No. 09-337

IN THE
Supreme Court of the United States

WANDA KRUPSKI,

Petitioner,

v.

COSTA CROCIERE S.p.A., a foreign corporation (Italy),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Wanda Krupski, injured on a cruise ship, timely sued the sales and marketing company which sold her the ticket, but only after the limitations period expired did she sue Costa Crociere, the operator of the vessel on which she had travelled. Under Rule of Civil Procedure 15(c), a plaintiff's failure to sue a proper defendant within the limitations period may be excused "if within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Did Krupski make a mistake, and did Costa Crociere know or have reason to know that it would have been sued but for the mistake, where within the period provided by Rule 4(m) Krupski had the ticket revealing the proper defendant, Krupski's attorney read the ticket, Krupski had been told that the sales and marketing company could not be held liable under general maritime law, and Krupski had been told that Costa Crociere was the proper defendant?

PARTIES TO THE PROCEEDING

Respondent relies on the list of parties and corporate disclosure statement on page ii of its Brief in Opposition to the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Plaintiff Wanda Krupski purchased a ticket for a cruise on board the *Costa Magica.* JA 36. The cruise began in Fort Lauderdale, Florida, on February 18, 2007, and Krupski claims that on February 21, 2007, she was injured on the ship when she fell in the theater. JA 23, 35, 76.

Weeks before the cruise, Krupski received her passenger ticket contract. JA 36. The contract (which appears at JA 40 and at Pet. App. 27a-37a) urged Krupski to review its terms. The ticket's cover stated "IMPORTANT NOTICE! PLEASE READ THIS TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS." JA 40, 36. The passenger was urged to "carefully examine the ticket, especially the section noted as 'GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT.'" JA 40, 37.

The ticket contained provisions indicating that lawsuits concerning the cruise were to be brought against the "carrier." The first page of the "general conditions" stated that the "CARRIER" "undertakes to transport the Passenger." Pet. App. 27a. The ticket provided that "[t]he CARRIER shall be liable only for its negligence," and the "CARRIER" disclaimed liability for certain damages for emotional distress. Pet. App. 28a, 36a.

The ticket also stated that the "carrier" could not be liable for personal injury unless given written notice of a claim within 185 days after the date of the injury. Pet. App. 27a-28a. Attempting to comply with this

provision, Krupski (through counsel) gave written notice of her claim on July 2, 2007. JA 69-70. The notice was sent to "Costa Cruiselines, N.V.," in Hollywood, Florida. JA 69. Krupski received a response from "International Risk Services, Inc., as Claims Administrator for Costa Cruise Lines N.V." Pet. App. 24a.

The ticket also provided that any claim against the "carrier" had to be filed within one year. Pet. App. 28a. Seeking to comply with this provision, Krupski filed her lawsuit just before the end of the limitations period. The limitations period expired on Feb. 20, 2008, and she filed her lawsuit on February 1, 2008. JA 21-28.

The ticket also had a provision requiring that any lawsuit against the "carrier" be filed in United States District Court for the Southern District of Florida. Pet. App. 36a. Although Krupski lived in Michigan, she sought to comply with this provision too. JA 21.

The ticket thus had three specific provisions which governed Krupski's claim against the "carrier"—notice of claim, venue, and time for suit. Krupski sought to comply with all three of these provisions. Indeed, Krupski acknowledged in her complaint that she (or her lawyer) had read the ticket. Her complaint noted that "the passenger ticket contains a forum selection clause," and that "all pre-suit requirements of the passenger ticket contract" were satisfied. JA 23. Krupski admitted that her attorney reviewed the ticket. JA 43.

The ticket contained a definition of "carrier" so that a claimant could determine which claims were subject to the three provisions governing notice of claim, venue,

and time-for-suit, as well as the limitations of liability. The ticket made clear that the "carrier" was an Italian corporation named Costa Crociere S.p.A.:

> *The word 'CARRIER' when used in this Contract, shall mean Costa Crociere S.p.A., an Italian corporation*, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said Vessels, and the manufacturers of said Vessels and all their component parts.

Pet. App. 27a (emphasis added). The ticket mentioned another corporation, Costa Cruise Lines N.V., and explained that it was merely the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." Pet. App. 29a.

Despite the contractual provisions identifying Costa Crociere as the carrier against whom suit should be brought, Krupski did not file her suit against Costa Crociere. Instead, on the eve of the running of the limitations period she named as defendant an entity which she called "Costa Cruise Lines, N.V., L.L.C., d/b/a Costa Cruise Lines, a foreign corporation (Netherlands Antilles)." JA 21.

Krupski served her complaint on Costa Cruise Lines N.V., L.L.C. on February 4, 2008. JA 21, DE 3. Costa Cruise Lines, in its answer filed on February 25, 2008,

stated that it was not involved in the operation, ownership or management of the vessel. JA 29-30. It referred to the ticket, and noted that under the ticket "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A, an Italian corporation." JA 31. It repeated the contractual provision that Costa Cruise Lines was merely the sales and marketing agent, and stated that it could not be held liable to Krupski under general maritime law. JA 31. Despite being informed that Costa Crociere was the proper defendant under the contract and general maritime law, Krupski did nothing to prosecute a claim against Costa Crociere.

Three months later, on May 6, 2008, Costa Cruise Lines moved for summary judgment. DE 19. Costa Cruise Lines again made it clear that the proper claim was against Costa Crociere. "[T]he asserted negligence based cause of action can be maintained by plaintiff only against the 'Carrier.' In this instance it is undisputedly Costa Crociere S.p.A." DE 19 - Pg 8. *See also* DE 19 - Pg 7-8, 10. Costa Cruise Lines submitted an affidavit in support of the motion for summary judgment, and that affidavit repeated that the *Costa Magica* was owned and operated by Costa Crociere. JA 35.

Over a period of many months, Krupski was thus repeatedly informed that Costa Crociere was a proper defendant. But Krupski did nothing. Finally, on June 13, 2008—fourteen days after the expiration of "the period provided by Rule 4(m) for serving the summons and complaint," Rule 15(c)(1)(C)—Krupski acted in contradiction to her previous clear lack of interest in prosecuting a claim against Costa Crociere. Krupski then

moved to amend her complaint to add Costa Crociere as a defendant. JA 41-55. In her motion, Krupski with understatement said that "it has been brought to Plaintiff's attention that Costa Crociere, S.p.A. is a proper defendant to this lawsuit." JA 45. She acknowledged that while leave to amend is to be freely given when justice so requires, whether a new claim relates back is a separate issue. JA 52 n.1.

Krupski did not, at this time or at any other time, present any testimony about why she had not sued Costa Crociere earlier. However, in her response to Costa Cruise Lines' motion for summary judgment, Krupski's counsel described what he called his "pre-litigation due diligence." JA 43. Although the passenger ticket in his possession plainly indicated the proper defendant, Krupski's counsel explained that he performed "internet research regarding Costa Cruise Lines." JA 43. That search, at the www.costacruise.com web site, indicated that the only United States office listed was "Costa Cruise Lines, N.V.," in Hollywood, Florida. JA 43-44. Krupski's lawyer said that he next went to the website of the Florida Department of State Division of Corporations, where he searched for "Costa Cruise Lines." JA 44-45. The result of the search was "Costa Cruise Lines N.V. L.L.C." *Id.*[1] He therefore

1. Krupski, implying that Costa Crociere was required to register with the State of Florida, refers to "Respondent's failure to register with the Department of State of Florida, in whose waters the voyage began." Petitioner's Brief, at 46 n.15.

Krupski's implication is incorrect. Florida law provides that where a corporation's only business in Florida is interstate, the corporation need not register with the state. Fla. Stat.

(Cont'd)

sued Costa Cruise Lines N.V. *Id.* Krupski attached photocopies of the web sites. JA 56-68.

The district court heard argument on Costa Cruise Lines's motion for summary judgment. JA 124-45. During the argument Krupski's counsel admitted that "under the plain language of the ticket, Costa Cruise Lines clearly can't be a carrier." JA 139. The district court allowed Krupski to file an amended complaint adding Costa Crociere as a party, with the relation-back issue to be resolved later. JA 143, 71-72. The court denied Costa Cruise Lines' motion for summary judgment without prejudice, noting that the issue could be raised again once it was determined whether the sales and marketing company had any employees on the *Costa Magica*. JA 139-43 71-72.

On July 11, 2008, Krupski filed an amended complaint which restated her claim against Costa Cruise Lines, and for the first time asserted a claim against Costa Crociere. Krupski's legal theories against the two defendants varied. She alleged (as she had in the first complaint) that Costa Cruise Lines owed a duty to her because it "owned, operated, managed, supervised and controlled" the *Costa Magica*. JA 76, 23. On the other hand, Krupski alleged that Costa Crociere owed a duty to her "as CARRIER under the terms of the passenger ticket contract." JA 80.

(Cont'd)

§ 607.1501(2)(i); *Circular Advertising v. American Mercantile Co.*, 63 So. 3 (Fla. 1913); *Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137, 142 (5th Cir. 1972). In contrast, Federal law imposes certain requirements on vessels which board passengers in the United States. 46 U.S.C. § 44101-44103. Costa Crociere complies with these federal requirements.

About a month later, using the Hague Convention, Krupski served the amended complaint on Costa Crociere in Genoa, Italy. DE 46. Krupski also agreed to voluntarily dismiss Costa Cruise Lines from the lawsuit. JA 85-86.

Krupski and Costa Crociere then focused on the issue on appeal: whether Krupski's failure to sue Costa Crociere within the limitations period could be excused by Rule 15(c). JA 87-123. The district court entered summary judgment in favor of Costa Crociere, based upon a finding that Krupski had not established that "within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule of Civil Procedure 15(c)(1)(C)(ii); Pet. App. 8a-22a. The Eleventh Circuit unanimously affirmed. Pet. App. 1a-7a.

SUMMARY OF ARGUMENT

Krupski failed to establish that her untimely complaint against Costa Crociere relates back.

Krupski did not make a "mistake concerning the proper party's identity" under Rule 15(c), and Costa Crociere neither knew or should have known that the action would have been brought against it, but for a mistake. Krupski made a conscious choice to not sue Costa Crociere. She possessed and read the ticket which revealed that Costa Crociere was the proper defendant. Later, when Costa Cruise Lines filed its answer, she was told that Costa Crociere was the proper defendant, and then told again when Costa Cruise Lines filed its motion

for summary judgment. Krupski's failure to sue Costa Crociere may have been foolish, but it was not a mistake.

Krupski's argument that events after the end of the limitations period are irrelevant ignores the plain language of Rule 15(c), which states that the time of inquiry is "within the period provided by Rule 4(m) for serving the summons and complaint." The rule, as amended in 1991, gives extra protection to a plaintiff. A plaintiff told in an answer that the wrong defendant has been sued will almost always have the opportunity to sue the proper defendant. Such a suit, within the Rule 4(m) period, will establish that there was a mistake under Rule 15(c). But even this liberal rule does not help Krupski, since she was repeatedly told that Costa Crociere was the proper defendant, but nevertheless did nothing during the Rule 4(m) period.

The dismissal of Krupski's untimely claim against Costa Crociere is not harsh, but simply the proper legal result. The law requires dismissal, and pleas for liberality do not trump the law. If there is any harshness, it is because of Krupski's failure to protect her own interests.

Krupski's argument that the mistake provision of Rule 15(c) should have no meaning beyond the notice and prejudice provisions would render the mistake provision meaningless. While one case supports Krupski's argument, the case is based on a misreading of Rule 15(c), and would leave the courts defenseless against a flood of "John Doe" claims.

The district court's conclusion that Krupski did not make a "mistake" was not an abuse of discretion or clearly erroneous.

ARGUMENT

KRUPSKI'S DELIBERATE DECISION TO NOT SUE COSTA CROCIERE WAS NOT A "MISTAKE" EXCUSED BY RULE OF CIVIL PROCEDURE 15(c)

Krupski is not entitled to have her complaint relate back. The plain language of Rule of Civil Procedure 15(c) provides that an untimely claim against a new defendant will relate back to the original complaint "if within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Here, during the relevant time Krupski had abundant knowledge that Costa Crociere was a proper defendant—this was stated in her ticket, which her attorney read (and otherwise complied with); this was stated in Costa Cruise Line's answer; and this was stated in Costa Cruise Line's motion for summary judgment. A plaintiff's failure to sue a clearly identified, known defendant is not a mistake, but rather is a deliberate decision not within the scope of Rule 15(c). Similarly, in light of Krupski's deliberate decision, Costa Crociere had no reason to believe that it would have been sued but for a mistake.

Krupski, throwing herself on the mercy of the Court, asks that her deliberate decision be deemed a mistake,

and the provisions of Rule 15(c) be read liberally to the point that they ignore the language of the rule. But this Court has stated that it will "accept the Rule as meaning what it says." *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986). Requirements for gaining access to the courts cannot be cast aside out of vague sympathy for a particular litigant. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Experience teaches that strict adherence to requirements specified by Congress is the best guarantee of evenhanded administration of the law. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

A. Rule 15(c) excuses a plaintiff's untimely claim only if the plaintiff proves both that there was a "mistake" and that the defendant knew or should have known that it would have been sued but for the mistake

Rule 15(c) provides the exclusive means by which an amendment which adds a new party may relate-back to an earlier complaint. *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1501 (9th Cir. 1994). The provision on adding new parties was included in the Rule in 1966. The "mistake" language was adopted almost verbatim from an article by Professor Clark Byse. *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40, 56 n.42 (1963). As discussed below, the provision was amended in 1991, mostly in response to this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986). Amendments in 2007 were stylistic only.

Courts interpreting the rule have held that the "mistake" provision requires that the plaintiff establish both that he or she made a "mistake," and that the newly-added defendant knew or should have known that it would have been sued, but for the "mistake."[2]

Once the defendant has established that the plaintiff did not sue that defendant within the limitations period, the burden of proof rests on the plaintiff to show that the new claim relates back under Rule 15(c).[3] The plaintiff must satisfy each of the requirements of the rule. *Schiavone v. Fortune*, 477 U.S. at 29.

B. The evidence established that Krupski made a deliberate decision to not sue Costa Crociere

Krupski is not entitled to the benefits of the relation-back provision of Rule 15(c) because she made a deliberate, conscious decision to not sue Costa Crociere. Such decisions are not within the scope of Rule 15(c).

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2. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 n.1 (2000); *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 26-27 (1st Cir. 2009); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *King v. One Unknown Federal Correctional Officer*, 201 F.3d 910, 914 (7th Cir. 2000); *Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993); *Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir. 1998); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918-19 (D.C. Cir. 1997). *See* 3 Moore's Federal Practice § 15.19[3][d], at 15-109 (3d ed. 2009).

3. *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir. 1996); *Smith v. Chyrsler Corp.*, 45 Fed. App'x 326, *1 (5th Cir. 2002); *Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished, available on Westlaw); *Farrell v. McDonough*, 966 F.2d 279, 282-83 (7th Cir. 1992).

This Court has noted that Rule 15(c) "applies only in cases involving 'a mistake concerning the identity of the proper party.'" *Nelson v. Adams USA*, 529 U.S. 460, 467 n.1 (2000). The rule thus did not apply where the plaintiff "made no such mistake. It knew of [the new defendant's] role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP." *Id.*

The Second Circuit recently held that "'[a] plaintiff is not considered to have made . . . a "mistake" . . . if the plaintiff knew that he was required to name an individual as a defendant but did not do so.'" *Ish Yerushalayim v. United States Department of Corrections*, 374 F.3d 89 (2d Cir. 2009) (Sotomayor, J.). "[A] conscious choice to sue one party and not another does not constitute a mistake and is not a basis for relation back." 3 MOORE'S FEDERAL PRACTICE § 15.19[3][d], at 15-110 (3d ed. 2009).[4]

In this case, Krupski was fully aware that Costa Crociere was a proper defendant in her suit for injuries aboard the *Costa Magica.*

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4. *Accord Barrow v. Westhersfield Police Department*, 66 F.3d 466, 469 (2d Cir. 1996); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *Garvin v. City of Philadelphia*, 354 F.3d 215, 221-22 (3d Cir. 2003); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1183 (3d Cir. 1994); *Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993); *Hall v. Norfolk Southern Railway Co.*, 469 F.3d 590, 596 (7th Cir. 2006); *Sandoval v. American Building Maintenance Industries*, 578 F.3d 787, 792 (8th Cir. 2009); *Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993); *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 857-58 (9th Cir. 1986); *Powers v. Graff*, 148 F.3d 1223, 1227 (11th Cir. 1998); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918-19 (D.C. Cir. 1997).

Krupski had a ticket, and that ticket had various provisions which governed claims against the "carrier." Krupski tried to comply with the provisions in the ticket—she gave notice of her claim within 185 days after the date of injury, she filed suit within one year, and she filed her suit in the proper venue. She (or her attorney) clearly read the ticket. Yet she did not honor the provisions of the ticket that identified Costa Crociere as the carrier against whom a claim should be brought. Instead, she sued Costa Cruise Lines, which was clearly identified as the sales and marketing agent for the carrier. Even Krupski's counsel admitted that "under the plain language of the ticket, Costa Cruise Lines, N.V., clearly can't be a carrier." JA 139. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update) ("The proper defendant in a passenger case is the shipowner or operator, not brokers or agents who issue the ticket or manage the ship for a disclosed principal."). Yet Krupski ignored the provision in the ticket.

Krupski was again told that Costa Crociere was a proper defendant on February 25, 2008, when Costa Cruise Lines filed its answer. The answer informed Krupski that Costa Cruise Lines wasn't involved in the operation, ownership or management of the vessel, and as the sales and marketing agent it could not be held liable under general maritime law. JA 29-31. Costa Cruises Lines explained to Krupski that "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A., an Italian corporation." JA 31. Yet Krupski did not respond by filing a claim against Costa Crociere.

Three months passed. Costa Cruise Lines then filed a motion for summary judgment, which told Krupski that she had to sue the "carrier," and that the carrier was "indisputedly Costa Crociere S.p.A." DE 19 - Pg 8. An accompanying affidavit repeated that the *Costa Magica* was owned and operated by Costa Crociere. JA 35. Again, Krupski did not promptly respond. Only five weeks later, after the time for service under Rule 4(m) had expired, did Krupski first attempt to assert a claim against Costa Crociere.

Krupski's failure to sue Costa Crociere was a deliberate, conscious decision. It may, in retrospect, have been an unwise, even foolish decision. But it was still a deliberate, conscious decision. It was, therefore, not a "mistake." Krupski cannot satisfy either of the two requirements of Rule 15(c)(1)(C)(ii)—within the period provided by Rule 4(m) for service, there was no "mistake" and Costa Crociere did not know or have reason to know that the action would have been brought against it, but for a mistake concerning its identity. Costa Crociere had every right to believe that Krupski's selection of a defendant, made after she conducted the "reasonable inquiry" required by Rule 11(b), was a deliberate decision, rather than a mistake.

The circuits have held that when a plaintiff is told to bring in another defendant, but does not do so during the relevant time, the plaintiff has made a deliberate choice, rather than a "mistake." For example, in *Ish Yerushalayim v. United States Department of Corrections*, 374 F.3d 89, 91-92 (2d Cir. 2009), there was no "mistake" where the district court told the plaintiff within the 120 days allocated for service of process that

the plaintiff had not named the proper party as defendant, but the plaintiff failed to promptly sue the new defendant. The plaintiff could not have the benefit of Rule 15(c). Similarly, in *Sandoval v. American Building Maintenance Industries*, 578 F.3d 787 (8th Cir. 2009), the defendant told the plaintiff that he needed to amend to add a new defendant. The plaintiff waited more than three months, and then sought to rely on Rule 15(c). The court held that inasmuch as the plaintiff was aware of the new defendant's identity for two months before the statute expired, "it cannot be argued that the mistake caused the failure to file a timely complaint." In *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853 (9th Cir. 1986), the plaintiff failed to amend her complaint after being informed of potential defendants. The court concluded that "Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party. . . ." *Id.* at 857-58. Where a plaintiff makes an "intentional choice" to not sue a particular defendant, there is no "mistake." *Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993). "That such a choice may not have been wise and that the attorney later sought to change it, is insufficient to invoke relation back of the amendment under Fed.R.Civ.P. 15(c)." *Id.*

This Court has addressed similar issues in two cases. In rejecting a plaintiff's reliance on Rule 15(c), the Court noted that the plaintiff—suing for defamation based on an article in *Fortune* magazine—could easily have determined the correct defendant merely by looking at the masthead of the magazine. *Schiavone v. Fortune*, 477 U.S. 21 (1986). "This was not a situation where the ascertainment of the defendant's identity was difficult

for the plaintiffs." *Id.* at 28. The Court made the same point in discussing the similar doctrine of equitable tolling. "The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). *Cf. Springman v. AIG Marketing*, 523 F.3d 685, 688 (7th Cir. 2008) ("The purpose of allowing relation back—to extend a deadline—allies the doctrine closely to equitable tolling. . . .").

Krupski did not carry her burden of establishing either of the requirements of Rule 15(c)(1)(C)(ii). She made no mistake. She was told that Costa Crociere was a proper defendant, but did not act upon it. Similarly, since Costa Crociere knew that Krupski had not made a mistake, it did not know or have reason to know that the action would have been brought against it, but for a mistake.

C. Under the plain language of Rule 15(c), the relevant time for analysis is the period stated in Rule 4(m) for service, not the end of the limitations period

Krupski, faced with the trail of her repeated failure to act despite her knowledge that Costa Crociere was the proper defendant, argues that the Court should ignore all the evidence after the end of the one-year limitation period. "Information obtained after the one year period has already expired is irrelevant to the inquiry," she asserts. Pet. Br. 12. *See also* Pet. Br. 41-44.

Krupski's contention is not correct. It is true that in *Schiavone v. Fortune*, 477 U.S. 21 (1986), this Court held that the time for the "mistake" analysis under Rule 15(c)(1)(C) is the expiration of the limitations period. But in response to *Schiavone*, Rule 15 was amended in 1991 to state that an amendment bringing in a new party can relate back "if, *within the period provided by Rule 4(m) for serving the summons and complaint*, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." (emphasis added).

Accordingly, under the plain language of the current rule the time for inquiry is not the end of the limitations period, but the 120 days after the filing of the complaint. "[T]he notice required under the rule is no longer tied to the governing limitations period, but is linked to the federal service of process period of 120 days or any additional time resulting from a court-ordered extension." WRIGHT, MILLER, AND KANE, FEDERAL PRACTICE AND PROCEDURE § 1498 (2009 update). *Accord McGuire v. Turnbo*, 137 F.3d 321, 325 (5th Cir. 1998).

Consistent with the change in the rule, courts have commonly included in their inquiry events after the end of the limitations period and into the time for service under Rule 4(m). For example, in *Ish Yerushalayim v. United States Department of Corrections*, 374 F.3d 89, 91-92 (2d Cir. 2009), the plaintiff was informed "within the 120 days allocated for service of process that he had not named the proper parties as defendants." Since the plaintiff did not add the defendant within the time remaining in the service period, he could not benefit

from Rule 15(c)(3). Other cases have considered events after the end of the limitations period and during the time for service. *See Morel v. DaimlerChrysler AG*, 565 F.3d 20, 26-27 (1st Cir. 2009); *Garvin v. City of Philadelphia*, 354 F.3d 215 (3d Cir. 2003); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1182-84 (3d Cir. 1994).[5]

The 1991 amendment to Rule 15(c) was intended to assist plaintiffs, and usually will. A plaintiff who sues the wrong defendant will often learn—upon receipt of an answer or motion to dismiss filed by the wrongly-named defendant—that the proper defendant was not sued. This will commonly be within the time for service under Rule 4(m), and the plaintiff will then be able to move to amend to add the new defendant. Once this is done, it will be indisputable that the original failure to sue the proper defendant had been a "mistake," and the requirements of Rule 15(c) will have been satisfied within the time for service under Rule 4(m).

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5. Krupski relies on *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000), in which the First Circuit stated that "what the plaintiff knew (or thought he knew) at the time of the original pleading is the relevant datum in respect to the question of whether a mistake concerning identity actually took place." This decision is contrary to the plain language of the amended rule, and contrary to the decisions cited above. But even the *Leonard* decision acknowledged that "post-filing events (including inaction in the face of new information)" can be relevant to the extent that they "(a) shed light upon the plaintiff's state of mind when he filed the original complaint, or (b) inform an added party's reasonable belief concerning the cause of her omission from that complaint." *Id.* at 30.

This is precisely what happened in *Suppa v. Costa Crociere S.p.A.*, 2007 WL 4287508 (S.D. Fla. Dec. 2007), which Krupski relies upon. In that case, as in the present case, the plaintiff sued Costa Cruise Lines when she should have sued Costa Crociere. The plaintiff in *Suppa* filed an amended complaint against Costa Crociere within the time for service under Rule 4(m), which made it clear within the relevant time that the prior failure to sue Costa Crociere had been a mistake.

Krupski could have done the same thing. Krupski filed suit against Costa Cruise Lines on February 1, 2008, and the time for service under Rule 4(m) expired on June 2, 2008. JA 21. Accordingly, events until June 2nd are relevant in evaluating whether Krupski satisfied the requirements of Rule 15(c). During this period she could have moved to add Costa Crociere as a defendant. By that time, having read the ticket and been twice told that the lawsuit should be against Costa Crociere, she certainly knew that Costa Crociere was the proper defendant. Her failure to take action during the service period, despite her knowledge, gives rise to the inescapable conclusion that her failure to sue Costa Crociere was a deliberate, conscious decision, rather than a "mistake" under Rule 15(c). Krupski's decision may have been foolish, but it was deliberate, and thus not within the scope of the rule.

D. Krupski's claim that the result is harsh is no reason to ignore the plain language of Rule 15(c)

Krupski's assertions that the decision of the circuit court is harsh and should be rejected in favor of a "liberal" interpretation of Rule 15(c) do not change the conclusion required by the plain language of the rule.

First, while Krupski argues for a liberal interpretation of the Rule in order to excuse her inaction, such liberality has no application here. As the Court stated in *Schiavone*, "We do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." 477 U.S. at 31.

Furthermore, when a plaintiff fails to file suit within the limitations period, and additionally fails to satisfy the requirements for relation-back of the complaint, the dismissal of the lawsuit is not "harsh." It is, rather, the proper ruling in a system governed by laws, rather than by sympathies. *See Schiavone*, 477 U.S. at 31. While there is a desire for a case to be decided on the merits of the claim, there is an important countervailing consideration—the respect to be afforded to a limitation period approved by Congress. 46 U.S.C. § 30508(b).

Additionally, the alleged harshness of the result is due to Krupski's failure to protect her own interests. In the adversarial system of litigation, "the plaintiff is responsible for determining who is liable for her injury and for doing so before the statute of limitation runs out; if she later discovers another possible defendant, she may not, merely by invoking Rule 15(c) avoid the consequences of her earlier oversight." *Rendall-Speranza v. Nassim*, 107 F.3d 913, 919 (D.C. Cir. 1997). Krupski got herself into the predicament in which she finds herself.

E. The flaws of Krupski's argument and main authority

Krupski's argument is for a new reading which eviscerates the phrase "mistake concerning the proper party's identity" in Rule 15(c)(1(C)(ii). "[W]here the 'notice' and 'not prejudiced' requirements of subsection (i) are met, and the added defendant 'knew or should have known' that it was an intended target of the Complaint, the 'mistake' criterion of subsection (ii) does not create a separate hurdle." Pet Br. 11.

At the outset, it is important to note that this argument, even if adopted, would not benefit Krupski. The argument retains the requirement in the rule that the newly-added defendant knew or should have known that it was an intended target. In this case, Costa Crociere knew that Krupski had repeatedly been informed that it was a proper defendant, but Krupski still did not bring a claim against it. Costa Crociere thus did not know or have reason to know that it was an intended target. Krupski thus loses even under her new theory of Rule 15(c).

Furthermore, Krupski's argument is deeply flawed and should not be adopted. The strongest support for her argument comes from a Fourth Circuit *en banc* decision, *Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007). In *Goodman*, the plaintiff sued Praxair Inc. and sought damages from it as successor in interest to another company, with whom the plaintiff had a contractual relationship. But in the complaint the plaintiff made clear that he was aware of another company, Praxair Services, Inc., which was the proper defendant.

Within the 120-day period for service, defendant Praxair, Inc. informed the plaintiff both that he had sued the wrong defendant and that the proper defendant was Praxair Services, Inc. Still within the 120-day period, the plaintiff filed an amended complaint adding Praxair Services, Inc. as a defendant. Thus, within the 120-day period of Rule 4(m), it was clear that (a) the plaintiff had made a mistake in identity, and (b) the newly added party was aware of that mistake.

The Fourth Circuit could easily have decided the case using the plain language of Rule 15(c). Under that plain language, the amended complaint would relate back, since it was clear to all within the period provided by Rule 4(m) that a mistake in identity had been made. But the Fourth Circuit failed to recognize that under the 1991 amendment to Rule 15(c) the relevant time for inquiry is the service period. Instead, the court repeatedly and incorrectly focused on whether there was a mistake during the limitations period.[6]

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6. The *Goodman* court stated:

> "The 'mistake' language is textually limited to describing the notice that the new party had, requiring that the new party have expected or should have expected, *within the limitations period*, that it was meant to be named in the first place, although it also implies that the plaintiff in fact made a mistake." 494 F.3d at 471 (emphasis added).
>
> "When that party has been given fair notice of a claim *within the limitations period* and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation-back." 494 F.3d at 471 (emphasis in original).

(Cont'd)

The Fourth Circuit's misunderstanding of the proper time for inquiry, and its desire to allow relation-back, led it to minimize the significance of the "mistake concerning identity" language and create a new interpretation of Rule 15(c). This interpretation stands alone among the circuits, and should not be adopted by this Court.

First, the plain language of Rule 15(c) includes the mistake requirement. It "unnecessarily muddies the water to treat [the mistake requirement] as inextricably intertwined with the questions of notice and prejudice under Rule 15(c)." *Woods v. Indiana University-Purdue University at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993). *See also Rendall-Speranza v. Nassim*, 107 F.3d 913, 919 (D.C. Cir. 1997). The rule should be interpreted so that it provides meaning to all its terms. *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2235 (2009). "Mistake" must mean something more than what is already covered by other provisions.

(Cont'd)

> "[W]hen a person is provided notice *within the applicable limitations period* that he would have been named in the timely filed action but for a mistake, the good fortune of a mistake should not save him." 494 F.3d at 472 (emphasis added).
>
> "These core requirements preserve for a new party the protection of a statute of limitations. They assure that the new party had adequate notice *within the limitations period* and was not prejudiced by being added to the litigation." 494 F.3d at 470 (emphasis in original).

Second, there is no need for a radically new interpretation of Rule 15. Had the *Goodman* court properly read Rule 15(c), including the 1991 amendment, it would have allowed the claim against the new defendant to relate back.

Finally, any attempt to re-interpret the rule to further assist plaintiffs who fail to timely file claims may have unintended consequences. Courts have relied on the "mistake" requirement to preclude the relation back of "John Doe" claims brought by plaintiffs against unknown defendants. According to almost all the circuits, "a plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the identity of the proper party' within the meaning of Rule 15(c)(3)(B)." *Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004).[7]

The Fourth Circuit acknowledged this case law and that courts sometimes decide these John Doe cases based on the mistake provision. *Goodman*, 494 F.3d at 470. The court suggested that John Doe cases could be found to be outside of Rule 15(c) by virtue of the rule's

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7. *Accord Malesko v. Correctional Services Corp.*, 229 F.3d 374, 383 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001); *Locklear v. Bergman & Beving AB*, 457 F.3d 363, 367 (4th Cir. 2006); *Jacobsen v. Osborne*, 133 F.3d 315, 320-21(5th Cir. 1998); *Moore v. Tennessee*, 267 Fed.App'x 450, 455-56 (6th Cir. 2008); *Worthington v. Wilson*, 8 F.3d 1253, 1256-57 (7th Cir. 1993); *Foulk v. Charrier*, 262 F.3d 687, 696 (8th Cir. 2001); *Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999), *overruled on other grounds*, *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). *But see Singletary v. Pennsylvania Department of Corrections*, 266 F.3d 186, 200-01 (3d Cir. 2001).

notice and prejudice provisions: "Most parties substituted for 'Doe' defendants would be protected against being added either because they were prejudiced or because they did not have proper notice." 494 F.3d at 470-71.

We suggest that the Fourth Circuit's confidence that the notice and prejudice provisions will protect against John Doe cases under Rule 15(c) is misplaced. John Doe cases often involve claims against government entities, where the plaintiff does not know the names of the specific police officers who encountered the plaintiff. In such cases, it seems entirely likely that where a lawsuit is filed against the government entity and Officer Does, the officers themselves will receive informal notice of the lawsuit, and it will be hard for them to establish prejudice. The bulwark against these John Doe claims thus remains the mistake provision of Rule 15(c). If it is interpreted as the *Goodman* court suggests, there may well be no limitation on John Doe claims.

Indeed, even the Fourth Circuit seemed to recognize this. After emphasizing the importance of the notice and prejudice requirements to guard against John Doe claims, the court added: "while parsing among different kinds of mistakes does not typically aid application of the Rule, naming Doe defendants self-evidently is no 'mistake' such that the Doe substitute has received proper notice." 494 F.3d at 471. But this afterthought is contrary to the court's stated intent of not "parsing among different kinds of mistakes." As even the Fourth Circuit acknowledged, the mistake provision plays an important role in Rule 15(c) and should not be ignored.

The *Goodman* case could have been decided the same way based on a proper reading of the relevant period of inquiry under Rule 15(c), and the decision fails to accord any real meaning to the mistake provision and will open the door to a flood of John Doe claims. It should not be adopted.

F. The burden of proof and standard of review favor affirmance

As explained, under the plain language of Rule 15(c) the district and circuit courts properly rejected Krupski's untimely claim against Costa Crociere. If the standard of review were *de novo*, affirmance would be required. But the standard of review is not plenary. In this case, the main question turns on whether Krupski's conduct was a deliberate choice or a mistake, and this inquiry is subject to a deferential standard of review, either abuse of discretion or clear error.[8] The district court's conclusion was neither an abuse of discretion nor clearly erroneous.

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8. Abuse of discretion: *VKK Corp. v. National Football League*, 244 F.3d 114, 127 (2d Cir. 2001); *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008); *Popp Telecom v. American Sharecom*, 361 F.3d 482, 489-90 (8th Cir. 2004); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993); *Wayne v. Jarvis*, 197 F.3d 1098, 1102 (11th Cir. 1999), *overruled on other grounds*, *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). *See generally Slayton v. American Express*, 460 F.3d 215, 226-27 (2d Cir. 2006).

Clear error: *Singletary v. Pennsylvania Department of Corrections*, 266 F.3d 186, 193 (3d Cir. 2001); *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998).

But see Williams v. Boeing Co., 517 F.3d 1120, 1132 n.8 (9th Cir. 2008) (*de novo* review); *Garrett v. Fleming*, 362 F.3d 692, 695 (10th Cir. 2004) (application of undisputed facts to Rule 15(c) is reviewed *de novo*).

Finally, insofar as the record on appeal is lacking in specifics, that is further reason for affirmance. Costa Crociere raised the statute of limitations as a defense, and on its face the defense was valid—Krupski's claim was not filed within the limitations period. Krupski then raised the relation-back argument, and on this issue she had the burden of proof. *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir. 1996). Yet Krupski did not come forward with any sworn proof, but instead relied for the most part on argument of counsel, which is not evidence. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). To the extent that the record is not complete, the incompleteness works against Krupski, and requires affirmance.

CONCLUSION

Krupski is not entitled to have her complaint relate back. During the relevant time she had abundant knowledge that Costa Crociere was a proper defendant, but she did nothing. Her failure to sue a clearly identified, known defendant was not a mistake but rather was a deliberate decision outside the scope of Rule 15(c). We respectfully request that the decision of the circuit court be affirmed.

Respectfully submitted,

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