STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PARK TOWNSHIP NEIGHBORS, a Michigan nonprofit corporation,

Plaintiff,

v

PARK TOWNSHIP, a Michigan municipal Corporation,

Defendant

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OPINION AND ORDER

File No. 2023-7474-CZ

Hon. Jon H. Hulsing

Introduction

This case presents a dispute between landowners and municipal government over the permissible uses of land within the municipality. In 1974, Defendant Park Township ("Township"), an affluent township bordering Lake Michigan, adopted a zoning ordinance. *At present,* the central issue of this case is whether that 1974 zoning ordinance prohibited Short Term Rentals ("STRs") of property in the township.

Plaintiff Park Township Neighbors ("PTN") is a nonprofit corporation formed to protect and represent the interests of dozens of landowners who rent their properties on a short-term basis. Plaintiff argues that the 1974 ordinance allows STRs, while defendant claims that STRs were not, and since at least 1974 have never been, allowed in residential zoning districts. When this case was filed in late 2023, the 1974 ordinance was in effect.

Plaintiff filed suit asserting that a 2022 amendment to the zoning ordinance was improperly enacted and that a 2023 amendment to the general ordinances was a de facto zoning ordinance which was also improperly enacted. In other words, plaintiff asserted that defendant's 2022 and 2023 alleged amendments to the zoning ordinances were enacted contrary to law. Both these amendments banned STRs within the township. Plaintiff sought to enjoin the enforcement of these alleged improper ordinances, along with requiring defendant to properly enact ordinances.

The counts alleged and relief requested in plaintiff's first amended complaint are as follows:

- Count I argues that defendant's Ordinance 2022-02 and Ordinance 2023-02 were adopted in violation of the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101 *et seq.*, and are therefore unlawful and void.
- Count II argues that by imposing a ban on short-term rentals in residential areas through any method other than amending the existing zoning ordinance violates the doctrine of legislative equivalency, and therefore any ban so imposed is unlawful and void.
- Count III asks for declaratory relief that the use of single-family homes as STRs is lawful and permitted in residential districts under the 1974 zoning ordinance.
- Count IV requests that the Court issue a writ of mandamus ordering defendant to follow the MZEA when amending its zoning ordinance and enforcing its land use regulations.
- Count V argues that the 2022 and 2023 ordinances, even if properly enacted, improperly preempted the MZEA by failing to recognize and permit preexisting nonconforming uses.
- Count VI, added in plaintiff's first amended complaint and offered in the alternative, argues that if the 1974 Zoning Ordinance does prohibit the use of single-family homes as STRs, then the prohibition is unconstitutionally vague and a violation of plaintiff's due process rights.

For these reasons, plaintiff seeks a permanent injunction against enforcement of defendant's ban on short-term rentals and declaratory relief in plaintiff's favor.

When this case was initially filed, plaintiff also moved for a temporary injunction preventing defendant from enforcing the 2022 and 2023 amendments. Defendant did not file any brief opposing the motion. Rather, defendant appeared at the motion hearing and generally objected to the relief requested. Based upon plaintiff's brief and legal argument, the Court entered a preliminary injunction in December 2023 that barred defendant from enforcing its ban on short

term rentals as substantial evidence was presented that defendant may have violated the MZEA when it enacted the 2022 and 2023 ordinances.

During the pendency of this case in March 2024, the zoning ordinance was amended to expressly state that STRs are prohibited in districts other than C-2 Resort Service districts. Defendant asserts that the 2024 amendment did not change the effect of the 1974 ordinance but instead used different words to effect the same prohibition of STRs. On the other hand, plaintiff argues that the 2024 ordinance amendment supports the claim that STRs were allowed prior to 2024. Parties agree that this ordinance was adopted correctly. The 2024 ordinance is indisputably now in effect.

Parties have now placed dueling motions before the court for summary disposition under MCR 2.116(C)(10). Defendant argues that plaintiff's lawsuit lacks merit and should be dismissed in its entirety, while plaintiff argues that it is entitled to summary judgment on its request for a declaratory judgment that the use of single-family homes as STRs is a permissible use under the Township's 1974 zoning ordinance.

Standard of Review

Summary disposition under MCR 2.116(C)(10) is appropriate where, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A (C)(10) motion tests the factual basis for a claim or defense.[1] "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law."[2] "[T]he disputed factual issue must be material to a dispositive legal claim."[3]

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[1] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[2] *Haliw v City of Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001).

[3] *Kostello v Rockwell Intern Corp*, 189 Mich App 241, 243; 472 NW2d 71 (1991).

Law and Analysis

1. Mootness

Defendant argues that the issues before the court in Counts I, II, IV, V, and VI are made moot by the valid adoption of the 2024 zoning ordinance amendment and the accompanying confirmation that the Township would not seek to enforce the STR ban other than through the 2024 amended ordinance. "It is well established that a court will not decide moot issues."[4] "Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself."[5] "Mootness occurs when an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the *existing* controversy. There is an exception, however, when an issue is publicly significant, likely to recur, and yet likely to evade judicial review."[6]

Here, plaintiff asks the Court to permanently enjoin two ordinances that are no longer in force or will no longer be improperly enforced. According to plaintiff, in December 2022, defendant enacted an amendment to the zoning ordinance which addressed STRs. Plaintiff contends that this amendment was enacted in violation of the MZEA. When this allegedly improper procedure was brought to the attention of defendant, plaintiff claims that this ordinance simply "disappeared" from the list of ordinances and a 2023 amendment to the general police power ordinances was enacted. Defendant retorts that the 2022 amendment was mistakenly signed and was never in effect. Both sides thus agree, although for different reasons, that the 2022 "amendment" is void. Therefore, any request to enjoin the 2022 action is moot.

According to plaintiff, the 2023 amendment also violated the MZEA, the legislative equivalency doctrine, and was precluded by preemption because the amendment was a de facto zoning ordinance that was enacted as a general police power ordinance. This 2023 amendment expressly forbids STRs. Defendant states that the 2023 amendment was not a zoning amendment, but rather an appropriate ordinance enacted under the general police powers of the Township. In other words, both parties now agree that the 2023 amendment does not amend the zoning ordinance. However, that ordinance defined "short term rental" for the first time and it appeared

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[4] *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).

[5] *Id.* at 35.

[6] *Adams v Parole Bd*, 340 Mich App 251, 259; 985 NW2d 881 (2022) (cleaned up) (emphasis added).

to the Court that this was an improperly enacted zoning amendment. As mentioned above, on December 1, 2023, the Court enjoined defendant from enforcing the 2023 amendment.

Assuming, without deciding, that the 2023 ordinance was an improper de facto zoning ordinance, further enjoining the 2023 ordinance's prohibition on STRs would have no effect. Defendant has made clear that any enforcement action regarding STRs is prospective in nature and will be based on the properly enacted 2024 ordinance.[7] That zoning provision must be read in conjunction with §38-631 which specifically provides for the continuation of prior nonconforming uses.

Plaintiff has effectively already obtained the relief it seeks in counts I, II and V regarding these ordinances, so those counts are moot. No argument has been presented that this case presents the type of issue that is likely to recur and evade judicial review, so the exception to mootness does not apply here.

Plaintiff asks for a writ of mandamus requiring defendant to follow the requirements of the MZEA if defendant seeks to change the land use regulations on STRs within the Township. A writ of mandamus is an "extraordinary remedy" for the purpose of compelling action by a public official.[8] Parties agree that the 2024 ordinance was properly adopted under the MZEA. A writ of mandamus will be denied when the issue is moot and the writ serves no purpose.[9] Defendant has already performed the action—the enactment of a proper zoning ordinance—for which plaintiff seeks a writ of mandamus, so Count IV is moot as well.

2. Administrative Exhaustion

In Count III, plaintiff asks the Court for a declaratory judgment that STRs were permitted under the 1974 zoning ordinance. While the ordinance has since been modified by the 2024 zoning ordinance amendment, the provisions of the 1974 ordinance are relevant to determining whether

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[7] Park Township Ordinance 2023-02 amended §8-1 of the general ordinances and defined a STR as rental of 27 or fewer nights. Ordinance 2024-1 amended §38-6 to define a STR as a rental of 28 or fewer consecutive days and nights. It is self-evident that the definition of STRs in §8-1 is subsumed by the definition of STRs in §38-6.

2023-02 also amended §8-15 by requiring registration of STRs. This case does not challenge the police power of Park Township to require the registration of STRs. §8-15 also purported to ban all STRs after October 1, 2023. As mentioned, defendant only seeks prospective enforcement of the properly enacted 2024 zoning amendments.

[8] *Warren City Council v Fouts*, 345 Mich App 105, 123; 4 NW3d 79 (2022).

[9] *Ziegler v Brown*, 339 Mich 390, 395; 63 NW2d 677 (1954).

use of properties for STRs was lawful before 2024 and thus whether STRs that began between 1974 and 2024 may be considered lawful nonconforming use.

Defendant argues that plaintiff has not exhausted its administrative remedies before bringing this action and therefore that this Court lacks subject-matter jurisdiction to hear plaintiff's claims. Plaintiff responds that its claims do not have an exhaustion requirement and that exhausting the administrative process would be futile.

> The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court. The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply.[10]

> Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies. . . . The burden of establishing jurisdiction is on the plaintiff. The circuit courts of this state have subject-matter jurisdiction to issue declaratory rulings, injunctions, or writs of mandamus. However, if the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over those same areas.[11]

a. Existence of a Remedy

The MZEA provides for municipal governments to set up a zoning board of appeals.[12] By statute, these boards "shall hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps" and "shall hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of a zoning ordinance adopted under [the MZEA]."[13] "The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under [MCL 125.3606]."[14]

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[10] *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009) (cleaned up).

[11] *Citizens for Common Sense in Govt v Attorney Gen*, 243 Mich App 43, 50; 620 NW2d 546 (2000) (cleaned up).

[12] MCL 125.3601(1).

[13] MCL 125.6303(1).

[14] MCL 125.6305.

Pursuant to the MZEA, defendant established the Park Township Zoning Board of Appeals and gave it the following powers and jurisdiction.[15]

> The Zoning Board of Appeals shall have all powers and jurisdiction granted by the Zoning Act, all powers and jurisdiction prescribed in other articles of this chapter and the following specific powers and jurisdiction:
> (1) The jurisdiction and power to hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official or body charged with enforcement of this division; excluding, however, decisions regarding the authorization of special uses and planned unit developments which are made by the Township Board or Planning Commission.
> (2) The jurisdiction and power to act upon all questions as they may arise in the administration and enforcement of this division, including interpretation of the Zoning Map.
> (3) The jurisdiction and power to decide matters referred to the Zoning Board of Appeals for decision pursuant to Section 603 of the Zoning Act (MCL § 125.3603).
> (4) The jurisdiction and power to authorize, upon appeal, a variance or modification of this chapter where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of this chapter so that the spirit of this chapter shall be observed, public safety secured and substantial justice done.[16]

The powers listed here give the Zoning Board of Appeals the power to grant the relief sought by plaintiff. Plaintiff argues that, under *Connell v Lima Twp*, 336 Mich App 263, 283; 970 NW2d 354 (2021), a zoning board of appeals has no power over "legislative" decisions made by the Township Board but may only perform "administrative" acts. Legislative acts include the adoption of a zoning ordinance and the rezoning of a parcel of land, while administrative acts include site-plan review and the approval of special use permit requests.[17]

In *Connell*, the plaintiff was directly challenging the defendant's approval of a rezoning request, which was a legislative act by the township defendant.[18] Here, plaintiff is asking for an interpretation of the 1974 zoning ordinance determining whether STRs were permitted prior to the 2024 amendment. Interpretation of a zoning ordinance by the Zoning Administrator is given as

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[15] Park Township Ordinance, § 38-65.

[16] Park Township Ordinance, § 38-66.

[17] *Connell*, 336 Mich App at 283.

[18] *Id.* at 285.

an example of an administrative decision in *Connell*.[19] Plaintiff therefore has an administrative remedy. It is undisputed that plaintiff has not yet exercised this remedy.

b. Declaratory Judgment

Plaintiff argues that it may seek a declaratory judgment before exhausting its administrative remedies, citing *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116; 673 NW2d 763 (2003). The question at issue in *Livonia Hotel*, however, was whether the plaintiff's action in the circuit court was an original action or an appeal of the defendant's mayor's veto of the plaintiff's requested special use approval.[20] This case did not address exhaustion of remedies, as the administrative remedies were exhausted.[21] However, in *Citizens for Common Sense in Govt v Attorney Gen*, 243 Mich App 43, 52-53; 620 NW2d 546 (2000), the Court of Appeals found that exhaustion of administrative remedies applied where a plaintiff sought declarative relief. Plaintiff cites several cases, published and unpublished, in which circuit courts exercised original jurisdiction over attempts to establish a prior nonconforming use, but plaintiff's cases do not address exhaustion of remedies and therefore are outweighed by *Citizens*.

MCR 2.605 allows courts to issue declaratory judgments, but this power does not change the analysis here.

> (A) Power to Enter Declaratory Judgment.
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

The key phrase here is "within its jurisdiction". Where the doctrine of exhaustion of remedies would prevent a court from exercising jurisdiction over a claim, MCR 2.605 does not offer a life ring that conveys subject matter jurisdiction.

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[19] *Id.* at 284.

[20] *Livonia Hotel, LLC*, 259 Mich App at 124.

[21] *Id.* at 123.

c. Futility

Plaintiff finally argues that any exhaustion of administrative remedies requirement would be futile. Futility is a recognized exception to the doctrine of exhaustion of remedies.

> There is a judicially created exception to the exhaustion requirement for cases where appeal to the administrative agency would be futile. To invoke this exception, it must be *clear* that an appeal to an administrative board is an exercise in futility and nothing more than a formal step on the way to the courthouse. Futility will not be presumed; courts assume that the administrative process will properly correct alleged errors.[22]

Where plaintiff has not attempted to pursue the administrative process, it is impossible to determine how the administrative process would go. "Futility is not established merely because it may appear at the preliminary stages of administrative proceedings that a litigant would be unable to prevail."[23] The parties seem to agree that the Zoning Board of Appeals has *never* been asked for, or rendered a formal opinion on, the propriety of STRs under the 1974 zoning ordinance. The opinion of the Zoning Board of Appeals will be known *iff* the issue is brought before the Zoning Board of Appeals. This Court lacks subject matter jurisdiction in Count III to declare that STRs are a lawful use of property under the Township's zoning ordinances.

3. Ripeness

Finally, plaintiff argues in the alternative in Count VI that, should this Court find that the 1974 zoning ordinance did not unambiguously permit single-family dwellings to be used as STRs, then the 1974 zoning ordinance is unconstitutionally vague in that it fails to provide fair notice of prohibited conduct and application of the ordinance is a violation of plaintiff's due process rights under the Michigan constitution. In *Paragon Properties Co v City of Novi*, the Michigan Supreme Court followed US Supreme Court precedent in holding that a zoning ordinance may be challenged as unconstitutional "as applied" or "on its face."[24]

> A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An "as applied" challenge alleges a present

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[22] *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 358; 733 NW2d 107 (2007).

[23] *Papas v Michigan Gaming Control Bd*, 257 Mich App 647, 665; 669 NW2d 326 (2003).

[24] *Paragon Properties Co v City of Novi*, 452 Mich 568, 576-77; 550 NW2d 772 (1996).

infringement or denial of a specific right or of a particular injury in process of actual execution.

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 U.S.C. § 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. . . .
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> Finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance.[25]

As plaintiff notes, a plaintiff may bring a facial constitutional challenge directly to the circuit court without exhausting any administrative remedies. However, a plaintiff "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims."[26] Plaintiff's Count VI simply declares, without much analysis, that the 1974 zoning ordinance is unconstitutional on its face. A court is not bound by a party's choice of labels for its cause of action because this would exalt form over substance.[27] "A party cannot avoid the dismissal of a cause of action through artful pleading. The gravamen of a plaintiff's action is determined by examining the entire claim."[28] It is evident that plaintiff wishes this Court to interpret various provisions of the Township's zoning ordinances. This is not a facial attack.

A claim, like plaintiff's here, that an ordinance is void for vagueness because it does not provide fair notice of the conduct proscribed must be examined "without concern for the hypothetical rights of others."[29] "Thus, the proper inquiry is not whether the ordinance may be susceptible to impermissible interpretations, but whether the ordinance is vague as applied to the conduct allegedly proscribed in this case."[30] Plaintiff's vagueness claim is therefore an "as applied" challenge and is accordingly subject to the rule of finality. In *Paragon,* the Court stated that "[t]he finality requirement is concerned with whether the initial decisionmaker has arrived at

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[25] *Id.* (cleaned up).

[26] *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[27] *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

[28] *Id.* (cleaned up).

[29] *Twp of Yankee Springs v Fox*, 264 Mich App 604, 606-07; 692 NW2d 728 (2004).

[30] *Id.* (cleaned up).

a definitive position on the issue that inflicts an actual, concrete injury."[31] In this case, there has not been *any* definitive and final decision that has arguably caused *any* injury to plaintiff. Hence, Count VI is not ripe for review and must be dismissed.

Conclusion

The judiciary's power and authority is limited. It may not act where issues have become moot, issues are not yet ripe, or where a court lacks subject matter jurisdiction. From the outset, plaintiff claimed that the 2022 and 2023 actions taken by the Township were contrary to law. When defendant properly amended the zoning ordinance in March 2024, the entire posture of this case changed. In reality, there is no longer a legally recognized dispute before the Court.

In this case, counts I, II, IV and V are moot because the relief demanded by plaintiff was satisfied when defendant amended the zoning ordinance in March 2024.[32] Obviously, any enforcement is prospective in nature. Regarding Count III, the Zoning Board of Appeals has not

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[31] *Paragon*, 452 Mich at 577 (cleaned up).

[32] For clarity, the Court will reference the various requests for relief which are listed on pp 27-29 on plaintiff's amended complaint, along with the Court's disposition of that request for relief:

A. Declare the ban on STRs unlawful and void as it violates the MZEA----This is moot as the new zoning ordinance is in effect.

B. Declare 2023-2 unlawful as it violates the MZEA---This is moot as the new zoning ordinance is in effect.

C. Declare 2022-2 unlawful and void. Both parties agree that it is void and unenforceable---This is now moot.

D. Declare the ban on STRs unlawful under the doctrine of legislative equivalency---This is moot as the new zoning ordinance is in effect.

E. Declare 2023-2 unlawful under the doctrine of legislative equivalency---This is moot as the new zoning ordinance is in effect.

F. Declare that the ban on STRs is preempted by state law and is void---This is moot as the zoning ordinance allows prior nonconforming uses.

G. Declare 2023-2 is preempted by state law and is void---This is moot as the zoning ordinance allows prior nonconforming uses.

H. Declare that STRs are allowed---The Court lacks jurisdiction to render this decision because administrative remedies have not been exhausted.

I. Declare that plaintiff's members have a vested property interest in using their properties as STRs--- The Court lacks jurisdiction to render this decision because administrative remedies regarding the interpretation of the ordinance have not been exhausted.

J. Issue a Writ of Mandamus requiring defendant to comply with the MZEA--- This is moot as the new zoning ordinance is in effect.

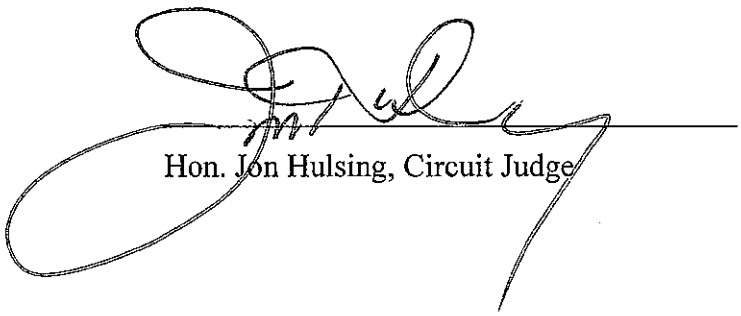
K. In the alternative, declare the zoning ordinance unconstitutional due to vagueness---This issue is not ripe as there has been no final decision that has caused an injury to plaintiff.

rendered an opinion, nor has it been asked to render an opinion interpreting any ordinance related to STRs. Therefore, this Court lacks jurisdiction to decide this issue prior to the exhaustion of administrative remedies. Similarly in count VI, the Zoning Board of Appeals has not interpreted the relevant issues in this dispute, nor has the ordinance at issue been applied to any property—in other words, there is no injury for which this Court may grant relief. In short, counts III and VI are not ripe for judicial review. Summary disposition is granted in favor of defendant on all counts and this case is DISMISSED. The preliminary injunction granted by this Court is lifted effective April 1, 2024, *nunc pro tunc.*

IT IS SO ORDERED.

This is a final order and closes the case.

Date: November 21, 2024



Hon. Jon Hulsing, Circuit Judge