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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEMETH,

Appellants,

-against-

K-TOOLING, ET AL.,

Respondents.

NO. 48

20 Eagle Street
Albany, New York
September 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Amanda M. Oliver
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. First case
2 on the calendar is Number 48, matter of Nemeth v. K-
3 Tooling.

4 Counsel?

5 MR. GOLDMAN: Thank you, Chief Judge Wilson. May
6 it please the court, my name is Jonathan Goldman from
7 Sussman and Goldman on behalf of the appellants.

8 May I reserve three minutes for rebuttal, please?

9 CHIEF JUDGE WILSON: Yes, sir.

10 MR. GOLDMAN: Thank you, Your Honor.

11 The order appealed from should be reversed
12 because the Third Department interpreted and applied the
13 state's relation-back doctrine in too narrow and
14 restrictive of a manner, and in a way that contravenes the
15 plain language of the relevant statute, this court's
16 precedent, and which undermines the underlying policy
17 considerations that animate the doctrine in the first
18 place.

19 JUDGE RIVERA: So Counsel, what's - - - what's
20 the - - - as they say, the fruit of the poisonous tree;
21 what's the root of this error?

22 MR. GOLDMAN: The root of this error is,
23 basically, contravening what I think the court held in
24 Buran to be very clear, that a mistake may not be excusable
25 to satisfy the relation-back doctrine. The Third

1 Department basically held that because the appellants knew
2 the identity of the omitted party, Ms. Kuehn, and had
3 involved her in a prior litigation, that it could not be a,
4 quote/unquote, mistake that satisfies the relation-back
5 doctrine.

6 JUDGE CANNATARO: So is it just the mistake or
7 is - - - was there also an issue regarding the identity of
8 arguments?

9 MR. GOLDMAN: So in terms of unity of interest,
10 which is the second prong of the doctrine, that was
11 certainly something that had been litigated below. As I
12 read the Third Department's decision, they - - - the
13 majority assumed the - - - that the first two prongs were
14 met and decided the issue dispositively on the third prong.

15 Justice Garry, in dissent, reached the merits of
16 the second prong, and I think rightly found that there is
17 unity of interest. That case - - - that issue has been
18 joined in the briefs on this appeal. And I would submit
19 that there is sufficient unity of interest if this court
20 were inclined to reach that issue.

21 JUDGE HALLIGAN: So was it a mistake of law or
22 was it an inadvertent omission in the sense of, you know, a
23 typo?

24 MR. GOLDMAN: I wouldn't necessarily say typo,
25 but I think it's sort of a combination of the two. You

1 have a situation where Ms. Kuehn is involved, and has been
2 involved, with these family businesses for decades, and the
3 application to the ZBA had been submitted expressly for the
4 purposes of the two manufacturing entities to be able to
5 use the property. The decision, itself, from the ZBA
6 speaks about Kuehn Manufacturing and - - -

7 JUDGE HALLIGAN: She was - - - she was joined in
8 a prior litigation, right - - -

9 MR. GOLDMAN: Yes.

10 JUDGE HALLIGAN: - - - I think 2013. So was the
11 non-joinder this time because she was inadvertently left
12 off, or because there was a determination she wasn't
13 legally necessary?

14 MR. GOLDMAN: With the caveat that I wasn't the
15 drafter of either petition, so I can't speak from personal
16 knowledge, but my understanding is, it was - - - it was
17 essentially inadvertent in the sense that it was not done
18 deliberately to obtain some sort of litigation advantage.
19 The decision of the ZBA being attacked by the Article 78
20 petition was a decision that granted a variance with - - -
21 with respect to the manufacturing entity's application to
22 operate their business from that property.

23 JUDGE HALLIGAN: So you're not saying it was a
24 mistaken apprehension that she was not legally necessary,
25 but an inadvertent omission; is that right?

1 MR. GOLDMAN: Again, I think it's somewhat of a
2 combination of both. But I would respectfully submit that
3 either way you look at it shouldn't matter for purposes of
4 relation-back. Because I think how the court should come
5 down on this, and I think Justice Garry, in dissent, got
6 this right, is that when you're speaking of whether or not
7 it's a mistake, it's not necessarily is it a mistake of
8 law, is it a misapprehension, is it inadvertent. The real
9 question is was the person omitted intentionally and
10 deliberately for the purposes of gaining some sort of
11 litigation advantage - - -

12 CHIEF JUDGE WILSON: Is there an exception - - -

13 JUDGE TROUTMAN: And is it your argument that the
14 record here doesn't support such?

15 MR. GOLDMAN: I'm sorry, Your Honor, I didn't
16 hear that.

17 JUDGE TROUTMAN: Is it your argument that the
18 record doesn't support a clear strategic choice?

19 MR. GOLDMAN: That's correct. In fact, there
20 could be none because she's a necessary party. So there'd
21 be no reason to intentionally and deliberately omit a
22 necessary party if - - - the - - - if you knew that this
23 necessary party were required to obtain any relief, and
24 understood that their omission might frustrate that
25 purpose, there's no litigation advantage or anything that

1 could be obtained by her omission. It was - - -

2 CHIEF JUDGE WILSON: So the intentionally and
3 deliberately strikes me, at least, as an exception to a - -
4 - to a general rule. And although it's a U.S. Supreme
5 Court decision interpreting 15(c), not one of our
6 decisions, Krupski seems to say that it's not the intent -
7 - - for the general rule, it's not the intent of the
8 plaintiff that matters at all, it's whether the defendant
9 should have been - - - should have expected to have been
10 joined.

11 MR. GOLDMAN: That's exactly - - -

12 CHIEF JUDGE WILSON: Do you interpret it that
13 way?

14 MR. GOLDMAN: I do interpret it that way. I
15 agree with that, Your Honor.

16 CHIEF JUDGE WILSON: So what are the things in
17 the record that would indicate that the defendant here
18 would have expected to be joined?

19 MR. GOLDMAN: The fact that she's been involved
20 in these proceedings since - - - since the prior
21 proceedings. She's the owner of the property. To the
22 extent she gained to benefit from this variance to her - -
23 - her property, as the property owner, it was done solely
24 because of the fact that as the property owner she had to
25 be involved somehow in the ZBA proceeding. It was brought

1 entirely for the purpose of her family businesses. The
2 businesses were established by her husband, Ray Kuehn, and
3 her son, Perry Kuehn. They're continued from the property.
4 She's represented by Mr. Pope. She has been throughout the
5 prior proceedings and this proceeding, along with all the
6 other respondents.

7 I don't think there's any reasonable way to
8 presume that she would not have understood that but for a
9 mistaken omission of her from this case, that there would
10 have been an intent not to include her as a necessary party
11 to the extent she was a necessary party.

12 And I would also - - -

13 JUDGE GARCIA: Counsel, on that point.

14 MR. GOLDMAN: Yes.

15 JUDGE GARCIA: That goes to, I think, something
16 I've been thinking about on prong three of the test, right?

17 MR. GOLDMAN: Yes, Your Honor.

18 JUDGE GARCIA: Excusable is gone under Buran.
19 What's left? Now, if we agree with you, if we were to
20 agree with you, and mistake of law, mistake of fact,
21 whatever the mistake, a mistake is a mistake, right?

22 MR. GOLDMAN: Correct, Your Honor.

23 JUDGE GARCIA: What's left? And I think Chief
24 Judge Wilson's point on the impression given to the
25 defendant here, whether it was reasonable to conclude, I

1 think that's still left.

2 But I disagree with what I think you were saying
3 before that you still don't have a gamesmanship issue - - -
4 not in this case, but, generally - - - potential whereas a
5 necessary joinder. Because I thought that, and I thought
6 that would weed a lot out of the purpose of prong three.

7 But I think in Brock v. Bua, the - - - that old
8 case where we still had the old standard of proof there.
9 At the Appellate Division, they talk about gamesmanship
10 with a necessary party in the sense that you don't join
11 them because you know you can join them later, so you have
12 a lot of runway in this case with a party who may be not as
13 financially able to defend or investigate, and then you
14 join the necessary party later at a - - - at a point in the
15 case that might foreclose certain avenues.

16 That's what they mention in there in - - - in the
17 Appellate Division in Brock v. Bua. And I think that's
18 still left even in a necessary joinder case. Again, I'm
19 not saying that's here. But I think that that leaves that
20 part of the prong three open still.

21 MR. GOLDMAN: I think I agree with Your Honor's
22 interpretation of that to the extent that, again, even with
23 a necessary party - - - and I agree with Your Honor that in
24 this case, that clearly can't be the case because there can
25 be no advantage or tactic in omitting the necessary party

1 here. They all have the same defenses.

2 The attack, really, it - - - it's not a claim
3 being brought against Ms. Kuehn, or seeking compensation
4 from Ms. Kuehn, or from any of the other manufacturing
5 respondents. It's a challenge to the ZBA's determination,
6 and all of the respondents, including the necessary
7 parties, share the exact same defense that, no, the ZBA's
8 determination was rational and legally supported. This
9 isn't the case.

10 But in other cases, in - - - in tort cases,
11 perhaps, if there's a necessary party issue, perhaps, there
12 could be an issue of gamesmanship, and that might be a
13 factual determination that might arise in - - - in such a
14 case. But I think you still also factor in, as Chief Judge
15 Wilson indicated, you look at the state of mind also of the
16 defendants, and would the defendant or respondent, if the
17 case may be, would they reasonably believe that the
18 intent - - - there was an - - - an intent to omit them such
19 that they could rest assured that the case has been settled
20 and put away for all time as against them.

21 And respectfully, I would submit what - - - what
22 might happen in other cases, that that could not be found
23 in this case.

24 JUDGE SINGAS: The Third Department also cited a
25 line of federal cases that drew a distinction between the

1 additional party cases and the wrong party cases; do you
2 think that's a meaningful distinction?

3 MR. GOLDMAN: I don't think so. And I think,
4 again, Justice Garry, in her dissent, pointed out why
5 that's not a meaningful distinction. And I think the point
6 of the federal cases, and I would also just point out,
7 while I agree as this court noted in - - - in Buran, that
8 our state's relation-back doctrine is modeled after the
9 federal rule, the federal rule is also written out in
10 Federal Rule 15, and expressly includes mistake in the
11 written text whereas our statute, CPLR 203, says nothing
12 about mistake, which I think is important.

13 So the - - - I think the lynchpin in the federal
14 and state cases is whether the defendant had notice. The
15 lynchpin is notice. Notice and prejudice, I think are the
16 two key issues with relation back. And where there's
17 joinder - - - I'm sorry, where there's unity of interest,
18 our state, under the statute, and the case law interpreting
19 it, says that you unity of interest is a sufficient proxy
20 for notice such that you're not going to be prejudiced by
21 late joinder and - - - and that - - - therefore, that would
22 satisfy that.

23 So the fact that in the federal cases, you have
24 wrong party versus missing party, I don't think that's as
25 germane in this context.

1 JUDGE CANNATARO: Is this case essentially
2 answered by Buran, or do you - - - if - - - if it's more
3 than that, what - - - what's the gloss that we have to put
4 on it? What's the rule that comes out of this case?

5 MR. GOLDMAN: Thank you.

6 I - - - I think technically it is answered by
7 Buran. And if this court decides that, I think that would
8 be sufficient for our purposes. But to the extent the
9 court finds it's not specifically answered by Buran, I - -
10 - I think the new sort of gloss or line is that any - - -
11 any mistake, what - - - so - - - so Buran said - - - it
12 framed the issue as, must the parties show excusable
13 mistake for the failure to have named the new party
14 originally, or is a mistake alone enough. So the question
15 really is, well, then, what's a mistake.

16 And I would submit to Your Honors, to the court,
17 that a mistake is simply an omission, an - - - an error,
18 something that happened wrongly, inadvertently, or in a
19 manner, because of faulty judgment, inadequate knowledge,
20 or inattention. So - - - so really the question is, is it
21 a mistake, an error. Or was it done intentionally for a
22 specific litigation purpose, and now you're trying to bring
23 the person back for, again, some litigation purpose.

24 That's really the issue. And that's the only
25 time, I think, the plaintiff or petitioner's state of mind

1 is relevant. Otherwise, the only relevant state of mind is
2 that of the defendant/respondent, as to whether they knew
3 or should have known that the case would have brought
4 against them. And I think, again, unity of interest is a
5 very significant way of measuring that. And I think
6 that's - - -

7 JUDGE RIVERA: So is another way of thinking
8 about this part of the rule you're talking - - - or you're
9 describing, that if counsel had realized that the
10 individual was not included in the pleading, they would
11 have added them? So that - - - doesn't that cover we just
12 made a mistake, it's a typo, whatever you want to call it,
13 or frankly, not to be unkind, but incompetence, right,
14 didn't realize it at the time, realize it subsequently, as
15 opposed to, yes, I know I could include them. Maybe, I
16 know I should include them, I think, is what Judge Garcia's
17 referring to, but I get an advantage for my client by not
18 including them right now.

19 MR. GOLDMAN: So - - - and I think that's an
20 important additional clause on the end of that.

21 May I just finish answering the question?

22 CHIEF JUDGE WILSON: Of course.

23 MR. GOLDMAN: Thank you, Your Honor.

24 So even if it's just, I know the person, and - -
25 - and I know they should be, but for whatever reason,

1 they're not there, I think that's what Buran said, that's
2 maybe inexcusable. And Justice Garry noted that in
3 dissent, maybe it was inexcusable, but that doesn't
4 frustrate relation-back. But if it was done expressly for
5 the purpose of gaining some sort of advantage or as a
6 tactic or in bad faith, then I think that might frustrate
7 satisfaction of that test.

8 JUDGE HALLIGAN: May I ask one other question?

9 CHIEF JUDGE WILSON: Of course.

10 JUDGE HALLIGAN: You could, though, it seems to
11 me, have an additional category, which is a mistake of law,
12 by which I mean, you don't appreciate that the person is
13 legally necessary. And I thought I heard you say that this
14 is a combination, perhaps, of a mistake of law and an
15 inadvertent omission; is that right?

16 MR. GOLDMAN: Yes.

17 JUDGE HALLIGAN: Okay.

18 MR. GOLDMAN: I think that's a fair way to look
19 at it. And in those cases where it's a mistake of law,
20 given that you don't appreciate the legal significance, I
21 think the federal cases that we cited, and that Justice
22 Garry in dissent cited, which say that even those types of
23 mistakes of law satisfy, I think that should satisfy under
24 the state's rule, as well.

25 JUDGE HALLIGAN: Thank you.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. GOLDMAN: Thank you, very much, Your Honors.

3 MR. POPE: May it please the court, Alan Pope,
4 from Coughlin & Gerhart, representing the respondents.

5 I'll start of by saying, I think the Buran test
6 is the test, as it exists right now, that covers this case.
7 And the Buran test only talks about a mistake in the
8 identity of the party. And the case law that's developed
9 from that, if it's a mistake in law, that is not something
10 that fits in the Buran test.

11 So what the appellants are asking this court to
12 do is insert into case law a mistake of law in the identity
13 of the party - - -

14 JUDGE TROUTMAN: But isn't the lynchpin of
15 relation-back is notice?

16 MR. POPE: And - - - and so - - - yes, Judge.
17 But when you look at the notice in the case law, whether
18 it's state case law, or federal case law, under notice,
19 almost all of those cases talk about the add-on party, in
20 this case Rosa Kuehn, being served within a statutory time
21 period, or in the federal cases, under Rule 4, within 120
22 days.

23 Rosa Kuehn wasn't served at all within those time
24 periods.

25 JUDGE TROUTMAN: So it doesn't matter if she knew



1 of the existence within the statutory period; it's that - -
2 - your argument, she had to be served within that period?

3 MR. POPE: That's correct. And - - - and
4 factually, in this record, she knew nothing about it.

5 And - - - and, if I can, I'm just going to kind
6 of jump ahead. If we look at the amended petition, 2016,
7 and that's at A - - - I think A-41 through A-51. Within
8 that petition, there's nothing in the caption about Rosa
9 Kuehn. There's nothing in that detailed amended petition
10 that mentions Rosa Kuehn. There's nothing that mentions
11 deed owner. There's nothing that mentions landowner.

12 There's two cursory allegations in that amended petition, a
13 detailed, lengthy amended petition, that talks about - - -

14 JUDGE RIVERA: But I - - - I don't think the law
15 is limited to whether or not there's a mention of the
16 missing party and - - - and they're just missing from the
17 caption and, perhaps, some other statement that makes clear
18 that you're suing them. I don't think the law is that
19 narrow.

20 MR. POPE: I agree, Judge. But if I can just get
21 to my point. So there's nothing mentioned there. So our
22 answer comes in, right, on the heels of this amended
23 petition. We raise an affirmative defense, Rosa Kuehn,
24 necessary party, not named; Perry Kuehn, necessary party,
25 not named.

1 At that point in time, if there wasn't
2 gamesmanship, if there wasn't something that's going
3 beyond, they had the absolute right within twenty days to
4 amend that petition, name Rosa Kuehn, name Perry Kuehn,
5 have them served, right? They could have done all that.
6 They chose not to.

7 The first time - - - the first time that they do
8 any of that is four years later. So - - -

9 JUDGE RIVERA: And - - - and is your point with
10 that, that that forecloses the relation-back doctrine's
11 applicability because that - - - that establishes clearly
12 that this was a strategic choice?

13 MR. POPE: What - - - I'm not saying it's a
14 strategic choice - - -

15 JUDGE RIVERA: Okay.

16 MR. POPE: - - - and there's nothing in the
17 record that - - - that, you know, would say that, but - - -

18 JUDGE RIVERA: Okay. So you agree that the
19 record doesn't show a strategic choice?

20 MR. POPE: We just don't have enough to know.

21 But if we're going back to what the appellants
22 are arguing to this court, let's expand Buran to be a
23 mistake of law, a law office failure. That's really what
24 they want, right? But when we go back to the affirmative
25 defense, raise those points, and it was within their

1 control, within twenty days, to redo that petition, name
2 Rosa Kuehn, name Perry Kuehn, and have them served, they
3 chose not to do it.

4 JUDGE GARCIA: Is that a - - -

5 CHIEF JUDGE WILSON: So if your - - - I'm sorry,
6 go ahead.

7 JUDGE GARCIA: Is that a waiver argument? I
8 mean, it doesn't seem in any way that - - - any case I've
9 seen, that that type of issue factors into the case, except
10 for, I think, what Judge Rivera was asking you, is this
11 gamesmanship. But that doesn't seem to have been argued
12 here.

13 So how would we factor this into our analysis of
14 the relation-back?

15 MR. POPE: I - - - I think the bottom line here
16 is the appellants are asking you to insert mistake of law,
17 but within the mistake of law rubber band, they want law
18 office failure to be included.

19 CHIEF JUDGE WILSON: So here's the difficulty I'm
20 having with the - - - with the last argument you're
21 making - - - or - - - or the point you made. Is if - - -
22 and I'm not taking this for granted, but if we were to
23 conclude that the Supreme Court's analysis of how to deal
24 with Federal 15(c) is correct, that is it focuses on
25 whether the defendant knew or should have known that he or

1 she should have been a party in the case, when you say that
2 twenty days after the party - - - the admitted parties
3 said, we are necessary parties, it's then very hard to say,
4 I didn't know or shouldn't have known that they should be
5 parties in the case.

6 So that - - - I mean, the fact you just recited
7 seems to be to fit right within the Supreme Court's
8 analysis of what matters here.

9 MR. POPE: But never served, right? They had the
10 opportunity to serve; they never served it. So whether you
11 look at state law or federal law, never served within the
12 statutory time period - - -

13 CHIEF JUDGE WILSON: Well, if they had been, you
14 wouldn't be in the relation-back situation at all?

15 MR. POPE: But I guess the other point I'm trying
16 to make is there's no question there was no mistake in the
17 identity of the party, Rosa Kuehn. And also, we know from
18 what happened in 2013, and what we had in 2016, there was
19 no mistake in law.

20 CHIEF JUDGE WILSON: So it does seem that that's
21 what your argument turns on, right, is that - - - that the
22 rule that we have cannot include what you're calling law
23 office failure mistake of law?

24 MR. POPE: Yes. That - - - that's right. And
25 then when we go to prong two, the unity of interest - - -

1 JUDGE GARCIA: Wasn't that the excusable - - -

2 JUDGE HALLIGAN: Sir, could you just state - - -

3 JUDGE GARCIA: I'm sorry. Wasn't that what we
4 did in Buran with excusable mistake? Wasn't that a law
5 office failure? It would be not an excusable mistake,
6 right?

7 MR. POPE: No. In Buran, it really, just like
8 the Third Department, looked at that hard, and - - - and
9 ruled it's a mistake in the identity of the party, meaning
10 a factual mistake of some kind, right? And - - - and this
11 is - - - there's been case law where the mistake in fact of
12 the identity of the party, take the 1983 cases, right, the
13 officer's name is misspelled or something - - -

14 JUDGE GARCIA: But let's say the statute said you
15 have to serve the secretary, and it meant the current
16 secretary, not the one that was, you know - - - and that -
17 - - and you interpret it to mean the one that was in - - -
18 the secretary when the event occurred, so you serve the old
19 secretary. What kind of mistake is that?

20 MR. POPE: So if that was under the federal case
21 law, that would fall under Rule 15. And under the federal
22 case law, mistakes in fact, identity of the party, or
23 mistakes in law are - - - are applicable for that.

24 Here, under the Buran test, it's not mistake in
25 law. And it certainly is not a law office failure because

1 if it was a law office failure, then it would just open up
2 Pandora's box that, you know, this particular amendment to
3 a pleading could be used to escape that. The Buran test
4 doesn't talk about that. CPLR doesn't talk about that.
5 And even Rule 15 doesn't talk about law office failure
6 being the escape hatch if you knew of a party and didn't -
7 - - didn't name them, didn't identify them, or serve them.

8 JUDGE SINGAS: Does prejudice come into that
9 analysis?

10 MR. POPE: I think it does. Again, I don't look
11 at the record here and see where we, on our side, developed
12 any particular prejudice argument for either Rosa Kuehn or
13 Perry Kuehn. But yes, it's a - - - it's a factor that, I
14 think, the courts have to look at.

15 If I could just for a couple minutes on unity of
16 interest. The case law, whether it's state or federal, is
17 clear that the unity of interest has to be the same jural
18 relationship. They have to have vicarious liability for
19 one another. And here, there's even a case, I think it's
20 the state court, that said, just the simple landlord/tenant
21 situation, alone, is not unity of interest.

22 And - - - and so here, there just can't be - - -
23 Rosa Kuehn, who's in her seventies or early eighties, who
24 happens to reside at the property, has nothing to do with
25 the manufacturing companies. There just is no unity of

1 interest so - - -

2 JUDGE RIVERA: Well, the Appellate Division
3 didn't actually analyze this prong and decide this issue,
4 correct?

5 MR. POPE: I don't think they decided it.

6 JUDGE RIVERA: Right.

7 MR. POPE: I think - - -

8 JUDGE RIVERA: I think they assumed - - -

9 MR. POPE: - - - in the dissent - - -

10 JUDGE RIVERA: - - - it, right? They assumed it.

11 MR. POPE: I think it's still a viable issue for
12 this court.

13 JUDGE RIVERA: Well, could - - - could we - - -
14 let's say we disagree with you on this question of the
15 mistake. Is that - - - would - - - is there any reason not
16 to simply send it back to the AD and let them address this
17 other prong? As opposed to us addressing it in the first
18 instance.

19 MR. POPE: I would encourage you to address it
20 in the first instance because the record is the record.
21 It's not going to change. And unity of interest, whether
22 factually, or - - - or the law, is not going to change.
23 And - - - and while maybe this isn't a salient argument,
24 we - - - we had a bench trial in 2010 with Judge
25 Fitzgerald, who's now at - - - at the Third Department.

1 And here we are in 2013 (sic), over this same case. It
2 really has to come to an end.

3 And I - - - and I would ask you if - - - if you
4 can include that, and not send that back down, that would
5 be much appreciated.

6 JUDGE RIVERA: Thank you.

7 MR. POPE: I think that's what I have for my
8 argument.

9 Thank you very much.

10 CHIEF JUDGE WILSON: Thank you, counsel.

11 JUDGE CANNATARO: So Counsel, Buran does - - -
12 over here - - - Buran does speak at - - - of a mistake as
13 to the identity of the parties. And Counsel's point is
14 well taken that this seems broader than just a mistake as
15 to identity.

16 So what is the type of mistake that we are now
17 theoretically expanding to? Is it any mistake? Is it a
18 law mistake? Is it law office failure? Is it any non-
19 strategic mistake? What are we looking for?

20 MR. GOLDMAN: I think it's any mistake. And I
21 understand that Buran said mistake as to the identity of
22 parties. And if you go also back to the Mondello case,
23 which we cite in our briefs. Mondello actually used the
24 term mistake - - - I believe. I don't have it in front of
25 me, but something along the lines of, and I quote it in the

1 brief, mistake in properly identifying the parties, or
2 something like that. I think that's the better phraseology
3 for it. And I think that's more consistent with,
4 regardless of what Buran - - -

5 JUDGE CANNATARO: Would that phrasing cover a
6 whole mess of sins, that mistake as to the identity of a
7 party doesn't?

8 MR. GOLDMAN: I think it does. I think it does.
9 And mistake as to the identity as Krupski - - -

10 JUDGE RIVERA: I'm sorry, so is the point of
11 that, that the focus is the action of - - - of the party
12 that fails to name someone as opposed to the identity of
13 who they fail to name?

14 MR. GOLDMAN: And that's why - - -

15 JUDGE RIVERA: Does that comport with that?

16 MR. GOLDMAN: - - - I think identity of the party
17 as opposed to identifying, meaning naming, or you know
18 joining the appropriate parties, is the wrong approach, the
19 latter being the right. Because I think if you say
20 identity of the party, you're looking more at the - - - the
21 plaintiff's state of mind, and why they knew, and should -
22 - - or should have known, versus the defendant's state of
23 mind, and what they knew or should have known.

24 Which is why I think even though Buran, when it
25 recited the Brock test, from the Second Department, and

1 Brock had used that language, what it actually held, I
2 think is more consistent with the phraseology that this
3 court used in Mondello, which is identifying the proper
4 parties. Again, I have the specific quote in our - - - in
5 our opening brief.

6 I just want to address Counsel's point about
7 early on and whether we could have - - - even if we had
8 amended, I think there still would have been a relation-
9 back problem because the statute of limitations here is
10 thirty days. And they interposed their answer well after
11 that. So even if we amended, then they would have said,
12 well, you're amending and adding her too late.

13 But I would also note this gap of four years. It
14 wasn't because we waited four years to add her. It's an
15 Article 78 petition, which we filed in August of 2016.
16 They filed their answer and asserted failure to join a
17 necessary party - - -

18 Your Honor, may I finish?

19 CHIEF JUDGE WILSON: Yes, please, of course.

20 MR. GOLDMAN: Thank you.

21 And then we filed the reply to that in which we
22 specifically said, we argued Rosa Kuehn's not a necessary
23 party, but even if she is, the court should join her under
24 CPLR 1000(b), and relation back should apply. We've been
25 arguing relation back since that reply to their answer in

1 the Article 78 when it was first filed in 2016. The reason
2 it took so long is because we then had to go up the Third
3 Department, when Supreme Court held against us on that
4 issue. Third Department didn't address relation back, it
5 just said, no, the court should have joined Rosa Kuehn
6 under 1000(b), and then allowed her to assert whatever
7 defenses she wanted. We went back down. We amended the
8 petition.

9 There's - - - there was a delay in that because
10 there was an order from the court that parties never got.
11 I'm not going to get into the minutiae of that. But in - -
12 - in any event, we ended up amending the petition and then
13 they asserted that defense and we argued relation-back
14 again, and we had to go back up to the Third Department.

15 So that - - - that's why the timing took too
16 long. It wasn't anything dilatory or intentional on our
17 part. We've been arguing relation back since the very
18 beginning.

19 And I - - - I would just agree that this court
20 can, and should, address unity of interest if it - - - if
21 it can reach that issue. Given the time that's gone by, I
22 think the issue's been properly joined.

23 CHIEF JUDGE WILSON: Thank you, Counsel.

24 MR. GOLDMAN: Thank you, very much, Your Honors.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Nemeth v. K-Tooling, et al., No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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