

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**The Estate of Jason Allen Smallwood,
Petitioner,**

vs.

**United States,
Respondent.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the face of *Scheuer v. Rhodes*, whether the trial court could have properly determined that the Estate's complaint must fail?
2. Whether 38 U.S.C. § 511(a) can preclude Tucker Act jurisdiction in light of a non-frivolous allegation for breach of implied-in-fact contract with the United States?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Through writ of certiorari to review the judgment below, the Estate of Jason Allen Smallwood prays for justice.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at Appendix A to this petition and is unpublished. The opinion of the United States Court of Federal Claims appears at Appendix B to this petition and is unpublished.

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its opinion and judgment on April 5, 2018. A copy is attached at Appendix A. No petition for rehearing was timely filed in the case. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 511(a):

The Secretary [of the Department of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

28 U.S.C. § 1491(a)(1):

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT OF THE CASE

Jason Allen Smallwood served honorably in the United States Army from September 2, 2011 to October 24, 2012. Appx.C-2. In June 2012, Mr. Smallwood suffered Traumatic Brain Injury while on active duty in Afghanistan—the result of three (3) improvised explosions within a twenty-four (24) hour period—and was hospitalized. *Id.* Following hospitalization, he was returned to the United States and discharged from duty early, due to an inability to perform satisfactorily. Appx.C-3. On November 5, 2012, Jason Smallwood took his own life. Appx.C-4.

On June 16, 2016, the Estate of Jason Allen Smallwood filed a complaint in the United States Court of Federal Claims for breach of implied-in-fact contract against the Department of Veterans Affairs. Appx.C-1-8. In it, the Estate attempted to provide notice of the claims to be defended. *Id.* Specifically, paragraphs 28 through 36, Count II in its entirety, introduced the allegations of breach. Appx.C-6-7.

Defendant, United States, filed a motion to dismiss for lack of subject matter jurisdiction, stating that, “the Court does not have jurisdiction to entertain claims seeking veterans benefits” or “claims regarding denial of such benefits,” citing 38 U.S.C. § 511(a) (The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans).

The Estate responded by explaining that it was not seeking any veterans benefits under 38 U.S.C. § 511(a), rather it was “seeking money damages” and specifically five million dollars (\$5M). Appx.D-5-6. The Estate attempted to make clear that the United States Court of Appeals for the Federal Circuit (Federal Circuit) has consistently held that “jurisdiction under the Tucker Act requires no more than a non-frivolous allegation of a contract with the government.” Appx.D-3; *Engage Learning, Inc., v. Salazar*, 660 F.3d 1346 (Fed.Cir. 2011). The Estate further urged the Court of Federal Claims to follow the precedent of this Court in *Scheuer* when deciding the motion to dismiss. Appx.D-2; *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Specifically, the Estate explained that “the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Appx.D-3; citing *Scheuer* at 236. On February 2,

2017, the Court of Federal Claims agreed with the Government and granted the motion to dismiss, stating “[t]his court lacks jurisdiction over allegations regarding the wrongful denial of benefits by the VA,” also citing 38 U.S.C. § 511(a). Appx.B-9.

On April 14, 2017, the Estate filed a timely appeal to the Federal Circuit, and, before the Federal Circuit, the Estate endeavored to establish the following: (A) the complaint against the VA alleged money damages and did not seek benefits, and (B) regardless of any other possible causes of action that arose from the facts of the case, the Estate maintains a cause of action under the Tucker Act because it is well-settled that 38 U.S.C. § 511(a) and 28 U.S.C. § 1491(a)(1) can coexist. *Hanlin v. United States*, 214 F.3d 1319, 1322 (Fed.Cir. 2000). Moreover, in its opening brief, the Estate bid to show with certainty that the trial court could not possibly have interpreted § 511(a) properly because § 511(a) requires a previous “decision by the Secretary under a law that affects the provision of benefits by the Secretary” yet the appeal contained no such decision. *Bates v. Nicholson*, 398 F.3d 1355 (Fed.Cir. 2005). The Federal Circuit agreed with the Court of Federal Claims and, pursuant to Federal Circuit Rule 36, affirmed the decision without issuing an opinion. Appx.A-1-2. The Estate now seeks a writ of certiorari from the Court on these two worthy questions.

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD GRANT THE WRIT TO DECIDE, IN THE FACE OF *SHEUER V. RHODES*, WHETHER THE TRIAL COURT COULD HAVE PROPERLY DETERMINED THAT THE ESTATE'S COMPLAINT MUST FAIL.

This case is not unlike *Scheuer* in that it concerns extremely difficult facts and unpopular causes of action. In *Scheuer*, a case involving alleged civil misconduct on the campus of Kent State University in 1970, the District Court dismissed the complaint for lack of subject matter jurisdiction. *Scheuer* at 232. The complaint stated causes of action against state officials who otherwise enjoyed governmental immunity. *Id.* The dismissal was upheld by the Sixth Circuit of the U.S. Court of Appeals but was ultimately reversed by this Court. *Id.* In an opinion on which all but one Justice¹ joined, Chief Justice Berger delivered the following:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss,

¹ Justice Douglas took no part in the decision.

whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer at 236.

Here, the Estate filed a complaint for breach of implied-in-fact contract against the Department of Veterans Affairs. Appx.C-1-8. In it, the Estate clearly identified the elements to be proven at trial, to wit: (a) mutuality of intent to contract, (b) consideration, (c), lack of ambiguity in offer and acceptance, and (d) actual authority by a representative of the government. Appx.C-6-7; *Schism v. United States*, 316 F.3d 1259 at 1301 (Fed.Cir. 2002) citing *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923). Furthermore, the Estate identified its authority as the federal common law of contracts. Appx.D-4; *Seaboard Lumber Co. v. United States*, 15 Cl. Ct. 366, 369 (1988), aff'd, 903 F.2d 1560 (Fed. Cir. 1990) ("The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims"). It is likely that the aforementioned allegation was not construed favorably to the Estate as evidenced by the trial court's adoption of the Government's mischaracterization of the complaint—that the complaint actually sought veterans benefits instead of money damages, as expressly alleged in the complaint. Appx.B-9-10.

II.**THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER 38 U.S.C. § 511(a) CAN PRECLUDE TUCKER ACT JURISDICTION IN LIGHT OF A NON-FRIVOLOUS ALLEGATION FOR BREACH OF IMPLIED-IN-FACT CONTRACT WITH THE UNITED STATES.**

A motion to dismiss may only be granted if it appears beyond doubt that no set of facts in the complaint can be proven. *Scheuer* at 236; citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Yet, the Estate's complaint was dismissed for one incorrect legal conclusion: The Court of Federal Claims could not exercise Tucker Act jurisdiction because Congress vested jurisdiction of veterans' benefits claims with the Secretary of Veterans Affairs. Appx.B-9-10. However, the trial court's conclusion was incorrect twofold, namely: (A) The Estate was not seeking veterans' benefits, (B) Even if the Estate was seeking veterans' benefits, it can still maintain a separate cause of action under the Tucker Act. Appx.D-5-6; *Hanlin* at 1319.

A. The Estate Was Not Seeking Veterans' Benefits.

The complaint plainly sought money damages. Appx.C-8. Moreover, the complaint prayed further relief in the form of: punitive damages, interest, court costs, attorney's fees, and an amount equal to the taxes on the award. *Id.* None of these forms of relief are available under § 511(a). 38 U.S.C. § 511(a) (the sole remedy under this section is veterans, dependents, and survivors benefits). In essence, the trial court determined that, although the Estate sought damages of five million dollars plus, it truly

sought veterans' benefits for a veteran who had already taken his own life. Appx.B-9-10.

Likewise, no favor was afforded the allegations set forth in the complaint, and the trial court improperly determined the complaint to be one seeking benefits. *Scheuer* at 236. The entire opinion regarding the Estate's claim against the VA stated:

In Count II, the Estate alleges that the VA "breached an implied-in-fact contract for healthcare with Mr. Smallwood" because Mr. Smallwood applied for healthcare benefits from the VA but never received them. This court lacks jurisdiction over allegations regarding the wrongful denial of benefits. A provision of the Department of Veterans Affairs Codification Act provides that "[t]he Secretary [of the VA] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." [38 U.S.C. § 511(a)]. If an individual receives an adverse decision from the Secretary, the Veterans' Judicial Review Act provides the statutory route that the individual must follow in appealing the decision. This includes an appeal to the Board of Veterans Appeals, the Court of Appeals for Veterans Claims, and finally the Federal Circuit. The Court of Federal Claims is not part of this statutory regime. Therefore, because the Estate's claim is based upon the VA's alleged failure to provide Mr. Smallwood with healthcare benefits, the court does not have jurisdiction over Count II.

Appx.B-9-10 (citations omitted).

Accordingly, the opinion of the Court of Federal Claims, by grounding the claim in § 511(a), improperly determined that the Estate would find its remedy there, and expanded the scope of § 511(a) beyond congressional intent. 38 U.S.C. § 511(a) (§ 511(a) only applies to the review of laws affecting the provision of benefits).

Conversely, the Estate did not seek any statutory remedy, it sought money damages. Appx.D-5-6. This Court provided a firm distinction between the two in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), wherein it was held that the Court of Federal Claims does not have jurisdiction where statute provides for the allowance of certain funds. *Bowen* at 895. In *Bowen*, this Court found that the suit was “seeking to enforce the statutory mandate” and not “money in compensation for the losses.” *Id.* Here, the Estate does not seek to enforce any statutory mandate, instead, it sought damages in the form of money. Appx.D-5-6.

B. Even If The Estate Was Seeking Veterans' Benefits, It Can Still Maintain A Separate Cause Of Action Under The Tucker Act.

The Federal Circuit has long since decided that § 511(a) and § 1491(a)(1) can coexist. *Hanlin* at 1319. In *Hanlin*, attorney-plaintiff sued the Department of Veterans Affairs for breach of implied-in-fact contract in the Court of Federal Claims. *Hanlin* at 1320. Similarly, the complaint was dismissed for lack of jurisdiction. *Hanlin* at 1320. *Hanlin* appealed to the Federal Circuit where the case was reversed and remanded. *Hanlin* at 1319. The Federal Circuit held “(1)...[a] nonfrivolous allegation of existence of implied-in-fact contract with United States was sufficient to confer jurisdiction in Court of Federal Claims under the Tucker Act, and (2) statute did not

grant Department of Veterans Affairs exclusive jurisdiction to decide such claims.” *Id.* Tucker Act jurisdiction is proper in the Court of Federal Claims unless divested expressly through another statute, but that statute cannot be § 511(a) here. *Hanlin* at 1321.

Likewise, it is legally impossible that the Secretary of the VA would have jurisdiction over the Estate’s claim. *Bates* at 1365. In *Bates*, the Federal Circuit further defined the meaning of “a law that affects the provision of benefits by the Secretary [of the VA],” which is to say, a law under which the original claim was presented (presumably a law within Chapter 38 of the United States Code or Code of Federal Regulations). *Bates* at 1359-1362. For these claims, once a decision has already been made by the Secretary, jurisdiction to review the same question on appeal belongs exclusively to the Secretary. *Id.*; 38 U.S.C. § 511(a). Notwithstanding, the Secretary does not have jurisdiction over “controversies that are committed by statute to other tribunals,” and certainly not over controversies that have not been previously decided by the Secretary. *Id.* at 1366.

Through *Hanlin* and *Bates*, the Federal Circuit made clear that § 511(a) only vests jurisdiction with the Secretary of the VA for: laws affecting the provision of benefits and, of those, claims that have already received a decision from the Secretary. *Hanlin* at 1321; *Bates* at 1366. The Estate of Jason Smallwood never received an adverse decision from the Secretary regarding benefits and for good reason—the Estate “seeks money damages” and not veterans’ benefits. Appx.C-8, Appx.D-5-6.

Because the Federal Circuit has previously decided that § 511(a) and § 1491(a)(1) can coexist and because no other reason was provided by the trial court, dismissing the complaint was done so in error.

CONCLUSION

The Estate of Jason Allen Smallwood provided evidence sufficient to survive a motion to dismiss, and the Estate stands ready to present more. On this, the petition for a writ of certiorari should be granted.

Year of the Lord,

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