No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff's cause of action under the Federal Tort Claims Act accrues when the plaintiff discovers, or reasonably should discover, not just the physical cause of injury, but the government's involvement in that physical cause?

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The July 9, 2008 Opinion of the Ninth Circuit Court of Appeals, attached as Appendix A-1–A-12, is reported at 531 F.3d 1052 (9th Cir. 2008). The Hensleys' Petition For Panel Rehearing And Petition For Rehearing En Banc was denied on October 16, 2008 in the Order attached as Appendix A-44. The district court's May 23, 2006 Judgment is not reported and is attached as Appendix A-13. The district court's May 1, 2006 Findings of Fact and Conclusions of Law is not reported and is attached as Appendix A-14–A-25. The district court's March 13, 2006 Order on Defendant USA's Motion to Dismiss is not reported and is attached as Appendix A-26–A-32. The district court's September 21, 2004 Order on Motion to Dismiss is not reported and is attached as Appendix A-33–A-43.

JURISDICTION

On October 16, 2008 the Ninth Circuit entered an Order Denying the Petition For Panel Rehearing And Petition For Rehearing En Banc of its July 9, 2008 Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of 28 U.S.C. § 2401 and 28 U.S.C. § 2679 as follows:

28 U.S.C. § 2401(b):

> 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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2679(b)(1):

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(d)(2):

> Upon certification by the Attorney General 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, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

STATEMENT OF THE CASE

On November 6, 2000, Pamela Hensley was injured in a rear-end collision caused by the negligence of Naval Reserve Ensign Edward C. Eich. Eich was driving his private vehicle on a public road leaving the front gate of the Whidbey Island Naval Station near Oak Harbor, Washington. After being taken to the hospital, Mrs. Hensley was directed by a military police officer "to follow up with the

defendant's insurance company who was identified and listed on the vehicle information exchange sheet." When she did so, Eich's insurance adjuster told her repeatedly that her claim could not be settled until she completed medical treatment, and that she had three years from the date of the accident to file a lawsuit under Washington law.

Several months before the expiration of Washington's three year statute of limitations, Mrs. Hensley retained counsel, who filed a lawsuit against Eich in Washington state court on October 24, 2003. On February 11, 2004, the federal government certified that Eich was acting within the scope of employment as a naval officer at the time of the accident, removed the case to district court under 28 U.S.C. § 2679(d), and moved to dismiss on the grounds that plaintiff had failed to file an administrative claim against the government within two years of the accident.

The district court denied the government's motion to dismiss, noting that the action against the government could not have accrued until plaintiff knew she had a claim against the United States, and not against its employee Eich in his private capacity. (App. A-43) The district court stayed the action pending resolution of plaintiffs' administrative claim, filed on November 23, 2004, which the government denied on statute of limitations grounds on May 18, 2005. The district court thereafter denied defendant's renewed motion to dismiss.

The district court held that the Hensleys' action was timely because it was brought within the three year Washington statute of limitations and

because Mrs. Hensley could not reasonably have ascertained that Eich was acting within the scope of federal employment at the time of the accident or before the action was certified and removed pursuant to 28 U.S.C. § 2679. (App. A-31–A-32) The government did not ask the district court to reexamine at trial the factual basis for its determination that plaintiff innocently believed her claim was against Eich, rather than the government, before Section 2679 certification, and the district court incorporated its orders denying the government's motions to dismiss into its findings and conclusions after trial. (App. A-24)

The Ninth Circuit reversed, holding that the Hensleys' cause of action for negligence accrued on the date Mrs. Hensley was injured in an automobile accident, and that her "ignorance of the involvement of United States employees is irrelevant." 531 F.3d at 1057, *quoting* ***Dyniewicz v. United States***, 742 F.2d 484, 487 (9th Cir. 1984). (App. A-8)

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Opinion Conflicts With Decisions From Other Circuits Regarding When A Tort Claim Against The Government "Accrues."

A claim against the United States under the Federal Tort Claims Act must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). The term "accrues" is not defined in the statute. The Ninth Circuit's decision in this case conflicts with decisions by the First, Seventh, Eighth and Eleventh

Circuits, which have held that the two year statute of limitations under 28 U.S.C. § 2401(b) accrues when plaintiff knows not just of the facts of her injury, but its causal connection to the government. ***Skwira v. United States***, 344 F.3d 64, 76-80 (1st Cir. 2003) (accrual under FTCA in most tort cases occurs where plaintiff knows of fact of injury and causal connection to government), *cert. denied*, 542 U.S. 903 (2004); ***Diaz v. United States***, 165 F.3d 1337, 1339-40 (11th Cir. 1999) (knowledge of decedent's suicide did not start running of two year statue of limitations absent knowledge of plaintiff's medical treatment by the government); ***Drazan v. United States***, 762 F.2d 56, 59 (7th Cir. 1985) (FTCA claim does not accrue until plaintiff discovers or reasonably should discover governmental cause of injury); *see also* ***Garza v. U.S. Bureau of Prisons***, 284 F.3d 930 (8th Cir. 2002) (affirming dismissal of wrongful death action for failure to notify victim of inmate's escape under two year statute where plaintiff had sufficient knowledge to make inquiry into relationship between City, which housed inmate, and Bureau of Prisons, which was responsible for his supervision).

Rejecting this discovery standard, the Ninth Circuit in this case relied on its previous decisions in ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) and ***Dyniewicz v. United States***, 742 F.2d 484 (9th Cir. 1984), to hold that Mrs. Hensley's claim accrued when she "'knew both the fact of injury and its immediate physical cause.' The plaintiffs' 'ignorance of the involvement of Untied States employees is irrelevant' to determining when [the] claim accrues." 531 F.3d at 1057, *quoting* ***Dyniewicz***, 742 F.2d at 487. (App.

A-8) The Ninth Circuit held that the Hensleys' claim was untimely because "[a]t the moment Eich struck Mrs. Hensley's car with his own, the Hensleys knew both the fact of the injury and its immediate physical cause." 531 F.3d at 1057 (App. A-8).

Dyniewicz and ***Gibson*** improperly limited the discovery rule adopted by this Court in ***United States v. Kubrick***, 444 U.S. 111, 118, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979) to cases involving "medical malpractice or hidden injuries." ***Dyniewicz***, 742 F.2d at 486. This Court in ***Kubrick*** did not define accrual in terms of a plaintiff's knowledge that the tortfeasor's actions constituted negligence because "[a] plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community" regarding whether the defendant's actions amounted to a breach of a legal duty of care. 444 U.S at 123. But this limitation does not affect the requirement that a plaintiff also must have sufficient knowledge of the cause of injury to trigger accrual under Section 2401(b), which is at issue in this case. The Ninth Circuit's decisions in ***Dyniewicz***, ***Gibson***, and in this case misapply ***Kubrick's*** holding to deny a plaintiff a cause of action before the plaintiff knows or reasonably should know that the injury is caused by a tortfeasor acting within the scope of federal employment. Just as in the medical malpractice context, it is unjust to require a plaintiff to initiate a claim before he or she knows of both the injury and its cause; where a plaintiff "did not understand that the employee was on federal business at the time of the accident . . . it is inequitable to hold a plaintiff to a strict accrual rule." (App. A-30–A-31)

This principle was recognized by the First Circuit in ***Skwira***, which interpreted ***Kubrick*** to hold that a claim accrues only when the "plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." 344 F.3d at 78. Similarly, the Eleventh Circuit in ***Diaz*** held that "in order for a claim to accrue, a plaintiff must have some indication that there may have been a government cause of the injury." 165 F.3d at 1340. And in ***Garza***, the Eighth Circuit held that the plaintiff's claim accrued when the estate's lawyer pursued the plaintiff's claims because it then became apparent that there was a relationship between the municipal halfway house from which the inmate escaped and the Bureau of Prisons. 284 F.3d at 936-37.

B. This Conflict Is Of Recurring National Importance Because States In Each Of The Circuits Have Statutes Of Limitations That Are Longer Than The FTCA Statute Of Limitations.

This issue is of recurring national importance because the Ninth Circuit's reasoning will lead to dismissal of claims against the government on the grounds that the federal statute of limitations has expired before deserving plaintiffs even know they have a federal claim. As in 24 other states and the

District of Columbia,[1] located in every federal circuit, Washington state's statute of limitation is longer than the federal statute of limitations. *See* ***Celestine v. Mt. Vernon Health Center,*** 403 F.3d 76, 83-84 (2d Cir. 2005) (recognizing that it would be "unjust" to treat as federally barred a timely state suit brought by a plaintiff reasonably thinking he had a state law claim). This unjust result can arise whenever a civil action is certified for removal under 28 U.S.C. § 2679 from state court in a jurisdiction where the tort statute of limitations is longer than the two-year federal statute of limitations.

A cause of action arising out of the government's certification that an individual defendant was acting within the scope of employment "accrues" only when the plaintiff knows her injury was caused by an employee acting within his federal employment. Pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(2), upon certification by the Attorney General that a defendant in a state court action was acting within the scope of federal employment at the

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[1] ARK. CODE ANN. § 16-56-105; DEL. CODE ANN. tit. 10, § 8106; D.C. CODE ANN. § 12-301(8); FLA. STAT. ANN. § 95.11(3)(a); ME. REV. STAT. ANN. tit. 14, § 752; MD. CODE ANN. CTS. & JUD. PROC. § 5-101; MASS. ANN. LAWS ch. 260 § 2A; MICH. COMP. LAWS § 600.5805(10); MINN. STAT. ANN. § 541.05; MISS. CODE. ANN. § 15-1-49; MO. REV. STAT. § 516.120(4); MONT. CODE ANN. § 27-2-204; NEB. REV. STAT. § 25-207; N.H. REV. STAT. ANN. § 508:4; N.M. STAT. ANN. § 37-1-8, 3; N.Y. C.P.L.R. § 214(5); N.C. GEN. STAT. § 1-52(5); N.D. CENT. CODE § 28-01-16(5); R.I. GEN. LAWS § 9-1-14(b); S.C. CODE ANN. § 15-3-530(5); S.D. CODIFIED LAWS § 15-2-14(3); UTAH CODE ANN. § 78B-2-307; VT. STAT. ANN. tit. 12, § 512(4); WASH. REV. CODE ANN. § 4.16.080(2); WIS. STAT. ANN. § 893.54(1); WYO. STAT. § 1-3-105(a)(iv).

time of an accident, the action is deemed an action against the United States, which can remove the case to federal court and is substituted as party defendant. For purposes of removal, the Attorney General's certification "shall conclusively establish scope of office or employment . . ." 28 U.S.C. § 2679(d)(2).

"Accrual" can not be defined, and the government can not evade substantive liability "in the same manner in which the common law historically has recognized the responsibility of an employer," Pub. L. 100-694, § 2(a)(2) (1988), by timing a certification that is intended to protect both the employee and the injured person, to instead manufacture an argument that the statute of limitations has run before plaintiff is aware that she has a federal claim. Yet that is the result in this case, and it will be the result in any case where the plaintiff reasonably did not learn of her claim against the government until the Attorney General certified a civil action for removal to federal court in a state where the statute of limitations for tort claims is longer than that under the Federal Tort Claims Act.

CONCLUSION

This Court should accept review and adopt the reasoning of those circuits that hold that a claim under 28 U.S.C. § 2401(b) only accrues when a plaintiff knows the fact of injury and its governmental cause.

DATED this 12th day of January, 2009.

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