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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 09-337, Krupski v. Costa  
5 Crociere, S.p.A.

6 Mr. Bendure.

7 ORAL ARGUMENT OF MARK R. BENDURE

8 ON BEHALF OF THE PETITIONER

9 MR. BENDURE: Mr. Chief Justice, and may it  
10 please the Court:

11 This case revolves around Rule 15(c)(1)(C)  
12 of the Federal Rules of Civil Procedure. In pertinent  
13 part, if two subsections are -- are satisfied, the rule  
14 permits relation back of an amendment adding a new  
15 defendant after expiration of the limitations period.

16 The courts below found, and Respondent does  
17 not question, that we satisfied the first subsection:  
18 Notice and no prejudice. That arose from the service of  
19 the original complaint upon Costa Cruise, the agent and  
20 corporate affiliate represented by the same attorney as  
21 Respondent Costa Crociere.

22 JUSTICE GINSBURG: Do you know, Mr. Bendure,  
23 what exactly the corporate relationship was between the  
24 two?

25 MR. BENDURE: No, Your Honor, not the

1 corporate relation. The functional relationship as  
2 described in the affidavit is that Costa Cruise is the  
3 booking agent for Costa Crociere. And for the notice  
4 procedure, according to the affidavit of Mr. Klutz,  
5 Costa Cruise engaged the IRSI adjustment service to  
6 resolve claims arising on the ship. So in that respect  
7 it was also, in our view, an agent of Costa Crociere.  
8 But the specific corporate relationship is not known.

9 JUSTICE GINSBURG: Thank you.

10 MR. BENDURE: Because of that timely service  
11 on Costa Cruise, we satisfied the first subsection. And  
12 as this Court noted in Schiavone, timely service on one  
13 defendant may serve to give imputed notice to a related  
14 defendant, which is what we have here.

15 CHIEF JUSTICE ROBERTS: Counsel, your --  
16 your client tripped over the cable, right?

17 MR. BENDURE: Correct.

18 CHIEF JUSTICE ROBERTS: What if the case  
19 were there were two people behind her and she was  
20 pushed? And she didn't know which one pushed her, Jones  
21 or Smith. So she sues Jones, and Smith knows all about  
22 it because, of course, he's a key witness or whatever.  
23 Can he be substituted later on because he was the person  
24 she should have sued?

25 MR. BENDURE: If you're talking about a lack

1 of knowledge of the real name, probably --

2 CHIEF JUSTICE ROBERTS: Not just the real  
3 name. It's not that Jones pushed her, but his real name  
4 is Johnson. It's that Jones -- whoever pushed her; I  
5 forget -- but one guy --

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: One of the people pushed  
8 her, and she named that -- she named the other person. She  
9 made a mistake about who pushed her. Can they have  
10 substitution in that case?

11 MR. BENDURE: I would say yes, because --  
12 again, assuming that all of the other criteria are  
13 satisfied.

14 CHIEF JUSTICE ROBERTS: Yes. The non-pusher  
15 has notice --

16 MR. BENDURE: Yes.

17 CHIEF JUSTICE ROBERTS: -- and everything else.  
18 But there's no relationship between the two of them.

19 MR. BENDURE: It's -- it's obviously a  
20 slightly different and more difficult case from our  
21 perspective, but what I think is critical is the status  
22 that's involved. In this particular case, the suit was  
23 filed against the vessel operator, and that vessel  
24 operator was identified as Costa Cruise, when we know  
25 that the actual identity was Costa Crociere.

1 JUSTICE GINSBURG: What was the first --  
2 when was your first notice of that? I mean, it was on  
3 the first page of the ticket, but the answer came after  
4 the statute of limitations. Was that your first notice  
5 that there was this different entity, or did you know  
6 that earlier?

7 MR. BENDURE: It was -- we say that was the  
8 first notice. Now, the circuit court used an imputed  
9 knowledge rationale to suggest that the inclusion of the  
10 name "Costa Crociere" within the definitions section  
11 gave us what I would call constructive notice. But in  
12 terms of actual knowledge that -- that we had sued the  
13 wrong party, it was the answer which was filed after --

14 JUSTICE SCALIA: Well, you don't -- I didn't  
15 understand you to deny that the ticket made it very  
16 clear who operated the ship.

17 MR. BENDURE: I'm not sure --

18 JUSTICE SCALIA: Do you contest that?

19 MR. BENDURE: I contest that it makes it  
20 very clear, but I don't contest that one could conclude  
21 that that provided constructive notice, that if read  
22 carefully one might infer.

23 JUSTICE SCALIA: Well, why not? Don't you  
24 read the contract carefully before you bring a lawsuit?

25 MR. BENDURE: Well, actually it was under

1 definitions. And according to the definitions, Costa  
2 Crociere fell within the same definition of "carrier" as  
3 the steward, the ship itself, any --

4 JUSTICE SCALIA: So you are -- you either  
5 are contesting or you're not contesting that it's clear  
6 from the ticket. I had assumed it was clear from the  
7 ticket.

8 MR. BENDURE: I'm not -- I am not agreeing  
9 that it's clear. I am agreeing that it provides  
10 constructive notice from which one might infer that.  
11 Not clear, but discernible.

12 JUSTICE SCALIA: So you had -- so then you  
13 had notice even before the suit was filed. It was on  
14 the -- it was on the ticket.

15 MR. BENDURE: We had what the circuit court  
16 referred to as "imputed knowledge." Now, I think there's  
17 a --

18 JUSTICE GINSBURG: Did the -- did the name  
19 show up any place other than page 1 of the general  
20 conditions of passage?

21 MR. BENDURE: I don't believe so, Your  
22 Honor.

23 JUSTICE GINSBURG: That's -- and this is  
24 what? An 11-page, very small print --

25 MR. BENDURE: It's an 11-page, small print

1 document. And one thing that bears mention is that  
2 reference is under the designation "Definitions,"  
3 because Respondent makes some hay out of the fact that  
4 we complied with other requirements which are under a  
5 different heading which says "Limitations of liability."

6 But what we also had was that we purchased  
7 the ticket from Costa Cruise; it was sent by Costa  
8 Cruise. We had the pre-suit notice sent to Costa  
9 Cruise, responded by the -- the gentleman under the  
10 heading "Costa" that says "claims administrator for  
11 Costa Cruise." So there was certainly what I would call  
12 conflicting information at best about which was the name  
13 of the actual vessel operator.

14 JUSTICE SCALIA: Not -- not if you read the  
15 definitions on page 1. And if you are not going to read  
16 all 11 pages before you file suit, I would think you  
17 would at least read page 1. And that, it seems to me,  
18 made it clear.

19 MR. BENDURE: Well, it -- well, under the  
20 same definition, the steward would be a carrier every  
21 bit as much as Costa Crociere, S.p.A. So it seems to me  
22 by that reasoning you could conclude that the steward or  
23 the janitor is the vessel operator because they are  
24 likewise defined as the carrier in that definitional  
25 section.



1                   And, in fact, it also includes the vessel  
2     itself within the definition. So let's assume that my  
3     client had, instead of suing Costa Cruise, sued Costa  
4     Magica, the name of the vessel itself. Most of the  
5     cases would say that an amendment like that to add the  
6     actual name, once you have identified the status of the  
7     defendant you seek to sue, falls within the  
8     subsection (ii), which is addressed primarily to the  
9     constructive notice of the defendant, that they knew or  
10    should have known that they would have been brought in  
11    the suit but for a mistake concerning the proper party's  
12    identity.

13                  But the general focus of that second subsection,  
14    I think, is to look to whether this defendant knew or  
15    should have known that it was the intended target.

16                  JUSTICE KENNEDY: Let me -- I've been  
17    thinking about the Chief Justice's question where the two  
18    people are pushed and you don't know which person -- or  
19    two people fired the shotgun, and there's only one pellet,  
20    and you don't know which gun the pellet came from. In  
21    that case, I think we could stipulate that even by  
22    reasonable inquiry, you wouldn't know.

23                  In your case, I think the -- and I think the  
24    difference in the case is that "reasonable inquiry"  
25    means you should have known. So now we have a rule that

1     excuses something you should have known but doesn't  
2     excuse something you -- you couldn't have known, which  
3     seems odd. And because it's odd, therefore, maybe  
4     that's why it only applies to clerical errors.

5                 MR. BENDURE: Well, actually when it talks  
6     of mistake, it seems to me that the very notion of  
7     mistake connotes error. I looked at a couple of  
8     definitions, dictionary definitions. Merriam Webster's  
9     defines a mistake as, quote, "a wrong judgment" or,  
10    quote, "a wrong action or statement proceeding from  
11    faulty judgment, inadequate knowledge, or inattention."  
12    So, at least in that colloquial sense, the very nature of  
13    mistake implies some measure of blameworthiness.

14                And, indeed, it's hard to conceive of a  
15    mistake that couldn't be avoided. And I think that's  
16    the problem with looking to the ticket, because what the  
17    definition on the ticket essentially says is: With due  
18    diligence, you might have avoided the mistake.

19                But in my view, and I think in the view of  
20    the language of the rule, that doesn't change the very  
21    nature of it as being a mistake.

22                JUSTICE SOTOMAYOR: Counsel --

23                MR. BENDURE: Certainly.

24                JUSTICE SOTOMAYOR: -- assume I accept  
25    your argument, and I am the cruise operator -- the

1 cruise owner, cruise ship owner, and I look at the  
2 complaint, and I say: I think they really meant me,  
3 but -- I think. Now, within the 4(m) period, which is  
4 the period in which I am supposed to reasonably know  
5 that I would have been named absent a mistake, here an  
6 answer is filed, and you are told there is a mistake,  
7 and you don't correct the mistake. What conclusion  
8 would a reasonable person at that second juncture make  
9 about whether you made a mistake or not?

10 MR. BENDURE: I think --

11 JUSTICE SOTOMAYOR: And I think that's what  
12 the issue is here, which is, assuming the complaint  
13 could be read as a mistake during the 4(m) period,  
14 wasn't that mistake corrected, and you refused or failed  
15 to act?

16 MR. BENDURE: Let me respond both legally  
17 and factually. Legally, I submit that it doesn't make a  
18 difference because under the text of the rule if during  
19 that 4(m) period they had the knowledge that you're  
20 suggesting and which would be suggested by the  
21 Respondent when they say, I think, if you had filed the  
22 amended complaint and served it a month after the answer,  
23 it would have been timely, we would have done it.

24 That acknowledges that there was a mistake,  
25 and once there is a mistake, if during that 120-day

1 period they knew or should have known that it would have  
2 been brought against them but for the mistake, that  
3 knowledge doesn't evaporate by later events, as long as  
4 there is knowledge during that period.

5 JUSTICE SOTOMAYOR: That makes so little  
6 sense to me. Here I think -- and for the following  
7 reason: You seriously I don't think could contend that  
8 if you had sought to amend a year later, that that would  
9 have been timely, correct?

10 MR. BENDURE: Correct.

11 JUSTICE SOTOMAYOR: All right. But putting  
12 aside prejudice --

13 MR. BENDURE: Okay.

14 JUSTICE SOTOMAYOR: -- what the lower court  
15 said was because your delay speaks to a choice, that  
16 that's the only thing a reasonable defendant would have  
17 assumed, that having been told that you sued the wrong  
18 party and you continued in that action, that that's what  
19 you intended to do, to sue that wrong party.

20 MR. BENDURE: Let me point out factually --  
21 and I did not stress it in my brief. The answer was  
22 filed on February 25th. Twenty-three days later, on  
23 March 20th, the court entered a scheduling order which  
24 said: You have until the end of June to amend your  
25 complaint to add parties.

1           So it seems to me that a defendant faced  
2   with a court order that says the time for amendment  
3   extends till the end of June would not be drawing any  
4   conclusions that the plaintiff's state of mind had  
5   changed. And one difficulty with trying to look at  
6   different points during the 120-day period is that it  
7   seems to me you'd have a constantly moving target.

8           If you say that we satisfied 120(m) at one  
9   point in time but somehow that's not enough and at a  
10  later point in time maybe they didn't know it any more,  
11  and then perhaps I guess in theory you could have them  
12  again -- if we had sent them a letter even after that and  
13  said, you know, we really did mean it, and then for some  
14  reason they concluded otherwise, you'd have a constantly  
15  moving target. And that's --

16           JUSTICE GINSBURG: Mr. Bendure, would you  
17  explain one factual matter to me? I might have gotten  
18  this wrong, but I thought the answer was filed after the  
19  1 year had run.

20           MR. BENDURE: It had. It had.

21           JUSTICE GINSBURG: So when the answer was  
22  filed it was too late for you to come within the statute  
23  of limitations.

24           MR. BENDURE: Absolutely true.

25           JUSTICE GINSBURG: And I thought that would be

1 the answer that you would give to Justice Sotomayor,  
2 because when you got the answer -- which was filed after  
3 how many days?

4 MR. BENDURE: It was filed I think 24 days  
5 after the complaint.

6 JUSTICE GINSBURG: If you had gotten that a  
7 few days earlier, you could have amended, and then we  
8 wouldn't be here.

9 MR. BENDURE: That's certainly true, Your  
10 Honor. And I think it also --

11 JUSTICE SOTOMAYOR: I'm sorry. You have  
12 120 days to amend, don't you, from the filing of the  
13 complaint?

14 MR. BENDURE: No, Your Honor. The 120 days  
15 is the time frame for the notice to the defendant.

16 JUSTICE SOTOMAYOR: Right.

17 MR. BENDURE: It -- 120 days after the amended  
18 complaint is our time for service of the amended --

19 JUSTICE SOTOMAYOR: Complaint.

20 MR. BENDURE: -- complaint on the new defendant.  
21 But I think the point that is raised by Justice Ginsburg is  
22 this: Once we find out and the limitation period has already  
23 expired, school's out. If we tried to amend immediately  
24 thereafter -- if we hadn't made a mistake -- we couldn't  
25 amend 1 day after expiration of the limitation period.

1           So if we had acted immediately, we still  
2   don't get relation back unless we've satisfied the two  
3   criteria of the subsections. But if we do satisfy those  
4   within the 120-day period, then we fall in the safe  
5   haven provided by the rule whether the amendment itself  
6   occurs 1 week, 3 weeks, or 7 weeks afterwards. That --

7           JUSTICE GINSBURG: But the basic point is  
8   the answer didn't come in until you were already out  
9   under the statute of limitations.

10          MR. BENDURE: Correct.

11          JUSTICE GINSBURG: So from their point of  
12   view, nothing else matters; you were out when they filed  
13   their answer, and you could do nothing to cure that.

14          MR. BENDURE: We could do nothing to, as a  
15   matter of right, file within the limitation period.

16          JUSTICE KENNEDY: Did your amended complaint  
17   contain any new and material allegations other than the  
18   name correction?

19          MR. BENDURE: It actually was a second  
20   count, but it was the same allegations against Costa  
21   Crociere that had been made against Costa Cruise. We  
22   did not amend the theories of liability. And, again,  
23   getting back to the question of status and theories, I  
24   think that's the critical distinction between this case  
25   and the cases they rely upon, *Ish Yerushalayim* and

1 things like that, where you're changing from an  
2 individual defendant to an institutional defendant or  
3 vice versa on a different theory. And, of course, you  
4 couldn't mistake an individual for an institution.

5           And that I think is the line of demarcation  
6 that we're asking the Court to draw, and it explains  
7 why in the lower courts the decisions which present our  
8 paradigm all or virtually all allow relation back;  
9 whereas, those that seek to amend a change from an  
10 individual to a corporation or vice versa often don't  
11 permit relation back.

12           JUSTICE SCALIA: I thought that the only  
13 condition was that it had to arise out of the same event  
14 or transaction, which would give you much more running  
15 room than -- than what you assert.

16           MR. BENDURE: Only if you're amending  
17 against the same defendant. If you are adding a new  
18 defendant, you have to satisfy (i) and (ii), which look  
19 to the notice and reason to know of the new defendant.

20           JUSTICE GINSBURG: Mr. Bendure, in addition  
21 to the mailing of the ticket -- the mailing of the  
22 ticket came; it said "Costa Cruise" -- were there any  
23 other connections between the plaintiff passenger and  
24 Costa Cruise beyond the ticket coming in an envelope  
25 that says "Costa Cruise"?



1           MR. BENDURE: There was the -- the pre-suit  
2     claims notice which was sent to Costa Cruise at the  
3     Florida address, in attempted compliance with the  
4     provision of the ticket which says you must file notice  
5     to the carrier before filing suit. And you have to do  
6     that within 185 days.

7           So we not only got the ticket from Costa  
8     Cruise -- we bought it from Costa Cruise -- the ticket  
9     itself, if you look at I think it's 25a of the  
10    appendix to the petition for certiorari, there is a  
11    prominent page which says "Costa Cruise, cruise company"  
12    next to a picture of the vessel. So we have that.

13          Then when we filed the notice, we sent it to  
14    Costa Cruise, we get a letter back from a person who  
15    claims to be in a position to resolve the liability of  
16    the vessel over -- owner, signed by him as claims  
17    administrator for Costa Cruise.

18          Those are the things -- oh, and then we  
19    have, prior to the commencement of suit, the  
20    Internet investigation about which Florida company is  
21    registered to do business in the State of Michigan, and  
22    we look at the Costa Cruise Web site, which says: "Costa  
23    Crociere with several offices in several countries,  
24    United States office, Costa Cruise, Florida."

25          So those are some of the things which give

1 rise to the mistake --

2 JUSTICE SCALIA: Mr. Bendure, can -- can I  
3 come back to your -- I'm not sure why it matters, but it  
4 seems to me you're giving too narrow an interpretation,  
5 and I would not like our opinion to read any more  
6 narrowly than the statute allows.

7 It seems to me that if you assert a  
8 different claim arising out of the same transaction, you  
9 would be able to amend. If you will look at (c)(1)(C),  
10 which is what you're asserting here, right? (C)(1)(C)  
11 says, "the amendment changes the party or the naming of  
12 party against whom the claim is asserted, if Rule  
13 15(c)(1)(B) is satisfied." Then you go back to (1)(B)  
14 and it says, "the amendment asserts a claim or defense  
15 that arose out of the conduct, transaction, or occurrence  
16 set out."

17 It doesn't say it has to be the same claim.

18 MR. BENDURE: There's no question we  
19 satisfy that. Everybody agrees.

20 JUSTICE SCALIA: I understand that. That's  
21 why I don't understand why you're arguing a more  
22 narrow -- a more narrow interpretation.

23 MR. BENDURE: Because I'm forced to --

24 JUSTICE SCALIA: It seems to me you're home  
25 free with (B).

1 MR. BENDURE: Unfortunately, (C) then goes  
2 on and says: "And if, within the period provided," (i)  
3 and (ii). So --

4 JUSTICE SCALIA: Oh, yes, but -- but those  
5 are the only things we -- we have to argue about.

6 MR. BENDURE: That's correct.

7 JUSTICE SCALIA: There's no doubt that you  
8 are asserting -- even if you were asserting a different  
9 claim, it certainly arose out of the same transaction or  
10 event, didn't it?

11 MR. BENDURE: Certainly. No question about  
12 that.

13 JUSTICE SCALIA: Okay.

14 MR. BENDURE: If the Court doesn't have any  
15 additional questions at this time, I'd like to reserve  
16 the remainder of my time for rebuttal.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 Mr. Glazier.

19 ORAL ARGUMENT OF ROBERT S. GLAZIER

20 ON BEHALF OF THE RESPONDENT

21 MR. GLAZIER: Mr. Chief Justice, and may it  
22 please the Court:

23 There are, we suggest, two issues before the  
24 Court: The first is the legal question of whether a  
25 plaintiff's knowledge about the identity of the proper

1 party can preclude a finding that there was a mistake  
2 concerning the identity of the proper party. That, we  
3 suggest, is in some ways the easier issue, because there  
4 are -- there's abundant authority from the circuit  
5 courts of appeal and from this Court in *Nelson v. Adams*  
6 USA, where the Court said the rule requires a mistake.  
7 In that case, there was no mistake.

8 JUSTICE GINSBURG: Mr. Glazier --

9 JUSTICE BREYER: It's no mistake if you  
10 happen to know it, if you happen to know who the right  
11 party is?

12 MR. GLAZIER: Correct. And --

13 JUSTICE BREYER: Ever?

14 MR. GLAZIER: Yes.

15 JUSTICE BREYER: Have you ever driven a car  
16 where your wife has said turn left and you've turned  
17 right?

18 (Laughter.)

19 JUSTICE BREYER: Has that ever happened to  
20 you?

21 MR. GLAZIER: Yes.

22 JUSTICE BREYER: Was there anything you  
23 didn't know?

24 MR. GLAZIER: What the facts are here, Your  
25 Honor --

1 JUSTICE BREYER: No, I'm asking about this  
2 question, my hypothetical.

3 MR. GLAZIER: You know --

4 (Laughter.)

5 JUSTICE BREYER: Was there anything you  
6 didn't know?

7 MR. GLAZIER: There is nothing that you did  
8 not know.

9 JUSTICE BREYER: Correct. Did you do it by  
10 mistake? Yes, of course, you did. It's happened to  
11 every human being. There are millions of instances in  
12 which people do things by mistake where, in fact --

13 JUSTICE SCALIA: I think your wife made a  
14 mistake. I don't think you made a mistake.

15 (Laughter.)

16 JUSTICE BREYER: No, my wife does not make  
17 mistakes.

18 (Laughter.)

19 MR. GLAZIER: I think --

20 JUSTICE BREYER: I make mistakes, and  
21 sometimes I make mistakes knowing all the facts, and so  
22 do you and so does everybody else. So I never heard of  
23 this thing that you can't make a mistake knowing all the  
24 facts. But anyway, here we have a person who didn't  
25 know all the facts. What the judge says is he should

1 have known all the facts.

2 Where in the record does he say he did know  
3 all the facts?

4 MR. GLAZIER: Where -- in three different  
5 times the plaintiff was informed of the facts. But let  
6 me say on the --

7 JUSTICE BREYER: That's a different matter.  
8 My wife told me to turn left and I turned right, okay?  
9 But I didn't take it in.

10 MR. GLAZIER: Well --

11 JUSTICE BREYER: So that's a different  
12 matter. Where does it say that he did know the facts as  
13 opposed to he should have known the facts?

14 MR. GLAZIER: The circuit court refers --  
15 talks about imputed knowledge. We disavow that. There  
16 was no need for imputed knowledge in this case. What  
17 imputes knowledge is someone who does not have  
18 knowledge. Courts and lawyers make that up. If you  
19 don't have knowledge --

20 JUSTICE BREYER: I just want the citations  
21 to the page. I wasn't challenging you. I just wanted  
22 the citations to the page --

23 MR. GLAZIER: There are --

24 JUSTICE BREYER: -- where there's a finding  
25 that, in fact, he knew that this company called "Costa

1 Cruise" in Italian is the same as the company called  
2 "Costa Cruise" in English? I take it "Crociere" means  
3 "cruise."

4 MR. GLAZIER: They are -- they're separate  
5 corporations.

6 JUSTICE BREYER: Yes, yes. One is called  
7 "Costa Cruise" in Italian and one is called "Costa  
8 Cruise" in English. And I just want to know where it  
9 says in the record that the client or he, the lawyer,  
10 actually knew, actually knew that he should have sued  
11 the one that spells its name in Italian?

12 MR. GLAZIER: They are separate  
13 corporations. There's nothing in the record that says --

14 JUSTICE BREYER: I didn't ask you that  
15 question. I'm asking for a record citation as to where  
16 there is a finding that this particular plaintiff knew  
17 that the Italian company called "Costa Cruise" was in  
18 fact the one he should have sued?

19 MR. GLAZIER: There is a finding --

20 JUSTICE BREYER: I'll write them down and  
21 look at them later.

22 MR. GLAZIER: The finding on page 19a of the  
23 district court opinion says --

24 JUSTICE SCALIA: 19a of the petition?

25 MR. GLAZIER: 19a of the cert petition

1 says "Her failure to timely naming Costa Crociere,  
2 S.p.A. as defendant."

3 JUSTICE BREYER: I thought what the district  
4 court said was "impute" the knowledge.

5 MR. GLAZIER: No. No, the district court  
6 did not impute knowledge, and this is an important  
7 point. The circuit court imputed knowledge, and --

8 JUSTICE BREYER: Where does it say that?  
9 Where does it say that on 19a?

10 MR. GLAZIER: 19a -- it's not precisely it,  
11 but it says, "Her failure to timely named Costa Crociere  
12 as defendant was not the result of a mistake." It does not  
13 specifically say --

14 JUSTICE BREYER: Well, I -- I know. I would  
15 say in reading this, that both courts have made the most  
16 elementary mistake of the English language in thinking  
17 that when a person doesn't know something but should  
18 have known it, that that's inconsistent with a mistake.  
19 That's the very definition of a mistake.

20 MR. GLAZIER: Your Honor --

21 JUSTICE BREYER: Now, all I want is some  
22 citation from you that shows that isn't what they  
23 thought.

24 MR. GLAZIER: Well, the best I can do is the  
25 conclusion that there is not a mistake. But I -- I need



1 to --

2 JUSTICE BREYER: Well, that's the conclusion,  
3 and when I read two sentences down, it said they may have  
4 had constructive knowledge. The word "constructive" to  
5 me, when I hear I want to run out the door, because what  
6 the word "constructive" to me means is not knowledge.

7 MR. GLAZIER: I'd like to --

8 JUSTICE SCALIA: I'm sorry. I -- I am not  
9 following it. Where -- where -- where --

10 JUSTICE BREYER: I'm on page 19a.

11 JUSTICE SCALIA: Yes. But he's talking  
12 about constructive notice --

13 JUSTICE BREYER: Constructive notice.

14 JUSTICE SCALIA: -- by -- by the defendant,  
15 not constructive knowledge by the --

16 JUSTICE BREYER: All right. Then what is --  
17 where is the page that it says that the plaintiff had actual,  
18 as opposed to imputed, knowledge?

19 MR. GLAZIER: The -- there -- there is not  
20 that sentence --

21 JUSTICE BREYER: Okay.

22 MR. GLAZIER: -- in the opinion. What there  
23 is, is the plaintiff made a conscious choice.

24 The facts of the case are, first of all,  
25 before the lawsuit is filed the plaintiff has the

1 ticket. There is no doubt, no doubt whatsoever, that  
2 the plaintiff or her attorney read --

3 JUSTICE GINSBURG: Is there any other than  
4 that one page on the ticket, that against the mailing  
5 envelopes that she got that say "Costa Cruise" -- is  
6 there anything in the entire record other than that  
7 definition page that includes carrier, that includes  
8 steward, anything else that tips her off that this is a  
9 different corporation?

10 MR. GLAZIER: There are three different  
11 pieces of evidence. The first is the ticket. The  
12 ticket defines carrier as Costa Crociere. It is the  
13 only entity stated by name --

14 JUSTICE SCALIA: It says it includes  
15 stewards. What do you -- what do you say to that?

16 MR. GLAZIER: I'm sorry. I didn't --

17 JUSTICE SCALIA: It includes the stewards on  
18 the boat, according to your -- your friend.

19 MR. GLAZIER: It lists one entity by name,  
20 Costa Crociere, and lists others by role. Now, there  
21 may be some dispute over whether --

22 JUSTICE SOTOMAYOR: So why can't Costa  
23 Cruise be perceived to hold one of those roles?

24 MR. GLAZIER: Well, one might argue that  
25 there might be a number of different entities that might

1 be a carrier, but there is only one entity which is  
2 clearly the carrier, indisputably a carrier.

3 JUSTICE GINSBURG: What is the relationship  
4 between those corporations?

5 MR. GLAZIER: Costa Crociere is, I believe,  
6 one level removed an owner of Costa Cruise Lines. Costa  
7 Crociere operates around the world. They have different  
8 companies that operate as sales and marketing agents in  
9 different regions.

10 JUSTICE GINSBURG: But are they -- are they  
11 sister corporations, a parent-sub --

12 MR. GLAZIER: No.

13 JUSTICE GINSBURG: -- or what?

14 MR. GLAZIER: Costa Crociere is parent, and I  
15 believe there's a corporation below them, and then that  
16 corporation owns Costa Cruise Lines.

17 JUSTICE KENNEDY: When it's below them, you  
18 mean it owns all the shares in its -- in its subsidiary  
19 company?

20 MR. GLAZIER: Yes.

21 CHIEF JUSTICE ROBERTS: You know, the -- the  
22 definition of carrier includes independent contractors.  
23 I mean -- I -- I would -- other than that they are more  
24 closely related, I can see someone thinking, well, Costa  
25 Cruise is at least an independent contractor with which

1 Costa Crociere does business.

2 MR. GLAZIER: There might be more than one  
3 carrier, but there is one carrier identified by name.  
4 It is the first -- it is the first person listed. Costa  
5 Crociere is the carrier. I -- I suggest that if one  
6 reads the first page of the ticket, one might have  
7 questions about whether there might be some other  
8 entities that are carriers, but there is simply no doubt  
9 that Costa Crociere is the carrier.

10 JUSTICE GINSBURG: And if you went to --

11 MR. GLAZIER: Now, there is no --

12 JUSTICE GINSBURG: If you went to the Web site,  
13 which was mentioned, for Costa Cruise, there would be a tab  
14 that says "Our ships" "Our ships" -- and one of those ships  
15 is Costa Magica, whatever.

16 MR. GLAZIER: Yes.

17 JUSTICE GINSBURG: "Our ships," and it  
18 identifies Costa Cruise as the cruise operator. That's  
19 the information that's given to passengers in the United  
20 States who are going to book on these ships. It says  
21 Costa Cruise, our ships, Costa Cruise is the operator.  
22 That's what was being put forth to the public.

23 MR. GLAZIER: What -- what -- the relationship  
24 between the parties was governed by the ticket. The  
25 ticket says, for example, the claim against the carrier

1 has to be filed within the Southern District of Florida.  
2 This claim was filed in Southern District of Florida,  
3 but they did not sue the carrier as identified on the  
4 ticket. And the question is was there a mistake  
5 concerning the identity of the proper party --

6 JUSTICE GINSBURG: So it shouldn't matter  
7 that this confusion was caused in large part by this  
8 entity that advertises in English under the name "Costa  
9 Cruise" and identifies Costa Cruise as the operator.  
10 "The largest European cruise operator" is how Costa  
11 Cruise is -- is identified in -- in the advertising.

12 MR. GLAZIER: We -- we believe that the  
13 ticket is clear, and that governs. But even if one would  
14 disagree with that, then we move forward. If there were  
15 any confusion, there's an answer filed. Costa Cruise  
16 Lines is sued. Costa Cruise Lines denies that it can be  
17 held liable, says it wasn't the carrier, it wasn't --

18 JUSTICE GINSBURG: And the answer is filed  
19 conveniently after the 1-year period has run.

20 MR. GLAZIER: The answer is filed, but the  
21 question of whether the defendant knew or should have  
22 known that there -- it -- it would have been sued but  
23 for a mistake, the inquiry there is not within the  
24 limitations period. It was until the 1991 amendment,  
25 which followed the Schiavone case.

1 CHIEF JUSTICE ROBERTS: Well, but I don't --  
2 I mean, there's some sharp practice going on here.  
3 Paragraph 10 of their complaint sues Costa Cruise Lines  
4 because -- saying they owned, operated, managed,  
5 supervised, and controlled the ocean-going passenger  
6 vessel. And it's the same lawyer for Costa Cruise as  
7 for Costa Crociere, right?

8 MR. GLAZIER: Yes.

9 CHIEF JUSTICE ROBERTS: Okay. So that  
10 lawyer looks at this and says: Aha, they made a  
11 mistake; they named the cruise line rather than the name  
12 in Italian. So I'm going to wait until the statute of  
13 limitations runs, and then a couple of days after, I'm  
14 going to say aha.

15 MR. GLAZIER: The statute of limitations is  
16 not the measuring period. It was before the 1991  
17 amendment. Now, what happened here is the answer is  
18 filed, which makes clear the defendant -- the defendant  
19 Costa Cruise Lines denies it was involved with the  
20 ownership, operation, or management. That's Joint  
21 Appendix 30. Joint Appendix --

22 JUSTICE GINSBURG: Did the answer say the  
23 statute -- the 1-year period has run? Was that raised  
24 as a defense in the answer?

25 MR. GLAZIER: It was not raised in the -- in

1 the defense -- it was not raised as defense in the  
2 answer. It -- it was not.

3 JUSTICE GINSBURG: When was it raised as a  
4 defense?

5 MR. GLAZIER: It was raised 10 weeks later  
6 in a motion for summary judgment, which was still within  
7 the Rule 4(m) period, and that is the crucial period.  
8 If upon reading the answer, which says the --

9 JUSTICE GINSBURG: But that -- the Rule 4(m)  
10 period concerns when you can serve. It doesn't say that  
11 the statute of limitations is any more than what was the  
12 term of the -- of the passage, was 1 year.

13 MR. GLAZIER: Well, the Rule 4(m) period is  
14 awfully important because Rule 15(c) turns on, since  
15 1991, on the Rule(4)(m) period. If during the Rule 4(m)  
16 service period, the -- it became clear to Costa Crociere  
17 that it was an intended defendant, that it would have  
18 been sued but for a mistake, then the complaint against  
19 Costa Crociere would relate back, even though it was not  
20 timely filed.

21 JUSTICE SCALIA: Now, that -- that  
22 assumes -- that assumes -- when, what is it, 1(C)(ii),  
23 "knew or should have known," it says within the period  
24 provided by rule 4(m). Now, in the early part of that  
25 period, at -- at one point in the period you should have

1 known. And at another point, because the answer was  
2 filed, you shouldn't have known.

3 MR. GLAZIER: Well --

4 JUSTICE SCALIA: And you're relying on the  
5 fact that they filed an answer which -- I'm sorry --  
6 that -- that you filed an answer which made it very  
7 clear to them what the situation was. But was there any  
8 point, any -- and all it takes I think is any point  
9 within that 4(m) period -- when you -- you knew or should  
10 have known?

11 MR. GLAZIER: The answer, we submit, is no.  
12 When they filed the complaint, the complaint indicated a  
13 couple of things. First of all, they were suing Costa  
14 Cruise Lines, but they had read -- the complaint made  
15 clear that they had read the ticket. They specifically  
16 relied on the venue provision of the ticket. So we knew  
17 that they had read the ticket, which clearly identifies  
18 Costa Crociere as being the carrier, yet they still --

19 JUSTICE GINSBURG: Where -- where is the  
20 defense -- I mean, the ticket says suit must be filed  
21 within 1 year of the date of any alleged injury. And  
22 where is the -- that defense stated? You said it comes  
23 up 10 weeks --

24 MR. GLAZIER: In the motion for summary  
25 judgment, which -- which is not in the joint appendix.



1 It's docket entry 19. The affidavit which is -- was  
2 filed with the motion for summary judgment is in the --  
3 the Joint Appendix at Joint Appendix 33. And the  
4 motion -- the answer made clear that Costa Crociere is  
5 the carrier which could be liable, not Costa Cruise  
6 Lines --

7 JUSTICE STEVENS: Yes, but --

8 MR. GLAZIER: -- but there was no change.

9 JUSTICE STEVENS: -- being realistic  
10 about it, as I understand it you're relying entirely on  
11 the condition, general conditions of passage in the  
12 ticket, the fine print describing the term "carrier."

13 That's -- but do you take into account that  
14 the cover of the ticket, which is what the passenger  
15 would look at, uses "Costa Cruises," blah, blah, blah --  
16 "Costa Cruise Lines" and so -- and doesn't even mention  
17 the carrier?

18 MR. GLAZIER: The --

19 JUSTICE STEVENS: Don't you think, looking  
20 at that ticket, if you were a passenger you would think  
21 you were doing business with Costa Cruise?

22 MR. GLAZIER: Well, Your Honor --

23 JUSTICE STEVENS: Just looking at the cover?

24 MR. GLAZIER: If what --

25 JUSTICE STEVENS: Am I correct that on the

1 cover of the ticket, the Italian name isn't used at all?

2 MR. GLAZIER: On the cover, the Italian name  
3 is not used. The ticketing agent's name --

4 JUSTICE STEVENS: And isn't that what the --

5 MR. GLAZIER: -- is Costa Cruise Lines.

6 JUSTICE STEVENS: -- what the passenger would  
7 normally look at, understand who he is doing business with?

8 MR. GLAZIER: If one were to not read the  
9 ticket, which on page 1 --

10 JUSTICE SCALIA: Assuming -- assuming the  
11 lawyer would just look at the cover before he files a  
12 lawsuit?

13 MR. GLAZIER: We know -- if this were a  
14 question of uncertainty whether the lawyer read the  
15 ticket, that would be one thing, but we know that the  
16 lawyer read the ticket.

17 JUSTICE BREYER: Well, I don't understand  
18 what the lawyer reading the ticket has to do with this  
19 question.

20 JUSTICE STEVENS: Because the question is  
21 whether the lawyer made a mistake. Isn't that the  
22 question?

23 MR. GLAZIER: Well --

24 JUSTICE STEVENS: And he did make a mistake.

25 MR. GLAZIER: The principle is if one knows

1    what the true facts are -- if one knows what the true  
2    facts are and proceeds in any event, then there's no  
3    mistake concerning the --

4                   JUSTICE BREYER:  That isn't true, is it?  In  
5    the English language, it's not true?  I mean, that's why  
6    I was giving you some examples.  I don't know; maybe  
7    there's some special legal language somewhere written  
8    in Blackstone, or maybe it's Lord Coke, I don't know,  
9    that says when you use the word "mistake" don't use it  
10   in English, use -- use it in Italian.

11                   (Laughter.)

12                   JUSTICE BREYER:  But I mean, if we're going  
13   to use it in English, there -- it's not hard to find  
14   instances where a person would know, but he'd still make  
15   a mistake.

16                   MR. GLAZIER:  Well --

17                   JUSTICE BREYER:  And there's even a  
18   fortiori --

19                   MR. GLAZIER:  Your Honor --

20                   JUSTICE BREYER:  -- if he doesn't know, even  
21   if he should.

22                   MR. GLAZIER:  We have --

23                   JUSTICE BREYER:  Isn't that true?

24                   MR. GLAZIER:  What we have up front is  
25   the -- the ticket.  If we move past that, it's sort of a

1 test case. All right, did this plaintiff really not --

2 JUSTICE BREYER: What possible reason is  
3 there that somebody who is hurt on a ship and has a  
4 lawyer, and she has a broken leg, and she'd like to get  
5 recovery, would deliberately sue the wrong person?

6 MR. GLAZIER: The plaintiff --

7 JUSTICE BREYER: Is there such a reason?

8 MR. GLAZIER: The evidence in the record is  
9 that the plaintiff's lawyer looked at the Web site and  
10 chose a United States corporation instead of --

11 JUSTICE BREYER: And I'm just saying, did he  
12 do it by mistake? If you were representing this person,  
13 would you want to sue the company that could give you  
14 some money if they are liable? Or would you rather sue  
15 the Bank of America that has nothing to do with it?

16 (Laughter.)

17 MR. GLAZIER: Well, if it were -- if I had  
18 to sue Costa Crociere through the Hague Convention in  
19 Genoa, maybe a lawyer --

20 JUSTICE BREYER: Well, I want to ask you  
21 about that, because in your brief you refer in your  
22 footnote on page 6 to requirements of the Federal  
23 Government 44101-44103. So I looked those up. I  
24 discovered that 44103 says that it is a requirement, and  
25 you say you follow these requirements, that you shall

1 establish under regulations of the FMC financial  
2 responsibility.

3 And those regulations tell you that, at  
4 least as best I could read them, that you must furnish a  
5 written designation of a person in the United States as  
6 a legal agent for service of process, and they are  
7 referring to instances in which somebody on a ship  
8 suffered an accident.

9 So since you say that you are complying with  
10 that, I would like to know the name and address of that  
11 person in the United States for whom you must send legal  
12 process, because if obviously that had been on the  
13 ticket, that is precisely the man to whom this plaintiff  
14 would have sent the notice.

15 MR. GLAZIER: I cannot answer the question  
16 now.

17 JUSTICE BREYER: Well then, were you correct  
18 when you said in your -- in your brief that this company  
19 which you represent does comply with 44103?

20 MR. GLAZIER: My understanding is the answer  
21 is yes, but I cannot address the specific question.  
22 I submit --

23 JUSTICE BREYER: It is relevant, I think,  
24 because it adds to the confusion if they are under a  
25 legal requirement to have a service -- an agent to

1 receive service, and then they not only don't do it, but  
2 they don't have it printed on the ticket. And they get  
3 everybody mixed up by having the same name in English,  
4 or a very similar one, and announcing someone you're  
5 supposed to serve, and then it turns out to be not that  
6 person you're supposed to serve. It's a mysterious  
7 person that you can't find.

8 MR. GLAZIER: But the question, though --

9 JUSTICE BREYER: It seems odd. I'd like  
10 to know what the explanation is of this.

11 MR. GLAZIER: Well, the question is not a  
12 more generalized blame explanation, but under the rule,  
13 the language of the rule, whether Costa Crociere knew or  
14 should have known that the action would have been  
15 brought against it but for a mistake concerning the  
16 proper party's identity.

17 And the most problematic case -- part of the  
18 case for the plaintiff is why, when they were told in  
19 the answer that they had not sued the proper party, that  
20 Costa Cruise Lines was not the carrier, was not the  
21 operator, but Costa Crociere is, why did the plaintiff  
22 not do anything?

23 JUSTICE GINSBURG: But we -- let's clarify  
24 that point now. I am looking at 3a, which is the court  
25 of appeals opinion, and it says that "Costa Crociere

1 moved to dismiss, arguing that it had been sued after  
2 the 1-year ticket period allowed for claims set  
3 forth" -- as set forth in the ticket. Then the rule  
4 tells us that you have this much time to serve, and  
5 then the complaint will -- the -- the amendment will  
6 relate back to the date of the original filing.

7           It doesn't change your statement, your  
8 defense. The 1-year statute of limitations isn't  
9 affected. What is affected is the complaint will  
10 relate back if there's an amendment filed. But the  
11 1-year statute of limitations remains, and you didn't  
12 bother to answer until the -- that time had run.

13           MR. GLAZIER: But if -- if, during the  
14 120-day period -- you know, the Rule 15(c) happens to  
15 rely upon the measuring point, but service is not the crucial  
16 point. Within that 120-day period, if the plaintiff had  
17 done anything, anything at all, to indicate that she had  
18 not sued Costa Crociere because of a mistake, then the  
19 complaint would have related back, a very easy case.

20           JUSTICE GINSBURG: Yes, but the relation  
21 back is different from the point at which the statute  
22 has run. The statute runs after 1 year. Then, if she  
23 does what the rules say, it can relate back to the date  
24 of the original filing. The fact remains that you  
25 didn't file your answer until after the limitation

1 period had run.

2 MR. GLAZIER: Yes. Yes, we did not file the  
3 answer. They filed the lawsuit on the eve of the --

4 JUSTICE ALITO: Why does that even matter?  
5 I'm not really sure I'm following this argument. Let's  
6 say that the answer was filed during the limitations  
7 period, and the lawyer -- the plaintiff's lawyer is a  
8 solo practitioner, and he or she is out of the office  
9 because the lawyer's on a cruise --

10 (Laughter.)

11 JUSTICE ALITO: -- and doesn't come back  
12 for 2 weeks. And by that time, the limitations period  
13 has run. It's still a mistake.

14 MR. GLAZIER: If --

15 JUSTICE ALITO: Where do you see in --  
16 the question on which cert was granted has to do with  
17 imputed knowledge. Where do you see in the text of this  
18 rule anything that picks up the concept of either imputed  
19 knowledge or actual knowledge? It just talks about a mistake.

20 MR. GLAZIER: We do not rely at all upon  
21 imputed knowledge. The Court granted review, but we  
22 don't think there is imputed knowledge here.

23 JUSTICE ALITO: Well, where -- just -- where do  
24 you -- where in the rule is there anything that relates to the  
25 reasonableness of the mistake? What if it is the most



1 foolish, negligent mistake you can possibly imagine? Is  
2 it not still a mistake?

3 MR. GLAZIER: The rule contemplates by its  
4 structure that the mistake will be the cause of the  
5 reason why the -- the plaintiff did not sue the parties.

6 JUSTICE SOTOMAYOR: That's not what the  
7 rule says. That's not what the rule says. The rule  
8 doesn't talk about what kind of mistake or why. The  
9 rule says what the defendant should have known. And so,  
10 when you read this complaint, it's very clear you know  
11 you're the carrier.

12 MR. GLAZIER: Yes.

13 JUSTICE SOTOMAYOR: You know cruise -- the  
14 other line, the sales agent, can't be the carrier,  
15 correct?

16 MR. GLAZIER: We --

17 JUSTICE SOTOMAYOR: So it's either a factual  
18 or a legal mistake. There is no other way to read that  
19 other than that there is a mistake.

20 MR. GLAZIER: And then --

21 JUSTICE SOTOMAYOR: Because -- then have you  
22 to answer Justice Breyer's question, which is: What  
23 conceivable reason that is not either negligence or  
24 unintentional or inadvertent or just plain stupidity,  
25 however you want to define it, that someone who is

1 injured would want to name a party who wasn't  
2 responsible for the injury?

3 MR. GLAZIER: The most powerful evidence is  
4 simply when they were informed of the claimed mistake,  
5 they did nothing for 95 days to indicate in any manner  
6 whatsoever that it was a mistake. They had --

7 JUSTICE ALITO: Well, that's evidence from  
8 which the absence of a mistake might be inferred. I  
9 agree with that, but that doesn't establish that it  
10 wasn't -- it wasn't a mistake.

11 MR. GLAZIER: Well, this -- whether  
12 something is a mistake ultimately is a factual issue.  
13 There's a legal question of whether a plaintiff's  
14 knowledge of the identity of a proper party can preclude  
15 a finding of mistake. But once we get past that --

16 JUSTICE SOTOMAYOR: But, counsel, don't --  
17 what you're really talking about is whether once the  
18 answer was filed, they were dilatory in making their  
19 motion. I don't understand how you can argue that the  
20 day you received this complaint, you didn't understand  
21 that some sort of mistake had been made.

22 The day that the answer came in, you might  
23 start to have a doubt because of their delay in the  
24 motion to amend, but doesn't that go to a 15(a)  
25 question, whether the judge should have given leave to

1 amend because of dilatory tactics? Isn't that a 15(a)  
2 question, not a 15(c) question?

3 MR. GLAZIER: Well, delay in moving to amend  
4 via 15(a). But 15(c) requires the judge to determine  
5 whether there was a mistake. And here, in essence, we  
6 have a test case: Well, the plaintiff is claiming that  
7 the reason why she did not sue Costa Crociere --

8 JUSTICE SOTOMAYOR: Is there anything in the  
9 face of the complaint that would suggest anything but a  
10 mistake? Now, forget -- I'm being very specific. On  
11 the face of the complaint. You read that.

12 MR. GLAZIER: Yes, I believe there is. The  
13 complaint specifically makes clear that the plaintiff's  
14 lawyer read the ticket.

15 JUSTICE SOTOMAYOR: Where does it say that?  
16 Where does it say: "I know that the carrier is Costa  
17 Crociere"? Where does it say that?

18 MR. GLAZIER: The complaint certainly does  
19 not say that. What --

20 JUSTICE SOTOMAYOR: What the complaint says  
21 is that Costa Cruise, the operator of the vessel,  
22 injured me, correct?

23 MR. GLAZIER: It says that the --

24 JUSTICE SOTOMAYOR: And is that an accurate  
25 statement of fact?

1           MR. GLAZIER: That -- it's not an accurate  
2 statement of fact.

3           JUSTICE SOTOMAYOR: So --

4           CHIEF JUSTICE ROBERTS: No, I would have  
5 said the previous paragraph, 9, says: "The plaintiff  
6 has complied with all the pre-suit requirements of the  
7 passenger ticket." So you know they read the ticket.

8           MR. GLAZIER: Right. And in the paragraph  
9 before, venue is proper in Broward County; defendant's  
10 passenger ticket contains a forum selection. So we know  
11 when Costa -- Costa Cruise Lines, or Costa  
12 Crociere learns of this, we know that the plaintiff  
13 decided --

14          CHIEF JUSTICE ROBERTS: Now, which is it?  
15 Is that a Freudian slip?

16                   (Laughter.)

17          MR. GLAZIER: No. No, because we're --  
18 because we're not disputing --

19          CHIEF JUSTICE ROBERTS: Just a mistake.

20                   (Laughter.)

21          MR. GLAZIER: We're not -- we are not  
22 disputing the notice issue. What -- what is clear is  
23 they have read the ticket, and despite that --

24          JUSTICE STEVENS: Despite that, they made a  
25 mistake.

1 MR. GLAZIER: -- they have decided to sue  
2 Costa Cruise Lines.

3 JUSTICE STEVENS: They made a mistake,  
4 right? They read the ticket, and despite that, they  
5 made a mistake.

6 MR. GLAZIER: No.

7 JUSTICE STEVENS: What?

8 MR. GLAZIER: We don't think so.

9 JUSTICE STEVENS: Why isn't -- why doesn't  
10 the rule cover it?

11 MR. GLAZIER: But, again, if we move past --

12 JUSTICE SCALIA: I object to your relying  
13 upon the -- the answer as -- as establishing compliance  
14 with (C)(ii), because (C), in the prologue, says "is  
15 satisfied, if within the period provided by Rule 4(m)."

16 And there is at least some point within that  
17 period before the answer was filed. And if, within that  
18 period before the answer, you knew or should have known  
19 that it was a mistake, it seems to me you lose.

20 Do you understand what I'm saying?

21 MR. GLAZIER: I understand what you're  
22 saying, but there's nothing in -- just the point --

23 JUSTICE SCALIA: And the -- the only  
24 thing you could rely on for that short period before the  
25 answer is filed is simply the ticket, right?

1           MR. GLAZIER: There's nothing in the rule --  
2 the ticket and the complaint -- there's nothing in the  
3 rule that says that only events up to point of the  
4 running of the limitations period or the service of the  
5 answer are relevant. It is throughout the certain --  
6 within the period --

7           JUSTICE SCALIA: Well, you are reading  
8 "within the period" to mean "throughout the period." It  
9 doesn't say "throughout the period." It says "if within  
10 the period."

11          MR. GLAZIER: Well, the district court,  
12 which is serving as the fact-finder there, looked at all  
13 the evidence. And the powerful evidence is the service  
14 of the answer, which identifies the party --

15          JUSTICE SCALIA: I think it's an important  
16 issue with respect to the statute. I don't think we can  
17 treat cavalierly whether "within the period" means  
18 "throughout the period." That's one of the issues here.

19          JUSTICE KENNEDY: I have one -- one question  
20 about the face of the ticket, the one with the picture  
21 on it. Is it Costa Cruise or Costa Crociere that got  
22 this big award for "B.E.S.T. 4"?

23          MR. GLAZIER: I -- I don't know the answer  
24 to that.

25          JUSTICE KENNEDY: Pardon me.

1 MR. GLAZIER: I don't know the answer at  
2 this time.

3 JUSTICE KENNEDY: I -- I make the assumption that  
4 it's the cruise line, Crociere, that got the award. So  
5 the ticket itself confuses the two companies.

6 Is that a mistake, incidentally?

7 (Laughter.)

8 JUSTICE KENNEDY: If I am right, is that a mistake?

9 MR. GLAZIER: I -- Your Honor -- clearly, as  
10 you said, Costa Crociere is the vessel operator. The  
11 ticket makes it clear on the next page, the very next  
12 page --

13 JUSTICE KENNEDY: How many -- if you have a  
14 1,000-page ticket, how many pages do you have to read?

15 MR. GLAZIER: Here, you only have to read  
16 one.

17 JUSTICE KENNEDY: But this is the first one.

18 MR. GLAZIER: Well, this is --

19 JUSTICE KENNEDY: The one I pointed out to  
20 you with the mistake, that's the first one.

21 MR. GLAZIER: It's -- it's on the cover.  
22 The ticketing agent here, Costa Cruise Lines, adds the  
23 cover. The first page of the provisions say Costa  
24 Crociere is the -- is the vessel operator.

25 But, again, if one looks at the answer,

1   there's no response. No response, and then a motion for  
2   summary judgment. Still nothing. If the plaintiff had  
3   merely said in an e-mail or a phone call, hey, I made a  
4   mistake, then it would be clear. An easy case. But  
5   they did not act despite being informed. Despite being  
6   informed in the answer of the identity of the proper  
7   party and in the motion for summary judgment. The trial  
8   court, serving as the trier of fact here on this issue,  
9   had to make that decision. Maybe the court with another --

10               JUSTICE STEVENS: I'm still puzzled, because  
11   Rule (C) just requires -- describes the state of mind of  
12   the defendant, correct? C(i) and (ii); isn't that  
13   right?

14               MR. GLAZIER: Yes.

15               JUSTICE STEVENS: And is it not true that  
16   under (i), the defendant did receive such notice of the  
17   action, would not be prejudiced? That's clear, isn't it?

18               MR. GLAZIER: Yes.

19               JUSTICE STEVENS: And is it also true that  
20   at the time they received the complaint, they knew or  
21   should have known that the action would have been  
22   brought against the carrier instead of the broker?

23               MR. GLAZIER: The answer --

24               JUSTICE STEVENS: I just don't understand  
25   how you get around the plain language.



1 MR. GLAZIER: Our answer is no, and  
2 especially considering, within the events, they don't  
3 show that there's --

4 JUSTICE STEVENS: You don't think -- you  
5 don't think that the agent didn't realize that they  
6 would have sued the carrier if they had known the  
7 identity of the right party?

8 MR. GLAZIER: What is known is that they had  
9 the ticket. They still decided --

10 JUSTICE STEVENS: I understand all that.

11 MR. GLAZIER: -- to sue Costa Cruise Lines --

12 JUSTICE STEVENS: But we're talking about the  
13 -- about mindset of the defendant, and to say that they  
14 wouldn't have sued -- they would have sued the broker  
15 instead of this carrier? It's absurd.

16 MR. GLAZIER: Well, the events played a role and  
17 demonstrated that even after the plaintiff was informed  
18 of the identity of the proper party, they continued to  
19 pursue the claim against the ticketing agent.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Bendure, you have 9 minutes remaining.

22 REBUTTAL ARGUMENT OF MARK R. BENDURE

23 ON BEHALF OF THE PETITIONER

24 MR. BENDURE: Thank you, Mr. Chief Justice.

25 Obviously, from the questions, the Court has

1 a good grasp of the facts and the issues in our  
2 arguments. I'd just like to clarify a couple of  
3 factual points.

4           The district court ruling didn't rely on the  
5 ticket at all. What the district court said was: I  
6 adopt the legal premise that if you knew before the  
7 filing of -- before the running of the statute of  
8 limitations but didn't sue, that would not be a  
9 mistake. And here, says the district court judge, they  
10 filed their answer after the statute of limitations, and  
11 that's why you lose under a rule that requires that  
12 notice before the statute of limitations expires. That  
13 was the district court rationale.

14           The circuit court was the one who relied  
15 upon the imputed knowledge notion that is now, I think,  
16 disavowed by Respondent himself.

17           With regard to the --

18           JUSTICE SCALIA: This is sort of an  
19 equitable rule, isn't it, this mistake? We're going to,  
20 you know -- equity takes account of such things. It  
21 seems to me very reasonable to say: If the mistake is  
22 egregious, it doesn't apply.

23           MR. BENDURE: I think now one gets into a  
24 wonderful process of trying to identify mistakes on a  
25 scale of egregiousness. Like, how many points of

1 egregiousness would it take? And I think that's beyond  
2 the statute, or the court rule itself, which just uses  
3 the plain language "mistake."

4 CHIEF JUSTICE ROBERTS: I would have thought  
5 your answer would have been: This has nothing to do  
6 with equity at all. It's just the interpretation of a  
7 legal rule.

8 MR. BENDURE: Certainly. And the rule  
9 itself -- I understood Justice Scalia's point to be that  
10 the interpretation of the rule is designed to be liberal  
11 in its application to avoid the forfeiture of  
12 potentially meritorious causes of action over technical  
13 mistakes which have nothing to do with the merits. I  
14 thought that was the sense in which you used the word  
15 "equitable."

16 The other point I'd like to make, even  
17 though it's, in my view, legally insignificant, is their  
18 argument regarding the nature of the delay. Their  
19 motion for summary judgment was filed on May 6th. Two  
20 days later, the court erroneously dismissed the lawsuit  
21 for a period of approximately a month. It was then  
22 reinstated on June 5th, and our response, which sought  
23 relation back, was filed on June 13th.

24 So in addition to the scheduling order,  
25 there is a 1-month period of time in which the case was

1 erroneously dismissed. So if it were significant, we  
2 could say there's not significant delay. But the  
3 ultimate point is it's legally beside the point.

4 If the Court has no further questions,  
5 I'll --

6 JUSTICE BREYER: This might be tangential,  
7 but is there a reason to suggest the Federal Maritime  
8 Commission look into this? Because I read the regs. I  
9 don't understand quite what's going on, because it seems  
10 to me they have a rule that is designed to prevent this  
11 situation.

12 MR. BENDURE: It may well --

13 JUSTICE BREYER: Is that true, what I'm suggesting  
14 or not? You know the area better.

15 MR. BENDURE: I don't know. I'm not a  
16 maritime lawyer, Your Honor. But I think certainly if  
17 the Court's opinion were to note it, the Maritime  
18 Commission might well take a hint from the opinion and  
19 look into it.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. BENDURE: Thank you.

22 CHIEF JUSTICE ROBERTS: The case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the  
24 above-entitled matter was submitted.)

25

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