

No. 22-670

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 Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENTS
AGRICARE, INC. AND TOM AVINELIS**

PETER J. MOOLENAAR
Counsel of Record
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
peter.moolenaar@gknet.com

*Counsel for Respondents
AgriCare Inc. and Tom Avinelis*

March 23, 2023

QUESTIONS PRESENTED

1. Whether the Court should review a non-dispositive issue finding a previously dismissed party was properly served with an amended complaint on his counsel through the district court's electronic filing system.

2. Whether the Court should review a fact-bound decision finding a failure to offer any cognizable evidence of the essential element of damages for Arizona state law claims.

3. Whether the Court should review a decision that did not address an additional basis to affirm summary judgment once it found a failure to offer any cognizable evidence of the essential element of damages for Arizona state law claims.

PARTIES TO THE PROCEEDING

Petitioner is Pacesetter Consulting, LLC. Respondents are: Herbert A. Kapreilian; Eastside Packing Incorporated; Craig L. Kapreilian; Fruit World Nursery Incorporated; AgriCare Inc.; Tom Avinelis; Mark Bassetti; A. Duda & Sons, Inc.; Duda Farm Fresh Foods, Inc.; and Dan Duda. Duda & Sons, LLC is a non-existent entity and not a party to this proceeding. Michael Mooradian is not a party to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent AgriCare Inc. certifies it does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Pacesetter Consulting, LLC v. Kapreilian, et al., United States District Court for the District of Arizona, No. 2:19-cv-003880. Judgment entered July 27, 2021.

Pacesetter Consulting, LLC v. Kapreilian, et al., United States Court of Appeals for the Ninth Circuit, No. 21-16244. Memorandum Disposition entered September 26, 2022.

Pacesetter Consulting, LLC v. Kapreilian, et al., United States Court of Appeals for the Ninth Circuit, No. 21-16244. Order entered October 18, 2022.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT.....	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES.....	v
STATEMENT OF THE CASE	1
A. Introduction	1
B. Background	1
C. The Ninth Circuit’s Decision	2
REASONS FOR DENYING THE PETITION	4
I. THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW AS NONE OF THE ISSUES IN THE PETITION WERE DISPOSITIVE TO THE NINTH CIRCUIT’S UNPUBLISHED DECISION	4
A. The Ninth Circuit ruled in Pacesetter’s favor in finding a previously dismissed party was properly served with an amended complaint through counsel	4

B.	The Ninth Circuit concluded Pacesetter Did Not Have Evidence of Damages— benefit-of-the-bargain or otherwise.....	5
C.	The Ninth Circuit did not address statute of limitations and they were not a basis for its decision.....	6
II.	THE NINTH CIRCUIT'S FACT-BOUND UNPUBLISHED DECISION DOES NOT WARRANT REVIEW.....	7
	CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	7
<i>Collins v. First Financial Services, Inc.</i> , 168 Ariz. 484, 815 P.2d 411 (Ariz. Ct. App. 1991).....	7
<i>Peery v. Hansen</i> , 120 Ariz. 266, 585 P.2d 574 (1978)	7
<i>Rivera v. Anaya</i> , 726 F.2d 564 (9th Cir. 1984)	6
<i>Safeway Ins. v. Guerrero</i> , 210 Ariz. 5, 106 P.3d 1020 (2008)	7
<i>Wang Electric, Inc. v. Smoke Tree Resort, LLC</i> , 230 Ariz. 314, 283 P.3d 45 (Ariz. Ct. App. 2012) ...	7
<i>Weinberg v. Whatcom County</i> , 241 F.3d 746 (9th Cir. 2001)	7
<i>Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund</i> , 38 P.2d 12 (Ariz. 2002)	7

Statutes

28 U.S.C. § 2111	4
------------------------	---

Rules

Fed. R. Civ. P. 5(b)..... 1, 4

Fed. R. Civ. P. 30(b)(6) 1, 2, 5, 8

STATEMENT OF THE CASE

A. Introduction

The Petition raises three questions presented, none of which were dispositive to the Ninth Circuit's decision. The Ninth Circuit ruled in Petitioner's favor with regards to the first question presented—special appearance—by finding a previously dismissed party was properly served through counsel under Rule 5(b), Fed.R.Civ.P. Pet. App. 8. With regards to the second question presented—benefit-of-the-bargain damages—the Ninth Circuit reviewed Petitioner's Rule 30(b)(6), Fed.R.Civ.P., deposition testimony in the district court litigation and concluded on case-specific evidentiary grounds that Petitioner did not have cognizable evidence of benefit-of-the-bargain damages. Pet. App. 5–6. Finally, the Ninth Circuit did not even address Petitioner's third question presented—statutes of limitations—and therefore, this issue was not a basis for its decision to affirm the district court's summary judgment in favor of the Respondents. Pet. App. 3.

B. Background

This matter arises from Petitioner's assignor—the Judson C. Ball Trust's ("Trust")—investment in two limited partnerships engaged in a mandarin orange project in California. More than three years after the Trust's investment, Respondent AgriCare, Inc. became the farm manager for the limited partnerships. In a separate lawsuit in Arizona state court against the limited partnerships, the Trust's limited partner interests were rescinded, and it was

awarded the return of its \$400,000 investment with interest and attorneys' fees. Nevertheless, following an assignment from the Trust, Petitioner Pacesetter Consulting, LLC ("Pacesetter") brought this case in the District of Arizona under diversity jurisdiction against, among others, AgriCare, Inc. and its then CEO, Tom Avinelis, (collectively, the "AgriCare Respondents"), alleging numerous Arizona state law claims. Ultimately, the AgriCare Respondents, and other Respondents, were granted summary judgment on all of Pacesetter's claims. Pacesetter appealed to the Ninth Circuit.

C. The Ninth Circuit's Decision

As with the district court, the Ninth Circuit found Pacesetter failed to offer cognizable evidence of damages—an essential element of all of Pacesetter's claims—and therefore the AgriCare Respondents, and other Respondents, were entitled to summary judgment. Pet. App. 5. The Ninth Circuit noted Pacesetter "vacillated between two different theories of damages throughout the course of litigation in the district court." Pet. App. 5. The Ninth Circuit explained at various times Pacesetter appeared to seek "benefit-of-the-bargain" damages, but at other times, it appeared to seek "opportunity-cost" damages. Pet. App. 5. Analyzing Pacesetter's Rule 30(b)(6) deposition in the district court litigation, the Ninth Circuit concluded that Pacesetter could not prevail under either theory. Pet. App. 6. The Ninth Circuit found "[b]ecause Pacesetter disclaimed any reliance on a benefit-of-the-bargain theory in its deposition, a benefit-of-the-bargain approach cannot provide a

damages theory sufficient to survive summary judgment[,]” and Pacesetter’s concessions in its deposition that it was “well able to make any investment” it wanted at any time were fatal to any assertion that it sustained lost-opportunity-cost damages. Pet. App. 6. The Ninth Circuit noted Pacesetter did not dispute that the existence of damages was an essential element to all of its claims and found the district court did not err in granting summary judgment in favor of the AgriCare Respondents and other Respondents. Pet. App. 6–7.

As a separate and additional ground for summary judgment in favor of the AgriCare Respondents, the district court found all of Pacesetter’s claims against the AgriCare Respondents were barred by their applicable Arizona statutes of limitations. Pet. App. 60–61. The district court found the AgriCare Respondents properly raised a statute-of-limitations defense in their answer, did not waive the defense by subsequently participating in the action, and Pacesetter’s claims were time-barred. Pet. App. 58–59. The district court then noted the statute-of-limitations analysis turned on whether Pacesetter presented sufficient evidence in the record to support the application of the discovery rule to delay the statute of limitations under Arizona law. Pet. App. 59. Ultimately, the district court concluded Pacesetter failed to present any admissible evidence to support the application of the discovery rule and its claims were barred. Pet. App. 60–61. However, after agreeing with the district court that Pacesetter failed to offer any cognizable evidence of damages and the AgriCare Respondents were entitled to summary

judgment, the Ninth Circuit did not address the statute of limitations issue or include it as a basis for its decision to affirm the district court judgment. Pet. App. 5.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW AS NONE OF THE ISSUES IN THE PETITION WERE DISPOSITIVE TO THE NINTH CIRCUIT'S UNPUBLISHED DECISION

A. The Ninth Circuit ruled in Pacesetter's favor in finding a previously dismissed party was properly served with an amended complaint through counsel.

Pacesetter's first reason for granting its Petition argues against so-called "special appearances."¹ However, the Petition fails to mention the Ninth Circuit ruled in Pacesetter's favor on this issue by finding the previously dismissed party—Dan Duda—was properly served with an amended complaint under Rule 5(b), Fed.R.Civ.P, through counsel that previously made a "special appearance" on his behalf. Pet. App. 8. Nor does the Petition recognize the Ninth Circuit continued to find the district court's error in dismissing Dan Duda was harmless under 28 U.S.C. § 2111. The Ninth Circuit

¹ Although this issue does not concern the AgriCare Respondents, they address it to highlight Petitioner's mischaracterization of the Ninth Circuit's decision.

correctly held “[g]iven our conclusion that the other defendants were entitled to summary judgment due to Pacesetter’s failure to offer any cognizable evidence of damages, we hold that Duda’s dismissal did not affect any substantial rights Pacesetter may have had in this action.” Pet. App. 8–9. As such, this case is not a proper vehicle for the court to consider the issue of “special appearances.”

B. The Ninth Circuit concluded Pacesetter Did Not Have Evidence of Damages—benefit-of-the-bargain or otherwise.

Pacesetter mischaracterizes the Ninth Circuit’s decision by claiming it ignored benefit-of-the-bargain as a measure of damages for Pacesetter’s claims. The Ninth Circuit’s decision was predicated on Pacesetter’s failure to offer admissible evidence of its damages, not whether benefit-of-the-bargain was a measure of damages available under Pacesetter’s Arizona state law claims. Indeed, the Ninth Circuit considered and analyzed whether Pacesetter offered sufficient evidence of benefit-of-the-bargain damages and found, based on Pacesetter’s own Rule 30(b)(6) deposition testimony, that “Pacesetter expressly denied that it was seeking the \$63 million in benefit-of-the-bargain damages[.]” Pet. App. 6. The Ninth Circuit explained, “[b]ecause Pacesetter disclaimed any reliance on a benefit-of-the-bargain theory in its deposition, a benefit-of-the-bargain approach cannot provide a damages theory sufficient to survive summary judgment.” Pet. App. 6. Therefore, it was Pacesetter’s Rule 30(b)(6) deposition testimony

expressly denying it was seeking benefit-of-the-bargain damages that was fatal to its claims, not that the Ninth Circuit failed to consider benefit-of-the-bargain as an available measure of damages under Pacesetter's Arizona state law claims. Pet. App. 6.

C. The Ninth Circuit did not address statute of limitations and they were not a basis for its decision.

While the Petition argues Pacesetter's claims are not barred by their applicable Arizona statutes of limitations, it wholly fails to acknowledge the Ninth Circuit did not address this issue and it was not a basis for its decision affirming the district court's summary judgment in favor of the AgriCare Respondents and other Respondents. Therefore, this case does not turn on the Ninth Circuit's rule permitting affirmative defenses to be raised for the first time in a motion for summary judgment. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Nor does it concern the application of Arizona's discovery rule to delay statutes of limitation. It also does not create an inter-circuit rift, as argued by Pacesetter. Given the application of Arizona statutes of limitations was not a dispositive issue in the Ninth Circuit, this case is not a proper vehicle to address these issues.

II. THE NINTH CIRCUIT’S FACT-BOUND UNPUBLISHED DECISION DOES NOT WARRANT REVIEW

The Ninth Circuit’s decision was based on its case-specific conclusion that “Pacesetter failed to offer any cognizable evidence of damages.” Pet. App. 5. If a plaintiff “fail[s] to offer competent evidence of damages, dismissal on summary judgment [is] appropriate with respect to all claims for which [that party bears] the burden of establishing the amount of actual harm . . . suffered.” *Weinberg v. Whatcom County*, 241 F.3d 746, 751 (9th Cir. 2001), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). Under Arizona substantive law, damages is a key element of all of Pacesetter’s claims. *See, Collins v. First Financial Services, Inc.*, 168 Ariz. 484, 486, 815 P.2d 411, 413 (Ariz. Ct. App. 1991) (conversion); *Peery v. Hansen*, 120 Ariz. 266, 270, 585 P.2d 574, 578 (1978) (Arizona consumer fraud requires someone to have been damaged by the prohibited practice); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.2d 12, 34 (Ariz. 2002) (fraudulent concealment requires pecuniary loss); *Safeway Ins. v. Guerrero*, 210 Ariz. 5, 10, 106 P.3d 1020, 1025 (2008) (tortious interference with contract requires resultant damage); *Wang Electric, Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, 283 P.3d 45, 49 (Ariz. Ct. App. 2012) (unjust enrichment requires an impoverishment); and *Wells Fargo Bank*, 38 P.2d at 23 (aiding and abetting requires a primary tortfeasor cause injury).

Analyzing Pacesetter’s Rule 30(b)(6) deposition testimony and disclosures, the Ninth Circuit noted Pacesetter “vacillated between two different theories of damages throughout the course of litigation in the district court.” Pet. App. 5. The Ninth Circuit explained at various times Pacesetter appeared to seek “benefit-of-the-bargain” damages, but at other times, it appeared to seek “opportunity-cost” damages. Pet. App. 5. Ultimately, the Ninth Circuit correctly concluded that Pacesetter could not prevail under either theory. Pet. App. 6.

The Ninth Circuit explained “[i]n its Rule 30(b)(6) deposition, Pacesetter expressly denied that it was seeking the \$63 million in benefit-of-the bargain damages in the federal lawsuit.” App 6. The Ninth Circuit concluded “[b]ecause Pacesetter disclaimed any reliance on a benefit-of-the-bargain theory in its deposition, a benefit-of-the-bargain approach cannot provide a damages theory sufficient to survive summary judgment.” Pet. App. 6.

Although not mentioned in the Petition, the Ninth Circuit also analyzed whether Pacesetter was entitled to lost-opportunity-cost damages. Pet. App. 6. However, after reviewing Pacesetter’s Rule 30(b)(6) deposition, the Ninth Circuit found “Pacesetter also has not offered any evidence of lost-opportunity-cost damages.” Pet. App. 6. The Ninth Circuit explained Pacesetter’s concessions in its deposition that it was “well able to make any investment” it wanted at any time were fatal to any assertion that it sustained lost-opportunity-cost damages. Pet. App. 6.

At bottom, the Ninth Circuit's fact-bound decision that Pacesetter failed to present cognizable evidence of its claimed damages does not raise any conflict among the U.S. Courts of Appeals or with this Court's precedent. Its narrow, unpublished decision correctly applied Arizona law, lacks exceptional importance, has little relevance beyond the parties' narrow interests, and does not warrant this Court's attention.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted.

PETER J. MOOLENAAR
Counsel of Record
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
peter.moolenaar@gknet.com

Counsel for Respondents
AgriCare, Inc. and Tom Avinelis

March 23, 2023