

Case No. 20-6351
SUPREME COURT OF THE UNITED STATES

JOHNNY TIPPINS,
Petitioner-Appellant,

v.

PATRICIA CARUSO; BARBARA MEAGHER; JOHN DOES;
JANE DOES; GEORGE KUBIN; JAMES C. KELLY; BLAINE LAFLEW, Warden,
Respondents-Appellees.

On Appeal from United States Circuit Court
for the Sixth Circuit
Case No. 17-1508

PETITIONER'S REPLY BRIEF TO RESPONDENTS GEORGE KUBIN
AND JAMES C. KELLY'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

By Johnny Tippins #342855
Oaks Correctional Facility
1900 Calverton Highway
Manistee, Michigan 49660

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MOTION STANDARD

Petitioner Johnny Tippins, in forma pauperis presents this Reply Brief to Respondents Kubin and Kelly's brief in opposition to his petition for writ of certiorari pursuant to USCS Supreme Ct R 15.6. which there are several points addressed in Respondents brief in opposition that are somewhat new.

ARGUMENT

Respondents inadequately claim petitioner continued to claim CERCLA in collateral proceedings in theory. which those points are inherently incorrect. In Tippins' first motion to recall mandate to the Sixth Circuit, he immediately stated to the Court that CERCLA claims on direct appeal were erroneous and inapplicable. (See R.E 32, 6/1/2020 Motion) Tippins had argued that the Sixth Circuit's determination that his complaint was untimely was a basis to recall mandate to prevent a miscarriage of justice. Because Tippins did not present the proper argument before the Sixth Circuit that a miscarriage of justice had occurred but instead claimed clerical mistake and a need to clarify an outstanding mandate. (See RE 47-1, 10/1/2020 Order, p. 2)

Petitioner contends the Sixth Circuit should have recalled its May 8, 2018 ~~mandate~~ mandate to prevent a miscarriage of justice. *United States v. Murray*, 2 Fed. Appx. 398, 399-400 (6th Cir. 2001). Respondents rather claims Tippins is attempting to recast "meritless" arguments in support of his statute-of-limitation theory. Although Respondents makes reference that, "because Congress did not specifically adopt a statute of limitations governing § 1983 actions, Federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought." *Wolfe*, 412 F.3d at 713-714, quoting *Banks*, 344 F.3d at 553.

Both the district court and the Sixth Circuit had decided only to borrow the state statute of limitations for personal injury in Michigan, which is 3 years. Tippins argues that Respondents, ~~and~~ the district court, and the Sixth Circuit was additionally required to borrow Michigan's tolling statutes.

This Court held in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the state statute of limitations and the state tolling rules governed federal actions brought under

42 U.S.C. § 1981, except when "inconsistent with the federal policy underlying the cause of action under consideration." This Court restated the general principle that since there was no specifically stated or otherwise relevant federal statute of limitations for the federal substantive claim created by Congress in that case, the controlling period would ordinarily be the most appropriate one provided by state law. 421 U.S. 462, and cases cited therein. The Court went on to observe that this borrowing logically included rules of tolling:

"Any period of limitation... is understood fully only in the context of the various circumstances that suspended it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point, at which the interests in prohibiting the prosecution of state ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit and exceptions thereto, on the prosecution of a closely analogous claim.

As Robertson and Johnson make clear, therefore the resolution requires this Court to identify the Michigan rule of billing and determine whether that rule is inconsistent with federal law. This is followed from the case of *Board of Regents v. Tomanio*, 446 U.S. 478 (1980)

The purpose to recall the May 8, 2018 mandate, the Sixth Circuit is asked to revisit the merits of the case. Whereas the Ninth Circuit case of *Zipfel v. Halliburton, Co.*, 861 F.2d 565 (9th Cir. 1988) ~~recalled~~ recalled the mandate, where the Court explained that the authority to recall a mandate may be exercised for "good cause" or to prevent injustice, *Aerjet-Generali Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). The power, however, should be exercised only in exceptional circumstances. *Johnson v. Becket Associates Professional Corp.*, 255 U.S. App D.C., (98, 801 F.2d 412, 416 (D.C. Cir. 1986). The Court also identifies that "whether the power is exercised at all falls within the discretion should be employed to recall a mandate only when good cause or unusual circumstances exists sufficient to justify modification or recall of a prior judgment. *American Iron and Steel Institute v. EPA*, 560 F.3d 589, 594-95 (3rd Cir. 1997).

Petitioner argues the Sixth Circuit failed to recognize a miscarriage of justice as an exceptional circumstance in order to recall mandate, while the Respondents are in support of such position. This decision conflicts with the Ninth Circuit finding in case cited above, *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir. 1988)

On direct appeal, the Sixth Circuit agreed with the district court to only borrow part of the state statute-of-limitations for personal injury in Michigan, which is three years. The fact that Respondents Kubin, Kelly, Lafler, Meagher, NWI-1, Inc., and Velsicol Chemical LLC., fraudulent concealed their potential identity of liability. That in which, on February 19, 2014, after Tippins filed grievance (ID# SLF-2014-02-0216-28g) at St. Louis Correctional Facility, Tippins received an April 29, 2016 Memorandum identifying ~~prison~~ ~~direct~~ prison officials, City of St. Louis Mayor's Office and others. This particular Memorandum had mention the City of St. Louis, Michigan had notified prison officials in Mid October 2005 harmful chemicals were in the City's drinking water supply. (See Compl. R.E 1)

Although the City officials notified prison officials, Respondents Laffer nor Meagher posted Memorandum in any housing unit during the three year state statute of limitations period. (which began around Mid-October 2005). Whereas Tippins complained of stomach pain, headache, pain in throat area etc., while housed at SLF prison. After transfer to Saginaw Correctional Facility, 2007 Tippins was diagnosed with Graves' Disease. Upon the time of diagnosis, Tippins was not aware of the identity of potential persons liable to sue until, February 19, 2014.

In Respondents brief in opposition, it was stated, "whether Tippins could identify all defendants in 2007 (when he learned of his alleged injury, at the very latest) is wholly irrelevant to the ultimate question whether his § 1983 claims are time-barred.

The un-borrowed tolling statute in Michigan for fraudulent concealment clearly identifies:

"... the existence of the claim or the identity of the person(s) who is liable for the claim, although the action would otherwise be barred by the period of limitations. MCL § 600.5855.

In other words, M.C.L. § 600.5855 allows a person to commence an action within 2 years after discovering the identity of potential person(s) who are liable for the claim. The statute is one of Michigan's tolling provisions, that in which are borrowed from that state when there is a cause of action commenced in federal court.

Respondents has devoted the majority of their argument directing the Court to focus on vexatious motions that in which had been filed in this matter in the past and in the Sixth Circuit. At the beginning, Tippins improperly pursued the CERCLA theory because the matter was in a federal court and CERCLA's theory is federal. Petitioner did not have the legal knowledge that state statute of limitations are borrowed from state for federal matters.

The fact that February 19, 2014 was the date Tippins discovered the identity of persons liable to sue, Petitioner filed his cause of action on March 3, 2014 within the 2 year period allowed by Michigan fraudulent concealment statute.

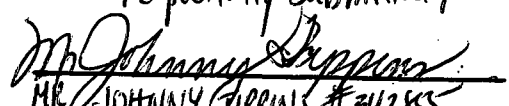
Because the district court had only borrowed Michigan's statute of limitations governing personal injury under M.C.L. § 600.5805(10) because there is no applicable statute of limitations under federal law. Tippins did not pursue the fraudulent concealment theory but the theory pursued although erroneous under CERCLA but actions describing Defendants actions demonstrated acts or misrepresentations, See Doe v. Roman Catholic Archbishop of Archdiocese of Detroit, 264 Mich. App. 632, 652; 692 N.W.2d 398 (2004). The fact that the complaint pled fraudulent concealment with particularity. Evans v. Pearsons, Enters, Inc., 439 F.3d 839, 850 (6th Cir. 2006) (See R.E 32 6/1/2020 Motion) which supports the conclusion that the Sixth Circuit should revisit the merits on direct appeal. Calderon v. Thompson, 523 U.S. 538, 558 (1998).

Tippins' contention constitutes "a showing of exceptional circumstances," which would have given the Sixth Circuit grounds to recall its mandate to prevent a miscarriage of justice. Ziptel, 861 F.2d at 567. Tippins has presented valid reasons for this Court to grant certiorari.

Therefore, Tippins has demonstrated good cause in the Court of Appeals because a recall is proper to prevent a miscarriage of justice. The case clearly warrants a writ of certiorari.

CONCLUSION

Petitioner-Appellant Johnny Tippins respectfully request that this Honorable Court grant this Petitioner's Tippins' petition for writ of certiorari.

Respectfully submitted,

MR. JOHNNY TIPPINS #342855
Oaks Correctional Facility
1800 Caberface Highway
Manistee, Michigan 49660

Dated: December 4, 2020

DESIGNATION OF RELEVANT SIXTH CIRCUIT COURT OF APPEALS DOCUMENTS

Description of entry no.	Date	Record Entry No.
Motion to Recall Mandate I	6/1/2020	1-7

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of entry	Date	Record Entry No.	Page ID #
Amended Complaint	1/8/2016	56	1-121
Opinion and Order Denying Motion to Amend Stricken Amended Complaint	5/5/2016	59	560-567