

ORIGINAL

No. 19-6514

IN THE

FILED
OCT 30 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

ALAN M LESCHYSHYN — PETITIONER
(Your Name)

vs.

DINESHKUMAR PATEL et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ARIZONA COURT OF APPEALS — DIVISION ONE

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALAN M LESCHYSHYN
(Your Name)

FCI LA TUNA, P.O. BOX 3000
(Address)

ANTHONY, TX 88021
(City, State, Zip Code)

NOT APPLICABLE
(Phone Number)

SUMMARY OF THE ARGUMENT

The Petitioner's Seventh Amendment rights were not protected in his defense against a Motion for Summary Judgment re: Statute of Limitations.

Leschyshyn intends to point out the following in his brief when his Petition for Writ of Certiorari is GRANTED:

- 1) Leschyshyn provided the courts with his plausible legal theory that the definition used by the court(s) in his case to determine if he had an unsound mind is broad, not narrow. Case law supports the broader definition as it states that a person does not have to be institutionalized nor be adjudged legally incompetent to have unsound mind;
- 2) Leschyshyn's evidentiary support for his claim of unsound mind and his legal theory comes from factual based conclusions made by his 3 medical experts. These conclusions were supported by:
 - detail facts;
 - observations;
 - history from various sources;
 - over 40 scientific medical literature;
 - blood test results correlating to the atypical behaviors;
 - clinical notes;
 - medical diagnoses.
- 3) Leschyshyn provided a plausible legal theory with the asserted version of facts to have been allowed to advance the argument to a jury to decide.

Petitioner prays that this Court will reverse the lower court's decision and have the case remanded back to the lower trial court so it can advance to trial by jury.

QUESTION(S) PRESENTED

1. With respect to the Petitioner's Seventh Amendment rights, does the judge(s) have to be convinced about legal theory which remains viable under the asserted version of facts that the Petitioner puts forth in defense of a Motion for Summary Judgment re: Statute of Limitations in order to be permitted to advance to trial by jury?

Case laws that will be the standard of review are:

- "No hint anywhere from the Supreme Court that the judge himself be convinced." Nader v. de Toledano (June 29, 1978 Court of Appeals, District of Columbia);
- "[The] showing of 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law." McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902, 905 (9th Cir. 1968);
- "A plaintiff opposing a defense motion for summary judgment, in order to make the evidentiary showing that will permit him to advance to trial must 'show that he has a plausible ground for the maintenance of the cause of action.'" Horne v. Federal Reserve Bank of Minneapolis, 344 F.2d 725, 729 (8th Cir. 1965); Repsold v. New York Life Insurance Co., 216 F.2d 479, 483 (7th Cir. 1954); Pen-ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 877 (6th Cir. 1943);
- 2. Does the judge(s) get to dismiss the facts as provided by the Petitioner as not being hard evidence because they are not convinced of the Petitioner's legal theory?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Advanced Endocrine & Metabolism, P.C.

RELATED CASES

Not applicable.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT.....	11
CONCLUSION.....	12

INDEX TO APPENDICES

APPENDIX A - Decision of State Court of Appeals

APPENDIX B - Decision of State Trial Court

APPENDIX C - Decision of State Supreme Court Denying Review

APPENDIX D - Not applicable

APPENDIX E - Not applicable

APPENDIX F - Not applicable

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Neder v. de Toledano	ii
McGuire v. Columbia Broadcasting System, Inc.	ii
Horne v. Federal Reserve Bank of Minneapolis	ii
Repsold v. New York Life Insurance Co.	ii
Pen-ken Gas & Oil Corp. v. Warfield Natural Gas Co.	ii
Allen v. Powell's Int'l, Inc.	6
Thompson v. Better-Bilt Aluminum Prods. Co.	7
Florez v. Sargent	7, 8, 10
Doe v. Roe	7, 8, 10
United States v. Various Slot Machines on Guam	7
Orme School v. Reeves	8
Kiley v. Jennings, Strous & Salmon	8
Webster v. Culbertson	8
Gust	10
STATUTES AND RULES	
Arizona Rules of Evidence	5
A.R.S. § 12-502	6, 8
OTHER	
Seventh Amendment	i, ii

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the State Trial court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was September 23, 2019. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment - Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Arizona Revised Statute (A.R.S.) § 12-502 - Effect of Minority or Insanity. If a person entitled to bring an action other than those set forth in article 2 of this chapter is at the time the cause of action accrues either under eighteen years of age or of unsound mind, the period of such commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others.

STATEMENT OF THE CASE

1. Medical malpractice lawsuit, Alan M. Leschyshyn sued Dr. Dineshkumar Patel, his former endocrinologist, in February 2017 for prescribing two dangerous drugs to treat a pituitary gland tumor:
 - Parlodel in March 2005;
 - Androgel in May 2006;without warning him about their dangers and serious side effects.
2. Unbeknownst to Leschyshyn and Dr. Patel, Parlodel changed their prescription insert label in 2012 to include the following warning:
 - "patients can experience intense urges to gamble [risk taking], increased sexual urges, intense urges to spend money uncontrollably, and other intense urges";
 - "patients may be unable to control these urges";
 - "patients...not recognize there behaviors as abnormal".
3. In 2012, Leschyshyn embarked on a sophisticated, three-year criminal conspiracy to commit wire, mail and bank fraud. He was arrested on February 18, 2015.
4. After the arrest, Leschyshyn's wife did some research of her husband's medications on the internet. Leschyshyn confronted Dr. Patel on February 27, 2015 with his wife's findings which led Dr. Patel to discontinue the Parlodel prescription.
5. Leschyshyn hired 3 medical experts:
 - Neuro Psychiatrist - Dr. Choi, who specializes in Neurolaw;
 - Neurologist - Dr. Rubenstein;
 - Neuro Pharmacologist - Dr. Ronaldson.
6. From July 2015 to July 2016, Leschyshyn through his medical experts did a forensic investigation into his criminal actions along with other atypical behaviors from the period 2006 - 2015.
7. All 3 medical experts concluded that the medications did in fact

cause Leschyshyn to commit the criminal behaviors along with the other atypical behaviors. Arizona Rules of Evidence 704 allows expert testimony, as a result Leschyshyn also used this expert testimony along with a medical malpractice expert, Dr. Doerr, in his lawsuit against Dr. Patel.

8. Dr. Choi's report stated:

- Leschyshyn "suffered from two psychiatric illnesses" which "significantly reduced [his] mental capacity";
- his "judgment and decision making was impaired for many years";
- however, his "cognitive skills were still in tact:
 - normal IQ;
 - normal working memory;
 - normal access to language and math functions."

9. The federal court refused to mitigate Leschyshyn's criminal sentence because Leschyshyn's counsel failed to have any of his medical experts in attendance at the hearing to address the judge's main concern with the medical mitigation argument. The concern was whether any of the expert reports explained if Leschyshyn was so cognitively impaired by his medications, how could he participate in a sophisticated fraud over a number of years. Leschyshyn's counsel failed to state that on page 34 of Dr. Choi's report, it stated:

- "Parlodel and Androgel impair cognition in very specific ways that spare overall intelligence";
- "Can actually experience enhanced problem-solving abilities and increases in genuine productivity, albeit with impaired judgment, certainly what Leschyshyn experienced";
- "Well known that medication-induced impulse control disorders can persist for years, usually until financial, legal and behavioral consequences become so severe that problems are impossible to ignore,

as was the case with Leschyshyn."

Leschyshyn was sentenced to 235 months in federal prison on October 31, 2016. Leschyshyn had filed in July 2019 a Notice of Appeal to his 2255 Motion for Ineffective Counsel.

10. In Leschyshyn's lawsuit against Dr. Patel, he alleged in defense of Dr. Patel's Motion for Summary Judgment re: Statute of Limitations, the statute was tolled under "unsound mind" exception (A.R.S. § 12-502).

The Superior Court signed the defense's Motion for Summary Judgment. Leschyshyn timely appealed.

The Court of Appeals affirmed the lower court's judgment. The following was the findings:

- "Leschyshyn did not come forward with 'hard evidence' to prove an unsound mind from 2006 to 2015";
- "Leschyshyn did not demonstrate he was unable to carry on the day-to-day affairs of human existence, nor does it show he did not understand his legal rights or liabilities";
- "Leschyshyn provides no evidence he was institutionalized for mental health reasons, experienced suicidal ideation, could not function at work and could not keep employment."

11. Per Wikipedia, activities of daily living includes:

- working;
- managing money.

12. Per the National Alliance on Mental Issues (NAMI), the average delay between onset of mental illness symptoms and treatment is 11 years. The study behind this statistic states the lack of sooner intervention as the reason for the delay. In Leschyshyn's case, it was 10 years and unfortunately there was no serious attempt of a intervention by his family &/or friends.

13. Leschyshyn used in state courts the Allen [Allen v. Powell's Int'l,

Inc., 518 P.2d 588 (Ct. App. 1974)] definition of unsound mind, which is a two prong test:

- a) unable to manage day-to-day affairs.

Leschyshyn's plausible legal theory was that yes, he was attempting to work in a financial role and tried to take care of personal finances, but he clearly should not have been allowed to. The catastrophic events of financial ruin and legal problems are hard facts. Dr. Choi's report explained how cognitively his overall intelligence was spared so that he could go through the motions of daily living, like so many Americans with severe mental illnesses, albeit his judgment/decision making was impaired.

Case law that Leschyshyn offered the lower courts were:

- "At the stage of the case, of course, we must take the facts in light favoring the party against whom summary judgment was granted." Thompson v. Better-Bilt Aluminum Prods. Co., 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).
- "An action may be dismissed if the non-moving party has done no more than create a 'scintilla or doubt'." Florez v. Sargent, 528, 917 P.2d at 257.
- "The affidavits [from a therapist]...presented facts, not mere conclusory opinions of post-traumatic disorder or unsound mind." Doe v. Roe, 191 Ariz. 313, 951, 965 ¶ 46 (1998).
- "[T]here are empirical facts easily verifiable and more difficult to fabricate than a narrow claim of inability to bring the action." Florez id at 255.
- "In the context of a motion for summary judgment, an expert must back up his opinion with specific facts." United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981).

- "Moonshadow's expert,....states that the symptoms of post-traumatic stress disorder made Moonshadow dysfunctional and depressed, thereby making it very difficult to conduct her life 'normally',....This is conclusory, and without value within the meaning of Rule 56(e), Ariz. R. Civ. P." Florez, 185 Ariz. 521, 917 P.2d 250, 527 (1996). "The reports [which detail facts, test results, observations, clinical notes, history from various sources, and medical diagnoses] referred to in the affidavits are replete with both factual conclusions and supporting evidentiary facts." Id. at 533.
- "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the fact are jury functions, not those of the judge..." Orme School v. Reeves, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990).
- "A litigant need not be institutionalized nor be adjudged legally incompetent to qualify for tolling under A.R.S. § 12-502." Kiley v. Jennings, Strous & Salmon, 187 Ariz. 136, 141, 927 P.2d 796, 801 (Ct. App. 1996).
- "On motion for summary judgment, reasonable inferences are to be viewed in the light most favorable to the non-moving party." Webster v. Culbertson, 158 Ariz. 159, 160, 761 P.2d 1063, 1064 (1998).
- "Plaintiff is not required to discredit all evidence of ability to manage affairs - such controverting evidence merely establishes that there is a jury question on an issue of material fact." Doe id at 965 ¶ 44.

Leschyshyn in the present case presented hard evidence that is verifiable and was supported by test results, observations, history from various sources & medical diagnoses that formed the factual conclusions in his medical expert reports.

For example, the following was part of what was provided:

Working

(i) sanction

Fact - fired from job because of financial irregularities.

Verifiable - sanction document issued by professional accounting body;

- scientific literature;
- blood test results;
- medical diagnoses.

(ii) criminal charges

Fact - participated in a fraud related to a business that Leschyshyn was working with.

Verifiable - PreSentence report issued by U.S. Dept. of Justice;

- scientific literature;
- blood test results;
- medical diagnoses.

Managing money

(i) overspending

Facts - \$300,000 loss on sale of house;
- \$250,000 in landscaping;
- \$130,000 in debt;
- \$60,000 in timeshare.

Verifiable - credit report, tax returns, agreements, receipts;
- scientific literature;
- blood test results;
- medical diagnoses.

b) or, unable to understand legal rights or liabilities.

Leschyshyn's plausible legal theory is that because of an impairment to "aversive learning which allowed the impairment

of judgment to continue for many years" according to Dr. Choi,

Leschyshyn was unable to appreciate his abnormal behaviors and thus unable to appreciate his legal rights or liabilities.

Case law that Leschyshyn offered the lower courts were:

- "When discovery occurs and a cause of action accrues are usually and necessary questions of fact for the jury." Gust, 182 Ariz. at 591, 898 P.2d at 969.

- "The discovery rule does not require a person to file a complaint based on knowledge the person believes is false." Doe id at 962 ¶ 35.

- "Consultation with an attorney, the single factor evidencing an ability to understand legal rights in both Allen and Florez, occurred within two years of the filing date. Thus the Court of Appeals erred in affirming the trial judge's award of summary judgment." Doe id at 967 ¶ 52.

- "It is for the jury to

(1) discern when the cause of action accrued, and
(2) determine whether at that time and thereafter Plaintiff was of unsound mind." Doe id at 968 ¶ 53.

Leschyshyn and his wife began to investigate after his arrest on February 18, 2015 and immediately seen Dr. Patel on February 27, 2015, when they found out the possible cause of his abnormal self destructive behaviors and unsound mind. Leschyshyn filed his complaint on February 17, 2017, requesting trial by jury, within the two year statute of limitations after tolling for unsound mind.

REASONS FOR GRANTING THE PETITION

This case is important to the public because per the NAMI, America is in a mental health crisis.

- "4.6% of U.S. adults experienced serious mental illness in 2018 (11.4 million people);
- One in 25 U.S. adults experience serious mental illness each year;
- 3.9 million Americans that have severe mental illness are currently untreated."

The courts will see more & more cases involving mental health issues. Constitutional rights of these individuals, including Petitioner, needs to be upheld by all the courts, criminal and civil, in these cases. The public opinion of the courts will be stained if these rights are not protected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Alan M Leschyshyn

Date: October 30, 2019