: if that date is outside the statutory period, the plaintiff is out of court. Under the more liberal approach adopted in some federal

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[64] *Id.* at 1307-08.

[65] 485 N.E.2d 644 (Ind. Ct. App. 1985).

[66] *Id.* at 651.

circuits, but now overruled by *Schiavone*, summary judgment might be precluded by the question of whether the defendant was actually prejudiced by first receiving notice outside the statutory period.

Because of the uncertainty surrounding the Indiana courts' approach to a fact situation similar to *Schiavone*, Indiana plaintiffs' counsel should exercise extra care in correctly naming target defendants when filing an action near the expiration of the applicable statute of limitations. If Indiana courts decide to follow *Schiavone* strictly, a mistake in the designation of a defendant may be fatal to their client's claim, even if the complaint is filed in a timely manner.