No. 22-194

In the Supreme Court of the United States

JEHAN ZEB MIR, M.D.,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 29, 2022
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QUESTIONS PRESENTED

1. Did Ninth Circuit Court err in *de-novo* review of summary judgment in deciding disputed issues of fact as the district court had done, that 5-years statute of limitations to conclude arbitration under California uninsured motorist statutes (California Insurance Code Section 11580.2(i)(2)(A)) had expired on September 1, 2016. The Petitioner had disputed that he never received any notice including September 24, 2012, letter of expiration of 5-year statute of limitations as required under California Insurance Code 11580.2(k) which tolled the statute of limitations by 30-days. State Farm admitted dispute and supported with Petitioner's letters dated August 25, 26, September 2, 6, 8, 2016, in support of its summary judgment motion. (App.56a-66a)?

2. Did Ninth Circuit Court decide issues of fact underlying the doctrines of estoppel, waiver, impossibility, impracticability, and futility excusing party's non-compliance with statutory time frames under Cal. Insurance Code Section 11580.2(i)(3)?

3. Can the requirement to give written 30-day notice of expiration of 5-year statute of limitations to conclude arbitration under Cal. Insurance Code Section 11580.2(k) be satisfied by giving that notice 4-years earlier?

4. Did Ninth Circuit Court and district court err in disallowing discovery and deposition of sole witness, an attorney upon whose declaration summary judgment motion was granted, where attorney in declaration merely authenticated letters between Petitioner and her, without testifying to any particular facts, severely prejudicing Petitioner?

PARTIES TO THE PROCEEDINGS

Petitioner

- Jehan Zeb Mir

Respondents

- State Farm Mutual Automobile Insurance Company
- John Does, 1-20
- Damon Groves
- Chris Kennedy
- Michael Struble

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-56403

Jehan Zeb Mir, M.D., *Plaintiff-Appellant*, v. State Farm Mutual Automobile Insurance Company., Et al., *Defendants-Appellees*

Date of Final Opinion: February 18, 2022

Date of Rehearing Denial: May 31, 2022

United States District Court
for the Central District of California

No. 2:19-cv-03960-SVW-SK

Jehan Zeb Mir, v. State Farm Mutual Automobile Insurance Company., Et al.

Date of Final Order: November 25, 2020

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JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari issue to review the Denial of his appeal by the United States Court of Appeals for the Ninth Circuit on February 18, 2022, and denying Petition for en banc rehearing on May 31, 2022.

INTRODUCTION

The Ninth Circuit Court and District Court made factual findings and that incorrectly granting summary judgment motion because 5-year statute of limitations to conclude arbitration had expired.

The respondent State Farm admitted that Petitioner disputed that he was not given at least 30-day notice of expiration of statute of limitations as required under California Insurance Code § 11580.2(k) which would toll the statute of limitations by 30-days and had conflict with depositions in Sacramento on August 31, 2016, the last day within 5-year statute to conclude arbitration which excused compliance pursuant to Cal. Insurance Code § 11580.2(i)(3).

The court deciding facts is in stark conflict with Rule 56(a), Decisions of Supreme Court, and other Circuits.

OPINIONS BELOW

The May 31, 2022, Order of the United States Court of Appeals for the Ninth Circuit summarily denying Mir's Petition for en banc review, which decision is herein sought to be reviewed was not published.

The February 18, 2022, Opinion of the Panel of the United States Court of Appeals for the Ninth Circuit was unpublished, but can be found at *Mir v. State Farm* 2022 WL 501581.

JURISDICTION

28 U.S.C. § 1254(1) confers this Court jurisdiction to review a Writ of Certiorari challenging the judgments in question.

JUDICIAL RULE INVOLVED

Fed R. Civ. P. 56(a)

> (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

STATEMENT OF THE CASE

Federal Rules of Civil Procedure 56(a) provides that the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Respondent State Farm Automobile Insurance Company (hereinafter 'State Farm') made summary judgment motion on single issue that 5-year statute of limitations to conclude arbitration had expired on September 1, 2016.

State Farm admitted in Statement of Undisputed Facts and produced Petitioner's (hereinafter 'Mir') letters dated August 24, 26, September 2, 6 and 8, 2016. (App.56a-66a). disputing with State Farm's attorney Lisa Rosenwasser (hereinafter 'Rosenwasser') that under California Insurance Code 11580.2(k) the statute of limitations was tolled by 30-days to September 30, 2016 since State Farm had failed to give Mir in writing at any time at least 30-day notice of expiration of 5-year statute of limitations.

In response Rosenwasser informed Mir that he was given notice of expiration of statute of limitations in a letter dated September 24, 2012, which Mir denied receiving. (App.56a-66a). In fact, Mir disputed that the September 24, 2016 letter was prepared in August

2016, after State Farm received notice from Mir that he was not given timely notice of arbitration.

Mir also disputed that 4-year notice was not a 30-day notice as required by the Cal. Insurance Code § 11580.2(k). If that was the case the law would have clearly stated that notice of expiration of 5-year statute of limitations shall be given at any time before the expiration of 5-year statute of limitations. That hallmark of the statute is to provide 30-day tolling which was not needed in 2012, or would be relevant even 60 days before the actual expiration of statute of limitations.

State Farm also admitted that Mir had earlier requested Rosenwasser to provide arbitration by phone call on January 6, 2016, and by letters on January 6, July 13 and August 5, 2016, and also requested to produce Claim examiner for deposition to provide the reasons for denial of uninsured motorist's claim which State Farm had not done.

Rosenwasser stonewalled Mir's requests till August 17, 2016, to inform him for the first time by phone call about the expiration of 5-year statute of limitations on September 1, 2016, after Rosenwasser on August 15, 2016, without Mir's mutual consent had already set the matter for arbitration for August 31, 2016, which was the earliest date arbitrator was available in August 2016.

On August 24, 2016, Mir complained to Rosenwasser of the short notice by letter and to the arbitrator that his witnesses were not available on such a short notice and needed at least 30-day-notice. That he had depositions set in another federal court matter on August 29, 30, 2016, in Sacramento, California

which could extend into August 31, 2016, and needed time to travel back. That the depositions could not be continued since the U.S. district court had allowed depositions after the discovery cut-off date. That he had to prepare for depositions before departure to Sacramento and could not attend arbitration set by Rosenwasser for August 31, 2016. (App.56a).

On August 25, 2016, the arbitrator agreed with Mir's 'good cause' and vacated the hearing set for August 31, 2016, and noted that no new date for arbitration was set.

On August 26, 2016, Mir wrote to Rosenwasser; that there was no written 30-day notice pursuant to Cal. Ins. Code Section 11580.2(k) and statute of limitations was tolled by 30-days. (App.59a).

Mir requested Rosenwasser to mutually agree to extend the statute of limitations, (Cal. Ins. Code Section 11580.2(i)(4). Rosenwasser declined.

The summary judgment motion was supported by declaration of Rosenwasser who did not testify to any facts except authenticating the correspondence between Mir and her.

Mir served Rosenwasser deposition subpoena to clarify facts and to admit genuine 'dispute' existed on a material fact. The district court quashed the deposition subpoena and other discovery upon State Farm's ex-parte motion. (App.19a, 22a, 25a).

The district court factually erred in granting summary judgment motion that Mir could attend arbitration on August 31, 2016, which had been vacated by the arbitrator on August 25, 2016. (App.7a).

The district court and Ninth Circuit Court in *de-novo* renew incorrectly decided genuine dispute of material fact that Mir did not dispute the existence of September 24, 2012, letter. (App.56a-66a). Mir in fact had alleged that September 24, 2016, letter was prepared in August 2016, after Mir first raised the issue of untimely notice. That on June 26, July 23 and August 17, 2012, Rosenwasser had written letters to Mir regarding arbitration but contained no reference at all to expiration of 5-year statute of limitations. Rosenwasser in 2012 letters agreed to place the file in inactive status and Mir to notify when ready for arbitration.

Instead, the district court in denying relief under 11580.2(k) and (i)(3) (estoppel, waiver, impossibility, impracticability and futility excusing statutory compliance) incorrectly found that Mir was not disputing that he did not receive September 24, 2012, letter. That he could attend arbitration in 2012, disregarding that in 2012, Mir had several other legal matters pending. That State Farm had agreed to place file in Inactive status till Mir was ready for arbitration. The issue was if Mir could attend arbitration on August 31, 2016 and not any other date in 2012. The Ninth Circuit Court made incorrect factual finding that there were no bases supporting tolling.

The district court in granting summary judgment motion and Ninth Circuit Court in *de-novo* review also found that 4-year notice of expiration of 5-year statute of limitations by September 24, 2012, letter satisfied the 30-day notice requirement to a *pro-se* under Cal. Ins. Code § 11580.2(k). The district court cited case law (*Jordan v. Superstar Sandcars*, 182 Cal.App.4th 1416, 1422 (2010)) which supported Mir providing that

similar notice was too remote in time to have any relevance.

The district court in granting summary judgment motion and the Ninth Circuit Court in *de-novo* review decided underlying facts supporting the doctrines of estoppel, waiver, impossibility, impracticality, and futility to excuse a party's noncompliance with the statutory timeframe under Cal. Insurance Code Section 11580.2(i)(3). (App.2a). The district court found that tolling was not available because Mir was given notice of arbitration on September 24, 2012. The district court erred because expiration of statute of limitations was not at stake in 2012, therefore no excuse was needed for and noncompliance with statutory time frames. The Ninth Circuit Court also decided factual issue that September 24, 2012 letter was not fabricated. (App.3a).

A. Underlying Facts Prompting Claim and Request for Arbitration

On October 15, 2009, Mir was a victim of 'hit and run' accident and suffered serious personal injuries. He immediately filed police report and reported accident to respondent insurer 'State Farm'. Mir produced evidence during deposition that he had a contract to provide locum tenens position as Vascular Surgeon at V.A. Hospital in State of Virginia starting November 2009, and lost income of $175,000 for 5 months period due to the subject accident. The position at the V.A. Hospital was not filled.

B. Mir's Facts Show That State Farm Breached Insurance Contract

State Farm's claim examiner sat on the Claim for two years and then denied it without giving any reasons.

On September 1, 2011, Mir requested Arbitration by Certified Mail, Return Receipt requested.

On May 16, 2012, Mir's deposition and discovery was completed. Mir produced evidence of loss of locum tenens position at V.A. Hospital, Virginia.

On June 26, 2012, Rosenwasser wrote to Mir, that he could not be contacted to discuss claim status and handling.

On July 23, 2012, Rosenwasser wrote to Mir, that contact could not be established with him and asked him to call to discuss claim status and handling.

On August 17, 2012, Rosenwasser wrote to Mir that if he was not ready to proceed with arbitration at that time, State Farm was willing to place file in the Inactive Status.

Mir could not respond at that time due to several other pending legal matter with deadlines.

Thereafter, no further proceedings took place till January 6, 2016. when Mir in letter requested Arbitration and to produce Claim handler Damon Grove for Deposition because State Farm had never provided any reasons for denial of the Claim.

On January 6, 2016 Mir, also personally spoke on telephone with Rosenwasser and her secretary about the requests for arbitration, and to produce claim examiner, Grove for deposition.

Rosenwasser never responded to the Requests for arbitration or to produce Grove for deposition.

On July 13, 2016, Mir wrote to Rosenwasser that back in January 2016, he requested Arbitration and to produce claim examiner Groves for Deposition, yet

she never responded. Mir repeated the Requests for arbitration and to produce Grove for Deposition

On August 5, 2016, Mir once again requested Rosenwasser to produce Groves for arbitration and to set the matter for arbitration before panel of three arbitrators.

On August 5, 2016, in response Rosenwasser wrote that there was no reasonable purpose to depose Damon Groves. That arbitration could be only conducted before a single arbitrator. Rosenwasser never once made mention of soon to expire mandatory 5-year statute of limitations.

On August 17, 2016, Rosenwasser informed Mir on telephone for the first time that 5 years for arbitration will expire on September 1, 2012, even though on August 15, 2016, she in a letter had already set the matter for arbitration on August 31, 2016, the earliest date arbitrator was available.

Mir informed Rosenwasser that he could not possibly prepare or appear for arbitration on such a short Notice. That his witnesses needed proper and timely Notice to review evidence, prepare for oral testimony and appear to testify at the arbitration hearing.

Mir further informed Rosenwasser her that in the following week, he had to travel to Sacramento, California to take Depositions of two defendants in a pending federal civil case on August 29 and 30, 2016 where the U.S. district Court, Southern District had allowed such depositions beyond the discovery cut-off date and could not be continued. That two 8-hour Depositions could very well extend into August 31,

2016, and that he needed time to travel back to Los Angeles on August 31, 2016.

Mir requested stipulation to mutually extend five-year statute of limitations to conclude arbitration under Cal. Code of Civil Procedure § 583.330(a) and California Insurance Code 11580.2((i)(4). Rosenwasser declined to extend time beyond 5-years period to complete arbitration.

On August 21, 2016, Mir wrote to Rosenwasser to confirm above communication.

On August 23, 2016, Rosenwasser wrote to Mir that he was informed about expiration of 5-year statute of limitations in 2012. That she agreed to place file in inactive status. That on August 21, 2016, letter he informed her about other pending matters which prevented attendance of arbitration on August 31, 2016. That did not provide justification to proceed outside applicable statutory authority.

On August 24, 2016, Mir wrote to Rosenwasser that her August 23, 2016, letter contained inaccuracies. That she never informed him about arbitration deadline in her letter dated August 5, 2016. She never responded to his request for Arbitration in January 2016. That he could not possibly appear along with his witnesses on such a short notice on August 31, 2016, and due to pending depositions on August 29, 30 2016. Mir requested to extend time to conclude arbitration. That if she did not stipulate to extend time to complete arbitration and produce Damon Grove for arbitration, he will no choice but to file lawsuit and report her to State Bar for bad faith and highly unethical conduct. That he had requested Arbitrator that for the foregoing

reasons, it would be impossible for him to appear for arbitration hearing on August 31, 2016. (App.56a).

On August 25, 2016, the arbitrator agreed with Mir vacated the August 31, 2016, hearing and noted that no new sate for arbitration was set.

On August 26, 2016, Mir wrote to Rosenwasser that at no time she provided Notice to him as *pro-se* in writing at least 30-day before expiration of the applicable statute of limitations pursuant to Cal. Insurance Code § 11580.2(k). That statute of limitations was tolled, by 30-days for failure to give Notice under § 11580.2(k). That he could not produce witnesses on 5-day notice. That doctrine of estoppel, waiver, impracticability, impossibility, and futility to comply with statutory time frames pursuant to Cal. Ins. Code § 11580.2 (i)(3) applied. Based on that he requested extension of time to conclude arbitration. (App.59a).

On August 26, 2016, Rosenwasser acknowledged the receipt of Mir's letters dated August 24 and 26, 2016. She disputed that Mir only had 5-day notice to prepare arbitration. That he was contacted in 2012. [no dates were provided] Rosenwasser never addressed issue of the 30-day tolling of statute of limitations pursuant to Cal. Ins. Code § 11580.2(k). She acknowledged January 2016 phone call and offered $600. to settle the case.

On September 2, 2016, Mir wrote to Rosenwasser that she was served with Deposition Subpoena for Damon Groves, the claim examiner. That he tried to schedule arbitration hearing with the 'Creative Dispute Resolution, Mediation and Dispute Resolution Services' and was informed by Judicial Assistant at that location that arbitration could only be set by respondent State

Farm. That the statute of limitations was tolled, by 30-days pursuant to Cal. Ins. Code § 11580.2(k) since she did not provide him written Notice of 5-year expiration of statute of limitations. Mir requested to schedule arbitration on September 27, 2016. (App.62a).

On September 2, 2016, Rosenwasser responded to Mir's September 1, 2016, facsimile Notice of Deposition for Claim Handler Grove that Notice of Deposition was untimely since statute expired on September 1, 2016.

On September 6, 2016, Rosenwasser wrote to Mir that he was given notice years before and statutes were not tolled.

On September 6, 2016, Mir reiterated in letter to Rosenwasser that at no time he was given 30-day notice of expiration of applicable statute of limitations pursuant to Cal. Ins. Code § 11580.2(k). Mir requested to produce Grove for Deposition on September 15, 2016, and set the matter for arbitration on September 27, 2016. (App.64a).

On September 8, 2016, Mir wrote to Rosenwasser, that he did not know notice of expiration of statute of limitations years ago, she was referring to. He could not find anywhere in his file such notification. Nonetheless, at least 30-day Notice of expiration of statutes of limitations pursuant to California Insurance Code § 11580.2(k) to *pro-se* is in addition to any Notice she might have given years ago. (App.66a).

On September 13, 2016, Rosenwasser wrote to Mir that he was given notice in 2012. That she found no authority that additional 30-day notice of expiration of statute of limitations was required. That he did not proceed for arbitration from 2012-2015.

C. Proceedings in the Record Below

I. Mir Files Breach of Insurance Contract Case in the Federal Court

On August 30, 2018, Mir filed lawsuit against State Farm in Central District of Illinois. (Peoria Division) (Case No.: 1:18-cv-01315-JBM-JEH)

On May 3, 2019, Central District of Illinois (Peoria) upon motion by State Farm transferred the instant case to Central District of California.

II. State Farm's Motion for Summary Judgment

On January 1, 2020, State Farm made a summary judgment motion on the following single issue that

Mir failed to arbitrate within 5-years.

That he was given Notice of expiration of 5-year statute of limitations on September 24, 2012. State Farm attached a copy of the letter.

That the 5-year statute of limitations should not be tolled by 30-days under California Insurance Code Section 11580.2(i)(3) applying doctrines of estoppel, waiver, impossibility, impracticality, and futility to excuse a party's noncompliance with the statutory timeframe, as determined by the court.

Rosenwasser admitted in her Declaration in support of summary judgment motion and produced Mir's letters (App.56a-66a) that he was disputing any Notice of expiration of statute of limitations whatsoever till he received phone call on August 17, 2016.

III. District Court Grants State Farm's Motion to Quash Deposition Notice to Rosenwasser and to Deny Mir's Requests for Admissions and Interrogatories

On January 22, 2020, State Farm made ex-parte motion to Quash Mir's Deposition Subpoena to Rosenwasser. The summary judgment motion was only supported by declaration of Rosenwasser authenticating her Exhibits in support of summary judgment motion and did not testify to any facts. Mir needed to depose Rosenwasser to clarify facts and to admit that disputed material facts existed to properly oppose summary judgment motion under Federal Rule of Civil Procedure Rule 56(d).

On January 27, 2020, the district court took under submission State Farm's ex-parte motion to prevent Deposition of Rosenwasser. (App.22a, 25a).

On February 11, 2020, district court granted State Farm's ex-parte application to prevent deposition of Rosenwasser. (App.19a).

On February 24, 25, 2020, Mir served requests for Admissions and Interrogatories.

On February 27, 2020, State Farm filed ex-parte application to oppose Mir's request for Admissions and Interrogatories.

On February 28, 2020, Mir filed Opposition to ex-parte application on several grounds.

On March 11, 2020, Court granted Stay of Additional Discovery.

IV. Opposition to Summary Judgment Motion

On July 10, 2020, Mir filed Opposition to Summary Judgment Motion and was based on several grounds that he never had as *pro-se*, 30-day written Notice of expiration of statute of limitations as required under Cal. Ins. Code § 11580.2(k).

Mir disputed September 24, 2012, letter stating that Rosenwasser's June 26, July 23 and August 17, 2012, letters never once informed him about expiration of 5-year statute of limitations. In fact, in the August 17, 2012, letter, Rosenwasser had agreed to stay the matter till Mir was ready to proceed with arbitration. Then according to disputed September 24, 2012, letter produced in support of summary judgment motion, Rosenwasser suddenly wakes up and informs him about expiration of 5-year statute of limitations, something she could have very well have done in June 26, July 13 and August 17, letters.

In Mir's Statement of Genuine Disputes of Material Facts in Opposition to Summary Judgment Motion. Mir disputed any Notice of expiration of 5-year statute of limitations at any time including September 24, 2012, letter, citing his letters to Rosenwasser on August 24, 26, 2016 and Admission of Dispute by State Farm in support of State Farm's Statement of Uncontroverted Facts. (App.56a-66a)

Nonetheless, even assuming, Rosenwasser had informed Mir on September 24, 2012, of 5-year statute of limitations, a 4-year Notice of expiration of 5-year statute of limitations is not a 30-day Notice to a *pro se* under Cal. Ins. Code § 11580.2(k). The apparent purpose is that a novice, unsuspecting *pro-se* does not fall into a trap of expiration of statute of limitations and

has sufficient time to prepare for arbitration. For that reason. Cal. Ins. Code § 11580.2(k) is not applicable when insured is represented by an attorney. Furthermore in 2012, expiration of statute of limitations was not at stake; therefore, Cal. Ins. Code 11580.2(i)(iii) was not applicable.

That a 4-year Notice is like giving No Notice at all. It is too remote in time. A *pro-se* must walk around daily for 4-years with information in his head about the expiration of statute of limitations.

That the doctrine of estoppel, waiver, impossibility, impracticality, and futility applied to excuse a Mir's noncompliance with the statutory timeframes under Cal. Ins. Code § 11580.2(i)(3). This is fact intensive inquiry, not subject to resolution by summary judgment.

State Farm was equitably estopped for

(i) Not negotiating before denying claim under Cal. Ins. Code § 11580.2(f).

(ii) Not providing arbitration between January 6, 2016, to August 5, 2016, based on requests made by Mir.

(iii) Not giving timely Notice of Arbitration, (5-day Notice)

(iv) Not giving 30-day Notice under Cal. Ins. Code § 11580.2(k)

(v) Not giving reasons for Denial of Claim to properly prepare for arbitration.

(vi) Not producing Grove, the Claim Handler for deposition to provide reasons for denial of uninsured motorist claim.

(vii) Not stipulating to extend 5-year statute of limitations under Cal. Ins. Code § 11580.2 (i)(4).

(viii) Equitable Estoppel is a question of fact to be determined by Jury.

Doctrine of Impracticability and Impossibility applied due to conflict with Depositions on August 29, 30, 2016 and time required in case of continuation of two 8-hour depositions to August 31, 2016, and for time to travel back from Sacramento to Los Angeles. Lack of time to prepare for arbitration before depositions and lack of witness availability due to extremely short notice. Lack of Notice of Reasons for Denial of uninsured motorist Claim.

Doctrine of Futility applied for inability to proceed with arbitration on a short Notice without any time for preparation and inability to produce witnesses who need sufficient notice of their own to prepare, appear to testify at the hearing. No Notice of Reasons for denial of Claim.

V. District Court Grants Summary Judgment Motion

On October 20, 2020, the district court granted summary judgment motion on the grounds that Mir was not disputing September 24, 2012, letter; That September 24, 2012, letter satisfied 30-day Notice of expiration of statute of limitations on September 1, 2016, under Cal. Ins. Code § 11580.2(k). That Mir could attend arbitration on August 31, 2016. The doctrines of estoppel, waiver, impossibility, impracticality, and futility to excuse a party's noncompliance with the statutory timeframes did not apply because Mir had

Notice of 5-year expiration of statute of limitations on September 24, 2012. (App.7a).

VI. Mir's Motion for Reconsideration of Decision Granting Summary Judgment

On October 27, 2020, Mir made motion for reconsideration on the grounds that court overlooked that the September 24, 2012. Notice was disputed and was too remote in time to expiration of statute of limitations on September 1, 2016, *citing back* the case law cited by the court. (*Jordan*, 182 Cal.App.4th 1416, 1422 (2010). The case law is also not applicable as it was not an arbitration case. *Jordan* was a court case, where plaintiff had control and failed to take matter to court trial within 5 years. In the instant case. Mir could not set the matter for arbitration as he was informed by Creative Dispute Resolution Service. That arbitration had to be set by State Farm.

That Mir repeatedly disputed in his correspondence in 2016 produced by State Farm, that at no time he had any prior 30-day Notice of expiration of statute of limitations under Cal. Ins. Code § 11580.2(k). (App.56a-66a).

That questions of estoppel, waiver, impracticability, impossibility, and futility are questions of fact to be determined by jury. (*Carrasco v. State Farm Ins.*, No. 18-cv-06509-BLF (N.D. Cal. Jan. 8, 2019, at *4) (*Holdgrafer v. Unocal Corp.*, (2008) 160 Cal.App.4th 907, 925-926, 73 Cal.Rptr.3d 216 . . . whether an estoppel exists is a question of fact and not of law.)

VII. Court Denies Motion for Reconsideration of Order Granting Summary Judgment

On November 25, 2020, the district court denied motion for reconsideration. (App.4a).

VIII. Appeal to Ninth Circuit Court

On February 24, 2022, the Ninth Circuit Court of Appeals affirmed summary judgment motion.

Mir's claims were barred by the applicable statute of limitations Cal. Ins. Code § 11580.2(i)(2), and Mir failed to establish any basis for tolling under (k) for (failure to provide written notice of applicable statute of limitations at least 30 days before the expiration) and under § 11580.2(i)(3) (excusing a party's noncompliance with the statute of limitations on the basis of estoppel, waiver, impossibility, impracticality, and futility).

The district court did not abuse its discretion by denying Mir's motion for reconsideration because Mir failed to establish any basis for such relief.

The district court did not abuse its discretion by granting defendant's application to quash the deposition subpoena of Rosenwasser because Mir failed to demonstrate actual and substantial prejudice. Court rejected that September 24, 2012 Letter was fabricated. (App. 1a-3a).

On May 31, 2022, The Ninth Circuit Court denied Petition for Rehearing and En-banc rehearing. (App.1a).

REASONS FOR GRANTING THE PETITION

I. GLARING CONFLICT OF THE DECISION OF THE NINTH CIRCUIT COURT WITH THE FEDERAL RULES OF CIVIL PROCEDURE 56(A), DECISIONS OF SUPREME COURT, DECISIONS OF OTHER CIRCUITS, IN GRANTING SUMMARY JUDGMENT MOTION AFTER MAKING FACTUAL FINDINGS, IN THE FACE OF MOVANT'S ADMISSION OF GENUINE DISPUTE OF A MATERIAL FACT, THAT MIR DISPUTED STATE FARM'S SEPTEMBER 24, 2016, LETTER

Both district court and Ninth Circuit Court made factual findings in denying summary judgment motion, in disregard of Federal Rules of Civil Procedure Rule 56(a).

The summary judgment motion was based on single issue that 5-years statute of limitations to conclude arbitration pursuant to Cal. Ins. Code § 11580.2(i)(2)(A), had expired without Mir taking the matter to arbitration.

The issue itself presents a genuine dispute that it was all Mir's fault in not taking matter to arbitration and State Farm had no role to play whatsoever in preventing timely arbitration. Mir's letters in 2016 stressed that it was State Farm which delayed, harassed, and stonewalled Mir and caused the statute to expire, as alleged in the complaint. (App.56a-66a).

Mir was informed by Dispute Resolution, Mediation and ADR Services that Mir could not set the matter to arbitration, that it must be initiated by State Farm.

Mir in his Opposition to summary judgment motion raised genuine dispute of material facts, that it was State Farm which caused statute of limitations to expire.

Whether a written 30-day notice of expiration of 5-year statute of limitations was given pursuant to Subsection (k) is a genuine dispute? It is undisputed that State Farm failed to give 30-day notice under Subsection (k), providing 30-day tolling. Instead, State Farm took the position that Mir was given notice of 5-year expiration of statute of limitations by letter on September 24, 2012. Mir denied knowledge or receiving and alleged that it was prepared after he raised the issue of 30-day tolling for failure to give 30-day notice of expiration of 5-year statute of limitations under Subsection (k) in his letter, dated August 26, 2016. (App.59a) A 4-year notice was not a 30-day notice. A 4-year notice is too remote in time to be relevant. Failure to give 4-year notice will not result in 30-day tolling, even failure to give 60-day notice would not result in 30-day tolling That would cause 30-day tolling surplusage in the statute.

State Farm did not provide arbitration, after Mir requested arbitration on January 6, 2016, over 7-months 23 days before the expiration of statute of limitations, then maintained silence when Mir requested arbitration by letters on July 13, August 5, 2016. State Farm declined to provide reasons for denial of claim or notice of defense and produce Claim Examiner for deposition to provide such reasons. Instead, gave 5-day notice of arbitration hearing set on the last day of expiration of Statute of limitations on August 31, 2016.

State Farm prevented Mir to prepare and call witnesses, and then according to the plan declined to stipulate to extend statute of limitations under § 11580.2(i)(4).

State Farm refused to accept the impossibility, impracticality to proceed with arbitration due to conflict with depositions dates on August 29, 30 2016 in Sacramento, CA and time required to return to Los Angeles from Sacramento on August 31, 2016. Nonetheless, on August 25, 2016, the arbitrator based on grounds provided by Mir under Cal. Ins. Code § 11580.2(i)(3) had vacated arbitration set for August 31, 2016.

It would be futile for Mir to proceed with arbitration without knowing the reasons for denial of claim and without time for preparation and time to call and prepare witnesses.

Mir was excused under Cal. Ins. Code § 11580.2 (i)(3) to for noncompliance with the statutory timeframe under the doctrine of estoppel, waiver, impossibility, impracticality, and futility.

These are material facts affecting genuine dispute if Mir was excused compliance with statutes of limitations. These facts are jury questions.

Estoppel applied to State Farm's conduct of delaying and harassing tactics as described above and is a jury question as discussed below,

In most insurance "bad faith" cases, the "reasonableness" of an insurer's denial of coverage is a question of fact. [*Amadeo v. Principal Mut. Life Ins. Co.* (9th Cir. 2002) 290 F.3d 1152, 1160]

Even when the basic facts are undisputed, reasonable minds could differ on the inferences to be

drawn from those facts, summary judgment should be denied. [*Adickes v. S.H. Kress & Co.*, (1970) 398 U.S. 144, 157, 90 S.Ct. 1598, 1608; *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, (9th Cir. 2014) 771 F.3d 1119, 1125–summary judgment improper "where divergent ultimate inferences may reasonably be drawn from the undisputed facts" (internal quotes omitted); *Estate of Pepper ex rel. Deeble v. Whitehead*, (8th Cir. 2012) 686 F.3d 658, 667-668]

That "whodunit" is genuine dispute and a jury question. That summary judgment for State Farm could not be granted.

The district court erred by first impermissibly making factual findings in deciding summary judgment and then by making them erroneously. The district court incorrectly repeatedly found that Mir did not dispute September 24, 2012, letter. State Farm attached Mir's letters disputing September 24, 2012, letter as Exhibits and cited facts in its Statement of Uncontroverted Facts in support of summary judgment motion. (App.7a).

Mir provided Declaration that he did not receive September 24, 2012, letter. It is immaterial at the summary judgment stage that the opposing evidence is self-serving: "We have long held that a plaintiff may defeat summary judgment with his or her own deposition." *Paz v. Wauconda Healthcare & Rehab. Centre.*, (7th Cir. 2006) 464 F.3d 659, 664-665. *Nigro v. Sears, Roebuck & Co.*, (9th Cir. 2015) 784 F.3d 495, 497-498-court may disregard plaintiffs self-serving declaration in opposition to summary judgment only it states conclusions rather than admissible evidence.

Mir also cited these letters in his Opposition to State Farms Statement of Uncontroverted Facts that at no time, he was given notice of 5-year expiration of statute of limitations. (App.56a-66a).

State Farm never disputed that no written 30-day notice of expiration of statute of limitations was given.

Based on that factual error, the district court found that 4-year notice of expiration of statute of limitations on September 24, 2012, satisfied the 30-day notice of expiration of statute of limitations therefore no 30-day tolling was available under subsection (k). The district court cited (*Jordan*, 182 Cal.App.4th 1416, 1422 (2010) (supra) which was in apposite, providing that it would too remote in time to have any relevance. (App.7a).

The 4-year notice of expiration of statute of limitations could not serve as 30-day notice under Subsection (k) providing 30-day tolling when no such notice is given, because failure to give notice 4 years before expiration could not provide 30-day tolling, it would create surplusage in the Subsection (k). The district court misread the statute as providing for a notice to be given at any time before expiration of statute of limitations. If legislature intended that requirement, it would have said so.

Based on that factual error that Mir did not dispute September 24, 2012, letter (App.56a-66a). the district court improperly intermingled Subsection (k) with Cal. Ins. Code § 11580.2(i)(3) providing the doctrines of estoppel, waiver, impossibility, impracticality, and futility and found that because of September 24, 2012, letter Mir was not excused from statutory noncompliance in 2016. (App.6a).

The district court also made another factual error that Mir could attend arbitration on August 31, 2016. On August 25, 2016, the arbitrator had agreed with Mir for his inability to attend arbitration and vacated arbitration on August 31, 2016.

The district court then denied Motion for Reconsideration of Order granting summary judgment motion made on the ground that district court made factual error that Mir did not dispute September 24, 2016, letter.

The district court found that Mir only disputed that 4-year notice was not sufficient. That the Mir's letters to State Farm in August and September 2016 did not create reasonable inference that September 24, 2012, notice was not given. (App.6a).

All reasonable inferences must be drawn in the opposing party's favor both where the underlying facts are undisputed (*e.g.*, background or contextual matters) and where they are in controversy. At the summary judgment stage, the nonmovant's version of any disputed issue of fact is presumed correct. [*Eastman Kodak Co. v. Image Technical*, (1992) 504 U.S. 451, 456, 112 S.Ct. 2072, 2077]

State Farm never carried its initial burden to show that Mir did not dispute September 24, 2012, letter, instead produced letters that Mir did dispute. Mir had no further obligation to dispute September 24, 2012, letter.

"If the moving party fails to carry its initial burden of production, the opposing party has no obligation to produce anything..." [*Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, (9th Cir. 2000) 210 24 F.3d 1099, 1102-1103. 25(i)

The Ninth Circuit Court impermissibly made factual findings and then erroneously in providing that "Mir provides no basis for tolling under § 11580.2(k) (providing for tolling if the insurer fails to provide written notice of the applicable statute of limitations "at least 30 days before the expiration"); *see also id.* § 11580.2(i)(3) (excusing a party's noncompliance with the statute of limitations on the basis of estoppel, waiver, impossibility, impracticality, and futility)." The Court made another factual finding that September 24, 2012, letter was not fabricated.

There are several bases for tolling under § 11580 .2(k), as discussed above.

Whether there were any bases for tolling or not is a factual question for the jury. Where the accrual, tolling or expiration of the statutory period depends on disputed facts, summary judgment will be denied. [*Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, (11th Cir. 1999) 198 F.3d 823, 832; *Avila v. Willits Environmental Remediation Trust*, (9th Cir. 2011) 633 F.3d 828, 843; *In re Arctic Express, Inc.*, (6th Cir. 2011) 636 F.3d 781, 802-803]

The Ninth Circuit Court compounded factual error in finding that the district court did not abuse its discretion by denying Mir's motion for reconsideration because Mir failed to establish any basis for such relief. Mir requested reconsideration because district court had made a factual error that Mir did not dispute September 24, 2012, letter.

In *Carrasco* No. 18-cv-06509-BLF (N.D. Cal. Jan. 8, 2019, at *4). The Court found that facts related to estoppel, waiver, impossibility, impracticality, or futility, or any alleged failure by State Farm to comply with

statutory notice requirements are jury questions. "Whether an estoppel exists is a question of fact and not of law." (*Holdgrafer*, (2008) 160 Cal.App.4th 907, 925-926, 73 Cal.Rptr.3d 216.

It is ordinarily a *question of fact* whether there has been a waiver [*St. Agnes Med. Ctr. v. PacifiCare of Cal.*, (2003) 31 Cal. 4th 1187, 1196, 8 15 Cal.Rptr.3d 517] Waiver may be implied by acts that are inconsistent with the agreement to submit to arbitration [*Roberts v. El Caion Motors, Inc.*, (2011) 200 Cal.App. 4th 832.

One party to an arbitration agreement may, by dilatory tactics or express refusal to proceed, place himself or herself in such a position that the other party may accede to the implied desire of the former, acquiesce in the abandonment of arbitration, and resort to court action [*Grunwald-Marx, Inc. v. L.A. Joint Bd., Amalgamated Clothing Workers*, (1961) 192 Cal.App.2d 268,277,280, 13 Cal.Rptr. 446]. Acts inconsistent with the right to arbitrate also include express repudiation of the agreement or requirements for arbitration [*see Cine v. Barna*, (2012) 206 Cal.App.4th 1383, 1391, 142 Cal.Rptr.3d 329 847 (2016).

Waiver, or more properly, forfeiture, of the right to invoke arbitration based on an insurer's failure to adequately inform the insured of the arbitration provision requires consideration of all relevant circumstances and a determination of bad faith conduct by the insurer [*Chase v. Blue Cross of Cal.*, (1996) 42 Cal.App.4th 1142, 1148, 50, Cal.Rptr.2d 178

The credibility of Rosenwasser was at issue. "If there is any dispute as to the underlying historical facts, summary judgment of course cannot be granted.

The inferences to be drawn even from undisputed facts) may depend on the weight and credibility of the evidence. These are questions of fact for the jury to decide." [*Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513; *Adickes*, 398 U.S. at 158-159, 90 S. 8 Ct. at 1609]

Rosenwasser delayed by not responding to Mir's requests for arbitration hearing made on January 6, July 13, August 5, 2016, and waited till August 21, 2016, to give notice of arbitration on August 31, 2016, the last day to conclude arbitration. "Summary judgment may be inappropriate even if the historical facts are undisputed. whether a person acted within a "reasonable" time? [*Western American, Inc. v. Aetna Gas. & Sur. Co.*, (8th Cir. 1990) 915 F.2d 1181, 1184]

Questions of "reasonableness" are generally fact questions because of the jury's unique competence in applying the "reasonable person" standard. [*Eid v. Alaska Airlines, Inc.*, (9th Cir. 2010) 621 F.3d 858, 868. Whether parties acted with "due care." [*Bryant v. Hall*, (5th Cir. 1956) 238 F.2d 783, 787] Issues of credibility, including issues of intent, should be left to the jury. [*Hanis v. ltzhaki*, (9th Cir. 1999) 183 F.3d 1043, 1051]

In most insurance "bad faith" cases, the "reasonableness" of an insurer's denial of coverage is a question of fact. [*Amadeo v. Principal Mut. Life Ins. Co.*, (9th Cir. 2002) 290 F.3d 1152, 1160] The bad faith acts for jury's consideration are, failure to pay claim, then sit on it for two years, then deny it without giving any reasons, then refusing to produce claim examiner for deposition to provide reasons for denial of claim, then stonewalling for 7- months and 23 days to respond to Mir's requests for arbitration, giving untimely (5 day) notice of arbitration hearing on the August 31, 2016, the last day of expiration of statute of limitations,

preventing preparation and time to produce evidence and witnesses at the arbitration; not considering its conflict with Mir's other pending depositions in Sacramento and finishing it off by not mutually consenting to extend statute of limitations beyond 5-years pursuant to § 11588.2(i)(4).

When the application of a rule of law depends on resolution of underlying historical facts, it becomes a mixed question of law and fact. [*Rose v. United States*, (9th Cir. 1990) 905 F.2d 1257, 1259—date cause of action accrues for limitations purposes may be mixed question of law and fact]

If the historical facts are in dispute, the matter generally must go to trial. But where the inference to be drawn requires "experience with the mainsprings of human conduct" and "reference to the data of practical human experience," the jury must make the determination and summary judgment is improper. [*Nunez v. Superior Oil Co.*, (5th Cir. 1978) 572 F.2d 1119, 1126]

Jury could determine under common human understanding if 4-year notice served, the purpose of the written 30-day notice requirement of expiration of statute of limitations. Airlines requiring passengers to check in at least two hours before flight departure does not mean to check in a day earlier.

II. NINTH CIRCUIT COURT ERRED THAT DENIAL OF DEPOSITION OF ROSENWASSER DID NOT PREJUDICE MIR

Rosenwasser was the lone witness on whose declaration the summary judgment was based. Rosenwasser did not testify to any facts; all she conveniently did was authenticate letters between Mir and her.

The district court drew inferences from these letters except for Mir's letters to Rosenwasser disputing September 24, 2012, letter. Mir needed deposition to obtain essential facts, admissions not otherwise available. (Federal Rules of Civil Procedure, Rule 56(d)

The district court also denied Mir's Requests for Interrogatories and Admissions.

The summary judgment record is merely a "paper" record. The "paper" record is likely to include the pleadings, the results of disclosures, discovery, other forms of pretrial investigation, and affidavits or declarations. *Anderson,* 477 U.S. 242, 251, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986)

Rosenwasser got away with summary judgment without uttering a word, yet Mir was not prejudiced.

III. NINTH CIRCUIT COURT'S DECISIONS CONFLICT WITH FEDERAL RULES OF CIVIL PROCEDURE, RULE 56(A)

Rule 56(a) provides,

> Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought. The court shall grant summary judgment if the movant shows <u>that there is no genuine dispute as to any material fact</u> and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

IV. NINTH CIRCUIT COURT'S DECISION CONFLICT WITH DECISIONS OF U.S. SUPREME COURT

The Ninth Circuit Court's conflict with Supreme Court's applicable decisions is direct, clear and readily apparent from lower court's rationale or result. (*United States v. Bass*, 536 U.S. 862, 864 (1977) (Supreme Court Rule 10) *Henderson v. Kibbe*, 431 U.S. 145 (1977) court of appeals decision appeared to be in conflict with Court's [prior] holding,) *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents")

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order see whether there is a genuine need for trial."

"The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . " [*Anderson* 477 U.S. at 249-255 (emphasis added).

Whether State Farm denied timely arbitration between January 6 and August 5, 2016, and gave untimely notice of arbitration on August 21, 2016, for hearing to be held on August 31, 2016, and declined to mutually stipulate to extend the statute of limitations under Section 11580.2(i)(4) is a genuine issue for trial by jury?

The moving party bears the initial burden of informing the court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The Ninth Circuit Court stated that there were no bases for tolling. Tolling was a disputed issue. Whether there were any bases for tolling was a factual issue for jury to decide. Whether September 24, 2012, letter was fabricated was an issue for jury to determine. (App.56a-66a)

V. NINTH CIRCUIT COURT'S DECISIONS CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS

Every other circuit follows the Federal Rules of Civil Procedure Rule (56) and any citations of decisions of other circuits would be superfluous.

VI. NINTH CIRCUIT COURT IS DISCRIMINATING MIR

There is a long history of Ninth Circuit Court denying Mir's appeals whether represented by counsel, or *in pro-per*[1]. In each case, Ninth Circuit rendered cursory and biased decision. Mir in another appeal (*Mir v. City of Torrance*, 18-56543) requested Ninth Circuit to transfer his appeal to another Circuit. In that case the magistrate judge gave Mir opportunity to amend complaint within 20-pages to comply with Rule 8. Mir did just that. The magistrate judge dismissed complaint any way. The Ninth Circuit Court denied request for transfer and the appeal.

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[1] Petitioner will retain attorney for further representation before Supreme Court once the writ is granted

CONCLUSION

The Ninth Circuit Court's decision is direct and clear conflict with the prior decisions of Supreme Court in deciding summary judgment motions.

The Court's function in deciding summary judgment motion is issue finding for trial and not issue deciding. The district court's decision whether tolling of statute of limitations was available under Cal. Insurance Code § 11580.2(k); and (i)(3) is entirely based on the erroneous fact finding that Mir did not dispute September 24, 2012 letter informing him 5-year expiration of statute of limitations where State Farm produced Mir's letters in 2016, disputing any notice at any time including September 24, 2012 letter and providing bases for his inability, impossibility, impracticability, futility to proceed with arbitration with conflict with other proceedings pending in federal court. State Farm stonewalled and denied arbitration over 7 months period and then gave 5-day untimely notice of arbitration hearing, thereby estoppel applied to State Farm and that is also factual jury question.

The Ninth Circuit Court went one step further and made incorrect factual findings that there were no bases at all for tolling under Cal. Insurance Code § 11580.2(k); and (i)(3) that September 24, 2012 letter was not fabricated. Mir presented several factual bases for tolling, and it was for jury to decide.

By reversing the decision of the Ninth Circuit Court of Appeals, this Court can right the miscarriage of justice done in the lower courts.

Respectfully submitted,

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