No. 08-904

IN THE
SUPREME COURT OF THE UNITED STATES

PAMELA S. HENSLEY; MICHAEL M. HENSLEY, husband and wife each of them and their marital community thereof,

Petitioners,

v.

UNITED STATES OF AMERICA, as substituted party for Edward and Jane Doe Eich,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners Pamela and Michael Hensley submit this reply in support of their petition for certiorari pursuant to Rule 15-6.

A. This Court Has Not Resolved The Issue Whether A Claim Accrues Under The FTCA Only When A Plaintiff Becomes Aware That The Government Caused His Injury.

This Court has never held that a cause of action accrues under the Federal Tort Claims Act's two-year statute of limitations even though a plaintiff is unaware that a federal actor caused his or her injury. The respondent correctly notes that the Court in ***United States v. Kubrick***, 444 U.S. 111, 123, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) held that an FTCA claim accrues when a plaintiff reasonably becomes aware of the fact of injury and its cause, and does not await awareness of the fact "that his injury was negligently inflicted." 444 U.S. at 123. However, the Court in ***Kubrick*** did not answer the question whether the "cause" of an injury is limited to the "immediate physical cause," as the Ninth Circuit held below. (Pet. App. A-8)

The respondent relies on the Court's holding in ***Kubrick*** that an injured party must exercise due diligence "by seeking advice in the medical and legal community." 444 U.S. at 123. But the holding in ***Kubrick*** was based on the sensible policy that "accrual" under the FTCA should not turn on a plaintiff's decision to consult counsel to determine the legal consequences of a known injury after the applicable limitations period. The government's contention that a cause of action always "accrues"

when a plaintiff knows of the immediate physical cause of the injury ignores the fact that under the unique circumstances of the Westfall Act, the government's responsibility in causing an injury, and therefore the liability of the United States, is exclusively controlled by the Attorney General's decision to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. . ." 28 U.S.C. § 2679(d)(2). "Accrues" under 28 U.S.C. § 2401(b) must be defined with reference to the practical manner in which the government waives its sovereign immunity:

> The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.' Such words are to be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.' ***Reading Co. v. Koons***, 271 U.S. 58, 62, 46 S.Ct. 405, 406, 70 L.Ed. 835 (1926).

Crown Coat Front Co. v. U.S., 386 U.S. 503, 517, 87 S.Ct. 1177, 18 L.Ed.2d 256 (1967).

The Ninth Circuit held that the Hensleys "could have protected their FTCA claim by seeking legal advice sooner." (Pet. App. A-9) But a plaintiff's knowledge that a defendant was acting within the scope of government employment is not the same as

knowledge that a defendant's negligence caused plaintiff's injury. While a plaintiff may by seeking legal advice learn that the harm resulting from the defendant's conduct was "negligently inflicted," ***Kubrick***, 444 U.S. at 123, the defendant's governmental status will only be established when the government certifies that its employee was performing the government's business.

B. The Circuits Have Not Uniformly Adopted The Government's Position That An FTCA Claim Is Barred Where The Government's Involvement In Causing Injury First Becomes Apparent Upon Westfall Certification And Removal.

Under the government's argument, a claim can accrue, and therefore be irretrievably lost, even though a plaintiff in fact sought legal advice and filed a lawsuit well before the expiration of the relevant state statute of limitations, as Pamela Hensley did here. While the government argues that Hensley failed to exercise reasonable diligence when she filed her lawsuit within the three years provided by Washington law, the district court found as a matter of fact that she acted with reasonable diligence by contacting Eich's private insurer, as advised by the military police on the day of the accident, and by consulting counsel only after she was unable to settle her claim herself within Washington's three-year statute of limitations, as advised by Eich's insurance adjuster. (Pet. App. A-32, 34-35)

The issue is not whether the plaintiff's access to her own medical records will put a plaintiff who was injured as a result of medical treatment on notice

of a treating physician's federal employment status, as in the cases cited in the government's brief. *See, e.g.*, ***Jones v. United States***, 294 Fed. Appx. 476, 477-78 (11th Cir. 2008) (plaintiff retained counsel and obtained medical records within two years, but filed federal tort claim more than three years following son's treatment); ***T.L. ex rel. Ingram v. United States***, 443 F.3d 956, 964 (8th Cir. 2006) ("Ingram was provided with many other medical records well before the limitations period. . ."); ***Gonzalez v. United States***, 284 F.3d 281, 285 (1st Cir. 2002) (mother consulted counsel within four months of child's birth); ***Gould v. Dept. of Health and Human Servs.***, 905 F.2d 738, 743 (4th Cir. 1990) (plaintiff retained counsel, who failed to "ma[k]e any effort to investigate" medical records until almost three years after death), *cert. denied*, 498 U.S. 1025 (1991).

In such circumstances, investigation of the injury-causing conduct itself will reveal the defendant's federal status. The issue here instead is the consequence of the government's certification of federal actor status independent of the records relevant to the injury.

Even in the medical malpractice context, the circuits do not, as the government asserts, uniformly hold that the two-year statute of limitations in 28 U.S.C. § 2401(b) will "run out" on injury victims who have not reasonably learned that the federal government is responsible for their injuries until the Attorney General certifies a case under the Westfall Act. For instance, the Third Circuit recently reversed dismissal of a FTCA case more than two years after injury because it was timely commenced under

Pennsylvania law in state court, and the first notice of the federal status of the state court defendant was when the government filed its certification and removed the case to district court under 28 U.S.C. § 2679(d)(2). ***Santos ex rel. Beato v. United States***, 559 F.3d 189 (3rd Cir. 2009).

The Third Circuit in ***Santos*** relied on the equitable tolling doctrine to toll the FTCA's statue of limitations because Santos could not have reasonably discovered that she was injured by government employees. Santos had "acknowledged that she filed her claim in the state court more than two years after its accrual. . . ," ***Santos***, 559 F.3d at 192, and the Third Circuit recognized the cases, relied on by the government here, that hold that a claim "accrues" upon discovery of the physical cause of the plaintiff's injury. The ***Santos*** court nonetheless held that "it would be inequitable to allow [the government] to avoid potential liability by reason of a limitations provision whose applicability a reasonably diligent claimant did not discover." ***Santos***, 559 F.3d at 203. *See also* ***Celestine v. Mt. Vernon Neighborhood Health Center***, 403 F.3d 76, 83-84 (2nd Cir. 2005).

Whether analyzed as an equitable exception under the tolling doctrine, or in terms of "accrual" under 28 U.S.C. § 2401(b), a cause of action that is timely under state law should remain timely under the FTCA if the plaintiff, in the exercise of reasonable diligence, does not learn that her injury resulted from the acts of the government until the government exercises its right of removal and "conclusively establish[es]" the government's responsibility under the Westfall Act. 28 U.S.C. § 2679(d)(2).

CONCLUSION

This Court should accept certiorari and hold that a claim under 28 U.S.C. § 2401 accrues when a plaintiff knows, or reasonably should have known, not just the fact of injury, but its governmental cause.

DATED this 1st day of May, 2009.

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