

Docket Number 2018-628
In the Supreme Court of the United States

Rebekah Cooper,
as Administratrix of the Estate of Jason
Cooper,
Petitioner,

v.

Ehtsham Haq, M.D., Amjed Javaid, M.D.,
and Amjed Javaid, L.L.C.
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

Petitioner's Reply Brief
in Response to Respondent Ehtsham Haq's
Opposition to Petitioner's Writ of Certiorari

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REPLY ARGUMENT

Any argument in this Court on an important issue of federal law that claims its only precedential support in a decision of the intermediate appeals court of New Mexico would ordinarily require no response.¹ However, this reply is required because Dr. Haq's reliance on *Williams v. Mann*, 388 P.3d 295 (N.M. 2016) both ignores the determinative facts in *Williams* and invites a misunderstanding of the record below in this case. In *Williams v. Mann* the Court of Appeals of New Mexico was careful to detail the factual record and the history of pleadings in its explanation for not allowing tolling under 28 U.S.C. § 1367.² The pivotal fact and elemental differences between *Williams* and the present case is that the plaintiff, Ms. Williams, knew that Mr. Mann was a potential defendant before the statute of limitations in her case expired. Indeed,

¹ Petitioner intends no disrespect either to New Mexico or its courts and is certain that had the New Mexico Court of Appeals been faced with the facts of record in this case, it would have allowed the amendment and its decision would have been consistent with the requirements of federal law.

² The Supreme Court of Alabama affirmed the trial court's error without explanation or description of the record. Dr. Haq does not take issue with Ms. Cooper's description of the history of this case as detailed in this Petition.

because Mann himself was the alleged perpetrator, Williams knew his identity before her first complaint was filed. In the instant case, however, Ms. Cooper did not learn of Dr. Haq's involvement in her husband's care and treatment until after the statute of limitations expired. She then immediately amended the complaint to name him as a defendant.

Williams v. Mann centered on the timeliness of Williams' New Mexico Human Rights Act ("NMHRA") claim against Mann. Williams was hired to manage and operate a string of dentists' offices called Four Corners Family Dental. Mann was her supervisor and allegedly sexually harassed and underpaid her. 388 P.3d 295, 298.

Williams first brought a state court lawsuit against Mann that made a number of claims against him but omitted an NMHRA claim. While the state court lawsuit was pending, Williams filed a second suit in U.S. District Court in New Mexico against her employer Four Corners Family Dental for violating the NMHRA. Again, Mann was not named as a defendant, even though the NMHRA permitted suit against him individually. *Id.* Williams later dismissed her federal court case. 388 P.3d at 299-300. During this time, the statute of limitations for Williams' NMHRA claim against Mann expired. After she dismissed her federal case,

Williams amended her state court lawsuit against Mann adding Four Corners Family Dental as a defendant and for the first time asserting an NMHRA claim against Mann as an individual. 388 P.3d at 300 at 302.

Mann moved to dismiss the NMHRA claim against him on the ground that it was barred by the statute of limitations. Williams argued that the claims against Mann were tolled by 28 U.S.C. § 1367 during the pendency of the federal court case and for a period of 30 days after the federal court case was dismissed. The trial court granted Mann's motion to dismiss and on appeal the New Mexico Court of Appeals affirmed the dismissal explaining that although an NMHRA had been brought against Four Corners Family Dental in federal court, no NMHRA claim was ever brought against Mann individually either in the first state court case or in the later federal court case. Thus, because Mann was never sued in federal court for violating NMHRA, and both he and his role in the alleged misconduct were known to Williams throughout the litigation, and the statute of limitations for an NMHRA claim had run before the state court case was amended, § 1367's tolling provisions could not permit Williams to bring an NMHRA claim against Mann in the state court case.

The linchpin of this decision is Williams' knowledge that Mann was a potential defendant long before any suit was filed. None of the recognized grounds for tolling under either New Mexico or federal law would apply. As the victim, she was well aware of his unlawful conduct when it was first visited on her and could have brought an NMHRA claim against him before the limitations period expired.

The purpose of § 1367 is to ensure that rights to recovery under state laws are not lost during the pendency of federal jurisdiction. The statute does not and was never designed to give a party the right to sandbag an opponent by preserving a claim against a defendant whose identity and conduct was long known to the plaintiff.

In sharp contrast to the record in New Mexico, Ms. Cooper never knew of Dr. Haq's involvement until after the expiration of the AMLA's two-year statute of limitations. Here, it is uncontested that Ms. Cooper could not have included Dr. Haq in the federal court case because she did not know who he was or that he had any role at all in her husband's care. He is not present in any of the hospital or police records obtained by Mrs. Cooper or her attorneys, and his involvement was not known even to attorneys for the hospital defendant. In his

reply to this Petition, Dr. Haq does not dispute any of the following:

- During Mr. Cooper's confinement to DMH-West, Ms. Cooper never knew Dr. Haq treated her husband. C.456-58; C.728-31.

- Ms. Cooper never spoke to Dr. Haq before Mr. Cooper died. *Id.*

- Ms. Cooper never spoke to Dr. Haq after Mr. Cooper died. *Id.*

- Mr. Cooper's medical records do not mention Dr. Haq. *Id.*

- The Decatur Police Department file does not refer to or mention Dr. Haq. *Id.*

- During the pendency of the suit in federal court Ms. Cooper was prohibited from engaging in discovery might have yielded Dr. Haq's name. *Id.*

- Only after the expiration of the two-year statute for Ms. Cooper's medical-malpractice claim against Dr. Haq, did Ms. Cooper learn that Dr. Haq may have treated her husband. Upon that discovery Ms. Cooper's counsel immediately sought to verify with attorneys for DMH-West that Dr. Haq had treated Mr. Cooper. C.650-56; C.713-17. Counsel for DMH-West were themselves unaware of any role Dr. Haq in Mr. Cooper's treatment and could not confirm that he had actually treated Mr.

Cooper during his admission to DMH-West. C.713-17. Thus, *Williams* is thoroughly distinguishable from this case and because of its dependence on the history of that case, by implication offers support for this petition.

Just as he gets no help from the New Mexico precedent, Dr. Haq's alternative argument, that he had to be a defendant in the federal court complaint for the tolling period to have applied to him, has no support in either Eleventh Circuit or Alabama case precedent. His reliance on *Rester v. McWane, Inc.*, 962 So. 2d 183 (Ala. 2007), is misplaced. *Rester* holds only that the tort claims brought in the subsequent state court action have to be the same as those asserted in the original federal court action, not that the parties be identical. *Rester* refers specifically to "same claims" but not to "same defendants." Ms. Cooper's *First Amended Complaint* alleges the identical state-law tort claims that she alleged in the federal court complaint.

28 U.S.C. § 1367(d) preserves the timeliness of all state law claims, including the right to add newly-discovered defendants in circumstances such as those in the uncontested record of this case, that are permitted by state law. Because the *First Amended Complaint* was filed within the statutory 30-day tolling period this Court should grant Ms. Cooper's petition, issue the

writ, and reverse the Alabama Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 12.28.2018, in compliance with the filing and service requirements set out in *Sup. Ct. R.* 29, I submitted the foregoing using the Supreme Court's Electronic System and that I served three copies of the foregoing by placing same in the United States mail, postage pre-paid and properly addressed, on the following attorneys, who represent all parties to this proceeding:

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