No. 08-904

In the Supreme Court of the United States

PAMELA S. HENSLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the two-year statute of limitations for presenting a claim under the Federal Tort Claims Act, 28 U.S.C. 2401(b), begins to run when a prospective plaintiff knows that he has been injured and knows the cause of his injury, or further requires that the plaintiff know that the federal employee alleged to have committed the tort was acting within the scope of his employment before the period begins to run.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 531 F.3d 1052. The opinion of the district court (Pet. App. A13-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2008. A petition for rehearing was denied on October 16, 2008 (Pet. App. A44). The petition for a writ of certiorari was filed on January 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, provides that a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within

two years after such claim accrues. 28 U.S.C. 2401(a). In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court ruled that an FTCA claim accrues (*i.e.*, the two-year statute of limitations period begins to run) when a plaintiff knows that he has been injured and is aware of the cause of his injury, even if he is unaware of his legal rights. *Kubrick* held that when a prospective plaintiff knows that he has been injured and knows the cause of the injury, he "can protect himself by seeking advice in the medical and legal community." *Id.* at 123.

2. On November 6, 2000, a car driven by Pamela Hensley, the wife of a Navy chief petty officer, was hit by a car driven by Ensign Edward C. Eich, on the grounds of the Whidbey Island Naval Air Station in the State of Washington. Pet. App. A2-A3. Eich was in uniform but was driving his personal vehicle. *Id.* at A3. Ms. Hensley saw that Eich was in uniform and knew from seeing the uniform that he was a Naval officer. *Ibid.* Military police were called to the scene and Ms. Hensley was taken to a Navy hospital, where she received treatment. *Ibid.* Ms. Hensley received a "Vehicle Information Exchange Sheet" at the hospital containing Eich's name and information about his personal insurance carrier, United Services Automobile Association (USAA). That sheet did not identify Eich as a member of the military. A military police officer who visited Ms. Hensley at the hospital advised her to follow up with Eich's insurance company. *Ibid.*

During the next two years, Ms. Hensley contacted USAA many times and claimed that USAA told her that she had three years under Washington State law to file suit if settlement negotiations proved unproductive. Pet. App. A3. Ms. Hensley hired a lawyer nearly three years after the accident. The lawyer then pursued fur-

ther discussions with USAA. When negotiations failed, the Hensleys filed suit against Eich and his wife in Washington State court on October 24, 2003, more than two years, but less than three years, after the accident. *Id.* at A3-A4.

3. Eich removed the case to federal court in early 2004. Pet. App. A4. Following certification by the United States Attorney that Eich was acting within the scope of his federal employment at the time of the accident, the United States was substituted for the Eichs as defendant, pursuant to 28 U.S.C. 2679(d)(1). The United States then moved to dismiss the Hensleys' complaint for lack of subject matter jurisdiction because, among other things, of the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b). Pet. App. A4. The district court denied the motion, ruling that the Hensleys' suit was timely. The court reasoned that, "[i]f a civil action is instituted within the applicable state limitations period, an FTCA claim does not accrue for limitations purposes until the plaintiff knows or should have known that the alleged tortfeasor was acting within the scope of federal employment." *Id.* at A33.

Following a bench trial, the district court found the United States liable to the Hensleys and awarded them more than $1.5 million in damages. Pet. App. A5.

4. The court of appeals reversed. It stressed that "[a]t the moment Eich struck [Ms.] Hensley's car with his own, [petitioners] knew both the fact of the injury and its immediate physical cause." Pet. App. A8. The court rejected petitioners' argument that "accrual of [their] claim awaited the moment when they knew or should have known that Eich was acting within the scope of his federal employment." *Id.* at A9.

The court of appeals also rejected petitioners' equitable tolling argument. The court concluded that petitioners had not exercised due diligence in investigating Eich's status at the time of the accident, and that the government had not engaged "in any fraudulent concealment, misconduct, or trickery that would have lulled [petitioners] into letting their rights lapse." Pet. App. A11.[1]

ARGUMENT

Petitioners contend (Pet. App. A9) that the court of appeals erred in holding that their claim under the FTCA accrued when they knew of their injury and its cause, rather than at the later date when petitioners learned that Eich was acting within the scope of his federal employment at the time of the accident. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *United States* v. *Kubrick*, 444 U.S. 111 (1979), the Court considered whether the claim of a medical malpractice plaintiff, who was already aware of his injury and its probable cause, did not accrue until he knew, or could have been expected to know, that the medical care he received from the government might have been legally negligent. *Id.* at 118. The Court held that accrual did not await his discovery that he might have a legal claim. The Court rejected the contention "that for statute of limitations purposes a plaintiff['s] ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." *Id.* at 122. Once a plaintiff is "armed with the

[1] The petition raises no equitable tolling issue, and that issue is therefore not before this Court.

facts about the harm done to him," he can "protect himself by seeking advice in the medical and legal community." *Id.* at 123. The Court further noted that, "[t]o excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." *Ibid.*

Like the plaintiff in *Kubrick*, petitioners had the essential facts about their injury and its cause. They knew that Ms. Hensley was physically injured when her car was rear-ended by another driven by Ensign Eich. Although they did not know that they might have a legal claim against the United States as Eich's employer, accrual of their cause of action under the FTCA does not await a potential plaintiff's awareness of her "legal rights." *Kubrick*, 444 U.S. at 122.

Petitioner urges that a potential plaintiff's knowledge of her injury's "cause," *Kubrick*, 444 U.S. at 122, must, for purposes of the FTCA, include knowledge "that the injury is caused by a tortfeasor acting within the scope of federal employment," Pet. 7. The court of appeals properly rejected that reading of *Kubrick*. *Kubrick* explained that "armed with the facts about the harm done to him," a prospective plaintiff "can protect himself by seeking advice" from an attorney. 444 U.S. at 123. Similarly, petitioners were aware that "[Ms.] Hensley suffered an injury," and "the cause (a collision)," as well as "the identity of the person who inflicted the injury (Eich)." Pet. App. A8-A9. "[A]rmed as they were with the available facts, [petitioners] could have protected their FTCA claim by seeking legal advice sooner." *Id.* at A9.

Other courts of appeals have also rejected the argument that knowledge of the tortfeasor's federal employment is essential before the FTCA statute of limitations begins to run. See *T.L.* v. *United States*, 443 F.3d 956, 964 (8th Cir. 2006) ("The statute of limitations is not tolled * * * simply because a plaintiff is unaware that an alleged tortfeasor is a federal employee."); *Gonzalez* v. *United States*, 284 F.3d 281, 292 (1st Cir. 2002) ("reject[ing] the plaintiff's claim that the statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees"); *Whittlesey* v. *Cole*, 142 F.3d 340 (6th Cir. 1998) ("plaintiff was armed with sufficient information to engage in an investigation of his claim which would have included a determination of the [employment] status of the treating physician"); *Gould* v. *HHS*, 905 F.2d 738, 743 & n.2, 735 (4th Cir. 1990) (rejecting the contention that "*Kubrick* implies that a claim des not accrue until a plaintiff learns the legal identity of the alleged tortfeasor as a federal employee"), cert. denied, 498 U.S. 1025 (1991); *Zeleznik* v. *United States*, 770 F.2d 20, 23 (3d Cir. 1985) (limitations period began to run despite plaintiff's lack of knowledge of INS's involvement), cert. denied, 475 U.S. 1108 (1986); *Steele* v. *United States*, 599 F.2d 823, 827-828 (7th Cir. 1979) (fact that plaintiff was unaware of FAA's control over the electrical current that injured him did not prevent limitations period from starting to run).

Petitioners express concern that cases may arise where "the statute of limitations has run before plaintiff is aware that she has a federal claim." Pet. 10. However, in *Kubrick*, this Court specifically rejected rules that would delay accrual until the plaintiff knew of the government's breach of a duty or had reason to suspect

that a legal duty had been breached. As the Court explained:

> [E]ither of these standards would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty. * * * It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been.

Kubrick, 444 U.S. at 125.

2. Petitioners contend (Pet. 5-8) that four circuits (including three that are listed above) have interpreted *Kubrick* in a manner contrary to that of the court of appeals in this case, but petitioners are mistaken. Petitioners' claim would not have been deemed timely under the precedent in any of the circuits on which they rely.

Petitioners cite *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (2002), as supporting their argument (Pet. 6, 8), but the Eighth Circuit there expressly noted that, in the absence of deception by the government, a cause of action accrues "when the existence of an injury and its cause are known," and that "the statute of limitations under the FTCA does not wait until a plaintiff is aware that an alleged tort-feasor is a federal employee." 284 F.3d at 935. Although the court of appeals noted the fact that the plaintiff was aware, more than two years before filing suit, of a "relationship" between the halfway house and the Bureau of Prisons—thus confirming that the plaintiff's claims were time-barred—it specifically rejected the contention that the

plaintiff must be aware that the individual who caused the injury was acting within the scope of federal employment. See *id.* at 936 ("lack of awareness that Simpson was a federal employee does not alone toll the statute of limitations"). More recent decisions by the Eighth Circuit confirm that "plaintiff's ignorance of the defendant's federal employee status" does not prevent the limitations period from running unless a diligent inquiry could not have revealed that information. *Motley* v. *United States*, 295 F.3d 820, 824 (2002). See *T.L.*, 443 F.3d at 964. Moreover, even if, as petitioners read *Garza*, Pet. 8, knowledge of a "relationship" between Eich and the federal government were necessary for petitioners' FTCA claim to accrue, their claim would still be untimely because, as the court of appeals observed, Ms. Hensley knew at the time of the accident that Eich was a Naval officer, Pet. App. A3.

Petitioners' reliance (Pet. 6, 8) on the decisions in *Diaz* v. *United States*, 165 F.3d 1337 (11th Cir. 1999), and *Drazan* v. *United States*, 762 F.2d 56 (7th Cir. 1985), is also misplaced. Although those decisions do refer to the plaintiff's knowledge of a "government cause" as necessary before the FTCA statute of limitations begins to run, the Eleventh Circuit has recently explained that those cases refer to "a 'government cause' simply because the government was the defendant in those cases." *Jones* v. *United States*, 294 Fed. Appx. 476, 480 (2008). Both *Diaz* and *Drazan* were "cases involving multiple causes of injury," *id.* at 479, and the courts simply recognized that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the [FTCA] statute of limitations running is knowledge of the government cause, not just of the other cause." *Diaz*, 165 F.3d at 1340 (brackets in

original) (quoting *Drazan*, 762 F.2d at 59). Here, there was only one cause of petitioner's injury, the government cause (Eich), and petitioners were aware of that cause. Neither the Seventh nor Eleventh Circuit further requires in such a circumstance that the plaintiff appreciate the fact that the individual who injured her was a federal employee. See *Jones*, 294 Fed. Appx. at 480 ("Neither *Drazan* nor *Diaz* upset the rule that ignorance as to the alleged tortfesor's *employer* does not toll the statute of limitations."); *Steele*, 599 F.2d at 827-828 (lack of awareness of FAA's role in injury did not toll limitations period).

Finally, petitioner cites (Pet. 6, 8) the First Circuit's decision in *Skwira* v. *United States*, 344 F.3d 64 (2003), cert. denied, 542 U.S. 903 (2004) for the proposition that a plaintiff must know "sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." *Id.* at 78. *Skwira* is of no assistance to petitioners, however. As noted above, in *Gonzalez*, the First Circuit "rejected the plaintiff's claim that the [FTCA] statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees." 284 F.3d at 292. The panel in *Skwira* did not purport to overrule *Gonzalez*, but instead explained it as establishing that "where the *personal* identity of the [immediate tortfeasor] is * * * known to the [plainitff], knowledge of the *legal* status of the [tortfeasor] as a federal employee is not required for claim accrual." 344 F.3d at 76. *Skwira* held that in other contexts, where "the identity of the individual(s) responsible for an injury may be less evident," the limitations period should not run "until a reasonably diligent plaintiff has reason to suspect a gov-

ernmental connection with the injury." *Id.* at 77.[2] By its own terms, *Skwira* is inapposite in a situation like this, where petitioners knew the "*personal* identity" of the tortfeasor (Eich). *Id.* at 76. But, even under *Skwira*'s articulation of the standard, petitioners' FTCA claim would be untimely because Ms. Hensley had "indications of government involvement," *id.* at 80, at the time of the accident, when she realized that Eich was a Naval officer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] In *Skwira*, the injury (Skwira's death) occurred at a Veterans Affairs Medical Center. 344 F.3d at 67. The cause of death was originally listed as heart failure, and Skwira's family only later learned that he had, in fact, been poisoned by a nurse at the medical center. *Id.* at 67, 69.