

No. 19-737

In the
Supreme Court of the United States

JAMES NATHANIEL DOUSE,
Petitioner,
v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**SECOND SUPPLEMENTAL
BRIEF FOR PETITIONER**

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SECOND SUPPLEMENTAL BRIEF

Key, in my view, a petitioner cannot raise new arguments in its petition for certiorari, as Petitioner in 19-737, did not. *See Carmichael v. Kellogg, Brown, & Root Serv., Inc.*, 572 F.3d 1271, 1293 (11th Cir. 2009) (holding that issues not briefed on appeal are deemed abandoned).

I.

The Eleventh Circuit's Court of Appeals on May 22, 2019, Decision's were Devastating and Destabilizing.

This issue comes up very OFTEN and is important enough to warrant review. Two federal circuits clearly disagree on a point of law. 4TH AND 11TH on North Carolina Disability Statutes NCGS 1-17; 35A-1101 Definitions Incompetency and Guardianship; 1-19; 1-20 AND North Carolina Failure to Warn Statutes.

The alleged split between federal circuits regarding how to answer a question of federal law which are Both "clear" nor "deep." This case is "Not shallow" nor exaggerated and warrant a grant of certiorari. These issues are coming up with some frequency, as you know and This court should be permitted to weigh in, is quite warranted.

Petitioner 19-737 is concerned that Respondent January 09, 2020, having waived its Right to respond to Petition 19-737, is that of a signals That Petition 19-737 is completely frivolous. However, the Petitioner believes that this petition, 19-737, qualifies and is specifically the kind of case where North Carolina Mandatory Directive, North Carolina Failure To Warn

State Statutes are The type of case that The Supreme Court looks for as this is a case “involving unsettled questions of federal constitutional or statutory law of general interest.”

- cases raising a federal question to which different courts (usually federal circuit courts) have given conflicting answers on an important federal question,
- cases clearly raising an important federal question, and
- cases that an appellate court decided in conflict with governing Supreme Court precedent. (SCR 10.)
- Cases where a District Court and a Circuit Court misapplied Law such as The North Carolina Disability Mandate and The North Carolina Failure To Warn State Statutes where these issues are not inextricably linked with the facts of this case as The District Court has to Fail to consider any new Evidence and has Fail to Grant my Motion to Amend my Complaint and Never issued ANY Order, verbal nor written, GRANTING my Motion to Amend my ComplaintFurthermore, A Granted Order It's not Docketed
- Additionally, The Statements:

“Mr. Douse also filed a motion to amend his complaint. In that motion, Mr. Douse states he wishes to amend his complaint to add the statement of Secretary of the Department of

Veterans Affairs Bob McDonald concerning the ATSDR report on contamination of drinking water at Camp Lejeune, as well as several points of procedural history in the litigation.”

Placed in the District Court December 05, 2016 Opinion/Ruling regarding my Motion are not my statements. The District Court had no idea what I was going to submit because it never Granted my Motion to Amend. There is No Docket/Document number where the District Court Granted my Motion so how could they know what I was going to say? But rather the statement above is that of the District Court or one of its Staff Attorneys but not my words. I am sure this was done because The District Court did not want me to Amend my Complaint and did not want to include NORTH CAROLINA DISABILITY MANDATES.

Respectfully, Had the Appeals Court Not caused the Spilt, conflict and misapplication of law, where The petition 19-737 justifiably seeks review, The Review by the Appeals Court would have overturned some of the factual findings of that District Courts that was presented in its December 05, 2016 Ruling/Opinion. Again, *see Carmichael v. Kellogg, Brown, & Root Serv., Inc.*, 572 F.3d 1271, 1293 (11th Cir. 2009) (holding that issues not briefed on appeal are deemed abandoned).

These issues raised in Cert Petition 19-737 were properly preserved and warrant Review. See App. 2.

II.

Lastly, Removing a State Case in Default to Federal District Court when defendant has violated Protected

constitutional Rights State Constitutional Rights and Federal Statutes. The Default should be GRANTED to this Petitioner 19-737. Petitioner has properly alleged which specific action caused his Injuries and that the "Circuit Courts, duty to protect those who have been adjudged incompetent extends beyond the trial courts to the appellate courts." *See id.* (exercising supervisory power to assume jurisdiction without an appeal and review errors committed against an incompetent "individual").

III.

It is not unprecedeted for a Court of Appeals to have its Mandate Recall when seeking Justice. *See Demjanjuk v. Petrovsky*, 85-3435 (6th Cir. June 5, 1992)(reopening case on motion of the court), reprinted in 10 F3.d 338,356 app.(6th Cir. 1993).

Petition 19-737 for a writ of certiorari Should be GRANTED. The order that Recalls 11th Circuit Court of Appeals' Mandate where the judgments of the court of appeals we reentered on May 22, 2019. A petition for rehearing en banc was denied on September 5, 2019. That Eleventh Circuit Court of Appeals, collectively, have earned the Right to Stand on its Ruling and therefore a review should be given as a just opportunity to see rather their Ruling versus a properly viewed and consideration of North Carolina Mandatory Directive is applicable to this Petition 19-737.

Again, This Petitioner/Plaintiff never waived its rights to challenge on appeal an argument that he failed to raise before the District Court. Again, as my Motion to Amend my Complaint and Reconsideration was

Raised in Federal District court and Denied by Federal District Court Again, Plaintiff was never allowed the Opportunity to Raise argument submit new Evidence As The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 774 Fed. Appx. 564.1 A prior opinion of the court of appeals (Pet. App. 19-34) is reported at 768 F.3d 1378. The opinion and order of the district court is reported at 263 F. Supp. 3d 1318. A prior opinion of the district court is not published in the Federal Supplement but is available at 2012 WL 12869566.

CONCLUSION

The judgment The Eleventh Circuit Court of Appeals Judgement May 22, 2019 Ruling should be vacated. Its Mandate Recalled and This case should remanded to the United States Court of Appeals. In light of North Carolina Mandatory Directives Properly applying North Carolina Disability Statutes NCGS 1-17; 35A-1101 Definitions incompetency and Guardianship; 1-19; 1-20 AND North Carolina Failure to Warn Statutes.

Respectfully Submitted,

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APPENDIX 1

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

No: 19-0737

[Filed January 9, 2020]

DOUSE, JAMES NATHANIEL)
Petitioner)
)
vs.)
)
USA, ET AL.)
)

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

s/

NOEL J. FRANCISCO
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APPENDIX 2

§ 1-17. Disabilities.

(a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

For the purpose of this section, a person is under a disability if the person meets one or more of the following conditions:

- (1) The person is within the age of 18 years.
- (2) The person is insane.
- (3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

(a1) For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

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(b) Notwithstanding the provisions of subsection (a) of this section, and except as otherwise provided in subsection (c) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

(c) Notwithstanding the provisions of subsection (a) and (b) of this section, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows:

- (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.
- (2) If the time limitations in G.S. 1-15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the medical malpractice action shall be commenced within three years from the date of such judgment or

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consent order, or before the minor attains the full age of 10 years, whichever is later.

(3) If the time limitations in G.S. 1-15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D-10.2, the medical malpractice action shall be commenced within one year after the minor is no longer in such legal custody, or before the minor attains the full age of 10 years, whichever is later.

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1:

Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this in this Subchapter:

(1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in

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conjunction with other brain-functioning disorders.

- (2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.
- (3) "Clerk" means the clerk of superior court.
- (4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, intellectual disability, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.
- (5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.
- (6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.
- (7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity

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to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

- (8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.
- (9) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.
- (10) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.
- (11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of

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harm to the person's physical well-being or to the person's estate.

- (12) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "unsoundness of mind", and "insanity".
- (13) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.
- (14) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

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- (15) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.
- (16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.
- (17) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction.

§ 1-19. Cumulative disabilities.

When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed.

§ 1-20. Disability must exist when right of action accrues.

No person may avail himself of a disability except as authorized in G.S. 1-19, unless it existed when his right of action accrued.

§ 99B-5. Claims based on inadequate warning or instruction.

- (a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate

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warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:

- (1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary NC General Statutes - Chapter 99B 3 care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.
- (2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

(b) Notwithstanding subsection (a) of this section, no manufacturer or seller of a product shall be held liable in any product liability action for failing to warn about an open and obvious risk or a risk that is a matter of common knowledge.

(c) Notwithstanding subsection (a) of this section, no manufacturer or seller of a prescription drug shall be liable in a products liability action for failing to provide a warning or instruction directly to a consumer if an

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adequate warning or instruction has been provided to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant unless the United States Food and Drug Administration requires such direct consumer warning or instruction to accompany the product.

**NORTH CAROLINA GENERAL ASSEMBLY
1975 SESSION**

**CHAPTER 252
SENATE BILL 276**

**AN ACT TO AMEND G.S. 1-17 SO AS TO
ELIMINATE IMPRISONMENT AS A
DISABILITY UNDER THE STATUTE OF
LIMITATIONS AND TO SUBJECT THE CIVIL
RIGHTS ACT OF 1871. 42 U.S.C. § 1983. TO
THE NORTH CAROLINA STATUTE OF
LIMITATIONS.**

The General Assembly of North Carolina enacts:

Section 1. G.S. 1-17 is hereby rewritten to read as follows: "A person entitled to commence an action who is at the time the cause of action accrued either

(1) within the age of 18 years; or (2) insane;

may bring this action in the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next

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after the removal of the disability, and at no time thereafter."

Sec. 2. G.S. 1-52(2) is hereby rewritten to read as follows: "Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it."

Sec. 3. For those persons under a disability on the effective date of this Chapter as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from the effective date of the enactment of this Chapter.

Sec. 4. G.S. 1-52 is hereby amended to add a new subsection as follows: "(13) against a public officer, for a trespass, under color of his office."

Sec. 5. G.S. 1-54. subsection (1) is deleted and the remaining subsections of G.S. 1-54 are renumbered accordingly.

Sec. 6. This act shall be in full force and effect January 1, 1976. In the General Assembly read three times and ratified, this the 12th day of May, 1975.