

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTWAUN BUSH,

Petitioner,

v.

CITY OF PITTSBURGH, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Counsel for Antwaun Bush:
STEVEN M. TOPRANI, *COUNSEL OF RECORD*
PA. I.D. 93217
LAW OFFICE OF STEVEN TOPRANI
18 West Cherry Avenue
Washington, PA 15301
stevetoprani@gmail.com
Tel. 412-997-7775

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit, the court below, erred in determining that the failure of defendants to contest, challenge or otherwise avail themselves of state procedural mechanisms to attack a writ of summons constitutes waiver of the statute of limitations defense in a subsequent federal action where the parties and the claims are the same.

PARTIES TO THE PROCEEDING

The caption does not name all of the parties to the proceedings in the court of appeals below.

Petitioner is Antwaun Bush who was the plaintiff in the district court. Respondents are the City of Pittsburgh Bureau of Police; Nathan Harper; Officer Donald Snider; Officer Daniel Joseph Paga, Jr.; Officer Charles Thomas; Officer Morgan Jenkins; Officer Charles Henderson and Officer David Canon. Plaintiff Antwaun Bush was the appellant and the City of Pittsburgh and the individual defendants were the appellees in the circuit court.

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	
OPINIONS BELOW.....	v
JURISDICTION.....	v
STATUTORY PROVISIONS AND RULES INVOLVED.....	v
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE WRIT.....	6
CONCLUSION.....	8
APPENDIX	

PETITION FOR A WRIT OF CERTIORARI

Antwaun Bush respectfully petitions for a writ of certiorari to review the order, entered on direct appeal, of the United States Court of Appeals for the Third Circuit (“Third Circuit”).

OPINIONS BELOW

The Third Circuit’s decision is reported at No. 19-1009, United States District Court for the Third Circuit, filed June 11, 2020, a non-precedential opinion and is included in the Appendix beginning at 1. The United States District Court for the Western District of Pennsylvania’s decision is included in the Appendix at 5, at docket 2:16-cv-00926, U.S. Dist. Ct. for Western District of Pennsylvania.

JURISDICTION

The Third Circuit issued its decision on June 11, 2020, See App'x 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Petition is filed within 150 days of the decision of the appeals court as consistent with the COVID Pandemic Order of this Court issued on March 19, 2020 which provides that "IT IS ORDERED that the deadline to file any petition for writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment. See Rule 13.1 and 13.3." ORDER LIST: 599 U.S.

STATUTORY PROVISIONS AND RULES INVOLVED

The text of statutes or rules is not at issue in this Petition.

STATEMENT OF THE CASE

This case presents a single issue of importance in the Third Circuit. The question is whether the Third Circuit erred in holding that a writ of summons filed in state court, when not defended or contested by the party against whom it is filed, fails to toll the statute of limitations for a federal cause of action thereafter filed in the district court.

The lawsuit underlying this Petition arose in a troubled neighborhood in the City of Pittsburgh, known for violence and criminal activity. At issue is the malicious and unconstitutional use of force by the City of Pittsburgh's Bureau of Police, when they deployed a K-9 police unit to maul and attack a potential suspect all as a means to cause a confession.

The alleged facts part of the district court's record are as follows. On February 15, 2012, around 11:00 pm, a woman called 9-1-1 to report that an incident of domestic violence occurred at an address in Pittsburgh. Thereafter, a second 9-1-1 call reported that a black man wearing a fur hat and blue jeans was waving a gun in a parking lot. Officer Snider was dispatched to the location described in the calls. Upon arrival at the scene, Snider exited the

police car, drew his weapon, and saw a man with a similar description as the suspect. A woman yelled “that’s him” to the officer.

At this time, Antwaun Bush first saw Snider with a gun drawn and ran away, with a foot chase ensuing. Officers contend that during a 300-yard pursuit, a gun was visible on Bush, however, no gun was ever recovered despite a canvassing of the area by police investigators. Bush contends that he never possessed a firearm but ran due to the surprise and having been on state parole.

Officers encountered Bush within minutes, as he was confined in a fenced-in back yard, lying face down on the ground. Officer Paga acknowledged in deposition that Bush appeared to be lying still on his abdomen with arms outstretched, anticipating arrest. Other officers, namely Sergeant Henderson, also arrived on scene and provided “lethal coverage” while Officer Paga deployed his K-9, Mixo, by lifting the police dog over the fence and commanding him to bite Bush. Mixo began biting Bush in the lower leg.

The parties accounts diverge at this point. The officers contend that Bush refused to show his hands, and was thus not complying with orders. Bush contends,

instead, that once Paga began biting him, he was incapacitated and in tremendous pain, unable to resist arrest. Bush contends that police officers then dragged him from the enclosure and continued to apply unlawful force by punching, dragging and kneeling on him. Mixo continued to bark in his face and display aggression.

Bush commenced an action in state court against the Defendants on January 30, 2014 when his prior lawyer, with whom he had little contact, filed a Writ of Summons in the Court of Common Pleas of Allegheny County. Bush filed a district court action under Section 1983 on June 22, 2016. The defendants filed to take any action with respect to the writ, in essence ignoring it, and did not avail themselves of any defensive actions under state law.

After nearly two years of litigation in the district court, Defendants for the first time filed a motion for summary judgment which raised, *inter alia*, a statute of limitations defense. The district court, in agreeing with defendants' position that the writ of summons fails to toll a federal court action, even when not objected to, granting the motion and dismissed the action. The district court stated in dicta that Bush failed to remove his own action to federal court, of which there is no procedure to do so.

The district court based its ruling entirely on sister district court decisions.

Bush filed a timely appeal to the Third Circuit. The appeals court denied oral argument and resolved the appeal on brief, determining, in a four-page opinion, that an un-objected to writ in state court fails to toll relative federal court claims. Bush's claims, at the time of filing the writ, were predominantly federal question claims for excessive force and other Section 1983 causes of action. On appeal, Mr. Bush contended that the failure of defendants to avail themselves of any of the procedural tools to challenge or contest the writ – that result of which renders them unable to later assert a statute of limitations defense due to waiver.

REASONS FOR GRANTING THE WRIT

I. The Decision to Affirm the Grant of Summary Judgment Was Made Without Citation to any Precedential Authority and Was Arbitrary.

Antwaun Bush, on appeal, asserted that the failure of defendants to contest, challenge or otherwise avail themselves of state procedural mechanisms to attack a writ of summons constitutes waiver of the statute of limitations defense.

The Third Circuit rejected this argument without citation to any precedential authority. Instead, the appeals court concluded it was unwilling to extend the rule tolling the statute to cases filed in federal court, despite the fact that it involved the same claims and parties. In so concluding, the appeals court cited to no authority or procedural rule.

Such a decision by the appeals court may jeopardize future claims where plaintiffs assert federal causes of action in state court, for statute of limitation purposes only, and defendants failed to defend and otherwise ignored the action, despite being on actual notice.

Specifically, the appeals court failed to consider *Pettinato v. Allegheny County*, 2011 WL 2672040 (W.D. Pa. 2011), which required the filing and service of a writ of summons on all defendants to preserve the statute of limitations. Further, the appeals court disregarded that while state law governs the length of the statute of limitations, federal law governs accrual. *Kacj v. Hose*, 589 F.3d 626 (3d Cir. 2009). Once a plaintiff files and serves a writ under Pennsylvania law, the statue is **satisfied**. *Galbraith v. Gahagen*, 204 A.2d 251, 253 (Pa. 1964). Pennsylvania procedural rules require defendants to “take the next step of ruling to file (their) complaint.” *Id.*

Finally, the appeals court disregarded *Schutz v. Honick*, 2012 WL 393501 (W.D. Pa. 2012), which applied *Galbraith*, and concluded that “under Pennsylvania law, once the writ of summons is timely served the statute of limitations is satisfied and defendant’s only remedy lies in (Pa.R.Civ.P.) Rule 1037.

Federal courts interpreting Pennsylvania procedures and case law also concluded that a prejudiced defendant must seek dismissal pursuant to Rule 1037, not under the statute of limitations.”

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

STEVEN M. TOPRANI, *Counsel of Record*
Counsel for Antwaun Bush
Pa.Id. 93217, a member of the bar of the United States
Supreme Court
Law Offices of Steven Toprani
18 West Cherry Avenue, Washington, PA 15301
Tel. 412-997-7775

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 1,419 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2020

Steven M. Toprani, Esquire

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I certify that the petition for writ of certiorari (three copies) was served on counsel for defendants by first class mail, postage prepaid on Monday, November 9, 2020:

Yvonne Hilton, Esquire, City Solicitor
Kezia O. L. Taylor, Esquire, Associate City Solicitor
City of Pittsburgh Law Department
414 Grant Street #313
Pittsburgh, PA 15219

Steven M. Toprani, Esquire

Appendix 1

NOT PRECENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No.: 19-1009

ANTWAUN BUSH, Appellant

v.

CITY OF PITTSBURGH, ET AL., Appellee

Appeal from the United States District Court for the
Western District of Pennsylvania
(D.C. Civil No. 2:16-cv-00926)
District Judge Honorable Cathy Bissoon

Submitted under Third Circuit LAR 34.1(a)
On September 24, 2019

Before: MCKEE, AMBRO and ROTH, Circuit Judges
Opinion Filed June 11, 2020

OPINION

* This disposition is not an opinion of the full Court and
pursuant to IOP 5.7 does not constitute binding
precedent.

ROTH, Circuit Judge:

On January 30, 2014, Antwaun Bush initiated an action in Allegheny County Court of Common Pleas by filing a praecipe for a Writ of Summons for injuries incurred during his arrest nearly two years earlier. He named the City of Pittsburgh, Pittsburgh's former chief of police, and several police officers as defendants. He did not file a complaint of a statement of intention to proceed. Roughly two and a half years later and approximately four and a half years after the events that gave rise to his causes of action, Bush initiated a separate action in United States District Court for the Western District of Pennsylvania regarding the same events and against the same defendants, alleging both state tort claims and federal claims under 42 USC Section 1983. The District Court granted the defendants' motion for summary judgment on the grounds that Bush's claims were time-barred. Bush has appealed. We will affirm the District Court's grant of summary judgment.

I.

We have jurisdiction over this appeal under 28 USC Section 1291. In reviewing the District Court's decision granting summary judgment, we exercise plenary review.¹

II.

In determining the statute of limitations for Section 1983 claims, we apply "the personal injury tort law of the state where the cause of action arose."² In Pennsylvania,

¹ *Lupyan v. Corninthian Colls., Inc.*, 761 F.3d 314, 317 (3d Cir. 2014)

² *Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009)

where Bush's Section 1983 claims arose, the statute of limitations for personal injury claims is two years.³ Bush's causes of action accrued on February 15, 2012, the date of his arrest. He filed his complaint in District Court on June 22, 2016, approximately two and a half years after the statute of limitation for his claims had expired. Bush argues, however, that the statute of limitations for his claims brought in federal court was tolled as of January 30, 2014, when he filed a praecipe for a Writ of Summons in the Allegheny County Court of Common Pleas.⁴

Under Pennsylvania Rule of Civil Procedure 1007, filing a praecipe constitutes the commencement of a civil action. Once a plaintiff has filed a praecipe for Writ of Summons, Pennsylvania law permits a defendant to request the prothonotary to order the plaintiff to file her complaint.⁵ Forgoing this opportunity forecloses the defendant's ability to bring a statute of limitations defense. The rationale for this is simple: By not taking advantage of the opportunity to compel the plaintiff to timely bring a complaint, the defendant signals that he is unconcerned about the timeliness of that complaint.⁶

³ See 42 Pa. Cons. Stat. Section 5524

⁴ See Allegheny County Court of Common Pleas Docket No. GD-14-001416.

⁵ See Pa. R. Civ. P. 1037(a) ("[T]he protonotary, upon praecipe of the defendant, shall enter a rule upon plaintiff to file a complaint. If a complaint is not filed within twenty days after service of that rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.").

⁶ See *Galbraith v. Gahagen*, 204 A.2d 251, 252 (Pa. 1964) ("[W]here the plaintiff has had the summons served upon the defendant, the defendant ... is thus made aware of the lawsuit pending against him, he cannot complain if the plaintiff takes his time and files the complaint more than two years after service.").

Thus, if a defendant has been timely served a praecipe for a Writ of Summons in the state court in which the plaintiff ultimately brings his complaint, the statute of limitations is tolled and the plaintiff can file her complaint past the statutory period. Petitioner wants to extend this rule to cases like the one at issue here, where the plaintiff, after filing and serving a praecipe for Writ of Summons in state court, files suit in federal court past the relevant statute of limitations period. We decline to do so.

Pennsylvania and federal law distinguish between actions commenced in state court and federal court for the purpose of tolling.⁷ The tolling of a claim by virtue of its initiation in state court by filing a praecipe for Writ of Summons does not toll a separate action in federal court irrespective of the similarity of claims.⁸ Had Bush filed his complaint in state court, it would not be time-barred – but he did not do so.

III.

We will affirm the judgment of the District Court.

⁷ See, eg, *Falsetti v. United Mine Workers of Am.*, 355 F.2d 658, 662 (3d Cir. 1966)(rejecting contention that commencement of prior state action served to toll the limitations period for subsequently filed federal action); *Ammlung v. City of Chester*, 494 F.2d 811, 816 (3d Cir. 1974)(“The running of a Pennsylvania statute of limitations against a federal cause of action is not tolled under Pennsylvania concepts of tolling by the commencement of a similar suit in state court.”); *Royal-Globe Ins. Cos. V. hauck Mfg. Co.*, 335 A.2d 460, 462 (Pa. 1975)(“An action in state court does not toll the running of the statute of limitations against subsequent action in federal court.”).

⁸ *Ammlung*, 494 F.2d at 816.

Appendix II

Memorandum Order

Bush v. City of Pittsburgh, et al, Civil Action No. 16-926
Judge Cathy Bissoon

Memorandum Order

Pending before the Court is a Motion for Summary Judgment (Doc. 94) filed by the Defendants the City of Pittsburgh (“the City”), Nathan Harper (“Harper”) and several city Police Officers (the “Officer Defendants”): Officer Donald Snider (“Snider”), Officer Daniel Joseph Paga, Jr. (“Paga”), Officer Charles Thomas (“Thomas”), Officer Morgan Jenkins (“Jenkins”), Officer Charles Henderson (“Henderson”) and Officer David Cannon (“Cannon”). For the reasons stated below, Defendants’ Motion for Summary Judgment will be granted.

Background.⁹

On February 15, 2012, around 11:00 pm, a woman called 911 to report a domestic violence incident at an

⁹ Defendants have filed a “Concise Statement of Material Facts” (hereinafter “Def.’s Facts,” Doc. 96), to which Plaintiff has responded with a “Responsive Concise Statement of Material Facts” (hereinafter “Pl.’s Responsive Fact, Doc. 103) that admits, disputes or clarifies Plaintiff’s position on each paragraph of Def.’s Facts. Plaintiff has also filed a “Concise Statement of Material Facts in Opposition” (hereinafter “Pl.’s Opposing Facts,” Doc. 105) that sets forth Plaintiff’s counternarrative of the relevant events. The following facts are undisputed, unless otherwise noted.

address in Pittsburgh, Pennsylvania. (Def.'s Facts P. 1; Pl.'s Responsive Facts P.1). About ten minutes later, a second 911 caller reported that a black man wearing a fur hat and blue jeans was waving a gun around outside. (Def.'s Facts P. 2; Pl.'s Responsive Facts P.2). Officer Snider was dispatched to the address given in the first 911 call. (Def.'s Facts P. 3; Pl.'s Responsive Facts P.3). Upon arrival, Snider exited his vehicle, drew his weapon, and saw Plaintiff, who matched the description given by dispatch. (Def.'s Facts P. 5; Pl.'s Responsive Facts P.5). Before Snider gave any commands to Plaintiff, an unidentified woman yelled to Snider "that's him" and pointed to Plaintiff. (Def.'s Facts P. 6; Pl.'s Responsive Facts P.6).

Plaintiff saw Snider with his gun drawn and ran away – Snider then chased Plaintiff for a distance of about 300 yards, while commanding Plaintiff to "stop" and get on the ground, and while informing Plaintiff that he was under arrest. (Def.'s Facts P. 7-9, 12; Pl.'s Responsive Facts P. 7-9, 12). Defendants allege that Snider saw Plaintiff remove a firearm from his waistband during the chase; Plaintiff disputes this fact, and notes that Snider testified that no gun was ever found. (Def.'s Facts P. 11; Pl.'s Responsive Facts P.11, Pl.'s Opposing Facts P 26). Snider

fired his TASER at Plaintiff, but only one prong made contact and the TASER had no effect. (Def.'s Facts P. 13-15; Pl.'s Responsive Facts P.13-15). Plaintiff escaped Snider's view and Snider requested that responding units establish a perimeter to search for Plaintiff. (Def.'s Facts P. 16; Pl.'s Responsive Facts P.16). Officer Paga responded with his canine service dog, Mixo. (Def.'s Facts P. 17; Pl.'s Responsive Facts P.17).

Mixo located Plaintiff, who was confined in a narrow, fenced-in backyard area, lying on the ground. (Def.'s Facts P. 18, 23; Pl.'s Responsive Facts P.18). Paga shined his flashlight into the enclosure and saw a man fitting Plaintiff's description. (Def.'s Facts P. 16; Pl.'s Responsive Facts P.16). Plaintiff testified in his deposition that he remained lying still on his abdomen, with his hands outstretched in front of him, anticipating that he would be arrested. (Pl.'s Responsive Facts P 23). A supplemental Police Report, prepared by Paga and Snider the day after the incident, indicates that Plaintiff's hands were tucked under his chest at this time and that Plaintiff failed to comply with repeated orders to show his hands. (Def.'s Fact P 23, 25-26). Sergeant Henderson, who had arrived at the scene, provided "lethal coverage" while Paga lifted Mixo over the fence and into the enclosure. (Def.'s Facts P

29; Pl.'s Responsive Facts P 29). Paga commanded Mixo to bite the Plaintiff in the lower left leg. (Def.'s Facts P. 32-33; Pl.'s Responsive Facts P.32-33).

The parties' accounts diverge sharply at this point. Defendants state that Plaintiff continued to resist by failing to sow his hands; that Paga entered the fenced-in area and removed Plaintiff's atrms from underneath him once Mixo had successfully "neutralized" Plaintiff; and that Officer Thomas, who followed Paga into the enclosure, handcuffed Plaintiff while Paga called off Mixo. (Def.'s Fact P. 32-34).

Plaintiff states that he never resisted arrest; that Defendants repeatedly demanded that he produce a firearm while Mixo was pulling and tugging him through the enclosure; that Defendants continued to allow Mixo to attack and maul his leg; that they told Plaintiff "all you little Homewood nigger gangsters run around with these guns, tell us where the gun is"; and that they stomped on him until he was handcuffed. (Pl.'s Responsive Facts P 33-34). Plaintiff also states that, after handcuffing him, Defendants began punching him in the ribs and face while holding him against a nearby garage until he fell down; and that Defendants then picked him up by the handcuffs, flipped him over a fence, dragged him by his handcuffs, and

left him with his pants down and genitals exposed, bleeding profusely, while Mixo barked in his face and Defendants jeered at him, until emergency medical services arrived. (Pl.'s Opposing Facts P 65-69).

Plaintiff commenced an action in Pennsylvania state court against the named Defendants on January 30, 2014 by filing a Praecept for Writ of Summons. (Exhibit K to Def.'s Facts Appendix, Doc. 96-16). Plaintiff commenced the instant action in this Court on June 22, 2016. (Complaint, Doc. 1).

ANALYSIS¹⁰

Plaintiff's Amended Complaint (Doc. 21) contains eight counts: (1) a 42 USC Section 1983 substantive due process claim against the Officer Defendants for excessive use of force; (2) a 42 USC Section 1983 claim against the City and Nathan Harper, Pittsburgh's Chief of Police at the

¹⁰ Summary judgment is appropriate if the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a fact is material only if it might affect the outcome of the action under the governing law. See Sovereign Bank v. BJ's Wholesale Club, Inc., 477 US 242, 248 (1986)). In ruling on the pending motion for summary judgment, the court must view the facts, and any reasonable inferences arising therefrom, in the light most favorable to the non-moving party. See Moody v. Atlantic City Bd. Of Ed., 2017 WL 3881957, at *1 n1 (3d Cir. Sept. 6, 2017)(citing Hugh v. Butler Cty. Family YMCA, 418 F.3d 265, 266-67 (3d Cir. 2005)).

relevant time, for failure to train and supervise the City's police officers with respect to the use of police canines; (3) a 42 USC Section 1983 claim against Officers Thomas, Jenkins, Henderson and Canon for failure to intervene to prevent the use of excessive force; (4) a Civil Rights Act claim against the Officer Defendants for a race-based conspiracy to violate Plaintiff's civil rights; (5) a Pennsylvania negligence claim against the Officer Defendants; (6) a Pennsylvania battery claim against the Officer Defendants; (7) a Pennsylvania assault claim against the Officer Defendants; and (8) a Pennsylvania intentional infliction of emotional distress claim against the Officer Defendants. (Amended Complaint P. 55-100).

Defendants move for summary judgment on several grounds, including that the applicable two-year statute of limitation bars this action, as Plaintiff's state court action, which was not removed to federal court, did not toll the statute as to the instant action.¹¹

¹¹ The remaining grounds are: the Fourth Amendment entirely subsumes Plaintiff's Fourteenth Amendment substantive due process claim; as to the claims against the City and Harper, Plaintiff's evidence is insufficient to establish each element of a municipal liability claim' qualified immunity shields all defendants from liability for excessive force; Plaintiff's evidence is insufficient to establish a claim for failure to intervene; Plaintiff's evidence is insufficient to establish a conspiracy to violate Plaintiff's constitutional rights; and to the extent that Plaintiff's several

Statute of Limitations

The statute of limitations for personal injury torts in the state where a cause of action arose determines the length of the limitations period for a claim under 42 USC Section 1983. Wallace v. Kato, 549 U.S. 384, 387 (2007). Pennsylvania sets a two-year limitations period for personal injury torts. 42 Pa.C.S. Sec. 5524; see also Kach v. Hose, 589 F.3d 626, 634 (3d Cir. 2009). The accrual date for a claim under 42 U.S.C. Section 1983, set by federal law, is the date on which “plaintiff has a complete and present cause of action” such that “plaintiff can file suit and obtain relief.” Wallace, 549 U.S. at 388 (internal citations and quotation marks omitted). “State law governs the question [of] whether an applicable state statute of limitations is tolled in an action brought under the federal Civil Rights Act.” Ammlung v. City of Chester, 494 F.2d 811, 815 (3d Cir. 1974)’ accord Humphries v. Houghton, 422 F. App’x 626, 628 n.3 (3d Cir. 2011).

Concerning Pennsylvania law on tolling, Plaintiff argues that filing a praecipe for writ of summons in state court within the two-year limitations period, and then

Pennsylvania state law tort claims are not barred under the Pennsylvania Subdivision Tort Claims Act, Plaintiff has failed to provide sufficient evidence to establish them. (See generally Def.’s SJM Brief.)

serving all defendants, is sufficient to toll the limitations period indefinitely, satisfying the statute of limitations. (Pl.’s Brief Opposing Defendants Motion for Summary Judgment, 5, Doc. 104). Plaintiff cites Galbraith v. Gahagen, 204 A.2d 251 (Pa. 1964), for the proposition that “where the plaintiff has had the summons served upon the defendant, and the defendant is thus brought onto the record by proper service and he is thus made aware of the lawsuit pending against him, he cannot complain if the plaintiff takes his time and files the Complaint more than two years after service.” Id. At 252. Rather, a served defendant seeking to avoid delay must “employ the weapon given him under [Pennsylvania] Rule [of Civil Procedure] 1037,” id., which allows a defendant to file a praecipe that compels a plaintiff to either file a complaint within twenty days or face a judgment of non pros, PA.R.Civ.P. 1037(a). See Schultz v. Honick, 2012 WL 393501, at *3 (W.D. Pa. Feb. 6, 2012)(“In sum, under Pennsylvania law once the writ of summons is timely served and the statute of limitations is satisfied and defendant’s only remedy lies in Rule 1037).

Contrary to Plaintiff’s understanding of the applicable tolling rule, Defendants argue that the tolling rule described in Galbraith applies only to a lawsuit

initiated by filing a praecipe for writ of summons – not to a separately filed federal lawsuit related to the same events. (Def.’s SJM Brief 8). In other words, a state court-filed praecipe for writ of summons will toll the statute of limitations for a removed action, but not for an action originally initiated in federal court by a plaintiff. (Id.).

The court agrees with Defendants. Every federal court applying Pennsylvania law to this question has reached the same conclusion: absent an equitable reason for tolling, filing a praecipe for writ of summons in state court does not toll the statute of limitations for a separate action that a plaintiff initiates later in federal court. E.g., McCreary v. Redevelopment Auth. Of City of Erie, 427 F.App’x 211, 215 (3d Cir. 2011)(“[t]he running of a Pennsylvania statute of limitations against a federal cause of action is not tolled under Pennsylvania concepts of tolling by commencement of a similar suit in state court” (quoting Ammlung, 494 F.2d at 816)); Pettinato v. Allegheny Cty., 2011 WL 2672040, at *7 (W.D. Pa. July 8, 2011)(“tolling based on state court filings (such as a writ of summons) is particularly distasteful when a plaintiff is in federal court on his or her own choosing, and not because the case is removed to a federal forum”), Baranowski v. Waters, 2008 WL 728366, at *9 (W.D. Pa. Mar. 18,

2008)(“[T]he commencement of one action does not automatically toll Pennsylvania’s two-year statute of limitations for purposes of a later action.”), vacated in part on other grounds, 2008 WL 4000406 (W.D. Pa. Aug. 25, 2008), aff’d, 370 F.App’x 318 (3d Cir. 2010); Davis v. Malizki, 2009 WL 3467770, at *9, *9n.8 (E.D. Pa. Oct. 27, 2009)(“Plaintiff commenced his federal lawsuit...by filing his original Complaint.[] Although Plaintiff’s argument that a writ of summons tolls a statute of limitation may generally be correct under Pennsylvania law, there is a fatal flaw as applied to this case because Plaintiff’s state court case was *not* removed to this federal court.” (footnote combined with preceding text)); see also Stinson v. Kaiser Gypsum Co., Inc., 972 F.2d 59, 62 (3d Cir. 1992)(“While a timely filed complaint or praecipe for writ of summons satisfies the statute of limitations under Pennsylvania law as far as that action is concerned, the Pennsylvania rule as to new actions is the same as the generally accepted rule.”)).

Plaintiff attempts to distinguish its case from these precedents by arguing that he timely served all defendants in the state action, placing them on notice of Plaintiff’s claims. (Pl.’s SJM Brief 5-6). However, this distinction is irrelevant to Pennsylvania law on tolling as to separately filed action. See Pettinato, 2011 WL 2672040, at *7(the

fact that plaintiff had filed and served a writ of summons in state court prior to initiating a separate federal suit does not alter the tolling analysis under state law); cf. Stinson, 972 F.2d at 62 (distinguishing the Pennsylvania tolling rules applicable to separately filed actions from those applicable to a single action).

The parties agree that Plaintiff's cause of action accrued on February 15, 2012. (Pl.'s SJM Brief 7; Def.'s SJM Brief 8). Plaintiff filed the instant action on June 22, 2016, over four years later. Nothing operated to toll the two-year statute of limitations during that time as to the instant action. Plaintiff's federal claims – as well as his related personal injury tort claims under state law – are barred by the two-year statute of limitations.

Accordingly, Defendants' Motion for Summary Judgment (Doc 94) is GRANTED. Plaintiff's claims are DISMISSED, with prejudice, as time-barred.

IT IS SO ORDERED

/s/ Cathy Bissoon

Cathy Bissoon, District Judge

November 30, 2018

JUDGMENT ORDER

For the reasons set forth in the Memorandum Order filed contemporaneously herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, FINAL JUDGMENT is hereby entered. The case has been marked closed.

/s/ Cathy Bissoon

Cathy Bissoon, District Judge

November 30, 2018