No. 20-960

In The

SUPREME COURT OF THE UNITED STATES



Khue Nguyen

Plaintiff-Petitioner,

vs.

Estate of Thin Thi Ta, Hai Phu Nguyen as heir and husband;

Thao Xuan Ta,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## INTRODUCTORY STATEMENT

In 2018, plaintiff sues four defendants who are heirs of plaintiff's business partner in Vietnam. Defendant Ngo Thi Ngoan seized partnership properties in November 2012. Other defendants, Thao Xuan Ta, Thin Thi Ta and Hai Phu Nguyen in Texas, were not aware and did not participate in the seizure. Thin died in 2011 in Texas. Remaining parties participated in a government-led ADR mediation in Vietnam (2013-2017) and Ngoan, Hai and Thao refused to settle in mediation. The Fifth Circuit upheld the district court's summary judgment, ruling claims accrued at time of defendant's refusal in mediation in 2013 despite Thin's death in 2011 and despite unresolved claims against Thin by either courts.

## QUESTIONS PRESENTED

Whether an appellate court can take the act of refusal to settlement at mediation out of the mediation context to strip off the immunity from liability afforded by law to such refusal in order to create an ad hoc liability for purpose of summary judgment affirmance.

Whether an act of refusal to settle by one party at mediation, without more, can give rise to breach of contract and other tort claims against that refusing party accrued from the time of refusal; and if it can, whether failure by district court to resolve all claims and all parties stripped the appellate court the authority or jurisdiction to hear the appeal pursuant to 28 U.S.C. §1291 (non-final judgment).

## PARTIES TO THE PROCEEDING AND

## DISCLOSURE STATEMENT

Petitioner is Khue Nguyen, an individual. Respondents are Texas residents Thao Xuan Ta, Hai Phu Nguyen and Thin Thi Ta (estate). Petitioner is pro se. Respondents are represented by same counsel in the district court and in the appellate court. Name and contact of counsel is: MAUREEN S. KERSEY, Karlseng, LeBanc et al, 19111 N Dallas Parkway Suite 120 Dallas, TX 75287 Tel: 972-733-3800 Email: maureen@klrlegal.com

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Petitioner, Khue Nguyen, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The *two* different opinions of the court of appeals are posted on the court's website and can be found as follows: "Khue Nguyen v. Estate of Thin Thi Ta, et al, No. 19-10934 (5th Cir. 2020)"

1- Appendix A – filed April 8, 2020 and published at:

http://www.ca5.uscourts.gov/opinions/unpub/19/19-10934.0.pdf

2- Appendix B – filed August 19, 2020 and published at":

http://www.ca5.uscourts.gov/opinions/unpub/19/19-10934.1.pdf

The opinion of the district court (**Appendix D**) is reported as "Khue Nguyen v. Estate of Thin Thi Ta, No. 4:18-CV-801-A, (N.D. Tex. Aug. 2, 2019)" at: https://casetext.com/case/nguyen-v-estate-of-ta

## REHEARING DENIED

**Appendix C** – filed 10/28/2020. Appellant's motion for leave to file petitions for panel rehearing and for rehearing en banc out of time is DENIED by the Fifth Circuit.

## JURISDICTION

The first judgment of the court of appeals was entered on April 8, 2020. The court granted Petitioner's request for rehearing and withdrew the first judgment and substituted it with the August 19, 2020 judgment. Appellant's motion for leave to file petitions for panel rehearing and for rehearing *en banc* out of time and Appellant's motion to recall mandate to prevent injustice are both denied on October 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Time to file is extended to 150 days by the Court's Covid-19 order.

## STATEMENT

As opined by the district court on this contract case, "a breach of contract occurs when ***a party*** fails or refuses to do something it promised to do". The initial question presented here is whether two Texas individuals (one died in 2011) who had sold their partnership interest to plaintiff back in 1989 and had done nothing ever since can be held liable for a unilateral and unauthorized act of a third party in Vietnam taking plaintiff's partnership property in 2012. The district court, citing no law, imputed cause of action to Texas individuals and answered in the affirmative despite finding these Texas individuals taking no part in the 2012 takeover *by the third party* in Vietnam. The district court then granted summary judgment to Texas defendants on basis of statute of limitations as the court determined plaintiff's claims in 2018 against them was time barred in 2016 and

defendant' alleged *refusal to hand over property during this 2013 – 2017 (mediation) proceeding* gave rise to the breach-of-contract claim against both the living in 2013 and the *dead* defendants and such claim became time barred in 2017. Generally, refusal to return property may give rise to contract or tort claims. However, within the context of mediation during 2013 – 2017, their refusal to settle at the mediation, without more, is a lawful position as there is no agreement to settle and no duty to settle at mediations. Thus the issue of whether any contract or tort claim may arise from refusal to settle at mediations by Texas defendants remains *contested* which by definition is a genuine issue of material fact. The next question presented here is whether the appellate court has any authority to employ either non-existent fact or material fact having genuine issue, one after another, as an alternative ground for affirmance that would avoid the need to decide that issue.

By creating an ad hoc breach-of-contract liability for party who refused to settle at *government* mediation ADR proceeding, the court of appeals had departed from well-established precedents in the Fifth Circuit imposing no duty to settle at the mediations and also departed from well-established precedents in the Second Circuit permitting a party to freely adopt any position including a "no pay" position at the mediation. This also represents new hostility toward mediation.

The departure of the Fifth Circuit from its own precedents has subjected tens of thousands of parties to mediation proceedings in Louisiana, Mississippi, Texas

or *out of state* to a new duty to settle at the mediation in contrary to well-established legal principles imposing no such duty. In light of this new ruling, parties to a dispute would avoid mediation altogether and go straight to the court thereby placing more burden on the already limited judicial resource. This new ruling by the Fifth Circuit is conflicting with the policy, administration and societal benefits offered by mediations to achieve prompt, creative, efficient, and sensible resolutions to civil claims. That is the definition of an intolerable conflict. And this case is an optimal vehicle for resolving it and for promoting the use of mediations as a viable alternative dispute resolution tool. Further, the court of appeals in this case lacks authority to hear the appeal because the district court did not resolve all claims against multiple parties and left claims and parties outstanding while designating its order as "final" in contrary to 28 U.S.C. §1291 and Fed. R. Civ. P. 54(b). The petition for a writ of certiorari should therefore be granted.

1. This lawsuit involves a 30-year partnership named Snow White between plaintiff's mother and defendants' father in Vietnam. Defendants had sold shop house and partnership interest inherited from their late father to plaintiff's mother in 1989. Plaintiff is the sole successor of Snow White partnership. In 2012, a lone third-party suddenly took over Snow White's shop house, partnership residence and partnership property in November 2012. Pursuant to Vietnam

contract law, a dispute was filed with the government's administrative hearing authority who assumed custody of the property in dispute and appointed the 2012 third party as temporary manager. Two Texas parties (respondent-defendant), Thao Xuan Ta and Hai Phu Nguyen, agreed to participate in the administrative hearing and mediation proceeding through agent in Vietnam (the 2012 third party) despite having no activity in Vietnam in 2012. The other Texas party is unadministered estate of Thin Thi Ta who died in 2011 and did not participate in mediation and ADR proceeding. During the seven mediation rounds (2013 – 2017), agent of Thao and Hai refused to settle by refusal to hand over shop house and property to petitioner *at mediation*. The estate had no representative and no say. After the mediation was over in June 2017, the administrative adjudicating authority ruled in favor of Snow White partnership and ordered all parties to return shop house and partnership property to plaintiff. Plaintiff made written demand in July 2018 to Thao Xuan Ta, Hai Phu Nguyen and to the Estate of Thin Thi Ta to which all failed to respond and failed to return any property. Plaintiff filed this Texas lawsuit in August 2018 against Thao Xuan Ta, Hai Phu Nguyen and the Estate of Thin Thi Ta for breach of contract and illegal detention of business property in contravention to the order of the Vietnam administrative hearing authority. Plaintiff met Thao, Hai and attorney of the Estate in 2019 in Texas to make demand and they both refused to return property to Plaintiff.

2. Defendants-respondents filed motion for summary judgment asking for dismissal. The district court granted summary judgment to Texas defendants – minus Thin Thi Ta – as it found petitioner's claims against defendants accrued in November 2012 by the unilateral act of third party in Vietnam and were time barred in November 2016. The district court also granted summary judgment to defendants other than Thin on basis of *res judicata* of an unrelated judicial lawsuit to which both petitioner-plaintiff and Texas respondents-defendants were not a party. The district court found Texas respondents-defendants having no activity in Vietnam in 2012.

3. Petitioner-plaintiff appealed the grant of summary judgment. The court of appeal agreed with petitioner-plaintiff's argument against the *res judicata* basis but affirmed on alternative ground. In its April 8, 2020 judgment, the court of appeal proceeded to supplement the fact finding below with its own "fact" that Texas defendants-respondents "purported to evict Thuy from Snow White's manufacturing facility in November 2012, and they held onto the business's assets." Appendix A, page 2. Petitioner protested the court's new "fact" as non-existent. The court of appeal granted petitioners-plaintiff request for a rehearing.

4. On rehearing, the court of appeal removed the non-existent "fact" protested by petitioner-plaintiff. As the court agreed that Texas defendants had no activity in Vietnam in November 2012, the court recognized that plaintiff and the

*living* Texas defendant "entered a dispute-resolution process operated by the local Vietnamese government" (Appendix B, page 2) but took the view that Texas defendant-respondent' refusal to hand over property during the 2013 – 2017 mediation proceeding by Vietnam government gave rise to contract and tort claims at time of refusal. Appendix B, page 4. Plaintiff had never met any Texas defendant outside the mediation context in Vietnam during 2013 – 2017. Defendants provided no evidence suggesting otherwise; the court found none.

5. The court of appeal also declined to consider the doctrine of equitable tolling generally applied in the case of "adversarial inducement or trickery". See *Bailey v. Gardner*, 154 S.W.3d 917, 920 (Tex. App.—Dallas 2005, no pet.) Plaintiff submitted evidence and argued Ngoan's adversarial misconduct of hiding Texas defendants whereabouts until June 2017 to prevent plaintiff from filing suit on-time. Appellant's Brief, page 61, item #29. Defendant made no objection and offered no evidence to overcome plaintiff's claim of equitable tolling. However, the court overlooked Appellant's Brief and concluded petitioner-plaintiff made no claim of being "tricked into filing late". Appendix B, page 3.

6. Plaintiff found the court of appeal lacked the authority and/or jurisdiction to hear the appeal because the district court's judgment is not final pursuant to 28 U.S.C. §1291 and Fed. R. Civ. P. 54(b) as it only resolved some, not all, claims against some, not all, defendants but erroneously labeled as a "final order".

## REASONS FOR GRANTING THE PETITION

As petitioner-plaintiff and Texas defendants attempted administrative dispute and mediation proceeding in Vietnam during 2013 – 2017 to resolve their controversy, now the court of appeals burdens Texas defendants with breach-of-contract and other tort claims for their *refusal* to settle and hand over property at mediation which accrued at time of refusal in 2013. This opinion is posted on the court's website accessible to the public. Beside lacking authority to hear this appeal, the court of appeals' decision in this case presents a square circuit conflict on a question of civil liability for failure to settle at mediations under federal case law that arises frequently and is of manifest importance to the promotion of orderly dispute resolution and mediation out of courts. That conflict, which represents the Fifth Circuit's departure from its own precedents to the point conflicting with other circuits, is unlikely to be resolved without the Court's intervention. And the lack of uniformity and predictability concerning the calculation of the limitations period in ADR-related cases urgently requires resolution to ensure that every party to administrative dispute and mediation proceedings are not subject to conflicting regimes depending on where the suit is filed, and to ensure that all parties can conduct their mediations and ADR settlements so as to minimize the risk of lawsuits being dismissed like the one petitioner is pursuing here. Because this case

presents an optimal vehicle for resolving the conflict, the petition for a writ of certiorari should be granted.

**A. The Decision Below Squarely Presents A Conflict Among The Courts Of Appeals**

This case presents a departure from well-established legal principles, and the decision below disrupts a settled body of case law concerning the immunity to liabilities for parties attending administrative dispute and mediation proceedings. Until the Fifth Circuit's decision in this case, the overwhelming consensus in the federal courts was that there is no duty to settle at mediations and there is no coercion of a settlement. See, e.g., *Negron v. Woodhull Hosp.*, 173 F. App'x 77, 78-79 (2d Cir. 2006) (stating that defendant was free to adopt a "no pay" position at the mediation). *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1334-35 (5th Cir. 1996) (citing *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995) (reversing sanctions imposed on good faith grounds because the defendants failed to make a monetary settlement, and noting that "there is no meaningful difference between coercion of an offer and coercion of a settlement")). The decision below, however, imposes contract and tort liabilities to Texas parties refusing to settle at administrative dispute and mediation proceeding. These newfound ad hoc liabilities create new claims for new lawsuit and endless litigation. That holding also means that, in this circuit, one party can induce another to attend a mediation

or settlement conference and make unreasonable settlement offer leading the other party into refusal to settle in order to establish contract and other tort claims to the other unsuspecting party. The Court's review is plainly warranted to resolve this conflict and lethally legal trap.

The decision by the court of appeals also goes against the public policy to promote alternative dispute resolution in the United States. The American Bar Association proclaims on its website that "the United States Federal Government utilizes dispute resolution processes to assist government employees and private citizens resolve complaints and disputes in many areas including workplace, employment, and contracting matters." (See ABA website at https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses)." All U.S. government departments and agencies are openly promoting the use of ADR. For example, U.S. Department of Transportation, (https://www.transportation.gov/civil-rights/civil-rights-library/alternative-dispute-resolution-policy) and the SEC (https://www.sec.gov/rules/policy/34-40306.htm). Plaintiff had made every effort to persuade the court of appeals to reconsider its ruling by filing motion for rehearing *en banc* and even motion to recall mandate but the court denied both motions. There can be no doubt, therefore, that this case presents a departure from well-established precedents in the Fifth Circuit creating a

circuit conflict and public policy more hostile towards alternative dispute resolutions (ADRs) that warrants this Court's review.

**B. The Court Of Appeals' Decision Is Incorrect.**

The court of appeals erred in holding that a party making refusal to settle at mediation may be liable for contract and tort claims at time of refusal despite no prior wrong doing. The creation of ad hoc liability for parties to mediations by dropping the context of mediation altogether was a violation of this Court's ruling regarding liberal construction of pro se pleading and evidence.

1. Reliance on unlikely event. The court of appeals relied solely on the refusal by Texas defendants to return business property to plaintiff during the 2013 – 2017 government mediation proceeding in Vietnam to conclude that such refusal gave rise to the contract and tort claims in 2013. Appendex B, page 4. The court is mindful that the *living* Texas defendants did not take over any property in 2012 and had no other act than refusal to hand over property at the mediation proceeding. The *dead* defendant could not have acted. The context whether refusal was made within or outside of the mediations dictates the legal consequence of the refusal as well-established principles of law in the Fifth Circuit and other circuits imposing *no duty to settle* at mediations as discussed above. Negotiation outside mediation context is an *unlikely* event as both district court and appellate court found none. The court of appeals' reliance on an unlikely event to

apply mediation law is unsound legal reasoning. And its affirmance of summary judgment based upon a material fact having such genuine issue is blatantly erroneous that deserves the Court's immediate correction and summary reversal.

2. Liberal construction rule violated. This Court recently reminded the Fifth Circuit to "adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 188 L.Ed.2d 895 (2014). In this case, the Fifth Circuit forgot that reminder, ignored evidence and pleading of nonmovant, inferred disputable facts to nonmovant's disfavor and affirmed summary judgment based on the *material fact* that Texas defendant made refusal at the mediations giving rise to contract and tort claims at time of refusal. However, this material fact had a genuine dispute as evidenced by the appellate court's own acknowledgment that the refusal was made "during the pendency of the [hearing and mediation] proceeding in Vietnam". (Appendix B, page 4) And refusal made *at mediations* is a legal position which cannot give rise to any liability as discussed above. Such grave error by the Fifth Circuit is inconsistent with Fed.R.Civ.P. Rule 56 and deserves the Court's immediate correction or, at least, summary reversal so that the court of appeals can properly credit plaintiff's pleading on the refusal made at mediations and can draw factual inferences in his favor.

3. Equitable tolling should be granted. First, plaintiff did not "sleep on his right" but promptly and actively pursue one of the legal remedies available to him in Vietnam where administrative ruling has same judicial force. And plaintiff had won in the administrative proceeding as the court of appeals acknowledged that Texas defendants were sued in 2018 "when they refused to hand over the property in contravention of a Vietnamese [administrative] court order". Appendix B, page 4.

Second, during the administrative proceeding, the Vietnam authority temporarily had custody right to the partnership property thus the "refusal to return property" by Texas defendants cannot give rise to any contract or tort claims as they did not have legal custody of partnership property. Defendant admitted the fact that a third party appointed by the authority had legal custody of the property in the summary judgment hearing. ROA Doc. 141 page 54 line 6-7. The district court also noted in its opinion that the third party exercised his custody authority ("Ngoan called the police to report that Thuy [owner of Snow White partnership] was *trespassing* and Thuy was *evicted* as a result.") ROA Doc. 134 page 4. As Texas defendants temporarily had zero connection with Snow White partnership shop house and property during the 2013 -2017 proceeding in Vietnam, plaintiff's claims on Texas defendants were premature during 2013 – 2017 which justifies a grant of equitable tolling as per rulings in the Fifth Circuit granting equitable

tolling when, "despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his claim." *Pacheco v. Rice*, 966 F.2d 904, 906-07 (5th Cir. 1992). And the court of appeals disregards plaintiff's argument for nonexistent cause of action or zero right to sue during the 2013 – 2017 proceeding in Vietnam ("The partnership does not have the right to sue for partnership shop house and assets until after the local government of People's Committee of Ben Nghe Ward orders Defendants return said shop house and assets to the partnership and Defendants resist"). Appellant's Brief, page 20.

Third, the court of appeals also disregards plaintiff's affidavit and argument that the agent of Texas defendants repeatedly asked the Vietnam authority for "bogus" extensions for five years to hide his principle's U.S. location until June 2017 which was vital information to file suit and which constituted "adversary's misconduct" inducing plaintiff into allowing filing deadlines to pass. Appellant's Brief, page 22 ("Even if Thuy wanted to sue for breach of contract in court, Thuy could not do so because of the adversary's misconduct by Ngoan. (ROA Doc. 90, page 25-26)"). All three factors above represent the extraordinary circumstances that support this Court's grant of equitable tolling as plaintiff "has been pursuing his rights diligently, and ... that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

**C. The Questions Presented Is Exceptionally Important and Warrants Review In This Case**

The question presented is also of substantial legal and practical importance, and this case is an optimal vehicle for the Court's review.

The ad hoc ruling by the court of appeals disrupted the consistency, uniformity and predictability of mediation law and limitations law. The departure of the Fifth Circuit from its own precedents has subjected tens of thousands of parties to mediation proceedings in Louisiana, Mississippi, Texas or out of state to a new duty to settle at the mediation in contrary to well-established legal principles imposing no such duty. In light of this new ruling, parties to a dispute would avoid mediation altogether and go straight to the court thereby placing more burden on the already limited judicial resource. This new ruling by the Fifth Circuit is conflicting with the societal benefits offered by mediations to achieve prompt, creative, efficient, and sensible resolutions to civil claims. That is the definition of an intolerable conflict. And this case is an optimal vehicle for resolving it and for promoting the use of mediations as a viable alternative dispute resolution tool. Further, the court of appeal in this case made an outlandishly erroneous judgment by repeatedly making up non-existent fact or material fact having genuine issue for use as alternative ground of affirmance.

The act of refusal to settle by living defendants, Thao and Hai, cannot be a basis to impose contractual and tort liabilities on a dead defendant, Thin, who neither seized properties nor participated in any mediation proceeding in Vietnam. Neither the district court's judgment nor the appellate court's ruling addressed this deceased defendant yet refused to continue the trial on merit regarding Thin. They both erred.

Finally, the appellate court lacks authority to hear this appeal because the district court's judgment is not final as the judgment left unresolved the claims against Thin Thi Ta (died in 2011) and left defendant Hai Phu Nguyen's dismissal status in limbo. The district court's "final" judgment showed Thin Thi Ta's name prominently in the caption yet nowhere in the judgment did the court resolve claims against Thin Thi Ta. See Appendix D. As for defendant Hai Phu Nguyen, the district court's Opinion found Hai was not a "proper party" in a two-sentenced paragraph on page 12 of Appendix E and dismissed Hai from the case as "not a proper party". Yet in the district court's "final" judgment, all claims against Hai were dismissed with prejudiced as if Hai had always been a "proper party" making Hai both a proper party and non-proper party *at the same time*. As the status of Hai Phu Nguyen and Thin Thi Ta was put in limbo and claims against them remained outstanding and unresolved, the judgment of the district court was not final pursuant to 28 U.S.C. §1291. This otherwise partial summary judgment did not

conform to requirement set forth in Fed. R. Civ. P. 54(b) for the court did not "expressly determines that there is no just reason for delay". The appellate court lacks necessary authority to hear this "hybrid" summary judgment pursuant to 28 U.S.C. §1291.

## CONCLUSION

The petition for a writ of certiorari or a summary reversal should be granted.

Respectfully submitted,

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Date: January 7, 2021