No. 25-

In the Supreme Court of the United States

KARL TOBIEN,
PETITIONER
v.
NATIONWIDE GENERAL INSURANCE COMPANY,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who raises the affirmative defense of improper venue in a non-patent case bears the burden of proving that venue is improper.

RELATED PROCEEDINGS

United States District Court (E.D. Ky.)

Tobien v. Nationwide General Insurance Company, No. 2:24-042-DCR, 2024 WL 4793819 (June 7, 2024). Judgment entered June 7, 2024.

United States Court of Appeals (6th Cir.)

Tobien v. Nationwide General Insurance Company, No. 24-5575, 133 F.4th 613 (6th Cir. 2025). Judgment entered April 2, 2025.

Tobien v. Nationwide General Insurance Company, No. 24-5575, 2025 WL 1513287 (6th Cir. May 19, 2025). Rehearing denied May 19, 2025.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Karl Tobien respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 133 F.4th 613 and is reproduced in the appendix at App. 8a–24a. The opinion and order of the district court granting Respondent's motion to dismiss or to transfer is unpublished and is reproduced at App. 26a–33a.

JURISDICTION

The Sixth Circuit issued its judgment on April 2, 2025. It denied a petition for rehearing on May 19, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1). On August 11, 2025 and September 24, 2025, Justice Kavanaugh granted Petitioner's applications for extension of time to file a petition for writ of certiorari, from August 17 to October 8, 2025.

STATUTORY PROVISION INVOLVED

The general federal venue statute, 28 U.S.C. § 1391, is reproduced at App. 35a–38a.

INTRODUCTION

The issue at the heart of this case—which party bears the burden of proving venue—has long divided the federal courts of appeals.

The decision below both acknowledged this split, noting that "[o]ur sister circuits are . . . divided" on the "question," App. 13a, and added to it, by joining the Second, Fourth, Ninth, and Eleventh Circuits in "placing the burden on the plaintiff," App. 13a–16a. In so doing, the Sixth Circuit cited precedential decisions from the Third, Seventh, and Eighth Circuits that had "reached the opposite conclusion." *Id.*

Leading treatises have likewise observed that some "federal courts have imposed the burden on the plaintiff," while others "have concluded that the burden of doing so is on the defendant, since venue is a 'personal privilege' that can be waived and a lack of venue should be established by the party asserting it." 5B *Wright & Miller's Federal Practice & Procedure*, § 1352 (4th ed. 2025); *accord* 17 *Moore's Federal Practice*, § 110.01[5][c] (3d ed. 2025). And these treatises have reached opposing conclusions on which of these two understandings should prevail. *Compare Wright & Miller's Federal Practice and Procedure*, *supra*, § 1352 (concluding that "impos[ing] the burden on the plaintiff" is the "correct" view), *with Moore's Federal Practice*, *supra*, § 110.01[5][c] (asserting that "the defendant has the burden of establishing that venue is improper").

This case presents an ideal opportunity for the Court to resolve this longstanding dispute. It involves a plaintiff, Karl Tobien, who is a resident of the Eastern

District of Kentucky, which is where he filed suit and where he asserts "a substantial part of the events and omissions giving rise to" his claims "occurred." App. 17a. The defendant, Nationwide General Insurance, challenged Tobien's selection of venue. App. 18a.

As the Sixth Circuit explained, to "resolv[e]" Nationwide's challenge, the court's "first task" was to "determine who bears the burden of proof." App. 11a. Tackling that first task would, in turn, answer the case's remaining issues. That is because after placing the burden on Tobien, the Sixth Circuit faulted Tobien for failing to provide "factual allegations," "affidavits," or "other evidence" to support his "assertion[s]" of venue. App. 19a. But Tobien would not have needed to do any of those things had the burden been on Nationwide. In that scenario, Nationwide would have been on the hook for producing evidence of improper venue. Worse, when Tobien sought limited discovery, including information regarding the circumstances of Nationwide's "investigation and evaluation of [his insurance] claim[s]," D. Ct. Dkt. 6 at 4—i.e., the very sort of evidence the Sixth Circuit criticized him for lacking—the courts below "denied that request," held that Tobien's Kentucky law claims would have failed in Ohio (the purportedly proper venue), and dismissed his suit with prejudice, App. 21a.

The Sixth Circuit's decision to place the burden on the plaintiff to prove venue was not simply outcome-determinative. It was also wrong. The Court has time and again stressed that when a plaintiff files suit, they exercise a "venue privilege." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013); *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964). It has

similarly stated that a defendant's objection to this "privilege must be 'seasonably' asserted; else it is waived." *Com. Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 179 (1929). Accordingly, challenges to venue are, as the Sixth Circuit recognizes, an "affirmative defense." App. 15a. And just last Term, this Court reiterated that "affirmative defenses . . . must be pleaded and proved by the defendant who seeks to benefit from them." *Cunningham v. Cornell Univ.*, 604 U.S. 693, 702 (2025).

There is no reason to depart here from that well-established understanding. Indeed, out of a "fairness concern," defendants often bear the burden of proof when a defense "turn[s] on facts one would expect to be in the [defendant's] possession." *Id.* at 705. As relevant to this case, the general federal venue statute provides that "[a] civil action may be brought" in (1) "a judicial district in which any defendant resides," (2) "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred," (3) "any judicial district in which any defendant is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(b). Defendants are better placed to know the facts concerning grounds one and three. And if they are challenging where the events giving rise to a claim occurred, they should—at minimum—be required to allege some facts that contravene the plaintiff's account and displace the plaintiff's choice of venue.

The Sixth Circuit failed to recognize this point, and instead improperly conflated venue with personal jurisdiction. Its resulting decision spelled a premature

end to Tobien's lawsuit. This Court should grant review and reverse.

STATEMENT OF THE CASE

A. Legal framework

1. The general federal venue statute, codified at 28 U.S.C. § 1391, provides that "[a] civil action may be brought" in a district court that satisfies any of three requirements.

First, an action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1). This residency-based understanding traces to the Judiciary Act of 1789, which provided that venue was proper wherever a defendant was "an inhabitant" or was "found at the time of serving the" suit. Act of Sep. 24, 1789, ch. 20, 1 Stat. 73, 79.

Second, an action may be brought in the "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). This provision dates to a 1966 law providing—in addition to the residency-based approach above—that venue is also proper in "the judicial district . . . in which the claim arose." Act of Nov. 2, 1966, Pub. L. 89-714, 80 Stat. 1111, 1111. In 1990, Congress broadened the scope of this subsection by removing the words "in which the claim arose" and replacing them with "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the

subject of the action is situated." Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 311, 104 Stat. 5114.

Third, and most recently, Congress added in 1990 and 1992 a "fallback option" to the general venue statute. *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 56–57 (2013); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 110, 104 Stat. 5089, 5114 (codified as amended at 28 U.S.C. § 1391(a)(3) (Supp. 1991)); Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 504, 106 Stat. 4506, 4513. This option provides that "if there is no district in which an action may otherwise be brought as provided," a case may be brought in "any judicial district in which any defendant is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(b)(3).

2. Along with the general venue statute, Congress has enacted several specialized venue statutes. These statutes pertain to actions brought under a particular law. *See, e.g.*, 15 U.S.C § 22 (Clayton Act); 40 U.S.C. § 3133(b)(3) (Miller Act); 42 U.S.C. § 2000e-5(f)(3) (Title VII); 28 U.S.C. § 1400(b) (Patent Act). Rules about venue, including which party holds the burden of proving proper venue, generally are governed by the law of the circuit where a case is filed.

3. Patent cases are an exception. As to these cases, Congress first enacted a "patent infringement venue statute" in 1897. *Pure Oil Co. v. Suarez*, 384 U.S. 202, 207 (1966). It has modified and amended the statute several times since. The patent venue statute is "the sole and exclusive provision controlling venue in patent infringement actions." *Fourco Glass Co. v. Transmirra*

Prods. Corp., 353 U.S. 222, 229 (1957). And with the creation of the Federal Circuit, "[w]hether venue is proper under § 1400(b) is an issue unique to patent law and is [now] governed by Federal Circuit law." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1012 (Fed. Cir. 2018). Amendments to the general venue statute have no bearing on interpretation or application of the patent venue statute. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 267–70 (2017).

The Federal Circuit has, in examining the patent venue statute, held that the plaintiff bears the burden of proving venue in all patent cases filed in federal court. *In re ZTE*, 890 F.3d at 1013.[1] It has explained that the "intentional narrowness" of the patent venue statute "supports placing the burden of establishing proper venue on the Plaintiff." *Id.* at 1014.

B. Factual background

Petitioner Karl Tobien lives in Boone County, Kentucky, and is a door-to-door salesman. App. 9a, 18a. In May 2023, his work brought him to Loveland, Ohio, a town across the Ohio River. While walking up the driveway of a home, Tobien was attacked by a dog. App. 9a. Respondent Nationwide General Insurance Company insured this home. *Id.*

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[1] Before Congress established the Federal Circuit, several courts of appeals examined the patent venue statute, and held that the plaintiff bore the burden of proving proper venue. *See Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086–87 (1st Cir. 1979); *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969); *Phillips v. Baker*, 121 F.2d 752, 756 (9th Cir. 1941).

After the incident, Tobien submitted a claim to Nationwide, seeking compensation for injuries sustained during the attack. *Id.* Nationwide refused to pay, and so Tobien filed a diversity action in the U.S. District Court for the Eastern District of Kentucky, asserting claims under state law for "(1) violations of Kentucky's Unfair Claims Settlement Practices Act, (2) common-law bad faith, and (3) punitive damages." App. 9a–10a. Nationwide moved to dismiss for improper venue or, alternatively, to transfer the case to the Southern District of Ohio. App. 10a, 26a.

C. Proceedings below

1. The district court granted Nationwide's motion to dismiss. App. 26a. In so ruling, it acknowledged Tobien's allegations that Nationwide "conducts business in" and that Tobien "received all correspondence related to his claim and the investigation of his claim" in the Eastern District of Kentucky. App. 28a. But the court viewed these events as "insufficient to render the Eastern District of Kentucky a locus for venue purposes," because Nationwide "is an Ohio-based company" that "issued a policy to an Ohio resident covering an Ohio home." App. 29a. On those facts, the district court reasoned, there was "too narrow a nexus between" the Eastern District of Kentucky "and the events that allegedly transpired for venue to be proper." *Id.* The district court also denied Tobien "leave to conduct discovery." *Id.*

The district court then addressed whether to dismiss Tobien's suit or transfer it to the Southern District of Ohio, where venue would have purportedly been proper. As the court observed, "transfer" is the "typical[]"

remedy, so long as an "action could have been properly brought in another district." App. 30a. But relying on an unpublished district court decision, the court determined that it could take a "peek at the merits" to see whether transfer "would be in the interest of justice." *Id.* (citing *Dalton v. Ferris*, 2019 WL 5581338, *5 (E.D. Ky. Oct. 29, 2019)). From this "peek," the district court concluded that Tobien's suit "would likely be dismissed upon transfer to the Southern District of Ohio" because Ohio "does not recognize third party bad faith claims." *Id.* On that basis, the district court dismissed Tobien's claims with prejudice. App. 30a–31a.

2. The Sixth Circuit affirmed. App. 24a. The court recognized that its "first task" was "to determine who bears the burden of proof." App. 11a. For that question, it acknowledged that "our sister circuits," as well as district courts in the Sixth Circuit, are "divided." App. 12a–13a. According to the Sixth Circuit, the First, Second, and Fourth Circuits "plac[e] the burden to establish proper venue on the plaintiff." App. 13a (citing *Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979); *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005); *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004)). The Third, Seventh, and Eighth Circuits, on the other hand, "plac[e] the burden on [the] defendant to prove that venue is improper." *Id.* (citing *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982); *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947); and *In re Peachtree Lane Assocs., Ltd.*, 150 F.3d 788, 794 (7th Cir. 1998)). *Moore's Federal Practice*, the panel added, embraces this latter view. *Id.*

After outlining the split in authority, the Sixth Circuit joined the courts which place the burden of proof on the plaintiff. *Id.* In reaching that conclusion, the court linked venue to personal jurisdiction, noting that "[b]oth are personal privileges of the defendant," "[b]oth are affirmative defenses unrelated to the merits of the claim," and "both often turn on the same facts." App. 13a–14a. Because plaintiffs bear the burden of proving personal jurisdiction, the panel reasoned, they should likewise bear the burden as to venue, since "[i]t wouldn't make sense for courts to use different burdens of proof in evaluating these motions." App. 14a.

The Sixth Circuit acknowledged that several other courts of appeals have "reached the opposite conclusion," including the Third and Eighth Circuits. App. 15a–16a. The panel here specifically examined the reasoning of *Myers v. American Dental Ass'n*, a Third Circuit case. App. 15a. There, the Third Circuit explained that "venue is an affirmative defense" and, as such, "the plaintiff doesn't have to allege in his complaint that venue is proper." *Id.* Hence, when a defendant does allege improper venue, it "has the burden of proving" it, just like any other affirmative defense. *Id.* (quoting *Myers*, 695 F.2d at 724).

The Sixth Circuit disagreed with this understanding, and did so by distinguishing between affirmative "substantive" defenses and affirmative "dilatory" defenses. App. 15a–16a. A "'substantive' defense is one that, if established, would terminate the litigation for the defendant on the merits." App. 15a. A "'dilatory' defense is one that 'temporarily obstructs or delays a lawsuit but does not address the merits.'" *Id.* (quoting *Defense*,

Black's Law Dictionary (12th ed. 2024)). "A defendant bears the burden to prove affirmative *substantive* defenses." App. 16a. But according to the Sixth Circuit, "the law often assigns to the *plaintiff* the burden of proving a dilatory defense." *Id.* Here again the Sixth Circuit cited personal jurisdiction as an example. *Id.*

Having imposed the burden on Tobien, the Sixth Circuit held that Tobien had failed to sufficiently demonstrate that a "'substantial part of the events or omissions giving rise to'" the lawsuit occurred in the Eastern District of Kentucky, as required by 28 U.S.C. § 1391(b)(2). App. 17a.[2] In particular, Tobien "didn't put before the district court any facts or allegations about the location of the [insurance] adjusters" when they denied his claim, and he "doesn't actually know where the adjusters were located." App. 20a. Although Tobien sought discovery as an alternative to dismissal, his request was not, in the panel's view, sufficiently specific. App. 20a–21a.

Finally, the Sixth Circuit upheld the district court's decision to dismiss with prejudice, rather than transfer this matter to the Southern District of Ohio, because a "peek at the merits" revealed that "under Ohio's substantive law, Tobien's lawsuit ha[d] no merit." App. 21a–22a. The Sixth Circuit denied a petition for rehearing en banc on May 19, 2025. App. 3a.

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[2] The Sixth Circuit did not examine whether 28 U.S.C. § 1391(b)(1) provided an alternative basis for venue because, in its view, "Tobien never argued that venue might have been proper under" that provision. App. 17a n.3.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE BURDEN OF PROVING VENUE IN NON-PATENT CASES.

A. Three courts of appeals place on defendants the burden of proving that venue is improper.

1. In *Myers v. American Dental Ass'n*, the plaintiff sued a national dentistry association, alleging violations of federal antitrust and local anti-monopoly law. 695 F.2d 716, 718 (3d Cir. 1982). The plaintiff filed his complaint in the Virgin Islands, his place of practice. The *Myers* defendants challenged that decision. *Id.*

At the outset, the Third Circuit observed that "[a] private antitrust plaintiff bringing federal antitrust claims has at his disposal two statutory sources of venue": the general venue statute, 28 U.S.C. § 1391, and the Clayton Act's specialized venue provision, 15 U.S.C. § 22. *Id.* at 722.

The court held that venue was "barred" under the general venue statute because, under the more restrictive version of § 1391 then in effect, venue lay only in the district where the claim "arose." *Id.* at 723. Applying this Court's precedent, the Third Circuit determined that the plaintiff's claim did not arise in the Virgin Islands, but in Chicago. *Id.* (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979)).

Still, "the burden is upon the movant"—i.e., the defendant—"to show that venue is improper under *any* permissible theory," and the *Myers* defendants had failed

to carry their burden as to venue under the Clayton Act. *Id.* at 725–26, 730 (emphasis added).

As the Third Circuit explained, there was no dispute in *Myers* over subject matter or personal jurisdiction. *Id.* at 724. "The venue issue, therefore," is "unlike the jurisdictional issue," since it is not about "whether the court has authority to hear the case but simply where the case may be tried." *Id.* Put differently, "a motion to dismiss for improper venue is not an attack on jurisdiction but only an affirmative dilatory defense." *Id.*

Rather than looking to personal jurisdiction, the Third Circuit likened improper venue to other, similarly structured dilatory defenses, such as "motions to dismiss for forum non conveniens; failure to join an indispensable party; failure to exhaust remedies; and failure to state a claim." *Id.* at 724–25 n.10 (citations omitted). Like venue, none of these defenses "concern the court's authority to adjudicate." *Id.* (citations omitted). And the defendant "bears the burden of proof" on all of them. *Id.*

The Third Circuit recognized that several conflicting opinions place the burden of proving proper venue on the plaintiff. *Id.* at 724 n.9 (citing *Bartholomew v. Virginia Chiropractors Ass'n*, 612 F.2d 812 (4th Cir. 1979)). But it stressed that "these cases confuse jurisdiction with venue or offer no reasons to support their position." *Id.* at 724. The Third Circuit, agreeing with *Moore's Federal Practice*, characterized that view as "unsound" and underscored that "the defendant should ordinarily bear the burden of showing improper venue in connection with a motion to dismiss." *Id.* at 724–25.

The Third Circuit applied this understanding to the *Myers* defendants and determined that the record

"supports the conclusion that the activity undertaken" by the defendants "constitutes the transaction of business of sufficiently substantial character to support the plaintiff's choice of venue." *Id.* at 730.

Subsequent Third Circuit decisions have affirmed that "[b]ecause improper venue is an affirmative defense, the burden of proving lack of proper venue remains—at all times—with the defendant," including for venue under the general venue statute. *Great W. Mining & Min. Co. v. ADR Options*, 434 F. App'x 83, 86 (3d Cir. 2011); *accord Resolution Mgmt. Consultants, Inc. v. Design One Bldg. Sys. Inc.*, 2024 WL 4471728, at *5 (3d Cir. Oct. 11, 2024) ("A defendant bears the burden of proving improper venue.").

2. The Seventh Circuit has also held that "the party challenging venue bears the burden of establishing by a preponderance of the evidence that the case was incorrectly venued." *In re Peachtree Lane Assocs.*, 150 F.3d 788, 792 (7th Cir. 1998). That is because, as *Peachtree Lane* outlines, a plaintiff's choice of venue "is presumed to be proper." *Id.* A party that objects must overcome that presumption. The appellee in *Peachtree Lane* had failed to do so, and the Seventh Circuit affirmed the bankruptcy court's decision finding venue proper in the Northern District of Illinois. *Id.* at 789.

Granted, as the decision below notes, in *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182, 1184 (7th Cir. 1969), the Seventh Circuit held that the "[p]laintiff has the burden of establishing proper venue." *See also* App. 13a. But *Grantham* concerned a case under the patent venue statute, which the Seventh Circuit recognized "should not be liberally construed in favor of venue." 420 F.2d at 1184.

Nor, *Grantham* adds, should "its provisions be supplemented by the general venue" statute. *Id.*

In any event, the advent of the Federal Circuit, followed by that court's subsequent decision in *In re ZTE* "to adopt a uniform national rule" for patent venue, 890 F.3d 1008, 1013 (Fed. Cir. 2018), leaves *Peachtree Lane* as the governing precedential decision in the Seventh Circuit in non-patent cases. Courts in the Seventh Circuit have cited *Peachtree Lane* and imposed the burden on defendants to show improper venue, both in bankruptcy and in general venue cases. *See In re Magnolia Storage & Logistics, LLC*, 2022 WL 42038, at *2–3 (N.D. Ill. Jan. 5, 2022) (bankruptcy); *Hamilton Mem'l Hosp. Dist. v. Toelle*, 2013 WL 1130888, at *5 (S.D. Ill. Mar. 18, 2013) (general venue).

3. Finally, in *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947), the Eighth Circuit held that a defendant who raises a motion to challenge venue carries the burden of proof. The court gave two reasons for its holding. First, "[a]s the motion was interposed by the defendants the burden of proof was upon them to show that" venue was improper. *Id.* Second, if a court relies upon inferences, it "should be warranted in inferring that [a] defendant . . . reside[s] where he was personally served with process." *Id.*

B. Five courts of appeals impose on plaintiffs the burden of proving that venue is proper.

1. The Second Circuit has reached the opposite conclusion, and its reasoning is emblematic of the circuits on the other side of the ledger.

As *Gulf Insurance Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) notes, courts that impose the venue burden on the plaintiff "typically treat venue determinations in the same way that they treat personal jurisdiction decisions." Like "dismissals for lack of personal jurisdiction," a motion to dismiss for improper venue should follow a two-part framework. *Id.*

First, "[i]f the court chooses to rely [only] on pleadings and affidavits," then "the plaintiff need only make a *prima facie* showing of [venue]." *Id.* (second alteration in original) (quoting *CutCo Indus. v. Naughton*, 806 F.2d 361, 364–65 (2d Cir. 1986)). On the other hand, if the district court decides to hold an evidentiary hearing on the motion, a "plaintiff must demonstrate [venue] by a preponderance of the evidence." *Id.* (alteration in original).

The Second Circuit has stressed that a plaintiff's *prima facie* showing is not insubstantial; courts "will not draw argumentative inferences in the plaintiff's favor," nor are they "required to accept as true a legal conclusion couched as a factual allegation." *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012) (cleaned up). A plaintiff must thus allege, in their pleadings or accompanying documents, "facts that, if credited by the ultimate trier of fact, would suffice to establish" venue and personal jurisdiction. *Id.* (quoting *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010).

Applying that standard in *Glasbrenner*, the Second Circuit held that the complaint and the insurance policy incorporated by reference to the complaint were insufficient to demonstrate venue, because neither

document "unambiguously lays venue in the" appropriate judicial district as provided under 28 U.S.C. § 1391. *Glasbrenner*, 417 F.3d at 358.

2. The Eleventh Circuit's rule is of a piece. Like the Second Circuit, the Eleventh Circuit requires plaintiffs to make a "prima facie showing" when their choice of venue is challenged. *Home Ins. Co. v. Thomas Indus., Inc.*, 896 F.2d 1352, 1355 (11th Cir. 1990). As in the Second Circuit, that requirement is based on the understanding that "[g]iven the judicial system's great concern with the efficient conduct of complex litigation, an important consideration in deciding appropriate venue is whether a forum can meet the personal jurisdiction and venue requirements for most or all of the defendants" in a case. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 857 (11th Cir. 1988). And consistent with the Second Circuit, plaintiffs in the Eleventh Circuit must often "present[] affidavits or deposition testimony sufficient to defeat a motion for judgment as a matter of law." *PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V.*, 598 F.3d 802, 810 (11th Cir. 2010).

In *DeLong Equipment*, for example, an antitrust plaintiff alleged that various defendants had "attended a two-hour meeting" in Atlanta, that these defendants had discussed sales and pricing information at the meeting, and—"[i]n addition to th[is] conspiratorial meeting"—that an "injury occurred in the Northern District [of Georgia]," where the action had been filed. 840 F.2d at 856. Taken together, these allegations were enough to deny a motion to dismiss for improper venue. *See id.* at 855.

3. The Fourth Circuit similarly places the burden on the plaintiff to show that venue is proper. In *Mitrano v. Hawes*, the court, drawing on *DeLong Equipment*, held that "[t]o survive a motion to dismiss for improper venue when no evidentiary hearing is held, the plaintiff need only make a prima facie showing of venue." 377 F.3d 402, 405 (4th Cir. 2004) (citing 840 F.2d at 845). And like the Second and Eleventh Circuits, the Fourth Circuit examines venue challenges under the same framework as motions to dismiss for lack of personal jurisdiction. *Id.* at 406; *accord Bartholomew*, 612 F.2d at 816 ("[T]he burden is upon plaintiff to establish venue and jurisdiction."), *overruled on other grounds by Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 125 n.6 (1982).

4. In the Ninth Circuit, the "[p]laintiff ha[s] the burden of showing that venue was properly laid" in the district where an action is filed. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979).

The contrast between the Ninth Circuit's decision in *Piedmont Label* and the Third Circuit's in *Myers* is instructive. Both were antitrust cases and, as such, both involved venue under the general venue statute and the Clayton Act's specialized venue provision. *Id.* at 492–93; *Myers*, 695 F.2d at 722.

In *Myers*, the defendants successfully demonstrated that venue was improper under the general venue statute. 695 F.2d at 723. But "[b]ecause the burden is upon the" defendants "to show that venue is improper under any permissible theory," *id.* at 725–26, and because the defendants had failed to carry that burden as to the

Clayton Act, the Third Circuit upheld "the plaintiff's choice of venue," *id.* at 730.

By comparison, in *Piedmont Label*, the plaintiff bore the burden of proving venue. It "chose to rely solely on the co-conspirator theory of venue," as provided under the Clayton Act. 598 F.2d at 496. The Ninth Circuit rejected that theory. *Id.* When the plaintiff sought remand "to complete discovery" on an alternative theory, the Ninth Circuit denied the request and faulted the plaintiff for not developing this theory below. *Id.*; *see also id.* at 497 (Browning, J., concurring) ("Because appellee has chosen to rely solely on the Clayton Act venue provisions, neither the court below nor this court has had occasion to consider the application of 28 U.S.C. § 1391(b) to appellee's claim."). Had the Ninth Circuit taken the *Myers* approach, the plaintiff would not have borne the responsibility to develop these additional and alternative theories. Instead, the moving party would have had to disprove them.

5. The Sixth Circuit's opinion ties together the reasoning from several of these other courts of appeals.

To start, much like the Third Circuit, the Sixth Circuit characterizes challenges to venue as an "affirmative defense[] unrelated to the merits of the claim"—i.e., an affirmative dilatory defense. App. 13a–15a; *accord Myers*, 695 F.2d at 724. But while the Third Circuit likened venue challenges to other "dilatory defenses that do not concern the court's authority to adjudicate," such as *forum non conveniens*, *id.* at 724–25 n.10, the Sixth Circuit drew a connection to a different defense, personal jurisdiction, App. 13a–14a. In drawing that analogy, the Sixth Circuit joined the Second, Fourth, and Eleventh

Circuits in calling on venue and personal jurisdiction to be treated similarly. *See* App. 13a–14a; *accord Glasbrenner*, 417 F.3d at 355; *Mitrano*, 377 F.3d at 406; *DeLong Equip.*, 840 F.2d at 857. And finally, the court below followed the Ninth Circuit's approach when it examined Tobien's choice of venue under a single theory, and denied him discovery to obtain facts that may support venue under that theory or any other. *See* App. 17a–21a; *accord Piedmont Label*, 598 F.2d at 495–96.

II. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

A. Venue challenges are affirmative defenses, which are pleaded and proven by the defendant.

1. As the Sixth Circuit recognized, venue is an "affirmative defense." App. 15a. That is because venue challenges, like other affirmative defenses, "confer[] a personal privilege on the defendant," *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923), which the defendant "may assert, or may waive, at his election," *Com. Cas. Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 179 (1929). Put another way, a plaintiff "is not required to include allegations showing that venue is proper" in their complaint. App. 18a (quoting *Wright & Miller's Federal Practice and Procedure*, *supra*, § 3826). It is up to the defendant to assert improper venue, through their own motion.

This conclusion—that venue is an affirmative defense—should provide a straightforward answer to the question presented. After all, the Court has time and

again determined that "it is incumbent on the defendant to plead and prove such a defense." *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). The Court reaffirmed this point just last Term. *Cunningham*, 604 U.S. at 701–02. This understanding includes affirmative defenses identified in the Federal Rules, *see Taylor*, 553 U.S. at 907; and in statutes, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 87, 90–91 (2008).

2. To be fair, the decision below acknowledges "[t]hat defendants normally bear the burden to prove affirmative defenses." App. 15a. But it tries to sidestep that principle by drawing a distinction between substantive and dilatory defenses. *Id.* Substantive defenses "terminate the litigation for the defendant on the merits" and, the panel notes, are borne by the defendant. App. 15a–16a. Dilatory defenses, on the other hand, do "not address the merits," and—according to the Sixth Circuit—"the law often assigns to the *plaintiff* the burden of proving a dilatory defense." *Id.*

The law does not do that. "Examples of dilatory defenses include misjoinder, nonjoinder, res judicata, misnomer, lack of capacity to sue, another action pending, statute of limitations, prematurity, unripeness, release, and settlement." *Defense*, *Black's Law Dictionary* (12th ed. 2024). For almost all of these defenses, the defendant—not the plaintiff—bears the burden. *See, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971) (res judicata); *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 435 n.9 (2017) (release); *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 590 (6th Cir. 2001) (The defendant "has the burden of proof on all affirmative defenses, such as the statute of limitations.").

3. The affirmative defense of improper venue functions much like transfer and *forum non conveniens*. The law provides for transfer under 28 U.S.C. § 1404 "when a sister federal court is the more convenient place for trial of the action," while *forum non conveniens* applies "where the alternative forum is abroad." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

Much like improper venue, both transfer and *forum non conveniens* are meant to serve "the convenience of the litigants." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (venue); *accord* 28 U.S.C. § 1404(a) (providing that "a district court may transfer any civil action" "[f]or the convenience of parties and witnesses"); *Sinochem*, 549 U.S. at 429 ("Dismissal for *forum non conveniens* reflects a . . . range of considerations, most notably the convenience to the parties.").

Like improper venue, both transfer and *forum non conveniens* fall upon the defendant to invoke. *See, e.g.*, *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) (transfer); *Sinochem*, 549 U.S. at 430 (*forum non conveniens*). And most importantly, the panel below acknowledged that "the defendant bears the burden to show that a transfer is warranted," App. 12a n.2, and this Court has made clear that "[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem*, 549 U.S. at 430. There is little reason why venue motions should be treated any different.

B. Venue is different from personal jurisdiction.

Shorn of its broader claim that plaintiffs bear the burden of proving all or most dilatory defenses, the Sixth Circuit panel is left with a more specific, and narrower, argument: that "venue and personal jurisdiction are closely related concepts" because they are both "personal privileges of the defendant" and "both often turn on the same facts." App. 13a–14a (quoting *Leroy*, 443 U.S. at 180). Yet that overstates the case in several respects.

1. *First*, personal jurisdiction and venue neither promote the same purpose nor rest on the same legal footing. Personal jurisdiction "flows . . . from the Due Process Clause" and "recognizes and protects an individual liberty interest." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This requirement "restricts judicial power not as a matter of sovereignty, but as a matter of individual liberty, for due process protects the individual's right to be subject only to lawful power." *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (internal quotation marks omitted). Personal jurisdiction, in other words, is a constitutional prerequisite.

By comparison, venue "is primarily a matter of choosing a convenient forum." *Leroy*, 443 U.S. at 180. It is thus "wholly a statutory matter." *Wright & Miller's Federal Practice & Procedure*, *supra*, § 3801.

This distinction—between "personal jurisdiction, which goes to the court's power to exercise control over the parties," and venue, which is about choosing a convenient place to hear a case—is why personal

jurisdiction "is typically decided in advance of venue." *Leroy*, 443 U.S. at 180.

Personal jurisdiction is, in other words, jurisdictional. And since federal courts are courts of limited jurisdiction, it makes sense that plaintiffs must prove personal jurisdiction when it is challenged at the outset of litigation. But venue has no such tie. It addresses "not whether the court has authority to hear the case but simply where the case may be tried." *Myers*, 695 F.2d at 724.

2. *Second*, venue and jurisdiction do not necessarily turn on the same facts. Notably, in arguing that "whether there's personal jurisdiction and proper venue depends on identical facts," the Sixth Circuit looked to 28 U.S.C. § 1391(b)(1), the provision of the general venue statute that provides for venue based on "the defendant's residence." App. 14a. The panel, in turn, outlined how residence and personal jurisdiction are substantially related. *Id.*

But that is not even the basis on which the panel here claims Tobien sought "to lay venue." App. 17a. Rather, the Sixth Circuit argues that Tobien attempted to establish venue "under prong two of the general venue statute, which provides that venue is proper if 'a substantial part of the events or omissions giving rise to the claim occurred' in the district." *Id.* (quoting 28 U.S.C. § 1391(b)(2)).

Yet under § 1391(b)(2), the requisite facts for venue are often different from personal jurisdiction. For venue, there must be a substantial connection to a particular judicial district. The allegations must be "*material* to the plaintiff's claim" and "must have occurred in the district

in question, even if other material events occurred elsewhere." *Glasbrenner*, 417 F.3d at 357. Personal jurisdiction, on the other hand, "encompasses the more abstract matter of submitting to the coercive power of a State" where the defendant has sufficient "minimum contacts." *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 582 U.S. 255, 263 (2017); *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945).

Put differently, "[t]he test for determining venue is not the defendant's 'contacts' with a particular district, but rather the location of those 'events or omissions giving rise to the claim.'" *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). Consequently, a court may have personal jurisdiction, but not venue, as "it would be error . . . to treat the venue statute's 'substantial part' test as mirroring the minimum contacts test." *Glasbrenner*, 417 F.3d at 357; *accord Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372 (11th Cir. 2003).

This is not to say that the facts showing personal jurisdiction and those showing venue do not overlap. But, particularly as to § 1391(b)(2), they can be different because at bottom they ask different questions: minimum contacts to a state on the one hand, substantiality to a district on the other.

3. *Third*, § 1391(b)(3) of the general venue statute likewise illustrates the interplay—and the differences—between venue and personal jurisdiction. That provision states, if venue is unavailable under (b)(1) or (b)(2), a case may be heard in "any judicial district in which any defendant is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(b)(3).

As this Court has explained, this language provides a "fallback option," designed to fix a "venue gap[]" by providing—as long as there is subject matter and personal jurisdiction—that "venue will always lie somewhere." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 56–57 (2013). But none of this means, as the Sixth Circuit would have it, that venue is "identical" to personal jurisdiction, or that courts must treat them one and the same. App. 14a. Such a result would turn the "fallback option" into a trapdoor, allowing defendants to knock out cases more easily than Congress intended.

C. Requiring defendants to bear the venue burden is more workable.

Finally, as a "general rule of evidence," courts "do[] not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary," because of "considerations of fairness," "expense," and "delay." *Selma, R. & D.R. Co. v. United States*, 139 U.S. 560, 568 (1891); *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957). That prudential rule applies with full force here.

After all, evidence of where witnesses live, where events happened, where a company actually does business—all relevant for a court evaluating a venue challenge—typically fall within a defendant's knowledge. Indeed, here there is no question that Nationwide knows where its insurance adjusters are located, whether its agents reviewed Tobien's claim in Kentucky, and whether their resulting decision to deny Tobien compensation took place in Kentucky. Those facts could establish or disprove

that "a substantial part of the events or omissions giving rise to" Tobien's third party bad faith claim occurred in Kentucky, as necessary under 28 U.S.C. § 1391(b)(2).

To be sure, when he filed his complaint, Tobien did not "know where the adjusters were located" and so he did not "put before the district court any facts or allegations about the location of the adjusters." App. 20a. But he did "request discovery" from Nationwide for these facts. *Id.* The courts below could have granted that request or, to save on "expense and delay," Nationwide could have itself produced these "facts peculiarly within the[ir] knowledge" when it moved to dismiss. *Selma*, 139 U.S. at 568; *New York, N.H. & H.R. Co.*, 355 U.S. at 256 n.5. Neither happened—leaving Tobien unable to proceed with his suit based on information outside of his knowledge and control.

III. THIS CASE PRESENTS AN IDEAL VEHICLE.

"Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976); *accord Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 626 (1993). This matter sharply illustrates that point.

After all, venue decisions—i.e., where a case may be heard—are unquestionably important to plaintiffs, defendants, witnesses, and judges. Nor is there any dispute that the question presented has divided courts, *see* App. 12a–13a, and commentators alike, *compare*

Wright & Miller's Federal Practice & Procedure, *supra*, § 1352, *with Moore's Federal Practice*, *supra*, § 110.01[5][c]. And the difference between these conflicting approaches has undoubtedly been consequential. Indeed, had *Myers* been heard in the Ninth rather than the Third Circuit, the plaintiff's suit likely would have been dismissed. Conversely, had *DeLong Equipment* been brought in the Eighth Circuit rather than the Eleventh, the plaintiff could have continued to seek relief for their claims. The split here is, in short, robust, open, and outcome-determinative. This case squarely presents it for this Court's review.

Venue in Kentucky might well have been proper if Nationwide's insurance adjusters were located in Kentucky when they investigated, adjudicated, and denied Tobien's claim. App. 18a–21a. But since Nationwide did not have the burden of proving improper venue, it did not have to come forward with any of this evidence when it filed its Rule 12(b)(3) motion. And when Tobien tried to get Nationwide to produce these facts, the Sixth Circuit turned him away and faulted him for not knowing them. App. 20a–21a.

The Sixth Circuit's decision to dismiss with prejudice does not pose an obstacle to review. The panel's conclusion flows from a multi-step chain of reasoning. First, that Tobien failed to carry his burden of proving that venue was proper in the Eastern District of Kentucky. Second, if the district court had transferred this case to the Southern District of Ohio, that court would apply Ohio choice of law rules. And finally, Ohio's choice of law rules would require the court to apply Ohio substantive law. Tobien was doomed to lose under Ohio

substantive law, because Ohio does not recognize third-party bad-faith claims, and Tobien's Kentucky statutory claim could not be heard on a standalone basis in Ohio.

Yet if the Sixth Circuit had answered the question presented differently, the above syllogism falls apart at step one. If, as Tobien contends, defendants bear the burden of proving that venue is improper, then Nationwide's motion to dismiss should have been denied because it produced no evidence to establish that venue in the Eastern District of Kentucky was improper. In this diversity case, a federal district court in Kentucky would have then applied the substantive law of the state in which it sits, *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965), including that state's choice of law rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Kentucky's choice-of-law rules would, in turn, likely require the court to apply Kentucky's substantive law. That is so because Kentucky has "a strong preference . . . for applying Kentucky law." *Wells Fargo Fin. Leasing, Inc. v. Griffin*, 970 F. Supp. 2d 700, 707 (W.D. Ky. Sept. 6, 2013). Indeed, "Kentucky courts have apparently applied Kentucky substantive law *whenever possible*"; "Kentucky applies its own law unless there are overwhelming interests to the contrary." *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069, 1071 (6th Cir. 1983) (discussing *Breeding v. Mass. Indem. & Life Ins. Co.*, 633 S.W.2d 717 (Ky. 1982)). Finally, Kentucky, unlike Ohio, recognizes third-party bad faith claims. *See Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000).

To sum up: If this Court were to hold that Nationwide bore the burden of proving that Kentucky was not a proper venue, Tobien would have had his day in court on

his Kentucky bad faith claim. Because the Sixth Circuit held otherwise, he never had a chance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 2025

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

No. 24-5575

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 19, 2025
KELLY L.
STEPHENS, Clerk

KARL TOBIEN,

Plaintiff-Appellant,

v.

NATIONWIDE GENERAL
INSURANCE COMPANY,

Defendant-Appellee.

ORDER

BEFORE: THAPAR, NALBANDIAN, and RITZ, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Kelly L. Stephens
Clerk

Tel. (513) 564-7000
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Filed: May 19, 2025

Mr. Louis C. Schneider
Thomas Law
250 E. Fifth Street
Suite 440
Cincinnati, OH 45202

Re: Case No. 24-5575, *Karl Tobien v. Nationwide General Ins Co*
Originating Case No.: 2:24-cv-00042

Dear Mr. Schneider,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Darrin Winn Banks

Enclosure

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: April 04, 2025

Mr. Darrin Winn Banks
Porter, Banks, Baldwin & Shaw
327 Main Street
Paintsville, KY 41240-1767

Mr. Louis C. Schneider
Thomas Law
250 E. Fifth Street, Suite 440
Cincinnati, OH 45202

Re: Case No. 24-5575, *Karl Tobien v. Nationwide General Ins Co*
Originating Case No. : 2:24-cv-00042

Dear Counsel,

The court has made a correction on page 6 of the published opinion that was filed in this case on April 2, 2025. Please see the pertinent paragraph below with the corrected word in yellow highlight:

> At least one circuit reached the opposite conclusion. In *Myers v. American Dental Association*, the Third Circuit held (over a dissent) that on a motion to dismiss for improper venue, the defendant "has the burden of proving the affirmative defense asserted by it." 695

F.2d at 724. The court thought this conclusion "logically follow[ed]" from the premises that (a) venue is an affirmative defense that a court will not raise on its own motion, and (b) the plaintiff doesn't have to allege in his complaint that venue is proper. *Id.*

Enclosed is a copy of the opinion incorporating the correction in print. Please note that the date the opinion is deemed to have been filed remains April 2, 2025.

Yours very truly,

Kelly L. Stephens, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Robert R. Carr

Enclosure

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0076p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KARL TOBIEN,
Plaintiff-Appellant,

v.

NATIONWIDE GENERAL INSURANCE COMPANY,
Defendant-Appellee.

No. 24-5575

Appeal from the United States District Court for the Eastern District of Kentucky at Covington.
No. 2:24-cv-00042—Danny C. Reeves, District Judge.

Decided and Filed: April 2, 2025

Before: THAPAR, NALBANDIAN, and RITZ, Circuit Judges.

COUNSEL

ON BRIEF: Louis C. Schneider, THOMAS LAW OFFICES, PLLC, Cincinnati, Ohio, for Appellant. Darrin W. Banks, PORTER, BANKS, BALDWIN & SHAW, PLLC, Paintsville, Kentucky, for Appellee.

OPINION

THAPAR, Circuit Judge. How does a case about a dog bite end up in federal court? Diversity jurisdiction. But just because a plaintiff is entitled to be in federal court, that doesn't mean any federal court will do. Rather, the plaintiff must pick the right federal court. Here, the district court found that the plaintiff picked the wrong one. We affirm.

I.

One Thursday in May 2023, Karl Tobien laced up his boots and hit the road. His plan for the day? Selling telecommunications services from door to door in Clermont County, Ohio. Being a door-to-door salesman isn't easy, and Tobien must have been prepared to encounter the usual hazards, like inclement weather or angry homeowners. But he couldn't have expected what awaited him at the end of a cul-de-sac in the serene hamlet of Loveland, Ohio. As he walked up the driveway of one of the houses, Tobien was attacked by a dog.

After the incident, Tobien filed two federal lawsuits. First, he filed a personal-injury complaint against the homeowners in the Southern District of Ohio, seeking compensation for the injuries he sustained in their driveway. *See* Compl., *Tobien v. Kern*, No. 1:24-CV-00164-MWM (S.D. Ohio filed Mar. 27, 2024). The parties agreed to dismiss that case.

Second, Tobien filed the lawsuit that's before us now. This is a suit against Nationwide General Insurance Company, which insured the home. Tobien had submitted an insurance claim to Nationwide, seeking compensation from the home-insurance policy. But Nationwide refused

to pay. So Tobien sued, asserting state-law claims for (1) violations of Kentucky's Unfair Claims Settlement Practices Act, (2) common-law bad faith, and (3) punitive damages. Although Tobien filed his first lawsuit in the Southern District of Ohio, he filed this lawsuit in a different federal court—the Eastern District of Kentucky. Nationwide then moved to dismiss for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure.

The district court concluded that Tobien had filed this lawsuit in the wrong place. According to the court, most of the relevant action had happened in Ohio. So the federal court in Eastern Kentucky wasn't a proper venue for the lawsuit. Then, rather than transfer the lawsuit to a court where venue would have been proper (like the Southern District of Ohio), the district court chose to dismiss the lawsuit outright.

Tobien now appeals these two aspects of the decision below: (1) the conclusion that venue wasn't proper in the Eastern District of Kentucky and (2) the court's decision to dismiss the lawsuit rather than transfer it. We address each contention in turn.

II.

Tobien argues that the Eastern District of Kentucky was a proper venue for his lawsuit. Our review is de novo. *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir. 1998).

A.

First, a brief explanation of venue. Venue is "[t]he proper or a possible place for a lawsuit to proceed, [usually] because the place has some connection either with the events that gave rise to the lawsuit or with the

plaintiff or defendant." *Venue*, Black's Law Dictionary (12th ed. 2024).

The modern venue requirement is based on an old idea: "there is a particular court or courts in which an action should be brought." 5B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3802 [hereinafter "Wright & Miller"]. This idea has "ancient common law lineage." *Id.* And it's been integral to the federal court system since the Judiciary Act of 1789. *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 708 (1972).

The current general venue rules are codified at 28 U.S.C. § 1391(b).[1] That statute lets plaintiffs sue in three main places: where a defendant resides, where a substantial part of the events happened, or if neither of those works, wherever personal jurisdiction is available. 28 U.S.C. § 1391(b)(1)–(b)(3).

Here, the dispute centers on the second option. Tobien contends that the Eastern District of Kentucky is a judicial district "in which a substantial part of the events or omissions giving rise to [this lawsuit]" occurred. *Id.* § 1391(b)(2).

B.

In resolving this appeal, our first task is to determine who bears the burden of proof. Does Tobien, as the plaintiff, bear the burden to show that a substantial part of the events giving rise to his claim occurred in the Eastern District of Kentucky? Or does Nationwide, as the

[1] Congress has sometimes enacted specialized venue statutes governing particular classes of cases. *E.g.*, 28 U.S.C. § 1400(b). The case before us now isn't encompassed by any special venue statute. So for this action, venue is only proper in a district that meets at least one criterion set forth in 28 U.S.C. § 1391.

defendant, bear the burden to negate that a substantial part of the events occurred there?

Our court has never answered that question.[2] As a result, "[t]here is a split of authority among district courts in the Sixth Circuit regarding who bears the burden of proof when venue is challenged as improper." *Reilly v. Meffe*, 6 F. Supp. 3d 760, 765 (S.D. Ohio. 2014). On the one hand, some courts have held that "[o]n a motion to dismiss for improper venue, the plaintiff bears the burden of proving that venue is proper." *Audi AG & Volkswagen of Am., Inc. v. Izumi*, 204 F. Supp. 2d 1014, 1017 (E.D. Mich. 2002). Other courts, by contrast, have held that "the

[2] To be sure, our court has explained that when a defendant moves to transfer a case from one proper venue to another under 28 U.S.C. § 1404(a), the defendant bears the burden to show that a transfer is warranted. *Means v. U.S. Conf. of Cath. Bishops*, 836 F.3d 643, 652 n.7 (6th Cir. 2016) (stating that the district court "correctly" placed the burden on defendants to "show that venue should be transferred" under § 1404(a) (citation omitted)); *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) (explaining that the "burden of proof in arguing for transfer" under § 1404 "is on defendant" (citation omitted)). That makes sense, since a plaintiff enjoys a "venue privilege" to file his action in whichever proper venue he prefers. *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63 (2013). For that reason, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Reese v. CNH Am., LLC*, 574 F.3d 315, 320 (6th Cir. 2009) (citation omitted). So the defendant bears the burden to show that a different forum is more convenient than the one chosen by the plaintiff. However, that logic only works when the plaintiff's chosen venue is proper in the first place. A § 1404(a) motion "operates on the premises that the plaintiff has properly exercised his venue privilege." *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). In our case, by contrast, the defendant has filed a Rule 12(b)(3) motion that challenges the plaintiff's chosen venue as improper. It doesn't follow that a defendant would bear the burden to show that venue is improper on a Rule 12(b)(3) motion just because he bears the burden to win a transfer from one proper venue to another on a § 1404(a) motion.

defendant [has] the burden of proving that the forum chosen by the plaintiff is improper." *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F. Supp. 2d 612, 631 (E.D. Ky. 2009).

Our sister circuits are also divided, with the majority placing the burden on the plaintiff. *Compare Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184 (7th Cir. 1969) (placing the burden to establish proper venue on the plaintiff), *Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) (same), *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (same), *and Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) (same), *with Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) (placing the burden on defendant to prove that venue is improper), *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947) (same), *and In re Peachtree Lane Assocs., Ltd.*, 150 F.3d 788, 794 (7th Cir. 1998) (same). *See also* 17 Moore's Federal Practice § 110.01[5][c] (adopting the minority view).

The majority is correct: when a defendant challenges the venue, the plaintiff bears the burden of proving venue by a preponderance of the evidence. That makes sense. After all, "it is the plaintiff's obligation to institute the action in a permissible forum." *Freeman v. Fallin*, 254 F. Supp. 2d 52, 56 (D.D.C. 2003).

What's more, this same burden-shifting framework applies to motions to dismiss for lack of personal jurisdiction. *Peters Broad. Eng'g, Inc. v. 24 Cap., LLC*, 40 F.4th 432, 437 (6th Cir. 2022). That's significant, because venue and personal jurisdiction are closely related concepts in their application. "[B]oth are personal privileges of the defendant." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). Both are affirmative

defenses unrelated to the merits of the claim. And crucially, both often turn on the same facts.

For example, in many actions, whether there's personal jurisdiction and proper venue depends on identical facts about the defendant's residence. Under 28 U.S.C. § 1391(b)(1), venue is proper at the judicial district in which all defendants reside. When the defendant is a natural person, he "reside[s]," for venue purposes, in the judicial district in which he is "domiciled." 28 U.S.C. § 1391(c)(1). And a person's domicile is one of the crucial facts in a personal-jurisdiction analysis. Indeed, in the "paradigm" case, "an individual is subject to general [personal] jurisdiction in her place of domicile." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358–59 (2021) (citation omitted).

Similarly, for venue purposes, Congress has tied an entity's place of residence to personal jurisdiction. 28 U.S.C. § 1391(c)(2) (providing that an entity defendant resides, for venue purposes, in "any judicial district in which [it] is subject to the court's personal jurisdiction with respect to the civil action in question").

Finally, where venue isn't available under § 1391(b)(1) or (b)(2), the fallback rule provides that venue is proper in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." *Id.* § 1391(b)(3). In that situation, the questions of venue and personal jurisdiction are identical: whether venue is proper depends on whether the court can exercise personal jurisdiction over the defendant. A 12(b)(3) motion contesting fallback venue under § 1391(b)(3) is thus the substantial equivalent of a motion to dismiss for lack of personal jurisdiction. It wouldn't make sense for courts to use different burdens of proof in evaluating these motions.

At least one circuit reached the opposite conclusion. In *Myers v. American Dental Association*, the Third Circuit held (over a dissent) that on a motion to dismiss for improper venue, the defendant "has the burden of proving the affirmative defense asserted by it." 695 F.2d at 724. The court thought this conclusion "logically follow[ed]" from the premises that (a) venue is an affirmative defense that a court will not raise on its own motion, and (b) the plaintiff doesn't have to allege in his complaint that venue is proper. *Id.*

While the two premises are correct, it does not "logically follow" that the defendant thus bears the burden. Why? Because once the defendant contests venue, it is up to the plaintiff to show that he filed the action in a permissible court, even if he doesn't need to make that showing in his complaint. Indeed, those very same premises would mean that the defendant must disprove personal jurisdiction. But even the Third Circuit has held that the plaintiff bears the burden of establishing personal jurisdiction. *E.g.*, *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir. 1998).

But what about *Myers*'s point that defendants normally bear the burden to prove affirmative defenses? As the dissent pointed out, the majority confused "affirmative *exculpatory* or substantive defenses" with "affirmative *dilatory* defenses," like venue. *Myers*, 695 F.2d at 733 (Garth, J., concurring and dissenting). A "substantive" defense is one that, if established, would terminate the litigation for the defendant on the merits. *See Defense*, Black's Law Dictionary (12th ed. 2024). By contrast, a "dilatory" defense is one that "temporarily obstructs or delays a lawsuit but does not address the merits." *Id.*

A defendant bears the burden to prove affirmative *substantive* defenses, including those listed in Rule 8(c). *Myers*, 695 F.2d at 732 (Garth, J., concurring and dissenting). But the law often assigns to the *plaintiff* the burden of proving a dilatory defense, like venue. That's because "the plaintiff has traditionally had the burden of proving that a court has authority to hear his case." *Id.*; *see also Freeman*, 254 F. Supp. 2d at 56. Again, for an example that even the Third Circuit has accepted, look no further than personal jurisdiction. *IMO Indus., Inc.*, 155 F.3d at 257.

The Eighth Circuit also appears to have come out the same way as the Third Circuit. In *United States v. Orshek*, the Eighth Circuit said that because the defendants made an improper-venue motion, "the burden of proof was upon them [i.e., the defendants] to show that neither of the defendants was a resident" of the Omaha Division of the Nebraska District. 164 F.2d at 742. Some district courts in the Eighth Circuit have relied on that pronouncement to conclude that "in the Eighth Circuit, the defendant bears the burden of establishing improper venue." *Brigdon v. Slater*, 100 F. Supp. 2d 1162, 1164 (W.D. Mo. 2000). Other district courts in that circuit, however, have assigned the burden to the plaintiff. *Id.* at 1164 n.2. To the extent the Eighth Circuit believes that the defendant bears the burden to prove improper venue, we respectfully disagree.

C.

Thus, when a defendant files a 12(b)(3) motion to dismiss for improper venue, the plaintiff must show by a preponderance of the evidence that venue is proper. But how does a district court decide that question? It has three options: it can resolve the motion on the papers; it can resolve the motion with an evidentiary hearing; or it can permit discovery in aid of deciding the motion. *See*

Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991) (holding as much in the personal-jurisdiction context). But "[h]owever the court handles the motion, the plaintiff always bears the burden of establishing" that venue exists. *See Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (holding as much in the personal-jurisdiction context).

Here, the district court decided the 12(b)(3) motion on the papers alone. So, to defeat the 12(b)(3) motion (and delay meeting his burden to establish venue until summary judgment or trial), Tobien needed to show that his pleadings and affidavits, if accepted as true, would establish that venue was proper. *See Theunissen*, 935 F.2d at 1458. He failed to make that showing.

Start with Tobien's complaint. It states that "[v]enue is proper in this division because Plaintiff resides in this district, Defendant conducts business in this district, and a substantial part of the events and omissions giving rise to the claims stated herein occurred in this district." R. 1, Pg. ID 2. This statement foreshadows that Tobien planned to lay venue under prong two of the general venue statute, which provides that venue is proper if "a substantial part of the events or omissions giving rise to the claim occurred" in the district. *See* 28 U.S.C. § 1391(b)(2).[3] To

[3] Indeed, 28 U.S.C. § 1391(b)(2) is the only possible basis for venue on review. Tobien never argued that venue might have been proper under 28 U.S.C. § 1391(b)(1). Under that provision, venue is proper if Nationwide "resides" in the Eastern District of Kentucky. The venue statute further provides that an "entity" (like Nationwide) "shall be deemed to reside," for venue purposes, "in any judicial district in which [the] defendant is subject to the court's personal jurisdiction" with respect to the action. 28 U.S.C. § 1391(c)(2). Put it all together, and venue would have been proper in the Eastern District of Kentucky if Tobien could show that Nationwide was subject to the court's personal jurisdiction. Because Tobien never advanced this theory, we

support that contention, the complaint alleges that Tobien is a resident of Boone County, Kentucky, and that Nationwide does business in Kentucky and has an agent for service of process in that state.

To be sure, the complaint's failure to allege venue didn't automatically doom Tobien. "Because venue is an affirmative defense, the petitioner is not required to address venue in its pleadings." *Uni-Top Asia Inv. Ltd. v. Sinopec Int'l Petroleum Expl. & Prod. Co.*, 600 F. Supp. 3d 73, 78 (D.D.C. 2022); *see also* Wright & Miller § 3826 ("[T]he plaintiff is not required to include allegations showing that venue is proper."). But once a motion to dismiss is filed, the plaintiff must come forward with evidence demonstrating that venue is proper. That evidence can include affidavits or other factual material.

Here, Nationwide moved to dismiss the complaint for improper venue under Rule 12(b)(3). In that motion, Nationwide observed that almost no facts supported venue in the Eastern District of Kentucky. The only facts that could even arguably support venue under § 1391(b)(2) were (a) Tobien's residence in the Eastern District of Kentucky and (b) that Nationwide conducts business in that district. Nationwide then made a legal argument: those facts, by themselves, could not show that "a substantial part of the events or omissions giving rise to [Tobien's] claim" occurred in the Eastern District of Kentucky. 28 U.S.C. § 1391(b)(2).

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have no occasion to address whether it might have had merit. Further, § 1391(b)(3) was off the table, since (as the parties agree) there's at least one judicial district that could have satisfied either of § 1391(b)(1) or (b)(2)—the Southern District of Ohio. And no specialized venue statute applies here. That leaves § 1391(b)(2) as the only possible basis for venue here.

This case boils down to the adequacy of Tobien's response. In Tobien's opposition, he made a new assertion: that a "substantial portion" of the insurance company's "communications with Plaintiff and investigation of Plaintiff's claim" took place in Eastern Kentucky. R. 6 at Pg. 3.

But Tobien didn't have any factual allegations to support that vague assertion. Nor did he support it by attaching affidavits or other evidence to his opposition.

The only possible allegations that Tobien could use to support venue were these: (1) he himself resides in Kentucky and (2) he sent and received correspondence with the insurance company from his home in Kentucky. Even accepting those allegations as true—as we must, for purposes of determining whether Tobien has made a prima facie showing that venue is proper— those facts do not qualify as a "substantial part of the events or omissions giving rise to" this lawsuit. 28 U.S.C. § 1391(b)(2).

Tobien's correspondence with the insurance company from his home in Kentucky, and the general fact that he lives in Kentucky, aren't "events or omissions giving rise to" his complaint that Nationwide violated the law by denying his claim in bad faith. The location from which Tobien sent letters to the insurance company has nothing to do with either (a) the dog attack that led Tobien to submit an insurance claim or (b) the company's actions in denying the claim in (allegedly) bad faith.

To the extent Tobien argues that he was situated in Kentucky when he suffered the negative consequences of the insurance company's actions, that fails to establish venue. "[W]ithout more," an allegation that the plaintiff "suffer[ed] . . . economic harm within a district is not sufficient for purposes of establishing venue in that

district" under § 1391(b)(2). *Alltech, Inc. v. Carter*, No. 5:08-CV-00325, 2010 WL 988987, at *3 (E.D. Ky. Mar. 15, 2010); *accord Konote v. Beattie*, No. 1:24-CV-706, 2024 WL 5109391, at *3 (S.D. Ohio Dec. 13, 2024) (rejecting plaintiff's claim of venue in Ohio even though plaintiff "currently resides in Cincinnati, Ohio" and "continues to suffer from 'the effects of Defendants' misconduct . . . while residing in this district'" (citation omitted)). "Otherwise, venue would almost always be proper at the place of a plaintiff's headquarters or residence, an option that Congress removed" from the venue statute in 1990. *Alltech, Inc.*, 2010 WL 988987, at *3.

What's more, under Tobien's theory, a plaintiff could make venue proper in any of the 50 states simply by traveling there and sending letters to the insurance company from that state. Congress did not intend to allow plaintiffs to manipulate the venue rules in that way, especially since the venue rules exist primarily "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63 n.7 (2013) (quoting *Leroy*, 443 U.S. at 183–84).

On appeal, Tobien tries a new tack. Now, he relies on speculation about where Nationwide's insurance adjusters were located when they denied his claim. But he concedes he doesn't actually know where the adjusters were located. And, more importantly, Tobien didn't put before the district court any facts or allegations about the location of the adjusters.

To be fair, Tobien did request discovery below as an alternative to dismissal. But he did so in a one-paragraph request at the end of his response to Nationwide's motion. "Motions for venue discovery are subject to the same legal standards that apply to motions for jurisdictional

discovery." *Uni-Top Asia Inv. Ltd.*, 600 F. Supp. 3d at 78. And Tobien's lone paragraph didn't provide a "detailed showing of what discovery [he] wishes to conduct or what results [he] thinks such discovery would produce." *Id.* (citation omitted). For example, Tobien didn't specify that he wanted discovery about the location of the adjusters. The district court denied that request, a decision that Tobien doesn't challenge on appeal.

* * *

In sum, the district court did not err in concluding that the Eastern District of Kentucky was an improper venue for Tobien's lawsuit.

III.

Tobien brings a second challenge to the district court's decision, which we review under an abuse-of-discretion standard. *See First of Mich. Corp.*, 141 F.3d at 262. He contends that, even if the Eastern District of Kentucky is not a proper venue, the district court abused its discretion by dismissing his case rather than transferring it to a district where venue *would* have been proper—like the Southern District of Ohio.

A.

When a plaintiff files a case in an improper venue, the district court may, "if it be in the interest of justice," transfer the case to a district where the plaintiff could have brought the action. 28 U.S.C. § 1406(a).

The district court held that transferring Tobien's case to a proper venue would not "be in the interest of justice." *Id.* The court gave one reason for that conclusion: after taking a "peek at the merits" of Tobien's underlying legal claims, the court concluded that Tobien's lawsuit would fail

on the merits if it were transferred to the Southern District of Ohio. R. 8, Pg. ID 53 (citation omitted).[4]

Tobien believes the district court was wrong in deciding that his lawsuit would not succeed in the Southern District of Ohio. We disagree. Upon receiving Tobien's lawsuit, the Southern District of Ohio would apply Ohio's state choice-of-law rules. Those choice-of-law rules would direct the court to apply Ohio's substantive law. And under Ohio's substantive law, Tobien's lawsuit has no merit.

B.

An Ohio federal court would apply Ohio's choice-of-law rules to determine which state's substantive law governs Tobien's claims. *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980). Those rules, in turn, "treat[] bad faith claims as claims arising in tort." *In re Com. Money Ctr., Inc., Equip. Lease Litig.*, 603 F. Supp. 2d 1095, 1107 (N.D. Ohio 2009). To determine which state's law applies in a tort action, Ohio's choice-of-law rules require application of the Restatement (Second) of Conflict of Laws. *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 288–89 (Ohio 1984). The Second Restatement selects the law of the state with the "most significant relationship to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 145(1).

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[4] On appeal, Tobien doesn't contest the district court's conclusion that it had authority to make a preliminary judgment about the lawsuit's merits in deciding whether a transfer would serve the interests of justice. *See Phillips v. Seiter*, 173 F.3d 609, 610–11 (7th Cir. 1999) (Posner, C.J.). Nor does Tobien argue that the district court shouldn't have dismissed his lawsuit with prejudice. Because Tobien doesn't challenge these decisions of the district court, we express no view on these matters.

Ohio has the most significant relationship to this litigation. Ohio is where Tobien suffered the physical injuries from the dog attack that gave rise to the insurance claim. And Ohio is where Nationwide, an Ohio-based company, issued the underlying insurance policy to the homeowners. Tobien's Kentucky residence doesn't outweigh these other factors. *See Nationwide Mut. Ins. Co. v. Black*, 656 N.E.2d 1352, 1356 (Ohio Ct. App. 1995) (placing little weight on the domicile of a party when the parties had different domiciles).

Resisting this conclusion, Tobien relies almost exclusively on *Adams v. Medical Protective Co.*, No. 1:20-CV-170, 2022 WL 20840916 (S.D. Ohio Sept. 29, 2022). But that case cuts against Tobien.

In *Adams*, the plaintiffs brought a claim for violations of Kentucky's Unfair Claims Settlement Practices Act and a third-party bad-faith claim against an insurance company, just as Tobien does here. *Id.* at *2. And just as Tobien does, the plaintiffs in *Adams* argued for the application of Kentucky law, since some plaintiffs lived in Kentucky and the insurance claim was adjudicated in Kentucky. *Id.* at *9. But the *Adams* court did the exact opposite of what Tobien asks us to do here: it held that Ohio law governed the dispute. *Id.*

Indeed, Tobien's case shares three of the same features that led the *Adams* court to apply Ohio law. First, in both cases, the injuries that led the plaintiffs to seek compensation from the insurance companies occurred in Ohio, since that's where the dog attacked Tobien. *Id.* Second, just as in *Adams*, Tobien has previously sued the alleged tortfeasors—here, the owners of the home where Tobien was attacked—in an Ohio federal court. *Id.*; *see also* Compl., *Tobien v. Kern*, No. 1:24-CV-00164-MWM (S.D. Ohio filed Mar. 27, 2024). And just as in *Adams*, the

homeowners' insurance contract on which Tobien bases his bad-faith claim was entered into in Ohio. *Adams*, 2022 WL 20840916, at *9; *see* R. 8, Pg. ID 51. Accordingly, even the case on which Tobien places the heaviest reliance shows that Ohio substantive law would govern this case in the event of a transfer to the Southern District of Ohio.

Finally, Tobien's claims would fail as a matter of Ohio substantive law. First, his bad-faith claim would fail because Tobien, as a third-party claimant not covered by the home insurance policy, "has no cause of action for bad faith against the tortfeasor's insurance company" under Ohio law—at least where that third-party claimant hasn't already obtained a judgment against the tortfeasor, which Tobien hasn't done. *Grimberg v. Blackbird Baking Co.*, 208 N.E.3d 111, 120 (Ohio Ct. App. 2023) (citation omitted). Second, Tobien's claim for breach of Kentucky's Unfair Claims Settlement Practices Act would fail because, as already explained, Kentucky law would not apply to Tobien's case. And third, with no underlying rights violation, Tobien's freestanding claim for punitive damages would fail as well.

In sum, Tobien's claims would be subject to dismissal upon transfer to the Southern District of Ohio. Accordingly, the district court did not err in concluding otherwise. Since that's the only basis on which Tobien challenges the district court's dismissal, the district court did not abuse its discretion when it refused to transfer Tobien's lawsuit.

* * *

We affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

KARL TOBIEN, Plaintiff, V. NATIONWIDE GENERAL INSURANCE COMPANY, Defendant.	)	Civil Action No. 2: 24-042-DCR **MEMORANDUM OPINION AND ORDER**

*** *** *** ***

Defendant Nationwide General Insurance Company has filed a motion to dismiss or to transfer this matter pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. For the reasons that follow, the defendant's motion will be granted and the case will be dismissed because venue is not authorized in this district and the plaintiff's claims would fail if the matter were transferred to the district having venue over the action.

I.

Plaintiff Karl Tobien is a resident and citizen of Boone County, Kentucky. He claims a German Sheppard dog attacked and injured him in the driveway of a home located in Clermont, Ohio and belonging to Kenneth and Anita Kern. A few days following the incident, Tobien filed a criminal complaint in an Ohio state court against Anita Kern for failing to keep the dog under reasonable control. That claim, however, was ultimately dismissed.

In turn, Tobien filed a federal complaint in the Southern District of Ohio against the Kerns. Specifically, the action asserts a claim of strict liability for violation of Ohio Revised Code § 955.28(b) and seeks punitive damages stemming from the Kerns' alleged malice and conscious disregard of his safety.

Although Tobien implicitly acknowledged the applicability of Ohio law by filing suit in the Southern District of Ohio against the Kerns, he nonetheless filed suit in this district against Nationwide General Insurance Company ("Nationwide"), the Kerns' insurer. Nationwide previously denied Tobien's claim because he could not prove that the subject dog belonged to the Kerns. Based on this denial, Tobien alleges that Nationwide violated the Kentucky Unfair Claims Settlement Practices Act. He also claims the insurance company faces additional liability for third-party bad faith under Kentucky common law for failing to properly evaluate his claim.

II.

A motion to dismiss for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure is appropriate if a case is not filed in a venue prescribed by 28 U.S.C. § 1391. *Kerobo v. Sw. Clean Fuelds, Corp.*, 285 F.3d 531, 536 (6th Cir. 2002). Further, the defendant has the burden of proving the forum chosen by the plaintiff is improper. *See Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F.Supp.2d 612, 631 (E.D. Ky. 2009). When considering venue under Rule 12(b)(3), "[t]he Court may look beyond the allegations of the Complaint but must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff." *Global Fitness Holdings, LLC v. Fed. Recovery Acceptance, Inc.*, 2013 WL 1187009, *6 (E.D. Ky. Mar. 20, 2013) (citing *Audi AG & Volkswagen of America,*

Inc. v. Izumi, 204 F. Supp. 2d 1014, 1017 (E.D. Mich. 2002)).

If a case is filed in an improper venue, the district court has two options. It "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). The decision of whether to dismiss or transfer is "within the district court's sound discretion." *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir. 1998).

III.

In federal court, venue is proper in one of the following locations: (1) a judicial district in which any defendant "resides" if all defendants are residents of the state in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action if there is no district in which an action may otherwise be brought. *See* 28 U.S.C. § 1391(b).

Tobien filed the suit against Nationwide in this district, claiming that the company "conducts business in this district, and a substantial part of the events and omissions giving rise to the claims stated herein occurred in this district."[1] [Record No. 1] More specifically, he "received all correspondence related to his claim and the investigation of his claim at his home" in Boone County, Kentucky, which is located within this district. [Record

[1] Otherwise, Tobien does not explicitly argue that Kentucky's long-arm statute for establishing personal jurisdiction extends to Nationwide based on the company's business connections with the Commonwealth pursuant to KRS 454.210(2)(a)(1).

No. 6] However, few events giving rise to Tobien's claims against Nationwide occurred in Kentucky.

Nationwide is an Ohio-based company. It issued a policy to an Ohio resident covering an Ohio home. The alleged tortious actions of the insureds, and the resulting injury to Tobien, occurred on the insured property in Ohio. And Nationwide processed Tobien's unsuccessful claim in Ohio where the company and its adjustors are purportedly located. *See Bates v. Dauper*, 2022 WL 15527636, *2 (Ky. Ct. App. Oct. 28, 2022) (concluding, in relevant part, that the conduct of an out of state insurance adjuster occurred in the state where the adjustor is located when he communicated with an individual in Kentucky). The actions in Kentucky were limited to Tobien's communications with Nationwide and unspecified investigative activities into his insurance claim with the company. *Id.* But this is insufficient to render the Eastern District of Kentucky a locus for venue purposes.

Sensing the inevitable, Tobien seeks leave to conduct discovery in an effort to establish that sufficient events occurred in this district to render venue proper. But such course is unnecessary where so many facts suggest the opposite. *See Valvoline Instant Oil Change Franchising Inc. v. RFG Oil, Inc.*, 2012 WL 3613300, *5 (E.D. Ky. Aug. 22, 2012) (noting that courts give a plaintiff's choice of forum significantly less weight when there is little connection between the matter and the forum). There simply is too narrow a nexus between this district and the events that allegedly transpired for venue to be proper in the Eastern District of Kentucky. *Setco Enterprises Corp. v. Robbins*, 19 F.3d 1278, 1281 (6th Cir. 1994) (holding that a "substantial connection to the claim" is required for venue to be proper).

Having determined that venue here is improper, the Court next decides how to dispose of the matter. Under 28 U.S.C. § 1406(a), "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *See also Jackson v. L&F Martin Landscape*, 421 F. App'x 482, 483 (6th Cir. 2009).

This Court typically would transfer the action rather than dismiss it if the action could have been properly brought in another district. *Dalton v. Ferris*, 2019 WL 5581338, *5 (E.D. Ky. Oct. 29, 2019). And when determining whether transfer is appropriate, a court may "take a peek at the merits" to see whether that course of action would be in the interest of justice. *Id.* But pulling back the curtain in this case reveals that the action would likely be dismissed upon transfer to the Southern District of Ohio. Ohio law applies pursuant to 28 U.S.C. § 1391(b)(1)-(2), and that state does not recognize third party bad faith claims. *See Grimberg v. Blackbird Baking Co.*, 208 N.E.3d 111, 120 (Ohio App. 2023) ("A third party has no cause of action for bad faith against the tortfeasor's insurance company.").

Without a clear path for Tobien to recover against Nationwide in a proper venue, the interests of justice neither support nor require transfer. Accordingly, it is hereby

ORDERED as follows:

1. Defendant Nationwide General Insurance Company's motion to dismiss pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure [Record No. 5] is **GRANTED**.

2. This matter is **DISMISSED** with prejudice and **STRICKEN** from the docket.

Dated: June 7, 2024.

UNITED STATES
DISTRICT COURT
EASTERN DISTRICT
OF KENTUCKY
[SEAL]

/s/ Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

KARL TOBIEN, Plaintiff, V. NATIONWIDE GENERAL INSURANCE COMPANY, Defendant.	)	Civil Action No. 2: 24-042-DCR **JUDGMENT**

*** *** *** ***

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and in accordance with the Memorandum Opinion and Order entered this date, it is hereby

ORDERED and **AJUDGED** [sic] as follows:

1. The claims asserted by Plaintiff Karl Tobien against Defendant Nationwide General Insurance Company are **DISMISSED**, with prejudice.

2. This civil action is **DISMISSED** and **STRICKEN** from the docket.

3. The plaintiff is responsible for payment of taxable costs incurred herein.

4. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

Dated: June 7, 2024.

UNITED STATES
DISTRICT COURT
EASTERN DISTRICT
OF KENTUCKY
[SEAL]

/s/ Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

APPENDIX D

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 87. District Courts; Venue (Refs & Annos)

28 U.S.C.A. § 1391

§ 1391. Venue generally

Currentness

(a) **Applicability of section.**--Except as otherwise provided by law--

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) **Venue in general.**--A civil action may be brought in--

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) **Residency.**--For all venue purposes--

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) **Residency of corporations in States with multiple districts.**--For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) Actions where defendant is officer or employee of the United States--

(1) **In general.**--A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) **Service.**--The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) **Civil actions against a foreign state**--A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim

occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) **Multiparty, multiforum litigation**--A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 935; Pub.L. 87-748, § 2, Oct. 5, 1962, 76 Stat. 744; Pub.L. 88-234, Dec. 23, 1963, 77 Stat. 473; Pub.L. 89-714, §§ 1, 2, Nov. 2, 1966, 80 Stat. 1111; Pub.L. 94-574, § 3, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 94-583, § 5, Oct. 21, 1976, 90 Stat. 2897; Pub.L. 100-702, Title X, § 1013(a), Nov. 19, 1988, 102 Stat. 4669; Pub.L. 101-650, Title III, § 311, Dec. 1, 1990, 104 Stat. 5114; Pub.L. 102-198, § 3, Dec. 9, 1991, 105 Stat. 1623; Pub.L. 102-572, Title V, § 504, Oct. 29, 1992, 106 Stat. 4513; Pub.L. 104-34, § 1, Oct. 3, 1995, 109 Stat. 293; Pub.L. 107-273, Div. C, Title I, § 11020(b)(2), Nov. 2, 2002, 116 Stat. 1827; Pub.L. 112-63, Title II, § 202, Dec. 7, 2011, 125 Stat. 763.)