Notice Pleading Problem
Adel Guirguis v. Movers

Adel Guirguis brought suit in federal district court against his former employer, Movers Specialty Services, Inc. He alleged violations of Title VII of the Civil Rights Act of 1964. Guirguis, who is of Arab descent and a native of Egypt, contends that Movers terminated his employment on the basis of his national origin.

Paragraphs seven through nine of the complaint contain the entirety of Guigruis's relevant factual allegations. They read:

7. Plaintiff began working for the defendant in 2021 in the accounting department. Plaintiff was employed by the defendant from that day until February 15, 2023.

8. Plaintiff is foreign born, is an Arab, having been born in Egypt on June 20, 1967.

9. On February 15, 2023, plaintiff was terminated by the defendant in violation of his rights due to his national origin, having been born in Egypt.

Movers sought dismissal, charging that his complaint failed to state a claim upon which relief could be granted. How should the trial court rule?

Notice Pleading Problem: Negligent Entrustment

On September 5, 2023, Emi Yamanoi and Olivia Denton went to a bar in San Antonio where Olivia drank alcohol to excess. Emi and Olivia left the bar at about 2:00 a.m. Olivia drove a vehicle she had rented from HEAD, Inc. Olivia lost control of the vehicle and collided with two light poles. Emi, who was a passenger in the car, died from the collision.

This was Olivia's third alcohol-related accident in three years. No one had been injured in either of the prior accidents. After the first accident she was charged with driving under the influence of alcohol. She pleaded guilty and a state criminal court judge in Texas gave her a suspended sentence. Her license remained valid and she could continue to drive. In the second accident, she was again charged with driving under the influence of alcohol and again plead guilty, for which she paid a $1,000 fine and was put on probation for one year but her license remained valid and she could continue to drive. When the September 5, 2023 accident happened, she was in the middle of her probationary period.

Emi's mother, Pikari Yamanoi, sued HEAD in the United States District Court for the Western District of Texas for negligent entrustment, a civil cause of action recognized under Texas state law. (For purposes of this question, you can assume there was a valid basis for subject matter jurisdiction, personal jurisdiction, and venue.) Here are some of Pikari's allegations:

> Paragraph 5: "At the time of the accident, Emi and Olivia were in a vehicle that Olivia was driving."
>
> Paragraph 6: "The vehicle Olivia drove was rented from HEAD."
>
> Paragraph 7: "HEAD is liable because it entrusted its vehicle to Olivia, whom HEAD knew or should have known to be reckless because of her prior DUIs."
>
> Paragraph 8: "Olivia was the negligent driver who was the cause of the collision and a proximate cause of Emi's injuries. Therefore, HEAD is liable for negligent entrustment of its vehicle to Olivia."

A plaintiff asserting a negligent entrustment claim must show: (1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless, (4) that the driver was negligent on the occasion in question and (5) that the driver's negligence proximately caused the accident. *See Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987). HEAD moved to dismiss under Rule 12(b)(6).

1. For this question, assume that under Texas law a rental car agency has no duty to check the prospective renter's driving record for DUI convictions. Its duty is to confirm that the driver's license presented to it is valid. Analyze how the court should rule on HEAD's motion.

2. For this question, assume that under Texas law a rental car company has a duty to check the prospective renter's driving record for DUI convictions but must use reasonable discretion in deciding whether to rent to the prospective driver. Analyze how the court should rule on HEAD's motion.

3. For this question, make the same assumption as in Question #2 but also assume these new facts: The rental car company attaches to its motion a copy of the rental agreement and the agreement lists someone else (Grover Norquist) as the sole authorized driver. In its motion to dismiss, HEAD asserts that Grover and Olivia went to the rental place together but that only Grover's name appears on the rental agreement and that only Grover was authorized by the agreement to drive the car. Analyze how the court should rule on HEAD's motion.

106 S.Ct. 2548
Supreme Court of the United States
CELOTEX CORPORATION, Petitioner
v.
Myrtle Nell CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased.
No. 85–198.
|
Argued April 1, 1986.
|
Decided June 25, 1986.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. ——. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, *post,* p. ——. STEVENS, J., filed a dissenting opinion, *post,* p. ——.

Opinion

Justice REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.,* 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products,* 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).[1] We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing

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asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product ... was the proximate cause of the injuries alleged within the jurisdictional ***320** limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970–1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Respondent ***321** appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative

evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.,* at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.,* at 166, 756 F.2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, ***323** there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to

isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party ... to show initially the absence of a genuine issue concerning any material fact." *Id.,* at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes,* the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of

a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes,* to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to ***326** *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C., at 167–168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28–29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's

burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless

required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

[2] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], pp. 56–466; 10A Wright, Miller & Kane § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, ——, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–159, 90 S.Ct. 1598, 1608–09, 26 L.Ed.2d 142 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright, Miller & Kane § 2721, p. 44; see, *e.g.*, *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (CA1 1983); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...." 723 F.2d, at 258.

[3] Once the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the

moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, Miller & Kane § 2727, pp. 138–143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e.g., First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

134 S.Ct. 1861
Supreme Court of the United States
Robert R. TOLAN
v.
Jeffrey Wayne COTTON.
No. 13–551.
|
May 5, 2014.

PER CURIAM.

During the early morning hours of New Year's Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. 713 F.3d 299 (2013). In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

I

A

The following facts, which we view in the light most favorable to Tolan, are taken from the record evidence and the opinions below. At around 2:00 on the morning of December 31, 2008, John Edwards, a police officer, was on patrol in Bellaire, Texas, when he noticed a black Nissan sport utility vehicle turning quickly onto a residential street. The officer watched the vehicle park on the side of the street in front of a house. Two men exited: Tolan and his cousin, Anthony Cooper.

Edwards attempted to enter the license plate number of the vehicle into a computer in his squad car. But he keyed an incorrect character; instead of entering plate number 696BGK, he entered 695BGK. That incorrect number matched a stolen vehicle of the

same color and make. This match caused the squad car's computer to send an automatic message to other police units, informing them that Edwards had found a stolen vehicle.

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, "That's not true." Record 1295. And Tolan explained, "That's my car." *Ibid.* Tolan then complied with the officer's demand to lie face-down on the home's front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan's parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan's father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained facedown.

Edwards told Tolan's parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan's father identified Tolan as his son, and Tolan's mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan's father explained, with his hands in the air, "[T]his is my nephew. This is my son. We live here. This is my house." *Id.*, at 2059. Tolan's mother similarly offered, "[S]ir this is a big mistake. This car is not stolen.... That's our car." *Id.*, at 2075.

While Tolan and Cooper continued to lie on the ground in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had exited a stolen vehicle. Tolan's mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family's garage door. In response to Cotton's order, Tolan's mother asked, "[A]re you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before." *Id.*, at 2077; see also *id.*, at 1465.

The parties disagree as to what happened next. Tolan's mother and Cooper testified during Cotton's criminal trial[1] that Cotton grabbed her arm and slammed her against the garage door with such force that she fell to the ground. *Id.*, at 2035, 2078–2080. Tolan similarly testified that Cotton pushed his mother against the garage door. *Id.*, at 2479. In addition, Tolan offered testimony from his mother and photographic evidence to demonstrate that Cotton used enough force to leave bruises on her arms and back that lasted for days. *Id.*, at 2078–2079, 2089–2091. By contrast, Cotton testified in his deposition that when he was escorting the mother to the garage, she flipped her arm up and told him to get his hands off her. *Id.*, at 1043. He also testified that he did not know whether he left bruises but believed that he had not. *Id.*, at 1044.

The parties also dispute the manner in which Tolan responded. Tolan testified in his deposition and during the criminal trial that upon seeing his mother being pushed, *id.,* at 1249, he rose to his knees, *id.,* at 1928. Edwards and Cotton testified that Tolan rose to his feet. *Id.,* at 1051–1052, 1121.

Both parties agree that Tolan then exclaimed, from roughly 15 to 20 feet away, 713 F.3d, at 303, "[G]et your fucking hands off my mom." Record 1928. The parties also agree that Cotton then drew his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. *Id.,* at 2019, 2080. One of the bullets entered Tolan's chest, collapsing his right lung and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.

B

In May 2009, Cooper, Tolan, and Tolan's parents filed this suit in the Southern District of Texas, alleging claims under Rev. Stat. § 1979, 42 U.S.C. § 1983. Tolan claimed, among other things, that Cotton had used excessive force against him in violation of the Fourth Amendment.[2] After discovery, Cotton moved for summary judgment, arguing that the doctrine of qualified immunity barred the suit. That doctrine immunizes government officials from damages suits unless their conduct has violated a clearly established right.

The District Court granted summary judgment to Cotton. 854 F.Supp.2d 444 (S.D.Tex.2012). It reasoned that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment. *Id.,* at 477–478. The Fifth Circuit affirmed, but on a different basis. 713 F.3d 299. It declined to decide whether Cotton's actions violated the Fourth Amendment. Instead, it held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. *Id.,* at 306.

In reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was ... clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.' " *Id.,* at 306 (quoting *Deville v. Marcantel,* 567 F.3d 156, 167 (C.A.5 2009)). The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because "an objectively-reasonable officer in Sergeant Cotton's position could have ... believed" that Tolan "presented an 'immediate threat to the safety of the officers.' " 713 F.3d, at 307.[3] in support of this conclusion, the cOURT RELIED

ON THE FOLLOWING facts: the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba [l] threa[t]." *Ibid.* Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, *id.*, at 305, and that Cotton therefore could reasonably have feared for his life, *id.*, at 307. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan.

The Fifth Circuit denied rehearing en banc. 538 Fed.Appx. 374 (2013). Three judges voted to grant rehearing. Judge Dennis filed a dissent, contending that the panel opinion "fail[ed] to address evidence that, when viewed in the light most favorable to the plaintiff, creates genuine issues of material fact as to whether an objective officer in Cotton's position could have reasonably and objectively believed that [Tolan] posed an immediate, significant threat of substantial injury to him." *Id.*, at 377.

II

A

In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a [federal] right [.]" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The inquiry into whether this right was violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Tennessee v. Garner,* 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); see *Graham, supra,* at 396, 109 S.Ct. 1865.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Ibid.* "[T]he salient question ... is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.,* at 741, 122 S.Ct. 2508.

Courts have discretion to decide the order in which to engage these two prongs. *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). But under either

prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen,* 543 U.S. 194, 195, n. 2, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*); *Saucier, supra,* at 201, 121 S.Ct. 2151; *Hope, supra,* at 733, n. 1, 122 S.Ct. 2508. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S., at 249, 106 S.Ct. 2505. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); see also *Anderson, supra,* at 255, 106 S.Ct. 2505

Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier, supra,* at 201, 121 S.Ct. 2151; see also *Anderson v. Creighton,* 483 U.S. 635, 640–641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau, supra,* at 195, 198, 125 S.Ct. 596 (inquiring as to whether conduct violated clearly established law " 'in light of the specific context of the case' " and construing "facts ... in a light most favorable to" the nonmovant).

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson,* 477 U.S., at 249, 106 S.Ct. 2505.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." 713 F.3d, at 307. The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was " 'fairly dark,' " and lit by a gas lamp that was " 'decorative.' " *Id.,* at 302. In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." Record 1552. He said that it was not. *Ibid.* Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, *id.,* at 2496,

and Cotton acknowledged that there were two motion-activated lights in front of the house. *Id.,* at 1034. And Tolan confirmed that at the time of the shooting, he was "not in darkness." *Id.,* at 2498–2499.

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." 713 F.3d, at 307 (internal quotation marks omitted). But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. Record 1032–1033. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." *Id.,* at 2075, 2077.

Third, the Court concluded that Tolan was "shouting," 713 F.3d, at 306, 308, and "verbally threatening" the officer, *id.,* at 307, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." Record 1928. But Tolan testified that he "was not screaming." *Id.,* at 2544. And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Cf. *United States v. White,* 258 F.3d 374, 383 (C.A.5 2001) ("A threat imports '[a] communicated intent to inflict physical or other harm' " (quoting Black's Law Dictionary 1480 (6th ed. 1990))); *Morris v. Noe,* 672 F.3d 1185, 1196 (C.A.10 2012) (inferring that the words "Why was you talking to Mama that way" did not constitute an "overt threa[t]"). Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. Record 2078–2079. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F.3d, at 305; see also *id.,* at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam [ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Record 1121–1122. Tolan testified at trial, however, that he was on his knees when Cotton shot him, *id.,* at 1928, a fact corroborated by his mother, *id.,* at 2081. Tolan also testified in his deposition that he "wasn't going anywhere," *id.,* at 2502, and emphasized that he did not

"jump up," *id.*, at 2544.

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag v. MacDougall* 454 U.S. 364, 366, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. *Brosseau,* 543 U.S., at 197–198, 125 S.Ct. 596 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); see also *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.,* 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per curiam*) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

The petition for certiorari and the NAACP Legal Defense and Educational Fund's motion to file an *amicus curiae* brief are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Oral Examination Questions: Pleading Sufficiency and Summary Judgment

Presentation order for groups of four:	Presentation order for groups of three:
Round 1 Question 1 – Student A Question 2 – Student B Question 3 – Student C Question 4 – Student D	**Round 1** Question 1 – Student A Question 2 – Student B Question 3&4 - Student C
Round 2 Question 1 – Student D Question 2 – Student C Question 3 – Student B Question 4 – Student A	**Round 2** Question 1 – Student C Question 2 – Student A Question 3&4 – Student B

1. Describe your understanding of how pleading sufficiency standards have evolved since 1938. After doing so, discuss what proponents like about the changes and what critics find concerning. Maximum time to answer: 4 minutes.

2. With as much detail as you can, describe your understanding of the two steps in a modern pleading sufficiency analysis. Maximum time to answer: 4 minutes.

3. In one passage in *Iqbal*, the Court describes the "plausibility standard as not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." In another passage, the Court rejected as implausible the plaintiff's allegations in paragraphs 47 and 69 of the complaint, writing: "Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose." Do you see any tension between these two descriptions of plausibility? If so, which one seems more workable to you as a pleading sufficiency standard? Maximum time to answer: 3 minutes.

4. Finally, drawing on the material we covered for today's class, describe your understanding of the difference between a motion to dismiss under Rule 12(b)(6) and a motion for summary judgment under Rule 56. Maximum time to answer: 2 minutes.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Domico Madrigal, Plaintiff, v. Kerry Inc., a foreign corporation, d/b/a Kerry Specialty Ingredients, Defendant.	Court File No. 05-CV-01673 JNE/JGL DEFENDANT'S ANSWER TO THE COMPLAINT

Kerry Inc. ("Kerry"), by its attorneys, hereby answers Plaintiff's Complaint.

1. Kerry admits the allegations in paragraph 1.

2. Kerry denies that "Kerry Specialty Ingredients" has been registered as an assumed name or that Kerry has not registered with the Minnesota Secretary of State as a foreign corporation. Kerry is without knowledge or information sufficient to form belief as to truth of the allegation that it is conducting business "throughout" the State of Minnesota in that such terminology is unclear. Kerry admits it does business in Minnesota and admits the remaining allegations of paragraph 2.

3. Kerry denies that Plaintiff became employed by it at its Albert Lea facility on or about February 4, 1984. Kerry admits that Plaintiff was employed by Freeborn Foods on or about that date. Kerry is without knowledge or information sufficient to form a belief as to the position in which Freeborn Foods originally employed Plaintiff. Kerry admits that when it purchased the Albert Lea facility from Armour Foods, Inc. in October, 2000, it hired Plaintiff.

4. Kerry admits that during the time Plaintiff was employed by it he performed his job in a manner sufficient to retain his position. Kerry is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 4.

5. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 in that the "job" referenced is not identified. Kerry admits that prior to approximately November 22, 2004 Plaintiff could perform the essential functions of the jobs he held with or without reasonable accommodation.

6. Kerry admits that records in its possession apparently generated during Plaintiff's employment with Freeborn Foods indicate that on or about June 22, 1989 Plaintiff injured the L-5 disc, that he sought and received workers' compensation benefits, had back surgery, and returned to work at Freeborn Foods under medical work restrictions. Kerry is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6.

7. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

8. Kerry denies that Plaintiff was terminated. Kerry admits that until Plaintiff's layoff on or about November 22, 2004, he worked in the "Intake" position referenced.

9. Kerry admits that in September 2004, in an economy measure, Kerry eliminated the job position previously held by Plaintiff, and at least one other job position held by other persons. Kerry admits that, pursuant to the requirements of the applicable collective bargaining agreement with Plaintiff's union, it posted a Notice of Job Openings for a "Janitor/Intake Operator." This new position combined the Janitor and Intake Operator jobs. The intake operator component of the position included a requirement, as an essential function of the job, that incumbents, upon occasion, perform lifting of as much as 55 lbs. Kerry admits further that, following negotiations with Plaintiff's union, on or about December 17, 2004 it modified the

41. Kerry denies the allegations of paragraph 41.

AFFIRMATIVE DEFENSES

1 To the extent Plaintiff's Complaint alleges injuries covered by the Minnesota Workers' Compensation Act (Minn. Stat. Section 176 et seq.), he is barred by the exclusivity provisions of that Act (Minn. Stat. Section 176.031).

2 Plaintiff's prayer for back pay and/or for monetary damages is barred in whole or in part by his failure to mitigate his damages.

3 To the extent Minnesota law does not allow trial by jury, Plaintiff's request for a jury trial should be stricken.

4 Plaintiff's claim is barred in whole or in part since, pursuant to the applicable Collective Bargaining Agreement with his union, on or about December 17, 2004, he bid on two open positions which he apparently believed were within his medical restrictions, but did not receive either position because he was not the senior bidder.

WHEREFORE, Defendant Kerry, Inc., prays that Plaintiff's Complaint be dismissed with prejudice, and that Kerry be awarded its costs, attorneys' fees, and other relief the court deems fit.

DATED: August 12, 2005

KERRY INC. d/b/a KERRY SPECIALTY INGREDIENTS, Defendant

s/ John J. McDonald, Jr.
John J. McDonald, Jr. (#136815)
Bradley J. Lindeman (#0298116)
MEAGHER & GEER P.L.L.P.
33 South Sixth Street, Suite 4200
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(612) 338-0661

and

Exercise On Timing and Waiver for Answer and Pre-Answer Defenses

Assume the following facts:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, you, Dugan's lawyer, file a pre-answer motion in which you assert the defense that process was not properly served. About a week later, you realize that Dugan has a potentially viable defense of lack of personal jurisdiction he could have asserted. You also conclude that another potential party, Trudy, is arguably an indispensable party who should be in the case. You have not yet filed an answer on Dugan's behalf and the court has not yet ruled on the motion you filed. Questions:

1. Can you assert the defense of lack of personal jurisdiction in another pre answer motion?

2. Can you assert the defense of failure to join an indispensable party in another pre answer motion?

3. Could you instead assert either defense in the answer?

4. Would it matter whether, at the time you filed the pre answer motion to dismiss for insufficient service that neither you nor your client were aware of the facts on which the additional defenses would be based?

Now change the facts, above, as follows:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file a pre-answer motion in which you assert the defense that venue is improper. When that motion is denied, you file an answer on Dugan's behalf. Six months later, you realize that there is no subject matter jurisdiction. Questions:

1. Can you assert this defense in a motion to dismiss? If so, what specific rule would you use?

2. What if you didn't realize the problem with subject matter until after the case had gone to trial and a verdict was entered against Dugan? Could you make this argument for the first time on appeal?

Now change the facts, above, as follows:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file an answer. A month later, however, you realize that there is a defense of insufficiency of service of process and another defense of failure to state a claim on which relief can be granted. Are you allowed to raise either of these defenses now? If so, how would you do so?

2014 WL 406497
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

ON TRACK INNOVATIONS LTD., Plaintiff,
v.
T–MOBILE USA, INC., Defendant.
T–Mobile USA, Inc., Counter Claimant,
v.
On Track Innovations Ltd., Counter Defendant.

No. 12 Civ. 2224(AJN)(JCF).
|
Feb. 3, 2014.

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV, United States Magistrate Judge.

***1** Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, the plaintiff in this patent infringement action, On–Track Innovations ("OTI"), seeks leave to amend its complaint to include claims of active inducement of patent infringement under 35 U.S.C. § 271(b). (On Track Innovations Ltd.'s Memorandum in Support of its Motion for Leave to File Amended Complaint ("Pl.Memo.")). The defendant, T–Mobile USA, Inc. ("T–Mobile"), opposes the motion, arguing that it is untimely, prejudicial, made in bad faith, and ultimately futile. (T–Mobile's Opposition to OTI's Motion for Leave to File Amended Complaint ("Def.Memo.")). For the following reasons, the motion is granted.

Background

This action arises from a patent dispute involving new cellular telephone technology "employing both contact and contactless modes of communication, such as so-called 'hybrid' smart cards." (Memorandum and Order dated June 20, 2013 at 3). Certain cell phones are equipped with a feature—Near Field Communications ("NFC")—enabling them to establish peer-to-peer radio communications with nearby devices. NFC-capable phones can communicate with other electronic devices in their proximity without needing physical contact; for instance, the user of an NFC-capable cell phone can turn on his nearby stereo through his cell phone. OTI is the owner of U.S. Patent No. 6,045,043 ("the '043 Patent"), which "deals with connecting a microprocessor with both the contact and contactless modes of communication through separate, dedicated lines of connection," obviating the need for a switching device between the two. (Order at 3).

The plaintiff filed its original complaint on March 26, 2012, claiming that T–Mobile's NFC-capable devices directly infringe its patent. In October 2012, T–Mobile did a pilot launch of the ISIS Mobile Wallet, a method of contactless payment using NFC-capable phones in conjunction with enhanced SIM cards, in two major U.S. cities. (Def. Memo. at 4; Declaration of Ellisen S. Turner dated Dec. 23, 2013, Exh. C). The national launch of T–Mobile's NFC program occurred in November 2013. (Pl. Memo. at 1–3; ISIS Mobile Wallet FAQ, attached as Exh. B to Amended Complaint, at 29). T–Mobile subscribers were informed, through T–Mobile's website, that they could visit T–Mobile stores to receive Advanced SIM cards for use in their NFC-capable cellular phones. (Pl. Memo. at 1–3; ISIS Mobile Wallet FAQ at 29). OTI now seeks to amend its complaint to allege that, by inviting its customers to obtain an Advanced SIM card for insertion into an NFC-capable cell phone, T–Mobile was "actively inducing infringement of the patent." (Pl. Memo. at 1).

Discussion

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a pleading should be freely granted "when justice so requires." Fed.R.Civ.P. 15(a)(2); *see also* *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Aetna Casualty & Surety Co. v. Aniero Concrete Co.,* 404 F.3d 566, 603–04 (2d Cir.2005); *Carrion v. Singh,* No. 12 CV 0360, 2013 WL 639040, at *11 (E.D.N.Y. Feb.21, 2013). Under this liberal standard, motions to amend should be denied only for reasons of undue delay, bad faith or dilatory motive, undue prejudice to the non-moving party, or futility. *See* *Burch v. Pioneer Credit Recovery, Inc.,* 551 F.3d 122, 126 (2d Cir.2008) (citing *Foman,* 371 U.S. at 182); *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 200 (2d Cir.2007); *In re Alcon Shareholder Litigation,* 719 F.Supp.2d 280, 281–82 (S.D.N.Y.2010). The same standard applies when the party seeks to supplement the complaint with events that happened after the date of the original pleading. *See* Fed.R.Civ.P. 15(d); *In re American International Group, Inc. Securities Litigation,* No. 04 Civ. 8141, 2008 WL 2795141, at *3 (S.D.N.Y. July 18, 2008) (noting that pleading is technically "supplemental pleading" but that the standard of Rule 15(a) governs). The court has broad discretion over such motions. *See* *McCarthy,* 482 F.3d at 200; *Biosafe–One, Inc. v. Hawks,* 639 F.Supp.2d 358, 370 (S.D.N.Y.2009).

***2** Generally, "[w]hen deciding issues in a patent case, a district court applies the law of the circuit in which it sits to nonpatent issues and the law of the Federal Circuit to issues of substantive patent law." *Paone v. Microsoft Corp.,* 881 F.Supp.2d 386, 393–94 (E.D.N.Y.2012) (internal quotation marks omitted); *see also* *In re Bill of Lading Transmission and Processing System Patent Litigation,* 681 F.3d 1323, 1331 (Fed.Cir.2012) (applicable law of regional circuit is applied to motions to dismiss for failure to state a claim in patent cases).

A. *Delay*

In the Second Circuit, a court may deny a motion to amend "where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice other parties." *Grace v. Rosenstock,* 228 F.3d 40, 53–54 (2d Cir.2000) (internal quotation marks omitted); *accord State Farm Mutual Automobile Insurance Co. v. Grafman,* No. 04 CV 2609, 2007 WL 7704666, at *3 (E.D.N.Y. May 22, 2007). However, "[m]ere delay, ... absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *Block v. First Blood Associates,* 988 F.2d 344, 350 (2d Cir.1993) (internal quotation marks omitted); *see also Rotter v. Leahy,* 93 F.Supp.2d 487, 497 (S.D.N.Y.2000) ("Typically, the moving party's delay, standing alone, is not sufficient reason to foreclose amendment.").

The plaintiff seeks to add a new claim twenty months after the filing of its original complaint. However, this new allegation centers on T–Mobile's November 2013 national launch of its NFC program, rather than on activities taking place at the time the action was commenced. T–Mobile argues that OTI was aware of similar activities—namely, its October 2012 pilot launch of the NFC program—at least one year earlier, and that this constitutes undue delay. (Def. Memo. at 3–5). However, as far as OTI knew at the time of the pilot launch, the only suggestions that customers insert Advanced SIM cards into NFC-capable phones came from an independent blogger and an ISIS press release, not from T–Mobile, and thus OTI did not then possess facts that could have supported an induced infringement claim against T–Mobile. According to OTI, the national launch was the first time that T–Mobile itself invited subscribers to obtain new Advanced SIM cards for their NFC cellular phones. (On Track Innovations LTD.'s Reply in Support of its Motion for Leave to File Amended Complaint ("Pl.Reply") at 3). Under these circumstances, there is no undue delay. *See TNS Media Research, LLC v. TRA Global, Inc.,* No. 11 Civ. 4039, 2012 WL 2052679, at *1 (S.D.N.Y. June 4, 2012) (allowing party to add counterclaim defendants where earlier suspicions were subsequently borne out through discovery); *Optigen, LLC v. International Genetics, Inc.,* 777 F.Supp.2d 390, 400 (N.D.N.Y.2011) (allowing amendment where "the new allegations, including those giving rise to the newly asserted cause of action, were facts of which Plaintiff did not become aware until some point during discovery"). Indeed, even if OTI had not offered a satisfactory explanation for the one-year delay after the October 2012 pilot launch, courts have allowed amendment after much longer periods of delay. *See, e.g., Commander Oil Corp. v. Barlo Equipment Corp.,* 215 F.3d 321, 333 (2d Cir.2000) (no abuse of discretion in grant of leave to amend after seven year delay, in absence of prejudice); *Rachman Bag Co. v. Liberty Mutual Insurance Co.,* 46 F.3d 230, 235 (2d Cir.1995) (leave to amend properly granted after four-year delay); *Block,* 988 F.2d at 350–51 (amendment allowed four years after complaint filed).

B. *Prejudice*

***3** "[P]rejudice alone is insufficient to justify a denial of leave to amend; rather the necessary showing is *'undue* prejudice to the opposing party.' " *A.V. by Versace, Inc. v. Gianni Versace S .p.A.,* 87 F.Supp.2d 281, 299 (S.D.N.Y.2000) (emphasis in original) (quoting *Foman,* 371 U.S. at 182). In deciding whether undue prejudice exists, courts should consider whether the new claim would " '(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.' " *Monahan v. New York City Department of Corrections,* 214 F.3d 275, 284 (2d Cir.2000) (quoting *Block,* 988 F.2d at 350); *Zoll v. Jordache Enterprises Inc.,* No. 01 Civ. 1339, 2002 WL 485733, at *1 (S.D.N.Y. March 29, 2002). This "inquiry involves a balancing process," weighing any potential prejudice to the opposing party against the prejudice that the moving party would experience if the amendment were denied. *Oneida Indian Nation of New York v. County of Oneida,* 199 F.R.D. 61, 77 (N.D.N.Y.2000).

T–Mobile claims that introducing a theory of induced infringement after fact discovery has closed prevents them from obtaining relevant evidence for their defense. T–Mobile contends that without previous notice of induced infringement claims, it had no reason to seek an opinion of counsel letter, which the Federal Circuit recognizes as probative of lack of intent. *See Bettcher Industries, Inc. v. Bunzl USA, Inc.,* 661 F.3d 629, 649 (Fed.Cir.2011) (finding opinion of counsel regarding non-infringement "admissible, at least with respect to [defendant]'s state of mind and its bearing on indirect infringement"). Because expert discovery has not yet closed, there is no reason that this evidence cannot now be obtained.

T–Mobile's prejudice argument goes one step further, and argues that any opinion it obtains now will, at trial, be argued to be untimely. (Def. Memo. at 8). However, while OTI is free to argue that an opinion of counsel letter obtained after the allegedly infringing acts is immaterial to T–Mobile' s intent at the time, it is statutorily barred from arguing that any failure to obtain the advice of counsel with respect to the '043 Patent is probative of T–Mobile's intent to induce infringement. 35 U.S.C. § 298 ("The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent.").

T–Mobile has not identified any way in which the amendment would require significant additional discovery. To be sure, a claim of induced infringement requires proving elements of knowledge and specific intent that are not required in a direct infringement

claim, and T–Mobile complains that it has not had the opportunity to elicit any evidence of intent.[1] However, the defendant "should have accessible to it the evidence bearing on its own state of mind." *Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc.*, 889 F.Supp.2d 453, 461 (S.D.N.Y.2012). As the proposed amendment is not likely to "require [T–Mobile] to expend significant additional resources to conduct discovery and prepare for trial" or "significantly delay the resolution of the dispute," there is no undue prejudice. *See Block,* 988 F.2d at 350.

*4 Similarly, there is no undue prejudice in the revised list of accused products in OTI's proposed amended complaint. Although T–Mobile states that three new accused devices are included for the first time (Def. Memo. at 14), OTI explains that this is due to the industry's regular updating of cell phone models, and the underlying technical basis for claiming infringement remains the same (Pl. Reply at 8).

C. *Futility*

Leave to amend may also be denied when the pleading would not survive a motion to dismiss. *See AEP Energy Services Gas Holding Co. v. Bank of America, N.A.*, 626 F.3d 699, 726 (2d Cir.2010); *Penn Group, LLC v. Slater,* No. 07 Civ. 729, 2007 WL 2020099, at *4 (S.D.N.Y. June 13, 2007) (collecting cases). A court may deny a motion to amend for futility only where no colorable grounds exist to support a claim or defense. *See Slay v. Target Corp.*, No. 11 Civ. 2704, 2011 WL 3278918, at *2 (S.D.N.Y. July 20, 2011) ("Futility generally turns on whether the proposed amended pleading states a viable claim."); *Estate of Ratcliffe v. Pradera Realty Co.*, No. 05 Civ. 10272, 2007 WL 3084977, at *4 (S.D.N.Y. Oct. 19, 2007). As when deciding a motion to dismiss, all reasonable inferences must be drawn in favor of the plaintiff. *See, e.g., Henneberry v. Sumitomo Corp. of America,* 415 F.Supp.2d 423, 433 (S.D.N.Y.2006) ("[T]he Court will review the amended complaint through the prism of a Rule 12(b)(6) analysis and, consequently, accept as true all of the proposed complaint's factual allegations, and draw all reasonable inferences in favor of plaintiff."). The opposing party bears the burden of establishing that an amendment would be futile. *See Amaya v. Roadhouse Brick Oven Pizza, Inc.*, 285 F.R.D. 251, 253 (E.D.N.Y.2012).

To state a claim for induced infringement under § 271(b), "the patentee must establish first that there has been direct infringement, and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement." *ACCO Brands, Inc. v. ABA Locks Manufacturer Co.*, 501 F.3d 1307, 1312 (Fed.Cir.2007) (internal quotation marks omitted); *MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1378 (Fed.Cir.2005); *Pecorino v. Vutec Corp.*, 934 F.Supp.2d 422, 447 (E.D.N.Y.2012). Induced infringement thus requires both "knowledge that the induced acts constitute patent

infringement," *Global–Tech Appliances, Inc. v. SEB S.A.*, —— U.S. ——, ——, 131 S.Ct. 2060, 2068, 179 L.Ed.2d 1167 (2011), as well as active steps "directed to encouraging another's infringement," *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed.Cir.2006). In short, "the inducer must have an affirmative intent to cause direct infringement ." *Id.* The knowledge requirement may be satisfied by showing actual knowledge or willful 2072.

Notably, "advertising materials, and particularly instructions, can sufficiently allege specific intent to induce infringement." *Smartwater, Ltd. v. Applied DNA Sciences, Inc.*, No. 12 CV 5731, 2013 WL 5440599, at *9 (E.D.N.Y. Sept. 27, 2013); *see also* *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1364 n. 4 (Fed.Cir.2006) (upholding finding of inducement where defendant "provided [an] instruction sheet to customers directing them to perform specific acts leading to the assembly of infringing devices, from which the district court could draw an inference of intent").

***5** Here, OTI asserts that T–Mobile had knowledge of the '043 Patent, knew that combining an Advanced SIM card with an NFC-capable cell phone constituted direct infringement of that patent, and subsequently instructed its subscribers to visit T–Mobile stores to receive an Advanced SIM card to insert into their NFC-capable cell phones, with the specific intent to induce infringement. (Pl. Memo. at 2–3; Pl. Reply at 11–12). OTI supports these factual allegations by attaching information from T–Mobile's website instructing subscribers to visit a T–Mobile store for an Advanced SIM card to use in NFC-capable cell phones. (ISIS Mobile Wallet FAQ). Drawing all inferences in OTI's favor, this supports a plausible claim of active inducement. As recently emphasized by the Federal Circuit, a plaintiff is not required to prove its case at the pleading stage. *See* *In re Bill of Lading*, 681 F.3d at 1339. At this stage, it is plausibility and not probability that governs pleadings. *See* *id.* at 1331 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

C. *Bad Faith*

To the extent that T–Mobile raises a bad faith objection to OTI's motion, that assertion also fails. T–Mobile claims that, in what it deems an improper *"quid pro quo,"* OTI refused to consent to T–Mobile's request to amend its answer unless T–Mobile allowed OTI to amend its complaint. (Def. Memo. at 5–6). This is now moot, as OTI has agreed to allow T–Mobile to amend its answer. (Pl. Reply at 9). Moreover, while there is little law in the Second Circuit on what constitutes bad faith in the context of a motion for leave to amend a pleading, *see* *Oneida Indian Nation*, 199 F.R.D. at 80, the precedent that exists indicates that the amendment itself must embody unfair strategic maneuvering, *see, e.g.*, *State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F.2d 409,

417–18 (2d Cir.1990) (denying motion to amend where plaintiff sought strategic advantage by reserving certain claims until after court's choice of law determination).

Conclusion

For the foregoing reasons, On Track Innovations' motion for leave to file an amended complaint (Docket no. 95) is granted.

SO ORDERED.

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203 Fed.Appx. 193
United States Court of Appeals,
Tenth Circuit.

Julie SPENCER, individually, and as Next Friend of A.H. and W.S., minors; Christopher Spencer, individually, and as Next Friend of A.H. and W.S., minors,
Plaintiffs–Appellants,
v.
WAL–MART STORES, INC., a Delaware corporation, Defendant–Appellee.

No. 05–5157.
|
Oct. 31, 2006.

CARLOS F. LUCERO, Circuit Judge.

1 Plaintiff Julie Spencer was struck by a vehicle while walking through an Oklahoma Wal–Mart parking lot. Following the incident, she and her husband, Chris Spencer, individually and as next friends for their minor children, brought a negligence claim against Wal–Mart. They argue Wal–Mart breached its duty to protect Ms. Spencer from the criminal act of a third party occurring on its property. Concluding Wal–Mart owed no duty to Spencers under Oklahoma law because, on its fact-finding, Wal–Mart did not "know or have reason to know that a criminal act was occurring or about to occur," the district court granted summary judgment in favor of Wal–Mart. We **AFFIRM.

I

On October 3, 2001, Ms. Spencer and her husband went shopping at Wal–Mart Store No. 992, located in Tulsa, Oklahoma. Ms. Spencer and Mr. Spencer separated, with Ms. Spencer agreeing to meet her husband at their car after she finished browsing the garden department. When Ms. Spencer exited the store and approached her vehicle, a black, late-model sports car rapidly accelerated towards her from the rear, swerved into her path, and struck her with sufficient force to hurl her into the air. The assailant then sped out of the parking lot. Although no Wal–Mart employee witnessed the incident, its security cameras recorded the attack.[1] Police have been unable to identify a suspect based on the surveillance footage.

On October 4, 2002, Spencers filed a diversity action against Wal–Mart in federal court alleging state claims for negligence, gross negligence, willful disregard of duty, loss of consortium, and loss of parental consortium. Wal–Mart moved for summary judgment, and the district court granted its motion. Spencers now appeal that order.

II

Spencers' Reply Brief was filed three days late, and Wal–Mart has moved to strike the brief as untimely. Conceding that the filing was untimely under Federal Rule of Appellate Procedure 31(a), Spencers ask us to excuse the delay because it was short-lived, Wal–Mart has not shown prejudice, and Spencers did not act in bad faith. We agree. Whether to excuse a late filing is within our discretion. *See Burnham v. Humphrey Hospitality Reit Trust, Inc.,* 403 F.3d 709, 712 (10th Cir.2005). Absent an allegation by the opposing party that it suffered prejudice because of the delay, we generally allow such filings. *See, e.g., id.* (holding that party could file brief approximately two months late). Given the short delay and absence of prejudice, Wal–Mart's motion to strike the reply brief is denied. We do, however, expect Spencers to comply with future deadlines.

III

Spencers contend that the district court abused its discretion in granting summary judgment to Wal–Mart before ruling on their pending motion for leave to file an amended complaint. During a hearing on the summary judgment motion, the district court informed the parties it would defer ruling on Spencers' motion to amend until after deciding Wal–Mart's summary judgment motion. Following the hearing, however, the district court granted summary judgment in favor of Wal–Mart without ruling on Spencers' request for amendment. Both parties consider this a denial of Spencers' motion, as do we.

**2 We review a district court's denial of a motion to amend for abuse of discretion. *Woolsey v. Marion Labs., Inc.,* 934 F.2d 1452, 1462 (10th Cir.1991). Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint "only by leave of court or by written consent of the adverse party." Because Wal–Mart did not consent, Spencers were required to obtain leave from the court. "Although such leave shall be freely given when justice so requires, whether to grant such leave is within the discretion of the trial court." *First City Bank N.A. v. Air Capitol Aircraft Sales, Inc.,* 820 F.2d 1127, 1132 (10th Cir.1987) (internal citations and quotations omitted). Leave may properly be denied by the district court if it finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Conversely, "outright refusal to grant [ ] leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.*

Assuming it was error for the court below not to state "justifying reasons" for the implicit denial, this error is harmless if the "record contains an apparent reason [for]

justifying the denial of a motion to amend" regardless of what the district court relied upon. *Lambertsen v. Utah Dept. of Corr.,* 79 F.3d 1024, 1029 (10th Cir.1996). Based on our independent review of the record, we conclude that Spencers' delay in filing a request to amend was unwarranted.

We recognize delay alone should not justify denial of leave to amend. *Minter v. Prime Equip. Co.,* 451 F.3d 1196, 1205 (10th Cir.2006). In determining whether the delay was undue, we consider both the length of the delay and the reason for its occurrence. *Id.* at 1205–06. Here, the delay was substantial. Spencers filed their motion to amend seventeen months after filing their initial complaint and shortly before trial was scheduled to begin.

We fail to see a reason for the delay. Their claim for deceit and their assumption of duty theory of negligence, both based on Wal–Mart's allegedly fraudulent ***196** representation that it was monitoring its video cameras, have been evident throughout the proceedings. Facts necessary to support these claims were known or should have been known to the Spencers at the time the original complaint was filed, and were clearly known to them at the time they filed their response to Wal–Mart's summary judgment motion seven months before filing their motion to amend.

We do not intend to impose upon plaintiffs a burden to immediately advance a claim upon notice of facts sufficient to support it. Litigants are allowed reasonable time to analyze information and make strategic decisions. Spencers have failed, however, to provide any legitimate justification for the substantial delay. As such, their motion to amend the complaint was undue, making the district court's error in failing to address that motion harmless. *See Evans v. McDonald's Corporation,* 936 F.2d 1087, 1091 (10th Cir.1991) ("[T]he liberalized pleading rules [do not] permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case."); *Fed. Ins. Co. v. Gates Learjet Corp.,* 823 F.2d 383, 387 (10th Cir.1987) (holding delay was undue when "the moving party was aware of the facts on which the amendment was based for some time prior to the filing of the motion to amend").[4]

[4] Contrary to Spencers' argument, we are not required to conclude that Wal–Mart suffered prejudice in order to hold there was undue delay. *See First City Bank, N.A.,* 820 F.2d at 1133 (rejecting party's argument that district court must find prejudice to deny a motion to amend on the grounds of undue delay).

42 F.4th 734
United States Court of Appeals, Seventh Circuit.

Patrick B. CAGE, Plaintiff-Appellant,
v.
Tiffany HARPER, et al., Defendants-Appellees.

No. 21-2447
|
Argued April 7, 2022
|
Decided August 1, 2022

Scudder, Circuit Judge.

In May 2017 Chicago State University fired its General Counsel, Patrick Cage. Litigation followed, with Cage alleging that the decision violated both the Illinois Ethics Act and the First Amendment by reflecting retaliation for his having blown the whistle on a potential conflict of interest that arose when the Board of Trustees began its search for a new University president. Cage likewise contended that the University violated his due process rights by shorting him two months of severance pay. The district court entered summary judgment for the University defendants. Seeing no errors in that decision, we affirm.

I

A

Patrick Cage served as the University's General Counsel from November 2009 until May 2017. Upon joining the University, he negotiated the terms and conditions of his employment in an offer letter, which he signed upon accepting the position. Everyone agrees that the signed offer letter constitutes Cage's employment agreement with the University.

The events that led to this litigation began in January 2017, when Illinois Governor Bruce Rauner appointed four new members to the University's Board. Paul Vallas was one of the new members. A month later Cage learned from media reports that Vallas had an interest in serving as the University's next president, a position that became available after the previous president resigned in September 2016. Cage believed that this news, if true, would present a conflict of interest under the Board's Bylaws: Vallas could not serve on the Board while seeking employment with the University. Cage knew that no steps had yet been taken to address the potential conflict.

Cage sought to raise his concern by requesting a meeting with the Board's Chairman, Dr. Marshall Hatch. The two met for lunch in February 2017. Cage says he discussed the potential conflict with Dr. Hatch. For his part, however, Dr. Hatch has no recollection of any such discussion.

In March 2017 the Board began searching for an interim president. One potential *737 candidate the Board contacted was Dr. Rachel Lindsey. During a Board meeting on March 27, the Board agreed to select a new interim president at its next meeting on April 7. According to the meeting minutes, the Board discussed whether it could consider Vallas for the position given that he was a sitting Board member. The discussion concluded with the Board members believing they could consider Vallas so long as he resigned from the Board. Vallas left the Board the following week.

On the evening of April 6—the day before the meeting at which the Board planned to decide on an interim president—Cage sent a letter to each member renewing his concern that Vallas had violated the University's Bylaws by simultaneously serving on the Board and seeking employment with the University. The April 7 meeting ended with the Board selecting Dr. Lindsey as its interim president.

Six weeks later, on May 22, Dr. Lindsey fired Cage, concluding he was no longer the right person for the position. In doing so, the University offered Cage a severance package, including pay equivalent to 44 weeks (just over 10 months) at his current salary. Cage refused the offer, believing that his employment agreement afforded him a full year of severance pay.

s terms, the employment agreement states that the "Chicago State University Board of Trustees Policies and Regulations ıal and the Chicago State University Administrative Procedures Manual govern [Cage's] employment contract" and that 's "appointment is guided by the Board of Trustees regulations." The agreement is otherwise short on details but includes mination clause specifying that "[i]f you are terminated from this position, or the funding supporting this position is enewed, you will remain employed at the University for a period of six months at your current salary." The University ulations, by contrast, have their own provision regarding the rights of terminated employees. Specifically, Section II(B) b) of the Regulations provides that employees who have worked for the University for at least six years will receive 12 ıths' notice of termination.

B

ı October 20, 2017, Cage invoked 42 U.S.C. § 1983 and sued Dr. Lindsey, the Board of Trustees, and five individual Board embers. He alleged that the University fired him in retaliation for reporting the potential conflict of interest in violation Illinois's State Officials and Employees Ethics Act and the First Amendment. He also claimed the University violated the ourteenth Amendment's Due Process Clause by not paying him the 12 months of severance pay allegedly promised by the ioard's Regulations.

The district court entered summary judgment for the defendants across the board. It concluded that Cage's employment ıgreement governed the terms of his employment and only entitled him to six months of severance pay. The district court also determined that Cage could not succeed on his retaliation claims because his primary allegations about Paul Vallas laboring under a conflict of interest fell outside the coverage of the Illinois Ethics Act and the First Amendment.

Cage now appeals.

III

Finally, Cage challenges the district court's denial of his request to amend his complaint. We owe some additional context around what transpired in the district court.

After the parties had completed their summary judgment briefing, but before the district court issued its decision, Cage sought permission to file a third amended complaint. His motion came more than three years after the deadline for amendments had passed. Arguing that the defendants advanced a new argument at the summary judgment stage—that his termination rights arose out of his employment agreement, not the Regulations—Cage sought to add a due process claim based on his employment agreement. The district court concluded that there was no good cause for the late amendment and denied the motion.

We see no abuse of discretion in that ruling. District courts generally evaluate a motion for leave to amend a complaint ***743** under Federal Rule of Civil Procedure 15(a)(2), which provides that courts "should freely give leave when justice so requires." But under Rule 16, which governs scheduling orders and includes a deadline for filing amended pleadings, a "schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Given this tension, we have held that a district court may "apply the heightened good-cause standard of Rule 16(b)(4) before considering whether the requirements of Rule 15(a)(2) were satisfied." *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). "In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment." *Id.* at 720.

2020 WL 1083681
Only the Westlaw citation is currently available.
United States District Court, D. Rhode Island.

JOHN FRANKLIN BUERMAN, SR. and Jane Buerman, Plaintiffs,
v.
Anthony J. WITKOWSKI, and New Penn Motor Express LLC f/k/a New Penn Motor Express, Inc., Defendants.
Anthony J. Witkowski, and New Penn Motor Express LLC, as successor in interest to New Penn Motor Express, Inc., Plaintiffs-in-Counterclaim,
v.
John Franklin Buerman, Sr., Defendant-in-Counterclaim.

C.A. No. 1:17-CV-00444-MSM-LDA
|
Signed 03/06/2020

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge

***1** This matter comes before the Court on the Motion for Partial Summary Judgment of the plaintiff/defendant-in-counterclaim, John Franklin Buerman, Sr. ("Buerman"), and the Objection of the defendants/plaintiffs-in-counterclaim, Anthony J. Witkowski ("Witkowski") and New Penn Motor Express LLC ("New Penn") (collectively "the defendants"). (ECF Nos. 24 & 28.)

The issue is whether Witkowski and New Penn's amended Counterclaim, filed after the expiry of the relevant statute of limitations, can, under Fed. R. Civ. P. 15(c), relate back to the timely filed original Counterclaim. The Court determines that the amended Counterclaim does so relate back and, for the reasons that follow, Buerman's Motion for Partial Summary Judgment is DENIED.

I. BACKGROUND

This matter arises from a collision between two tractor trailer vehicles on Route 6 in Foster, Rhode Island, on October 21, 2014. (ECF No. 1-1.) Buerman, the driver of one of the vehicles, filed suit in Rhode Island Superior Court on August 28, 2017. *Id.* He has

asserted that he sustained personal injuries as a result of the alleged negligence of the driver of the other vehicle, Witkowski. Further, he has asserted Witkowski's employer and the owner of the vehicle, New Penn, also is liable for Witkowski's acts or omissions pursuant to R.I.G.L. § 31-33-6.[1] *Id.*

The defendants, Witkowski and New Penn, removed the matter to this Court on September 27, 2017, pursuant to the diversity jurisdiction clause of 28 U.S.C. § 1332. (ECF No. 1.) On October 18, 2017, the defendants filed their Answer to the plaintiffs' Complaint and asserted a Counterclaim against Buerman. (ECF No. 4.) Through the Counterclaim, the defendants have alleged that Buerman's negligence caused the accident and that therefore New Penn is entitled to the damages allegedly caused to its vehicle. *Id.* Specifically, the defendants have alleged that Buerman operated his truck with no lights, or insufficient lights, in a dark environment. *Id.*

On October 31, 2017, the defendants filed an amended Counterclaim, adding to their asserted damages a prayer for recovery of the workers' compensation benefits that New Penn paid to Witkowski for injuries he allegedly sustained as a result of the collision.[2] (EOF No. 7.)

Buerman now seeks partial summary judgment on the defendants' amended Counterclaim as it relates to New Penn's claim for reimbursement of Witkowski's workers' compensation benefits. As grounds, Buerman asserts that the defendants filed the amended Counterclaim after the passing of the relevant statute of limitations. The parties do not dispute that the statute of limitations expired on October 21, 2017. The defendants in turn argue that the amended Counterclaim should relate back the original Counterclaim pursuant to Fed. R. Civ. P. 15(c).

III. DISCUSSION

A. The Relevant Statute of Limitations

As this matter is before the Court subject to diversity jurisdiction, the Court applies state substantive law. *See Crellin Techs, Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 4 (1st Cir. 1994). Here, the parties do not dispute that it is Rhode Island's substantive law which governs and the Court will not disturb this choice. *See Moores v. Greenberg*, 834 F.2d 1105, 1107 n.2 (1st Cir. 1987).

"State statutes of limitations have been uniformly held to be substantive in nature, rather than procedural." *Waters v. Walt Disney World Co.*, 237 F. Supp. 2d 162, 165 (D.R.I. 2002) (citing *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 110 (1945)). For personal injury actions under Rhode Island law, the statute of limitations is three years.

occurrence," described in the original pleading. *See* *Mayle v. Felix*, 545 U.S. 644, 659 (2005); *Tiller v. Atl. Coast Line R. Co.*, 323 U.S. 574, 580-81 (1945). Indeed, the U.S. Supreme Court has interpreted Rule 15(c)(1)(B) to "depend[ ] on the existence of a common core of operative facts uniting the original and newly asserted claims." *Mayle*, 545 U.S. at 646. "A common core of operative facts exists if 'the opposing party has had fair notice of the general fact situation and legal theory upon which the amending party proceeds.' " *Tenon v. Dreibelbis*, 190 F. Supp. 3d 412, 416 (M.D. Pa. 2016) (quoting *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 310 (3d Cir. 2004)). A party cannot assert a new claim that would otherwise be untimely if the new claim "[is] supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650.

Yet, the addition of some facts in an amended pleading does not necessarily preclude a finding of relation back if the facts remain based upon the same "occurrence." *See* *Tiller*, 323 U.S. at 580-81 (allowing an amended pleading adding a statutory claim to a wrongful death action to relate back, despite relying on facts not originally asserted, because the amended claim was based upon the same, single occurrence). However, if the new facts added involve an occurrence not discernable in the original complaint—"facts that differ in both time and type"—the amendment will not relate back. *Mayle*, 545 U.S. at 650. *See also* *F.D.I.C. v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) ("If a plaintiff attempts to interject entirely different conduct or different transactions or occurrences into a case, then relation back is not allowed."); *O'Loughlin v. National R.R. Passenger Corp.*, 928 F.2d 24, 26-27 (1st Cir. 1991) (holding that an amended complaint did not relate back when the plaintiff's amendment sought relief for a different accident than that set forth in the original complaint).

Indeed, "[t]he rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n.3 (1984). Because the critical issue is whether the opposing party received adequate notice, the principal inquiry is whether "the matters raised in the amended pleading [have] been given to the opposing party within the statute of limitations 'by the general fact situation alleged in the original pleading.' " *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 86 (2d Cir. 1999) (citations omitted); *see also Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) ("The underlying question is whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint."); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Procedure § 1497 ("[I]f the alteration of the original pleading is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the

claim ... then the amendment will not relate back.").

Therefore, courts allow amended pleadings asserting new legal theories of recovery to relate back to the original filing where both pleadings share a basis in factual circumstances (a "common core of operative facts"). *See, e.g.,* *Tiller*, 323 U.S. at 580-81; *Travelers Ins. Co. v. Third Assocs.*, 14 F.3d 114, 125 (2d Cir. 1994); *Johansen v. E.I. DuPont de Nemours & Co.*, 810 F.2d 1377, 1380 (5th Cir. 1987); *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

***4** Moreover, amended pleadings that do not add a new cause of action, but instead include an additional claim for damages based on the same occurrence set forth in the original pleading, may also relate back. *See, e.g.,* *Conner*, 20 F.3d at 1386 (holding that an amendment "to identify additional sources of damages that were caused by the same pattern of conduct identified in the additional complaint" related back to the original pleading); *Belmont Commons, LLC v. Axis Surplus, Ins. Co.*, 569 F. Supp. 2d 637, 644 (E.D. La. 2008); *Scott v. Fairbanks Capital Corp.*, 284 F. Supp. 2d 880, 887 (S.D. Ohio 2003).

Here, the "conduct, transaction, or occurrence" alleged in the original Counterclaim is the motor-vehicle accident between Buerman and Witkowski. *See* Fed. R. Civ. P. 15(c)(1)(B). The facts that the defendants have alleged regarding that occurrence, namely that it was caused by Buerman's operation of his truck with no lights or insufficient lights in a dark environment, is the "common core of operative facts" uniting both the original and amended Counterclaims. *See* *Mayle*, 545 U.S. at 646. From these facts, the defendants put forth a negligence cause of action against Buerman.

In the amended Counterclaim, the defendants do not go so far as to assert a new legal theory; instead, they expand their claim for damages within their negligence claim. That is, the defendants asserted in the original Counterclaim a negligence cause of action whereby New Penn sought compensation for alleged property damages to the vehicle that Witkowski was driving at the time of the accident. In their amended Counterclaim, New Penn adds to its negligence count a claim for compensation for the workers' compensation benefits it paid to Witkowski for the injury to his person.

Certainly, adequate notice of the conduct or occurrence giving rise to the defendants' amended Counterclaim (the accident) was provided to Buerman in the original Counterclaim. Further, a factual nexus exists between the amended and original pleadings: the same accident gave rise to both the alleged property damage and the personal injury. *See* *Mayle*, 545 U.S. at 664 ("So long as the original and amended [pleadings] state claims that are tied to a common core of operative facts, relation back

will be in order.").

Because the amended Counterclaim arises from the same "conduct, transaction, or occurrence" set out in the original Counterclaim and both pleadings depend upon "a common core of operative facts," Buerman received adequate notice prior to the expiry of the statute of limitations of the basis of liability upon which the defendants proceed. *See* Fed. R. Civ. P. 15(c)(1)(B); *Mayle*, 545 U.S. at 664. As such, Rule 15(c)(1)(B) requires that the amended Counterclaim relate back to the date of filing of the original Counterclaim.

IV. CONCLUSION

Because the amended Counterclaim relates back to the original Counterclaim per Rule 15(c)(1)(B), it is not barred by Rhode Island's statute of limitations for actions arising from personal injury. Buerman's Motion for Partial Summary Judgment (ECF No. 24) is therefore DENIED.

IT IS SO ORDERED.

Footnotes

[1] Rhode Island General Laws § 31-33-6 is the state's "owner-liability statute," which provides that an automobile owner is vicariously liable for the acts of a driver operating the vehicle with the owner's consent.

[2] New Penn makes this claim pursuant to R.I.G.L. § 28-35-58, which provides that if an employee has been paid workers' compensation benefits, "the person by whom the compensation was paid shall be entitled to indemnity from the person liable to pay damages, and to the extent of that indemnity shall be subrogated to the rights of the employee to recover those damages."

United States District Court, E.D. Pennsylvania.
WAYNESBOROUGH COUNTRY CLUB OF CHESTER COUNTY, Plaintiff,
v.
DIEDRICH NILES BOLTON ARCHITECTS, INC., et al., Defendants.
Civil Action No. 07–155
|
Filed 02/13/2012

ORDER

TIMOTHY R. RICE, United States Magistrate Judge

*1 And now, this 13th day of February, 2012, upon consideration of Plaintiff Waynesborough Country Club of Chester County's ("Waynesborough") Motion for Leave to Amend Complaint (doc. 102), the supporting memorandum of law and exhibits, and all responses thereto, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part, for the following reasons. Waynesborough can allege new grounds of negligence as set forth in ¶ 50 of the amended complaint only to the extent they relate to water infiltration. Waynesborough can allege most new grounds for the breach of contract claim as set forth in ¶ 59 of the amended complaint for both water infiltration and life-safety issues, but can allege the breach of contract claims in ¶¶ 59(1) and 59(o) only to the extent they relate to water infiltration. The parties must meet and confer by March 14, 2012 to designate which negligence claims are related to water infiltration and not general architectural or building safety issues.

Background

On January 12, 2007, Waynesborough filed a complaint against Diedrich Niles Bolton Architects, Inc. ("Niles Bolton") for professional negligence and breach of contract, seeking damages for water infiltration that occurred at the clubhouse designed by Niles Bolton. Waynesborough alleges Niles Bolton improperly prepared construction drawings and specifications, oversaw the construction process, and reviewed modifications made by contractors during the construction of the clubhouse. See generally Complaint, Waynesborough Country Club of Chester Cnty. v. Diedrich Niles Bolton Architects, Inc., No. 07–155 (E.D. Pa. Jan. 12, 2007) [hereinafter Complaint].

Waynesborough seeks leave to amend its complaint to allege additional bases for its existing claims against Niles Bolton. Waynesborough alleges it has discovered additional deficiencies in Niles Bolton's work during the course of litigation and discovery. Br. Supp. Pl.'s Mot. Leave Amend Compl. at 2, Waynesborough Country Club of Chester

Cnty. v. Diedrich Niles Bolton Architects, Inc., No. 07–155 (E.D. Pa. Dec. 6, 2011) [hereinafter Pl.'s Br.]. Although Waynesborough contends some claims asserted in the amended complaint are related to the water infiltration, Reply Br. Supp. Pl.'s Mot. Leave Amend Compl. at 8–9, Waynesborough Country Club of Chester Cnty. v. Diedrich Niles Bolton Architects, Inc., No. 07–155 (E.D. Pa. Jan. 24, 2012) [hereinafter Pl.'s Reply], it acknowledges some of the claims are for life-safety or structural deficiencies, id.

Legal Standard

"[C]ourts have shown a strong liberality ... in allowing amendments under Rule 15(a)." Heyl & Patterson Int'l, Inc. v. F.D. Rich Hous. of the V.I., Inc., 663 F.2d 419, 425 (3d Cir. 1981) (quoting 3 James Wm. Moore et al., Moore's Federal Practice ¶ 15.08(2) (2d ed. 1980)). "The court should freely give leave [to amend]," Fed. R. Civ. P. 15(a)(2), in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or the] futility of amendment," Foman v. Davis, 371 U.S. 178, 182 (1962); see also Coventry v. U.S. Steel Corp., 856 F.2d 514, 519 (3d Cir. 1988).[1]

*2 Leave to amend is futile if the proposed amendment would be barred by the applicable statute of limitations. Cowell v. Palmer Twp., 263 F.3d 286, 296 (3d Cir. 2001); Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). Pennsylvania has a two-year statute of limitations for negligence claims, 42 Pa. Cons. Stat. Ann. § 5524, and a four-year statute of limitations for breach of contract claims, id. § 5525(a)(1).

Under the discovery rule, the statute of limitations is tolled until a "party knew or should have known on the exercise of reasonable diligence of his injury and its cause." Fine v. Checcio, 870 A.2d 850, 858 (Pa. 2005). A plaintiff "must exercise only the level of diligence that a reasonable man would employ under the facts and circumstances presented in a particular case." Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995) (citation omitted). "[I]n the case of a latent defect in construction, the statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware, of the defect." A.J. Aberman, Inc. v. Funk Bldg. Corp., 420 A.2d 594, 599 (Pa. Super. Ct. 1980); see also Pagano v. Flakey Jake's of Greater Phila., Inc., No. 94–7777, 1995 WL 650241, at *2 (E.D. Pa. Oct. 31, 1995); Amodeo v. Ryan Homes, Inc., 595 A.2d 1232, 1235 (Pa. Super. Ct. 1991). The question when a plaintiff was able to discover his injury through reasonable diligence is a jury question, unless "reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause." Fine, 870 A.2d at 858.

Discussion

Niles Bolton asserts the amendment is futile because the claims are barred by the statute of limitations. Def.'s Br. Opp'n Pl.'s Mot. Amend Compl. at 11–15, Waynesborough Country Club of Chester Cnty. v. Diedrich Niles Bolton Architects, Inc., No. 07–155 (E.D. Pa. Dec. 20, 2011) [hereinafter Def.'s Br.].[2] Depositions from August 2007 reveal Waynesborough knew then of Niles Bolton's failure to properly respond to requests for information and review payment applications. See Def.'s Br. at Ex. F, pp.61–67, 175–77, 189–90 (discussing review of payment applications); id. at Ex. F, pp.166–71, Ex. G, pp.128–31 (discussing requests for information).[3]

*3 Waynesborough, however, did not discover the latent defects alleged in the amended complaint, as well as the claims alleged in ¶ 50(h)–(k), (m)–(n), (p)–(r) and ¶ 59(h)–(k), (m)–(n), (p)–(r), until May 13, 2008. Waynesborough acted with reasonable diligence by hiring experts to investigate the source of the water infiltration in 2004. See Def.'s Br. at Ex. E. Although Waynesborough knew of the water infiltration problem in late 2003, it was not until 2008 that any expert identified the deficiencies Waynesborough seeks to add in its amended complaint as problems related to the water infiltration, as well as the additional life-safety deficiencies.[4] See Pl.'s Reply at Ex. C. It is reasonable that lay people would be unable to discover all sources of water infiltration, especially considering it took experts more than four years to discover the alleged additional deficiencies. Cf. Szpynda v. Pyles, 639 A.2d 1181, 1184 (Pa. Super. Ct. 1994) ("The discovery rule tolls the statute of limitations until such time as a reasonably intelligent person (not an expert), exercising due diligence, should have some reason to suspect that his injury might have been caused by [another source]."). It also is reasonable that the life-safety issues were not discovered by Waynesborough until 2008, because nothing had occurred to alert it to the latent defects, and it was only further investigation into the water infiltration problem that revealed the life-safety problems. See Pl.'s Reply at Ex. C.

Thus, the breach of contract claims related to most of the alleged deficiencies are not barred by the statute of limitations, which does not expire until May 13, 2012, four years after TBS's 2008 report.[5] See 42 Pa. Cons. Stat. Ann. § 5524. The two-year statute of limitations for the claims of negligence, however, expired on May 13, 2010, two years after TBS's 2008 report. See id. § 5525(a)(1). The statute of limitations to bring a breach of contract claim regarding the allegations in ¶¶ 59(1) and 59(o) of the amended complaint expired no later than August 15, 2011, four years after the depositions at which the issues were discussed and almost four months before Waynesborough filed its motion to amend the complaint. The statute of limitations to bring a negligence claim regarding the allegations in ¶¶ 50(1) and 50(o) expired no later than August 15, 2009. Thus, Waynesborough can bring the claims in ¶¶ 50(1), 50(o), 59(1), and 59(o) only to the extent they relate to water infiltration, because claims not involving water infiltration do

not relate back to the original complaint.

An amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim ... that arose out of the conduct, transaction, or occurrence set out ... in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). A claim does not relate back to the original complaint "when it asserts a new ground for relief supported by facts that differ in both time and type" from the claims in the original complaint. Mayle v. Felix, 545 U.S. 644, 650 (2005). "So long as the original and amended [complaints] state claims that are tied to a common core of operative facts, relation back will be in order." Id. at 664; see also Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 310 (3d Cir. 2004). "[A]mendments that restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading fall within Rule 15(c)." Bensel, 387 F.3d at 310. I must consider whether Niles Bolton "has had fair notice of the general fact situation and legal theory upon which [Waynesborough] proceeds." Id.

The negligence claims and the claims alleged in ¶¶ 50(1), 50(o), 59(1) and 59(o) of the amended complaint relate back to the original complaint only to the extent they allege claims related to water infiltration. Any of the allegations in the amended complaint related to water infiltration arose under a "common core of operative facts." Mayle, 545 U.S. at 650. In the original complaint, Waynesborough alleged Niles Bolton failed "to assure the clubhouse was constructed in a manner which would prevent water infiltration into the interior of the clubhouse." Complaint at ¶ 28(d). By alleging in the amended complaint newly discovered specific deficiencies that contributed to the water infiltration, Waynesborough is merely "amplify [ing] the factual circumstances" of the water infiltration deficiencies previously alleged. See Bensel, 387 F.3d at 310. Moreover, Niles Bolton cannot claim it did not have fair notice of claims related to water infiltration. It was the focus of the original complaint.

***4** The original complaint, however, does not allege facts concerning the broader life-safety problems; it focused solely on water infiltration. See generally Complaint. Even though both the water infiltration and the life-safety issues allegedly result from Niles Bolton's performance during construction, Niles Bolton did not have notice of claims relating to life safety until almost five years after the original complaint was filed and almost four years after Waynesborough learned of the potential problems.

Oral Examination Questions: Amendments

Presentation order for groups of three:	Presentation order for groups of four:
Round 1 Question 1 – Student A Question 2 – Student B Question 3 - Student C	**Round 1** Question 1 – Student A Question 2 – Student B Question 3A – Student C Question 3B – Student D
Round 2 Question 1 – Student C Question 2 – Student A Question 3 – Student B	**Round 2** Question 1 – Student D Question 2 – Student C Question 3A – Student B Question 3B – Student A

1. In *OTI*, the court concluded that the plaintiff's 20-month delay in seeking to add a new claim was not undue. By contrast, the court in *Spencer* concluded that the plaintiff's 17-month delay in seeking to amend was undue. Similarly, the court in *Cage* concluded that the plaintiff's delay of more than 30 months was undue. Try to explain any factual or legal reasons that the cases came out differently. Maximum time to answer: 4 minutes.

2. Analysis under Rule 15(a) always precedes a relation-back inquiry analysis under Rule 15(c), if any is required at all. Explain why, using the facts from *Waynesborough Country Club* case to do so. Maximum time to answer: 4 minutes.

3. What is your understanding of the differences between relation back under Rule 15(c)(1)(A), (c)(1)(B), and (c)(1)(C)? As to Rule 15(c)(1)(B), describe with as much detail as you can your understanding of the legal standard in that rule provision for allowing relation back? Maximum time to answer: 5 minutes.

   (In a four-person group, these two questions should be broken up into two (#3A and #3B)—answering #3A in 2 minutes and #3B in 3 minutes.)

THE CASE AGAINST THE LAWSUIT ABUSE REDUCTION ACT OF 2011

Lonny Hoffman[*]

I. INTRODUCTION

On March 9, 2011, Lamar Smith, Chairman of the House of Representatives Committee on the Judiciary, introduced H.R. 966, the Lawsuit Abuse Reduction Act.[1] On the same day Charles Grassley, the ranking Republican member of the Senate Judiciary Committee, sponsored an identical measure in the upper chamber.[2] Animated by concern over rising costs and abuses in federal civil cases, the bills stiffen penalties against lawyers who file sanctionable papers in federal court by legislatively amending Rule 11 of the Federal Rules of Civil Procedure, the general certification and sanctions standard for federal civil cases.[3]

This is not the first time that Congress has tried to reform the federal sanctions rule as a means of curbing litigation costs and abuse. Since 1995, bills regularly have been introduced that would toughen Rule 11, but to date, none have been successfully enacted.[4]

However, buoyed by sweeping victories last November that gave Republicans majority control of the House and a much greater voice in the Senate,[5] the prospects for legislative reform of Rule 11 are better now than they have ever been before.

Enacted in 1938 as part of the original rules, Rule 11 remained unchanged for half a century.[6] Then, in 1983, spurred by perceptions of a growing litigation crisis, judicial rulemakers proposed significant amendments to the rule.[7] One of the most important changes was that the rule was made mandatory so that courts were required "to impose sanctions whenever a violation of the rule was found to have occurred."[8] This and other amendments in 1983 signaled that the rule was now meant to hold lawyers more accountable for improper conduct in federal cases.[9] It soon became apparent, however, that the 1983 version of Rule 11 not only failed to deter groundless litigation practices but actually led to greater litigation costs and abuses in many cases by incentivizing voluminous, wasteful satellite litigation over sanctions. Finally convinced that the 1983 experiment with Rule 11 was ill-advised,

rulemakers amended the rule again a decade later to soften its sharpest edges.[10] Although most in the legal profession welcomed the 1993 amendments, some thought the revisions to the rule weakened a powerful deterrent against wrongful litigation practices.[11] Seizing on these concerns, the Republican Party made reform of Rule 11 one of the highlighted parts of the sweeping legislative reforms they proposed in the Contract with America leading up to the 1994 mid-term elections.[12]

With awareness of this history, and frustrated by their repeated failures over the last fifteen years to stiffen penalties against lawyers, sponsors introduced the Lawsuit Abuse Reduction Act of 2011 (LARA) with high hopes of finally succeeding in their ambitions. The first of the changes LARA makes to Rule 11 is to require the imposition of sanctions whenever the district judge finds that the rule was violated, mirroring the mandatory form of the 1983 version of the rule.[13] This sanction provision is a significant change to existing law. Indeed, except for the decade in which the 1983 version of Rule 11 was in force, federal judges have always been vested with discretion to decide which violations of the rule warrant punishment and which do not.[14] LARA's second retrogressive reform eliminates the existing safe harbor provision in the current rule.[15] The safe harbor, put in place in 1993, protects against the imposition of sanctions if the filing alleged to be in violation of the rule is withdrawn in a timely manner.[16] The third reform would make the sanctions rule even more potent than it was thirty years ago. The proposed legislation does so by adding an express proviso authorizing—the better word may be *encouraging*—judges to award monetary sanctions, including attorney's fees and costs incurred by the other side, when the rule is violated.[17] This change departs drastically not only from current law but even from that earlier version of the rule inasmuch as compensation never has been the express purpose of the rule.[18] Indeed, one of the main criticisms of the 1983 version of Rule 11 that prompted its revision was that, notwithstanding that rulemakers intended the rule to be for deterrence, litigants and courts frequently misused it for compensatory, cost-shifting purposes.[19]

II. Extensive Empirical Research on Rule 11 Demonstrates That a Return to the 1983 Version of the Rule Would Increase Costs and Delays and Foster Greater Litigation Abuse

A vast body of empirical evidence has been collected relating to the 1983 version of Rule 11. As Georgene Vairo observes in her leading treatise on Rule 11, "Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11."[20] As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been at least nine major empirical studies and numerous reports of the 1983 version of Rule 11.[21] Several books, a great many law review articles, and a myriad of legal and lay newspaper stories have also examined it.[22] Of course, there were also literally thousands of reported judicial opinions on the subject,[23] though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience. Indeed, the available empirical evidence is so persuasive that it has produced a remarkable degree of agreement across the political spectrum that the 1983 sanctions rule was one of the most ill-advised procedural experiments ever tried. This moment is one of those occasions, regrettably rare, when we do not have to legislate blindly; history can be our guide.

A. *The 1983 Version of the Rule Produced an Avalanche of Unwelcome Satellite Litigation*

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated nearly 7,000 reported sanctions decisions.[24] And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfed the reported figures, as the country's most respected legal practitioner on the subject, Greg Joseph, has emphasized.[25] Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found that in the Third Circuit less than 40% of the Rule 11 decisions were published or available on Lexis or Westlaw.[26] The

contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendments to Rule 11 went into effect (more on that, in Part III, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the 1983 amendments, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer's (or both lawyers') alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable.[27] And on and on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Georgene Vairo summarized the "avalanche" of satellite litigation unleashed by the 1983 amendments:

> Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.[28]

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers' intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule's strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that

the frequent award of monetary damages was producing, were greatly troubling developments.[23]

B. The 1983 Rule Was Applied Inconsistently and Inequitably

1. Civil Rights and Employment Discrimination Plaintiffs, in Particular, Were Impacted the Most Severely Under the 1983 Version of Rule 11. The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the amended rule's existence. In a study conducted in 1988, researchers with the Federal Judicial Center (FJC) found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 22% of the time, well out of proportion to the percentage of such cases filed.[30] Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.[31]

One reason why civil rights claimants and other resource-poor plaintiffs, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule, the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create in "cases involving litigants with greatly disparate financial resources."[32] In addition, the 1993 Advisory Committee

Notes make reference to the problems posed by cost-shifting fi "an impecunious adversary."[33]

The 1983 experience also reflects that judg disproportionately enforced the prefiling factual investigatic requirement of the rule against civil rights plaintiffs and the lawyers.[34] In many of these decisions, sanctions were awarde even though factual information vital to asserting a claim was i the sole possession of the defendant. There are man illustrations of this perverse problem, as Professor Carl Tobia carefully documented in a series of penetrating articles about th rule's disparate impact on civil rights claimants.[35] Professc Tobias recognized that lack of access to proof was a problem tha bedeviled these claimants especially:

> Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.[36]

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the rule.[37] One illustration of this is *Johnson v. United States*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

> The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had "committed past offenses or manifested previous aberrant behavior that his employers should have detected." . . .
>
> Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda's personnel file, is in the government's control, but it usually would be regarded as quasi-confidential and unavailable to an outsider. As a practical matter, therefore, plaintiff's attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.[38]

A still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rules, but for reasons that are perhaps still not entirely understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.[39] As discussed below in Part III, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule, which ameliorates at least some of the harsh effects of the rule's inherent indeterminacy.

Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as "novel," the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate prefiling investigations.[40] What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule's amendment.[41]

Further, the empirical evidence also suggests that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (nearly 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11, they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.[42] Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that "whether it can be classified as a chilling effect or not, lawyers reported a cautionary effect of Rule 11."[43]

A last, related lesson to mention from the 1983 experience with Rule 11 is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule further exacerbated the rule's discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of "hindsight bias," as it is often called.[44] In his 1988 study of Rule 11 for the FJC, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the

merits, "there may be a tendency to merge the sanctions issue with the merits" and that "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."[45] Another keen observer, Professor Charles Yablon, made the same point some years later:

> A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.[46]

"Like a reader who already knows how the mystery turns out," Yablon analogized, "she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge's view of what constitutes 'reasonable inquiry.'"[47] By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendments and, specifically, the addition of the safe harbor provision in Rule 11(c).

2. Plaintiffs Were Targets of Sanctions Far More Often than Defendants and Were Sanctioned at Strikingly Higher Rates. The evidence also shows that under the 1983 version of Rule 11, plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Notwithstanding possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study found that plaintiffs were the target of sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).[48] Of the reported Rule 11 cases, a violation was found 57.8% of the

time.[49] However, the 1988 study found that plaintiffs were ruled to be in violation of Rule 11 more frequently (46.9%) than defendants (10.9%).[50] The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).[51] The starkest disparities were revealed by a later study conducted by the FJC in 1991 which looked at both reported and unreported cases in five different judicial districts.[52] Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below from the 1991 FJC study[53] illustrates the disparities:

Table 20
Orders Imposing Rule 11 sanctions: targeted "side" of litigation

	D. Ariz.	D. D.C.	N.D. Ca.	E.D. Mich.	W.D. Tex.
Number of rulings imposing sanctions against:					
Plaintiff's side	35	17	34	33	34
Defendant's side	3	5	4	8	21
Other	6	0	4	0	1
Total	44	22	42	41	56
As percentage of all rulings imposing sanctions					
Plaintiff's side	80%	77%	81%	80%	61%
Defendant's side	7%	23%	9%	20%	38%
Other	14%	0%	9%	0%	2%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version was applied.

C. *The 1983 Version of Rule 11 Increased Costs and Delays by Encouraging Rambo-Like Litigation Tactics*

Yet another unfortunate result of the 1983 amendments is that they increased costs and delays by encouraging "[t]he Rambo-like use of Rule 11 by too many lawyers," as Professor Georgene Vairo explained.[54] Similarly, in their treatise, *The Law of Lawyering*, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it "has been a major contributing factor in the rise of so-called 'Rambo tactics' and the breakdown of civility and professionalism."[55]

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators "to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court's primary function."[56] Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that "[t]he amendment of Rule 11 . . . has called forth a flood of . . . collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves . . . ."[57] The sentiment was widely felt. The FJC's 1991 study found that more than half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.[58] The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.[59]

In light of the rulemakers' professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that, by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade, the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merit-based resolution of cases.

D. *The 1983 Version of Rule 11 Was Not an Effective Means for Reducing Cost, Delay, and Abusive Litigation Activity*

Finally, and independently of the unintended consequences the rule's amendments produced, the empirical evidence also

shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay, and abuse problems that prompted reformers to act. A 1991 FJC study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.[52] The FJC's 1995 study of Rule 11 similarly found that most federal judges and lawyers were opposed to returning Rule 11 to its 1983 version.[53] As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs and delays and for addressing abusive litigation conduct.[54] Instead, judges and others in the profession report that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost, delay, and groundless litigation.[55]

III. THERE IS NO SUPPORT FOR THE ASSERTION THAT THE 1993 AMENDMENTS CAN BE BLAMED FOR ANY PROBLEMS THAT DO EXIST WITH FEDERAL CIVIL LITIGATION

We have seen the serious difficulties that attended the 1983 revision of Rule 11. In the next Part, I will show that LARA can also be opposed on the ground that sponsors fail to demonstrate that the 1993 amendments to Rule 11 can be blamed for any problems that do exist today with federal civil litigation.

In the years after the 1983 amendments of Rule 11 went into effect, criticism of it grew in volume and intensity.[56] By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the FJC to evaluate the rule.[57] Then, in the summer of 1990, the

Committee announced a "Call for Comments" from the bench and bar, which produced more criticisms and suggestions than the Committee had ever received before in its half-century existence.[66] One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case.[67] A second, frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges.[68] A third and fourth theme echoed over and over again was, respectively, that the rule disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.[69]

In February 1991, the Committee held a public hearing in which testimony from judges, lawyers, and academics was taken.[70] The criticism had a powerful effect on the Committee, which promptly issued an interim report that concluded that "in light of the intensity of criticism—the process of possible revision should not be delayed."[71] The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, "have sufficient merit to justify considering specific proposals for change."[72] Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects, the 1983 version of Rule 11 "impacted plaintiffs more frequently and severely than defendants."[73] All too often, it resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* "cost-shifting" rule, a result that incentivized lawyers to abuse the sanctions rule. Occasionally, the rule proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary, and it disincentivized lawyers from backing away from positions they could no longer support. In addition, the rule sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.[74]

In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule, but instead sought "to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions."[75] Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent.[76] Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation.[77] This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the "safe harbor" provision, which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions or from the various other rules, statutes, and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation.[78] Nevertheless, the addition of the safe harbor has been credited with successfully reducing the incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.[79] The addition of the safe harbor is also significant because it

fundamentally alters one key problem observed with the 1983 version of Rule 11—namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11."[80]

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.[81] At the same time, this drop in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrates that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. § 1927 and pursuant to the court's inherent powers.[82] Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred § 1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.[83] This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary laws are available for addressing wrongful lawyer conduct. Finally, as I discuss further in Part IV, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation that are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The FJC's 1996 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the

rule.[84] Then a 2005 survey conducted by the FJC even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.[85] More than 80% of the 278 district judges surveyed shared the view that "Rule 11 is needed and it is just right as it now stands."[86] An even higher percentage (87%) preferred the existing rule to the 1983 version.[87] Equally strong support (86%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation.[88]

IV. LARA IS NOT NEEDED BECAUSE THERE ARE MANY AVAILABLE ALTERNATIVES FOR MANAGING CIVIL LITIGATION COSTS AND ABUSES

By focusing exclusively on Rule 11, LARA's sponsors overlook the fact that both the existing Rule 11, as well as many other provisions in the existing rules, serve the purpose of managing federal litigation and deterring, punishing, and otherwise addressing abusive litigation practices. Of course, problems with particular cases still exist and, unavoidably, will always exist. Rules, alone, cannot eliminate all difficulties. However, the fundamental point that LARA's sponsors miss is that existing rules can and are used effectively by courts every day to adequately monitor federal civil cases.

Since the focus of LARA is on sanctioning lawyers, we can start there. Existing Rule 11 requires that all factual contentions that are plead must contain "evidentiary support."[89] When a pleading is brought without evidentiary support, sanctions can be sought and imposed if the pleader does not withdraw the offending allegations.[90] Moreover, Rule 11 is not the only source of legal authority for regulating lawyer conduct. Rule 26(g), which was enacted in 1983 as part of the same package of amendments that stiffened Rule 11, imposes a steep certification obligation on lawyers with regard to discovery disclosures, requests, responses, and objections.[91] The provision was designed as a "deterrent to both

excessive discovery and evasion" and to require lawyers "to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[92] Although the 1983 version of Rule 11 was repealed, under Rule 26(g) sanctions are still mandatory for violations of this section.[93] In addition, after a motion to compel has been filed, sanctions for discovery abuse can be imposed under Rule 37.[94] More broadly still, lawyers are regulated through other law, including 28 U.S.C. § 1927, as well as under an array of other, even more specific provisions.[95] Of course, the court also possesses inherent power to impose sanctions when they are deemed appropriate.[96] In sum, there are a plethora of authorities by which lawyers are held accountable and may be sanctioned when their conduct warrants it, under existing law. These authorities, which LARA sponsors have failed to acknowledge, cannot be squared with the bald assertion that the existing Rule 11 is inadequate for regulating lawyer conduct in the federal courts.

But sanctions rules are far from the only means for managing litigation costs and abuses. The discovery rules themselves provide powerful means for controlling costs and abuses. For more than a decade, Rule 26 has required that parties make mandatory disclosures at various stages in the case.[97] These mandatory disclosures are expressly designed to reduce discovery costs and avoid unnecessary skirmishes over groundless objections to routine discovery.[98] Moreover, while the rules obviously contemplate liberal discovery, important restrictions exist on discovery rights. For instance, presumptive limits on the amount of discovery now exist, including limits on the number of written interrogatories and the number and length of oral depositions.[99]

Even more specifically, the rules authorize judges to protect parties from unnecessarily expensive and burdensome discovery. One way this goal is accomplished is by the foundational requirement in Rule 26(b)(2) that the discovery sought must be proportional with the burden imposed. Thus, when the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," the court has wide discretion to limit the discovery sought.[100] So too can it limit discovery when it is sought too late in the case.[101] Perhaps most importantly, Rule 26(b)(2)(C)(iii) provides that discovery can be limited when "the burden or expense of the proposed discovery outweighs its likely benefit."[102]

Another vital provision by which discovery is controlled is Rule 26(c), which allows for the entry of protective orders to protect against "annoyance, embarrassment, oppression, or undue burden or expense."[103] For instance, if documents are sought that cover a period of time longer than relevant to the claims in the case that has been brought, a protective order can be issued.[104] The rule also protects against production of information protected by, for example, trade secret protection. Courts effectively employ this rule to protect against discovery abuses.[105]

Even before the discovery phase, there are many procedural tools available for managing litigation and, where appropriate, dismissing cases even before the discovery stage is reached. If a pleading is filed that is too vague to understand, Rule 12(e) is available. If a pleader files a pleading that "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," this rule authorizes an order directing the party to plead a more definite statement of the claim.[106]

Separate from vagueness, Rule 12(b)(6) is another powerful procedural rule for obtaining dismissal before discovery. Indeed, it is nothing short of astonishing that in urging Rule 11's amendment, LARA's proponents do not mention that in the last few years the Supreme Court has increased the availability of dismissals before discovery under Rule 12(b)(6).[107] The decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* were justified by the Court—and, not coincidently, hailed by these same reformers—precisely because the motion to dismiss for failure to state a claim was seen as the appropriate rule for filtering out groundless cases before they reach the pleading stage.[108]

Beyond existing rules, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committee.[109] The Judicial Conference remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major Conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules.[110] That Conference exemplifies the Advisory

Committee's serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays, and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference "as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation."[111] The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges, and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The report of the Advisory Committee following the Conference makes this point:

> Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.[112]

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice), though even here most participants recognized that the existing procedural framework was fundamentally sound.[113] What may be most relevant, for present purposes, is that although the two-day Conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for strengthening Rule 11 along the lines contemplated by the proposed legislation.[114]

The lack of any serious discussion at the Conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee's decision in 1983 was an "ill-considered, precipitous step," as Professor George Cochran once succinctly described it.[115]

Rule 11
Questions to Discuss

1. What is the primary function of Rule 11?

2. What is the scope of Rule 11? To what things does it apply?

3. What is Rule 11's certification requirement?

4. How does the safe harbor of Rule 11(c) work?

5. Do you think the following example would satisfy Rule 11(b)(3)?

   P brings suit against D claiming that D, his neighbor, caused P to develop cancer by spraying a chemical pesticide on his flowers. P does not allege that any medical evidence links his cancer to the pesticides that were sprayed.

6. Do you think the following example would satisfy Rule 11(b)(4)?

   P brings suit against D for injuries caused by a defective product that D manufactured. Assume that an internal investigation D conducted before suit revealed that its manufacture of the product was defective. If P was not aware of that internal investigation at the time she brought suit, may D deny the allegation under Rule 11(b)(4)?

7. May P make the allegation of a defective product under Rule 11(b)(3) if P was not aware of that internal investigation, and P had no other evidentiary support for the allegation that D's product was defectively manufactured?

60 S.W.3d 273 (2001)

COMPASS EXPLORATION, INC., Appellant,

v.

B-E DRILLING COMPANY and Ray E. Eubank, Appellees.

No. 10-00-301-CV.

Court of Appeals of Texas, Waco.

October 10, 2001.

275 *275 Jerry C. Hanson, Palestine, for appellant.

276 *276 J. Clinton Schumacher, Locke, Liddell & Sapp, L.L.P., Dallas, for appellee.

Before Chief Justice DAVIS, Justice VANCE, and Justice GRAY.

OPINION

BILL VANCE, Justice.

Compass Exploration, Inc. ("Compass") hired B-E Drilling Company ("B-E") to drill a well on property in Leon County leased by Compass. Ray H. Eubank signed the contract for B-E. There were provisions in the contract about when B-E would be held responsible if the drilling went amiss and the hole was lost. According to the provisions, if the hole deviated from true vertical by more than two degrees between any two periodic tests for vertical, and an event happened during drilling which caused the hole to be abandoned, B-E would be responsible.

The hole was drilled to approximately 12,000 feet. However, when the drill pipe was being extracted, it became stuck and eventually broke off in the hole. Consequently, the well was abandoned. Tests for true vertical had been conducted which indicated the hole may have been more than two degrees off. Compass refused to make full payment under the contract. Accordingly, B-E sued Compass in Dallas County for breach of contract and suit on a sworn account. Compass did not countersue or challenge venue. The suit in Dallas County was tried to the court which ruled in Compass's favor, finding that B-E failed to prove it met the drilling specifications in the contract. A take-nothing judgment was issued against B-E. No appeals were taken.

While the suit in Dallas County was pending, and before trial, Compass filed the present suit in Leon County, claiming breach of contract and negligence. After the judgment in the Dallas County suit, B-E filed a motion for summary judgment in the Leon County suit, asserting that Compass's claims (1) should have been brought as compulsory counterclaims in the Dallas County suit, and (2) were barred by res judicata. Compass responded that a mandatory venue statute required its claims to be brought in Leon County. The trial court granted the motion, and Compass appeals.

Compass's response to the motion for summary judgment, and its complaint on appeal, are that the mandatory venue rule in section 15.011 of the Civil Practices and Remedies Code (1) requires that its claims be brought in Leon County, and (2) trumps the compulsory counterclaim rule in Rule 97(a) of the rules of procedure. Tex. Civ. Prac. & REM.CODE ANN. § 15.011 (Vernon Supp.2001); Tex.R. Civ. P. 97(a). These provisions read:

§ 15.011. Land

> Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to

quiet title to real property shall be brought in the county in which all or a part of the property is located.

Rule 97. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of
277 third parties of whom the court cannot acquire jurisdiction; *277 provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

Standard of Review

A party filing a motion for summary judgment must prove by summary-judgment evidence that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." Tex.R. Civ. P. 166a(c); *e.g.*, Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548 (Tex.1985); Delta Air Lines, Inc. v. Norris, 949 S.W.2d 422, 425 (Tex.App.-Waco 1997, writ denied). We must resolve all doubts and indulge every reasonable inference in favor of the non-movant. Nixon, 690 S.W.2d at 549; Delta Air Lines, 949 S.W.2d at 425. A summary judgment is reviewed *de novo*. *E.g.*, Rucker v. Bank One Texas, N.A., 36 S.W.3d 649, 653 (Tex.App.-Waco 2000, pet. filed).

Section 15.011

Compass argues that section 15.011 requires the suit to be brought in Leon County, and therefore the Dallas court was without jurisdiction and its judgment is void. Compass says section 15.011 is a jurisdictional statute. However, it presents no authority for this argument. It is axiomatic that "venue" provisions do not confer "jurisdiction." Furthermore, the district court in Dallas County had jurisdiction to hear Compass's claims, just as the district court in Leon County did. Tex. Const. art. V, § 8 (District courts have "original jurisdiction ... of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest ...."); *see also* Tex. Gov't Code Ann. § 24.007 (Vernon 1988). As for venue, if Compass wanted to object to venue in Dallas County, it should have raised the issue in the Dallas County suit by a motion to transfer venue. There is no indication in the record that it did, and therefore it waived this complaint. Tex.R. Civ. P. 86(1).

In addition, B-E's claims do not fall under section 15.011, which by its express wording does not pertain to B-E's breach-of-contract action for damages from non-payment for services performed under the contract. Therefore, absent a venue challenge by Compass, B-E could prosecute its suit in Dallas County. And "[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute." Tex. Civ. Prac. & Rem.Code Ann. § 15.062 (Vernon Supp.2001).

Section 15.011 possibly could have controlled venue, but only if Compass had filed its Leon County suit first. Because it did not, and for the reasons just stated, section 15.011 does not defeat the summary judgment.

Rule 97(a)

Rule 97(a) by its express wording requires all claims "aris[ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim" to be brought as counterclaims to the pending suit. A counterclaim is compulsory if: (1) it is within the jurisdiction of the court; (2) it is not at the time of filing the answer the subject of a
278 pending action; (3) the action is mature and owned by the pleader at the time of filing the answer; *278 (4) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; (5) it is against an opposing party in the same capacity; and (6) it does not require for its adjudication the presence of third parties over whom the

court cannot acquire jurisdiction. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex.1988). "A defendant's failure to assert a compulsory counterclaim precludes its assertion in later actions." *Id.*

None of *Wyatt* elements 1, 2, 3, 5, and 6 are in dispute. As for element 4, to determine whether or not a defendant's claim "arises out of the transaction or occurrence that is the subject matter of the [plaintiff's] claim," some courts have used a "logical relationship" test. *E.g.*, *Williams v. National Mortg. Co.*, 903 S.W.2d 398, 404 (Tex.App.-Dallas 1995, writ denied); *Klein v. Dooley*, 933 S.W.2d 255, 259 (Tex.App.-Houston [14th Dist.] 1996), *rev'd on other grounds*, 949 S.W.2d 307 (1997). "When the same facts ... are significant and logically relevant to the various causes of action, the 'logical relationship' test is satisfied." *Williams*, 903 S.W.2d at 404 (citing *Jack H. Brown & Co. v. Northwest Sign Co.*, 718 S.W.2d 397, 400 (Tex.App.-Dallas 1986, writ ref'd n.r.e.)).

It is undisputed that both suits pertained to B-E's drilling the well and the loss of the hole, and that performance under the contract was at issue in both suits. We conclude that Compass's claims in the Leon County suit were compulsory counterclaims in the Dallas County suit which were forfeited when Compass did not file them as such.

Kedra v. City of Philadelphia, 454 F. Supp. 652

United States District Court, E. D. Pennsylvania.

June 29, 1978.

OPINION

LUONGO, District Judge.

This civil rights action arises out of an alleged series of brutal acts committed by Philadelphia policemen against the plaintiffs. The events set forth in the complaint span one and one-half years, from December 1975 to February or March 1977. The defendants have moved to dismiss. *See* Fed.R.Civ.P. 12(b).

I. *The Factual Allegations*

Plaintiffs are Dolores M. Kedra; her children, Elizabeth, Patricia, Teresa, Kenneth, Joseph,[1] Michael, Robert, and James; and Elizabeth's husband, Richard J. Rozanski. Michael, Robert, and James Kedra are minors, and their mother sues on their behalf as parent and natural guardian.

Defendants are the City of Philadelphia; Police Commissioner Joseph J. O'Neill; officials of the Police Department's Homicide Division — Division Chief Donald Patterson, Chief Inspector Joseph Golden, Lieutenant Leslie Simmins, and Sergeant John Tiers; Homicide Detectives Richard Strohm, James Richardson, George Cassidy, and Michael Gannon; Police Lieutenant Augustus C. Miller; Police Officers James Brady, Robert Pitney, Jessie Vassor, and John J. D'Amico; an officer surnamed Tuffo; and other unidentified members of the Police Department. It is alleged that "at all times material to plaintiffs' cause of action [the City of Philadelphia] employed all of the 658*658 individual defendants." It is further alleged that each of the individual defendants, "separately and in concert," acted under color of Pennsylvania law and, "pursuant to their authority as agents, servants, and employees of defendant City of Philadelphia, intentionally and deliberately engaged in the unlawful conduct described . . .." They are sued "individually and in their official capacity" and "jointly and severally."

The series of events set forth in the complaint[2] dates from December 22, 1975. On that evening, Richard Rozanski and Joseph and Michael Kedra were arrested at gun point without probable cause by defendants Vassor and D'Amico and taken to Philadelphia Police Headquarters (the Roundhouse). At the Roundhouse, they were separated and questioned for seventeen hours by defendants Strohm, Richardson, Cassidy, and Gannon. They were not informed of their constitutional rights and were refused requests for counsel. The complaint states —

"During the course of the interrogation, plaintiffs Richard Rozanski, Michael Kedra and Joseph Kedra were handcuffed, struck about the head, face, stomach, abdomen, arms and legs with fists and physical objects, were harassed and threatened with further physical violence by defendants Strohm, Richardson, Cassidy and Gannon; during the course of this interrogation, plaintiff Richard Rozanski's legs

were held apart by two of the defendant detectives while he was kicked in the testicles, groin, buttocks and legs by defendant Strohm."

Rozanski, and Michael and Joseph Kedra each sustained serious injuries as a result of the beatings.

Meanwhile, defendant Richardson forcibly took Elizabeth Rozanski from her mother's house to the Roundhouse, where she was detained and questioned for seventeen hours by defendants Strohm, Gannon, Richardson, and Simmins. She was not advised of her rights. She was shown her husband, who had been beaten badly, and "was threatened with arrest in an attempt to coerce a false statement from her." A warrantless search of her bedroom was conducted by defendant Strohm "and others" without her consent and without probable cause.

On that same evening, Dolores Kedra voluntarily went to the Roundhouse "where she was illegally interrogated, coerced into signing a release authorizing the search of her house and forcibly detained" for nine hours by Strohm, Richardson, Cassidy, Gannon, "and other unidentified defendants."

Seven days later, on the morning of December 29, 1975, defendants Brady and Pitney went to the Kedra home, demanding to see Richard Rozanski and "falsely stating that they had papers for his appearance in Court on the following day." All of the plaintiffs except Dolores Kedra, the mother, were at home at the time. The policemen "attempted to drag [Rozanski] out of the house," but Rozanski and Kenneth Kedra shut and locked the door. Rozanski asked to see a warrant, but Brady and Pitney did not have one. Brady and Pitney then secured the aid of other policemen who, without a warrant or probable cause and "through the use of excessive force," "broke open the door with the butt end of a shotgun and forced their way into the house with shotguns, handguns, blackjacks, and nightsticks in hand." Defendants Brady, Pitney, Miller, Tiers, "and ten to fifteen other defendant members of the Philadelphia Police Department" conducted a thorough search of the house and, while doing so, physically assaulted Patricia, Joseph, Michael, and Kenneth Kedra, inflicting serious injuries. They also attempted to confiscate a camera and note pad being used by Joseph Kedra. It is alleged further that—

"[T]he defendants unlawfully detained plaintiffs within the house by blocking off both the front and rear doors, holding plaintiffs in fear of life and limb by visibly displaying shotguns, handguns and 659*659 nightsticks, and through threats of violence, coercion and abusive language."

Rozanski and Joseph, Michael, and Kenneth Kedra were taken to the Roundhouse in a police van, and Kenneth was beaten while being led to the van. At the Roundhouse, Michael and Kenneth were "unlawfully detained" for twenty-four hours, and Rozanski "was struck in the face by defendant Strohm" and was denied repeated requests for counsel. "[W]ithout just or probable cause," Rozanski was charged with murder, burglary, and receiving stolen goods, and Kenneth and Joseph were charged with assault and battery, harboring a fugitive, and resisting arrest. In defending these charges, they incurred attorney's fees. All three later were acquitted on all counts.

With respect to the December 1975 events, the complaint sets forth the following general allegations:

"17. At all times material to plaintiffs' cause of action, plaintiff Richard Rozanski, through his attorney, offered to voluntarily surrender to the Philadelphia Police; the defendants chose, however, to engage in the course of conduct described in detail above, the purpose and effect of which was to knowingly, intentionally and deliberately deprive plaintiffs of rights secured by the Constitution of the United States.

18. All of the aforementioned acts were committed by defendants intentionally, deliberately and maliciously, pursuant to their authority as agents, servants and employees of the Police Department of the City of Philadelphia.

19. The aforementioned acts were committed with the consent and knowledge and at the direction of defendants Joseph F. O'Neill in his capacity as Police Commissioner of the City of Philadelphia.

20. The aforementioned acts were committed with the knowledge and consent and at the direction of defendant Joseph Golden in his official capacity as Chief Inspector of the Homicide Division of the Police Department of the City of Philadelphia.

21. The aforementioned acts were committed with the knowledge and consent and at the direction of Captain Donald Patterson, Chief of the Homicide Division of the Philadelphia Police Department, Lieutenant Lesley Simmins and Sergeant John Tiers, in their official capacities as supervisory officials of the Philadelphia Police Department.

22. The defendants named in Paragraphs 18, 19, 20 and 21 are and were at all times material to plaintiffs' cause of action in a position to exercise direct supervision of the defendant officers and detectives and did in fact exercise such control and supervision at all times material to plaintiffs' cause of action.

23. All of the aforementioned acts were committed without just or probable cause with regard to each of the plaintiffs."

The complaint alleges further that "defendants have engaged and continue to engage in a systematic pattern of harassment, threats and coercion with the intention of, and having the effect of depriving plaintiffs of . . . rights and privileges . . .." As part of this "pattern," Michael Kedra was arrested in June 1976 and was beaten by defendant Strohm, "who handcuffed plaintiff's hands behind his back, and struck him in the chest and stomach with a nightstick and fist." James Kedra has been "harassed and threatened without cause" by defendants D'Amico, Brady and Pitney, and in February or March 1977 "was grabbed by the shirt" by Tuffo and Pitney "and threatened with physical violence."

The complaint asserts that "as a result of the aforementioned actions, plaintiffs have suffered and continue to suffer severe emotional distress."

II. *The Suit and the Motion*

Plaintiffs' complaint was filed on November 23, 1977. The action is brought under the Constitution and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. As a basis for their civil rights 660*660 claims, the plaintiffs assert that defendants' actions deprived them of the following federal "rights, privileges and immunities":

"(a) The right of free speech and the right to peacably [*sic*] assemble under the First and Fourteenth Amendments.

(b) The right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures under the Fourth and Fourteenth Amendments.

(c) The prohibition against compulsory self-incrimination under the Fifth and Fourteenth Amendments.

(d) The right to be free from deprivation of life, liberty or property without due process of law under the Fifth and Fourteenth Amendments.

(e) The prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments."

Without explanation, the complaint also cites the Equal Protection Clause of the Fourteenth Amendment and Article 1, §§ 1, 8, and 9 of the Pennsylvania Constitution. Plaintiffs also invoke the pendent jurisdiction doctrine to assert additional claims under Pennsylvania law "for false arrest, false imprisonment, malicious prosecution, assault and battery, trespass to real and personal property and negligent and intentional infliction of emotional distress." Plaintiffs seek compensatory and punitive damages in excess of $10,000 and attorneys' fees and costs.

All of the named defendants have filed the motion to dismiss. It is based on several grounds[3] and raises questions of procedure as well as jurisdictional and substantive issues under the civil rights laws. In addition, the pendent state claims raise jurisdictional issues not discussed in the motion which should be examined in this opinion.

III. *Procedural Questions*

Defendants' motion raises two matters that essentially are procedural. First, they contest Dolores Kedra's prosecution of the case on behalf of her minor sons, Michael, Robert, and James. Second, they contend that there has been an improper joinder of parties.

B. *Joinder*

Defendants contend that there has been an improper joinder of parties under Federal Rule of Civil Procedure 20(a), which provides:

"All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All

persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Defendants argue that plaintiffs' claims against them do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" because they stem from events spanning a fourteen or fifteen month period.[6]

The joinder provisions of the Federal Rules are very liberal. As the Supreme Court noted in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966),

"Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

383 U.S. at 724, 86 S.Ct. at 1138 (footnote omitted).

The reason for the liberality is that unification of claims in a single action is more convenient and less expensive and time-consuming for the parties and the court. *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). In recognition of this attitude, the "transaction or occurrence" language of Rule 20 has been interpreted to "permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary." *Id.* at 1333.

662*662 Although the events giving rise to plaintiffs' claims in this case occurred over a lengthy time period, they all are "reasonably related." The complaint sets forth a series of alleged unlawful detentions, searches, beatings and similar occurrences and charges defendants with "engag[ing] in a systematic pattern of harassment, threats and coercion with the intention of . . . depriving plaintiffs of [their] rights"; each of the incidents set forth is encompassed within the "systematic pattern." There is no logical reason why the systematic conduct alleged could not extend over a lengthy time period and, on the face of these allegations, there is nothing about the extended time span that attenuates the factual relationship among all of these events. The claims against the defendants "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" for purposes of Rule 20(a), and therefore joinder of defendants in this case is proper.

Apart from the procedural propriety of the joinder under Rule 20(a), however, there is a question whether a single trial of all claims against all defendants will prejudice some of the defendants. Some of the defendants were involved in only one of the several incidents alleged, and lumping them together with other defendants who were involved in more than one incident may be unfair. This problem is of particular concern with respect to the December 29, 1975 incident, which, apart from the allegations of direction, supervision, and control, appears to involve different actors than the other incidents alleged. Federal Rule 20(b) provides the court with power to remedy this situation:

"The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

At oral argument, counsel for both sides recognized the potential prejudicial effect of the joinder in this case and suggested formulation of a stipulation which would attempt to remedy the problem. It appears, however, that it will be better to deal with the problem after discovery has been completed and the case is ready for trial. At that time, the degree of involvement of each of the defendants will be more clear and potential prejudice will be easier to assess. I therefore shall defer decision of this aspect of the case. I shall retain flexibility to sever portions of it or to take other remedial actions, if necessary, once the prejudice issue is more clearly focused.

[1] Joseph Kedra is named as a plaintiff in the body of the complaint but not in the caption. This oversight violated federal pleading rules (*see* Fed.R.Civ.P. 10(a); *Carrigan v. California State Legislature*, 263 F.2d 560, 567 (9th Cir.), *cert. denied*, 359 U.S. 980, 79 S.Ct. 901, 3 L.Ed.2d 929 (1959)) and should be corrected by amendment.

[2] The facts related in the text are as alleged in the complaint. For purposes of this motion, those allegations are taken as true. *See Estelle v. Gamble*, 429 U.S. 97, 99, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

[6] The Federal Rules permit unlimited joinder of claims against an opposing party (Fed.R.Civ.P. 18(a)), but in multiparty cases joinder is limited by the requirement of Rule 20(a) that plaintiffs or defendants may not be joined in the same case unless some of the claims by or against each party arise out of common events and contain common factual or legal questions. Defendants have not argued that common factual and legal questions are not present in this case; the similarity of the claims against each defendant makes it abundantly clear that there are common issues. Once parties are joined under Rule 20(a), Rule 18(a)'s allowance of unlimited joinder of claims against those parties is fully applicable. *See* Advisory Committee on Rules, Note to 1966 Amendment to Rule 18.

Discussion Questions: Joinder of Parties and Claims

1. P sues D. D answers and asserts a counterclaim against P based on facts that are entirely unrelated to P's original claim against D. Two questions: (1) Is that allowed? (2) If so, what happens if P has a potential counterclaim to D's counterclaim but fails to assert it? As to the second question, does it matter if P's potential counterclaim is related or unrelated to D's asserted counterclaim? Maximum time to answer: 2 minutes.

2. Courts are likely to be more flexible in finding that the transaction or occurrence standard in Rule 20 has been met than they are in finding that the transaction or occurrence standard in Rule 15(c)(1)(B) standard has been met. Try to articulate why. Maximum time to answer: 3 minutes.

3. What is impleader and when is it allowed? Maximum time to answer: 2 minutes.

4. Rule 18 looks like a generous rule that does not require the joinder of all related claims but there are consequences that could follow if a claimant fails to assert all related available claims that arise out of the same transaction or occurrence. Try to articulate your understanding of this point. Maximum time to answer: 2 minutes.

66 S.Ct. 154
Supreme Court of the United States
INTERNATIONAL SHOE CO.
v.
STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT et al.
No. 107
|
Decided Dec. 3, 1945.

Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, s 9998—103a through s 9998—123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act, Wash.Rev.Stat. 1941 Supp., s 9998—114c, authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. By ss 14(e) and 6(b) the order of assessment may be administratively reviewed by an appeal tribunal within the office of unemployment upon petition of the employer, and this determination is by s 6(i) made subject to judicial review on questions of law by the state Superior Court, with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 154 P.2d 801. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under s 237(a) of the Judicial Code, 28 U.S.C. s 344(a), 28 U.S.C.A. s 344(a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The

cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. International Harvester Co. v. Kentucky, 234 U.S. 579, 587, 34 S.Ct. 944, 946, 58 L.Ed. 1479; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87, 38 S.Ct. 233, 235, 62 L.Ed. 587, Ann.Cas.1918C, 537; Frene v. Louisville Cement Co., 77 U.S.App.D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. s 1606(a), 26 U.S.C.A. Int.Rev.Code, s 1606(a), provides that 'No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.' It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270; Perkins v. Pennsylvania, 314 U.S. 586, 62 S.Ct. 484, 86 L.Ed. 473; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308, 63

S.Ct. 1067, 1068, 87 L.Ed. 1416; Hooven & Allison v. Evatt, 324 U.S. 652, 679, 65 S.Ct. 870, 883; Southern Pacific Co. v. Arizona, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520.

Appellant also insists that its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. See Green v. Chicago, Burlington & Quincy R. Co., 205 U.S. 530, 533, 27 S.Ct. 595, 596, 51 L.Ed. 916; International Harvester Co. v. Kentucky, supra, 234 U.S. 586, 587, 34 S.Ct. 946, 58 L.Ed. 1479; Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 268, 37 S.Ct. 280, 61 L.Ed. 710; People's Tobacco Co. v. American Tobacco Co., supra, 246 U.S. 87, 38 S.Ct. 235, 62 L.Ed. 587, Ann.Cas.1918C, 537. And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 132 A.L.R. 1357.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, Klein v. Board of Tax Supervisors, 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140, 73 A.L.R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are ***317** used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141. Those demands may be met by such contacts

of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson v. Chase & Gilbert, supra, 45 F.2d 141.

'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222; Hess v. Pawloski, supra; Young v. Masci, supra. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. Lafayette Insurance Co. v. French, 18 How. 404, 407, 15 L.Ed. 451; St. Clair v. Cox, supra, 106 U.S. 356, 1 S.Ct. 359, 27 L.Ed. 222; Commercial Mutual Accident Co. v. Davis, supra, 213 U.S. 254, 29 S.Ct. 447, 53 L.Ed. 782; State of Washington v. Superior Court, 289 U.S. 361, 364, 365, 53 S.Ct. 624, 626, 627, 77 L.Ed. 1256, 89 A.L.R. 653. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. Smolik v. Philadelphia & R.C. & I. Co., D.C., 222 F. 148, 151. Henderson, The Position of Foreign

Corporations in American Constitutional Law, 94, 95.

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. St. Louis S.W.R. Co. v. Alexander, supra, 227 U.S. 228, 33 S.Ct. 248, 57 L.Ed. 486, Ann.Cas.1915B, 77; International Harvester Co. v. Kentucky, supra, 234 U.S. 587, 34 S.Ct. 946, 58 L.Ed. 1479. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. Pennoyer v. Neff, supra; Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 43 S.Ct. 293, 67 L.Ed. 573.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare International Harvester Co. v. Kentucky, supra, with Green v. Chicago, Burlington & Quincy R. Co., supra, and People's Tobacco Co. v. American Tobacco Co., supra. Compare Connecticut Mutual Life Ins. Co. v. Spratley, supra, 172 U.S. 619, 620, 19 S.Ct. 314, 315, 43 L.Ed. 569, and Commercial Mutual Accident Co. v. Davis, supra, with Old Wayne Mut. Life Ass'n v. McDonough, supra. See 29 Columbia Law Review, 187-195.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit in personam to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's 'presence' there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Opinion

Mr. Justice BLACK delivered the following opinion.

Congress, pursuant to its constitutional power to regulate commerce, has expressly provided that a State shall not be prohibited from levying the kind of unemployment compensation tax here challenged. 26 U.S.C. s 1606, 26 U.S.C.A. Int.Rev.Code, s 1606. We have twice decided that this Congressional consent is an adequate answer to a claim that imposition of the tax violates the Commerce Clause. Perkins v. Pennsylvania, 314 U.S. 586, 62 S.Ct. 484, 86 L.Ed. 473, affirming 342 Pa. 529, 21 A.2d 45; Standard Dredging Corp. v. Murphy, 319 U.S. 306, 308, 63 S.Ct. 1067, 1068, 87 L.Ed. 1416. Two determinations by this Court of an issue so palpably without merit are sufficient. Consequently that part of this appeal which again seeks to raise the question seems so patently frivolous as to make the case a fit candidate for dismissal. Fay v. Crozer, 217 U.S. 455, 30 S.Ct. 568, 54 L.Ed. 837. Nor is the further ground advanced on this appeal, that the State of Washington has denied appellant due process of law, any less devoid of substance. It is my view, therefore, that we should dismiss the appeal as unsubstantial,[1] Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 90, 92, 53 S.Ct. 32, 34, 35, 77 L.Ed.

180, 86 A.L.R. 174; and decline the invitation to formulate broad rules as to the meaning of due process, which here would amount to deciding a constitutional question 'in advance of the necessity for its decision.' Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725, 1734.

Certainly appellant can not in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical 'presence.' For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 1722, 145 A.L.R. 1113. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

The criteria adopted insofar as they can be identified read as follows: Due process does permit State courts to 'enforce the obligations which appellant has incurred' if it be found 'reasonable and just according to our traditional conception of fair play and substantial justice.' And this in turn means that we will 'permit' the State to act if upon 'an 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business', we conclude that it is 'reasonable' to subject it to suit in a State where it is doing business.

It is true that this Court did use the terms 'fair play' and 'substantial justice' in explaining the philosophy underlying the holding that it could not be 'due process of law' to render a personal judgment against a defendant without notice to and an opportunity to be heard by him. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357.

In McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458, cited in the Milliken case, Mr. Justice Holmes speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of 'fair play', which even the common law would have deemed 'contrary to natural justice.' And previous cases had indicated that the ancient rule against judgments without notice had stemmed from 'natural justice' concepts. These cases, while giving additional reasons why notice under particular circumstances is inadequate, did not mean thereby that all legislative enactments which this Court might deem to be contrary to natural justice ought to be held invalid under the due process clause. None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of 'natural justice.' I should have thought the Tenth Amendment settled that.

I believe that the Federal Constitution leaves to each State, without any 'ifs' or 'buts', a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this ***325** Court's notion of 'fairplay', however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words 'fair play', 'justice', and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. Express prohibitions against certain types of legislation are found in the Constitution, and under the long settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons and businesses within the State, provided proper service can be had. Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion,[2] and the right to counsel. This has already happened. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Compare Feldman v. United States, 322 U.S. 487, 494—503, 64 S.Ct. 1082, 1085—1089, 88 L.Ed. 1408, 154 A.L.R. 982. For application of this natural law concept, whether under the terms 'reasonableness', 'justice', or 'fair play', makes

judges the supreme arbiters of the country's laws and practices. Polk Co. v. Glover, 305 U.S. 5, 17—18, 59 S.Ct. 15, 20, 21, 83 L.Ed. 6; Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 600, 62 S.Ct. 736, 750, 86 L.Ed. 1037, note 4. This result, I believe, alters the form of government our Constitution provides. I cannot agree. True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:

'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.' Baldwin v. Missouri, 281 U.S. 586, 595, 50 S.Ct. 436, 439, 74 L.Ed. 1056, 72 A.L.R. 1303.

International Shoe Personal Jurisdiction Discussion Questions

1. Try to articulate the constitutional Due Process limits on judicial power prior to *International Shoe*.

2. Using *International Shoe*'s reformulation of the constitutional test, try to articulate why Due Process is satisfied if (1) a corporation's in-state activities are "continuous and systematic" and (2) those in-state activities "give rise to" the plaintiff's claim. (As an example, you can use the facts of the *International Shoe* case itself, which the Court thought had both of these predicates.)

3. By contrast, (1) if a corporation has conducted very few in-state activities (2) that, in any event, are entirely unconnected to the plaintiff's cause of action, it would violate the corporation's Due Process rights to be sued in that state. For example, consider this scenario: a corporation maintains an agent in State A but that agent doesn't do anything there and the corporation does no other business in the state. Nevertheless, the plaintiff, who herself lives in State B, chooses to bring a suit in State A alleging that the corporation wronged him based entirely on actions by the corporation taken against him in State B. Using *International Shoe*'s language, why isn't it constitutional for a court in State A to exercise jurisdiction over the corporation based on these two predicates?

4. *International Shoe* also said that jurisdiction is constitutional (1) if a corporation only has a single or few in-state corporate activities (2) but those activities "arise out of or are connected with" the plaintiff's cause of action. Using *International Shoe*'s language, try to articulate why it's constitutional. You should also think about whether *International Shoe* uses any different rationales to justify jurisdiction for the circumstances described in Question 2 and this question.

5. Finally, *International Shoe* says that it would be constitutional to exercise jurisdiction over a corporation (1) if its in-state activities are "so substantial and of such a nature as to justify suit against it" (2) even though the plaintiff's cause of action "arise[es] from dealings entirely distinct from those activities." The Court does not do much to explain, but can you extrapolate from what *International Shoe* said about other contexts to explain why the exercise of jurisdiction would be constitutional based on these two predicates? [We will answer this question in our next class.]

Ohio Long-Arm Statute

Ohio Rev. Code Ann. § 2307.382

§ 2307.382. Personal jurisdiction

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

California Long-Arm Statute

Cal. Code Civ. Proc § 410.10

§ 410.10. Jurisdiction exercisable

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Texas long arm statute

SUBCHAPTER C. LONG-ARM JURISDICTION IN SUIT ON BUSINESS TRANSACTION OR TORT

Sec. 17.041. DEFINITION. In this subchapter, "nonresident" includes:

(1) an individual who is not a resident of this state; and

(2) a foreign corporation, joint-stock company, association, or partnership.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 17.042. ACTS CONSTITUTING BUSINESS IN THIS STATE. In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 17.043. SERVICE ON PERSON IN CHARGE OF BUSINESS. In an action arising from a nonresident's business in this state, process may be served on the person in charge, at the time of service, of any business in which the nonresident is engaged in this state if the nonresident is not required by statute to designate or maintain a resident agent for service of process.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 17.044. SUBSTITUTED SERVICE ON SECRETARY OF STATE. (a) The secretary of state is an agent for service of process or complaint on a nonresident who:

(1) is required by statute to designate or maintain a resident agent or engages in business in this state, but has not designated or maintained a resident agent for service of process;

(2) has one or more resident agents for service of process, but two unsuccessful attempts have been made on different business days to serve each agent; or

(3) is not required to designate an agent for service in this state, but becomes a nonresident after a cause of action arises in this state but before the cause is matured by suit in a court of competent jurisdiction.

(b) The secretary of state is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises out of the business done in this state and to which the nonresident is a party.

(c) After the death of a nonresident for whom the secretary of state is an agent for service of process under this section, the secretary of state is an agent for service of process on a nonresident administrator, executor, or personal representative of the nonresident. If an administrator, executor, or personal representative for the estate of the deceased nonresident is not appointed, the secretary of state is an agent for service of process on an heir, as determined by the law of the foreign jurisdiction, of the deceased nonresident.

(d) If a nonresident for whom the secretary of state is an agent for service of process under this section is judged incompetent by a court of competent jurisdiction, the secretary of state is an agent for service of process on a guardian or personal representative of the nonresident.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 158, Sec. 1, eff. May 25, 1987.

Sec. 17.045. NOTICE TO NONRESIDENT. (a) If the secretary of state is served with duplicate copies of process for a nonresident, the documents shall contain a statement of the name and address of the nonresident's home or home office and the secretary of state shall immediately mail a copy of the process to the nonresident at the address provided.

(b) If the secretary of state is served with process under Section 17.044(a)(3), he shall immediately mail a copy of the process to the nonresident (if an individual), to the person in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation).

(c) If the person in charge of a nonresident's business is served with process under Section 17.043, a copy of the process and notice of the service must be immediately mailed to the nonresident or the nonresident's principal place of business.

(d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

(e) If the secretary of state is served with duplicate copies of process as an agent for a person who is a nonresident administrator, executor, heir, guardian, or personal representative of a nonresident, the secretary shall require a statement of the person's name and address and shall immediately mail a copy of the process to the person.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 158, Sec. 2, eff. May 25, 1987; Acts 2001, 77th Leg., ch. 275, Sec. 1, eff. Sept. 1, 2001.