The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

***Water Splash, Inc. v. Menon,* 581 U.S. ___ (2017)**

An employer sued a former employee alleging that she had begun to work for a competitor in Canada while she was still employed. Because the employee lived in Canada, the employer got permission to serve her the lawsuit via mail. After she failed to appear, the employer obtained default judgment against her and subsequently denied her motion to vacate due to improper service. An appellate court reversed finding that under the Hague Service Convention, service via mail was not proper. On appeal, the United States Supreme Court reversed, finding that under the plain language of the Hague Service Convention, service of process by mail is not prohibited. In so ruling, the court noted that the statute used the term "send," a broad term with no statutorily defined meaning, and that the language of the statute as a whole does not prohibit service by mail.

The Bullet Point: The Hague Service Convention was created to simplify, standardize, and improve the process of servicing documents abroad by specifying certain approved methods of service. Service by mail, while not specifically permitted, is not only a cost-effective manner of service but also comports with the text and purpose of the Hague Service Convention to simply the process of servicing lawsuits and legal documents outside the country.

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As business becomes more global, the ability to get service upon international entities can become critical. This ruling realigns decades of law and will allow businesses to more easily enforce agreements and legal rights, potentially saving significant costs and time. This should reduce risks for all businesses with respect to international transactions.

***TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. ____ (2017).**

This appeal to the United States Supreme Court involved the question of the proper court in which to file a patent lawsuit (called "venue"). The defendant filed a patent infringement lawsuit against the plaintiff in Delaware, a competitor organized and headquartered in Indiana who allegedly shipped the infringing products to Delaware. The plaintiff moved to transfer venue to Indiana, arguing that venue was improper in Delaware. The district court and appellate court denied the motion, finding that under the relevant patent statute, a corporation is deemed a resident "in any judicial district in which such defendant is subject to the court's personal jurisdiction." In other words, almost anywhere in the country where a corporation does business or sales.

The Supreme Court disagreed and reversed the lower court judgments. In so ruling, the court found that "residence" for venue purposes in the applicable patent statutes only refers to the state of incorporation.

The Bullet Point: *TC Heartland* has dramatically altered where patent lawsuits can be brought. Prior to the court's decision, litigants could shop around for "patent-owner-friendly" courts throughout the country as the lax venue rules permitted suit in most courts throughout the country provided the defendant did business in that state. In light of *TC Heartland*, such forum shopping is likely no longer possible and businesses can more predictably assess where patent suits may be filed.
Moreover, the threats posed by "patent trolls" — entities that get rights to one or more patents in order to profit by means of licensing or litigation, rather than by producing its own goods or services — have been curtailed as their litigation costs will likely increase, since in most cases, they can no longer file in more plaintiff-friendly jurisdictions.

***Little v. Wyndham Worldwide Ops., Inc.*, M.D. Tenn. No. 16-cv-02758, 2017 WL 1788427 (May 5, 2017).**

This lawsuit involved a question of first impression on whether removal before a defendant located in the forum state is served, called "snap removal," is appropriate. The case involved common law claims under Tennessee law by citizens from the state of Illinois. One of the defendants was a sales agent of Wyndham Worldwide who was a Tennessee resident. Four days after the suit was filed, Wyndham Worldwide removed the lawsuit to federal court, prior to its sales agent being served with the lawsuit.

The plaintiffs moved to remand, arguing that it was improper to remove the lawsuit before all defendants had been served and that by doing so, Wyndham Worldwide had engaged in "forum shopping." The district court ultimately agreed with the plaintiffs. In so ruling, the court noted that there was a split in case law on the issue in the Sixth Circuit Court of Appeals. Despite the conflict, the district court found that snap removal was improper. The court found the removal statute ambiguous and, applying rules of statutory construction, found that snap removal defeats

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the purpose of the removal statute in part because it smacks of forum shopping and would result in the death of the "forum defendant rule."

The Bullet Point: Snap removal is often used when a larger company believes an individual or smaller party has been added simply to keep a case in state court, as opposed to federal court, which some consider to be more sophisticated and fair to larger companies. For a defendant business who wishes to remove a lawsuit immediately upon service despite a forum defendant not yet being served, a finding that snap removal is inappropriate would thwart such goals and require the lawsuit to proceed in state court.

Courts in the Sixth Circuit Court of Appeals have split on whether snap removal is proper and the issue has not yet been decided by the Sixth Circuit. This case is almost certain to be appealed. We are considering assembling an amicus group to argue in favor of reversal. If you are interested, please contact us.

***Washburn v. Gvozdanovic*, 1st Dist. Hamilton No. C-160590, 2017-Ohio-2954.**

This was an appeal of a trial court's decision to grant summary judgment on claims for fraud and breach of contract. The dispute centered around the purchase of real property for $92,000. As part of the sale, the defendant signed a disclosure form noting some structural issues in the property. Prior to purchasing the property, the plaintiff had a number of inspections done that found mold and determined that water had been entering the home through the walls in the basement. The plaintiff still went ahead and purchased the property. Some time later, plaintiff started noticing large cracks in the home and driveway and hired a structural engineer. The engineer advised that the home sat on an active landslide and that he had told the defendant this as well. Almost four years later, plaintiff filed suit and asserted claims for breach of contract and fraud.

Regarding the fraud, plaintiff claimed defendant misrepresented the condition of the property on the disclosure form. Eventually, the trial court dismissed the fraud claim, finding it was barred by the four-year statute of limitations for asserting such a claim. Defendant appealed and the First Appellate District affirmed. In so ruling, the court noted that a fraud claim must be brought within four years after it had been discovered, "or should have been discovered in the exercise of reasonable diligence." The court noted that this discovery rule did not require actual knowledge; rather, constructive knowledge was sufficient. Here, the court found that the plaintiff had constructive knowledge of the structural issues when he purchased the property and the fraud claim, filed some six years after the loan closing, was not timely.

The Bullet Point: A party has four years to assert a claim for fraud. The clock starts running on such a claim not from when the litigant has "actual" knowledge of the fraud but, rather, when constructive knowledge exists. In determining whether constructive knowledge exists, the question is whether the fact "would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry." In other words, constructive knowledge exists if a reasonable person would be aware of the *possibility* of fraud.

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***U.S. Bank, N.A. v. Hull*, 9th Dist. Lorain No. 16CA010979, 2017-Ohio-2914.**

This was an appeal of a trial court's decision to deny a motion to vacate a final judgment in a foreclosure action. After the plaintiff had obtained judgment on its claim for foreclosure, the defendant filed a motion for relief from judgment contesting the judgment. The Ninth Appellate District agreed with the trial court's ruling.

It noted that the motion for relief from judgment was barred by the concept of *res judicata*. This concept precludes a party from relitigating any issue that was, or could have been litigated in a prior lawsuit between the parties. Here, the court found that the issues raised in the defendant's motion were issues previously litigated in the foreclosure that she could have, and should have, timely appealed and that *res judicata* prohibited the court from considering her belated claims.

The Bullet Point: *Res judicata* exists when there was a prior lawsuit between the same parties involving the same or similar claims that were or could have been litigated and a final judgment was entered. The purpose of *res judicata* is to ensure litigation is brought to an end at some point and to stop the endless relitigation of issues previously decided. Its purpose also is to avoid the unnecessary waste of judicial resources in the court system.

***Eighmey v. City of Cleveland*, 8th Dist. Cuyahoga No. 104779, 2017-Ohio-2857.**

This was an appeal by the city of Cleveland appealing the trial court's decision to certify a class of plaintiffs who claimed the city issued unlawful traffic tickets from unmarked traffic cameras. Here, the named plaintiff received a speeding ticket on October 3, 2013. She paid the ticket roughly a month later. Thereafter, she filed a class action complaint against the city. The city of Cleveland opposed class certification arguing, among other things, that the named plaintiff lacked standing. The trial court disagreed and certified the class. The city appealed.

On appeal, the Eighth Appellate District reversed the trial court's ruling on the grounds that the named class plaintiff lacked standing to sue. In so ruling, the court found that while a defense against the named plaintiff's claims may not ultimately preclude class certification, standing is a jurisdictional prerequisite that must be met before considering the merits of a lawsuit. Here, the court found that by paying the speeding ticket, the named plaintiff could not receive any redress from the litigation and therefore lacked standing and could not represent the class.

The Bullet Point: Above and beyond meeting the requirements of a class action, a class representative must also have standing to sue. This requires evidence that the class representative suffered an injury, that is traceable to the defendant's conduct and will be redressed by the requested relief.

When considering bringing and defending suits businesses should consider whether they have standing to sue or the other party has standing to sue. This requires analysis of whether a party has sustained or will sustain direct injury or harm and that the harm can be set right.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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WATER SPLASH, INC. *v.* MENON

CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

No. 16–254. Argued March 22, 2017—Decided May 22, 2017

Petitioner Water Splash sued respondent Menon, a former employee, in a Texas state court, alleging that she had begun working for a competitor while still employed by Water Splash. Because Menon resided in Canada, Water Splash obtained permission to effect service by mail. After Menon declined to answer or otherwise enter an appearance, the trial court issued a default judgment for Water Splash. That court subsequently denied Menon's motion to set aside the judgment on the ground that she had not been properly served. On appeal, Menon argued that service by mail does not comport with the requirements of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention), which seeks to simplify, standardize, and generally improve the process of serving documents abroad, specifying certain approved methods of service and preempting "inconsistent methods of service" wherever it applies, *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 699. The Texas Court of Appeals agreed with Menon, holding that the Convention prohibited service of process by mail. Article 10, the provision at issue, consists of Articles 10(b) and 10(c), which plainly address permissible methods of "service," and Article 10(a), which provides that the Convention will not interfere with "the freedom to send judicial documents, by postal channels, directly to persons abroad," but does not expressly refer to "service."

Held: The Hague Service Convention does not prohibit service of process by mail. Pp. 4–12.

(a) This Court begins its analysis by looking to the treaty's text and the context in which its words are used. See *Schlunk*, 486 U. S., at 699. The key word in Article 10(a)—"send"—is a broad term, and

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there is no apparent reason why it would exclude the transmission of documents for the purpose of service. The structure of the Convention strongly counsels against such an exclusion. The Convention's preamble and Article 1 limit the scope of the Convention to service of documents abroad, and its full title includes the phrase "Service Abroad." This Court has also held that the scope of the Convention is limited to service of documents. *Id.,* at 701. It would thus be quite strange if Article 10(a)—apparently alone among the Convention's provisions—concerned something other than service of documents. Indeed, such a reading would render Article 10(a) superfluous. Article 10's function is to ensure that, generally, the Convention "shall not interfere" with the activities described in 10(a), 10(b), and 10(c). But since Article 1 already "eliminates [the] possibility" that the Convention would apply to any communications that "do not culminate in service," *id.,* at 701, in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service. Menon's attempt to avoid this superfluity problem by suggesting that Article 10(a) applies not to *service of process* but only to the service of "post-answer judicial documents" lacks any plausible textual footing in Article 10. If the drafters wished to limit Article 10(a) to a particular subset of documents, they could have said so—as they did, *e.g.*, in Article 15, which refers to "a writ of summons or an equivalent document." Instead, Article 10(a) uses the term "judicial documents"—the same term featured in 10(b) and 10(c). And the ordinary meaning of the word "send" is broad enough to cover the transmission of *any* judicial documents. Accordingly, the text and structure of the Convention indicate that Article 10(a) encompasses service by mail. Pp. 4–6.

(b) The main counterargument—that Article 10(a)'s phrase "send judicial documents" should mean something different than the phrase "effect service of judicial documents" in Article 10(b) and Article 10(c)—is unpersuasive. First, it must contend with the compelling structural considerations strongly suggesting that Article 10(a) pertains to service of documents. Second, reading the word "send" as a broad concept that includes, but is not limited to, service is probably *more* plausible than interpreting the word to exclude service, and it does not create the same superfluity problem. Third, the French version of the Convention, which is "equally authentic" to the English version, *Schlunk*, *supra,* at 699, uses the word "adresser," which has consistently been understood to mean service or notice. At best, Menon's argument creates an ambiguity as to Article 10(a)'s meaning. The Court thus turns to additional tools of treaty interpretation, which comfortably resolve any lingering ambiguity in Water Splash's favor. Pp. 7–8.

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(c) Three extratextual sources are especially helpful in ascertaining Article 10(a)'s meaning. First, the Convention's drafting history strongly suggests that the drafters understood that service by postal channels was permissible. Second, in the half-century since the Convention was adopted, the Executive Branch has consistently maintained that the Hague Service Convention allows service by mail. Finally, other signatories to the Convention have consistently adopted Water Splash's view. Pp. 8–12.

(d) The fact that Article 10(a) encompasses service by mail does not mean that it affirmatively authorizes such service. Rather, service by mail is permissible if the receiving state has not objected to service by mail and if such service is authorized under otherwise-applicable law. Because the Court of Appeals concluded that the Convention prohibited service by mail, it did not consider whether Texas law authorizes the methods of service used by Water Splash. That and any other remaining issues are left to be considered on remand to the extent they are properly preserved. P. 12.

472 S. W. 3d 28, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–254

WATER SPLASH, INC., PETITIONER *v.* TARA MENON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

[May 22, 2017]

JUSTICE ALITO delivered the opinion of the Court.

This case concerns the scope of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), 20 U. S. T. 361, T. I. A. S. No. 6638. The purpose of that multilateral treaty is to simplify, standardize, and generally improve the process of serving documents abroad. Preamble, *ibid.*; see *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 698 (1988). To that end, the Hague Service Convention specifies certain approved methods of service and "pre-empts inconsistent methods of service" wherever it applies. *Id.*, at 699. Today we address a question that has divided the lower courts: whether the Convention prohibits service by mail. We hold that it does not.

I

A

Petitioner Water Splash is a corporation that produces aquatic playground systems. Respondent Menon is a former employee of Water Splash. In 2013, Water Splash sued Menon in state court in Texas, alleging that she had begun working for a competitor while still employed by

Water Splash. 472 S. W. 3d 28, 30 (Tex. App. 2015). Water Splash asserted several causes of action, including unfair competition, conversion, and tortious interference with business relations. Because Menon resided in Canada, Water Splash sought and obtained permission to effect service by mail. *Ibid.* After Menon declined to answer or otherwise enter an appearance, the trial court issued a default judgment in favor of Water Splash. Menon moved to set aside the judgment on the ground that she had not been properly served, but the trial court denied the motion. *Ibid.*

Menon appealed, arguing that service by mail does not "comport with the requirements of the Hague Service Convention." *Ibid.* The Texas Court of Appeals majority sided with Menon and held that the Convention prohibits service of process by mail. *Id.,* at 32. Justice Christopher dissented. *Id.*, at 34. The Court of Appeals declined to review the matter en banc, App. 95–96, and the Texas Supreme Court denied discretionary review, *id.*, at 97–98.

The disagreement between the panel majority and Justice Christopher tracks a broader conflict among courts as to whether the Convention permits service through postal channels. Compare, *e.g., Bankston* v. *Toyota Motor Corp.,* 889 F. 2d 172, 173–174 (CA8 1989) (holding that the Convention prohibits service by mail), and *Nuovo Pignone, SpA* v. S*torman Asia M/V,* 310 F. 3d 374, 385 (CA5 2002) (same), with*, e.g., Brockmeyer* v. *May*, 383 F. 3d 798, 802 (CA9 2004) (holding that the Convention allows service by mail), and *Ackermann* v. *Levine*, 788 F. 2d 830, 838–840 (CA2 1986) (same). We granted certiorari to resolve that conflict. 580 U. S. ___ (2016).

B

The "primary innovation" of the Hague Service Convention—set out in Articles 2–7—is that it "requires each state to establish a central authority to receive requests

for service of documents from other countries." *Schlunk*, *supra*, at 698. When a central authority receives an appropriate request, it must serve the documents or arrange for their service, Art. 5, and then provide a certificate of service, Art. 6.

Submitting a request to a central authority is not, however, the only method of service approved by the Convention. For example, Article 8 permits service through diplomatic and consular agents; Article 11 provides that any two states can agree to methods of service not otherwise specified in the Convention; and Article 19 clarifies that the Convention does not preempt any internal laws of its signatories that permit service from abroad via methods not otherwise allowed by the Convention.

At issue in this case is Article 10 of the Convention, the English text of which reads as follows:

> "Provided the State of destination does not object, the present Convention shall not interfere with—
>
> "(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> "(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> "(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." 20 U. S. T., at 363.

Articles 10(b) and 10(c), by their plain terms, address additional methods of service that are permitted by the Convention (unless the receiving state objects). By contrast, Article 10(a) does not expressly refer to "service." The question in this case is whether, despite this textual

difference, the Article 10(a) phrase "send judicial documents" encompasses sending documents *for the purposes of service*.

II

A

In interpreting treaties, "we begin with the text of the treaty and the context in which the written words are used." *Schlunk*, 486 U. S., at 699 (internal quotation marks omitted). For present purposes, the key word in Article 10(a) is "send." This is a broad term,[1] and there is no apparent reason why it would exclude the transmission of documents for a particular purpose (namely, service). Moreover, the structure of the Hague Service Convention strongly counsels against such a reading.

The key structural point is that the scope of the Convention is limited to service of documents. Several elements of the Convention indicate as much. First, the preamble states that the Convention is intended "to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time." (Emphasis added.) And Article 1 defines the Convention's scope by stating that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." (Emphasis added.) Even the Convention's full title reflects that the Convention concerns "Service Abroad."

We have also held as much. *Schlunk*, 486 U. S., at 701 (stating that the Convention "applies only to documents transmitted for service abroad"). As we explained, a preliminary draft of Article 1 was criticized "because it suggested that the Convention could apply to transmissions

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[1] See Black's Law Dictionary 1568 (10th ed. 2014) (defining "send," in part, as "[t]o cause to be moved or conveyed from a present location to another place; esp., to deposit (a writing or notice) in the mail").

abroad that do not culminate in service." *Ibid.* The final version of Article 1, however, "eliminates this possibility." *Ibid.* The wording of Article 1 makes clear that the Convention "applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended." *Ibid.*

In short, the text of the Convention reveals, and we have explicitly held, that the scope of the Convention is limited to service of documents. In light of that, it would be quite strange if Article 10(a)—apparently alone among the Convention's provisions—concerned something other than service of documents.

Indeed, under that reading, Article 10(a) would be superfluous. The function of Article 10 is to ensure that, absent objection from the receiving state, the Convention "shall not interfere" with the activities described in 10(a), 10(b) and 10(c). But Article 1 already "eliminates [the] possibility" that the Convention would apply to any communications that "do not culminate in service," *id.,* at 701, so it is hard to imagine how the Convention could interfere with any non-service communications. Accordingly, in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service.

Menon attempts to avoid this superfluity problem by suggesting that Article 10(a) does refer to serving documents—but only *some* documents. Specifically, she makes a distinction between two categories of service. According to Menon, Article 10(a) does not apply to *service of process* (which we have defined as "a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action," *id.,* at 700)). But Article 10(a) does apply, Menon suggests, to the service of "post-answer judicial documents" (that is, any additional documents which may have to be served later in the litigation). Brief for Respondent 30–31. The problem with this argument is

that it lacks any plausible textual footing in Article 10.[2]

If the drafters wished to limit Article 10(a) to a particular subset of documents, they presumably would have said so—as they did, for example, in Article 15, which refers to "a writ of summons or an equivalent document." Instead, Article 10(a) uses the term "judicial documents"—the same term that is featured in 10(b) and 10(c). Accordingly, the notion that Article 10(a) governs a different set of documents than 10(b) or 10(c) is hard to fathom. And it certainly derives no support from the use of the word "send," whose ordinary meaning is broad enough to cover the transmission of *any* judicial documents (including litigation-initiating documents). Nothing about the word "send" suggests that Article 10(a) is *narrower* than 10(b) and 10(c), let alone that Article 10(a) is somehow limited to "post-answer" documents.

Ultimately, Menon wishes to read the phrase "send judicial documents" as "serve a subset of judicial documents." That is an entirely atextual reading, and Menon offers no sustained argument in support of it. Therefore, the only way to escape the conclusion that Article 10(a) includes service of process is to assert that it does not cover service of documents at all—and, as shown above, that reading is structurally implausible and renders Article 10(a) superfluous.

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[2] The argument also assumes that the scope of the Convention is not limited to service of process (otherwise, Article 10(a) would be superfluous even under Menon's reading). *Schlunk* can be read to suggest that this assumption is wrong. 486 U. S., at 700–701; see 1 B. Ristau, International Judicial Assistance §4–1–4(2), p. 112 (1990 rev. ed.) (Ristau) (stating that the English term "service" in the Convention "means the formal delivery of a legal document to the addressee in such a manner as to legally charge him with notice of the institution of a legal proceeding"). For the purposes of this discussion, we will assume, *arguendo,* that Menon's assumption is correct.

B

The text and structure of the Hague Service Convention, then, strongly suggest that Article 10(a) pertains to service of documents. The only significant counterargument is that, unlike many other provisions in the Convention, Article 10(a) does not include the word "service" or any of its variants. The Article 10(a) phrase "send judicial documents," the argument goes, should mean something different than the phrase "effect service of judicial documents" in the other two subparts of Article 10.

This argument does not win the day for several reasons. First, it must contend with the compelling structural considerations discussed above. See *Air France* v. *Saks*, 470 U. S. 392, 397 (1985) (treaty interpretation must take account of the "context in which the written words are used"); cf. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 13) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices").

Second, the argument fails on its own terms. Assume for a second that the word "send" must mean something other than "serve." That would not imply that Article 10(a) must *exclude* service. Instead, "send[ing]" could be a broader concept that includes service but is not limited to it. That reading of the word "send" is probably *more* plausible than interpreting it to exclude service, and it does not create the same superfluity problem.[3]

Third, it must be remembered that the French version of

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[3] Another plausible explanation for the distinct terminology of Article 10(a) is that it is the only provision in the Convention that specifically contemplates direct service, without the use of an intermediary. See Brief for United States as *Amicus Curiae* 13 ("[I]n contrast to Article 10(a), all other methods of service identified in the Convention require the affirmative engagement of an intermediary to effect 'service'"). The use of the word "send" may simply have been intended to reflect that distinction.

the Convention is "equally authentic" to the English version. *Schlunk*, 486 U. S., at 699. Menon does not seriously engage with the Convention's French text. But the word "adresser"—the French counterpart to the word "send" in Article 10(a)—"has been consistently interpreted as meaning service or notice." Hague Conference on Private Int'l Law, Practical Handbook on the Operation of the Service Convention ¶279, p. 91 (4th ed. 2016).

In short, the most that could possibly be said for this argument is that it creates an ambiguity as to Article 10(a)'s meaning. And when a treaty provision is ambiguous, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, *supra*, at 700 (internal quotation marks omitted). As discussed below, these traditional tools of treaty interpretation comfortably resolve any lingering ambiguity in Water Splash's favor.

III

Three extratextual sources are especially helpful in ascertaining Article 10(a)'s meaning: the Convention's drafting history, the views of the Executive, and the views of other signatories.

Drafting history has often been used in treaty interpretation. See *Medellín* v. *Texas*, 552 U. S. 491, 507 (2008); *Saks*, *supra*, at 400; see also *Schlunk*, *supra*, at 700 (analyzing the negotiating history of the Hague Service Convention). Here, the Convention's drafting history strongly suggests that Article 10(a) allows service through postal channels.

Philip W. Amram was the member of the United States delegation who was most closely involved in the drafting of the Convention. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (App.) (1967) (S. Exec. Rep.) (statement of State Department Deputy Legal Adviser Richard D. Kearney).

A few months before the Convention was signed, he published an article describing and summarizing it. In that article, he stated that "Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service." The Proposed International Convention on the Service of Documents Abroad, 51 A. B. A. J. 650, 653 (1965).[4]

Along similar lines, the Rapporteur's report on a draft version of Article 10—which did not materially differ from the final version—stated that the "provision of paragraph 1 also permits service . . . by telegram" and that the drafters "did not accept the proposal that postal channels be limited to registered mail." 1 Ristau §4–3–5(a), at 149. In other words, it was clearly understood that service by postal channels was permissible, and the only question was whether it should be limited to registered mail.

The Court also gives "great weight" to "the Executive Branch's interpretation of a treaty." *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010) (internal quotation marks omitted). In the half century since the Convention was adopted, the Executive has consistently maintained that the Hague Service Convention allows service by mail.

When President Johnson transmitted the Convention to the Senate for its advice and consent, he included a report by Secretary of State Dean Rusk. That report stated that "Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service." Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967).

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[4] Two years later, Amram testified to the same effect before the Senate Foreign Relations Committee. S. Exec. Rep., at 13 (stating that service by central authority "is not obligatory," and that other available techniques included "direct service by mail").

In 1989, the Eighth Circuit issued *Bankston,* the first Federal Court of Appeals decision holding that the Hague Service Convention prohibits service by mail. 889 F. 2d, at 174. The State Department expressed its disagreement with *Bankston* in a letter addressed to the Administrative Office of the U. S. Courts and the National Center for State Courts. See Notice of Other Documents (1), United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under the Hague Service Convention, 30 I. L. M. 260, 260–261 (1991) (excerpts of Mar. 14, 1990, letter). The letter stated that "*Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country." *Id.,* at 261. The State Department takes the same position on its website.[5]

Finally, this Court has given "considerable weight" to the views of other parties to a treaty. *Abbott*, 560 U. S., at 16 (internal quotation marks omitted); see *Lozano* v. *Montoya Alvarez*, 572 U. S. ___, ___ (2014) (slip op., at 9) (noting the importance of "read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties" (internal quotation marks omitted)). And other signatories to the Convention have consistently adopted Water Splash's view.

Multiple foreign courts have held that the Hague Ser-

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[5] Dept. of State, Legal Considerations: International Judicial Assistance: Service of Process (stating that "[s]ervice by registered . . . mail . . . is an option in many countries in the world," but that it "should . . . not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels)"), online at https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html (all Internet materials as last visited May 19, 2017).

vice Convention allows for service by mail.[6] In addition, several of the Convention's signatories have either objected, or declined to object, to service by mail under Article 10, thereby acknowledging that Article 10 encompasses service by mail.[7] Finally, several Special Commissions—comprising numerous contracting States—have expressly stated that the Convention does not prohibit service by mail.[8] By contrast, Menon identifies no evidence that any

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[6] See, *e.g., Wang* v. *Lin*, [2016] 132 O. R. 3d 48, 61 (Can. Ont. Sup. Ct. J.); *Crystal Decisions (U. K.), Ltd*. v. *Vedatech Corp.*, EWHC (Ch) 1872 (2004), 2004 WL 1959749 ¶21 (High Court, Eng.); *R.* v. *Re Recognition of an Italian Judgt*., 2000 WL 33541696, ¶4 (D. F. Thes. 2000); Case C–412/97, *ED Srl* v. *Italo Fenocchio*, 1999 E. C. R. I–3845, 3877–3878, ¶6 [2000] 3 C. M. L. R. 855; see also *Brockmeyer* v. *May*, 383 F. 3d 798, 802 (CA9 2004) (noting that foreign courts are "essentially unanimous" in the view "that the meaning of 'send' in Article 10(a) includes 'serve'").

[7] Canada, for example, has stated that it "does not object to service by postal channels." By contrast, the Czech Republic has adopted Czechoslovakia's position that "judicial documents may not be served . . . through postal channels." Dutch Govt. Treaty Database: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Parties With Reservations, Declarations and Objections, (entries for Canada and the Czech Republic) online at https://treatydatabase.overheid.nl/en/Verdrag/Details/004235_b; see also, *e.g., ibid.* (entries for Latvia, Australia, and Slovenia). In addition, some states have objected to *all* of the channels of transmission listed in Article 10, referring to them collectively with the term "service." See, *e.g., ibid.* (entries for Bulgaria, Hungary, Kuwait, and Turkey).

[8] Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions ¶55, p. 11 (Oct. 28–Nov. 4, 2003) ("reaffirm[ing]" the Special Commission's "clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels"), online at https://assets.hcch.net/upload/wop/lse_concl_e.pdf; Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ¶16,

signatory has ever rejected Water Splash's view.

* * *

In short, the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not "interfere with . . . the freedom" to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law. See *Brockmeyer*, 383 F. 3d, at 803–804.

Because the Court of Appeals concluded that the Convention prohibited service by mail outright, it had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash. We leave that question, and any other remaining issues, to be considered on remand to the extent they are properly preserved.

For these reasons, we vacate the judgment of the Court of Appeals, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

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p. 5 (Apr. 1989) (criticizing "certain courts in the United States" which "had concluded that service of process abroad by mail was not permitted under the Convention"), online at https://assets.hcch.net/upload/scrpt89e_20.pdf; Report on the Work of the Special Commission on the Operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 21–25 1977, 17 I. L. M. 312, 326 (1978) (observing that "most of the States made no objection to *the service* of judicial documents coming from abroad directly by mail in their territory" (emphasis added)).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TC HEARTLAND LLC *v.* KRAFT FOODS GROUP BRANDS LLC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 16–341. Argued March 27, 2017—Decided May 22, 2017

The patent venue statute, 28 U. S. C. §1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." In *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 226, this Court concluded that for purposes of §1400(b) a domestic corporation "resides" only in its State of incorporation, rejecting the argument that §1400(b) incorporates the broader definition of corporate "residence" contained in the general venue statute, 28 U. S. C. §1391(c). Congress has not amended §1400(b) since *Fourco*, but it has twice amended §1391, which now provides that, "[e]xcept as otherwise provided by law" and "[f]or all venue purposes," a corporation "shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." §§1391(a), (c).

Respondent filed a patent infringement suit in the District Court for the District of Delaware against petitioner, a competitor that is organized under Indiana law and headquartered in Indiana but ships the allegedly infringing products into Delaware. Petitioner moved to transfer venue to a District Court in Indiana, claiming that venue was improper in Delaware. Citing *Fourco,* petitioner argued that it did not "resid[e]" in Delaware and had no "regular and established place of business" in Delaware under §1400(b). The District Court rejected these arguments. The Federal Circuit denied a petition for a writ of mandamus, concluding that §1391(c) supplies the definition of "resides" in §1400(b). The Federal Circuit reasoned that because pe-

Syllabus

titioner resided in Delaware under §1391(c), it also resided there under §1400(b).

Held: As applied to domestic corporations, "reside[nce]" in §1400(b) refers only to the State of incorporation. The amendments to §1391 did not modify the meaning of §1400(b) as interpreted by *Fourco*. Pp. 3–10.

(a) The venue provision of the Judiciary Act of 1789 covered patent cases as well as other civil suits. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 563. In 1897, Congress enacted a patent specific venue statute. This new statute (§1400(b)'s predecessor) permitted suit in the district of which the defendant was an "inhabitant" or in which the defendant both maintained a "regular and established place of business" and committed an act of infringement. 29 Stat. 695. A corporation at that time was understood to "inhabit" *only* the State of incorporation. This Court addressed the scope of §1400(b)'s predecessor in *Stonite,* concluding that it constituted "the exclusive provision controlling venue in patent infringement proceedings" and thus was not supplemented or modified by the general venue provisions. 315 U. S., at 563.

In 1948, Congress recodified the patent venue statute as §1400(b). That provision, which remains unaltered today, uses "resides" instead of "inhabit[s]." At the same time, Congress also enacted the general venue statute, §1391, which defined "residence" for corporate defendants. In *Fourco*, this Court reaffirmed *Stonite*'s holding, observing that Congress enacted §1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status, even the fact that §1391(c) by "its terms" embraced "all actions," 353 U. S., at 228. The Court also concluded that "resides" in the recodified version bore the same meaning as "inhabit[s]" in the pre-1948 version. See *id.*, at 226.

This landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c). The revised provision stated that it applied "[f]or purposes of venue under this chapter." In *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F. 2d 1574, 1578, the Federal Circuit held that, in light of this amendment, §1391(c) established the definition for all other venue statutes under the same "chapter," including §1400(b). In 2011, Congress adopted the current version of §1391, which provides that its general definition applies "[f]or all venue purposes." The Federal Circuit reaffirmed *VE Holding* in the case below. Pp. 3–7.

(b) In *Fourco,* this Court definitively and unambiguously held that the word "reside[nce]" in §1400(b), as applied to domestic corporations, refers only to the State of incorporation. Because Congress has not amended §1400(b) since *Fourco*, and neither party asks the Court

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to reconsider that decision, the only question here is whether Congress changed §1400(b)'s meaning when it amended §1391. When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the amended provision's text. No such indication appears in the current version of §1391.

Respondent points out that the current §1391(c) provides a default rule that, on its face, applies without exception "[f]or all venue purposes." But the version at issue in *Fourco* similarly provided a default rule that applied "'for venue purposes,'" 353 U. S., at 223, and those phrasings are not materially different in this context. The addition of the word "all" to the already comprehensive provision does not suggest that Congress intended the Court to reconsider its decision in *Fourco*. Any argument based on this language is even weaker now than it was when the Court rejected it in *Fourco*. *Fourco* held that §1400(b) retained a meaning distinct from the default definition contained in §1391(c), even though the latter, by its terms, included no exceptions. The current version of §1391 includes a saving clause, which expressly states that the provision does not apply when "otherwise provided by law," thus making explicit the qualification that the *Fourco* Court found implicit in the statute. Finally, there is no indication that Congress in 2011 ratified the Federal Circuit's decision in *VE Holding*. Pp. 7–10.

821 F. 3d 1338, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–341

TC HEARTLAND LLC, PETITIONER *v.* KRAFT FOODS GROUP BRANDS LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[May 22, 2017]

JUSTICE THOMAS delivered the opinion of the Court.

The question presented in this case is where proper venue lies for a patent infringement lawsuit brought against a domestic corporation. The patent venue statute, 28 U. S. C. §1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." In *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 226 (1957), this Court concluded that for purposes of §1400(b) a domestic corporation "resides" only in its State of incorporation.

In reaching that conclusion, the Court rejected the argument that §1400(b) incorporates the broader definition of corporate "residence" contained in the general venue statute, 28 U. S. C. §1391(c). 353 U. S., at 228. Congress has not amended §1400(b) since this Court construed it in *Fourco*, but it has amended §1391 twice. Section 1391 now provides that, "[e]xcept as otherwise provided by law" and "[f]or all venue purposes," a corporation "shall be deemed to reside, if a defendant, in any

judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." §§1391(a), (c). The issue in this case is whether that definition supplants the definition announced in *Fourco* and allows a plaintiff to bring a patent infringement lawsuit against a corporation in any district in which the corporation is subject to personal jurisdiction. We conclude that the amendments to §1391 did not modify the meaning of §1400(b) as interpreted by *Fourco*. We therefore hold that a domestic corporation "resides" only in its State of incorporation for purposes of the patent venue statute.

I

Petitioner, which is organized under Indiana law and headquartered in Indiana, manufactures flavored drink mixes.[1] Respondent, which is organized under Delaware law and has its principal place of business in Illinois, is a competitor in the same market. As relevant here, respondent sued petitioner in the District Court for the District of Delaware, alleging that petitioner's products infringed one of respondent's patents. Although petitioner is not registered to conduct business in Delaware and has no meaningful local presence there, it does ship the allegedly infringing products into the State.

Petitioner moved to dismiss the case or transfer venue

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[1] The complaint alleged that petitioner is a corporation, and petitioner admitted this allegation in its answer. See App. 11a, 60a. Similarly, the petition for certiorari sought review on the question of "corporate" residence. See Pet. for Cert. i. In their briefs before this Court, however, the parties suggest that petitioner is, in fact, an unincorporated entity. See Brief for Respondent 9, n. 4 (the complaint's allegation was "apparently inaccurat[e]"); Reply Brief 4. Because this case comes to us at the pleading stage and has been litigated on the understanding that petitioner is a corporation, we confine our analysis to the proper venue for corporations. We leave further consideration of the issue of petitioner's legal status to the courts below on remand.

to the District Court for the Southern District of Indiana, arguing that venue was improper in Delaware. See 28 U. S. C. §1406. Citing *Fourco*'s holding that a corporation resides only in its State of incorporation for patent infringement suits, petitioner argued that it did not "resid[e]" in Delaware under the first clause of §1400(b). It further argued that it had no "regular and established place of business" in Delaware under the second clause of §1400(b). Relying on Circuit precedent, the District Court rejected these arguments, 2015 WL 5613160 (D Del., Sept. 24, 2015), and the Federal Circuit denied a petition for a writ of mandamus, *In re TC Heartland LLC*, 821 F. 3d 1338 (2016). The Federal Circuit concluded that subsequent statutory amendments had effectively amended §1400(b) as construed in *Fourco*, with the result that §1391(c) now supplies the definition of "resides" in §1400(b). 821 F. 3d, at 1341–1343. Under this logic, because the District of Delaware could exercise personal jurisdiction over petitioner, petitioner resided in Delaware under §1391(c) and, therefore, under §1400(b). We granted certiorari, 580 U. S. ___ (2016), and now reverse.

II

A

The history of the relevant statutes provides important context for the issue in this case. The Judiciary Act of 1789 permitted a plaintiff to file suit in a federal district court if the defendant was "an inhabitant" of that district or could be "found" for service of process in that district. Act of Sept. 24, 1789, §11, 1 Stat. 79. The Act covered patent cases as well as other civil suits. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 563 (1942). In 1887, Congress amended the statute to permit suit only in the district of which the defendant was an inhabitant or, in diversity cases, of which either the plaintiff or defendant was an inhabitant. See Act of Mar. 3, 1887, §1, 24

Stat. 552; see also *Stonite*, *supra*, at 563–564.

This Court's decision in *In re Hohorst*, 150 U. S. 653, 661–662 (1893), arguably suggested that the 1887 Act did not apply to patent cases. As a result, while some courts continued to apply the Act to patent cases, others refused to do so and instead permitted plaintiffs to bring suit (in line with the pre-1887 regime) anywhere a defendant could be found for service of process. See *Stonite*, *supra*, at 564–565. In 1897, Congress resolved the confusion by enacting a patent specific venue statute. See Act of Mar. 3, 1897, ch. 395, 29 Stat. 695. In so doing, it "placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 713 (1972). This new statute (§1400(b)'s predecessor) permitted suit in the district of which the defendant was an "inhabitant," or a district in which the defendant both maintained a "regular and established place of business" and committed an act of infringement. 29 Stat. 695. At the time, a corporation was understood to "inhabit" *only* the State in which it was incorporated. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449–450 (1892).

The Court addressed the scope of §1400(b)'s predecessor in *Stonite*. In that case, the two defendants inhabited different districts within a single State. The plaintiff sought to sue them both in the same district, invoking a then governing general venue statute that, if applicable, permitted it to do so. 315 U. S., at 562–563. This Court rejected the plaintiff's venue choice on the ground that the patent venue statute constituted "the exclusive provision controlling venue in patent infringement proceedings" and thus was not supplemented or modified by the general venue provisions. *Id.,* at 563. In the Court's view, the patent venue statute "was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights," a purpose that would be undermined by

interpreting it "to dovetail with the general provisions relating to the venue of civil suits." *Id.*, at 565–566. The Court thus held that the patent venue statute "alone should control venue in patent infringement proceedings." *Id.,* at 566.

In 1948, Congress recodified the patent venue statute as §1400(b). See Act of June 25, 1948, 62 Stat. 936. The recodified provision, which remains unaltered today, states that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U. S. C. §1400(b) (1952 ed.). This version differs from the previous one in that it uses "resides" instead of "inhabit[s]." At the same time, Congress also enacted the general venue statute, §1391, which defined "residence" for corporate defendants. That provision stated that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." §1391(c) (1952 ed.).

Following the 1948 legislation, courts reached differing conclusions regarding whether §1400(b)'s use of the word "resides" incorporated §1391(c)'s definition of "residence." See *Fourco*, 353 U. S., at 224, n. 3 (listing cases). In *Fourco*, this Court reviewed a decision of the Second Circuit holding that §1391(c) defined residence for purposes of §1400(b), "just as that definition is properly . . . incorporated into other sections of the venue chapter." *Transmirra Prods. Corp.* v. *Fourco Glass Co.*, 233 F. 2d 885, 886 (1956). This Court squarely rejected that interpretation, reaffirming *Stonite*'s holding that §1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions, and . . . is not to be supplemented by . . . §1391(c)." 353 U. S., at 229. The Court observed that

Congress enacted §1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status. The fact that §1391(c) by "its terms" embraced "all actions" was not enough to overcome the fundamental point that Congress designed §1400(b) to be "complete, independent and alone controlling in its sphere." *Id.*, at 228.

The Court also concluded that "resides" in the recodified version of §1400(b) bore the same meaning as "inhabit[s]" in the pre-1948 version. See *id.*, at 226 ("[T]he [w]ords 'inhabitant' and 'resident,' as respects venue, are synonymous" (internal quotation marks omitted)). The substitution of "resides" for "inhabit[s]" thus did not suggest any alteration in the venue rules for corporations in patent cases. Accordingly, §1400(b) continued to apply to domestic corporations in the same way it always had: They were subject to venue only in their States of incorporation. See *ibid.* (The use of "resides" "negat[es] any intention to make corporations suable, in patent infringement cases, where they are merely 'doing business,' because those synonymous words ["inhabitant" and "resident"] mean *domicile* and, in respect of corporations, mean the state of incorporation only").

B

This landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c), to provide that "[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Judicial Improvements and Access to Justice Act, §1013(a), 102 Stat. 4669. The Federal Circuit in *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F. 2d 1574 (1990), announced its view of the effect of this amendment on the meaning of the patent venue statute.

The court reasoned that the phrase "[f]or purposes of venue under this chapter" was "exact and classic language of incorporation," *id.*, at 1579, and that §1391(c) accordingly established the definition for all other venue statutes under the same "chapter." *Id.,* at 1580. Because §1400(b) fell within the relevant chapter, the Federal Circuit concluded that §1391(c), "on its face," "clearly applies to §1400(b), and thus redefines the meaning of the term 'resides' in that section." *Id.*, at 1578.

Following *VE Holding*, no new developments occurred until Congress adopted the current version of §1391 in 2011 (again leaving §1400(b) unaltered). See Federal Courts Jurisdiction and Venue Clarification Act of 2011, §202, 125 Stat. 763. Section 1391(a) now provides that, "[e]xcept as otherwise provided by law," "this section shall govern the venue of all civil actions brought in district courts of the United States." And §1391(c)(2), in turn, provides that, "[f]or all venue purposes," certain entities, "whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." In its decision below, the Federal Circuit reaffirmed *VE Holding*, reasoning that the 2011 amendments provided no basis to reconsider its prior decision.

III

We reverse the Federal Circuit. In *Fourco*, this Court definitively and unambiguously held that the word "reside[nce]" in §1400(b) has a particular meaning as applied to domestic[2] corporations: It refers only to the State of

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[2]The parties dispute the implications of petitioner's argument for foreign corporations. We do not here address that question, nor do we express any opinion on this Court's holding in *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706 (1972) (determining proper venue for foreign corporation under then existing statutory

incorporation. Congress has not amended §1400(b) since *Fourco*, and neither party asks us to reconsider our holding in that case. Accordingly, the only question we must answer is whether Congress changed the meaning of §1400(b) when it amended §1391. When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision. See *United States* v. *Madigan*, 300 U. S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored"); A. Scalia & B. Garner, Reading Law 331 (2012) ("A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute").

The current version of §1391 does not contain any indication that Congress intended to alter the meaning of §1400(b) as interpreted in *Fourco*. Although the current version of §1391(c) provides a default rule that applies "[f]or all venue purposes," the version at issue in *Fourco* similarly provided a default rule that applied "for venue purposes." 353 U. S., at 223 (internal quotation marks omitted). In this context, we do not see any material difference between the two phrasings. See *Pure Oil Co.* v. *Suarez*, 384 U. S. 202, 204–205 (1966) (construing "'for venue purposes'" to cover "all venue statutes"). Respondent argues that "'all venue purposes' means 'all venue purposes'—not 'all venue purposes *except* for patent venue.'" Brief for Respondent 21. The plaintiffs in *Fourco* advanced the same argument. See 353 U. S., at 228 ("The main thrust of respondents' argument is that §1391(c) is clear and unambiguous and that its terms include all actions—including patent infringement actions"). This

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regime).

Court was not persuaded then, and the addition of the word "all" to the already comprehensive provision does not suggest that Congress intended for us to reconsider that conclusion.

This particular argument is even weaker under the current version of §1391 than it was under the provision in place at the time of *Fourco*, because the current provision includes a saving clause expressly stating that it does not apply when "otherwise provided by law." On its face, the version of §1391(c) at issue in *Fourco* included no exceptions, yet this Court still held that "resides" in §1400(b) retained its original meaning contrary to §1391(c)'s default definition. *Fourco*'s holding rests on even firmer footing now that §1391's saving clause expressly contemplates that certain venue statutes may retain definitions of "resides" that conflict with its default definition. In short, the saving clause makes explicit the qualification that this Court previously found implicit in the statute. See *Pure Oil*, *supra,* at 205 (interpreting earlier version of §1391 to apply "to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute"). Respondent suggests that the saving clause in §1391(a) does not apply to the definitional provisions in §1391(c), Brief for Respondent 31–32, but that interpretation is belied by the text of §1391(a), which makes clear that the saving clause applies to the entire "section." See §1391(a)(1) ("Except as otherwise provided by law— . . . this *section* shall govern the venue of all civil actions" (emphasis added)).

Finally, there is no indication that Congress in 2011 ratified the Federal Circuit's decision in *VE Holding*. If anything, the 2011 amendments undermine that decision's rationale. As petitioner points out, *VE Holding* relied heavily—indeed, almost exclusively—on Congress' decision in 1988 to replace "for venue purposes" with "[f]or

purposes of venue *under this chapter*" (emphasis added) in §1391(c). Congress deleted "under this chapter" in 2011 and worded the current version of §1391(c) almost identically to the original version of the statute. Compare §1391(c) (2012 ed.) ("[f]or all venue purposes") with §1391(c) (1952 ed.) ("for venue purposes"). In short, nothing in the text suggests congressional approval of *VE Holding*.

* * *

As applied to domestic corporations, "reside[nce]" in §1400(b) refers only to the State of incorporation. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

2017 WL 1788427
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee, Nashville Division.

Robert E. LITTLE, and Kathleen D. Little, Plaintiffs,
v.
WYNDHAM WORLDWIDE OPERATIONS, INC., Wyndham Vacation Resorts, Inc., Wyndham Vacation Ownership, Inc., and Christopher Clabough, Defendants.

No. 3:16–cv–02758
|
05/05/2017

Synopsis

Background: Buyers of timeshare resort vacation plans brought action in state court against sellers and sales agent asserting common law and statutory claims under Tennessee law. Following removal, buyers moved to remand.

Holdings: The District Court, Waverly D. Crenshaw, Chief Judge, held that:

[1] on a matter of apparent first impression for the district, removal before service of process on a forum defendant, known as "snap removal," is improper;

[2] removal based on federal question jurisdiction was not proper; and

[3] buyers were not entitled to an award of attorney fees upon remand of the case to state court.

Motion granted.

West Headnotes (16)

[1] **Federal Courts**
What Constitutes Citizenship in General

In order to be a citizen of a State within the meaning of the diversity jurisdiction statute, a natural person must both be a citizen of the United States and be domiciled within the State. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[2] **Federal Courts**
Coplaintiffs and Codefendants; Complete Diversity

Diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[3] **Removal of Cases**
Residence of party removing case

Removal before service of process on a forum defendant, known as "snap removal," is improper, as it thwarts the purpose of the forum defendant rule, which confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state, encourages defendants to engage in gamesmanship by racing to remove before service of process is effected on the forum defendant, and smacks of forum shopping by a defendant. 28 U.S.C.A. §§ 1332, 1441(a), 1441(b)(2).

Cases that cite this headnote

[4] **Statutes**
Construing together; harmony

A court must interpret a statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

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Cases that cite this headnote

[5] **Statutes**
Unintended or unreasonable results; absurdity

Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.

Cases that cite this headnote

[6] **Removal of Cases**
Residence of party removing case

Separate and apart from the statute conferring diversity jurisdiction, the forum defendant rule confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state. 28 U.S.C.A. §§ 1332, 1441(b).

Cases that cite this headnote

[7] **Removal of Cases**
Residence of party removing case

The "forum defendant rule" disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction, namely to protect defendants against presumed bias of local courts, is not a concern because at least one defendant is a citizen of the forum state. 28 U.S.C.A. §§ 1332, 1441(b).

Cases that cite this headnote

[8] **Removal of Cases**
Residence of party removing case

The forum defendant rule, which confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state, helps to insure that plaintiffs do not manufacture state court jurisdiction by naming as a second defendant in the complaint an in-state defendant that the plaintiff had no honest intention of pursuing in litigation, never intended to serve, and in fact did not serve with process, that is, it helps to avoid gamesmanship by preventing plaintiffs from joining forum defendants merely to preclude federal jurisdiction. 28 U.S.C.A. §§ 1332, 1441(b).

Cases that cite this headnote

[9] **Removal of Cases**
Constitutional and statutory provisions
Removal of Cases
Evidence

The removal statutes are to be strictly construed, and the removing party bears the burden of establishing its right thereto.

Cases that cite this headnote

[10] **Removal of Cases**
Evidence

Any doubt about the propriety of removal must be resolved in favor of remand.

Cases that cite this headnote

[11] **Statutes**
Similar or Related Statutes

Statutory construction is a holistic endeavor that requires a court to select a meaning that produces a substantive effect that is compatible with the rest of the law.

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Cases that cite this headnote

[12] **Removal of Cases**
Cases Arising Under Laws of United States

Removal based on federal question jurisdiction was not proper, in state court action brought by buyers of timeshare resort vacation plans against sellers and sales agent, asserting common law and statutory claims under Tennessee law; the only listed basis for removal in sellers' notice of removal was diversity jurisdiction, and none of the 15 counts in the state court complaint raised a federal claim, with Truth in Lending Act (TILA) only mentioned in passing, apparently to show that sales agents glossed over the lending requirements when doing closings. Truth in Lending Act § 102 et seq., 15 U.S.C.A. § 1601 et seq.; 28 U.S.C.A. §§ 1332, 1441(a), 1446.

Cases that cite this headnote

[13] **Removal of Cases**
Notice or Petition

A defendant generally is required to cite the proper statutory basis for removal and to allege facts from which a district court may determine whether removal jurisdiction exists. 28 U.S.C.A. § 1446.

Cases that cite this headnote

[14] **Federal Courts**
'Well-pleaded complaint' rule

Under the "well-pleaded complaint rule," a federal question must appear on the face of the complaint, and the party invoking federal jurisdiction has the burden to prove that jurisdiction.

Cases that cite this headnote

[15] **Federal Courts**
State-law claims and causes of action

A federal question giving rise to jurisdiction in the federal courts may arise out of a state law case or controversy if the plaintiff asserts a federal right that: (1) involves a substantial question of federal law; (2) is framed in terms of state law; and (3) requires interpretation of federal law to resolve the case. 28 U.S.C.A. § 1331.

Cases that cite this headnote

[16] **Removal of Cases**
Costs on remand

Although it was improper for sellers of timeshare resort vacation plans to effect a snap removal, or removal before service of process on a forum defendant, of a state court action brought against them by buyers, which asserting common law and statutory claims under Tennessee law, their snap removal was objectively reasonable, and thus, buyers were not entitled to an award of attorney fees upon remand of the case to state court; although a significant number had disapproved of snap removals, a significant number of cases had determined that the practice was lawful. 28 U.S.C.A. § 1447(c).

Cases that cite this headnote

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MEMORANDUM OPINION

WAVERLY D. CRENSHAW, CHIEF UNITED STATES DISTRICT JUDGE

***1** Pending before the Court is Plaintiffs' Motion to Remand (Doc. No. 16), to which Defendants have responded in opposition (Doc. No. 21), and Plaintiffs have replied (Doc. No. 33). For the reasons that follow, Plaintiffs' Motion will be granted and this case will be remanded to state court.

I. Background

[1]This litigation asserting common law and statutory claims under Tennessee law was filed in the Chancery Court for Davidson County on October 14, 2016. Plaintiffs, Robert E. and Kathleen D. Little, are citizens of the state of Illinois. (Doc. No. 1–1, Chancery Complaint). Named as Defendants are Wyndham Worldwide Operations, Inc., which is alleged to be a Delaware corporation with its principal place of business in New Jersey, and Wyndham Vacation Resorts, Inc. and Wyndham Vacation Ownership, Inc., both of which are alleged to be Delaware corporations with their principle places of business in Florida. (Id. ¶¶ 2–4). Also named as a Defendant is Christopher Clabough, who is alleged to be a licensed sales agent for the Wyndham Defendants and a Tennessee resident. (Id. ¶¶ 5, 8(h)). Four business days after suit was filed, the Wyndham Defendants removed the action to this Court on diversity jurisdiction grounds,[1] even though Defendant Clabough had yet to be served with process.

Plaintiffs now move to remand, arguing that those Defendants are attempting "to game the system" by "watching the [state] court dockets and quickly removing cases before anyone can even be served" in order to bypass the forum defendant rule. (Doc. No. 33 at 2). Plaintiffs ask this Court to prohibit "big corporate giants like Wyndham" from engaging in "jack rabbit removal to defeat the purpose of Congressional intent,"[2] and to remand the case to the Chancery Court from whence it originated for lack of diversity jurisdiction. (Id.). Plaintiffs also contend that the Court should "ignore" the Wyndham Defendants' "lame argument" that federal question jurisdiction exists under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, characterizing the argument as being "embarrassingly specious, even for a sneaky corporate defendant." (Id. at 5). Although the Court finds such hyperbole unnecessary, it agrees that remand is appropriate.

II. Analysis

***2** [2]Diversity jurisdiction is conferred by 28 U.S.C. § 1332 that provides shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs and is—(1) against citizens of different states." 28 U.S.C. § 1332(a)(1). Under this statute, "diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff," Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), as is alleged to be the case here.

A defendant sued in state may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Specifically with regard to diversity jurisdiction, however, Section 1441(b) of the removal statute—also known as the "forum defendant rule"—provides:

> **(b) Removal based on diversity of citizenship**.—
>
> (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C.A. § 1441(b).

The Wyndham Defendants argue that removal was proper based upon both the plain language of § 1441(b)(2) and the Sixth Circuit's decision in McCall v. Scott, 239 F.3d 808 (6th Cir. 2001). While both sources provide a colorable basis for their decision to remove when they did, the Court finds that McCall is not controlling and that permitting the Wyndham Defendants' removal would

thwart the underlying purpose for the forum defendant rule.

In McCall, the Sixth Circuit stated that "[w]here there is complete diversity of citizenship, as [plaintiff] concedes there was, the inclusion of an unserved resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b)." 239 F.3d at 809 n.2. However, that statement—made without any further elaboration and relegated to a footnote—has repeatedly been characterized as dicta, both within and outside the Sixth Circuit, and is therefore not necessarily followed. See e.g. Breitweiser v. Chesapeake Energy Corp., 2015 WL 6322625, at *3 (N.D. Tex. Oct. 20, 2015); Arrington v. Medtronic, Inc., 130 F.Supp.3d 1150, 1155 (W.D. Tenn. 2014); In re Darvocet, Darvon & Propoxyphene Prod. Liab. Litig., 2012 WL 2919219, at *3 (E.D. Ky. July 17, 2012); Goodwin v. Reynolds, 2012 WL 4732215, at *8 (N.D. Ala. Sept. 28, 2012); NFC Acquisition LLC v. Comerica Bank, 640 F.Supp.2d 964, 969 n.3 (N.D. Ohio 2009).

Additionally, the facts in McCall were entirely different from those that usually underlie jack rabbit or snap removals. Unlike the typical situation where a large corporate defendant monitors local state filings and promptly removes actions filed against it, McCall involved a situation where "the derivative shareholder actions brought against non-forum defendants were already in federal district court at the time of removal by the forum defendant." Harrison v. Wright Med. Tech., Inc., 2015 WL 2213373, at *6 (W.D. Tenn. May 11, 2015) (citing McCall, 239 F.3d at 813 n.1).

Apart from McCall, there is a dearth of appellate authority construing the "properly joined and served" language of § 1441(b)(2) because orders remanding cases are, by statute, non-reviewable. Harvey v. Shelter Ins. Co., 2013 WL 1768658, at *1 (E.D. La. Apr. 24, 2013); see, Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007) ("The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute."). For their part, district courts have struggled with the issue, leading to conflicting results, not only nationwide, but among the district courts in the Sixth Circuit, and even within at least one district in this circuit. See Margetta v. Medtronic, Inc., 2013 WL 12149654, at *2 (W.D. Tenn. Nov. 21, 2013) ("There is a split within this Circuit as to the issue of a defendant's removal prior to service."); compare Linder v. Medtronic, Inc., 2013 WL 5486770, at *1 (W.D. Tenn. Sept. 30, 2013) (holding "there is nothing in the removal statute that precludes [Defendant] from filing a notice of removal prior to Plaintiff effecting service of process upon it") with Montgomery v. Medtronic Sofamor Danek USA, Inc., 2014 WL 12611256, at *4 (W.D. Tenn. June 26, 2014) (holding that defendants' prompt removal prior to service of process on an in-state defendant was improper). This Court has yet to consider the issue, but does so now.

***3** Generally speaking, trial courts addressing the issue take one of two approaches. Many woodenly apply the "properly joined and served" language and permit pre-service removal, being of the view that this is in keeping with the literal language of the statute.[3] See, e.g., Rogers v. Boeing Aerospace Operations, Inc., 13 F.Supp.3d 972, 978 (E.D. Mo. 2014) ("Under the plain, unambiguous language of Section 1441(b)(2), an out-of-state defendant may remove a diversity case if at least one defendant—and no forum defendant—has been served."); Harvey, 2013 WL 1768658, at *2 (stating that "§ 1441(b)(2) plainly provides that a civil action may not be removed if any defendant that has been joined and served is a forum defendant," and that "the plain language of the statute must prevail over the plaintiff's policy arguments to the contrary"); Holmes v. Lafayette, 2013 WL 654449, at *1 (N.D. Miss. Feb. 21, 2013) ("The plain language of the statute provides that the forum defendant be 'properly joined and served' to prevent removal."); Ott, 213 F.Supp.2d at 666 (stating that, "in accordance with the plain language of § 1441(b), courts have held, virtually uniformly, that where, as here, diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b)").

Many other district courts prohibit pre-service removal when there is a resident defendant, being of the opinion that this is in keeping with Congress's intent. See e.g., In re Testosterone Replacement, 67 F.Supp.3d at 959 ("The Court finds the cases that rely on the underlying purpose of the forum-defendant rule more persuasive than those that simply apply its language."); Vallejo v. Amgen, Inc., 2013 WL 12147584, at *3 (C.D. Cal. Aug. 30, 2013) ("If defendants were permitted to remove a case before the plaintiff even had the opportunity to serve them, this would effectively circumvent Congress's entire statutory scheme and render § 1441(b)(2) superfluous. Such an application could not have been intended by Congress."); Fields v. Organon USA Inc., 2007 WL 4365312, at *4–5 (D.N.J. Dec. 12, 2007) (concluding that "[t]he result of blindly applying the plain 'properly joined and served' language of § 1441(b) is to eviscerate the purpose of the forum defendant rule"); Vivas v. Boeing Co., 486 F.Supp.2d 726, 734 (N.D. Ill. 2007) (stating that permitting pre-service removal in violation of the forum defendant rule would be "against what the courts have

long understood to be Congress's intent").

[3]Because a thorough review of the reasoning behind the differing approaches can be found in cases such as Breitweiser, 2015 WL 6322625, at *2–7, Phillips Const., LLC v. Daniels Law Firm, PLLC, 93 F.Supp.3d 544, 547–556 (S.D.W. Va. 2015), and In re Testosterone Replacement, 67 F.Supp.3d at 958–92, the Court finds it unnecessary to rehash that which has already been covered. Instead, the Court turns to why it believes that pre-service or snap removal is improper.

***4** The analysis necessarily begins with the language of § 1441(b)(2) given "[t]he controlling principle" and "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). To reiterate, the statute provides that a diversity action "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2). While some courts, as already noted, consider the phrase "properly joined and serve" to clearly allow for pre-service removal, this may only be true by applying a negative hypothesis. That is, the statute speaks of when an action cannot be removed, not when it can be removed.

[4] [5]Regardless, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citation omitted). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,'...and 'fit, if possible, all parts into an harmonious whole.' " Id. Furthermore, "[i]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Guzman v. U.S. Dep't of Homeland Sec., 679 F.3d 425, 432 (6th Cir. 2012) (citation omitted).

Applying those cannons of statutory construction, the Court concludes that snap removal thwarts the purpose of the forum defendant rule. The Court does so for five interrelated reasons.

[6] [7]First, "[s]eparate and apart from the statute conferring diversity jurisdiction, 28 U.S.C. § 1332," the forum defendant rule "confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state." Lively v. Wild Oats Markets, Inc., 456 F.3d 933, 939 (9th Cir. 2006). This an offshoot of the underlying reason behind the perceived need for diversity jurisdiction, to wit, protecting out-of-state defendants from homegrown, local juries. "In other words, the forum defendant rule disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction 'to protect defendants against presumed bias of local courts' is not a concern because at least one defendant is a citizen of the forum state." Morris v. Nuzzo, 718 F.3d 660, 665 (7th Cir. 2013) (citation omitted); see Allen v. GlaxoSmithKline PLC, 2008 WL 2247067, at *4 (E.D. Pa. May 30, 2008) ("With an in-state defendant, the likelihood of local bias is reduced, if not eliminated, and removal to a federal forum is not warranted.").

[8]The inclusion of the "properly joined and served" language in § 1441(b)(2) also helps to insure that plaintiffs do not manufacture state court jurisdiction "by naming as a second defendant in the Complaint (i.e. 'joining') an in-state defendant that the plaintiff had no honest intention of pursuing in litigation, never intended to serve, and in fact did not serve with process." Allen, 2008 WL 2247067, at *11; see Stan Winston Creatures, Inc. v. Toys R Us, Inc., 314 F.Supp.2d 177, 181 (S.D.N.Y.2003) ("The purpose of the 'joined and served' requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."). In short, it helps to "avoid gamesmanship by preventing plaintiffs from joining forum defendants merely to preclude federal jurisdiction." Allen, 2008 WL 2247067, at *4. If, however, the rule is read to allow snap removals, this could encourage "defendants to engage in a different gamesmanship—racing to remove before service of process is effected on the forum defendant." Magallan v. Zurich Am. Ins. Co., ––F.Supp.3d ––––, ––––, 2017 WL 111308, at *3 (N.D. Okla. Jan. 11, 2017). Stated more bluntly,

> ***5** the result of blindly applying the plain "properly joined and served" language of § 1441(b) is to eviscerate the purpose of the forum defendant rule. It creates a procedural anomaly whereby defendants can always avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action to federal court before they are served by the plaintiff. In other words, a literal interpretation of the provision creates an opportunity for gamesmanship by defendants,

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> which could not have been the intent of the legislature in drafting the "properly joined and served" language.

Fields, 2007 WL 4365312, at *5. In the view of many courts, this produces "absurd results." Phillips Const., 93 F.Supp.3d at 553; Swindell–Filiaggi v. CSX Corp., 922 F.Supp.2d 514, 516 (E.D. Pa. 2013); Vallejo, 2013 WL 12147584, at *3; In re Darvocet, 2012 WL 2919219, at *3; Ethington, 575 F.Supp.2d at 863.

Second, "[p]re-service removal by means of monitoring the electronic docket smacks more of forum shopping by a defendant, than it does of protecting the defendant from the improper joinder of a forum defendant that plaintiff has no intention of serving." Perez v. Forest Labs., Inc., 902 F.Supp.2d 1238, 1242 (E.D. Mo. 2012). This possibility is something Congress certainly could not have envisioned when it enacted the present version of § 1441(b)(2) in 1943. See id. (noting the year of enactment and observing that Congress could not have foreseen "the tremendous loophole" exploited by "defendants who monitor state dockets").

Third, permitting snap removals "would result in the elimination of the forum defendant rule" in some states "at least for the vigilant defendant," In re Testosterone Replacement, 67 F.Supp.3d at 962, and result in unequal treatment depending upon location. This is because, in many states, process is served by the county sheriff or other authorized agents, but "recordkeeping and docketing technology is several generations ahead of th[is] procedure." Id.; see Ethington, 575 F.Supp.2d at 863 ("[R]igidly applying the plain meaning of the forum defendant rule's test would be especially inequitable in states such as New Jersey which do not even allow for perfecting service until the clerk's office has processed the complaint and issued a TAN number (or its equivalent in states other than New Jersey)."). Certainly, Congress did not intend to allow different results depending upon the jurisdiction in which a case is filed.

Fourth, snap removals can preempt the provision of § 1441(a) that permits removal only for "pending" cases. As one court has recently explained:

> To qualify for removal, a civil action must be "pending" in state court. See 18 U.S.C. § 1441(a). But in many states, a suit is not "pending" until service has been effectuated. For instance, both Kansas and Kentucky require issuance of a summons before the "commencement" of an action....In other states, however, an action is "commenced" by filing a complaint....Reading the removal statute to require service of some defendant ensures uniformity. Under such a construction, the availability of a federal forum does not vary on a state-by-state basis, an outcome that does not appear contemplated by statute.

In re Jean B. Mcgill Revocable Living Trust, 2017 WL 75762, at *2 (N.D. Okla. January 6, 2017); accord, Hawkins v. Cottrell, Inc., 785 F.Supp.2d 1361, 1371–72 (N.D. Ga. 2011) (finding for purposes of § 1441(a) that, "under Georgia law, an action is not 'pending' suit until after service of process is perfected"). Again, Congress could not have intended to allow different results based on location.

***6** [9] [10]Fifth, the removal statutes "are to be strictly construed," Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 32, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002), and the removing party "bears the burden of establishing its right thereto," Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 337 (6th Cir. 1989). Further, any doubt about the propriety of removal must be resolved in favor of remand. Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 405 (6th Cir. 2007); Jacada, Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 704 (6th Cir. 2005). The sheer number of cases that disapprove of snap removals themselves makes the propriety of removal in this case doubtful.

[11]Ultimately, " '[s]tatutory construction...is a holistic endeavor' " that requires a court to "select a meaning [that] produces a substantive effect that is compatible with the rest of the law." Czyzewski v. Jevic Holding Corp., —— U.S. ——, 137 S.Ct. 973, 985, 197 L.Ed.2d 398 (2017) (quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). Based upon the statutory scheme, the Court finds that permitting snap removals when a forum defendant is sued runs counter to the reasons underlying the forum defendant rule and is not a result that Congress could have envisioned, let alone countenanced, when it enacted the rule to protect out-of-state defendants from local juries.

[12] [13]Two points remain for consideration. In their response brief, the Wyndham Defendants argue that even if removal on diversity grounds was improper, the Court

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should retain the case because of the existence of federal question jurisdiction. This argument fails at the outset because 28 U.S.C. § 1446 requires that a notice of removal "contain[ ] a short and plain statement of the grounds for removal." In this regard, "[a] defendant generally is required to cite the proper statutory basis for removal and to allege facts from which a district court may determine whether removal jurisdiction exists." Pet Quarters, Inc. v. Depository Trust & Clearing Corp., 559 F.3d 772, 778 (8th Cir. 2009). Here, the only listed basis for removal was diversity jurisdiction. Likewise, the Civil Cover Sheet attached to Defendants' Notice of Removal only listed diversity jurisdiction. (Doc. No. 1–4 at 1).

[14] [15]Furthermore, under the well-pleaded complaint rule, "a federal question must appear on the face of the complaint," Chase Bank USA, N.A. v. City of Cleveland, 695 F.3d 548, 554 (6th Cir. 2012) and "the party invoking federal jurisdiction has the burden to prove that jurisdiction." Glob. Tech., Inc. v.Yubei Power Steering Sys. Co., 807 F.3d 806, 810 (6th Cir. 2015). None of the fifteen counts in the Chancery Court Complaint raises a federal claim—TILA is only mentioned in passing, apparently to show that sales agents glossed over the lending requirements when doing closings. Although " a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case," Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 377 F.3d 592, 595 (6th Cir. 2004), Defendants have not come close to showing that to be the case here.

[16]Finally, Plaintiffs move for an award of attorneys' fees under 28 U.S.C. § 1447©, which provides that a court *may* award fees and costs when remanding a case. The Supreme Court has interpreted the clause to mean that fees and costs should only be awarded "where the removing party lacked an objectively reasonable basis for seeking removal," but denied "when an objectively reasonable basis exists[.]" Martin v. Franklin Capital Corp., 546 U.S. 132, 141, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005).

***7** Just as the sheer number of cases that disapprove of snap removals made removal of this case doubtful, the sheer number of cases that go the other way made snap removal objectively reasonable. This is particularly so given the language in McCall and the fact that construction of the "properly joined and served" language of § 1441(b)(2) in the context of a snap removal is a matter of first impression for this Court and apparently this district.

III. Conclusion

On the basis of the foregoing, Plaintiffs' Motion to Remand (Doc. No. 16) will be granted, and this case will be remanded to Chancery Court. Plaintiffs' incorporated request for attorney's fees will be denied.

An appropriate Order will be entered.

All Citations

--- F.Supp.3d ----, 2017 WL 1788427

Footnotes

1 The Court notes that, "[i]n order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the State." Newman–Green, Inc. v. Alfonzo–Larrain, 490 U.S. 826, 828, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). While the Complaint in this case only alleges that Plaintiffs are residents of Illinois and that Defendant Clabough resides and works in Tennessee, the Wyndham Defendants do not suggest that those individuals are domiciled elsewhere. In fact, the Wyndham Defendants specifically assert in their removal papers that the Littles are Illinois residents and that Clabough's "citizenship in the forum state does not preclude removal under 28 U.S.C. § 1441(b)(2)." (Doc. No. 1, Notice of Removal ¶¶ 1, 7).

2 Some courts refer to removal before service of process as "jack rabbit removal," see e.g., Schilmiller v. Medtronic, Inc., 44 F.Supp.3d 721, 727 (W.D. Ky. 2014), while others refer to the practice as "snap removal," see e.g., Smethers v. Bell Helicopter Textron, Inc., 2017 WL 1277512, at *1 (S.D. Tex. Apr. 3, 2017).

3 Defendants argue that this is the majority rule, relying on In re Darvocet, 2012 WL 2919219 at *2, Brake v. Reser's Fine Foods, Inc., 2009 WL 213013, at *3 (E.D. Mo. Jan. 28, 2009); Massey v. Cassens & Sons, Inc., 2006 WL 381943, at *2 (S.D. Ill. 2006); and Ott v. Consol. Freightways Corp., 213 F.Supp.2d 662, 665 (S.D. Miss. 2002). Those cases,

however, were rendered between five and fifteen years ago and it is unclear whether this remains the majority rule given that snap removals continue to be a hotbed of discussion and a source of debate as evidenced by the number of opinions that have been issued since then. In fact, it has been observed that "[s]nap removal appears to be an emerging litigation tactic," Breitweiser, 2015 WL 6322625, at *3, and that "the growing trend among district courts wrestling with this latest litigation fad is to grant a timely motion to remand," Ethington v. Gen. Elec. Co., 575 F.Supp.2d 855, 863 (N.D. Ohio 2008). At a minimum, there is clearly a "split in authority on the issue, with a number of courts" rejecting the literal interpretation approach. In re Testosterone Replacement Prod. Liab. Litig., 67 F.Supp.3d 952, 959 (N.D. Ill. 2014).

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[Cite as *Washburn v. Gvozdanovic*, 2017-Ohio-2954.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STEPHEN J. WASHBURN,	:	APPEAL NO. C-160590 TRIAL NO. A-1502783
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
MARINKO GVOZDANOVIC,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 24, 2017

The Matre Law Group, Co., LPA and *Kerrie K. Matre*, for Plaintiff-Appellant,

Finney Law Firm, LLC, Christopher P. Finney and *Bradley M. Gibson*, for Defendant-Appellee.

MYERS, Judge.

{¶1} Plaintiff-appellant Stephen J. Washburn has appealed from the trial court's entry granting summary judgment to defendant-appellee Marinko Gvozdanovic on Washburn's claims for fraud, breach of contract, and a violation of R.C. 5302.30.

{¶2} Washburn has raised three assignments of error for our review. In the first two assignments of error, he challenges the trial court's entry of summary judgment on his claim for fraud. In the third assignment of error, Washburn argues that the trial court erred in striking the affidavit of his expert witness. We affirm.

Factual and Procedural Background

{¶3} On October 25, 2009, Washburn and Gvozdanovic entered into a contract for Washburn to purchase the property located at 622 Fleming Road from Gvozdanovic for $92,000. The contract provided that the property was being sold "as is." Gvozdanovic had executed a "Residential Property Disclosure Form," which Washburn signed and acknowledged on the date that the contract was entered into. Section E of the disclosure form was titled "STRUCTURAL COMPONENTS," and it contained the following language: "Do you know of any movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls?" In response to this question, Gvozdanovic checked a box marked yes and wrote that "there has been ground movement in the area."

{¶4} Prior to closing on the property, Washburn visited it multiple times and had several inspections conducted. Washburn had noticed a small amount of

mold on his first visit to the property, and he hired Tencon, Inc., a technical environmental consulting company, to inspect the property for water issues. On December 30, 2009, Tencon sent Washburn a report indicating that it had found visible mold growth in the basement of the home, and that "ground water appears to be entering the basement via the cement block wall through the block structure, through minor cracks and/or where the blocks join the footer and basement floor."

{¶5} On February 11, 2010, Truman P. Young & Associates conducted a structural inspection on the property. The report issued following that inspection indicated that "[t]he basement floor and first floor are noticeably tilted towards the front of the house, indicating probable settlement of the foundation." The report further stated that "[i]t is likely that moisture is penetrating the basement walls through cracks, however, the extent and severity of any cracking cannot be determined without removing the gypsum board wall finish and wood furring." The report noted that the inspection did not involve the removal of any finishes to view concealed conditions. Washburn did not remove the gypsum board prior to closing.

{¶6} Washburn closed on the property on March 19, 2010. TKS Construction Services then performed construction and remodeling work on the home. TKS invoiced Washburn for its work on May 20, 2010. Sometime prior to sending the invoice, TKS informed Washburn that it had discovered cracked foundation walls after damaged drywall had been removed during mold remediation.

{¶7} Approximately one year after taking possession of the property, Washburn noticed that his asphalted driveway had begun to crumble and heave, that horizontal cracks were forming on the front porch, and that new cracks were forming in the basement walls. Washburn hired Quentin Gorton, a geotechnical engineer, to

inspect the property. After his inspection on May 25, 2011, Gorton told Washburn that the property sat on an active landslide. He additionally informed Washburn that he had previously been hired by Gvozdanovic to inspect the property, and that he had told Gvozdanovic that the property sat on an active landslide.

{¶8} On May 22, 2015, Washburn filed suit against Gvozdanovic, asserting claims for breach of contract, fraud, and a violation of R.C. 5302.30. With respect to the fraud claim, Washburn's complaint alleged that Gvozdanovic had committed fraud by misrepresenting the condition of the property in the disclosure form and by concealing the damage caused by the landslide with new drywall and asphalt.

{¶9} The trial court issued a case management order on July 30, 2015. The order provided that Washburn's experts had to be identified in writing by December 14, 2015. The order further stated that "[e]xperts not named by the dates set forth herein shall not be permitted to testify. Expert reports shall be provided to opposing counsel within 30 days after the expert has been identified unless counsel otherwise agrees." In his responses to Gvozdanovic's interrogatories, which were served upon Gvozdanovic's counsel on December 3, 2015, Washburn named Gorton as an expert witness. Washburn's discovery responses further indicated that he had received only an oral report from Gorton. Washburn did not provide a written report by the specified deadline.

{¶10} Gvozdanovic moved for summary judgment on Washburn's claims. Along with his memorandum in opposition to Gvozdanovic's motion for summary judgment, Washburn filed both his own affidavit and an affidavit from Gorton. Attached to Gorton's affidavit was a letter from Gorton to Washburn's counsel

stating that the damage to Washburn's property had been caused by a landslide. This letter is a written report of the expert's opinions.

{¶11} Gvozdanovic filed a motion to strike Gorton's affidavit because Washburn had failed to timely provide an expert report from Gorton.

{¶12} In the same entry, the trial court granted both Gvozdanovic's motions to strike Gorton's affidavit and for summary judgment. With respect to the motion to strike, the trial court mistakenly found that Washburn had failed to identify Gorton as an expert prior to the deadline set in the case.

{¶13} The trial court provided numerous reasons in support of its grant of summary judgment. As relevant to this appeal, it found that Washburn's claim for fraud was filed outside of the applicable statute of limitations. And with respect to the merits of the claim for fraud, the trial court found that summary judgment was appropriate because Washburn failed to establish that Gvozdanovic fraudulently concealed the existence of a landslide or that he had justifiably relied on a misrepresentation made by Gvozdanovic.

{¶14} Washburn has appealed from the trial court's entry. His assignments of error challenge the trial court's grant of summary judgment on his claim for fraud and the trial court's striking of Gorton's affidavit. Washburn raises no challenge to the trial court's entry of summary judgment on his claims for breach of contract and for a violation of R.C. 5302.30.

Fraud Claim Not Timely Filed

{¶15} We consider Washburn's second assignment of error first, as it is dispositive of this appeal. In his second assignment of error, Washburn argues that

the trial court erred in determining that his claim for fraud was time-barred because it was filed past the applicable statute of limitations.

1. Standard of Review

{¶16} We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exist no genuine issues of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to that party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

2. Discovery Rule

{¶17} An action for fraud must be brought within four years of the accrual of the action. R.C. 2305.09(C). The four-year limitations period begins to run "when the complainant has discovered, or should have discovered in the exercise of reasonable diligence, the alleged fraud." *Vanderlaan v. Pavlik*, 1st Dist. Hamilton No. C-150060, 2015-Ohio-5349, ¶ 13, citing *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d 206 (1989), paragraph 2b of the syllabus. A person should be aware that a fraud has occurred when the facts that she or he possesses would alert a reasonable person to the possibility of fraud. *Palm Beach Co. v. Dun & Bradstreet, Inc.*, 106 Ohio App.3d 167, 171, 665 N.E.2d 718 (1st Dist.1995).

{¶18} As both this court and the Supreme Court of Ohio have explained, "[c]onstructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery

rule." *Vanderlaan* at ¶ 13, quoting *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 30.

{¶19} Washburn's fraud claim is based on two allegations: that Gvozdanovic misrepresented that the property sat on an active landslide by writing on the property disclosure form that "there has been ground movement in the area," and that Gvozdanovic concealed the effects of the landslide by putting new asphalt on the driveway and new drywall over the cracks in the basement.

{¶20} Washburn argues that he first discovered the fraud on May 25, 2011, when Gorton informed him, after inspecting the property, that it sat on an active landslide and that he had previously inspected the property for Gvozdanovic and had conveyed to him the same information. Using this date of discovery, Washburn contends that his complaint filed on May 22, 2015, was filed within the four-year limitations period.

{¶21} Gvozdanovic contends that, based on an accumulation of facts, Washburn had notice of the alleged fraud no later than May 20, 2010, the date that TKS informed Washburn of cracked foundation walls. Using that date, Gvozdanovic argues that Washburn's complaint was filed outside of the four-year limitations period. The trial court found that Washburn "should have been aware through the exercise of reasonable diligence, of all of the alleged defects, namely the landslide, no later than May 20, 2010." Consequently, it held that the limitations period began to run on that date and that the cause of action for fraud was time-barred.

{¶22} Following our review of the record, we agree with the trial court's determination. We find that the following facts, when considered together, would have alerted a reasonable person to the possibility of fraud.

{¶23} On October 25, 2009, Washburn signed the "Residential Property Disclosure Form" indicating that "there has been ground movement in the area." With respect to this statement, Washburn argues that a reference to ground movement "in the area" referred to area around the property, but not the property itself. Washburn's argument is flawed. He ignores the fact that the disclosure was made in the "structural components" section of the disclosure form, and that it was provided in response to a direct question about the structural integrity of 622 Fleming Road.

{¶24} After being made aware of ground movement in the area, Washburn received the Tencon report in December of 2009 indicating that water had been entering the basement through minor cracks. Shortly thereafter, in February of 2010, Washburn received the report from Truman P. Young & Associates stating that "[t]he basement floor and first floor are noticeably tilted towards the front of the house, indicating probable settlement of the foundation." The report further informed Washburn that moisture was penetrating through cracks, but that the extent of the cracking could not be determined without removing certain finishes from the wall. Despite receiving this information, Washburn, at that time, did not remove any of the gypsum board wall finish or wood furring to determine the extent of the cracking.

{¶25} After closing on the property on March 19, 2010, Washburn was informed by TKS, no later than May 20, 2010, that TKS had found cracked foundation walls in the basement after damaged drywall had been removed.

{¶26} We find that, as of May 20, 2010, Washburn possessed facts sufficient to alert a reasonable person to the possibility of fraud. At that point, he: 1) had been

informed of ground movement in the area affecting his property (listed under the "Structural Components" section of the disclosure form); 2) had been given two reports stating that moisture was entering the basement through cracks; 3) was aware that the basement and first floor were noticeably tilted toward the front of the house; and 4) had been told of cracked foundation walls in the basement that had been previously covered by drywall. A reasonable person, in possession of these facts, would have been alerted to the possibility that Gvozdanovic's statement on the disclosure form was a potential misrepresentation and that Gvozdanovic had possibly concealed damage caused by the ground movement or landslide. *See Palm Beach Co.*, 106 Ohio App.3d at 171, 665 N.E.2d 718.

{¶27} Consequently, the limitations period for Washburn's fraud claim began to run on May 20, 2010, and his claim filed on May 22, 2015, was untimely. Because Washburn's claim was filed outside of the limitations period, we hold that the trial court did not err in granting summary judgment to Gvozdanovic. The second assignment of error is overruled.

{¶28} Our resolution of Washburn's second assignment of error has rendered his first assignment of error concerning the merits of the fraud claim and his third assignment of error, in which he challenges the trial court's striking of Gorton's affidavit, moot. The judgment of the trial court is, accordingly, affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., concurs.
MILLER, J., dissents.

MILLER, J., dissenting.

{¶29} Respectfully, I dissent. First, when the factual question of commencement is close, as in this case, the law requires a jury to decide what event triggered the statute of limitations. Second, the trial court erred in excluding Washburn's expert geotechnical engineer on the basis of nondisclosure where the expert was timely disclosed as an expert in Washburn's discovery response, was mentioned by name in Gvozdanovic's discovery requests, whose opinions were summarized in Washburn's discovery responses, and who was identified in Washburn's complaint. Finally, I would reverse the trial court's granting of summary judgment on the merits of Washburn's fraud claim, as there remain genuine issues of material fact to be resolved.

A Close Question on the Discovery Rule Goes to the Jury

{¶30} Some cases simply must be tried. This is one. The question of when a party should have discovered a fraud for the purposes of commencing the running of the statute of limitations is a question of fact. *Hamilton v. Ohio Savs. Bank*, 70 Ohio St.3d 137, 140, 637 N.E.2d 887 (1994). The court below erred by not construing the facts in favor of the nonmoving party when it decided that Washburn should have discovered the fraud earlier than he did. Accordingly, summary judgment on the basis of the running of the statute of limitations should not have been granted.

{¶31} The majority recites the facts with a lawyer's eye and with perfect hindsight to conclude that an ambiguous statement that "there has been ground movement in the area," combined with knowledge of a leaky basement, a sloped basement floor, and a cracked basement wall, meant that Washburn should have discovered the alleged fraud prior to being told of the fraud by Gorton, the geo-

technical engineer. Maybe Washburn should have been more alert to signs of fraud. But this case is a close call. Close calls go to the jury.

{¶32} Construing the facts in favor of Washburn, the use of the passive voice and present perfect progressive tense in the disclosure that "there has been ground movement in the area" could be reasonably understood to mean that at some time in the recent past, minor ground movement occurred somewhere near the property. It would also be reasonable to conclude based upon Gvozdanovic's prior litigation over his sale of the adjoining property, and his testimony in that case to the effect that he would not purchase a property that he knew was the subject of an active landslide, that the disclosure was intentionally and artfully written to deceive, and thus did not provide notice of the fraud—the statement itself was the fraud.

{¶33} Further, wet basements, uneven floors, and cracked foundation walls are common in older homes. These facts do not necessarily rise to the level of constructive notice of an active landslide—and certainly are not notice that Washburn should have suspected that Gvozdanovic knew of the active landslide. Water intrudes into basements regularly. The evidence was that the walls were cracked, not shifted, bowed, or angled. There was no evidence submitted regarding the extent of cracking to indicate something significant should have been expected.

{¶34} None of the several experts Washburn hired prior to Gorton stated that an active, or for that matter, past landslide, had caused the leaky basement, sloped floors, and cracked walls. The stated cause of the uneven floor was settlement. The source of what was characterized as "moisture" in the basement was never identified. Critically, no one linked these particular issues to the landslide before Washburn spoke with Gorton. On this record, it would be reasonable to

conclude that the first indication of a landslide on the property occurred a year after closing when Washburn's driveway began to crumble and heave, and new cracks formed. It was then that Washburn hired Gorton and Gorton informed Washburn both of the existence of the active landslide and of Gvozdanovic's knowledge of the landslide. Gorton was the key to Washburn's discovery of Gvozdanovic's alleged fraudulent behavior. A reasonable jury could conclude that the statute of limitations did not commence until Washburn had spoken with Gorton. Accordingly, summary judgment on the basis that the statute of limitations had run on Washburn's fraud claim was inappropriate.

{¶35} Because I would not affirm the trial court's granting of summary judgment on the basis of the statute of limitations, I address the remaining assignments of error.

Gorton was Timely Disclosed as an Expert

{¶36} The trial court excluded Gorton as an expert because "Plaintiff failed to identify Mr. Gorton as an expert at any time prior to the deadline *in this case*." (Emphasis in original.) This was flatly wrong.

{¶37} The trial court set a case-management order requiring Washburn to disclose any expert witnesses by December 14, 2015. On December 3, 2015, Washburn specifically identified Gorton in response to Gvozdanovic's Interrogatory #3, which sought the identity of expert witnesses. The answer also described the scope of Gorton's work, "Mr. Gorton identified the existence of a rotational slip fault and scarp-line surrounding the house." In response to Interrogatory #15 requesting an identification of opinions, Washburn answered, "Mr. Gorton verbally stated that in his opinion stabilizing the structure would require the installation of 36" diameter

concrete piers extending down to bedrock at each corner of the house. He also estimated at that time that it could cost up to $150,000 to install such piers. Defendant may have a written report in his possession from this same expert obtained prior to selling the property to Plaintiff."

{¶38} As further proof that Gvozdanovic had actual knowledge of Gorton, it is necessary to look no further than Washburn's complaint in which he stated that "Plaintiff learned of the fraud perpetrated upon him by the Defendant on May 25, 2011 when he hired Quentin A. Gorton, P.E. to examine the cracking foundation walls ... and learned that this same engineer informed the Defendant of the landslide conditions a few years earlier." Also, Gvozdanovic's discovery requests sought the production of documents "sent to or received from Quentin A. Gorton, P.E., regarding the Property."

{¶39} In sum, Gvozdanovic had clear notice of Gorton being an expert witness, and that Gorton did not prepare an expert report. At that point, it became incumbent upon Gvozdanovic to pursue additional discovery of Gorton via deposition.

{¶40} Despite all of this, the trial court excluded Gorton as undisclosed. This error should be reversed. Moreover, even if Gorton's expert opinions were excludable, he would still remain a viable fact witness regarding Gvozdanovic's prior knowledge of the landslide. The trial court therefore should have, at a minimum, considered his affidavit for these facts alone.

There Is Sufficient Evidence of Fraud to Withstand Summary Judgment

{¶41} Construed most favorably to Washburn, there are sufficient indicia of fraud for the claim to survive summary judgment. *See Burr v. Cty Comms. of Stark*

Cty., 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), syllabus (setting forth the elements of fraud).

{¶42} There is evidence that Gvozdanovic was aware of the active landslide, both through the prior litigation regarding Gvozdanovic's sale of the adjoining property and from Gorton's affidavit that Gorton had told Gvozdanovic about the landslide on the property.

{¶43} Gvozdanovic completed a standardized, state mandated, "Residential Property Disclosure Form." That form's instructions require a seller to "Identify any material matters in the property that are actually known." It was on this form under the "Structural Components" disclosure that Gvozdanovic checked a box indicating that he was aware of "movement, shifting, deterioration, material cracks/settling ... or other material problems with the foundation, basement/crawl space, floors or interior/exterior walls." The form then reads, "If 'Yes', please describe:" Here, Gvozdanovic wrote "There has been ground movement in the area." Arguably, this statement was nonresponsive to the question and was evasive. Gvozdanovic did not disclose any movement of the foundation, floors, or walls in his response. There was no relation of the ground movement in the area to the structure.

{¶44} Gvozdanovic circled the word "No" in answer to the question whether there was any current settling, grading or erosion issues affecting the property, despite allegedly being aware of the landslide. Gvozdanovic left blank the space where he was to identify "any repairs, modifications, or alterations to the property" in response to "drainage, settling, grading or erosion problems since owning the property" despite the fact that he recently resurfaced the driveway to repair cracks allegedly caused by the landslide.

{¶45} Gvozdanovic also left blank the catchall section that required him to disclose "other known material defects in or on the property" where "material defects" was defined as including "any non-observable physical condition existing on the property that could be dangerous to anyone occupying the property or any non-observable physical condition that could inhibit a person's use of the property."

{¶46} Despite having several prompts to disclose the landslide on the property, Gvozdanovic could be found by a reasonable jury not to have done so. Gvozdanovic certified that "Owner represents that the statements contained in this form are made in good faith based on his/her actual knowledge as of the date signed by the Owner." A jury could reasonably conclude that Gvozdanovic fraudulently violated this provision.

{¶47} The acts of drywalling over the cracked foundation walls and resurfacing the driveway could reasonably be construed as acts done to hide damage allegedly caused by the landslide. A jury could reasonably find that these acts hid a latent defect and lulled Washburn into a false state of comfort regarding the status of the property.

{¶48} Accordingly, there was evidence of actionable fraud that, if believed, could result in a jury verdict in Washburn's favor. Summary judgment on the merits of the fraud claim was therefore inappropriate.

Conclusion

{¶49} The trial court erred in finding the fraud claim barred by the statute of limitations when a jury could have reasonably concluded that Washburn did not have cause to discover the alleged misrepresentation until alerted to it by Gorton. The court also improperly excluded Washburn's expert witness as undisclosed.

Finally, the trial court should have allowed Washburn's fraud claim to proceed on the merits, as there were genuine issues of material fact left to be resolved.

{¶50} For these reasons, I would reverse the trial court's judgment, and remand the cause for further proceedings.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

[Cite as *U.S. Bank, Natl. Assn. v. Hull*, 2017-Ohio-2914.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
U.S. BANK, NATIONAL ASSN. Appellee v. BRAD A. HULL, et al. Defendants and LISA A. HULL Appellant	C.A. No. 16CA010979 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 12CV178512

DECISION AND JOURNAL ENTRY

Dated: May 22, 2017

CALLAHAN, Judge.

{¶1} Appellant, Lisa Hull, nka Pavkovich, appeals the judgment entered in favor of Appellee, U.S. Bank, National Association ("the Bank"), in the Lorain County Court of Common Pleas. For the reasons set forth below, this Court affirms.

I.

{¶2} The Bank filed a foreclosure action against Lisa and Brad Hull, the mortgagors, in November 2012. At the time of the foreclosure filing, Lisa and Brad Hull were involved in divorce proceedings.

{¶3} Ms. Hull's divorce attorney filed an answer on her behalf on March 7, 2013. In this answer, she admitted the allegations in paragraph 1 of the complaint which stated "[the

Bank] is in possession of, and entitled to enforce, a note executed by the defendants, Brad A. Hull and Lisa A. Hull." A month later, Mr. Hull's divorce attorney filed an answer on behalf of both of them. Their joint answer denied for want of knowledge that the Bank had possession of and was entitled to enforce the note. Neither answer asserted standing as an affirmative defense.

{¶4} After a number of pretrials, the Bank filed a motion for summary judgment. The Bank supported its motion for summary judgment with the affidavit from a representative of the Bank's servicing agent. As to standing, the representative averred that "[a]t the time of the filing of the complaint * * *, and to date, [the Bank] * * *, has been in possession of the Promissory Note." The defendants failed to file a response brief.

{¶5} On October 24, 2013, the magistrate granted the Bank's summary judgment and the judge adopted the magistrate's decision and entered a decree of foreclosure. No appeal was filed. Sheriff's sales were scheduled and canceled during the next two years, three times because the Bank was "reviewing the file for loss mitigation options" with the homeowners and one time due to an investor-directed moratorium.[1]

{¶6} Twenty-six months after the trial court granted summary judgment, Ms. Hull filed a motion to set aside the judgment and requested a hearing. The Bank opposed the motion. The trial court denied the motion without a hearing.

{¶7} Ms. Hull timely appeals, raising one assignment of error for review.

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[1] The Bank's brief indicates the sheriff's sales were canceled due to Lisa and Brad Hull's bankruptcy filings. However, the trial court's orders do not reflect that as the basis for canceling the sheriff's sales. Further, the docket contains only one notice of bankruptcy for Ms. Hull and it was filed after the Bank's motion to withdraw the fourth sheriff's sale.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SET ASIDE JUDGMENT WITHOUT HOLDING AN EVIDENTIARY HEARING.

{¶8} In her sole assignment of error, Ms. Hull argues the trial court erred by not holding a hearing on her Civ.R. 60(B) motion. She argues that she set forth operative facts in her motion and affidavit and was entitled to a hearing. This Court disagrees.

{¶9} In order to prevail on a Civ.R. 60(B) motion, the movant must establish that: (1) the party has a meritorious defense or claim; (2) a circumstance arises under Civ.R. 60(B)(1)-(5); and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. If any of these three requirements are not met, the motion must be denied. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988). However, "Civ.R. 60(B) may not be used as a substitute for appeal." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 131 (1986).

{¶10} A movant does not have an automatic right to a hearing on a motion for relief from judgment. *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 52 (9th Dist.1991), citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103 (8th Dist.1974). "It is an abuse of discretion for a trial court to overrule a Civ.R. 60(B) motion for relief from judgment without first holding an evidentiary hearing *only if* the motion or supportive affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." (Emphasis sic.) *Boster v. C & M Servs., Inc.*, 93 Ohio App.3d 523, 526 (10th Dist.1994); *see Fairbanks Capital Corp. v. Unknown Heirs at Law, Devisees, Legatees, Exrs. or Admrs. of Douglas*, 9th Dist. Summit No. 22733, 2005-Ohio-6459, ¶ 14.

{¶11} According to the trial court, "at no time [did Ms. Hull] identify any operative facts to show that she [was] entitled to relief under Civ.R. 60(B)(4) or (5)." Additionally, the trial court denied the motion as being an improper substitute for an appeal and barred by res judicata.

{¶12} On appeal, Ms. Hull limits her argument to the trial court's failure to conduct a hearing and relies solely on Civ.R. 60(B)(4). Ms. Hull ignores the trial court's determination that her Civ.R. 60(B) motion was barred by res judicata.

{¶13} This Court finds it is unnecessary to review whether the trial court abused its discretion in denying Ms. Hull's Civ.R. 60(B) motion without a hearing, because res judicata bars this Court's consideration of Ms. Hull's assigned error. "The doctrine of res judicata precludes a party from relitigating any issue that was, or should have been, litigated in a prior action between the parties." *Dun-Rite Constr., Inc. v. Hoover Land Co.*, 9th Dist. Summit No. 25731, 2011-Ohio-4769, ¶ 8. "[L]ack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 25.

{¶14} In her Civ.R. 60(B) motion, Ms. Hull argued as a meritorious defense that the Bank lacked standing at the time it filed the foreclosure action. While Ms. Hull did not assert an affirmative defense for lack of standing, she admitted the Bank had standing in her original answer and then denied the Bank had standing in her subsequent answer. Based on her answers, Ms. Hull challenged the Bank's standing.

{¶15} In support of its summary judgment motion, the Bank submitted an affidavit setting forth its standing to bring the foreclosure action. Ms. Hull did not file any opposition to the Bank's summary judgment. The issue of standing could have been challenged at the dispositive motion stage, but was not.

{¶16} Further, Ms. Hull did not file an appeal of the trial court's decree of foreclosure. Instead, Ms. Hull waited twenty-six months to file her Civ.R. 60(B) motion, thereby rendering it a substitute for an appeal. "It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion." *Kutcha*, 141 Ohio St.3d 75, 2014-Ohio-4275, at ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶ 8-9.

{¶17} Ms. Hull has not demonstrated the existence of an injustice so great as to warrant a departure from the application of res judicata. *See Kutcha* at ¶ 15. Instead, the record merely reflects that Ms. Hull failed to appeal the foreclosure judgment. However, Civ.R. 60(B) "does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision." *Id*., citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

{¶18} In this case, Ms. Hull filed a Civ.R. 60(B) motion in order to relitigate an issue that she had raised at the start of litigation, but failed to raise in response to the Bank's summary judgment motion and failed to pursue on appeal. Thus, the doctrine of res judicata bars her attempted collateral attack against the judgment in foreclosure. *See Kutcha* at ¶ 16; *see JP Morgan Grantor Trustee v. Sponseller*, 9th Dist. Summit No. 27244, 2014-Ohio-5533, ¶ 8, 10; *see Deutsche Bank Trust Co. Americas v. Ziegler*, 2d Dist. Montgomery No. 26287, 2015-Ohio-1586, ¶ 56, 62; *see Bank of New York Mellon v. McMasters*, 11th Dist. Lake No. 2014-L-112, 2015-Ohio-1769, ¶ 15-16; *see Bank of New York Mellon v. Hutchins*, 8th Dist. Cuyahoga No. 100435, 2014-Ohio-2765, ¶ 8, 10. Because res judicata bars this Court's consideration of Ms. Hull's assigned error, her assignment of error is overruled.

III.

{¶19} Ms. Hull's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNNE S. CALLAHAN
FOR THE COURT

HENSAL, P. J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

MARC E. DANN and EMILY WHITE, Attorneys at Law, for Appellant.

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[Cite as *Eighmey v. Cleveland*, 2017-Ohio-2857.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104779

ALLYSON EIGHMEY

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-822702

BEFORE: E.T. Gallagher, J., Keough, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: May 18, 2017

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, city of Cleveland ("Cleveland" or "the city"), appeals an order certifying a class of plaintiffs who claim the city issued unlawful traffic citations generated by unmarked traffic cameras. The city assigns one error for our review:

> The trial court erred in granting class certification as Plaintiff Eighmey is precluded from seeking judicial review and does not meet the requisite typicality requirement that would allow her to represent an identified class.

{¶2} We find merit to the appeal and reverse the trial court's judgment.

I. Facts and Procedural History

{¶3} In July 2005, Cleveland enacted Cleveland Codified Ordinances ("C.C.O.") 413.031, which authorized the use of automated cameras to impose civil penalties on individuals who exceed the posted speed limit or cross a marked stop line at a steady red light. The ordinance provided that

> [a]t each site of a red light or fixed speed camera, the Director of Public Works shall cause signs to be posted to apprise ordinarily observant motorists that they are approaching an area where an automated camera is monitoring for red light or speed violators.

Id. The ordinance also stated that "[m]obile speed units shall be plainly marked vehicles." C.C.O. 413.031(g).

{¶4} On October 3, 2013, a mobile speed unit recorded a traffic violation committed by the plaintiffs' class representative, Allyson Eighmey ("Eighmey"), at the intersection of Detroit Avenue and West 32nd Street in Cleveland. She later received the notice of violation in the mail and promptly paid her ticket on October 27, 2013.

{¶5} Four months later, in February 2014, Eighmey filed a class action complaint against Cleveland, alleging that the mobile unit that recorded her traffic violation failed to comply with the notice requirements of C.C.O. 413.031(g) because the unit contained "no distinguishable markings whatsoever." (Class Action Complaint ¶ 10.) Eighmey's traffic ticket specified the manner in which it could be appealed as required by C.C.O. 413.031(h). C.C.O. 413.031(k), which created the appeal procedure, states, in relevant part:

> A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the ticket. The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the ticket and shall be considered an admission.
>
> Appeals shall be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. At hearings, the strict rules of evidence applicable to courts of law shall not apply. The contents of the ticket shall constitute a prima facie evidence of the facts it contains. Liability may be found by the hearing examiner based upon a preponderance of the evidence. If a finding of liability is appealed, the record of the case shall include the order of the Parking Violations Bureau, the ticket, other evidence submitted by the respondent or the City of Cleveland, and a transcript or record of the hearing, in a written or electronic form acceptable to the court to which the case is appealed.

{¶6} In the complaint, Eighmey alleged that challenging the citation would have been "futile because the City's own failure to comply with the ordinance is not one of the enumerated defenses to a notice of liability under C.C.O. 413.031." (Class Action Complaint ¶ 15.) Eighmey also asserted that the class of plaintiffs wrongfully cited by

unmarked mobile units was "so numerous that joinder of all members is impracticable." (Class Action Complaint ¶ 25.)

{¶7} Eighmey filed a motion in support of class certification. The city opposed the motion, arguing, in part, that Eighmey lacked standing to represent the class because she failed to exhaust her administrative remedies by appealing the citation as provided in the ordinance. The city also argued that Eighmey's claims were barred by res judicata because she did not contest the violation and paid her ticket.

{¶8} The trial court granted Eighmey's motion for class certification. In a written opinion, the court expressly found that Eighmey met all the requirements for class certification set forth in Civ.R. 23 and certified the following class:

> All persons (a) issued tickets or notices of Liability by a "mobile speed unit" under Cleveland Codified ordinance[s] § 413.031 et seq., (b) during the period September 25, 2013 to December 26, 2016, (c) which were not warnings, and (d) upon which there was not a finding of no liability pursuant to § 413.031(k).

The opinion did not mention the city's arguments regarding Eighmey's inability to represent the class due to her alleged failure to exhaust administrative remedies, res judicata, or standing. Rather, the court found that Eighmey's claims were typical of the class because "[t]here [wa]s no express conflict between the interests of named class representative, Allyson Eighmey, and the interests of putative class members." Cleveland now appeals the order of class certification.

II. Law and Analysis

{¶9} In the city's sole assigned error, it argues the trial court erred in granting class certification because Eighmey, the purported class representative, fails to meet the typicality requirement of Civ.R. 23(A) that would allow her to represent the class.

{¶10} To be eligible for class certification pursuant to Civ.R. 23, a plaintiff must establish that (1) an identifiable and unambiguous class exists, (2) the named representative of the class is a class member, (3) the class is so numerous that joinder of all members of the class is impractical, (4) there are questions of law or fact that are common to the class ("commonality"), (5) the claims or defenses of the representative plaintiff or plaintiffs are typical of the claims and defenses of the members of the class ("typicality"), (6) the representative parties fairly and adequately protect the interests of the class ("adequacy"), and (7) one of the three requirements of Civ.R. 23(B) is satisfied. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 6.

{¶11} Failure to satisfy one of the Civ.R. 23(A) requirements is fatal to a request for class certification. *Musial Offices, Ltd. v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 99781, 2014-Ohio-602, ¶ 19. The party seeking class certification bears the burden of demonstrating that the requirements of Civ.R. 23(A) and (B) are met. *Id.*

{¶12} The Ohio Supreme Court has held that "[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion." *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. We apply the abuse of discretion

standard in reviewing class action determinations to give deference to "the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Id*. at 201.

{¶13} Nevertheless, "the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). The trial court may only certify a class if it finds, after a rigorous analysis, that the moving party has demonstrated that all the factual and legal prerequisites to class certification have been satisfied. *Id.*

{¶14} Cleveland argues the trial court erred in granting class certification because Eighmey, the class representative, fails to meet the typicality requirement of Civ.R. 23(A). Cleveland does not challenge any of the other requirements of Civ.R. 23(A).

{¶15} A plaintiff's claim is typical "'if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 485, 727 N.E.2d 1265 (2000), quoting 1 Newberg, *Class Actions*, Section 3.13, 3-74 to 3-77 (3d Ed.1992). "'When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.'" *Id.* at 485, quoting 1 Newberg, *Class Actions*, Section 3.13, 3-74 to 3-77. The typicality requirement is met where "there is no express

conflict between the class representatives and the class." *Gattozzi v. Sheehan*, 8th Dist. Cuyahoga No. 103246, 2016-Ohio-5230, ¶ 17.

{¶16} Cleveland argues that Eighmey lacks standing and cannot legally represent the class because (1) she failed to exhaust administrative remedies, and (2) her claims are barred by res judicata. However, unique defenses applicable to the class representative will not destroy typicality of representation unless it is "so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members." *Hamilton* at 78, quoting 5 Moore, *Federal Practice*, Section 23.25[4][b][iv], at 23-126, Section 23.24[6], at 23-98.

{¶17} In *Baughman*, the Ohio Supreme Court held that "'defenses asserted against a class representative should not make his or her claims atypical. Defenses may affect the individual's ultimate right to recover, but they do not affect the presentation of the case on the liability issues for the plaintiff class.'" *Baughman* at 486, quoting 1 Newberg, *Newberg on Class Actions*, Section 3.16, at 3-90 to 3-93. The doctrines of res judicata and failure to exhaust administrative remedies are affirmative defenses that relate to the merits of Eighmey's claims. *Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 30, *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, ¶ 11.

{¶18} These defenses may or may not destroy the typicality of Eighmey's class representation depending on how central they are to the litigation. *See Hamilton* at 78. However, as the Ohio Supreme Court explained in *Lycan*, standing is an entirely different

matter because rather than raising questions about the merits of the plaintiff's claims, it addresses justiciability. *Lycan* at ¶ 26. Standing is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit. *Tate v. Garfield Hts.*, 8th Dist. Cuyahoga No. 99099, 2013-Ohio-2204, ¶ 11; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 22.

{¶19} The doctrine of standing requires a court to satisfy itself that a plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction. *Id*.; *see also Ohio Pyro, Inc. v. Ohio Dept. Of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550 (a party must have standing to be entitled to have a court decide the merits of the dispute).

{¶20} Traditional standing principles require the plaintiff to show that she has suffered (1) an injury that is, (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief. *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is not sufficient for the individual to have a general interest in the subject matter of the action. To have standing, the plaintiff must be the party who will be directly benefitted or injured by the outcome of the action. *Tate* at ¶ 12.

{¶21} The fact that a plaintiff seeks to bring a class action does not change the standing requirements. *Hamilton*, 82 Ohio St.3d 67 at 74, 694 N.E.2d 442 (a class representative must have "proper standing"). Individual standing is a threshold

requirement of all actions, including class actions. *San Allen, Inc. v. Buehrer*, 8th Dist. Cuyahoga No. 94651, 2011-Ohio-1676, ¶ 11, citing *Hamilton* at 74.

{¶22} According to the complaint, Eighmey was injured by having to pay Cleveland a fine that was wrongfully generated by an unmarked mobile vehicle. However, Eighmey admitted in her complaint that she voluntarily paid the ticket. (Complaint ¶ 14.) C.C.O. 413.031(k) provides, in relevant part, that "[t]he failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the ticket." Thus, by paying her ticket, Eighmey waived her right to contest the ticket and she is barred from any recovery. She will neither benefit from, nor be harmed by, the litigation of other potential class members who may pursue viable claims. Eighmey cannot receive redress from this litigation and, therefore, lacks standing and is unable to represent the class.

{¶23} Finally, Eighmey argues her claims are not barred for failing to exhaust her administrative remedies because an appeal through the administrative process would have been futile. Indeed, parties are not required to pursue administrative remedies "'if doing so would be a futile or vain act.'" *Schneider v. Cuyahoga Cty. Bd. of Cty. Commrs*., 8th Dist. Cuyahoga No. 103647, 2017-Ohio-1278, ¶ 20, quoting *State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 18-24.

{¶24} In *Teamsters*, the Ohio Supreme Court explained that "a 'vain act' occurs when an administrative body lacks the authority to grant the relief sought," and that "a

vain act does not entail the petitioner's probability of receiving the remedy." *Id*. *Teamsters* at ¶ 24. Eighmey contends an administrative appeal would have been futile in her case because C.C.O. 413.031(k), which lists affirmative defenses, did not expressly provide the right to challenge citations issued from unmarked mobile speed units. Therefore, she argues, the Parking Violations Bureau, which hears such appeals, lacked authority to excuse her violation even if it were issued unlawfully.

{¶25} However, the defenses listed in C.C.O. 413.031(k) are non-exhaustive. The ordinance specifically states that mobile speed units that issue violations "shall be plainly marked vehicles." C.C.O. 413.031(g). Just as motorists are required to comply with local ordinances, so too must the Cleveland Director of Public Safety and other city officials, who implement Cleveland's civil enforcement system. We see no reason why the city's failure to abide by the law could not stand as a valid defense to an unlawfully issued traffic citation under the ordinance in an appeal before the Parking Violations Bureau.

{¶26} Moreover, the Ohio Supreme Court has held that the administrative proceedings set forth in C.C.O. 413.031 and R.C. 2506.01, which authorizes appeals of administrative decisions to the common pleas court, provide an adequate remedy at law to aggrieved motorists in receipt of civil traffic violations. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 24. *See also Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, ¶ 28 (citing *Scott* for the proposition that administrative proceedings established to challenge civil traffic citations

generated by automated traffic cameras provide an adequate remedy at law.). Therefore, because an appeal of Eighmey's civil traffic violation would not have been futile, her failure to pursue the appeal bars her from representing the class.

{¶27} Accordingly, the sole assignment of error is sustained.

{¶28} The trial court's judgment is reversed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
MARY J. BOYLE, J., CONCUR