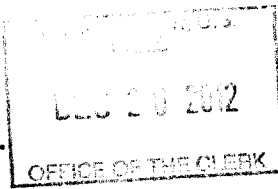


12. 767



In the Supreme Court of the United States

PROGRESSIVE FOODS, LLC, EITAN FLANK, MIKE FLANK,
SHAUL FLANK & JOEL SAUSEN,
Petitioners,

v.

DUNKIN' DONUTS, INC., BASKIN-ROBBINS USA Co. &
THIRD DUNKIN' DONUTS REALTY, INC.,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

THOMAS R. BRULE
Counsel of Record
BRULE LAW FIRM, LLC
P.O. Box 401
CHAGRIN FALLS, OHIO 44022
(216) 789-4229
brulet@gmail.com

Attorney for Petitioners

QUESTIONS PRESENTED

Every case, both civil and criminal, is affected by judicial admissions. Every pleading, whether a complaint or an answer, must contain statements concerning questions of fact. It is widely understood that a party must choose its statements wisely or risk pleading themselves out of court. What is not widely understood or universally applied, however, is the effect of contradictory judicial admissions made by adverse parties and the role of the appellate courts in reviewing the district court's treatment of judicial admissions. In this case, the district court declined to bind Petitioner by certain allegations in its complaint that Respondents denied in their answer and admitted could not have been true in memoranda to the court. The court of appeals reversed without finding that the district court abused its discretion and without explaining why Respondents' conflicting statements did not also apply as binding admissions. This case therefore presents the following questions:

1. When confronted with contradictory judicial admissions from adversarial parties, can a court hold either party bound by their statement, or does the issue become a question of fact?
 2. Are statements made in memoranda to the court judicial admissions?
 3. Can a court of appeals disregard the trial court's findings of fact and bind a party by its statements without holding that the district court's findings were clearly erroneous or that the district court abused its discretion in declining to so bind the party?
-

4. Does a party that waives by contract its right to a jury trial also waive its Seventh Amendment right to have no fact determined at trial re-examined by the court of appeals?

PARTIES TO THE PROCEEDING

The Petitioners are Progressive Foods, LLC (plaintiff in the district court and appellee/cross-appellant in the court of appeals), Eitan Flank, Mike Flank, Shaul Flank, and Joel Sausen (third-party defendants in the district court and appellees/cross-appellants in the court of appeals). Respondents are Dunkin' Donuts, Inc., Baskin-Robbins USA Co., and Third Dunkin' Donuts Realty, Inc. (defendants/third-party plaintiffs in the district court and appellants/cross-appellees in the court of appeals).

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Progressive Foods, LLC does not have any parent corporations, and no publicly held company owns 10 percent or more of its stock. The remaining petitioners are natural persons.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”) is unreported and has been reprinted in Appendix (“Appx.”) 2a-10a.¹ The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported and has been reprinted in Appx. 11a-13a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its panel decision on August 9, 2012. Petitioners filed a petition for rehearing *en banc* on August 23, 2012. The Sixth Circuit denied the petition for rehearing by an order dated September 27, 2012. Appx. 89a-90a. Jurisdiction for this petition is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Seventh Amendment to the Constitution of the United States provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII.

¹ For purposes of this petition, citations to the Sixth Circuit’s panel decision are abbreviated as “PD.”

STATEMENT OF THE CASE

This case exemplifies the profound impact of the improper application of judicial admissions rules by the court of appeals. When wielded without due caution and without respect for the discretion of the trial judge, the incompletely defined judicial admissions rules permit the court of appeals to reach beyond its appropriate role at the cost of undermining the fundamental functions of the trial court. In this case, the Sixth Circuit dismantled a judgment carefully constructed by the district court, basing its decision to reverse on nothing more than a single statement repeated in separate counts in Petitioners' pleading, denied six times in Respondents' answer, and contradicted by statements in Respondents' memoranda. In so doing, the Sixth Circuit disregarded a two-week bench trial including extensive witness testimony and thousands of pages of documentary evidence. But most importantly, in focusing only on Petitioner's statement, the Sixth Circuit ignored Respondents' admissions, made in pleadings and in memoranda to the court, directly conflicting the statement upon which the panel based its reversal. A court of appeals cannot be permitted to undermine determinations best left to the discretion of the trial court by cherry-picking admissions on appeal, without so much as even declaring the standard upon which it reviewed the district court's treatment of the parties' admissions. To do so would be to permit judgment by lottery, rather than the careful consideration of the allegations, arguments, and facts and evidence presented at trial—the very basis of our judicial system.

At the heart of this case is a business arrangement consisting of multiple agreements between the parties to develop and operate quick-serve (fast food) restaurants (“QSRs”) in the Cleveland, Ohio area. Petitioners are businessmen who formed Progressive Foods, LLC (“Progressive”) for the purpose of entering into a Store Development Agreement (“SDA”) and franchise agreements with Respondents for the development and operation of combination Dunkin’ Donuts/Baskin Robbins franchise restaurants. Respondents are a group of affiliated and subsidiary corporations that act, as required by their respective roles, as franchisors, lessors, real estate developers and/or general contractors for the planning, construction and oversight of franchise restaurants.

At the outset of its relationship with Respondents, Progressive expected to eventually own and operate many franchise restaurants within the Respondents’ system in the Cleveland market. The parties agreed under the SDA to develop at least six QSRs over the course of approximately three years, beginning in September, 2004. Had development proceeded as contemplated under the SDA, Progressive would have had the option to develop additional stores within its territory for an additional franchise fee. But development did not proceed as planned, due to Respondents’ wrongful conduct in breach of the SDA and other agreements between the parties. *See generally* FFCL,² Appx. 14a-88a.

² For purposes of this petition, citations to the district court’s findings of fact and conclusions of law are abbreviated as “FFCL.”

Although the SDA development schedule was to have been completed by January 1, 2008, Respondents have permitted Progressive to open only three QSRs to date while demanding that Progressive pay the balance of the \$240,000 in initial franchise fees owed for the six stores contemplated under the SDA. Respondents have prevented Progressive's development through the use of the "development hold," a tool that the district court found Respondents to have applied unilaterally, in breach of the SDA, and for nearly the entire duration of the SDA term. FFCL, Appx. 17a, 24a, 85a. The district court also found that Respondents used the development hold as a means of corralling Progressive into accepting development at unfavorable sites that Respondents had acquired as part of a recklessly aggressive expansion program before Progressive had even approached Respondents to explore becoming franchisees. FFCL, Appx. 16a-17a, 24a-25a, 37a. Respondents kept Progressive on development hold for nearly the entire thirty-seven month period that the SDA was in effect, and only lifted the hold for two very brief windows during the periods when Respondents attempted to sell or lease to Progressive stores in which Respondents had invested before entering the SDA with Progressive. FFCL, Appx. 24a.

Progressive filed suit on October 3, 2007 in the Court of Common Pleas for Cuyahoga County, Ohio, seeking a jury trial for its claims including breach of contract, unjust enrichment, civil conspiracy and fraud, among others, and seeking damages and injunctive relief. Respondents removed the case to the United States District Court for the Northern District of Ohio on November 2, 2007. The district court had jurisdiction to hear the dispute under 28 U.S.C.

§ 1332(a) due to the diversity of citizenship among the parties and the amount in controversy. Respondents also bitterly contested Progressive's demand for a jury trial based on a waiver contained within the parties' SDA. *See* DC³ 42, 43, 46, 47, 154, 159, 161, 173, 174, 175, 176, 180, 182. The district court concluded that Progressive waived its right to a jury trial and scheduled a bench trial to hear the parties' claims. *See* DC 177.

On November 11, 2007, the district court ordered Progressive to file an amended complaint setting out each of its claims in a separate count. Progressive complied with the order on February 17, 2008 by repeating certain allegations verbatim for each count under its own respective heading.⁴ As a result, certain statements contained in Progressive's state-court complaint were repeated in Progressive's amended complaint. Progressive's allegations and claims for relief remained otherwise unchanged. The purpose and effect of Progressive's amended complaint was to comply with the district court's order to reformat the document for the court's convenience, not to alter Progressive's allegations or claims.⁵

³ For purposes of this petition, citations to documents filed in the district court and not reproduced in the appendix are abbreviated as "DC" and are referred to by docket number.

⁴ Progressive's amended complaint has been reproduced at Appx. 91a-134a. For purposes of this petition, citations to Progressive's amended complaint are abbreviated as "Com."

⁵ Progressive's original complaint and amended complaint are essentially identical. Each count in the original complaint

At the time Progressive filed suit, Petitioners were unaware of the extent of the Respondents' misuse of development holds and that Respondents had information causing some of Respondents' personnel to doubt whether the sites they had forced on Progressive were actually suitable for the development of successful QSRs. These facts were only revealed by the extensive pre-trial discovery in this case at the district court level. What Progressive did know, however, was that the development sites Respondents had suggested were failing; Respondents had consistently refused to approve development at sites identified by Progressive, while demanding that Progressive continue to pay initial franchise fees for all six stores under the SDA; and Respondents overbearing interference with the day-to-day operations of Progressive's existing stores was having a significant negative effect on profitability.

However, Progressive included in its complaint a generic, self-limiting statement regarding an alleged notice of claims and issues that Progressive had purportedly given to Respondents in August of 2005, more than two years before Progressive filed suit. Progressive stated that "Progressive timely notified the Defendants of all of the issues and problems and their claims against the Defendants on or about August 3, 2005." Com. ¶¶ 23, 60, 102, 136, 195, 229, Appx. 96a, 102a, 109a, 115a, 125a, 131a. The statement, only if

contained a statement incorporating the allegations in the preceding paragraphs by reference, a common pleading practice. While Respondents and the court of appeals have made much ado about the repetition of certain statements in Progressive's amended complaint, in reality the only difference between the original and amended complaint is the formatting.

taken literally and out of context, beyond its logical limits, and discounting facts conceded by Respondents, would, as applied by the Sixth Circuit, foreclose all of Progressive's claims against Respondents since the parties' SDA contains a two-year contractual limitations provision. But Progressive's statement inherently has a much narrower meaning. By August 3, 2005, Progressive had opened only one QSR (*see* Joint Stipulation of Undisputed Facts, DC 187 at ¶¶ 24, 33, 38) and had no knowledge of Respondents' internal communications expressing doubt regarding the suitability of the sites they would force on Progressive or the extent of Respondents' wrongful application of the development holds, committed in breach of the SDA, to force Progressive into those sites.

It was impossible for Progressive to have provided notice of the facts and claims upon which Progressive made its case in district court by August, 2005, and any notice of claims and issues provided in August, 2005, would necessarily have been limited to claims and issues existing at that time and within Progressive's knowledge. As discussed herein, Progressive gained a complete understanding of Respondents' wrongful acts only through extensive discovery of information previously concealed by Respondents. Before filing suit, Progressive could not have known various aspects of Respondents' internal, secret actions and behavior, including that Respondents had secretly kept Progressive on a near continuous development hold. Progressive could not have known of, nor was it privy to, private internal communications among Respondents' personnel who expressed serious concerns about the suitability of the development sites that would eventually be forced on Progressive. And since

two of Progressive's stores had not even opened for business by August 3, 2005, Progressive obviously could not have notified Respondents of its claims based on Respondents' interference with operations at those stores by that time. When Progressive alleged that it notified Respondents of the issues and problems in August, 2005, it meant that Progressive informed Respondents of the issues and problems *existing at that time* insofar as Progressive was aware of and understood them. Inarguably, Progressive could not possibly have provided notice of issues, problems, and claims concerning events that had not yet occurred or were outside of its knowledge.

Respondents apparently also have no record of such a notice. Respondents produced more than 18,000 pages of documents during discovery in this case, yet not one of those pages includes nor refers to any notice of claims received from Progressive in August, 2005, and neither was any such document produced at trial. And none of Respondents' witnesses at trial, nor any personnel within Respondents' respective organizations have testified nor otherwise provided any indication that they received such a notice from Progressive.⁶

Respondents' pleadings also tend to confirm that Progressive did not, and could not have, actually provided notice of all issues, problems and claims on August 3, 2005. For each of the allegations in

⁶ Curiously, counsel for Respondents stated in a letter to the court of appeals that they had in their possession a copy of the alleged August, 2005, notice and would provide it upon the court's request. Respondents failed to produce this documentary evidence at trial.

Progressive's amended complaint regarding the August, 2005, notice, Respondents' answer⁷ contains a corresponding categorical denial that such a notice was provided. *Compare* Com. ¶¶ 23, 60, 102, 136, 195, 229, Appx. 96a, 102a, 109a, 115a, 125a, 131a *with* Ans. ¶¶ 23, 60, 102, 136, 195, 229, Appx. 139a, 146a, 154a, 159a, 170a, 175a. Despite their initial reaction wholly denying the existence of the August, 2005, notice, Respondents have argued at every turn that Progressive should be bound by the statement regarding the August, 2005, notice in its pleadings. Respondents however failed to acknowledge their own pleadings (or their professional ethical obligations of candor to the court) or explain why their pleadings should not have the same binding effect.

Respondents also do not explain why their specific statements contained in memoranda filed with the district court do not estop Respondent from arguing that all of Progressive's claims are barred under the SDA limitations clause. Respondents filed a motion for summary judgment on June 5, 2009. DC 51. In their brief in support of their motion for summary judgment, Respondents argued that the SDA limitations provision barred only *some*, rather than all, of Progressive's claims. DC 51-1 at 12-13. Respondents specifically admitted that "[t]he limitations provision may not apply to certain aspects of the Euclid franchise since it opened in February 2006." *Id.* at 13, n.2. Respondents further stated that "[f]rankly, there is no way for

⁷ Respondents' answer has been reproduced at Appx. 135a-185a. For purposes of this petition, citations to Respondents' answer are abbreviated as "Ans."

Progressive to know whether the stores will be successful or not at this point,” well after Progressive had filed suit. *Id.* at 11. Therefore, Respondents have not only denied that Progressive provided the notice of claims upon which Respondents have based much of their case and appeal, but have also admitted that even if the notice had been given, many of Progressive’s claims would not be barred since much of the factual basis for Progressive’s claims occurred after the supposed notice was made and less than two years before Progressive filed suit.

The district court denied Respondents’ motion for summary judgment on March 12, 2010, stating that there were material facts in dispute preventing disposition. DC 167. The district court conducted a bench trial from September 14-22, 2010. The court issued its findings of fact and conclusions of law and a corresponding judgment entry on February 14, 2011. Appx. 11a-88a.

The district court entered judgment in favor of Progressive and awarded it a total of \$336,000 in damages and injunctive relief “in the context of the [SDA]” in the form of the right to develop three additional QSRs during a three-year period following the date of the judgment entry. Appx. 11a. The district court granted the Defendants \$100,000 on their counterclaim and third-party claim for amounts owing under the SDA so that Progressive, having retained its right to develop, would be required to pay the underlying franchise fees for its remaining three QSRs. The amount awarded to Respondents directly corresponds with the injunction awarded to Progressive.

On March 15, 2011, Respondents filed a notice of appeal to the Sixth Circuit. DC 219. On March 25, 2011, Progressive filed a notice of cross-appeal. DC 222. The parties presented oral arguments before a panel of the Sixth Circuit on April 19, 2012. On August 9, 2012, the panel issued its decision, which reversed the district court's award of damages and injunctive relief to Progressive despite affirming that Respondents breached the SDA, affirmed the district court's denial of interest, costs, and attorneys' fees to Respondents and reduced the district court's award of \$100,000 to Respondents to reflect an agreed-upon modification of one of the franchise agreements between the parties. Appx. 8a, 10a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision in this case raises significant questions that cover new legal ground and affect all proceedings in the trial courts below and in many appellate decisions. This Court's authority is required to provide direction to the lower courts regarding the treatment of conflicting judicial admissions and the appropriate standard of review for such questions in the courts of appeal. While there is no controlling authority on the correct course of action when faced with conflicting judicial admissions, Progressive is aware that such a situation has presented itself to this Court and that Justices of this Court have in the past expressed concern with the Court's decision to cherry-pick an admission in the absence of a clear rule. *See Christian Legal Soc'y Chapter of the Univ. of CA, Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 3005-06 (2010) (dissent of Justices Alito, Roberts, Scalia & Thomas).

While there is no nationwide standard of appellate review for the trial court's treatment of judicial admissions, Progressive's research indicates that a majority of circuits apply an abuse of discretion standard. Progressive's understanding of this Court's guidance, informed by this Court's longstanding decision in *Oscanyan v. Arms Co.*, is that abuse of discretion is the appropriate standard of review. 103 U.S. 261 (1880); *See also Jones v. Morehead*, 68 U.S. 155, 164-65 (1863) (declining to review the trial court decision to bind the defendant by statements in its answer after hearing evidence on the issue, stating that "[i]t was a matter in the discretion of the [trial court], and we are not disposed to review its action on that subject here under these circumstances, if indeed it can be done under any."); *Cf. Old Chief v. United States*, 519 U.S. 172 (1997) (holding that a trial judge has discretion to reject a criminal defendant's stipulation of prior conviction in lieu of accepting evidence of the fact); *United States v. Williams*, 612 F.2d 735 (3d Cir. 1979), cert. denied, 100 S. Ct. 1328 (1980) (holding the same). However, even though the Sixth Circuit has applied that standard in the past (*see e.g. United States v. Cohen*, 946 F.2d 430, 435 (6th Cir. 1991)), the panel in this case reversed on the basis of a judicial admission without finding that the district court abused its discretion and without reconciling the Respondents' conflicting statements, therefore substituting its own findings for questions that should have been left to the determination of the trial court. Because judicial admissions resolve questions of fact, which are indisputably the domain of the trial court, a nationwide rule is needed to provide guidance to the courts below, resolve conflicts at the circuit and trial levels, and to protect the integrity of district court

rulings regarding the treatment of judicial admissions so that they are not reversed on appeal in the absence of an abuse of discretion.

A rule is also needed to settle whether statements made in memoranda submitted to the courts may be treated as judicial admissions. While the rule permitting the trial court to bind parties to pled statements and statements made in open court is almost universally accepted, there is no corresponding rule for statements in other documents filed with the courts. For reasons discussed below, Progressive asserts that such statements should be subject to treatment as judicial admissions.

The Sixth Circuit's decision to reverse the district court award of damages and injunctive relief granted to Progressive is based almost entirely on the panel's conclusion that a single statement, repeated in six counts in Progressive's amended complaint, even though denied six times by Respondents' answer and contradicted by statements made by Respondents in memoranda, renders all of Progressive's claims untimely, thus undermining the integrity of the district court opinion. The panel reached its decision despite the fact that Progressive's statement could not have been factually accurate, ignoring the district court's findings based on the Respondents' improper interference with the operation of stores that were not even open for business by August 3, 2005, and on information regarding Respondents' wrongful acts and breaches committed in secret and uncovered only by discovery. But more importantly, the panel reached its decision without even considering the district court's discretion to relieve Progressive of the binding nature

of its statements and without considering the effect of statements in Respondents' answer denying that the August, 2005, notice occurred, statements which could themselves have been considered binding admissions, and statements in Respondents' memoranda to the district court plainly admitting that the SDA limitations provision may not apply to some of Progressive's claims. Nor did the panel consider that Respondents presented no evidence, documentary, testimonial, or otherwise, regarding the alleged August, 2005, notice.

The Sixth Circuit's decision in this case reflects a rote application of judicial admissions that conflicts with this Court's guidance. In *Oscanyan* and *Jones*, this Court announced a policy under which a trial court MAY bind a party by its admissions, but not one in which the court MUST bind the party. The *Oscanyan* Court stated that "nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit" *Oscanyan*, 103 U.S. at 264. The *Jones* Court, while affirming that the court below had discretion to bind defendant by its statement, minimized the effect of the admission by applying the most limited interpretation of the statement permitted by its literal terms. *Jones*, 68 U.S. at 165 ("The admission, however, need go no further than its terms necessarily imply. The language of the admission is satisfied, by assuming that the smallest number of *locks* were made, consistent with the use of that word in the plural") Through *Oscanyan* and *Jones*, this Court has outlined that courts should proceed with caution when dealing with judicial admissions. Judicial admissions should

never be applied in a rote or arbitrary manner. While the district court may hold a party bound by its statements, it is given broad discretion to relieve a party of the consequences of judicial admissions, particularly where additional facts and explanation indicate that the party's statements were either inadvertent or inaccurate. And on appeal, such a holding should not be reversed unless it was an abuse of discretion.

A survey of the courts' treatment of judicial admissions reveals many courts straying away from the *Oscanyan* rule. What was intended as a powerful tool to be wielded with caution has, in many cases, become a dangerous trap, the usage of which has resulted in illogical and unjust results. See, e.g., *Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990) (holding that the production of contradictory evidence would not allow a party to avoid the impact of the general rule rendering admissions binding); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963) (stating that once a judicial admission has been made, subject matter ought not to be reopened in absence of showing of exceptional circumstances); *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968) (once a judicial admission has been made, no further evidence should be accepted on the issue); *Best Canvas Prod. & Suppliers, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (quoting *Hill v. Federal Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941) ("[F]acts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.")).

This Court has provided little substantive guidance on the issue of judicial admissions for more than a century, and many courts below have begun to misconstrue the rules. Furthermore, as noted by members of this Court in *Christian Legal Soc’y*, questions regarding the appropriate course of action in cases involving conflicting judicial admissions have yet to be answered.

I. THERE IS NO CLEAR RULE REGARDING THE EFFECT OF CONFLICTING JUDICIAL ADMISSIONS.

The Sixth Circuit’s decision reversing Progressive’s award turns largely on a single allegation (repeated in six counts per order of the trial court) in Progressive’s complaint, but fails to address the impact of Respondents’ answer, which categorically denied the allegation six times, and statements made in Respondents’ memoranda to the district court admitting that some of Progressive’s claims might not be barred by the limitations provision in the parties’ contract. The Sixth Circuit held that Progressive’s statements were binding admissions (PD, Appx. 5a), wholly ignoring and failing to explain why Respondents’ equal and opposite statements denying Progressive’s allegations, as well as statements admitting that not all of Progressive’s claims were barred, were not binding against Petitioners, when it is well established that statements made in an answer may be treated as judicial admissions. *See, e.g., Jones v. Morehead*, 68 U.S. 155 (1863); *Ahghazali v. Sec’y of Health and Human Servs.*, 867 F.2d 921, 927 (6th Cir. 1989); *Adams v. Teck Cominco Alaska, Inc.*, 414 F. Supp. 2d 925 (D. Alaska 2006); *In re Miller*, 335 B.R.

335 (E.D. Pa. 2005). Progressive is not aware of any controlling precedent on the effect of conflicting judicial admissions by opposing parties and respectfully submits that the question is an important matter requiring the attention of this Court.

While there may not be direct precedent on the issue of conflicting judicial admissions by opposing parties, this Court, in *Oscanyan*, and some of the circuit courts below have provided guidance that may form the basis for an appropriate rule. As discussed above, the *Oscanyan* Court announced a rule urging the courts below to exercise caution when deciding whether to bind a party by its statements and to provide the party an opportunity to present explanations or facts showing that the statement should not be applied to dispose of its claims. Under *Oscanyan*, where there is doubt regarding the question of fact, the court should decline to hold a party bound by statements that could otherwise be considered judicially admitted. Because conflicting admissions on the same question of fact necessarily create doubt, Progressive respectfully urges in this instance a rule under which neither party's statement is binding and the question is therefore left solely to the fact finder for resolution.

In some prior cases, the Sixth Circuit has correctly applied the *Oscanyan* rule. In *MacDonald v. General Motors Corp.*, the Sixth Circuit affirmed a decision in which the district court refused to bind the defendant by its admissions. 110 F.3d 337 (6th Cir. 1997). Citing the First Circuit, the Sixth Circuit stated that "considerations of fairness and the policy of encouraging judicial admissions require that trial

judges be given broad discretion to relieve parties from the consequences of judicial admissions.” *Id.* at 340 (citing *United States v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975)). In another case, the Sixth Circuit, citing *Oscanyan*, stated that “[b]ecause of the binding effect of judicial admissions, opportunity is usually afforded counsel to explain and qualify such statements as here involved before conclusive action is taken on the strength thereof.” *Harrison Constr. Co. v. OH Turnpike Comm.*, 316 F.2d 174, 177 (6th Cir. 1963) (citing *Oscanyan* at 264). In *MacDonald*, the Sixth Circuit again cited *Oscanyan* for the proposition that “[i]f a doubt exists as to the [judicial admission], the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.” *MacDonald* at 340 (citing *Oscanyan* at 263). The court went on to caution that “[w]ere we to rule otherwise, we would be turning a valuable time-saving device, the voluntary use of which should be encouraged, into a trap for the unwary.” *Id.* at 341.

Other district and circuit courts below have also correctly applied the *Oscanyan* rule, although, as discussed above, not all have done so uniformly. In *L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr. Co.*, the Seventh Circuit correctly concluded that a trial court has discretion to reject judicially admitted facts. 253 F. 914, 917 (7th Cir. 1918). In so concluding, the *Larson* court stated that “a party should be left within the knot of his [judicial admissions], unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice . . . that under no circumstances could the . . . admissions be true.” *Id.* Many other courts have reached similar conclusions.

See, e.g., In re Applin, 108 B.R. 253, 258-59 (E.D. Cal. 1989) (“The court has discretion to accept or reject the judicial admission.”). These courts have correctly concluded that in circumstances such as those faced by the district court in this case—where evidence and conflicting statements of the opposing parties created doubt—the trial court has discretion to decline to treat the party’s statements as binding admissions and to resolve the issue on the evidence, as with any other question of fact.

Additional guidance may be found by analogy to the courts’ treatment of conflicting statements made by the same party either as a result of amended or withdrawn pleadings, pleadings from past actions, or due to the liberal pleading provision of Federal Rule of Civil Procedure 8(e)(2), which allows a party to assert alternative claims and multiple inconsistent theories of recovery. In the case of amended, withdrawn, or superseded pleadings as well as pleadings from the same party in a separate action, courts almost universally treat the allegations therein as non-binding evidentiary admissions rather than binding judicial admissions.⁸ *See, e.g., United States v. McKeon*, 738

⁸ The Sixth Circuit has stood as an outlier to this otherwise well-established rule. In *Penn. R. Co. v. City of Girard*, 210 F.2d 437, 440 (6th Cir. 1954), the Sixth Circuit held a party bound by statements made in a withdrawn pleading. As discussed herein, Progressive did not attempt to amend away its statements regarding the August, 2005 notice because: a) the statement referred only to notice of facts existing at that time and in Progressive’s knowledge; b) Progressive believed that it would not be bound by the expansive literal interpretation of the statement since Respondents’ denial created a question of fact; and c) under

F.2d 26, 30-31 (2d Cir. 1984); *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1431 (10th Cir. 1990); *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742, 745 (5th Cir. 1988); *Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986) (statements from pleadings in a prior case may be used as evidentiary admissions for impeachment purposes); *Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981) (statements from pleadings in another proceeding are admissible as evidence, but not as binding judicial admissions); *Ross v. Phillip Morris & Co.*, 328 F.2d 3, 15 (8th Cir. 1964); *Parkinson v. California Co.*, 233 F.2d 432, 437 (10th Cir. 1956); *Contractor Utility Sales Co. v. Certain-Teed Prods.*, 638 F.2d 1061, 1084 (7th Cir. 1981) (“Although prior pleadings cease to be conclusive judicial admissions, they are admissible in a civil action as evidentiary admissions.”).

The courts have also limited the effect of contradictory statements pled as multiple inconsistent theories of recovery or in cases involving complex and often contradictory pleadings as a result of joinder. In such cases, the courts have held that the contradictory pleadings are “admissions negating each other” and therefore, that “one of two inconsistent pleas cannot be used [by the defendant] as evidence in the trial of the other.” *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 n.4 (3d Cir. 1956) (citing *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294 (5th Cir. 1971)); see also, e.g., *Garman v. Griffin*, 666 F.2d 1156

Penn. R. Co., any attempt to amend would have no effect on the court’s treatment of the superseded allegations.

(8th Cir. 1981); *OKI Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 314 (9th Cir. 1989); *Nichols v. Barwick*, 792 F.2d 1520, 1523 (11th Cir. 1986); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 842-43 (D.C. Cir. 1981). Under the liberal pleading rule of Fed. R. Civ. P. 8(e)(2), a party must be permitted to allege inconsistent statements under alternate theories of recovery. Because contradictory statements on a single question of fact cannot logically settle the issue, the courts have concluded that none of the allegations are binding admissions. Just as conflicting statements pled by the same party negate each other and are therefore non-binding, conflicting statements pled by opponents must also negate each other. Because Respondents' denial of Progressive's allegation regarding the August, 2005, notice negated Progressive's supposed admission, Progressive respectfully submits that the Sixth Circuit erred in holding Progressive bound by its statements.

In this case, the district court properly exercised its discretion to relieve both parties of the binding effect of their pled statements. The *Oscanyan* rule holds that where there is doubt as to an otherwise binding admission, the trial judge has discretion to relieve a party of the binding effect of the admission and leave the issue to the fact finder. *Cf. H. Hackfeld & Co., Ltd. v. United States*, 25 S.Ct. 456, 457-58 (1905) (concluding that a question of ultimate fact, judicially admitted by stipulation, may settle a controversy as a matter of law only when there is no reasonable doubt as to the fact or the inference to be drawn therefrom). "Where the state of facts is such that reasonable minds may fairly differ upon the question [of an ultimate

fact], its determination is a matter of fact for the jury to decide.” *Id.* at 458. Conflicting judicial admissions necessarily create doubt since the trial court cannot logically hold that both statements conclusively resolve the factual issue. Thus, under *Oscanyan* and *Hackfeld*, where there are conflicting admissions, neither should be binding and the conflicting statements should become a question of fact to be resolved by the fact finder, in this case, the trial judge.

The district court below faced the peculiar situation in which both parties made opposite statements against their own interest on the same question of fact. Progressive’s statements were limited in temporal scope and to facts within Progressive’s knowledge at the time period stated. Respondents’ statements however were not so limited. The circumstances created significant doubt, and the evidence proved that an expansive, literal interpretation of Progressive’s statements did not accurately portray the facts and that the statements could not be extended beyond their context to bar all of Progressive’s claims. The district court properly abstained from holding either party bound by their statements and resolved the issue, like any other question of fact, based on the evidence presented at trial. Since Respondents presented no evidence whatsoever regarding the supposed August, 2005, notice, the district court properly decided that Progressive’s claims were not barred under the SDA limitations provision.

II. STATEMENTS MADE IN MEMORANDA FILED WITH THE COURT SHOULD BE SUBJECT TO JUDICIAL ADMISSION RULES.

In their brief in support of their motion for summary judgment, Respondents argued that the SDA limitations provision barred only some, rather than all, of Progressive's claims. DC 51-1 at 12-13. Respondents specifically admitted that "[t]he limitations provision may not apply to certain aspects of the Euclid franchise since it opened in February 2006." *Id.* at 13, n.2. Therefore, Respondents have not only denied in their answer that Progressive provided the notice of claims upon which Respondents have based much of their case and appeal, but they have also admitted in memoranda submitted to the district court that even if the notice had been given, many of Progressive's claims would not be barred since much of the factual basis for Progressive's claims occurred after the supposed notice was made and less than two years before Progressive filed suit.

The courts have diverged on the issue of whether statements made in memoranda may be considered binding judicial admissions. The issue has been raised before this Court in the past, but it declined to rule on the question. *See United States v. Fruehauf*, 365 U.S. 146 (1961). In the absence of a clear rule, the courts below have reached inconsistent conclusions. In *Young & Vann Supply Co. v. Gulf F. & A. Ry. Co.*, the Fifth Circuit, citing *Oscanyan*, held that statements in briefs submitted to the court could be considered binding admissions. 5 F.2d 421 (5th Cir. 1925); *see also In re Southeast Banking Corp.*, 855 F. Supp. 353, 357 n.2

(S.D. Fla. 1994) (noting that statement in brief that statute of limitations precluded certain claims constituted a judicial admission); *Dennis v. Bradbury*, 236 F. Supp. 683 (D. Colo. 1964); *Kurek v. Pleasure Driveway*, 557 F.2d 580, 595 n.13 (7th Cir. 1977). But other courts have reached the opposite conclusion, basing their decisions on the fact that statements in memoranda are not made on the record or are not sufficiently formal or conclusive. See, e.g., *Taylor v. Allis-Chalmers Mfg. Co.*, 320 F. Supp. 1381, 1385 (E.D. Pa. 1969); *Plastic Container Corp. v. Cont'l Plastics of Okla., Inc.*, 607 F.2d 885 (10th Cir. 1979) (following *Taylor*, but attempting to reconcile with *Young* by focusing on judicial discretion); *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 309 (6th Cir. 1983); *Rekeweg v. Fed. Mut. Ins. Co.*, 27 F.R.D. 431 (N.D. Ind. 1961); *Bigelow v. RKO Radio Pictures, Inc.*, 16 F.R.D. 15 (N.D. Ill. 1954); *Wholesale Supply Co., Inc. v. South Chester Tube Co.*, 20 F.R.D. 310 (E.D. Pa. 1957).

The inconsistent application of the rule is so prevalent that the Second Circuit has made rulings conflicting with its own precedent on the issue. In *Hub Floral Corp v. Royal Brass Corp.*, the Second Circuit followed *Taylor* in holding that statements in memoranda were not judicial admissions because they were not part of the record despite three decisions within its jurisdiction, two of which made by the Second Circuit itself, concluding that such statements could be considered binding judicial admissions. *Hub Floral*, 454 F.2d 1226, 1228-29 (2d Cir. 1972); *Leslie v. Knight Soda Fountain, Co.*, 55 F.2d 224, 225 (2d Cir. 1932) (binding court to appellant's evaluation in its brief of the item at issue and concluding "we are entitled to take him at his word"); *United States v.*

Greenberg, 268 F.2d 120, 127-28 (2d Cir. 1959) (binding defendant to guilty plea entered in course of trial when defendant was competently and fairly represented by experienced counsel); *United States v. Motion Picture Film*, 285 F. Supp. 465 (S.D.N.Y. 1968) (rev'd on other grounds, 404 F.2d 196 (2d Cir. 1968)) (reasoning that government statement in brief that film had "social value" constituted judicial admission in a case where government attempted to confiscate pornographic material).

Progressive respectfully submits that a ruling from this Court is necessary to resolve the question whether statements made in memoranda to the court may be considered judicial admissions and urges that the question should be answered in the affirmative. Statements made in memoranda are carefully constructed and deliberate representations made by counsel directly to the court. As such, there is very little risk that a party will make inadvertent or erroneous statements in memoranda that will adversely impact its legal claims. In any event, parties are protected by the *Oscanyan* rule that allows the trial judge discretion to relieve the party of the binding effect of its judicial admissions when there exists doubt as to whether the statement is accurate or deliberate.⁹

⁹ See also Ediberto Roman, "Your Honor What I Meant to State Was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP L. REV. 981, 1001-15 (1995) (arguing in depth that statements in memoranda submitted to the court should be susceptible to treatment as judicial admissions).

Respondents in this case admitted in no uncertain terms that the contractual limitations period in the SDA did not apply to many of the underlying facts in this case and therefore did not apply to bar all of Progressive's claims. The district court properly treated the statements made in Respondents' brief in support of their motion for summary judgment as admissions and properly gave them, together with Respondent's denial that the August, 2005, notice occurred, the same weight as the allegations made in Progressive's complaint. Because Respondents' admissions conflicted with Progressive's, the district court properly exercised its discretion to hold neither party bound, consequentially finding that there were "material facts in dispute that negate ruling for [Respondents] on the motion for summary judgment." DC 167 at 3. At trial, the district court properly took evidence on the issue and, hearing no evidence regarding the supposed 2005 notice of claims and, on the other hand, hearing much evidence of Respondents' wrongdoings in the two-year period preceding Progressive's decision to file suit, found that Progressive's claims were not barred.

III. THERE IS NO CLEAR RULE REGARDING APPELLATE REVIEW OF THE TRIAL COURT'S TREATMENT OF JUDICIAL ADMISSIONS.

Progressive is not aware of any decision of this Court announcing the appropriate standard of review for an appellate court concerning a trial court's treatment of judicial admissions. However, since the decision of whether a party's statements are binding, and therefore conclusively settle a question of fact,

encompasses a decision on whether to admit additional evidence on the issue, Progressive respectfully urges that the same standard of review should apply to questions of judicial admissions as applies to questions regarding the admission of evidence. Appellate courts should review the trial court's treatment of judicial admissions for abuse of discretion. This Court's decision in *Old Chief v. United States* supports this conclusion by analogy. 519 U.S. 172 (1997) (holding that the trial court did not abuse its discretion in admitting evidence to prove a defendant's prior conviction despite that the defendant offered to stipulate to the conviction); *see also United States v. Williams*, 612 F.2d 735 (3d Cir. 1979) (holding the same).

Most of the Circuits below, including the Sixth Circuit, have uniformly applied the abuse of discretion standard to cases involving the trial court's treatment of judicial admissions. *See, e.g., Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 394 (6th Cir. 2007); *Russell Indus., Inc. v. K & P Enters., Ltd.*, No. 97-2087, 1998 WL 964249, at *2 (6th Cir. Dec. 29, 1998); *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997); *United States v. Cohen*, 946 F.2d 430, 435 (6th Cir. 1991).

However, the Sixth Circuit in this case did not adhere to any standard of review, let alone abuse of discretion, in reversing the district court's decision not to bind Progressive by the overly literal, expansive interpretation of its statement regarding the August, 2005, notice. The Sixth Circuit simply found Progressive bound by its statement and reversed the district court's judgment in Progressive's favor without

stating that the district court had erred in any way by declining to consider Progressive's allegations as judicial admissions. Meanwhile, the Sixth Circuit took no notice of Respondents' six denials or their admissions regarding the limited effect of the limitations clause in Respondents' memoranda. Progressive respectfully argues that the Sixth Circuit erred in reversing the district court's judgment without finding an abuse of discretion and respectfully urges this Court to confirm that abuse of discretion is the appropriate standard of review for questions involving the trial court's decision to relieve a party of the binding effect of judicial admissions and to correct the error of the Sixth Circuit.

IV. THE SIXTH CIRCUIT SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE OF THE TRIAL COURT WITHOUT FINDING AN ABUSE OF DISCRETION OR CLEAR ERROR IN VIOLATION OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SEVENTH AMENDMENT.

Judicial admissions resolve questions of fact. *Oscanyan*, 103, U.S. at 263 (“[Judicial admissions] may dispense with proof of facts for which witnesses would otherwise be called.”); *MacDonald*, 110 F.3d at 341. The standard of appellate review for findings of fact differs depending on whether the facts were found by a jury (applying the “substantial evidence” standard) or, as in this case, by the trial judge in a bench trial (applying the “clearly erroneous” standard). *Compare Glasser v. United States*, 315 U.S. 60, 80 (1942) (“It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be

sustained if there is substantial evidence . . .”), *with Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (applying the “clearly erroneous” standard of Civil Rule 52(a) to a trial judge’s findings of fact). While the “substantial evidence” standard differs slightly from the “clearly erroneous” standard, the court of appeals may in no event undertake to perform the fact-finding role of the trial court. *Anderson*, 470 U.S. at 573 (“The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. ‘ . . . [A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.” (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969))). The “substantial evidence” standard derives from the parties’ Seventh Amendment right that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, [other] than according to the rules of the common law.” U.S. Const. amend. VII. The “clearly erroneous” standard is embodied in the Federal Rules of Civil Procedure to afford parties to a bench trial similar protection. *See* Fed. R. Civ. P. 52(a)(6). Under either standard, findings of fact cannot be reexamined by the court of appeals.

The Seventh Amendment provides that parties to a civil suit retain the right to a jury trial. U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”). Progressive sought to exercise its Seventh Amendment right to a jury trial in this case. *See Com.*, Appx. 92a, 134a. However Respondents, relying on a contractual waiver contained within the SDA, bitterly contested Progressive’s demand for a jury trial. *See* DC 42, 43,

46, 47, 154, 159, 161, 173, 174, 175, 176, 180, 182. In the end, the district court held that Progressive had waived its right to a jury trial.

The Seventh Amendment is the fundamental basis for all trials in the United States judicial system. A party that waives its right to a jury by contract should not also forgo the constitutional guarantee, embodied in the Civil Rules, that fact-finding is strictly within the province of the trial court and cannot be undertaken by the courts of appeal. Any other rule would undermine the integrity of the bench trial judge and would open the door for the potential abuse of contractual jury waiver clauses. The court of appeals cannot be permitted to sit as a super court, reexamining the facts without direct access to the witnesses and other evidence in direct violation of the letter and spirit of the Seventh Amendment and the Civil Rules.

As discussed above, because there was doubt created by the parties' conflicting admissions, the district court properly exercised its discretion to relieve Progressive of the binding effect of its statements. The question of timeliness then turned on an issue of fact—whether Progressive actually provided notice of all claims and issues on August 3, 2005—to be proved by evidence. The district court, hearing no evidence of the notice from the Defendants, resolved the issue in Progressive's favor.

Having found no abuse of discretion, the Sixth Circuit could only have reviewed the district court's resolution of the issue of timeliness as a question of fact. A court of appeals may set aside the findings of

the trial court only if they are clearly erroneous, giving “due regard to the trial court’s opportunity to judge the witnesses’ creditability.” Fed. R. Civ. P. 52(a)(6); *see also, e.g., Dillon v. Cobra Power Corp.*, 560 F.3d 591, 599 (6th Cir. 2009). In no event can the court of appeals ever substitute its own findings of fact for those resolved at trial.

The panel decision does not hold that the district court clearly erred in any of its findings of fact. The district court’s findings regarding timeliness were not clearly erroneous since there were conflicting admissions on the subject and Respondents presented no evidence of Progressive’s alleged August, 2005, notice. It is not the province of the court of appeals to find facts. Fact finding is left to the trial court because it alone has the opportunity to judge the credibility of the witnesses and other evidence. *See* Fed. R. Civ. P. 52(a)(6). The Sixth Circuit disregarded the district court’s discretion to accept evidence on the question of the notice and its subsequent finding in Progressive’s favor. The panel decision improperly substitutes the findings of the court of appeals for the findings of the district court without holding that the district court’s findings were clearly erroneous, contrary to the United States Constitution, federal precedent, and the Federal Rules of Civil Procedure. Progressive respectfully submits that a ruling from this Court is required to correct the Sixth Circuit’s error and to restore precedential conformity and adherence to the Civil Rules and the Constitution of the United States.

CONCLUSION

The rules regarding the courts' treatment of judicial admissions go to the very heart of pleading practice and therefore have the most critical impact on the resolution of justice in this nation. Every case, both civil and criminal, begins with a pleading, and every pleading, whether complaint or answer, contains statements that may bind a party and forestall any further evidence or argument on their subject matter. Pleading practice is the backbone of the federal judiciary. As such, judicial admission rules, because they have such a profound effect on the way cases are pled and tried, must be clearly defined and universally applied. As discussed herein, the courts below have begun to stray from the cautious approach that focused on trial court discretion urged by this Court in *Oscanyan* and *Jones* more than a century ago. And other questions, such as those regarding the effect of conflicting admissions from adverse parties and whether statements in memoranda are susceptible to treatment as judicial admissions, remain unanswered. The attention of this Court is required to guide the courts below to a coherent and reasoned application of judicial admission rules.

The Sixth Circuit's reversal in this case demonstrates that the misapplication of judicial admissions disrupts the relationship between the trial courts and the courts of appeal and turns the appropriate role of the appellate court on its head. By ignoring the district court's decision relieving the parties of the binding effect of their pleadings and therefore deciding the question of contractual limitations on the evidence presented at trial, the Sixth

Circuit assumed the role of a fact finder and, as such, overstepped its bounds without even considering the trial court's discretion to reject judicial admissions. Judicial admissions are widely regarded as a useful tool to expedite proceedings by removing certain issues from debate, but that expeditious function does not extend to the appellate level. A case such as this one, involving three years of litigation, a two-week trial, thousands of pages of documentary evidence, and full appellate briefing and argument, cannot be expedited by the application of judicial admissions.

Under *Oscanyan*, a judicial admission does not create an absolute block to further explanation or evidence on an issue, particularly when, as in this case, the conflicting statements of the parties give reason for doubt. A party's pleadings must be weighed against its adversary's statements in answer and, in the case of a trial, against the evidence presented. In reversing the award of damages and injunctive relief granted to Progressive based on a single statement taken out of context while affirming the enforcement of payment under a contract that the district court found the Respondents to have breached, the Sixth Circuit unjustly upset an equitable award and created an illogical result that disregards the abundant trial evidence and the tireless labor and reasoned opinion of the trial court. Progressive respectfully submits that the attention of this Court is required not just to restore justice in this case, but also to provide guidance to all of the courts below and to resolve conflicting rules and unanswered questions among the circuit and district courts below regarding judicial admissions.

Respectfully Submitted,

THOMAS R. BRULE
Counsel of Record
BRULE LAW FIRM, LLC
P.O. BOX 401
CHAGRIN FALLS, OHIO 44022
(216) 789-4229
brulet@gmail.com

Attorney for Petitioners
