On Submission

State of New York
Court of Appeals

JOSEPH AND DONNA NEMETH, VALERIE GARCIA

Petitioners-Appellants,

–against–

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS, and ROSA KUEHN,

Respondents-Respondents.

NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Appellate Division, Third Judicial Department Case No. 532948

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STATE OF NEW YORK
COURT OF APPEALS

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JOSEPH AND DONNA NEMETH,
VALERIE GARCIA

No. _____

Petitioners-Appellants,

App. Div. No. 532948

–against–

K-TOOLING, KUEHN MANUFACTURING, CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS, and ROSA KUEHN,

NOTICE OF MOTION

Respondents-Respondents.

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PLEASE TAKE NOTICE, that, upon (1) the accompanying Memorandum of Law in Support of Motion for Leave to Appeal to the Court of Appeals and its Appendix; (2) the Record on Appeal filed in the Appellate Division, Third Judicial Department; and (3) the briefs filed in the Appellate Division, Third Judicial Department, Petitioners-Appellants will move this Honorable Court, at the courthouse thereof, located at 20 Eagle Street, Albany, New York, on the 20th day of June 2022, at 10:00 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order, pursuant to New York C.P.L.R. § 5516 and 22 N.Y.C.R.R. § 500.22, granting Petitioners-Appellants leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Third Judicial

Department, entered May 5, 2022, and for such additional relief as the Court deems just, proper and equitable under the circumstances.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be filed in the Court of Appeals with proof of service by the return date of this motion.

Dated: June 6, 2022
Goshen, New York

Yours, etc.,

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STATE OF NEW YORK
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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

I. PRELIMINARY STATEMENT.

Almost 30 years ago, in *Buran v. Coupal*, this Court corrected an erroneous interpretation of New York's relation back doctrine that had arisen in the lower courts and which, as the Court put it, had "the practical effect for New York litigants . . . to render the relation back doctrine meaningless in all but rare circumstances." 87 N.Y.2d 173, 181 (1995). Fixing this error, thereby expanding the scope of the relation back doctrine, the Court held that, to establish the third prong of the three-prong relation back test, a litigant's mistake as to the identity of the proper parties need not be an excusable one.

Our case presents another important question as to the scope of the third prong of the relation back test – whether an inadvertent legal error in omitting a necessary party, as opposed to a mistake of fact, qualifies.

In the nearly 30 years since it decided *Buran*, we are aware of no decision by this Court directly addressing or deciding this issue. The generally prevailing view among the four Departments of the Appellate Division – and the one the Third Department below applied – is that such a legal error does satisfy the relation back test's third prong. But application of this rule has had the same deleterious practical effect on the relation back doctrine *Buran* sought to remedy – that is, it has made the doctrine less accessible to litigants.

Moreover, despite the general prevailing view of the third prong as just noted, in practice, the Courts have not been as consistent. Indeed, as Presiding Justice Gary noted in dissent in our case: "Precedent from all four Departments of the Appellate Division demonstrates the difficulty of applying the third prong of the doctrine" and "Proper application of the doctrine is thus unsettled and unclear" (A-16 n. 2).[1] Indeed, in the nearly 30 years since *Buran*, the state's relation back jurisprudence has developed in an inconsistent and unfair manner, and the cases rejecting application of the doctrine are legion. What remains is a trap for the unwary, especially for claims involving short statutes of limitations like the land use claim at

[1] Citations to "A-___" refer to the Appendix annexed hereto.

issue in the instant matter, resulting in innocent and mistaken pleading errors leading to the dismissal of proceedings and the award of windfalls to defendants/respondents at the expense of well-meaning but mistaken plaintiffs/petitioners.

This case is a prime example. The Third Department's majority concluded that, since Appellants were aware of the identify of the landowner of the affected property when they commenced this land use proceeding, their mistaken failure to initially name her as a necessary party is not a mistake contemplated by the relation back doctrine.

We respectfully submit that the majority decision directly conflicts with the reasoning and spirit of *Buran*, if not its express holding, and also reflects the inconsistent application of the relation back doctrine that has developed amongst the lower courts. Respectfully, we submit that Presiding Justice Gary's dissent is correct in both Her Honor's recognition of a problem in the jurisprudence and application of the relation back doctrine to the facts of this case.

In short, this case presents a crucially important procedural question with significant statewide implications beyond just this case. Further, given the inconsistent development of the law, guidance from this Court is critically needed. The prevailing view that has developed conflicts with the reasoning and spirit of *Buran* and frustrates two fundamental precepts of this Court's policy toward litigation – that equity abhors a forfeiture and that, as often as possible, cases should

be decided on their meris. For all of these reasons, the Court should grant Appellants leave to appeal.

A. Factual background.

Respondents Kuehn Manufacturing and K-Tooling operate industrial manufacturing businesses from the property located at 396 East Front Street in the Village of Hancock, New York (the "Premises"). Rosa Kuehn owns both the Premises and Respondent Kuehn Manufacturing (R-1222), and Rosa's son Perry owns K-Tooling (*Id.*).[2] Appellants own neighboring properties.

The Premises is situated in a residential district and, except for an 800 square-foot addition that is the subject of these proceedings, is a prior non-conforming manufacturing use. In a prior proceeding [*Nemeth I*], the Third Department held that the 800 square-foot addition, built in 2001 [some 18 years after adoption of the Village's Zoning Ordinance], constituted an illegal expansion of the non-conforming use and, thus, enjoined the Kuehn Respondents from using the addition for any purpose not otherwise permitted in the residential zone in which it is located.

Thereafter, the Kuehn Respondents sought and received from the Village ZBA a variance allowing them to use the addition for manufacturing purposes. Appellants commenced an Article 78 proceeding challenging that determination,

[2] Citations to "R-___" refer to the Record on Appeal filed in the Appellate Division, Third Judicial Department.

which Supreme Court upheld. On appeal, in *Nemeth II*, the Third Department vacated Supreme Court's Order and annulled the ZBA's determination, holding that the Kuehn Respondents failed to provide sufficient dollars and cents proof that they could not realize a reasonable rate of return from any use permitted in the residential zone absent the use variance.

Following that decision, the Kuehn Respondents again applied to the ZBA for a variance. Perry Kuehn signed the application on behalf of both K-Tooling and Kuehn Manufacturing, Co. and Rosa Kuehn signed the application, also on behalf of Kuehn Manufacturing Co. (R-264). The ZBA then held two public hearings – one on April 21, 2016 and another on May 26, 2016 – at which it received testimony and documentary evidence (R-280-83, R-789-92).

On July 25, 2016, the ZBA filed its decision granting the variance (R-251-61). On August 24, 2016, Appellants timely commenced the underlying Article 78 Proceeding challenging the ZBA's determination (R-13-90). By Decision and Order dated February 10, 2017, Supreme Court dismissed the Petition for Appellants' failure to name Rosa Kuehn as a necessary party (R-2688-93). Appellants timely appealed that Order (R-2694-99) and, by Decision and Order dated July 5, 2018, in *Nemeth III*, the Third Department reversed and remanded the matter so that Appellants could join Rosa Kuehn and serve the petition on her (R-2700-03).

On July 30, 2019, Appellants served their Verified Amended Petition, which added Rosa Kuehn as a respondent (R-2704-83). Thereafter, Respondents moved to dismiss the Amended Petition on the ground that Appellants had failed to join Rosa Kuehn within the 30-day limitations period (R-2789-2978). By Decision and Order dated August 11, 2020, Supreme Court granted Respondents' motions and dismissed the Amended Petition (R-8-12). Appellants timely noticed their appeal (R-1-7).

By Decision and Order dated and entered May 5, 2022, a majority of the Third Department panel, with Presiding Justice Gary dissenting, affirmed Supreme Court's dismissal of the Petition. Appellants now timely seek leave from this Court to appeal the Third Department's Order.

B. Appellate Division's Decision and Order.

In dismissing the Petition, Supreme Court had held that Appellants failed to establish the second and third prongs of the relation back test – *i.e.*, that Rosa Kuehn was not united in interest with any of the other respondents and that Appellants' mistake in failing to initially name Rosa Kuehn as a respondent was a mistake of law, which, under prevailing Third Department precedent, is not the type of mistake contemplated by the relation back doctrine (A-4-5).

On appeal, Appellants argued that, as owner of Kuehn Manufacturing and its landlord, and as a signatory to the ZBA application on behalf of that entity, and also as she was represented by the same counsel, Rosa Kuehn shared exactly the same

defenses with and, thus, was united in interest with the manufacturing respondents. They also argued that the Third Department should revisit and overturn its precedent holding that their inadvertent legal error in failing initially to name Rosa Kuehn as a necessary party is not the type of mistake contemplated by the relation back doctrine.

The majority concluded that, even if the second prong of the test (unity of interest) was satisfied, Appellants cannot meet the third prong of the test (A-10). It reasoned: "Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in the 2013 . . . ; thus, this is simply not an instance where the identity of a respondent . . . was in doubt or there was some question regarding the party's status" (A-10 [first ellipses added]). It then declined Appellants' request to overturn its precedent, concluding that, as applied to this case, its rule is constituent with *Buran* (A-10-13)

Presiding Justice Gary dissented, concluding that Third Department precedent precluding application of the relation back doctrine to legal errors should be overturned "thereby aligning the Third Department more closely with the federal approach [to relation back] and the Court of Appeals' holding in *Buran v. Coupal*" (A-13).[3] In doing so, Justice Gary recognized that the mistake in *Buran* "mirrors"

[3] Justice Gary also expressly addressed the second prong of the relation back test, agreeing with Appellants' that, in fact, Rosa Kuehn was united in interest with Kuehn Manufacturing (A-16-17)

the mistake at issue here (A-14). As Justice Gary aptly explained: "The parties in [*Buran*] were neighbors; it was not a case in which the plaintiffs were mistaken about who had trespassed by building on their land. Rather, the plaintiffs' mistake was their failure to sue one of the record property owners. If the relation back doctrine did not apply to mistakes of law, the plaintiffs would not have prevailed through its application" (*Id.*). Thus, Justice Gary reasoned, "the fact that the Court of Appeals applied the doctrine there should dictate our remedy here."

Justice Gary also noted that the *Buran* Court interpreted New York's relation back doctrine in light of the federal relation back rule and, since the federal rule applies to mistakes of law, so too should New York's (A-14-15). Also like the federal rule, the *Buran* Court's decision that the third prong has no excusability requirement redirects the inquiry as to what the *defendant* knew or should have known, not to the plaintiff's state of mind (A-15). "This redirection further emphasizes the linchpin of the relation back doctrine, whether the later-added defendant suffers from any lack of notice or prejudiced, thus protecting the purpose of status of limitations to which the doctrine might provide an exception and serving the purposes of liberalizing the strict formalistic pleading requirements of the past century." (A-15-16 [quotations & citations omitted]).

Further explaining why application of *Buran* here would satisfy the third prong of the relation back test, Justice Gary made an important logical point: "[I]f

the focus is meant to be placed on the plaintiff's knowledge, it would not make sense for the Court in *Buran* to remove the excusability test; if it makes no difference whether the plaintiff's mistake was excusable, then the plaintiff's state of mind is only relevant to the extent that he or she was not purposefully omitting a defendant in an attempt to gain some tactical advantage" (A-16). She then noted that, on this point, the precedent from all four Departments of the Appellate Division is inconsistent and that "[p]roper application of the doctrine is thus unsettled and unclear" (A-16 n. 2).

In short, Justice Gary concluded that the particular kind of legal error Appellants made here by inadvertently failing to name the landowner as a necessary party within the 30 day limitations period, even if inexcusable, is nevertheless the type of mistake that satisfies the third prong of the relation back test (A-17-18).

II. PROCEDURAL HISTORY, TIMELINESS AND JURISDICTION.

A. Procedural History and Timeliness.

On August 12, 2020, Supreme Court, Court of Delaware, entered its Order, dated August 11, 2020, dismissing the Petition (A-1-6). On September 16, 2020, Appellants timely filed and served their Notice of Appeal (R-1-7). On May 5, 2022, the Appellate Division, Third Department entered its Decision and Order affirming, with one dissent, Supreme Court's Order, notice of entry of which served that day day (A-7-18).

This motion is being served on June 6, 2022, within the allotted time[4] after Respondents served Appellants with notice of entry of the Third Department's Decision and Order. *See* N.Y. C.P.L.R. § 5513(b); 22 N.Y.C.R.R. § 500.22(b)(2)(i).

B. Jurisdiction

This matter originated in Supreme Court, and the Appellate Division, Third Department's Order affirming dismissal of the Petition, which order is not appealable as of right under CPLR § 5601, resulted in a complete and final determination of this proceeding. Thus, this Court has jurisdiction under CPLR § 5602(a)(1).

III. QUESTION PRESENTED.

This appeal presents the following question for review:

> Under the third prong of New York's relation back test, a plaintiff/petitioner must show that the new party to be added knew or should have known that, but for a mistake as to the identity of the proper parties, the action would have been brought against him as well. The mistake need not be excusable, and the linchpin of the relation back doctrine is whether the defendant/respondent had ample notice of the proceeding. Does a mistake of law, including a petitioner's inadvertent legal error in failing to name a landowner as a necessary party to a proceeding challenging a land use determination as to the landowner's property, satisfy the third prong of this test?

[4] As the thirtieth day follow service of the Appellate Division's Order with Notice of entry falls on a Saturday [June 4, 2022], Appellants time to serve this motion is extended to the next business day [Monday June 6, 2022]. *See* N.Y. Gen. Constr. L. § 25-a(1).

This question is preserved for review as it formed the basis for Appellant's argument in the Appellate Division. *See* App. Br. at 3, 13-22; App. Reply Br. at 8-9.

IV. REASONS FOR GRANTING LEAVE

A. Leave should be granted because the Third Department's Order conflicts with the reasoning and spirit of *Buran v. Coupal*, if not its express holding.

The Third Department's majority decision concluded that, since Appellants were aware that Rosa Kuehn was the landowner before they commenced this proceeding, their inadvertent legal error in failing to name her as a necessary party fails to satisfy the third prong of the relation back test thereby precluding application of this doctrine. Respectfully, and as Justice Gary aptly explained in Her Honor's well-reasoned dissent (A-13-18), the majority's decision conflicts with the reasoning and spirit, if not the express holding, of this Court's decision in *Buran v. Coupal*.

Under New York State's relation back doctrine, an action timely brought against one defendant is deemed timely as against all others united in interest with that defendant. *See* N.Y. C.P.L.R. §§ 203(b) and (c); *Buran*, 87 N.Y.2d 173, 177-78 (1995). The third prong of the relation back test requires that "the new party knew or should have known that, but for a[] . . . mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Buran*, 87 N.Y.2d at 178.

In establishing this prong, the plaintiff need not demonstrate that his mistake was excusable; indeed, such a requirement would "unwisely focus[] attention away from . . . the primary consideration in such cases – whether the *defendant* could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he is concerned." *Id.* at 180-81. (citations & quotations omitted) (emphasis in original).

Of course, there has been no mistake when the plaintiff "intentionally decides not to assert a claim against a party known to be potentially liable" and omits that defendant "to obtain a tactical advantage in the litigation." *Id.* at 181. But courts repeatedly hold that mistakes, including apparent legal errors, that results from mere inadvertence, as opposed to an intentional decision to gain a tactical advantage, suffice under the relation back inquiry. *See, e.g., OneWest Bank N.A. v. Muller*, 189 A.D.3d 853, 856 (2d Dep't. 2020); *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 167 A.D.3d 1305, 1308 (2018); *Headley v. City of New York*, 115 A.D.3d 804 (2d Dep't. 2014) ("[I]nitial failure to name the City as a defendant was a mistake, rather than an intentional decision not to assert the claim in order to gain a tactical advantage."); *Thomsen v. Suffolk County Police Dep't.*, 50 A.D.3d 1015 (2d Dep't. 2008) ("[I]nitial failure to name the County as a defendant was a mistake, rather than an intentional decision not to assert the claim in order to gain a tactical advantage.");

DeLuca v. Baybridge at Bayside Condo. I, 5 A.D.3d 533, 535 (2d Dep't. 2004) ("[T[here is no indication that the plaintiff intentionally failed to join the Baybridge defendants as parties to the 1998 action or acted in bad faith. His failure to properly join the Baybridge defendants to the 1998 action constituted a 'mistake.'"); *Losner v. Cashline, L.P.*, 303 A.D.3d 647, 649 (2d Dep't. 2003) ("The Losners' failure to name North Fork as a defendant was merely inadvertent, and there is no evidence that the Losners were attempting to gain some tactical advantage by omitting North Fork from the action."). Indeed, Justice Gary pointed out in dissent the apparent inconsistent development and application of this prong amongst the Departments of the Appellate Division (A-16 n. 2).

Here, Appellants' failure to name Rosa Kuehn as a respondent in this proceeding arose from an inadvertent and mistaken legal error in failing to include her as a necessary party. And they did not omit Mrs. Kuehn in bad faith or to obtain any sort of tactical litigation advantage.

Furthermore, Rosa Kuehn knew, or should have known, that, but for this mistake, she would have been named as well. Again, the focus must be on the state of *her* mind and not whether Appellants knew of her existence at the time they commenced this proceeding. As owner of Kuehn Manufacturing and its landlord, and as mother of K-Tooling's owner, and being represented by the same counsel as these entities, Rosa Kuehn certainly had, or should have had, notice of this

proceeding during the limitations period. And, of course, she is well familiar with the variance application, the ZBA's determination, and all of the administrative proceedings prior to this proceeding. Accordingly, she must be charged with actual or constructive knowledge of the fact that she would have been named as respondents but for Appellants' mistake. Indeed, she has never denied such notice.

Relying on its prior precedents, the Third Department held that Appellants' failure to initially name Rosa Kuehn as a respondent despite knowing that she was the landowner was not the type of mistake contemplated by the relation back doctrine (A-10). Again, respectfully, this conclusion conflicts with this Court's reasoning and decision in *Buran*.

In holding that the third prong of the relation back doctrine does not require that the mistake be excusable, the *Buran* Court traced the origins and purpose of the State's relation back rule and, in doing so, explained that it was based on the federal rule codified in Rule 15(c) of the Federal Rules of Civil Procedure. *See Buran*, 87 N.Y.2d at 179-80. A critical component of the Court's reasoning in holding that the State rule does not require an excusable mistake is that the analogous federal rule does not require excusability. *See Id.* at 179. The Court also concluded that, requiring the mistake be excusable would run counter to, and undermine the policies, underlying the relation back doctrine, which is to protect against the harsh effects resulting from pleading errors that would otherwise obtain. *See Id.* at 177-78, 181.

In this regard, it is notable that the federal relation back rule *does* apply to mistakes of law or inadvertent legal errors. *See Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35-36 (2d Cir. 1996); *Muwwakkil v. Hoke*, No. 96-2394, 1996 U.S. App LEXIS 37677, at * 10 (2d Cir. 1996) (summary order) ("It is true that 'mistakes,' for purposes of Rule 15(c), include mistakes of law.").

In *Soto*, the plaintiff, while a pretrial detainee at the Brooklyn Correctional Facility, had been attacked and injured by other detainees. *See Id.* at 35. Despite advising corrections officers of the detainees who assaulted him, when he was released from the hospital, the officers returned him to the same housing unit as his attackers. *See Id.* The plaintiff was assaulted again and, thereafter, filed suit under 42 U.S.C. § 1983 alleging violations of his constitutional rights. *See Id.* In doing so, he named only Brooklyn Correctional Facility as a defendant, but he did not allege that the violations of his rights arose from a policy or custom, as would be required to state a claim against a municipal defendant such as the facility, *see Monell v. NYC Dep't. of Soc. Servs.*, 436 U.S. 658 (1978), and so the district court dismissed his complaint. *See Soto*, 80 F.3d at 35.

On appeal, the Second Circuit reversed, holding that the plaintiff should be granted leave to amend the complaint to assert claims against the individual corrections officer who violated his rights, noting that such claims would relate back to the filing of his complaint, so long as the officers had timely notice of the initial

complaint and would not be prejudiced. *See Id.* at 34-35, 37. In doing so, the Court explained that the mistake prong of the relation back rule applies to mistakes of law:

> For Soto's amended complaint to relate back to the date of his original complaint he must show that he failed to name the individual officers due to a "mistake concerning the identity of the proper party." Fed. R. Civ. P. 15(c)(3)(B). This phrasing of the "mistake" criterion was introduced in the 1966 amendment to Rule 15. According to the Advisory Committee Note accompanying the 1966 amendment, the language was prompted by several cases in which plaintiffs, unaware of the technical requirements of the law, mistakenly named institutional instead of individual defendants. *See Cohn v. Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961); *Hall v. Department of Health, Education and Welfare*, 199 F. Supp. 833 (S.D. Tex. 1960); *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958). In these cases, plaintiffs, who were required by statute to sue the Secretary of Health, Education and Welfare, "had mistakenly named as defendants the United States, the Department of HEW, [and] the 'Federal Security Administration' (a nonexistent agency) . . . ." Fed. R. Civ. P. 15 advisory committee note (1966 amendment). The amendment was expressly intended to preserve legitimate suits despite such mistakes of law at the pleading stage.

Id. at 35-36. The court explained that Soto's mistake – that, absent a municipal policy or custom, as a matter of law, he could only sue individual officers in their individual capacities – was similar to the types of mistakes of law the Advisory Committee cited in its notes accompanying the 1966 amendments to Rule 15(c) as being subject to the relation back rule. *See Id.* at 36.

The *Soto* Court also distinguished its facts from those in its prior decision in *Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994). *See Id.* at 36. *Cornwell* recognized that mistakes of law are subject to the relation back rule but held that a proposed amended complaint did not relate back "where the plaintiff had shown neither factual mistake (*i.e.*, that she misapprehended the identities of the individuals she wished to sue) nor legal mistake (*i.e.*, that she misunderstood the legal requirements of her cause of action.)" *Id.* at 36.

There was no mistake there because "Cornwell had always known the identities of the individuals, and h*er original complaint had been legally sufficient.*" *Id.* (emphasis added). "Cornwall was not required to sue the individual defendants, and her failure to do so in the original complaint must be considered a matter of choice, not mistake." *Id.* at 36-37 (quotations & citations omitted) (alterations accepted). By contrast, absent a municipal policy or custom, "Soto was required to sue the individual defendants to maintain [his] action . . . . His failure to do so cannot be considered a matter of choice; but for his mistake as to the technicalities of constitutional tort law, he would have named the officers in the original complaint . . . ." *Id.* at 37.

Like in *Soto*, here, Appellants were required to name Rosa Kuehn as a respondent and, but for their legal error in failing to join all possible necessary parties (including the landowner) when challenging a ZBA's land use determination, they

would have timely done so. They plainly did not exclude Rosa Kuehn in bad faith or to obtain some tactical litigation advantage. Rather, their mistake, even if one of law, was inadvertent and should not prejudice their ability to challenge the ZBA's determination on the merits, particularly where Rosa Kuehn, through her unity of interest with the other Kuehn Respondents, is charged with notice of this proceeding and is not prejudiced by late joinder.

In short, the type of mistake at issue here is precisely the type of mistake that would be permitted to be corrected by amendment under the federal relation back rule. And, since New York's rule is "patterned largely after the Federal relation back rule," *Buran*, 87 N.Y.2d at 179, the same analysis should apply here. Neither the statutory text, *see* N.Y. C.P.L.R. §§ 203(b) and (c), nor any Court of Appeals' decision interpreting the relation back rule precludes such a holding.

Indeed, as Justice Gary noted in dissent, the mistake at issue in *Buran* "mirrors" the legal error at issue here (A-14). There, in suing their neighbors for trespass, the plaintiffs sued only the husband, but not the wife, although the wife co-owned the property with her husband. *Id.* at 176. Certainly, the deed reflecting the wife's shared ownership in the property was publicly available at the time. Thus, the plaintiff's mistake in failing to initially name her as a defendant was essentially a mistake of law regarding the technical need to name all property owners as necessary parties to the trespass suit. And, despite constructive notice of the

existence and identity of the wife as a co-owner of the property at the time of the initial suit, the Court of Appeals held the plaintiff's later amended complaint naming the wife as defendant related back to the time of the initial filing suing only the husband. *See Id.* at 182.

In sum, "[t]he linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period." *OneWest Bank N.A. v. Muller*, 189 A.D.3d 853, 856 (2d Dep't. 2020) (quotations & citations omitted); *Accord Buran*, 87 N.Y.2d at 180. Appellant's demonstrated a good faith mistake as to their failure to name Rosa Kuehn, who most certainly knew, or should have known, that, but for this mistake, they would have timely named her as a respondent as well. As Justice Gary concluded in dissent, proper application of *Buran's* reasoning and holding dictates that Appellants' mistake here satisfies the relation back doctrine. Respectfully, this Court should grant leave to clarify the scope of this prong of the test and correct the Third Department majority's error.

B. Leave should be granted to clarify a critically important procedural issue that, as the dissent pointed out, has become unsettled amongst the lower courts and has dire consequences for litigants.

Understanding the proper application of the relation back test is of critical importance for litigants statewide. This is especially so given the harsh consequences that flow from application of statutes of limitations, which consequences are particularly glaring when limitations periods are truncated, such

as the 30-day period at issue in this case. As Justice Gary noted in dissent, despite *Buran's* attempt to expand the scope of the third prong of the relation back test and, thereby the applicability of the doctrine, "[p]recedent from all four Departments of the Appellate Division demonstrates the difficulty of applying the third prong of the doctrine, alternatively focusing on the plaintiff's or the defendant's state mental state (A-16 n. 2 [comparing demonstrative cases]). Thus, the law has developed in an inconsistent and unfair manner making "proper application of the doctrine . . . unsettled and unclear" (*Id.*).

As such, Appellants' application is about more than just their own case. Critical guidance from this Court is needed to clarify the scope of this important statutory and procedural doctrine so that litigants across the state can understand its scope and lower courts can reach consistent results.

C. Leave should be granted because equity abhors a forfeiture and our State embraces a strong public policy of deciding cases on their merits – allowing the prevailing application of the third prong of the relation back test frustrates both of these important policy considerations.

Finally, important policy considerations support Appellants' application for leave to appeal. Indeed, our state has a strong public policy in favor of deciding cases on their merits, and courts abhor forfeitures of valuable legal rights. Yet the unduly narrow interpretation of the third prong of the relation back doctrine that has developed since this Court sought to expand its scope in *Buran* has frustrated these policies by penalizing well-meaning plaintiffs/petitioners who have made

inadvertent legal errors. Through the relation back statute, the Legislature has provided a mechanism by which these litigants can seek to correct such errors. Respectfully, the Court should now intervene to interpret that statute in a manner that supports, rather than undermines, the State's important public policy goals and furthers the legislative purpose underlying the statute.

CONCLUSION

For all of the foregoing reasons, the Court should grant Appellants leave to appeal.

Dated: Goshen, New York
June 6, 2022

Respectfully submitted,
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DELAWARE

JOSEPH and DONNA NEMETH,
VALERIE GARCIA,

Petitioners,

v.

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS,

Respondents.

NOTICE OF ENTRY

Index No. 2016-708

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order of the Honorable John F. Lambert for Motion #6 entered in the office of the clerk of the within named Court on or about August 12, 2020.

Dated: August 19, 2020

COUGHLIN & GERHART, LLP

/s/ Nathan D. VanWhy

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At a term of the Supreme Court of the State of New York, held in and for the County of Delaware, at Delhi, New York on July 17th, 2020.

PRESENT: Hon. John F. Lambert,
Acting Supreme Court Judge

STATE OF NEW YORK SUPREME COURT
COUNTY OF DELAWARE

JOSEPH and DONNA NEMETH,
VALERIE GARCIA,
Petitioners,

-against-

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS,
Respondents.

DECISION & ORDER
Index No. 2016/0708

Petitioner filed a motion for an order and judgement (a) declaring and adjudging that respondent Village of Hancock Zoning Board of Appeals ("ZBA") acted in an arbitrary, capricious and illegal manner when, on July 25, 2016, it granted the respondents K-Tooling and Kuehn Manufacturing Co. a use variance with respect to the property located at 396 East Front Street, Hancock, New York; (b) annulling and vacating the July 25, 2016 use variance issued by the Hancock ZBA with respect to the property located at 396 East Front Street, Hancock, New York; (c) permanently enjoining respondents from using the 800 square foot addition to their property at 396 East Front Street, Hancock New York for manufacturing uses or any other use at variance with the R-I zoning of the Village of Hancock for that parcel; and (d) granting to petitioners such additional relief as the Court deems just, proper and equitable under the circumstances, including the costs and disbursements petitioners have incurred in commencing and maintaining this proceeding.

In support of the motion the Court is in receipt of an Amended Verified Petition with eight Exhibits. The Court received an affirmation in opposition to the cross motions to dismiss and in

support of the amended petition by Jonathan R. Goldman, Esq. dated June 10th, 2020, as well as a memorandum of law dated July 10th, 2020. The Court received a stipulation between the parties dated June 11th, 2020 that states: respondent Hancock ZBA shall file and serve its verified answer to the amended verified petition on or before June 11, 2020; respondent Village of Hancock ZBA shall not be required to re-serve and re-file the certified record of its underlying proceedings in this matter, having already done so when it responded to the original verified petition in this proceeding; respondent Hancock ZBA shall file and serve any cross-motion to dismiss the amended verified petition on or before June 11, 2020; consistent with the return date for the amended verified petition and the Kuehn respondents' cross-motion, the return date for the Village of Hancock ZBA's cross-motion, if filed, shall be July 17, 2020, unless otherwise extended by the Court.

A cross motion to dismiss the amended petition, and in opposition to the petition, was made by respondents K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn. In support of respondent respondents K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn cross motion and opposition to the amended petition, the Court received affirmation and memorandum of law, dated May11th, 2020, by Allan J. Pope, attorney for respondents, K-Tooling, Kuehn Manufacturing Co. and Rosa Kuehn, as well as a reply affidavit dated July 15th, 2020. A cross motion to dismiss the amended petition, and in opposition to the petition, was made by respondent Hancock ZBA. In support of respondent Hancock ZBA cross motion and opposition to the amended petition, the Court received affirmation dated May 8th, 2020, by Nathan VanWhy, attorney for respondent, Hancock ZBA, with exhibits.

In their motion to dismiss, K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn assert that the petitioners' original Article 78 Petition was filed on August 24, 2016. Rosa Kuehn was not served until March 2, 2020, which is three (3) years, six (6) months and seven (7) days later. These respondents assert that Rosa Kuehn was required to be served within thirty (30) days of the underlying unanimous Hancock ZBA decision duly filed on July 25, 2016. By so asserting, Rosa

Kuehn raises a statute of limitations defense.

In response, petitioners acknowledge that the thirty-day statute of limitations has expired on the petitioners' claims against Rosa Kuehn, however, they assert that those claims are nevertheless timely under the "relation back" doctrine. Under that doctrine, "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced." C.P.L.R. § 203(c). In order to avail themselves of the benefit of the relation back doctrine, the petitioners are required to demonstrate: (1) that the claims arose out of the same occurrence, (2) that the later-added respondents were united in interest with the original respondents, and (3) that the later-added respondents knew or should have known that, but for a mistake by petitioners as to the identity of the proper parties, the proceeding would have been brought against them as well (see *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 A.D.3d 1474 [3rd Dept. 2014]).

The K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn respond by asserting that absent any evidence demonstrating that Rosa Kuehn would be vicariously liable as a matter of law for the acts of the other respondents, petitioners fail to satisfy the second prong of the relation back doctrine. "Although the parties might share a multitude of commonalities, including shareholders and officers, the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand" *Nehnick v. Meadowbrook Assocs.*, 20 A.D.3d 793 (3rd Dept. 2005). Rosa Kuehn's interests as a land owner with a properly granted use variance that runs with the land is not the same or even united with the respondent manufacturers or the respondent Hancock ZBA.

Regarding the third prong of the relation back doctrine, the petitioner acknowledges that the failure to serve Rosa Kuehn arose from a mistake as to the identity of the properly suable parties. The petitioner's also acknowledge that if the Court finds that petitioners' mistake is one of law, the Court is bound by precedent to hold that a mistake of law cannot satisfy the third prong of the relation back doctrine. "The fact that a petitioner is aware of the existence of a property owner but fails to realize

that the property owner is legally required to be named in a proceeding is not a mistake contemplated by the relation back doctrine (citations omitted)" *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518, 1520 [3d Dept 2017]). Given that petitioner was aware of the respondent's existence and failed to appreciate that she was legally required to be named in proceedings of this type, petitioner's reliance on the relation back doctrine is unavailing (see *Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, 179 AD3d 1270, 1271-1272 [3d Dept 2020]).

In this matter, this is precisely what occurred. Petitioners failed to join Rosa Kuehn as a necessary party. This court and the Appellate Division 3rd Department found that she is a necessary party. The petitioners acknowledged that they were well aware of the existence of Rosa Kuehn as the property owner but originally failed to realize that she was legally required to be named in this proceeding. As is set forth in *Matter of Sullivan v Planning Bd. of the Town of Mamakating* supra; *Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, supra, the Court is bound by precedent to hold that a mistake of law cannot satisfy the third prong of the relation back doctrine. Accordingly, this matter must be dismissed in its entirety.

Respondent Hancock ZBA asserts that as respondent Kuehn demonstrated that the Amended Verified Petition was not timely commenced and that the relation back doctrine does not apply, and the Amended Verified Petition should also be dismissed against the Hancock ZBA. In, *Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v NY State Pub. Empl. Relations Bd.*, supra, once the Court found that a necessary party to the proceeding was not timely served, the amended petition must also be dismissed insofar as asserted against the others because the petitioners failed to join a necessary party and they will thereafter be unable to do so. Following that rationale, this Court must dismiss this matter in its entirety.

For these reasons and upon the foregoing papers, it is,

ORDERED that the Amended Verified Petition is DENIED; furthermore it is,

ORDERED that the cross motion to dismiss by K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn is GRANTED; it is

ORDERED that the cross motion to dismiss by Village of Hancock Zoning Board of Appeals is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: August 11, 2020
Delhi, New York

Digitally signed by
Hon. John F. Lambert
8/12/2020 ,1:16:00 PM

Hon. John F. Lambert
Acting Justice Supreme Court

TO: MICHAEL H. SUSSMAN, ESQ.
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Attorneys for Petitioners

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Attorneys for Respondents
K Tooling, Kuehn Manufacturing Co., and Rosa Kuehn

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Village of Hancock Zoning Board of Appeals

Entered on August 12, 2020 at 2:32pm Debra A Hardrich, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

JOSEPH and DONNA NEMETH,
VALERIE GARCIA,

Appellants,

v.

NOTICE OF ENTRY

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS,

Case No. 532948

Respondents.

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Memorandum and Order of the Appellate Division, Third Judicial Department, entered in the office of the clerk of the within named Court on or about May 5, 2022.

Dated: May 5, 2022

COUGHLIN & GERHART, LLP

/s/ Alan J. Pope

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 5, 2022 532948

In the Matter of JOSEPH NEMETH et al.,
Appellants,
v MEMORANDUM AND ORDER

K-TOOLING et al.,
Respondents.

Calendar Date: February 15, 2022

Before: Garry, P.J., Lynch, Clark and Fisher, JJ.; McShan, J., vouched in.

Sussman & Associates, Goshen (Jonathan R. Goldman of counsel), for appellants.

Coughlin & Gerhart, LLP, Binghamton (Alan J. Pope of counsel), for respondents.

Clark, J.

Appeal from a judgment of the Supreme Court (Lambert, J.), entered August 12, 2020 in Delaware County, which, in a proceeding pursuant to CPLR article 78, among other things, granted respondents' cross motions to dismiss the amended petition.

The underlying facts are discussed at length in our prior decision in this proceeding (163 AD3d 1143 [2018]), as well as two other related proceedings (Matter of Nemeth v Village of Hancock Zoning Bd. of Appeals, 127 AD3d 1360 [2015]; Nemeth v K-

Tooling, 100 AD3d 1271 [2012]). As relevant here, respondents Kuehn Manufacturing Co. and K-Tooling operate their respective manufacturing businesses from a residentially-zoned property. Rosa Kuehn owns that property and Kuehn Manufacturing Co., and her son, Perry Kuehn, owns K-Tooling. In 2013, respondents applied for and received a use variance for expansion of their nonconforming use, but petitioners, individuals who had purchased parcels adjacent to the operating manufacturing businesses, were ultimately successful in overturning that administrative determination (Matter of Nemeth v Village of Hancock Zoning Bd. of Appeals, 127 AD3d at 1361-1363). In 2016, respondents again applied for and received a use variance, prompting the instant CPLR article 78 proceeding in which petitioners failed to name Rosa Kuehn as a respondent. Upon motion, Supreme Court dismissed the petition for failure to join a necessary party. On appeal, this Court agreed that Rosa Kuehn was a necessary party but reversed and directed Supreme Court to order her summoned (163 AD3d at 1144-1145). On remittal, petitioners filed an amended petition adding Rosa Kuehn, in her personal capacity as a landowner, as a respondent, and they moved for a judgment thereon. Respondents cross-moved to dismiss the amended petition, arguing that petitioners' claims against Rosa Kuehn were time-barred and not saved by the relation back doctrine and that the claims against the remaining respondents in turn required dismissal for lack of a necessary party. Supreme Court agreed and dismissed the amended petition. Petitioners appeal, and we affirm.

Supreme Court correctly determined that petitioners are not entitled to the benefit of the relation back doctrine. That doctrine "permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her" (Matter of Sullivan v Planning Bd. of the Town of

Mamakating, 151 AD3d 1518, 1519-1520 [2017], lv denied 30 NY3d 906 [2017]; see CPLR 203; Buran v Coupal, 87 NY2d 173, 178 [1995]).

It is not disputed that the first condition of the relation back doctrine was satisfied here. Even if the same were true for the second condition, petitioners simply cannot meet the third and final condition and therefore cannot avail themselves of the doctrine. Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in 2013 (Matter of Nemeth v Village of Hancock Zoning Bd. of Appeals, 127 AD3d at 1361-1362); "thus, this simply is not an instance where the identity of a respondent . . . was in doubt or there was some question regarding that party's status" (Matter of Baker v Town of Roxbury, 220 AD2d 961, 964 [1995], lv denied 87 NY2d 807 [1996]; see Buran v Coupal, 87 NY2d at 180 [holding that it is proper for courts to "reject() application of the (relation back) doctrine on the ground . . . that there was no 'mistake' – i.e., that (the) plaintiffs knew of the existence of the proper parties at the time of their initial filing"]; Wallach v R&J Constr. Corp., 128 AD3d 566, 566 [2015]; Mongardi v BJ's Wholesale Club, Inc., 45 AD3d 1149, 1151 [2007]). Under the established law of this state, any "mistake" here would "not [be one] contemplated by the relation back doctrine" (Matter of Sullivan v Planning Bd. of the Town of Mamakating, 151 AD3d at 1520; see Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd., 179 AD3d 1270, 1271 [2020]; Branch v Community Coll. of the County of Sullivan, 148 AD3d 1410, 1411-1412 [2017], lv denied 29 NY3d 911 [2017]; Matter of Ayuda Re Funding, LLC v Town of Liberty, 121 AD3d 1474, 1476 [2014]; Windy Ridge Farm v Assessor of Town of Shandaken, 45 AD3d 1099, 1099-1100 [2007], affd 11 NY3d 725 [2008]).

Further, we decline petitioners' invitation to overturn the long-standing precedent of this state concerning the sorts of errors that may constitute a "mistake by petitioners as to [a] later-added respondent's identity" (Matter of Sullivan v

Planning Bd. of the Town of Mamakating, 151 AD3d at 1519-1520; see Buran v Coupal, 87 NY2d at 176; see generally Doe v HMO-CNY, 14 AD3d 102, 106 [4th Dept 2004]; Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y., 302 AD2d 155, 165 [1st Dept 2002]; Somer & Wand v Rotondi, 251 AD2d 567, 569 [2d Dept 1998]; State of New York v Gruzen Partnership, 239 AD2d 735, 736 [3rd Dept 1997]). In petitioners' view, because our state's relation back test was largely premised upon Federal Rules of Civil Procedure rule 15 (c) (see generally Mondello v New York Blood Ctr.-Greater N.Y. Blood Program, 80 NY2d 219, 226 [1992]; Brock v Bua, 83 AD2d 61, 68 [1981]), our approach to relation back must mirror the application of the federal rule, which, according to petitioners, would necessitate the conclusion that their error[1] was a mistake within the meaning of the doctrine and that they should therefore benefit from its application.

Initially, as highlighted by our dissenting colleague, it is true that the Court of Appeals, in Buran v Coupal (87 NY2d 173 [1995]), looked to, among other sources, the text of the federal rule when eliminating this state's prior, superfluous requirement that a mistake as to a party's identity be "excusable" (id. at 179-180), and thereby more closely aligned this state's test with the text of the federal statute. However, Buran certainly did not do away with what is, in this state, a threshold requirement for relation back – that the petitioner/plaintiff made a mistake "as to the identity of the proper parties" (id. at 180). As noted above, the Court of Appeals has expressly acknowledged that there is no "mistake" within the meaning of relation back if the "[petitioners/]plaintiffs knew of the existence of the proper parties at the time of their initial filing" (id.). This is precisely the circumstance here; petitioners cannot claim either that they were unaware of Rosa Kuehn's identity as the owner of the subject property or that there was a question of or misunderstanding regarding her status.

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[1] Apart from referring to their error as an "inadvertent and mistaken failure," petitioners do not explain, or in any way substantiate, the nature of their initial failure to name Rosa Kuehn as a respondent in this proceeding (see generally Matter of Baker v Town of Roxbury, 220 AD2d at 963-964).

In light of the points made by the dissent, we also find it important to note that there is far from one uniform interpretation of Federal Rules of Civil Procedure rule 15 (c) (1) (C), notwithstanding concerted effort to that end (see generally Krupski v Costa Crociere S. p. A., 560 US 538, 546-554 [2010]).[2] One particularly notable construction includes that taken by courts in the Second Circuit, which have found that rule 15 (c) cannot apply at all where, as here, a petitioner/plaintiff seeks to add an additional respondent/defendant (an "additional party" case), as opposed to where the petitioner/plaintiff "changes the party or the naming of the party against whom a claim is asserted" (a "wrong party" case) (Fed Rules Civ Pro rule 15 [c] [1] [C]; see generally Ceara v Deacon, 916 F3d 208, 212-213 [2d Cir 2019]; Barrow v Wethersfield Police Dept., 66 F3d 466, 468-470 [2d Cir 1995], mod 74 F3d 1366 [1996]; Liverpool v Davis, 442 F Supp 3d 714, 725-726 [SD NY 2020]; Atakhanova v Home Family Care Inc., 2019 WL 2435856, *6, *6 n 9, 2019 US Dist LEXIS 27126, *13-16, *13 n 9 [ED NY Feb. 19, 2019, No. 16-CV-6707 (KAM/RML)]; Precision Assoc., Inc. v Panalpina World Transp. [Holding] Ltd., 2015 WL 13650032, *7-13, 2015 US Dist LEXIS 194073, *36-50 [ED NY June 24, 2015, No. 08-CV-42 (JG/VVP)]; In re Vitamin C Antitrust Litig., 995 F Supp 2d 125, 128-131 [ED NY 2014]). Thus, petitioners' request that we abandon our relation back precedent and follow federal law is also essentially a request to deviate from yet another established principal of state law – that, in "a conflict between the decisional law of the Court of Appeals and that of the lower and intermediate federal courts, the ruling of the Court of Appeals controls" (Davies v S.A. Dunn &

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[2] In Krupski v Costa Crociere S. p. A. (560 US 538 [2010]), the Supreme Court of the United States rejected reliance upon a plaintiff's knowledge to deny relation back, holding that "[i]nformation in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity" (id. at 548). However, the Supreme Court did "agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity" (id. at 549).

Co., LLC, 200 AD3d 8, 15 [2021], lv denied 38 NY3d 902 [2022]; see Towle v Forney, 14 NY 423, 428 [1856]) – a request that we must also decline.

In sum, there is no reason to depart from the Court of Appeals decision in Buran, which, in our view, clearly speaks to the factual circumstances presented here (see Buran v Coupal, 87 at 180). Under Buran, and the other legal precedent of this state, petitioners have failed to satisfy the third condition of the relation back test. Without the benefit of the doctrine, petitioners have failed to join a necessary party (see CPLR 1001 [a]), mandating dismissal of this proceeding (see CPLR 1003, 3211 [a] [10]; [e]). The remaining arguments before us are therefore academic.

Lynch, Fisher and McShan, JJ., concur.

Garry, P.J. (dissenting).

The relation back doctrine allows a respondent to be added after the statute of limitations has expired where the petitioner demonstrates "(1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by [the] petitioner[] as to the later-added respondent's identity, the proceeding would have also been brought against him or her" (Matter of Sullivan v Planning Bd. of the Town of Mamakating, 151 AD3d 1518, 1519-1520 [2017], lv denied 30 NY3d 906 [2017]). The majority faithfully applies Third Department precedent, which distinguishes a mistake of law as not meeting the requirements of the third prong. Petitioners ask us to overrule that precedent and hold that the relation back doctrine applies in this matter. I dissent, as I would grant the request and overrule our prior case law, thereby aligning the Third Department more closely with the federal approach and the Court of Appeals' holding in Buran v Coupal (87 NY2d 173 [1995]).

In Buran, the Court emphasized that the New York rule is "patterned largely after the [f]ederal relation back rule" (id. at 179), the "'linchpin'" of which is "notice to the defendant within the applicable limitations period" (id. at 180, quoting Schiavone v Fortune, 477 US 21, 31 [1987]). The Court reasoned that, since the later-added defendant had notice of the trespass action against her husband, with whom she was united in interest, and adding her as a party resulted in no delay or prejudice, the relation back doctrine was satisfied. Importantly, the Court in Buran focused its analysis on the third prong, eliminating the "excusability test" as its results were "not in keeping with modern theories of notice pleading and the admonition that the Civil Practice Law and Rules 'be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding'" (Buran v Coupal, 87 NY2d at 181, quoting CPLR 104). The parties in that case were neighbors; it was not a case in which the plaintiffs were mistaken about who had trespassed by building on their land. Rather, the plaintiffs' mistake was their failure to sue one of the record property owners. If the relation back doctrine did not apply to mistakes of law, the plaintiffs would not have prevailed through its application. The mistake in that case, where the plaintiffs had failed to join a necessary party they knew to be the landowner, mirrors the mistake of law in the instant proceeding. In my view, the fact that the Court of Appeals applied the doctrine there should dictate our remedy here.

The federal rule draws no distinction as to whether the mistake was one of law or identity. In Soto v Brooklyn Corr. Facility (80 F3d 34, 34-35 [2d Cir 1996]), a plaintiff who filed a civil rights action against a correctional facility in federal court but initially failed to join the individual correction officers who allegedly harmed him was allowed the benefit of the relation back doctrine. The plaintiff was not mistaken about the identity of the officers but about the fact that they were necessary parties; the precedent of our Court would label this mistake as one of law and depart from the federal rule in requiring dismissal (see Ish Yerushalayim v United States Dept. of Corr., 374 F3d 89, 91-92 [2d Cir 2004]; Muwwakkil v Hoke, 107

F3d 3 [2d Cir 1997] [table; text at 1997 WL 76871, *4, 1996 US App LEXIS 37677, *10-11 (1997)]). Further, the notes of the advisory committee amending Federal Rules of Civil Procedure rule 15 (c), which contains the federal relation back rule, reference a number of cases that prompted the amendment. All of the referenced cases involve actions by private parties against officers or agencies of the United States (see Advisory Comm Notes, 1996 amend, Fed Rules Civ Pro rule 15 [c]). In other words, the cases referenced by the advisory committee involve mistakes as to who is considered a necessary party, rather than mistakes of "identity" as more narrowly interpreted by our Third Department precedent. Clearly, the drafters of the federal relation back rule envisioned its operation in some circumstances where a plaintiff did not know he or she had to sue a different defendant.

The Supreme Court of the United States has spoken to the misplaced emphasis on a plaintiff's knowledge in the third prong: "Rule 15 (c) (1) (C) (ii) asks what the prospective defendant knew or should have known during the [period for service], not what the plaintiff knew or should have known at the time of filing [his or] her original complaint" (Krupski v Costa Crociere S. p. A., 560 US 538, 548 [2010]).[1] This redirection further emphasizes the linchpin of the relation back doctrine, whether the later-added defendant suffers from any lack of notice or prejudice, thus protecting the purpose of statutes of limitations to which the doctrine might provide an exception and serving the purpose of "liberalizing the strict

[1] The majority cites Krupski for the proposition that "making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity" (Krupski v Costa Crociere S. p. A., 560 US at 549). The next two sentences are also relevant: "[w]e disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue" (id.).

formalistic pleading requirements of the past century" (Buran v Coupal, 87 NY2d at 177). Indeed, if the focus is meant to be placed on the plaintiff's knowledge, it would not make sense for the Court in Buran to remove the excusability test; if it makes no difference whether the plaintiff's mistake was excusable, then the plaintiff's state of mind is only relevant to the extent that he or she was not purposefully omitting a defendant in an attempt to gain some tactical advantage (see id. at 181).[2]

In the instant petition, it is undisputed that the first prong of the relation back doctrine is satisfied. As to the second prong, Rosa Kuehn is united in interest with respondent Kuehn Manufacturing Co., as she is the owner of that company. In other cases, where a challenger to a zoning law or variance named business owners but failed to join property owners, we have held that there was no unity of interest between them (see Matter of Sullivan v Planning Bd. of the Town of Mamakating, 151 AD3d at 1520; Matter of Ayuda Re Funding, LLC v Town of Liberty, 121 AD3d 1474, 1475-1476 [2014]). In Matter of Sullivan, the owner of a vacant lot had no unity of interest with a business that applied for a variance to operate a cellular tower on that vacant lot; in Matter of Ayuda Re Funding, the owners of numerous parcels affected by the challenged zoning law had no unity of interest with the two respondent businesses and the municipality. In contrast, Rosa Kuehn is the owner of the

[2] Precedent from all four Departments of the Appellate Division demonstrates the difficulty of applying the third prong of the doctrine, alternatively focusing on the plaintiff's or the defendant's mental state (compare OneWest Bank N.A. v Muller, 189 AD3d 853, 856 [2d Dept 2020], and NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc., 167 AD3d 1305, 1308 [3d Dept 2018], and Cintron v Lynn, 306 AD2d 118, 120 [1st Dept 2003], and Williams v Majewski, 291 AD2d 816, 817-818 [4th Dept 2002], with Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd., 179 AD3d 1270, 1271-1272 [3d Dept 2020], and Gil v City of New York, 143 AD3d 572, 573 [1st Dept 2016], and Doe v HMO-CNY, 14 AD3d 102, 105-106 [4th Dept 2004], and Somer & Wand v Rotondi, 251 AD2d 567, 568-569 [2d Dept 1998]). Proper application of the doctrine is thus unsettled and unclear.

single property affected by the variance and the owner of one of the two respondent businesses operating on that property. "[B]y reason of that relationship[, she] can be charged with such notice of the institution of the action that [she] will not be prejudiced in maintaining [her] defense on the merits by the delayed, otherwise stale, commencement" (Mondello v New York Blood Ctr.–Greater N.Y. Blood Program, 80 NY2d 219, 226 [1992]; see Castagna v Almaghrabi, 117 AD3d 666, 667 [2014]). In the context of this CPLR article 78 proceeding, the defenses available to Rosa Kuehn and Kuehn Manufacturing Co. are identical, and they will stand or fall together with respect to the zoning variance (see Fasce v Smithem, 188 AD3d 1542, 1543-1544 [2020]; Losner v Cashline, L.P., 303 AD2d 647, 648 [2003]; Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp., 301 AD2d 362, 363 [2003]).

As to the third prong, focusing as instructed in Buran on the later-added respondent's state of mind, Rosa Kuehn cannot complain of any lack of notice or prejudice here. In her capacity as owner of Kuehn Manufacturing Co., Rosa Kuehn applied for the challenged variance, which affects her property alone. She similarly appeared in the instant proceeding as the owner of Kuehn Manufacturing Co. The attorney representing her also represents Kuehn Manufacturing Co. and respondent K-Tooling. She cannot reasonably believe that the proceeding was "laid to rest as far as [she] is concerned" (Buran v Coupal, 87 NY2d at 181 [internal quotation marks and citation omitted]). Although petitioners made a mistake of law in failing to join Rosa Kuehn personally – perhaps even an inexcusable one – Buran instructs that the mistake need not be excusable (see id. at 180; Castagna v Almaghrabi, 117 AD3d at 667).

In holding that the third prong is not satisfied, the majority invokes a line of cases from the federal Second Circuit, labeled as "additional party" cases, which allegedly deny application of the doctrine where the plaintiff seeks to add a party, rather than replace one. However, these cases are readily distinguishable because, unlike here, they address the doctrine in the context of "John Doe" defendants, where the plaintiffs lacked knowledge of the defendant's identity until

after the statute of limitations expired. Notably, the most recent Second Circuit case cited by the majority allowed relation back because the later-added defendant was referenced, by a misspelled name, in the original complaint; thus, "it [was] implausible that [a named defendant] and [the later-added defendant] did not know to whom [the plaintiff] was referring" (Ceara v Deacon, 916 F3d 208, 213 [2d Cir 2019]). The court clearly focused its inquiry on what the later-added defendant knew or should have known.

Finally, the majority misunderstands my position when it asserts that this argument fails to apply the law of the Court of Appeals, in favor of federal law. It is my view that this Court has applied the principles set forth in Buran in an inappropriately restrictive manner. This case continues that unfortunate trend. There would be no practical difference to Rosa Kuehn or any of the other respondents had she been named personally in the proceeding. Yet for the failure to do so, applying Third Department precedent, petitioners pay the price of dismissal. The conditions of the relation back doctrine seek to relax the formalistic pleading requirements of the past while respecting the fairness to respondents supplied by statutes of limitations. Neither purpose is served by this result. Accordingly, upon review of the case law cited above, I would now hold that mistakes of law are contemplated by the relation back doctrine and reverse the dismissal of the petition.

ORDERED that the judgment is affirmed, with costs.

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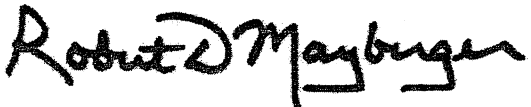

Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

----------x

JOSEPH AND DONNA NEMETH,
VALERIE GARCIA

No. _____

Petitioners-Appellants,

App. Div. No. 532948

–against–

K-TOOLING, KUEHN MANUFACTURING, CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS, and ROSA KUEHN,

Respondents-Respondents.

AFFIDAVIT OF SERVICE

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF ORANGE)

JOYMARIE LEWISHOLIDAY, duly sworn, deposes and states:

1. I am over 18 years of age and not a party to this action.

2. On June 6, 2022, I caused to be served **one true copy of the annexed Notice of Motion and Memorandum of Law in Support of Plaintiff-Appellant's Motion for Leave to Appeal to the Court of Appeals** in the within matter upon counsel for Respondents-Respondents by mailing the same in a sealed envelope, with postage prepaid thereon, via U.S. Postal Service, Overnight Mail, to the last known addresses of the addressee(s) as indicated below by depositing the same in a post office or official depository under the exclusive care and custody of the United States Postal Service:

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JOYMARIE LEWISHOLIDAY

Sworn to before me
this 6th day of June 2022

NOTARY PUBLIC

MICHAEL HOWARD SUSSMAN
Notary Public, State of New York
No. 02SU6332584
Qualified in Orange County
Commission Expires Nov. 09, 20 23