

CASE NO. [REDACTED]

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

[REDACTED],

Appellant,

v.

[REDACTED],

Appellee.

APPEAL FROM JUDGMENT AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [REDACTED]

APPELLANT’S REPLY BRIEF

[REDACTED]

[REDACTED]

ATTORNEYS FOR APPELLANT

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RESTATEMENT OF ISSUES

Appellant's Opening Brief, taken together with Appellee's Response Brief, have collectively outlined the nature of the dispute that underlies this litigation as well as the action's present procedural posture. Very briefly summarized, it can be said that Appellant (as plaintiff) filed a lawsuit in the trial court against a corporate defendant known, by shorthand, as "█." █ was a wholly-owned subsidiary of "█." Appellant's complaint alleged that █ was responsible for damages arising out of a contract between Appellant and a third-party known as "█," because █ had acquired and merged with █ and was believed by Appellant to have succeeded to all of █ liabilities.

There is no dispute that the initial complaint was filed against █ within █'s three-year statute of limitations applicable to contract actions. The problem for Appellant arose when it became apparent that it was █ (the parent corporation of █) that had succeeded to █'s liabilities rather than █. Appellant then filed an amended complaint, this time naming █ as an additional defendant, leaving █ in its role as co-defendant. Appellant alleged among other things that █ and █ were effectively the alter egos of one another and should for all practical purposes be treated as a single entity.

By the time that pleading was filed, █'s three-year statute of limitations had expired as to Appellee █.

The only real question at issue in this appeal is whether or not under Fed. R. Civ. P. 15(c), Appellant’s second complaint was effective in “relating back” to the original filing date of the first complaint.

- If it was, the “relation-back” doctrine will salvage Appellant’s claim it originally thought it had as against ■■■, and leave it on the doorstep of where in fact it belongs: ■■■’s corporate parent, ■■■.
- If it was not, Appellant’s claim against ■■■ will be time-barred by ■■■’s applicable statute of limitations.

THE DISTRICT COURT ERRED WHEN IT HELD THAT APPELLANT’S AMENDED COMPLAINT WAS BARRED BY THE STATUTE OF LIMITATIONS AS AGAINST APPELLEE EVEN THOUGH THE “RELATION-BACK” PROVISIONS OF FED. R. CIV. P. 15(c) SHOULD HAVE COMPELLED THE EXACT OPPOSITE OF THIS CONCLUSION

In its Responding Brief, Appellee seeks to persuade this Court that the application of Fed. R. Civ. P. 15(c) to the underlying procedural posture of this action is a complex undertaking complicated by numerous factors. This is simply not the case. The law in this area – particularly the law as articulated in some of the most recent cases dealing with the application of Fed. R. Civ. P. 15(c) – makes the correct analytical framework quite clear. And even Fed. R. Civ. P. 15(c) is itself nothing novel or new; it was promulgated as a codification of the pre-existing common law “relation-back” doctrine. One court has characterized it as “...merely

a concise statement of the law which was in existence at the time it was adopted." *Anderson v. Abbott*, 61 F.Supp. 888, 893 (W.D. Ky. 1945). As far back as Mr. Justice Holmes' days on the bench, the issue had been presented in *New York Cent Co v. Kinney*, 260 U.S. 340, 43 S.Ct. 122, 67 L.Ed. 294 (1922), in which Justice Holmes wrote:

“The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time.' Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293, 36 Sup. Ct. 567, 568 (60 L. Ed. 1006). 'The facts constituting the tort were the same, whichever law gave them that effect.' Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 354, 36 Sup. Ct. 126, 60 L. Ed. 324. St. Louis, San Francisco & Texas Ry. Co. v. Smith, 243 U. S. 630, 37 Sup. Ct. 477, 61 L. Ed. 938. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for

the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.”

The cases which have cited *New York Cent Co*, *supra* with approval over the ensuing years have included *Greentree v. Fertitta*, 338 Md. 621, 625 n. 5, 659 A.2d 1325, 1327 n. 5 (1995); *Ott v. Kaiser-Georgetown Health Plan*, 309 Md. 641, 653, 526 A.2d 46, 52 (1987); *Cherry v. Brothers*, 306 Md. 84, 92, 507 A.2d 613, 617 (1986); *McSwain v. TriState Transportation*, 301 Md. 363, 370, 483 A.2d 43, 46-47; and *Ehrlich v. Board of Education*, 257 Md. 542, 547-550, 263 A.2d 853, 856-857 (1970).

Appellee argues that there is a major distinction under Fed. R. Civ. P. 15(c) to situations in which a defending party is *replaced* entirely by a new defendant in the amended complaint, versus scenarios such as the action at bar in which a new defending party is simply being *added*. Appellee contends that the latter situation does not involve a “change” in parties within the meaning of Fed. R. Civ. P. 15(c). All that needs to be said about this contention is that it has been thoroughly considered, and roundly rejected, by the courts. The Second Circuit, to name but one example, has held specifically that if a complaint is amended to include an additional defendant after the statute of limitations has run, “...the amended complaint is not time-barred if it ‘relates back’ to a timely filed complaint.” *VKK Corp. v. National Football League*, 244 F.3d 114, 128 (2nd Cir. 2001).

The standards for determining whether the “relation-back” feature of Fed. R. Civ. P. 15(c) are properly applicable have, most recently, been set forth in *Arthur v. Maersk, Inc.*, No. 04-3670 (Fed. 3rd Cir. 1/13/2006) (Fed. 3rd Cir., 2006), in which the court opined that under Fed. R. Civ. P. 15(c):

“The relation back inquiry is more circumscribed. Rule 15(c) enumerates three distinct prerequisites for an amendment to relate back to the original complaint: (1) the claims in the amended complaint must arise out of the same occurrences set forth in the original complaint, (2) the party to be brought in by amendment must have received notice of the action within 120 days of its institution, and (3) the party to be brought in by amendment must have known, or should have known, that the action would have been brought against the party but for a mistake concerning its identity. Fed. R. Civ. P. 15(c). Once these requirements are satisfied, Rule 15(c) instructs that the ‘amendment...relates back to the date of the original pleading.’ *Id.*; see also *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 174-75 (3d Cir. 1977); 6A

Charles Alan Wright et al., *Federal Practice and Procedure* § 1498 (2d ed. 1990).”

The only task this Honorable Court faces in deciding this appeal is whether or not Appellant’s second, amended complaint comported with each of these three standards.

The first question is whether the claims in the amended complaint arose out of the same occurrences set forth in the original complaint. The answer here is obviously “yes.” Appellant originally had a claim against ■■■■■; ■■■■■ was acquired by and merged into ■■■■■; ■■■■■ was a wholly-owned subsidiary of ■■■■■; and initially, thinking it was suing the right party when it named ■■■■■ as the sole defendant, Appellant pursued his admittedly erroneous course of action until it was discovered that ■■■■■, rather than ■■■■■, should technically have been the correctly named defendant. There are no other parties with which to contend outside this very limited scope, two of which, as the amended complaint alleges, are in fact the alter egos of one another.¹ It is thus clear that Appellant’s second, amended complaint meets the first of the three tests prescribed by Fed. R. Civ. P. 15(c) in order for the “relation-back” doctrine to apply.

¹ ■■■■■, as previously noted in Appellant’s Opening Brief, owns 100% of the shares of ■■■■■. Both parties are represented in this litigation by the same counsel. These facts alone make it impossible for either of these parties to credibly claim that they operate totally independently from one another and have no knowledge of one another’s day-to-day affairs.

The second requirement is: “The party to be brought in by amendment must have received notice of the action within 120 days of its institution.” Considering that ■■■ is 100% owned by ■■■, the only logical interference for the Court to make is that ■■■ learned of the filing of the litigation immediately, or at least shortly thereafter. It would be difficult to imagine a member of a subsidiary’s management team to not bother telling someone at the parent corporation, “Oh by the way, we just got sued for \$620,000.” Certainly ■■■’s counsel promptly received notice of the pendency of the proceedings, and that very same counsel represents *both* ■■■ as well as its subsidiary, ■■■, in this action. It is a *res ipsa loquitur* sort of conclusion that obviously once the subsidiary got sued in the trial court, the parent promptly acquired knowledge of the proceedings.

The third requirement is that the party to be brought in by amendment must have known, or should have known, that the action would have been brought against the party but for a mistake concerning its identity. In the action at bar, this is factually obvious. ■■■ was an “insider” in the transaction whereby it assumed all of ■■■’s former liabilities; the deal terms would have been intimately known to it. They were most likely also known to ■■■, though this is not a material consideration to determining the third factor of the Fed. R. Civ. P. 15(c) test. They were unfortunately not known to Appellant until after he commenced his original lawsuit in the trial court against ■■■; the facts giving rise to ■■■’s liability did not

come to Appellant's attention until later. In the meantime, ■■■ had been sued, and sued at a time when ■■■ knew of the nature of the obligations it had inherited from ■■■. By definition, from even before the trial court suit was instigated, ■■■ had the requisite knowledge to meet the third standard of the Fed. R. Civ. P. 15(c) test.

**THE STANDARDS FOR REVIEW THAT
MUST BE APPLIED BY THIS COURT**

In *Yowman v. Jefferson County Community Supervision*, 370 F.Supp.2d 568 (E. D. Tex., 2005), the court had this to say regarding the standard of review that should be employed when applying the Fed. R. Civ. P. 15(c) tests:

“The liberality of Rule 15(a) counsels in favor of amendment even when a party has been less than perfect in the preparation and presentation of a case. *See Foman*, 371 U.S. at 182; *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938-39 (3d Cir. 1984). It allows for misunderstandings and good-faith lapses in judgment, so long as the party thereafter acts reasonably and diligently. *Adams*, 739 F.2d at 868-69; *see also* 6 Wright et al., *supra*, § 1488 (stating that leave should be granted if delay was due to ‘oversight or excusable neglect’). Whether or not Arthur hypothetically could have deduced

that the United States was the proper party at the outset of the case, the record demonstrates that he took affirmative steps soon thereafter to determine the identity of the proper party and to amend the complaint accordingly. His delay cannot be considered ‘undue.’”

Had this action proceeded in the original [REDACTED] state court in which Appellant filed it prior to its removal to the district court, an even more liberal rule on the “relation-back” doctrine would apply. The [REDACTED] Supreme Court proclaimed, in *Crowe v. [REDACTED]* (1974), that:

"A frequently encountered problem, which is the result of the more liberal use of amendments, is whether a new action has commenced, an action which may be barred by limitations, or whether the doctrine of relation back is applicable: that is, whether the assertion of the original complaint tolled the running of the statute. The modern view seems to be that so long as the operative factual situation remains essentially the same, no new cause of action is stated by a declaration framed on a new theory or invoking different legal principles. As a consequence,

the doctrine of relation back is applied, and the intervention of a plea of limitations [is] prevented."

CONCLUSION

Contrary to first glance, this is *not* a case involving difficult or novel issues. It is incumbent upon Appellant to demonstrate – with the benefit of receiving liberal rules of interpretation for its pleadings – that the filing of its second, amended complaint met the three separate requirements imposed by Fed. R. Civ. P. 15(c). Appellant respectfully submits that it has carried that burden, and accordingly requests that the judgment and order of the trial court be reversed and the case remanded back to the trial court for further proceedings consistent with this Honorable Court’s instructions.

Dated: [REDACTED], 2006

[REDACTED]

By _____
[REDACTED]
Counsel for Appellant

[REDACTED]

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains less than 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced font that includes serifs using Microsoft Word 2003 in 14 point Times Roman font.

Dated: [REDACTED], 2006

[REDACTED]

By _____
[REDACTED]
Counsel for Appellant

[REDACTED]

PROOF OF SERVICE BY MAIL

I, the undersigned, do hereby declare under penalty of perjury pursuant to the laws of the State of Maryland that:

1. I am at least eighteen (18) years of age, and not a party to the within action.

2. On [REDACTED], 2006, I placed a true and correct copy of the foregoing Appellant’s Reply Brief in a sealed envelope, with first class postage thereon fully prepaid, and deposited the same into the United States Mail at [REDACTED], [REDACTED], addressed as follows:

[REDACTED]

I declare that this Declaration was executed by me on this [REDACTED] day of [REDACTED], 2006, at [REDACTED].

[Signature]

[Printed Name]