

Case No. 19-5173

IN THE
Supreme Court of the United States

JOHNNY KIRKLAND, *Petitioner*

versus

HUNTINGTON INGALLS INCORPORATED, *Respondent*

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

**SUPPLEMENTAL BRIEF OF RESPONDENT
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's finding that Petitioner's claims were barred by the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a).
2. Whether the Court of Appeals correctly determined that the dual capacity doctrine did not apply to Petitioner's claims.
3. Whether the Court of Appeals correctly affirmed the District Court's finding that Petitioner's claims were barred by the applicable statute of limitations.

PARTIES TO THE PROCEEDINGS

1. Petitioner, the *pro se* Plaintiff/Appellant below, is Johnny Kirkland.
2. Respondent, Defendant/Appellee below, is Huntington Ingalls Incorporated.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Respondent discloses that Huntington Ingalls Incorporated is a wholly owned subsidiary of Huntington Ingalls Industries, Inc., a publicly held corporation (NYSE: HII).

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OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit was filed on March 28, 2019 [Resp. Appendix A]¹ and designated as a non-published opinion which can be found at 758 Fed.Appx. 345 (Mem) (5th Cir. 2019). The Court of Appeals denied the Appellant's Petition for Rehearing by unpublished Order dated April 23, 2019 [Resp. Appendix C], with the Court's mandate issued on May 1, 2019 [Resp. Appendix D].

The District Court's non-published Memorandum Opinion and Order was issued on September 11, 2018, and can be found at 2018 WL4343410, with a Final Judgment of Dismissal issued on the same date [Resp. Appendix B]. Plaintiff filed a Motion to Reinstate Dismissed Case which was denied by the District Court by unpublished Order of October 1, 2018 [Resp. Appendix E].

¹Petitioner's Appendix did not include all orders issued below. Accordingly, Respondent's Appendix is submitted which includes all orders issued in both the United States District Court and the Court of Appeals as well as the summary judgment affidavit of Steven Pierce which was submitted in the District Court proceedings.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 18, 2019. Appellant filed a petition for rehearing which was denied on April 23, 2019. Appellant's petition for a writ of certiorari was filed on July 5, 2019, and docketed in the Supreme Court on July 15, 2019. According to the form petition for writ of certiorari submitted by Petitioner, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner filed a *pro se* Complaint in the District Court wherein he alleged that while he was employed by Huntington Ingalls Incorporated (Huntington Ingalls) at its shipyard in Pascagoula, Mississippi, he was exposed to asbestos which resulted in “his illness” for which he sought damages of “2.8 MILLION.” Petitioner claimed that he began working at Huntington Ingalls as a third class laborer in 1971 at the age of 13, although he represented on his employment application that he was 18 years old.

Without leave of court, Petitioner filed an Amended Complaint on October 4, 2017, naming as additional defendants the trusts of numerous asbestos manufacturers such as Fibreboard Asbestos Trust, Armstrong Asbestos Trust, Gypsum Asbestos Trust, Flintkote Asbestos Trust, etc.² The Amended Complaint alleged that Petitioner worked as a laborer in the “27th Department” painting, cleaning up, carrying out insulation in the trash, sand blasting, and rust grinding and sought damages of “5 or TEN BILLION DOLLARS.”

On December 4, 2017, Kirkland filed a Second Amended Complaint which was stricken for noncompliance with FRCP 15. He then filed a Motion to Amend Pleadings seeking to supplement his Amended Complaint with an allegation that Huntington Ingalls failed to screen his employment application, or it would have

²The Magistrate Judge later entered Orders granting Petitioner’s subsequent motions to dismiss all Defendants other than Huntington Ingalls.

been discovered that he was a minor and that he had used his cousin's Social Security number to obtain employment. The Motion was granted.

Huntington Ingalls timely moved for summary judgment because Petitioner's claims fell within the exclusive jurisdiction of and were preempted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). In the alternative, Huntington Ingalls argued that Petitioner's claims were time barred by § 15-1-49(1) of the Miss. Code.

In responding to the Motion for Summary Judgment, Petitioner admitted that Huntington Ingalls was "covered under the LHWCA," but argued for the first time that he was also "suing Huntington Ingalls (sic) under the Dual Capacity Doctrine for strict liability in tort, breach of duty, negligence, punitive damages, and illegal underage working," citing Mississippi Code § 71-1-17. He also argued for the first time that his claim was not time barred because his injury was latent.

Huntington Ingalls replied and again pointed out that to the extent the claims were not preempted by the LHWCA, they were time barred by the three-year statute of limitations found at Mississippi Code § 15-1-49(1) and that Petitioner failed to present any evidence to support his claim of a latent injury.

On September 11, 2018, the District Court granted Huntington Ingalls' Motion for Summary Judgment and entered a corresponding final Judgment of Dismissal. An appeal was taken to the Court of Appeals for the Fifth Circuit

which, by *Per Curium* Order of March 18, 2019, affirmed the District Court’s grant of summary judgment.

SUMMARY OF THE ARGUMENT

Pursuant to its obligations under Supreme Court Rule 15.2, Huntington Ingalls files this Supplemental Brief In Opposition to Petition for Writ of Certiorari in order to address misstatements of fact in Kirkland’s “Reply Brief” dated August 13, 2019. In all other respects, Huntington Ingalls incorporates by reference the arguments presented in its initial Opposition Brief dated and docketed on July 30, 2019.

ARGUMENT

Misstatements in Petitioner’s “Reply Brief” In Support of Petition for Writ of Certiorari

At page 5 of his “Reply Brief,” Petitioner makes the following (mis)representation:

In my medical records was a diagnose of asbestos, and in my medical Excerpts was a Pathology Report of Mesothelioma Diagnosis Dated 8/9/2016.

[Reply Brief at p. 5]. These allegations are simply false. The referenced pathology report of August 9, 2016, was included in Petitioner’s Record Excerpts at the Fifth Circuit and can be found in the Record on Appeal to the Fifth Circuit at 18-60710.716. Contrary to Petitioner’s assertions, it makes absolutely no

reference to mesothelioma. Nor does it mention asbestos, asbestosis, or any asbestos-related illness. Rather, the pathology report references a granular cell tumor, the type of which “behave predominantly in a benign fashion.”^{3,4} Id. Additionally and also contrary to Petitioner’s assertions, there is no medical document included in the Record On Appeal which contains any reference to asbestos, much less the “diagnosis of asbestos” which Petitioner claims. In fact, the official 835-page Record on Appeal at the Fifth Circuit included a total of 9 pages of medical records (found at 18-60710.708 through 18-60710.716). There is no mention of asbestos, asbestosis, mesothelioma, or any asbestos-related illness on any of these pages.

Accordingly, Petitioner’s “Reply Brief” assertions are unfounded, untrue, and have no support in the record. These misrepresentations are called to this Court’s attention in accordance with Huntington Ingalls’ obligations under Supreme Court Rule 15.2.

³It noted that there are malignant examples, but the pathologist reported the features associated with those were not identified in Petitioner’s sample. Even if this had been a malignant granular cell tumor, however, there is nothing in the pathology report to relate it to asbestos exposure or to somehow associate it with a diagnosis of mesothelioma.

⁴The 2016 pathology report was part of the record before the District Court as Document 52-1, page 10. In the District Court’s Memorandum Opinion and Order Granting Defendant Huntington Ingalls’ Motion for Summary Judgment, the District Court noted that its opinion was based on a “review of the Motions, the Response, the related pleadings, the record, and relevant legal authority.” [Resp. Appendix B, p. 1].

In all other respects, Huntington Ingalls incorporates by reference the arguments presented in its initial Opposition Brief dated and docketed on July 30, 2019.

CONCLUSION

The District Court's grant of Summary Judgment to Huntington Ingalls was eminently correct, and the affirmation of the District Court's ruling by the Court of Appeals for the Fifth Circuit was proper in all respects. Petitioner has presented no compelling reason for the granting of certiorari in this case, and his Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 23rd day of August, 2019.

HUNTINGTON INGALLS INCORPORATED

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been transmitted by Federal Express (standard overnight) and by U. S. Mail, first class and postage prepaid, to:

Mr. Johnny Kirkland, *Pro Se* Petitioner
124 Jefferson Street
Castleberry, AL 36432

This the 23rd day of August, 2019.

/s/ Richard P. Salloum
RICHARD P. SALLOUM