No. 09-337

IN THE

Supreme Court of the United States

WANDA KRUPSKI,

Petitioner,

v.

COSTA CROCIERE S.p.A.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court abuses its discretion and is clearly erroneous in concluding that a plaintiff in a maritime action who fails to file suit against the proper defendant before the limitations period runs is not entitled under Rule 15(c)(1)(C) to have her complaint relate back to a prior complaint, where (1) the plaintiff within the limitations period reviewed her ticket, which identified the proper defendant, and (2) the plaintiff, upon learning of the failure to sue the proper defendant, waited more than four months to sue that defendant?

LIST OF PARTIES

The only parties in this Court are Petitioner Wanda Krupski and Respondent Costa Crociere S.p.A. At one time, Costa Cruise Lines N.V., LLC was a defendant, but it was dismissed from the case in the district court.

Corporate Disclosure Statement: Respondent Costa Crociere S.p.A. is an Italian corporation. Its parent corporations are Carnival Corporation and Carnival PLC, which are publicly-held.

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STATEMENT OF THE CASE

Plaintiff Wandra Krupski purchased a ticket for a cruise aboard the *Costa Magica*. [DE 19-4 - pg 11-12; Pet. App. E] The ticket made unmistakably clear that the cruise was operated by an Italian corporation, Costa Crociere S.p.A.

In the definitions section of the ticket, Costa Crociere S.p.A. was specified as being the "Carrier":

> 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 the Vessels, and the manufacturers of said Vessels and all their component parts.

[Pet. App. 27a]

Other portions of the ticket made clear that—consistent with established principles of maritime law—an action for personal injuries arising from the cruise should be against the Carrier, Costa Crociere S.p.A. The ticket provided that "[t]he CARRIER shall be liable only for its negligence." [Pet. App. 28a] A venue provision provided that claims against the "CARRIER" seeking more than $75,000 had to be brought in federal district court in Broward County, Florida, "and any other action

against the CARRIER shall be considered void." [Pet. App. 36a] The limitation of liability provision stated that the "CARRIER" disclaimed liability for certain damages for emotional distress. [Pet. App. 36a]

The ticket listed on a cover sheet Costa Cruise Lines N.V., but it was clear that this entity was not the Carrier. The ticket specifically identified Costa Cruise Lines N.V. as "a sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." [Pet. App. 29a]

Finally, the Plaintiff was warned that the ticket contained important information. The front page stated:

> IMPORTANT NOTICE. PLEASE READ THE TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS in accepting this ticket. Guests agree to be bound by all of its terms, including its limitations of the Guest's rights. Guest should carefully examine the ticket, especially the section noted as "GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT" located on pages A1 to A14 of this book."

[DE 19-3 - pg 19][1]

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1. The Petitioner's appendix contains the remainder of the travel documents, but omits this cover page.

THE CRUISE AND THE LAWSUIT AGAINST COSTA CRUISE LINES N.V.

The Plaintiff claims that she was injured onboard the cruise on about February 21, 2007, when she tripped and fell over a camera cable. [DE 1 - pg 3] Five months later her lawyer sent a letter to Costa Cruise Lines N.V., seeking compensation for her claimed injuries. [DE 26-2 - pg 13] The letter was answered by International Risk Services, Inc., identified as "Claims Administrator for Costa Cruise Lines, N.V." [DE 26-2 - pg 15]

On February 1, 2008, the Plaintiff filed suit in federal district court in Broward County, Florida. [DE 1] This was only a few weeks before the one-year time-for-suit limitation specified in the ticket was scheduled to run.

The complaint made clear that the Plaintiff and her attorney possessed the ticket for the cruise, and had reviewed it. [DE 1 - pg 2] The complaint stated that the suit was being filed in federal court in Broward County because the "passenger ticket contains a forum section [clause]." *Id.*

The Plaintiff named as the only defendant an entity which it called "Costa Cruise Lines, N.V. L.L.C. d/b/a Costa Cruise Lines, a foreign corporation (Netherlands Antilles)." [DE 1 - pg 1] The complaint alleged that Costa Cruise Lines was liable because it "owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *Costa Magica*." [DE 1 - pg 2]

COSTA CRUISE LINES RAISES THE ISSUE OF THE CORRECT DEFENDANT, AND THE PLAINTIFF DOES NOTHING FOR FOUR MONTHS

Costa Cruise Lines N.V. was served on February 4, 2008, and answered the complaint on February 25th. [DE 19 - pg 2] In its answer, Costa Cruise Lines N.V. noted that under the passenger ticket "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere, S.p.A., an Italian corporation." [DE 19-3 - pg 2] Costa Cruise Lines N.V. also noted that it was identified in the passenger ticket as the "sales and marketing agent for the carrier/vessel operator, Costa Crociere, S.p.A," and that Costa Cruise Lines N.V. "does not occupy a status" upon which it could be held liable under General Maritime Law. [DE 19-3 - pg 2-3]

The Plaintiff did nothing in response to this information.

COSTA CRUISE LINES N.V. MOVES FOR SUMMARY JUDGMENT

Three months later, Costa Cruise Lines N.V. moved for summary judgment on the basis that it wasn't the "carrier" and could not be held liable for injuries on board the *Costa Magica*. [DE 19] The motion was accompanied by an affidavit which stated that Costa Cruise Lines N.V. was a sales and marketing agency for vessels operated by Costa Crociere S.p.A., that Costa Cruise Lines N.V. did not own or operate any ships, and that the *Costa Magica* was owned and operated by Costa Crociere S.p.A. [DE 20 - pg 2]

The Plaintiff responded on June 13, 2008 with an unsworn memo of law. She stated that in July 2007 her attorney had conducted research about who was the proper defendant. [DE 26 - pg 2-3] The attorney could have researched who was the proper defendant by simply reading his client's ticket, which revealed that Costa Crociere S.p.A. was the carrier, and that Costa Cruise Lines N.V. was merely the sales and marketing agent. Indeed, the attorney reviewed part of the ticket [DE 1 - pg 2], but apparently not the relevant parts of the ticket.

Rather than review the terms of the ticket to determine the proper defendant, the attorney searched on the internet. [DE 26 - pg 2-3] In conducting the internet search, the attorney limited his search to (1) local corporations, and (2) corporations with the name "Costa Cruise Lines." *Id.* He first looked at www.costacruise.com, and found that "the only United States office" listed on the web site was "Costa Cruise Lines, N.V." *Id.* He then went to the Florida corporations web site, where he searched for "Costa Cruise Lines." He found that the only active name returned was Costa Cruise Lines N.V., L.L.C. [DE 26 - pg 2-3] He concluded that Costa Cruise Lines N.V., L.L.C. was the proper defendant.

The Plaintiff added that she still "reasonably believes and maintains that [Costa Cruise Lines N.V.] is a proper party to this case." [DE 26 - pg 4] She said that "it is too early to determine" whether Costa Cruise Lines should be dismissed from the lawsuit. *Id.* The Plaintiff also asked for leave to amend her complaint to add Costa Crociere S.p.A. as a defendant. *Id.*

The district court held a hearing on the motion for summary judgment. [DE 57] During the hearing, the Plaintiff admitted that Costa Cruise Lines N.V. was not a "carrier" under the ticket. "As it relates to Costa Cruise Lines N.V., I think that the plain language of the ticket, Costa Cruise Lines N.V. clearly can't be a carrier." [DE 57 - pg 16] Still, she argued that she should be given an opportunity to further investigate. *Id.* The district court denied the motion for summary judgment without prejudice, and granted the Plaintiff's motion for leave to amend to add Costa Crociere S.p.A. [DE 30]

THE PLAINTIFF AMENDS HER COMPLAINT TO ADD A CLAIM AGAINST COSTA CROCIERE S.P.A.

The Plaintiff filed an amended complaint which repeated the allegations against Costa Cruise Lines N.V. from the original complaint, and added new allegations against Costa Crociere S.p.A. [DE 31 - pg 3, 6]

The allegations against the two Defendants were similar but not identical. The Plaintiff alleged that Costa Cruise Lines N.V. was liable because it "owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *Costa Magica*." [DE 31 - pg 3] On the other hand, the Plaintiff alleged that Costa Crociere S.p.A. was liable "as CARRIER under the terms of the passenger ticket contract." [DE 31 - pg 6]

THE MOTIONS TO DISMISS

Costa Cruise Lines N.V. moved to dismiss the amended complaint. [DE 35] The Plaintiff responded by admitting that she had no claim against Costa Cruise Lines N.V., and voluntarily dismissed that claim. [DE 42]

Costa Crociere S.p.A. also moved to dismiss the complaint. [DE 43] It argued that it was not sued within the time-for-suit limitation, and that the amended complaint in which it was sued did not relate back to the original complaint. [DE 43 - pg 1]

THE DISTRICT COURT'S DECISION

The district court treated the motion to dismiss as a motion for summary judgment, giving the parties the opportunity to present material outside the pleadings. [Pet. App. 8a] The court granted summary judgment in Costa Crociere S.p.A.'s favor.

The district court found that the first two requirements of Rule 15(c)(1)(C) were satisfied: the claim against Costa Crociere S.p.A. arose out of the conduct, transaction, or occurrence set out in the original complaint, and Costa Crociere S.p.A. received sufficient notice of the action that it would not be prejudiced in defending on the merits (noting that both entities were represented by the same counsel and had an identity of interest). [Pet. App. 14a-18a]

However, the district court found that the third requirement was not satisfied—the Plaintiff had not established that Costa Crociere S.p.A. "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." [Pet. App. 18a] The court concluded that "[a]lthough Costa Crociere S.p.A. may have had constructive notice of this action within 120 days of the Original Complaint, Krupski's First Amended Complaint cannot relate back under Rule 15(c)(1)(C)(ii) because her failure to timely name Costa Crociere S.p.A. as a defendant was not the result of a 'mistake.'" [Pet. App. 19a] "This is not a case where there was a lack of knowledge of the existence of the proper party or the identity of the proper party. Nor is this amendment sought because of a scrivener's error." [Pet. App. 20a] The court concluded that the relation back provisions of Rule 15 did not apply in a case like this, "where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not have necessarily known that, absent a mistake by the plaintiff, they would have been sued." [Pet. App. 20a-21a]

THE CIRCUIT COURT OPINION

The Eleventh Circuit affirmed the district court. *Krupski v. Costa Cruise Lines N.V.*, 330 Fed. Appx. 892 (11th Cir. 2009).

The circuit court stated that the "determinative question is whether Krupski's suit against Costa Cruise rather than Costa Crociere was the result of a 'mistake concerning the proper party's identity' as contemplated

by Rule 15(c)(1)(C)." [Pet. App. 5a-6a] The court held that the district court did not err in concluding that the Plaintiff's amendment adding Costa Crociere S.p.A. as a defendant was not due to the kind of mistaken identity addressed by Rule 15(c). [Pet. App. 6a]

The court stated that "Krupski concedes that if suing Costa Cruise, and not Costa Crociere, was a deliberate choice, no 'mistake' occurred and the suit against Costa Crociere is time-barred." [Pet. App. 6a] The court noted that nothing in Rule 15 or the Advisory Committee Notes "indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged." [Pet. App. 5a].

The court explained the facts demonstrating the Plaintiff's decision to file suit against Costa Cruise Lines, despite its knowledge of Costa Crociere S.p.A.:

> Undisputed . . . is that Krupski kept her ticket and furnished it to counsel shortly after the alleged injury. Costa Crociere, not Costa Cruise, was clearly identified in the Ticket's definition of "Carrier." The identity and knowledge of Costa Crociere as a potential party shortly after the alleged injury, therefore, must be imputed to Krupski and her counsel.
>
> Indeed, Krupski conceded before the district court that under the plain language of the Ticket, Costa Cruise could not be the Carrier. We agree with the district court that

> this is not a case about simple mistake of identity or misnomer—to the contrary, Krupski chose to sue one potential party and not another even though the identity of both was known to her.

[Pet. App. 6a]

The circuit court also noted the Plaintiff's delay in adding Costa Crociere S.p.A. as defendant after she learned of her alleged "mistake." [Pet. App. 7a] The Plaintiff was told in the answer filed on February 25, 2008 about Costa Crociere's identity, yet she did not file an amended complaint adding Costa Crociere until 133 days later. *Id.* The court stated that "Krupski offers no reason for this delay." *Id.*

The Eleventh Circuit's opinion was unanimous, and the court specified that it would not be published. [Pet. App. 1a] The Plaintiff did not ask the court to publish the opinion.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition. First, even if there were an important legal issue for the Court to review, this case is not a proper vehicle for review. Second, while there is some variation among the circuits in their consideration of Rule 15(c)(1)(C), there is no reason to review this case.

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW OF THE ISSUES RAISED IN THE PETITION

Even if the case presented an issue of law appropriate for review by the Court, this case would not be a suitable vehicle for review of the legal issue.

A. Contrary to the Petition, the circuit court did not create an "imputed knowledge" exception to Rule 15(c)(1)(C), but simply acknowledged the well-accepted principle that a party is charged with knowledge of a document which it possesses and reviews

The Court should deny the Petition because it mischaracterizes the opinion of the circuit court.

The circuit court considered whether there was a "mistake" under Rule 15(c)(1)(C). As the court noted, "Krupski concedes that if suing Costa Cruise, and not Costa Crociere, was a deliberate choice, no 'mistake' occurred and the suit against Costa Crociere is time-barred." [Pet. App.6a] In analyzing this question, the court noted that "Krupski kept her Ticket and furnished it to counsel shortly after her alleged injury," and that "Costa Crociere, not Costa Cruise, was clearly identified in the Ticket's definition of 'Carrier.'" *Id.* Further, it was clear that the Plaintiff's counsel had reviewed the ticket, as the Plaintiff complied with other provisions of the ticket (including notification of the claim, forum selection, and time for suit as to Costa Cruise Lines N.V.). [DE 1 - pg 2]

Based on these facts, the Court made the common-sense conclusion that the Plaintiff was charged with knowledge of what was in the ticket: "The identity and knowledge of Costa Crociere as a potential party shortly after the alleged injury, therefore, must be imputed to Krupski and her counsel." [Pet. App. 6a]

Based on this sentence, the Plaintiff claims that "[t]he decision of the Eleventh Circuit creates an 'imputed knowledge' exception" to Rule 15(c)(1)(C). [Pet. at 7] Similarly, the Plaintiff in her "Question Presented" claims that the circuit court "concluded that there can be no such 'mistake' where the Plaintiff had imputed knowledge of the identity of the added Defendant prior to filing suit."

The Plaintiff's claim that the circuit court created a new rule of law, an exception to Rule 15(c)(1)(C), is not accurate. The circuit court decided a case, and in the process made an uncontroversial statement that a party is charged with knowledge of a document which (1) was in the party's possession, and (2) the party admitted that it reviewed, and (3) was not claimed to be confusing or illegible. There is nothing noteworthy about this question. *See generally Oltman v. Holland America Line*, 538 F.3d 1271, 1276-77 (9th Cir. 2008); *Marek v. Marpan Two*, 817 F.2d 242, 247 (3d Cir. 1987); *Deiro v. American Airlines*, 816 F.2d 1360, 1364-65 (9th Cir. 1987).

B. The Plaintiff failed to assert estoppel

This case is an unsuitable vehicle for the additional reason that the Plaintiff failed to assert a doctrine relevant to her case, a doctrine which she could have argued would have afforded her the relief which she was denied under Rule 15(c)(1)(C). She could have but did not assert an estoppel argument.

Under Rule 15, an amendment relates back when "the law that provides the applicable statute of limitations allows relation back." Rule 15(c)(1)(A). The

Committee Note to the 1991 amendment to the rule explains that "[i]n some circumstances, the controlling limitations law may be federal law. Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim."

Here, the controlling law is admiralty law. Admiralty law may permit an estoppel argument under the circumstances of this case. As the leading commentator explains, "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. If the defendant's actions make it difficult to ascertain the party who should be held responsible, the doctrine of equitable estoppel may be used to overcome a time bar for suit." T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update).

In one case, a passenger injured on a cruise ship sued the sales agent instead of the operator of the ship. *Schrader v. Royal Caribbean Cruise Line*, 952 F.2d 1008 (8th Cir. 1992). The two entities had similar names—the sales agent was Royal Caribbean Cruise Line, Inc., while the ship operator was Royal Caribbean Corporation. After the limitations period had run, the plaintiff sued the proper defendant, the ship operator. The district and circuit courts both ruled that the plaintiff had failed to establish the requirements of Rule 15(c). But the circuit court reversed the summary judgment for the defendant on the basis that there was a jury question on whether the defendant was estopped from relying on the limitations period because it misled the plaintiff as to the identity of the proper defendant.

Accordingly, even a plaintiff who cannot succeed under the specific requirements of Rule 15(c)(1)(C) might be able to prevail under an estoppel argument. *See Axelrod v. Incres Steamship Co.*, 363 F.2d 531, 532 (2d Cir. 1966); *Fugaro v. Royal Caribbean Cruises Ltd.*, 851 F. Supp. 122 (S.D.N.Y. 1994). The Plaintiff's failure to assert estoppel makes this an unsuitable vehicle for review of the issues raised in the Petition.

C. The Petition contains assertions of fact not supported by the record

An additional reason why this case is not a suitable vehicle for review of the issues raised is that the record is sparse, and this spareseness has led the Plaintiff to make factual assertions which are without support in the record.

The burden of establishing "relation back" rested with the Plaintiff.[2] Even though the case was decided on summary judgment, the Plaintiff still had the burden of coming forward with evidence to rebut the time-for-suit defense and to support her argument that her

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2. *Smith v. Chyrsler Corp.*, 45 Fed. App. 326, 1 (5th Cir. 2002); *Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished opinion); *Tubre v. Western Diversified Casualty Insurance Co.*, 2009 WL 3447255 (E.D. La. Oct. 19, 2009); *Moore v. Horel*, 2009 WL 2513920 (E.D. Cal. Aug. 18, 2009); *Estate of Grier v. University of Pennsylvania Health System*, 2009 WL 1652168 (E.D. Pa. June 11, 2009); *Pitre v. Tera Technologies*, 2008 WL 4831657 (E.D. La. Nov. 6, 2008); *VKK Corp. v. National Football League*, 187 F.R.D. 498, 500 (S.D.N.Y. 1999); *Irvin v. City of Chicago*, 2007 WL 3037051 (N.D. Ill. Oct. 15, 2007).

amended complaint related back to her original complaint. *See Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished opinion) ("While [the defendant] had the burden on summary judgment of presenting evidence sufficient to prove its statute of limitations defense, [the plaintiff] had the burden of proof to rebut the statute of limitations grounds by relation back under Rule 15(c)."); *Smith v. Chyrsler Corp.*, 45 Fed. App. 326, 1 (5th Cir. 2002); *Pitre v. Tera Technologies*, 2008 WL 4831657 (E.D. La. Nov. 6, 2008); *Logwood v. Apollo Marine Specialists*, 772 F.Supp. 925, 929 (E.D. La. 1991).

In this case, there were large gaps in the record. While the Defendant submitted an affidavit in support of its argument against relation back, the Plaintiff did not submit any sworn evidence.

Since the record contained few facts to support the Plaintiff's argument, she made unsworn assertions in the trial court, repeated them in the circuit court, and repeats them again here. For example, she alleges that "the 'mistake,' *as explained by Petitioner's counsel*, was an initial misunderstanding over which of the many 'Costa' entities was the name of the ship operator responsible for Mr. Krupski's injuries." [Pet. at 10, emphasis added] But the only place where the Plaintiff's counsel "explained" anything was in unsworn argument. Indeed, the Plaintiff acknowledges this: "The only explanation of record is that found in the Responses filed by Petitioner in the District Court in response to Summary Judgment or dismissal motions." [Pet. at 10 n.3] These responses were not sworn (and there was no request for an evidentiary hearing).

These unsworn assertions by counsel are not evidence. "[L]egal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

Since the record lacks evidence to support the Plaintiff's position, this case would be a poor vehicle to consider the legal issues raised in the Petition.

D. The circuit court's opinion was unpublished

The circuit court's opinion was unpublished. Even if the Plaintiff were correct in her argument that the circuit court created a new exception to Rule 15, that "exception" does not exist outside of this lawsuit. Under Eleventh Circuit rules, unpublished opinions are "not considered binding precedent," and the court "generally does not cite to its 'unpublished' opinions because they are not binding precedent." 11th Cir. R. 36-2; 11th Cir. Rule 36, IOP 7 & 6. A rule of law stated in one unpublished, nonprecedential opinion does not justify review by this Court.

II. THE MERITS OF THE CASE DO NOT PRESENT AN IMPORTANT ISSUE FOR THE COURT TO REVIEW

As explained above, this case is not a proper vehicle for consideration of the issues which the Plaintiff raises. But there is a more fundamental reason for denying the writ: the case does not involve important enough issues, and the result of the circuit court was proper.

A. The case involves an appellate court's determination that the trial court was not clearly erroneous or did not abuse its discretion

The case does not present an issue suitable for Supreme Court review.

The heart of the opinion of the circuit court is the following conclusion: "We agree with the district court that this is not a case about simple mistake of identity or misnomer—to the contrary, Krupski chose to sue one potential party and not another even though the identity of both was known to her." [Pet. App. 6a]

This conclusion is not a statement of law. It is, instead, either a finding of fact or an application of Rule 15(c)(1)(C), both of which receive deferential review. As the circuit court explained, even where the district court enters summary judgment, the appellate court reviews a district court's application of Rule 15(c)(1)(C) for abuse of discretion, and reviews findings of fact necessary for application of the rule for clear error. [Pet. App. 3a-4a] *See also VKK Corp. v. National Football League*, 244 F.3d 114, 127 (2nd Cir. 2001) ("We review for abuse of discretion a district court's determination that an amended complaint does not relate back to the original complaint."); *Popp Telecom v. American Sharecom*, 361 F.3d 482, 489-90 (8th Cir. 2004) ("The district court's application of Rule 15(c) is reviewed for an abuse of discretion."); *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) ("The district court did not abuse its discretion in finding relation back to be appropriate here."). *But see Williams v. Boeing Co.*, 517 F.3d 1120, 1132 (9th Cir. 2008).

While the Plaintiff may disagree with the district court's conclusion, or the circuit court's affirmance of the district court's conclusion, there is not an appropriate basis for Supreme Court review. The Plaintiff's argument is merely an assertion of "erroneous factual findings or the misapplication of a properly stated rule of law," S.Ct. R. 10, and not a basis for review in this Court.

B. The result in this case was proper under abundant legal authority

Even if this case did present an issue of law appropriate for review by the Court, and even if this were a suitable case for review of the legal issue, the Court should not grant the writ because the result in this case was proper under abundant legal authority.

Here, two matters were or should have been apparent to the Plaintiff. First, it is fundamental that in maritime "[t]he 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." SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update). *Accord Chan v. Society Expeditions*, 123 F.3d 1287, 1293 (9th Cir. 1997). Second, the ticket received by the Plaintiff, and reviewed by her lawyer, stated that (a) the carrier/owner/operator was Costa Crociere S.p.A, and (b) Costa Cruise Lines N.V., was the sales and marketing agent for Costa Crociere S.p.A. Despite this, the Plaintiff sued Costa Cruise Lines, not Costa Crociere.

There is abundant authority that Rule 15(c)(1)(C) does not allow the relation back of a complaint where the plaintiff all along had knowledge of the proper defendant. Where a party possesses knowledge of the proper defendant, but does not sue that defendant, the action is not a "mistake concerning the proper party's identity" under Rule 15(c). "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. . . ." *Kilkenny v. Arco Marine*, 800 F.2d 853, 858 (9th Cir. 1986). "A plaintiff's ignorance or misunderstanding about who is liable for his injury is not a 'mistake' as to the defendant's 'identity.'" *Hall v. Norfolk Southern Railway Co.*, 469 F.3d 590, 596-97 (7th Cir. 2006).[3]

Courts have recognized that nothing in the history of Rule 15(c)(1)(C) suggests that such conduct by a plaintiff is to be excused. "Nothing in the Rule or in the Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged."

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3. *See also Sandoval v. American Building Maintenance Industries*, 578 F.3d 787, 792 (8th Cir. 2009); *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998); *Woods v. Indiana University-Purude University at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993); Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 CAL. R. REV. 1549, 1587 (2001) ("When it seems likely that the plaintiff knew the additional defendant existed but failed to name it either through carelessness or because of poor legal advice, courts are likely to deny relation back."). *Compare Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007); *Leonard v. Parry*, 219 F.3d 25 (1st Cir. 2000).

Rendall-Speranza v. Nassim, 107 F.3d 913, 917-19 (D.C. Cir. 1997). "In fact, the Notes speak of a defendant that may properly be added under Rule 15(c) as an 'intended defendant,' and of an amendment pursuant to the Rule as 'a name-correcting amendment.'" *Id. See also Nelson v. Adams USA*, 529 U.S. 460, 467 n.1 (2000) ("Rule 15(c)(3) . . . applies only in cases involving 'a mistake concerning the identity of the proper party.' Fed. Rule Civ. Proc. 15(c)(3)(B). Respondent Adams made no such mistake. It knew of Nelson's role and existence. . . .").

C. The court properly considered the Plaintiff's delay in filing suit against Costa Crociere S.p.A.

The Plaintiff argues that the circuit court improperly considered her delay after she claims to have learned that Costa Cruise Lines N.V. was the wrong defendant. The circuit court noted that the Plaintiff failed to seek leave to amend her complaint until June 2008, even though Costa Crociere was identified in Costa Cruise Lines N.V.'s answer, filed more than four months earlier.

The Plaintiff claims that it is "illogical to consider post-suit information in assessing pre-suit knowledge," and that it is also "illogical to consider post-suit delay in amendment as probative of whether the failure to sue the added defendant initially was a 'mistake concerning the proper party's identity.'" [Pet. at 20]

Contrary to the Plaintiff's argument, the courts consider post-suit events in determining whether the requirements of Rule 15(c)(1)(C) have been satisfied. The Plaintiff relies on *Leonard v. Parry*, 219 F.3d 25(1st

Cir. 2000), but the court there noted that post-filing events can be relevant. The court stated that *knowledge* obtained by the plaintiff post-filing is without weight in determining his state of mind when he filed the complaint. *Id.* at 29. However, "post-filing events (including inaction in the face of new information)" are 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. *See also Springman v. AIG Marketing Inc.*, 523 F.3d 685, 689-90 (7th Cir. 2008).

Here, the Plaintiff waited more than four months to act after learning that Costa Cruise Lines N.V. was not a proper defendant. The Plaintiff's lack of action in the face of this notice suggests that the Plaintiff's decision to sue Costa Cruise Lines was a deliberate decision, rather than a "mistake concerning the proper party's identity" under Rule 15(c).

The circuit court properly considered post-filing events. At the very least, the consideration of post-filing events is not a basis for granting review.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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