To be argued by:
JONATHAN R. GOLDMAN, ESQ.
Time requested: 20 minutes

APL-2022-00132

State of New York
Court of Appeals

In the Matter of
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

BRIEF FOR PETITIONERS-APPELLANTS

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Dated: November 11, 2022

Appellate Division, Third Department Docket No. 532948
Delaware County Supreme Court Index No. 2016/708

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PRELIMINARY STATEMENT

This appeal arises from Appellants' Article 78 proceeding challenging Respondent Village of Hancock Zoning Board of Appeals' determination to grant Respondents K-Tooling and Kuehn Manufacturing's application for a use variance with respect to an 800 square-foot addition to their property. But the merits of that challenge are not before Court. Rather, this appeal raises a procedural issue about the scope of New York's relation back doctrine as to the late joinder of parties united in interest with an original party after the statute of limitations expires.

Almost 30 years ago, in *Buran v. Coupal*, 87 N.Y.2d 173 (1995), this Court corrected an erroneous and constricted interpretation of the relation back doctrine, 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." Fixing this error and thereby expanding the scope of the doctrine, the Court held that, to satisfy the relation back test, a litigant's mistake in initially omitting a later joined party need not be an excusable one.

The time has once again come for the Court to course-correct, as application of the relation back doctrine since *Buran* remains quite constricted, again rendering it practically meaningless in all but rare circumstances and thereby unduly penalizing plaintiffs/petitioners for their procedural errors while awarding underserved windfalls to defendants/respondents.

Given the plain language and intent of the relation back statute, and upon properly balancing the competing policy interests at stake, the Court should hold that a party's unintended failure to join a necessary party united in interest with a timely named party is the type of mistake that satisfies the relation back test. And, in doing so, the Court should find that Appellants' mistaken omission here satisfies the test and, therefore, reverse the contrary decisions below and reinstate their Petition.

QUESTION PRESENTED

This appeal presents the following question:

> By statute, a claim asserted in a complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced. A plaintiff seeking relation back of a claim against a party joined after expiration of the statute of limitations must show that the new party to be added knew or should have known that, but for a mistake in failing to initially identity all proper parties, the action would have been brought against her as well. The mistake need not be excusable, and the linchpin of the relation back doctrine is whether the defendant had ample timely notice of the proceeding.
>
> Does a petitioner's unintentional 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 this test, where the landowner is united in interest with a timely named party?

JURISDICTIONAL STATEMENT

This matter originated in the Delaware County Supreme Court, and the Appellate Division, Third Department's Order affirming dismissal of Appellants'

Amended Verified Petition, which Order is not appealable as of right under CPLR § 5601, resulted in a complete and final determination of this proceeding. Therefore, this Honorable Court has jurisdiction under CPLR § 5602(a)(1) and, on September 15, 2022, it granted Appellants' timely motion for leave to appeal (A-1).

Moreover, this Honorable Court has jurisdiction to review the question presented because the issue of whether the relation back doctrine applies – and, particularly whether the mistaken omission of a necessary party at issue here satisfies the relation back test – was integral to Supreme Court's and the Appellate Division's Orders (A-3-13; A-16-20) and Appellants advanced the position they assert herein below (*see* App. Br. and App. Reply Br. below).

NATURE OF THE CASE

A. Statement of Facts and Procedural Background.

Most of the relevant facts are undisputed or have already been resolved by the Third Department in prior proceedings between the parties. For years, Kuehn Manufacturing and K-Tooling operated their industrial manufacturing businesses from the property located at 396 East Front Street in the Village of Hancock, New York. *See Matter of Nemeth v. Village of Hancock Zoning Bd. of Appeals*, 127 A.D.3d 1360, 1361 (3d Dep't. 205) ("*Nemeth II*"). Rosa Kuehn owns both the property and Kuehn Manufacturing (A-4); her son Perry owns K-Tooling (*Id.*).

The property is situated in a residential district and, except for the 800 square-foot addition that is the subject of these proceedings, was a prior non-conforming manufacturing use. In 2012, 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. *See Nemeth v. K-Tooling*, 100 A.D.3d 1271, 1275-76 (3d Dep't. 2012) ("*Nemeth I*").

Thereafter, the Kuehn Respondents sought and received from the Village's ZBA a variance allowing them to use the addition for manufacturing purposes. Appellants commenced an Article 78 proceeding challenging that determination, 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. *See Nemeth II*, 127 A.D.3d at 1360-63.

Following that decision, in February 2016, the Kuehn Respondents again applied to the ZBA for a variance (A-71-81). 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. (A-72). 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 (A-82-86).

On July 25, 2016, the ZBA filed its decision granting the variance (A-61-70). On August 24, 2016, Appellants timely commenced the underlying Article 78 proceeding challenging the ZBA's determination (A-38-51). By Decision and Order dated February 10, 2017, Supreme Court dismissed the Petition for Appellants' failure to name Rosa Kuehn as a necessary party (A-32-36). Appellants timely appealed that Order (A-30-31) and, by Decision and Order dated July 5, 2018, the Third Department reversed and remanded the matter back to Supreme Court so that Appellants could join Rosa Kuehn and serve the petition on her (A-26-29).

On or about July 30, 2019, Appellants served their Amended Verified Petition, which added Rosa Kuehn as a respondent (A-88-95). Respondents then moved to dismiss the Amended Petition on the ground that Appellants had failed to join Rosa Kuehn within the 30-day limitations period (A-96-103).

B. Supreme Court's Decision and Order.

By Decision and Order dated August 11, 2020, Supreme Court granted Respondents' motions and dismissed the Amended Petition (A-16-20). In doing so, the Court held that Appellants failed to establish the second and third prongs of the relation back test – specifically, that Rosa Kuehn was not united in interest with any of the other respondents and that Appellants' mistake in failing to initially name her

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-18-19). Appellants timely appealed to the Third Department (A-14-15).

C. Appellate Division, Third Department's Decision and Order.

On appeal, Appellants argued, as they did in Supreme Court, that, as the owner of Kuehn Manufacturing and its landlord, and as a signatory to the ZBA application on behalf of that entity, and as she was represented by the same counsel as them, 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 precedents under which Supreme Court held 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 could not meet the third prong (A-5). 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 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" (*Id.*). It then declined Appellants' request to overturn its precedent, concluding that, as applied to this case, its rule is consistent with *Buran* (A-5-8)

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-8).[1] In doing so, Justice Gary recognized that the mistake in *Buran* "mirrors" the mistake at issue here (A-9). 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" (*Id.*).

Justice Gary also noted that *Buran* interpreted New York's relation back doctrine in light of the federal rule and, since the federal rule applies to mistakes of law, so too should New York's (A-9-10). Also like the federal rule, *Buran's* elimination of the excusability requirement properly redirects the inquiry as to what the *defendant* knew or should have known, not to the plaintiff's state of mind (A-9). "This redirection further emphasizes the linchpin of the relation back doctrine,

[1] 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-11-12).

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 purposes of liberalizing the strict formalistic pleading requirements of the past century." (A-10 [quotations & citations omitted]).

Justice Gary made also made and 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-11). In short, Justice Gary concluded that the Appellants' particular legal error here, even if inexcusable, is nevertheless the type of mistake that satisfies the third prong of the relation back test (A-12-13).

ARGUMENT

Point I

A litigant's inadvertent omission of a legally necessary party united in interest with an original party constitutes a legal error that satisfies the relation back test under CPLR § 203(c).

Appellants inadvertently neglected to name the property owner, Rosa Kuehn, as a necessary party to their Article 78 land use proceeding. The question is whether her late joinder, after the statute of limitations expired, relates back to Appellants' timely initiation of this proceeding against, among others, her company and tenants.

As Presiding Justice Gary concluded in her well-reasoned dissent below, since Rosa Kuehn is united in interest with her company, Kuehn Manufacturing, and therefore knew, or reasonably should have known, that she would have been named as a respondent but for Appellant's mistaken omission, the relation back test is met.

In its current form, the relation back test for claims against parties joined after expiration of the statute of limitations has three prongs:

> (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party 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.

Buran, 87 N.Y.2d at 178. In answering the question presented, it is helpful to first explore the development of this test to its current form.

We begin with the statutory text. The relation back statute at issue here provides: "In an action which is commenced by filing, 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." N.Y. C.P.LR. § 203(c).

Notably, the statute says *nothing* about mistakes, whether of fact, of law, or of any kind. Rather, under the statute's plain language, a claim asserted by one party is deemed "interposed" against the named party and all others united in interest the

moment the action is commenced. Thus, the text appears to require only two elements – identity of the claim and unity of interest.

Despite this, in *Brock v. Bua*, 83 A.D.3d 61, 68-69 (2d Dep't. 1981), the Appellate Division, Second Department adopted the three-prong test set forth above, modelling it after the federal relation back test codified in Federal Rule of Civil Procedure 15(c)(1)(C). As initially adopted, the third prong of the Second Department's test required the plaintiff's mistake be excusable. *See Id.* at 69.

Just over ten years later, in *Mondello v. New York Blood Ctr.*, 80 N.Y.2d 219 (1992), this Court adopted *Brock's* test, which, it noted, the Second Department had "embossed" upon the "bare language" of the underlying statute, *see id.* at 225. Without analyzing Section 203's text or otherwise discussing its underlying policy, after reciting it, this Court summarily concluded: "We endorse the *Brock* test and apply it in this case . . . ." *Id.* at 226. *Mondello* turned decisively on the issue of unity of interest, and so the Court focused exclusively on that issue and emphasized that it had no occasion to evaluate the other prongs of the test. *See Id.* at 230.

Three years later, the Court decided *Buran*. There, the plaintiffs sued their neighbors in trespass for building a seawall across their land toward Lake Champlain. In doing, they named only Mr. Coupal as a defendant and not his wife, although she co-owned the property with him as tenants by the entirety. *Id.* at 176. Certainly, the deed reflecting Mrs. Coupal's shared ownership was publicly

available at the time plaintiffs brought suit, giving them constructive notice of that fact. Thus, their mistake in failing to initially name Mrs. Coupal as a defendant was not a mistake of fact or identity in the general since. Rather, it constituted a legal error – that is a legal defect flowing from their failure to name all property owners as necessary parties to the suit. The question was whether plaintiffs' late joinder of Mrs. Coupal related back to their commencement of the action against her husband. This Court answered affirmatively, and its analysis is critical to resolving our case.

Although *Mondello* seemingly endorsed the entirety of the *Brock* test, the *Buran* Court recognized that, since it had no occasion to evaluate anything other than the second prong there, it would "now address the issue explicitly left open in *Mondello* . . . ." *Id.* at 178-79. After extensive analysis of the competing policy considerations involved and surveying the development of the federal relation back rule after which the *Brock* test was modelled, the Court concluded that a litigant need not establish an excusable mistake to satisfy the relation back test. *See Id.* at 179-81.

At the outset, *Buran* recognized the remedial nature of the relation back doctrine, noting that it was "[a]imed at liberalizing the strict, formalistic pleading requirements of the past century . . . , while at the same time respecting the important policies in statutory repose . . . ." *Id.* at 177 (quotations & citations omitted). As such, the doctrine "gives courts the sound judicial discretion to identify cases that justify relaxation of limitations strictures to facilitate decision on the merits if the

correction will not cause undue prejudice to the plaintiff's adversary." *Id.* (quotations & citations omitted) (ellipses omitted).

The Court then emphasized that the federal rule after which *Brock* modelled its test contains no excusability requirement. *See Id.* at 179; *See also* Fed. R. Civ. P. 15(c)(1)(C). Examining the issue further, the Court noted that "the 'excusable mistake' requirement appears to have originated as a judicial gloss" imposed where plaintiffs "deliberately failed to identify the proper party who was known to them at the time . . . or where the proposed new defendant had no notice of the pendency of the action such that the defendant could not reasonably be expected to have been sued." *Id.* at 179-80. However, such a requirement is superfluous because the first and second prongs of the *Brock* test already protect against these concerns of "lack of notice or bad faith." *Id.* at 180.

Continuing, the Court made three key policy points supporting its conclusion that the test does not require an excusable mistake:

- adding "the word 'excusable' . . . improperly deemphasizes what the United States Supreme Court has called the 'linchpin' of the relation back doctrine – notice to the defendant within the applicable limitations period";

- "requiring courts to determine in each case whether the plaintiff's mistake was 'excusable' unwisely focusses attention away from what *Brock* assumed to be 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"; and

- "the excusability test often punishes the plaintiff for even minor drafting errors – precisely the situation that warrants application of the doctrine."

See Id. at 180-81 (quotations & citations omitted) (emphasis in original).

At bottom, the Court concluded that requiring a party to demonstrate an excusable mistake has had "the practical effect . . . [of] render[ing] the relation back doctrine meaningless in all but rare circumstances." *Id.* at 181. And that "result is not in keeping with modern theories of notice pleading and the admonition that the [CPLR] 'be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding' (CPLR 104)." *Id.*

Having chronicled the genesis of the current relation back test, we return to the question in this case – whether Appellant's inadvertent omission of Rosa Kuehn is the type of "mistake" that satisfies the third prong of the test.

Supreme Court concluded that Appellants failed to satisfy this prong because their mistake in omitting Rosa Kuehn constituted a mistake of law, which is not the type of mistake contemplated by the relation back doctrine (A-18-19). The Third Department affirmed, reasoning that, since Appellants had properly named Rosa Kuehn as the landowner in a prior challenge, their omission now "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-5). Respectfully, these holdings reflect an unduly restrictive application of the relation back doctrine, in contravention of both

the Legislature's intent as reflected by the plain language of the relation back statute and this Court's reasoning in *Buran*.

To the extent Appellant's mistake is denoted one of law, we note that the federal relation back rule, after which New York's rule is modelled, applies to such 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."). Nor would allowing legal mistakes to satisfy the relation back test be precluded by the text of CPLR § 203 or *Buran's* explication of the rule.

To the Third Department's conclusion that, since they knew of her identity and status as the landowner from their prior litigation, Appellants' omission of Rosa Kuehn is not the type of mistake contemplated by the relation back doctrine, Appellants submit that this reasoning is inconsistent with *Buran's* admonition that the inquiry must not focus on what the plaintiff knew or should have known, but rather upon the *defendant's* state of mind. *See* 87 N.Y.2d at 180-81. *Buran's* point is also consistent with interpretation of the federal relation back rule. *See Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 548 (2010) (noting the pertinent question "is not whether [plaintiff] knew or should have known the identity of . . . the proper defendant, but whether [the proper defendant] knew or should have known that it would have been named as a defendant but for an error.").

In short, Appellants were required to name Rosa Kuehn and, but for their legal error in failing to join all necessary parties when challenging a ZBA's land use determination, they would have timely done so. They plainly did not omit her in bad faith or to obtain some tactical litigation advantage; indeed, there is no such conceivable advantage that could have been attained. Rather, their mistake, even if one of law or simply the result of oversight, 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.

Indeed, despite the cramped interpretation of the relation back doctrine that persists in this State as adopted by the court's below and which this appeal seeks to remedy, some lower courts repeatedly have held that inadvertent mistakes, including apparent legal errors that do not evidence an intentional decision to gain a tactical advantage trigger application of the relation back doctrine. *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.").

In this regard, we highlight a noticeable distinction in the phraseology that has been used to describe the third prong of the relation back test. *Brock* set forth the third prong [without "excusability"] as follows: "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." 83 A.D.3d at 68-69 (emphasis added). But in *Mondello*, in which it endorsed the *Brock* test, this Court phrased the third prong as follows [again, removing "excusability"]: "the new party new or should have known that, but for a[] mistake *by the plaintiff in originally failing to identify all the proper parties*, the action would have been brought against the additional party united in interest as well." 80 N.Y.2d at 226 (emphasis added).

The *Mondello* language more accurately captures the essence of the third prong as later elucidated in *Buran*. In other words, a mistake "as to the identity of the proper parties" seems to suggest that that mistake must be about the parties' actual identity – *i.e.*, who the party is or what his or the nature of his legal status – whereas, by contrast, a mistake "by the plaintiff in originally failing to identify all the proper parties" suggests that the plaintiff simply erred in failing to identify [*i.e.*, to name] the proper parties in the pleading. While the former type of mistake might be sufficient, it is not necessary to allow application of the relation back doctrine.

Indeed, *Buran's* logic would seem to eschew the former interpretation because it emphasizes the *plaintiff's* knowledge. But, again, as *Buran* points out, the mistake prong should not look to plaintiff's state of mind, but rather must focus on what the *defendant* knew or should have known. In other words, even where the plaintiff knows the party's identity, he may have simply erred in failing to so identify that person in the pleading. So long as this omission was not intentional, but rather a mistake (as in an "error"), and so long as the other party knew or should have known that it would have been sued but for this mistake, the test should be satisfied.

Such an interpretation is consistent with the text of CPLR § 203, which makes unity of interest a proxy for notice of the proceeding and lack of prejudice to the later joined party, and with *Buran's* proper balancing of the State's strong public policy of deciding cases on the merits against the interests of statutory repose. So

long as the later joined party is not prejudiced because she had, or should have had, timely notice of the proceeding through her unity of interest with a timely named party, she is not entitled to the windfall of repose where her initial omission resulted from an unintentional legal error.

CONCLUSION

Appellants' mistaken omission of Rosa Kuehn is cured under the relation back doctrine. Whether it is denoted a mistake of law or was simply the product of oversight, the relation back test must focus not on the reason for Appellant's omission, except to rule out the possibility that it was intentional [which it clearly was not], and, instead, on whether Rosa Kuehn was united in interest and, because of that relationship, knew or should have known of this proceeding and that she would have been named as a necessary party but for Appellants' inadvertent mistake in initially omitting her as a party. Since the Appellate Division misapplied the relation back test, its Order affirming dismissal of the Amended Petition should be reversed and vacated, the Amended Petition reinstated, and the matter remanded for adjudication of the merits of Appellants' claim.

Dated: Goshen, New York
November 11, 2022

Respectfully Submitted
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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 N.Y.C.R.R. § 500.13(c)(1)

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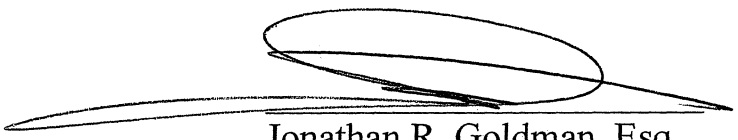

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