

No.

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In The

SUPREME COURT OF THE UNITED STATES

HOAI THANH PETITIONER

v.

HIEN THI NGO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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i.

**QUESTIONS PRESENTED
FOR REVIEW**

1) Did the court of appeals sanction a lower court's decision in conflict with a decision of a state's court of last resort so as to call for this Court's supervisory power, in particular with a decision of the Maryland Court of Appeals regarding application of the statute tolling statutes of limitations during bankruptcy, Maryland Code, Courts and Judicial Proceedings, §5-202?

2) In so doing did the court of appeals decide an important federal question in a way that conflicts with important decisions of this Court?

3) Has the court of appeals so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power?

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The unpublished Opinion of the United States Court of Appeals for the Fourth Circuit, filed on August 8, 2017, per curiam affirmance.

Memorandum Opinion of the United States District Court for the District of Maryland filed July 22, 2016 granting summary judgment to respondent.

Final Order of the United States District Court for the District of Maryland filed July 22, 2016.

Paperless Order of the United States District Court for the District of Maryland denying petitioner's Motion to Amend/Correct; and paperless Order denying Motion to Amend/Correct. December 29, 2016.

Memorandum Opinion of the United States District Court for the District of Maryland, filed May 11, 2015.

Order of the United States District Court for the District of Maryland denying in part and granting in part Respondent's Motion to Dismiss, May 11, 2015.

JURISDICTION

The judgment sought to be reviewed was filed in the United States Court of Appeals for the Fourth Circuit on August 8, 2017. Rehearing was denied on October 11, 2017. The statutory provision believed to confer on this Court jurisdiction on a writ of certiorari is United States Code, Title 28, Section 1354 (1)

RELEVANT STATUTE INVOLVED

Maryland Code, Courts and Judicial Proceedings
Article, §5-202:

If debtor files a petition in insolvency which is later dismissed, the time between the filing and the dismissal is not included in determining whether a

claim against the debtor is barred by the statute of limitations.

STATEMENT

Jurisdiction in the United States District Court for the District of Maryland originally was based on a federal cause in the first of several successor suits with the defendant a citizen of Maryland and the plaintiff a citizen of Virginia giving diversity as well. The federal cause of action disappeared from the case when it was lost after and an appeal to the Fourth Circuit with the district court declining to exercise jurisdiction over the pendant state tort counts. The plaintiff then filed those counts in the Circuit Court for Montgomery County, Maryland. While the case was there, which was against the defendant Ngo and three others, Ngo petitioned for bankruptcy in the the Maryland bankruptcy court, staying the action against her in the Montgomery County case, where, subsequently, a judgment was obtained against her three co-defendants there in the amount of \$1,000.000.

The defendant/appellee in the case below, Hien Thi Ngo, (Ngo), a citizen of Maryland, filed for bankruptcy in the United States Bankruptcy Court for the District of Maryland in No. 09-16698 on April 16, 2009. While she was in bankruptcy the plaintiff/appellant in the case below, Hoai Thanh, (Thanh), a Virginia citizen, filed a Motion to lift the automatic stay resulting from bankruptcy so that he might proceed against her in a lawsuit then in the Circuit Court for Montgomery County, Maryland, which Thanh had been pursuing against Ngo and three

other parties.¹ That Motion was denied but resulted into an adversary case which was then elevated, upon withdrawal of reference, into a case in the United States District Court for the District of Maryland, case No. 8:11-cv-01992-PJM. The gravamen of Thanh's Complaint consisted of the intentional torts of malicious use of process, defamation and false light. These charges had existed throughout the series of predecessor suits and persisted through successor litigations, all arising from the same causes of action. The torts occurred in radio broadcasts and email and website posts involving tens of thousands of Vietnamese language recipients. .

This petition revolves around the effect of Hien's bankruptcy upon Thanh's litigations under Maryland Code, Courts and Judicial Proceedings Article, §5-202, which provides for the suspension of the running of statutes of limitations between the filing of a "petition in insolvency" and the dismissal of that petition. Maryland's highest court has held that this applies to federal bankruptcy proceedings. *Ali v. CIT Technology Financing Services, Inc.*, 6 A.3d 890, 416 Md. 249 (Md., 2010).

The lower court persisted in ignoring this Maryland tolling statute suspending the running of statutes of limitations during bankruptcy (App. pp. 3-56) although presented with it repeatedly in Complaints and pleadings. App. pp. 57-74. The United States Court of Appeals for the Fourth Circuit then sanctioned this departure by the lower court, putting it in conflict with the Maryland statute

¹ The three other parties were Hien's brother and two companies, one of which was hers and the other her brother's.

as interpreted by Maryland's highest court. App. pp. 1-3. It also was presented extensively with the Maryland tolling statute and the ignoring of it by the lower court. App. bottom p. 74-79.

It appears from a search of Fourth Circuit opinions on its website that it has never addressed this Maryland tolling statute. As can be seen in *Ali, supra* the Maryland tolling statute's history began in the early 1800s. Virginia has a similar tolling statute found at Virginia Code, Title 8.01, § 8.01-229 D. A search of the Fourth Circuit site indicates that it has never addressed this similar Virginia statute either. West Virginia has such a statute, at West Virginia Code, §55-2-22. It appears that it, likewise, has never been addressed by the Fourth Circuit.

When the adversary case was filed Ngo was in bankruptcy and was still in it when the withdrawal of reference led to the 2011 case going up to the district court. In the latter case, on 11/27/2013, with Ngo not discharged from bankruptcy against Thanh, Thanh moved to amend his Complaint in the United States District Court, attaching a proposed amended Complaint referring specifically to Ngo's bankruptcy and its effect. App. p. 58 and 58-59.

The U. S. District Court denied the amendment but in lieu of allowing it, allowed Thanh to file a new case, which he did. No. 8:14-cv-00448-PJM, ECF 1, filed 2/14/2014.

In that Complaint, Thanh specifically alleged the Maryland tolling statute and its effect. App. pp. 59-60. Thanh then filed a Motion to Amend the Complaint on 6/13/2014, within 21 days of service upon Ngo, so that the proposed First Amended Complaint was granted on June 30, 2014. The new Complaint, filed in two forms, contained the

references to the tolling statute at ECF 6-3 in the case. App. p. 61-63. On that same day Ngo filed a Motion to Dismiss.

In its Support Memo she admitted these dates of publication: October 6, 2001, October 21, 2001, September 2, 2004, September 7, 2004, December 11, 2005, December 6, 2006, December 10, 2006, March 21, 2006, April 6, 2006. ECF 7-1 No. 8:14-cv-00448-PJM.

The statute of limitations for false light in Maryland is three years. *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642, 547 A. 2d 1105 (1988). Therefore, it is the case that two of these dates, December 6, 2006 and December 10, 2006, are within the statute of limitations for false light in Maryland if one but takes into account the tolling of the statute of limitations during Ngo's bankruptcy under Maryland law as interpreted by its highest court, which the lower court failed to do here and then was joined in that by the appellate court which, thus, sanctioned this failure by the lower court.

Further, as the lower court had recognized, there is another tolling statute applicable here, a federal one, found at 28 U.S.C. §1367(d). It tolls statutes of limitations for the time that a claim is pending in federal court plus 30 additional days after a claim ceases to be pending. Here Thanh first filed suit in the United States District Court for the District of Maryland on 12/27/2004 (8:04-cv-04033-RWT).

Thereafter Thanh suffered a very serious stroke as a result of which he was unable to speak and suffered greatly for a period of months. As a result he took a voluntary dismissal which went into effect 8/25/2005. 30 days from that date takes us to 9/24/2005. Within several months he recuperated

sufficiently to re-file his complaint on 12/22/2005. ((8:05-cv-03420-AW). This reiteration of his case was adjudged against him in the lower court and was appealed to the Fourth Circuit, where it ultimately terminated when he sought reconsideration of an affirmance (07-1437). Reconsideration was denied 4/21/2007. The state law tort defamation and false light counts were not decided upon in these first two iterations of his case in federal court. Thanh, upon termination in his second case at the Fourth Circuit, filed in Montgomery County, Maryland, Circuit Court on October 8, 2007 so that there was another four months and 29 days during which statutes were running. Once Thanh had filed his case in Montgomery County Circuit Court there was no more time during which statutes of limitations were running.²

Thus, if one does the math, it can be seen that, when one combines the tolling statutes, state and federal, only two of the above listed dates, the first two, are barred. So the lower court, while it had acknowledged the dates of pendency in federal court as tolling, failed to apply the federal statute as well as ignoring the Maryland tolling statute. Thanh pled the Maryland tolling statute in his several Complaints and argued it specifically in his opposition to Ngo's dismissal motion (ECF 8-1 p. 15 ff.) but the lower court persisted in ignoring it throughout as did the Fourth Circuit upon appeal, despite its being briefed in the Opening and Reply briefs as well as in the effort to obtain panel reconsideration or *en banc* consideration.

² Thanh obtained judgment against Ngo's co-defendants in state court for one million dollars.

Back in the lower court: Thanh opposed Ngo's dismissal motion at ECF 8 with the support memo at ECF 8-4. It went extensively into the failure of the lower court to deal with the Maryland tolling statute. App. pp. 64-68. This was completely ignored by the lower court in its Opinion on Ngo's dismissal motion. App. 34-54.

The lower court then went forward after Ngo filed for summary judgment and opined in favor of Ngo, continuing to ignore the tolling statute. App. 3-33. After the lower court issued its summary judgment Order in favor of Ngo in 8:14-cv-00448-PJM (ECF 30), Thanh filed under Rule 59(e) to Amend/Correct, going at great length into the Maryland tolling statute and the lower court's failure to pay any attention to it despite its having been pled and briefed on 8/19/2016. (ECF 31). App. 66-69. After the briefing of the Motion, the lower court denied the Motion in a paperless Order (ECF 36) without providing any reasoning which would have allowed the appellate court to analyze the decision. App. 34.

Another instance of the lower court's ignoring the Maryland tolling statute occurred with regard to allegations that Thanh made in his Complaints starting with the proposed Complaint that he filed in 8:11-cv-01992-PJM. (ECF 96-1 ¶66). App. 58. He had discovered archived on the Internet as of October 2, 2011, a blast defamatory and falsely lighting email from Ngo that went out to a worldwide audience of Vietnamese language recipients.

As a result Ngo, once the Complaint had been filed in 8:14-cv-00448, filed an affidavit by an Internet expert (ECF 21-3) in which the expert pointed out that although Thanh had discovered the defamatory and falsely lighting material archived on October 2,

2011, it actually had been posted and published to the Internet on an earlier date, November 28, 2007. This was one year, four months and 20 days prior to Ngo's bankruptcy petition and thus, under the Maryland tolling statute did not bar Thanh's false light claims against Ngo. In fact the publication on the Internet on that date was after, on October 8, 2007, Thanh had filed his successor case to his first round of federal cases in the Montgomery County Circuit court. So the statute of limitations of one year for defamation had not expired either since it was the Montgomery County Complaint filed on that date became the adversary suit against Ngo in her bankruptcy that became, ultimately, No. 8:14-cv-00448-PJM. It is to be further noted that in publishing on the Internet when she did Ngo would be held to reasonably anticipate that her publishing would be subsequently expected to be republished by being archived on Google and the Tin Paris Vietnamese website.

The lower court, however, persisted in ignoring the Maryland tolling statute and the Montgomery County filing date as well when Thanh pointed it out in a Rule 59 (e) Motion (ECF 30-1). The lower court denied the Motion in a paperless Order without any explanation or reasoning to give the appellate court an ability to analyze its reasoning. This was sanctioned by the Fourth Circuit when it was pled there. Similarly, when Thanh, simultaneously, moved to amend the Complaint to include dates of publishings on the Internet acknowledged by Hien, that too was denied in a paperless Order.

REASONS FOR GRANTING THE PETITION

As to the first question presented for review, Petitioner submits that the decisions of the Fourth Circuit sanctioned the lower court's knowing refusal to follow the decision of Maryland's highest court in *Ali, supra*, that the Maryland statute tolling statutes of limitations during bankruptcy despite the tolling statute having been pled, briefed, and then brought up again in a post-judgment motion. The refusal to acknowledge and take into account affects a substantial number of litigants. If maintained as a policy it would affect not only decisions in Maryland but also in the Fourth Circuit cases coming up from Virginia and West Virginia, which, as pointed out above, have similar statutes. It could also, if followed, affect such cases in the First and Sixth Circuits. They also have states with similar statutes. Code of Maine, Title 14: COURT PROCEDURE-CIVIL, Part 2: PROCEEDINGS BEFORE TRIAL, Chapter 205: LIMITATIONS OF ACTIONS, Subchapter 3: MISCELLANEOUS ACTIONS, § 866 **Defendant out of State when action commenced; insolvency**; Ky. Stat. §§. 2535, 2544, 413.20 (1) (2) **Effect of injunction or other restraint on limitation**. So the number and scope of litigants who could be affected here militates in favor of this Court making clear that no confusion arises among courts by making it clear that the decision in *Ali, supra*, should not be allowed to be ignored and that ignoring sanctioned as it was here.

As to the second question presented for review, Petitioner submits the following: In 1789 Congress enacted the Federal Judiciary Act that is today codified at 28 U.S.C. §1652. In the case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (Opinion per Brandeis, J.) this Court extended to

state decisional law, in addition to state statutory law the phrase in the 1789 Act “the laws of the ...states.” This means, of course, in the present instance, the law in *Ali, supra*, with regard, in a diversity jurisdiction federal case concerning state common law torts such as defamation and false light. Further, in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 531-34 (1949) this Court established that this doctrine applies not only to state statutes of limitations in cases such as this one but also to state statutes tolling the running of statutes of limitations. It should be noted further that there are no “countervailing federal considerations. See *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). That the decision here is thus in conflict with well established precedents of this Court is clear.

With regard to the third question presented for review: Petitioner submits that the appellate court far departed from the accepted and usual course of judicial proceedings. This appears upon an analysis, using judicial notice which petitioner hereby requests of the patterns in recent years of Fourth Circuit decisions. Petitioner first noticed this pattern in analyzing Fourth Circuit decisions concerning appeals from the United States District Courts for the District of Maryland wherein the lower court judge is the lower court judge in this case, the honorable Peter J. Messitte, Senior Judge. The case number in the Fourth Circuit is No. 17-1110.

The Fourth Circuit affirmed Judge Messitte’s decision in an unpublished per curiam opinion consisting of a single paragraph on October 11, 2017. App. Petitioner points out that the Opinion makes

no analysis of what the issues before the lower were. Petitioner submits that if the appellate court had stated the issue of honoring the Maryland tolling statute it would have been forced thereby to face the mistake it was making. App.

Thanh filed for panel reconsideration or a hearing *en banc*, which was denied in four lines, without any analysis or explanation, including not mentioning the statute of limitations and tolling issues although there were addressed comprehensively when reconsideration was sought. .

The same is true for a related case involving the same parties, Thanh and Ngo, and also Judge Messitte, a case with similar issues of defamation and false light. It was a case that the Fourth Circuit had combined out of two cases between the same two parties which had come up from the lower court. Their individual numbers of the two cases before they were combined were 16-1391 and 16-1397. On 04/06/2017 the Fourth Circuit issued an Opinion in these cases (Doc. 37) affirming per curiam. As in No. 17-1110 the Opinion consisted of a single paragraph. As with the Opinion in 17-1110 it cited no authority and gave no analysis and contained no reasoning. As with the Opinion in 17-1110 it did not even state what the issues in controversy were.

In these combined cases also Thanh filed a Petition for Panel Rehearing or Consideration Banc. As with the similar Petition in No. 17-1110, in a per curiam Order, the Fourth Circuit denied the Petition in four lines, doing so on 05/22/2017 without explanation or analysis.

As in 17-1110 this effectively sanctioned mistakes in the court below. These mistakes arose because of proof in the record in both of the cases in the lower

court which the appellate court ignored when it was presented to it.

While No. 16-1391 was in the bankruptcy court as an adversary case, the fact that the radio show in question was the show of Ngo was held to have been admitted and to not be subject to to future challenge by bankruptcy Judge Wendelin I. Lipp when Ngo failed to respond to discovery. Ngo was also sanctioned monetarily there by Judge Lipp for failure to respond to discovery about the show when Thanh unsuccessfully moved to compel. This was ignored by the lower court both in the case that became No. 16-1391 in the court of appeals and in No. 16-1397 and that was sanctioned by the court of appeals.

In No. 16-1397 it was shown that in the lower court Ngo admitted under oath during deposition with her counsel present that the show in question was her show and that the person whom she suddenly claimed was the host of the show in question was in actuality a reader on her “news reading” show. App. 79-81³. Further still, in that case below it was shown by attestations in affidavits from Vietnamese language listeners familiar with the radio shows that the show in question was the show of Ngo not of the man whom she swore was a reader on her show and that that gentleman did not have a show of his own. App. 82-89.³ The lower court took it upon itself to deny the credibility of these witnesses at summary judgment. In addition, in No. 16-1391 the lower court made a number of factual mistakes that were familiar, failing to remember

³ For technical reasons only a photo image could be reproduced of relevant portions of one affidavit; requires magnification.

correctly what it itself had done, accusing Thanh of missing an important filing date when he had not done so, confusing one its own rulings for another one, accusing Thanh and his counsel of misrepresenting matters when they had not done so and so forth.

Many of these mistakes also played a role in the lower court's mistakes in No. 16-1397, Thanh's Fraud Upon the Court case pursued under Fed.R.Civ.P. 60 (d) (1). One was that in the Complaint in that case, Thanh specifically alleged that the bankruptcy court had ruled that the show in question was Ngo's question was deemed admitted and not challengeable in the future. This was ignored and then sanctioned. It was ignored in both cases that Ngo engaged in spoliation and failed to preserve recordings of her broadcasts and her blast emails although she was in litigation or it was clearly contemplated and it was alleged in both cases that her radio shows were rebroadcast over and over so that clearly they were recorded. The lower court refused to draw adverse inferences from this spoliation and the appellate court sanctioned it. It was shown that Ngo's counsel purposely omitted material in court submissions that would have shown that the shows in question were Ngo's and when Thanh filed material by the same translator used by Ngo showing this inaccuracy the lower court mistakenly refused to accept it based on inaccurate assertions. The lower court applied incorrect filing dates and confused its own opinion so that one was substituted for another. The appellate court sanctioned these mistakes when shown them.

Petitioner points this out because both this case and its predecessor two cases combined are part of a pattern that has emerged in the Fourth Circuit that

departs from the accepted and usual course of judicial proceedings so as to call for this Court's supervisory power.

The pattern that has emerged with regard to the lower court in this case is observable on the web site of the Fourth Circuit and is noticeable by this Court there. It is a pattern that applies to all reviews by the Fourth Circuit of decisions appealed from lower court decisions by the lower court judge in this case, the honorable Peter J. Messitte. It is this: Up to a certain point in time in 2015, when decisions by Judge Messitte came up for review in the Fourth Circuit, the reviewing panel would, in its opinion, go into the issues presented, describing them, giving their reasons for affirming or remanding, or whatever they did, and, thus, providing a platform which could form a basis for the losing party to use if they wished to petition for certiorari.

For example,⁴ No. 15-2086 is a published opinion, FLEUR S. BRESLER, et al. v. WILMINGTON TRUST CO., et al., in which the panel used some 56 paragraphs in an extremely thorough examination and analysis replete with extensive reasoning on numerous points and in which one judge wrote the affirming opinion, another joined and the third wrote concurring in part and dissenting in part. It was a probate case. In another, unpublished opinion, civil case submitted to the Fourth Circuit in 2015, No. 15-1681, GENESIS OFFICE SYSTEMS, INC. v. PNC BANK, NA, the panel issued a six paragraph affirming opinion. The opinion, although only six paragraphs, gave a thorough analysis of the issues,

⁴ All these materials are judicially noticeable on the special search feature of the Fourth Circuit website.

set out its reasoning and giving supporting cites to case authority for its decisions.

Petitioner points out that by the time of this case and its companion case described above, the Fourth Circuit panels had abandoned giving any analysis of what the issues were in the case and with no analysis of what the issues in the case were and any reasoning as to its affirmance.

In another 2017 submission to the Fourth Circuit from civil decisions by Judge Peter J. Messitte in the lower court, even in an unpublished opinion affirming and even when they were only one or two paragraphs, at least the issue is accurately set out. See No. 17-1414, *FATIMA MUSTAFA; KAMALA MUSTAFA v. PENNYMAC CORP.*. This seems amplify the manner in which the decision of Maryland's highest court was ignored and effectively overruled without any countervailing federal interest and the clear decisions by this Court were not heeded with regard to state statutes of limitations and state's statutes tolling those limitations. Judge Messite's opinions show his impatience with Thanh's pursuit if his remedies in his court and seem to reflect a desire that the case be shut down, leading it would seem to such things as ignoring the tolling statute. It is to be noted that this case reflects a media dispute between media figures in the large Vietnamese diaspora in the United States. In one of Ngo's litigations she named not only Thanh but also over three other Vietnamese newspaper owner operators. Hundreds of thousands of Vietnamese-Americans are affected. It is important that the rule of law prevail and our courts be held up as preserving that rule to this community.

CONCLUSION

For the above and foregoing reasons, particularly because of the large number of people in the Vietnamese-American community and the importance of preserving the creditor protection embedded in the tolling statutes pointed out in several states, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/s/

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