No. _____

In The
Supreme Court of the United States

PACESETTER CONSULTING, LLC,

Petitioner,

v.

HERBERT A. KAPREILIAN; EASTSIDE PACKING, INC.; CRAIG L. KAPREILIAN; FRUIT WORLD NURSERY, INC.; AGRICARE, INC.; TOM AVINELIS; MARK R. BASSETTI; MICHAEL MOORADIAN; DUDA & SONS, LLC; A. DUDA & SONS, INC.; DUDA FARM FRESH FOODS, INC.; AND DAN DUDA,

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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QUESTIONS PRESENTED

Special appearance. In federal courts, "special appearances" no longer exist—and have not for many decades. But lawyers file them every day and district courts regularly allow and honor them as if they actually meant something. But they do not. When, as here, defendants make a purported "special appearance" and obtain dismissal from a case without prejudice, may the plaintiff serve those former specially appearing lawyers with a copy of an amended complaint—or must the plaintiff serve the amended complaint on the former defendants that had made the special appearances?

Surprisingly, this is not an issue this Court has ever addressed, although special appearances are filed daily in federal courts. This Court has also never addressed whether special appearances even exist—or should exist. Do they exist?

Benefit-of-the-bargain damages. Did the district court err by failing to apply substantive Arizona law requiring application of Arizona's unique benefit-of-the-bargain damages rule? This Court has never addressed whether a district can refuse to apply a plaintiff's decision to seek damages under a state-law benefit-of-the-bargain damages rule.

Applying substantive state law on statutes of limitations. Did the defendants waive the statute-of-limitations defense by hoarding it until almost two

QUESTIONS PRESENTED—Continued

years after they filed their answers, letting the costly litigation go forward, and then springing the defense on Pacesetter in summary-judgment motions? If there was no waiver, did the district court properly refuse to let the trier of fact decide if, under the discovery rule or the concealment doctrine, the relevant statutes of limitations were tolled? This Court has never addressed whether the Arizona waiver-by-conduct doctrine would apply to this situation.

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Petitioner Pacesetter Consulting, LLC, is not a corporation. It is an Arizona limited-liability company. It has no parent corporation. It has no stock. And there naturally is no publicly held company that owns 10% more of Pacesetter's nonexistent stock.

STATEMENT OF RELATED CASES

- *Pacesetter Consulting, LLC v. Kapreilian*, United States District Court for the District of Arizona No. 2:19-cv-003880DWL (Doc. 280). Order entered July 27, 2021.
- *Pacesetter Consulting, LLC v. Kapreilian*, United States Court of Appeals for the Ninth Circuit No. 21-16233 (Doc. 68-1). Order and Memorandum entered Sep. 26, 2022.
- *Pacesetter Consulting, LLC v. Kapreilian*, United States Court of Appeals for the Ninth Circuit No. 21-16233 (Doc. 70). Order entered Oct. 18, 2022.

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OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On September 26, 2022, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Order and Memorandum Decision (App. 2).

JURISDICTION

On September 26, 2022, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Order and Memorandum Decision (App. 2), affirming the July 27, 2021 Order of the U.S. District Court for the District of Arizona (Docket Entry 280) (App. 10).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

No constitutional provisions are involved.

STATEMENT OF THE CASE

1. Introduction.

This Court has plenary authority over the federal district courts which are not only obligated to correctly interpret and apply the federal rules of civil procedure, but are also required, in diversity cases such as this one, to apply substantive state law on civil damages and statutes of limitations.

While issues of personal rights and vast constitutional import grab public attention, making sure that the federal district courts follow basic principles of procedural and substantive law is, in the long term, equally as important to the interests of both efficiency and simple justice for all those who litigate in federal court. The issues in this petition are superficially mundane, but they are important to the proper functioning of the federal court system—and this Court has not addressed them before, although they repeatedly arise.

2. Background.

This case is about an Arizona Trust that invested in what appeared to be a uniquely profitable plan to raise robust new mandarin-orange cultivars in the San Joaquin Valley, a famous site for bountiful, large-scale citrus farming.

The project was a bust. The man who touted it had no experience or expertise in the mandarin-orange cultivars, which were vulnerable to frost and generally unsuitable for cultivation in the San Joaquin Valley.

The project's promoters gulled the Trust into investing in the first place, and those who came in after that to keep the project operating in some fashion and who were in charge of its financial aspects hid the truth and committed misrepresentations and concealment in a complex, collaborative effort to keep the Trust and its Trustee in the dark.

The Trust's assignee (Pacesetter) fought hard to obtain a remedy in federal district court. But the district court let key Florida defendants out for insufficiency of process that had, in fact, been sufficient. And then, after viewing all the facts in the light most unfavorable to Pacesetter, and after taking all possible inferences in favor of the defense, the district court granted summary judgment for the rest of the Defendants on damages and statute-of-limitations defenses. Pacesetter appealed to seek redress from those errors, lost the appeal, and seeks an opportunity to correct fundamental, recurring, and, for this Court, issues of first impression.

REASONS FOR GRANTING THE PETITION

1. "Special appearances" no longer exist. But federal courts continue to allow them and lawyers continue to file them. This Court has never put a stop to a confusing anachronism that no civil procedure rule allows.

"Special appearances" do not exist. But almost everyone acts as if they did. For this Court, this is an

issue of first impression and national interest, application, and importance. Here is how the issue arose.

The district court dismissed Dan Duda and A. Duda and Sons, Inc. because the Third Amended Complaint was directly served on a lawyers who had specially appeared for them.

What may seem the most unusual issue is also the simplest. But it is one that lawyers and district courts perpetually get wrong, as happened here. The issue is that once a lawyer appears for a client, whether the appearance is called "special appearance" or "general appearance," that lawyer is authorized, and has a duty, to receive service of case-related documents for that client—at least until the case has finally ended or until the district court has filed an order releasing that lawyer from representing the client. The lawyer stays attorney of record.

Some of the lower courts have managed to figure out that the "technical distinctions between general and special appearances have been abolished" and as a result, the special appearance "label has no legal significance." *McGarr v. Hayford*, 52 F.R.D. 219, 221 (S.D. Cal. 1971). *See* Wright & Miller, 5B *Federal Practice and Procedure* § 1344 (3rd ed. 2019) ("Thus, technical distinctions between general and special appearances have been abolished and the rule makers wisely concluded that no end is accomplished by retaining those terms in federal practice.").

So, an attorney filing a purported limited or special appearance for a client is really making a general

appearance for the client. An attorney who makes an appearance for a client, as the attorney did for Dan Duda, becomes the "attorney of record [and] shall be deemed responsible as attorney of record in all matters before and after judgment until the time for appeal expires or until there has been a formal withdrawal from or substitution in the case." Local Rule Civ. 83.3(a). "The attorney who has appeared of record for any party shall represent such party in the cause and shall be recognized by the Court and by all the parties to the cause as having control of the client's case, in all proper ways." Local Rule Civ. 83.3(c)(1).

Dan Duda was dismissed from the case without prejudice by the district court's April 15, 2019 Order. (Doc. 57). But that dismissal did *not* remove the "specially" appearing lawyers out as Duda's attorneys of record "in all matters before and after judgment until the time for appeal expires or until there has been a formal withdrawal from or substitution in the case." Local Rule Civ. 83.3(a).

There was no "formal written order of the Court" letting the lawyers withdraw from representing Dan Duda in this matter. Local Rule Civ. 83.3(b). The time for an appeal had not started. Nor had it expired. The "specially" appearing lawyers thus remained Duda's attorneys of record. Local Rule Civ. 83.3(b).

As a result, electronic service of the Third Amended Complaint on those attorneys on December 23, 2019, was service on Dan Duda. *See* Local Rule Civ. 5.5(h) (service of electronic filings).

This reflects an important and enduring principle. Attorneys of record for a client are just that—attorneys of record with the obligation to accept service of lawsuit documents for their clients—until the time for appeal expires or until a court order permits their formal withdrawal from, or substitution in, the case.

In fact, when a party, such as Dan Duda, "is represented by an attorney, service under [Rule 5] *must* be made on the attorney." Fed. R. Civ. Proc. 5(b)(1) (emphasis added) (rule on serving and filing pleadings and other papers).

Thus, Pacesetter had no choice on whom to serve. At the district court and, for that matter, at the Ninth Circuit, the "specially" appearing lawyers remained the attorneys of record for Dan Duda in these proceedings. So service of the Third Amended Complaint on them was mandatory—not optional. Serving it directly on Dan Duda would have violated Fed. R. Civ. Proc. 5(b)(1).

"No certificate of service is required when a paper is served by filing it with the court's electronic-filing system," as the Third Amended Complaint was actually served. But Pacesetter provided a certificate of service. Fed. R. Civ. Proc. 5(d)(1)(B).

And so, the Third Amended Complaint was properly and timely served on Daniel Duda by electronically serving it on Duda's existing attorneys of record on December 23, 2019, the date the district court indicated was a proper service date. *See* Order (Dec. 2, 2019) (Doc. 128 at ¶(4), Page 16:22-25).

The same principles and reasoning apply to A. Duda & Sons, Inc. On February 28, 2019, A. Duda & Sons, Inc., made a purported "special, limited appearance" in this matter to contest jurisdiction, sufficiency of process, and the supposed lack of claims made against it. "Motion to Dismiss First Amended Complaint as to Duda & Sons, LLC" (Doc. 21 at 2:5-7). A. Duda & Sons, Inc., appeared through attorneys specifically identified as attorneys for A. Duda & Sons, Inc. (Doc. 21 at 4:21-24).

But as discussed above, there is no longer any such thing as a special or limited appearance. You will search the Federal Rules of Civil Procedure and the Local Rules of Civil Procedure in vain for the terms "special appearance," "specially appear," or "limited appearance"—or any variation on them.

True, in admiralty or maritime cases, there can be something called a "restricted appearance." Rule F(8), Supplemental Rules for Admiralty of Maritime Claims and Asset Forfeiture Actions. And although we sometimes seem to be at sea in this case, it is not an admiralty or maritime case. Thus, there is no right to make a "restricted appearance."

"Of course, the general rule in civil actions is now (and has been for some time) that any appearance in an action is a general appearance." *United States v. Republic Marine, Inc.*, 829 F.2d 1399, 1402 (7th Cir. 1987). The trial court erred by concluding that Dan Duda and A. Duda & Sons, Inc. had not been served with the Third Amended Complaint. They were served through

their attorneys of record. And so, the trial court committed clear error and an abuse of discretion by dismissing the Third Amended Complaint—and the claims it stated—against Dan Duda and A. Duda & Sons, Inc.

The issue is, however, much broader. Ask almost any lawyer or judge if there is such as thing as a special appearance, and the answer is almost certain to be in the affirmative. But that answer is wrong.

2. In diversity cases, federal district courts must apply substantive state law on damages—including the benefit-of-the-bargain standard.

In this fraud-and-fraudulent misrepresentation case, Pacesetter indicated that the basic measure of damages was the benefit-of-the-bargain rule. In addition, unlike many states, Arizona damages resulting from fraud and misrepresentation are both benefit-of-the-bargain damages and consequential damages. *See Cole v. Gerhart*, 5 Ariz. App. 24, 27-28 (1967) (Allowing the recovery of benefit-of-bargain, consequential, and lost-profit damages in a fraud case.).

In Arizona, a fraud victim is "entitled to compensation for every wrong which was the natural and proximate result of the fraud." *Ulan v. Richtars*, 8 Ariz. App. 351, 359 (1968). But the "benefit of the bargain rule is the yardstick adopted by the Arizona courts in fraud cases." *Smith v. Don Sanderson Ford, Inc*., 7 Ariz. App. 390, 392 (1968).

"The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty." *Restatement (Second) of Torts* § 549(2) (1977). *See also DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1449 (9th Cir. 1996) (The benefit-of-the-bargain damages measure lets a plaintiff recover the difference between what the plaintiff expected to receive, had the defendant's representations been true, and what the plaintiff actually got.).

Pacesetter's expert provided a straightforward bookkeeping analysis of the return that Pacesetter should have had on its investment. But that sort of bookkeeping analysis is merely the common-law, Arizona benefit-of-bargain damages doctrine at work. There is, as Professors Dobbs, Hayden, and Bublick explained in one of the most respected tort treatises ever written, "nothing unusual in the law of damages about using this kind of . . . bookkeeping measure of damages." Dan B. Dobbs, Paul T. Hayden, Ellen M. Bublick, *The Law of Torts* § 694 (2nd ed. 2011). *See also Gibraltar Escrow Co. v. Thomas J. Grasso Inv., Inc.*, 4 Ariz. App. 490, 496 (1966) ("We are aware that the measure of damages for fraud in Arizona is the benefit of the bargain.") (citing *Lufty v. R. D. Roper & Sons Motor Co.*, 57 Ariz. 495, 502-03 (1941)); *Steele v. Vanderslice*, 90 Ariz. 277, 286 (1961) (The "benefit of the bargain rule obtains in Arizona.").

Benefit of the bargain is, after all, not a sophisticated damages measure. Perhaps its simplicity was what led the district court astray.

If an Arizona resident has been fraudulently promised something, and does not get it, Arizona's benefit-of-the-bargain damages law lets that person recover the amount that was promised. It is just that simple. When the district court held there was no "cognizable evidence of damages," it committed clear legal error and abused its discretion. The Ninth Circuit refused to correct that error although "an error of law *is* an abuse of discretion." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) (emphasis in original).

This Court has never addressed whether a federal district court sitting in diversity can simply ignore a State's most fundamental damages measure for fraud and fraudulent misrepresentation cases.

3. The district court failed to apply Arizona's waiver-by-conduct doctrine and other statute-of-limitations principles.

The district court also granted summary judgment in favor of Agricare and Thomas Avinelis because the applicable statutes of limitations for Pacesetter's claims against them had supposedly expired. But under Arizona's unique waiver-by-conduct doctrine, Agricare and Thomas Avinelis had waived any statute-of-limitations defense. The district court erred by concluding otherwise.

On February 28, 2019, Agricare and Avinelis asserted in their Answer that Pacesetter's claims were "barred, in whole or in part, by the statute of limitations." (Doc. 17, Page 27, ¶ 5). They could have filed a statute-of-limitations motion to dismiss that day. But they waited until December 7, 2020—over 21 months later.

Under Arizona's waiver-by-conduct doctrine, Avinelis and Agricare had waived any statute-of-limitations defense. "A party may assert an affirmative defense in its pleadings and still waive that defense by conduct." *Jones v. Cochise County*, 218 Ariz. 372, 379 ¶ 23 (App. 2008) (Waiver by conduct of statute-of-limitations defense after the defendant had issued a disclosure statement, answered interrogatories, participated in seven depositions, and *then* raised the defense, almost a year after filing the complaint.).

"Waiver by conduct [is] established by evidence of acts inconsistent with an intent to assert [a known] right." *American Continental Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980). Here, "waiver by conduct is apparent from the extensive litigation record." *City of Phoenix v. Fields*, 219 Ariz. 568, 575 ¶ 32 (2009). "Even though a party has properly preserved an affirmative defense in its answer or a Rule 12(b) motion, it may still waive the defense due to its later conduct in the litigation." *O'Connell v. Smith*, No. CV 07-0198-PHX-SMM, 2009 WL 10673410 at *5 (D. Ariz. June 12, 2009).

Thomas Avinelis and Agricare mentioned the statute-of-limitations defense in its Answers, but waived that defense due to its later conduct in the litigation. In this case, for a period of over 21 months, they actively litigated this action, filing motions, conducting extensive discovery, and voluntarily participating in many long depositions. By doing that for over 21 months, as a matter of law, Agricare and Avinelis committed waiver by conduct of any statute-of-limitations defense.

In addition, it is a question of fact whether concealment has tolled running of the statute of limitations. "The rationale behind the discovery rule is that it is unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for believing that a claim exists." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 589 (App. 1995). A cause of action thus does not accrue until, using reasonable diligence, the plaintiff should know the facts underlying the cause of action. *Id*. at 588. As the Trust's principal, Judson Ball, said in his Declaration, until about March 2018, because of the concealment of the truth, he did not realize the existence and nature of the joint concealment and joint fraudulent conduct.

Pacesetter filed the lawsuit on January 26, 2019. It is thus timely under the statutes of limitations for consumer fraud, A.R.S. § 12-541 (one year) and tortious fraud claims, A.R.S. § 12-542 (two years). Notably, the "statute of limitations for a claim of fraudulent concealment or fraudulent misrepresentation is three years, which time begins to accrue on the date of

'discovery by the aggrieved party of the facts constituting the fraud or mistake.'" *O'Neal v. Corp. Service Co., Inc.*, No. 1 CA-CV 19-0118, 2020 WL 428655 at *4 ¶ 20 (Ariz. App. Mem. Dec. Jan. 28, 2020) (quoting A.R.S. § 12-543(3)).

Under the Arizona discovery rule, "a claim accrues when the plaintiff has reason to connect her injury with a 'causative agent' such that 'a reasonable person would be on notice to investigate whether the injury might result from fault.'" *Kopacz v. Banner Health*, 245 Ariz. 97, 100 ¶ 9 (App. 2018) (quoting *Walk v. Ring*, 2020 Ariz. 310, 316, ¶¶ 22, 23 (2002)). Here, in the course of conducting discovery in the state-court case, Ball gradually learned that the persons and entities that are Defendants in the present action had jointly concealed facts from the Trust and jointly defrauded it.

"When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Doe v. Roe*, 191 Ariz. 313, 323 (1998). In Arizona, the statute of limitations is an affirmative defense. Thus, in general, "'such disputes are questions of fact for the jury.'" *Perez v. First Am. Title Ins. Co.*, 810 F.Supp.2d 986, 994 (D. Ariz. 2011) (quoting *Lee v. State*, 225 Ariz. 576, 579 ¶ 13 (App. 2010)). There was a question of fact on the discovery doctrine that only the jury could resolve.

In addition, the Kapreilian Defendants waived any statute-of-limitations defense by failing to assert it as a defense in their Answer. (Doc. 132).

The statute of limitations is an affirmative defense that must be raised in a responsive pleading or is waived. Ariz. R. Civ. Proc. 8(d)(1)(P); Fed. R. Civ. Proc. 8(c)(1). *See also Andra R Miller Designs LLC v. US Bank NA*, 244 Ariz. 265, 269 ¶ 11 (App. 2018) (The statute-of-limitations defense is a personal one a party can waive.); *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 302 ¶ 10 (App. 1999) ("The statute of limitations is an affirmative defense that is waived unless raised."). Therefore, the Kapreilian Defendants have waived that defense.

It is true that the unusual rule in the Ninth Circuit is that a defendant may raise an affirmative defense, including statute of limitations, for the first time in a summary judgment motion if doing so does not result in prejudice to the plaintiff. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Here, Pacesetter has suffered prejudice, because of the many months of delay and costly litigation that could have been avoided if a successful statute-of-limitations motion had been filed at the start of the case.

Notably, the Ninth Circuit's approach to waiver ignores the plain language of the federal procedural rules. In addition, other circuit courts do not universally use the Ninth Circuit's approach to waiver, creating an inter-circuit rift that the Supreme Court will need to resolve. *See*, *e.g.*, *SEC v. Amerindo Inv. Advisors*, 639 Fed. Appx. 752, 754 (2nd Cir. 2016) (A claim that a statute of limitations bars a suit is an affirmative defense and is waived if not raised in the answer to the complaint.); *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (A statute-of-limitations defense is

waived unless affirmatively pled in an answer.); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653-54 (4th Cir. 2006) (Where a defendant fails to raise a statute-of-limitations defense in its answer, the defense is usually waived.); *JSK v. Hendry County School Bd.*, 941 F.2d 1563, 1570 (11th Cir. 1991) (A statute of limitations is waived if the defendant fails to raise it in its answer.).

The Kapreilian Defendants failed to provide true facts to Pacesetter and to the Trust. So all of the possibly applicable statutes of limitations were tolled. "Arizona courts have consistently held that a failure to disclose true facts leading to the plaintiff's injury amounted to fraudulent concealment, and that such action tolls the applicable statute of limitations until the plaintiff discovers or was put on reasonable notice of the breach of trust." *Anson v. American Motors Corp.*, 155 Ariz. 420, 428 (App. 1987).

The discovery rule tolls the statute of limitations until a plaintiff has the minimum knowledge to recognize a wrong occurred and injured the plaintiff. *Ritchie v. Krasner*, 221 Ariz. 288, 304 ¶ 57 (App. 2009). The rule raises questions of reasonableness and knowledge that "this court is particularly wary of deciding as a matter of law." *Long v. Buckley*, 129 Ariz. 141, 144 (App. 1981).

Here, Judson Ball's discovery of the misrepresentations and fraudulent concealment was gradual. During the Arizona state-court litigation, previously concealed facts were uncovered to the point that, in about March 2018, Judson Ball (principal of the investor Trust) ultimately realized that Herbert Kapreilian,

Eastside Packing, Craig Kapreilian, Fruit World, Agricare, Thomas Avinelis, A. Duda & Sons, Inc., Mark Bassetti, and Michael Mooradian had collectively and actively concealed the facts on orchard mismanagement and about the unsuitability of the mandarin-orange cultivars for the climate and conditions of the San Joaquin Valley.

As noted above, when "discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Doe*, 191 Ariz. at 323. "Under Arizona law, the running of the statute of limitations is an affirmative defense, and '[i]n general, such disputes are questions of fact for the jury.'" *Perez*, 810 F.Supp.2d at 994 (quoting *Lee*, 225 Ariz. at 579 ¶ 13). The district court erred by not letting the jury decide when Judson Ball finally uncovered the misrepresentations and fraudulent concealment that the opposing parties, including the Kapreilian Defendants, committed against the Trust.

The statute-of-limitations problems are more case-specific than the first two questions presented to the Court. But if the Court grants the petition for writ of certiorari on the first two questions, it should exercise its discretion to address the statute of limitations questions as well.

CONCLUSION

For the reasons set forth above, Pacesetter asks the Court to grant the petition for writ of certiorari.

Respectfully submitted.

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