No: 21-362

In the Supreme Court of the United States

Reuel Jacques Abale Gnalega,
Petitioner

v.

United States of America and Washington DC Veterans Medical Center,
Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Pro Se Petitioner

August 30, 2021

ORIGINAL

QUESTIONS PRESENTED

Petitioner Reuel Jacques Abale Gnalega, an African-American US military veteran, was electrocuted and misdiagnosed by a VA Hospital physician team, including a Dr. Michael H. Pfeiffer. Petitioner is a veteran who is eligible for treatment at the VA Hospital in Washington, DC.

After electrocuting Petitioner, and several years of attempts by the VA Hospital to diagnosis and cure of the cause of Petitioner's pain, the VA Hospital in Washington DC prematurely discharged Petitioner from further diagnosis and treatment. On March 16, 2016, the VA Hospital in Washington, DC refused to continue to evaluate and treat Petitioner's pain. *Id.* As a result, Petitioner has suffered incapacity from the chronic excruciating pain of the internal burns, the inability to walk except with crutches, a possible foot amputation, cognitive decline, and the inability to work.

On May 31, 2017, Petitioner submitted a claim letter to the VA of Washington DC – well within two years of the VA Hospital's discharge and ending its treatment attempts to determine the cause and resolve the pain of Petitioner.

After the District Court initially denied Respondent's motion to dismiss and allowed the parties to proceed with discovery, the Respondent filed a Motion for Summary Judgment that relied on sworn affidavits of two VA "Doctors," Michael H. Pfeiffer and Freidhelm Sandbrink. Plaintiff sought deposition of those doctors. It was only then that the District Court decided to cut off case discovery, and, in turn, block Petitioner from deposing the very VA doctors whose affidavits formed the factual basis for Respondent's Motion for Summary Judgment.

The questions presented are:

(A) Issue 1: Whether Appellate review of a grant of summary judgment was *de novo*, (*Judicial Watch, Inc. v. Dep't of Def.*, 913 F.3d 1106, 1110 (D.C. Cir. 2019)), and whether, in such review, the Court of Appeals "examine[d] the facts in the record and all reasonable inferences derived there from in a light most favorable to' the non-moving party." *Feld v. Fireman's Fund Ins. Co.*, 909 F.3d 1186, 1193 (D.C. Cir. 2018);

(B) Issue 2: Is a court obligated to treat the Federal Tort Claims Act's statute of

limitations as running while the veteran remains under the exclusive control and care of the VA to correct his debilitating and traumatizing electrocution injury in an involuntary experiment that they caused, and thus allowing the VA to benefit from its illegal and/or immoral behavior.

(C) Issue 3: Whether it was violation of procedural due process under the Fifth Amendment for the District Court to prevent Petitioner from deposing and doing other forms of discovery on the VA doctors whose affidavits and records were, in fact, relied upon by the District Court in granting the Motion for Summary Judgment.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following appeared before the US Court of Appeals for the District of Columbia.

Petitioner-Appellant is Reuel Jacques Abale Gnalega, an African-American US Veteran who

was severely injured and improperly diagnosed and treated by the VA Hospital in Washington DC

Respondent-Appellee is United States of America and Washington DC Veterans Medical Center.

CORPORATE DISCLOSURES

Pursuant to Rule 29.6, Petitioner states: None

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OPINIONS BELOW

This Petition for Writ of Certiorari seeks review of the Order of the US Court of Appeals for the District of Columbia, USCA Case #20-5262, March 25, 2021 (*COA Order*, APP-1), and Denials of Panel Rehearing and Rehearing En Banc, US Court of Appeals of the District of Columbia, June 7, 2021 (*COA Rehearing Order*, APP-3 and *COA En Banc Rehearing Order,* APP-4, respectively). Those appellate orders summarily affirmed the US District Court Grant of a Motion for Summary Judgment by Respondent, Case 1:18-cv-00514-APM, July 31, 2020 (*USDC Order,* APP-5 and *USDC Memorandum,* APP-6).

JURISDICTION

The US Court of Appeals of the District of Columbia issued its opinion on March 25, 2021, and its Panel Denial and En Banc Denial on June 7, 2021. This Court has jurisdiction under 28 USC §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Due Process Clause of the Fifth Amendment of the US Constitution and the Federal Tort Claims Act (FTCA) statute of limitations 28 USC § 2401(b) [Reproduced in Appendix at APP-50].

STATEMENT OF THE CASE

As this brief is written, millions of veterans depend upon the US Veterans Administration (VA) for proper diagnosis and treatment of their medical conditions. The VA has earned a poor reputation over the years as being generally incompetent and a safe harbor for inadequately trained and/or unqualified doctors. (*Veterans Health Administration: Greater Focus on Credentialing Needed to Prevent Disqualified Providers from Delivering Patient Care*, GAO Report GAO-19-6, February 2019)

Furthermore, the VA's Medical Records have been known to be manipulated by individuals inside the VA. See, e.g., *VA Manager Indicted on 50 counts of Falsifying Records of Veterans Waiting for Medical Care*, Washington Post, July 20, 2015, *Former VA Podiatry Chief Sentenced to 6.5 Years in Prison for Health Care Fraud Scheme*, DOJ Press Release, March 3, 2000.

The quality of care the VA delivers depends upon proper incentives for the VA to hire and maintain qualified doctors and nurses, and to have them properly diagnose and treat its captive patients. That depends, in part, on the ability of our veterans to be able to properly investigate and seek judicial relief when they are improperly treated, including when they have been treated, as here, by an

unqualified staff of the VA who engage in involuntary and dangerous electrocution experimentation on our Veterans, and staff that mislead those Veterans with misinformation to cover up their fellow staff member's crimes and mistakes.

In the case below, the VA doctor(s) were engaging in, what can only be described as an electrocution experiment, rather than diagnosis and treatment. Evidence was discovered that the attending VA "doctor", "Dr. Michael Pfeiffer," was not properly qualified as a doctor but, instead was only a PhD researcher in neurophysiology, from Humbolt University in Germany.

All of these facts were properly alleged in the complaint below. However, just as that attending VA "doctor," his supervisor, and another VA doctor were being scheduled for deposition, the Respondent filed conflicting affidavits accompanying a motion for summary judgment and a Motion to Stay all discovery. Without waiting for even a response from Petitioner to the Motion to Stay, the District Court granted that request motion for stay of all discovery, including preventing depositions, without reasons. The District Court left no opportunity to cross-examine the doctors nor any fair opportunity to challenge the affidavits and records upon which the Respondent's Motion for Summary Judgment relied. (*Minute Order*, APP-16)

Then, in an order granting Defendant's Motion for Summary Judgment, the District Court decision improperly implicitly accepted as true the VA doctors affidavits and records (e.g., the accuracy of the medical records those doctors authored, the role of each of the doctors, their qualifications, the nature of the unauthorized electrocution experiment that was performed on Petitioner, what they said to Petitioner and when they said it, etc.). The District Court failed to accept as true, in a light most favorable to Petitioner, the allegations of the Complaint and Petitioner's supporting affidavit. (*Memorandum* (APP-6), *Petitioners Declaration* (APP-24) *Second Amended Complaint,* (APP-42))

Furthermore, the District Court ignored that the VA staff had mislead Petitioner during its continuing care from 2013 to March 2016 while failing to properly diagnose and treat the physical pain and psychological damages caused by the VA "doctor's" electrocution experiment on Petitioner.

The District Court substituted its own uninformed medical opinion to determine that the statute of limitations began to run when the electrocution occurred in 2014, rather than when the VA ceased its attempts to diagnose, treat, and mislead Petitioner in 2016. Based on the District Court's uninformed medical opinion, it ruled that the stutute of limitations of the FTCA required granting the

Respondent's Motion for Summary Judgment (*Memorandum* (APP-6)).

It is now clearly established by this Court that the FTCA's §2401(b)'s time limits are non-jurisdictional and thus subject to equitable tolling. *United States* v. *Kwai Fun Wong*, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015). However, instead of relying on this more modern view, the District Court relied solely upon the somewhat outdated *United States v. Kubrick*, 444 U.S. 111, 122–23 (1979) which placed a burden on the injured Veteran to "inquire into the unknown cause of a known injury.":

> A medical malpractice claim under the FTCA accrues when the plaintiff knows "the critical facts that he has been hurt and who has inflicted the injury," even if he does not know that the injury was "negligently inflicted." *United States v. Kubrick*, 444 U.S. 111, 122–23 (1979). This standard places on an injured plaintiff the burden to "inquire into the unknown cause of a known injury." *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1443 (D.C. Cir. 1989) (citing *Sexton v. United States*, 832 F.2d 629, 637 (D.C. Cir. 1987)). If the plaintiff knows the "historical facts associated with the injury itself," *Sexton*, 832 F.2d at 634, "he need only undertake a reasonably diligent investigation to determine whether a cause of action may

lie." *Id.* at 633. Thus ordinarily, "a plaintiff's understanding of the basic nature of the treatment should suffice to begin the statute running." *Id.*

- *Memorandum* (APP-10)

The District Court went on to argue:

> In this case, no reasonable jury could conclude that Plaintiff did not "understand the basic nature of the treatment" on January 9, 2014, the date the EMG test was performed, or shortly thereafter. Plaintiff readily admits to the immediate effects of the electrical shock: he "was thrown off the chair and fell onto the floor," *Gnalega Decl.* ¶ *10*; he suffered "extreme" pain, *id.* ¶ *20*; within days of the test, his "whole left side went numb," *id.* ¶ *45*, and he developed a bump on his ankle and swelling "at the location where the EMG machine was placed," *id.* ¶ *29*; and he reported to the emergency room "in the days after that EMG on January 9, 2014," *id.* ¶ *45*."
>
> - *Memorandum* (APP-10 – APP-11)

Buried in a footnote, however, the District Court aknowledged that Petitioner did make inquiries of his injury throughout the years following. *Memorandum* at note 2. (APP-11):

> "True, Plaintiff visited doctors to complain of ankle pain in the ensuing years, and those doctors did not affirmatively identify the EMG test as the cause. *See Gnalega Medical Records Attachments to Affidavit, ECF No. 60-5.* But Plaintiff offers no evidence that he actually notified any subsequent treating physician of the botched EMG test."

What the District Court failed to point out was that Petitioner's inquiries were to the VA, along with its doctors, *who all had access to his medical records*, yet repeatedly failed to properly diagnose and treat the complex pain condition that the VA caused. Clearly seeking to misinform or through their own incompetence would the VA doctors not make the connection between the EMG test found in the medical records of VA and Petitioner's complex pain.

Nothing in the case law supports the District Court's view placing such a self-diagnostic burden on Petitioner (who has no medical training) in an FTCA VA medical malpractice case.

At the time, the Petitioner had no choice but to use the VA's doctors and its services. Special permission had to be granted to use medical services outside the VA. The VA was Petitioner's only source of medical diagnosis and treatment. Whether intentionally or through ineptness it covered up critical facts from

Petitioner as to the nature of his injury, including that Petitioner had involuntarily and unknowingly served as a guinea pig for a VA PhD neurophysiology researcher, Michael H. Pfeiffer. In addition, Petitioner pled that he had limited awareness and understanding of his condition as a result of the severe negative effect of the electrocution on his cognitive skills – as evidenced by many of the entries in the VA records – and that he relied upon the VA to determine what was wrong with him.

Suffering from amnesia and severe depression after Petitioner was disabled by the VA electrocution in January 2014 (*January 30, 2020 Declaration of Petitioner* ¶¶23-27 (APP-30 – APP-32) supported by *Petitioner's Medical Records* at 435-436) and having nowhere else to get medical treatment/diagnosis because of VA's practical monopoly on supplying my diagnosis and treatment (*January 30, 2020 Declaration of Petitioner* ¶¶28-32 (APP-32 – APP-33), The Medical Records of the VA show how vulnerable Petitioner was to misleading or absence of information provided by the VA doctors as to the cause of his pain:

a. "Unclear etiology given mostly normal MRI and EMG findings. Neurologic symptoms not consistent with focal lesion. Suspects that there is a psychological component to pain in addition to underlying issues" Feb 6, 2014 (*Plaintiff's Medical Records* at 432)

b. "Medicine makes me drowsy." Feb 6, 2014 (*Plaintiff's Medical Record* at 430)

c. "Mr Gnalega is voicing extreme frustration at not knowing why he is in so much pain. He has difficulty keeping up with his young son and has been getting into more arguments with his wife, he is extremely worried about his future if he can't start working again soon" Feb. 6, 2014 (*Plaintiff's Medical Records* at 430)

d. Patient "appears frustrated" Feb. 6, 2014 (*Plaintiff's Medical Records* at 431)

e. "The PHQ-9 test is positive for moderately severe depression" "The PHQ-2 test is positive for depression" Feb. 6, 2014 (*Plaintiff's Medical Records* at 435-436)

f. "Epicenter is unknown to patient. Increased pain noted with bearing L (LE). Pain mostly around ankle or knee Jt and is dull and emerging in nature" Feb. 28, 2014 (*Plaintiff's Medical Records* at 427)

g. "Pt with no particular pattern of pain and pt is not able to identify where pain is, (whole (L) Leg hurts)" March 7, 2014 (*Plaintiff's Medical Records* at 428)

h. "Aggravating factor: walking, Alleviating factor: I don't know what starts and what stops" May. 13, 2014 (*Plaintiff's Medical Records* at 339)

i. "A small elevation of the left foot: Unclear etiology. Does not appear to be infected. Recommendation/plan: I would not recommend any interventional pain procedures unless there is solid indication for those procedures. Since I am not sure the problem with his left foot small elevation, I suggested him to f/u with Dr Luse" May. 13, 2014 (*Plaintiff's Medical Records* at 343)

j. "Patient presents to physical therapy complaining of left ankle pain of Unknown cause" March 25, 2015 (*Plaintiff's Medical Records* at 151)

k. "Complaining of left ankle pain of unknown cause. He was in a car accident in 2013 but reports injuring his back not his foot" March. 25, 2015 (*Plaintiff's Medical Records* at 232-237)

l. "Patient reported he still doesn't have answers after the most recent neuro visit. He reports no one can explain the pain, temperature changes and weakness in his leg" May. 27, 2015 (*Plaintiff's Medical Records* at 219)

m. "He reports he continues to have. intense pain in the left leg with pressure and movement.

He is Frustrated he doesn't have any answers about the cause and the treatment for his issues. He remains convinced the injections into his back caused the leg pain, either from a reaction to the medication or due to nerve damage" June. 11, 2015 (*Plaintiff's Medical Records* at 216)

n. "He continues to report pain in his entire leg and ankle, no specific point tenderness. He is also concerned about a recent ultra sound showing thickening of his muscle" November. 12, 2015 (*Plaintiff's Medical Records* at 177).

o. "He requests a muscle biopsy for further evaluation" November. 12, 2015 (*Plaintiff's Medical Records* at 174)

p. "He is concerned that his symptoms are being caused by the epidural injections he had with an outside pain clinic in 2013." Nov. 12, 2015 (*Plaintiff's Medical Records* at 171.

"Individuals who have experienced an Electrical Injury have been reported to demonstrate both acute and *delayed* cognitive and psychiatric symptoms (emphasis added), (Aase, et al., "*Mood and Cognition after Electrical Injury: A Follow-up Study*, Archives of Clinical Neuropsychology *29 (2014) 125-130).* "Voltage level, chronic pain and litigation status did not predict psychiatric morbidity. Psychiatric difficulties commonly emerge and persist following

EI [Electrical Injury]." (Rubin, *et al.fxAy* 2009, *Psychiatric morbidity following Electrical Injury and its effects on cognitive functioning*, General Hospital Psychiatry 31(4):360-6)) The medical records of Petitioner clearly indicate in a number of places he suffered from electrical shock trauma-induced depression and other undiagnosed mental impairments. It is well established that depressed individuals have difficulties seeking and receiving support from others (e.g., Coyne and Joiner, *The Interactional Nature of Depression, Advances in Interpersonal Approaches*, American Psychological Association (1999)). After reviewing the medical records and seeing the extensive documentation provided by Petitioner, common sense should have led the District Court to realize that, with his mental condition, Petitioner was not in a position to do an effective investigation of his medical condition, and that he was vulnerable to the misinformation he was receiving from the VA staff in his attempt to determine the cause of, and to relieve, the complex pain he was suffering from.

Petitioner was not going to recognize that he was getting ineffective treatment from the VA, and could not be held accountable for not being aware of the cause of his complex pain, and what to do about it — including filing an informed FTCA action within two years while he was still reliant on the VA for his medical information.

These disputed facts, including what the Petitioner knew and when he knew it, made the grant of a Motion for Summary Judgment the benefit of critical discovery, including deposing the key VA "doctors," improper and reversible. The District Court disregarded the availability equitable tolling of the statute of limitation of the FTCA in a case such as this.

Instead of a fair hearing of the evidence, the District Court abruptly cut short discovery and barred depositions of key doctor affiants – including those with fraudulent credentials who engaged in illegal electrocution experimentation on the Veteran-Petitioner. Despite its words to the contrary, the District Court accepted as true facts in the affidavits of VA doctors and doctor-authored records with no opportunity for cross-examination or deposition of those doctors or the authors of those records.

The District Court below did not acted consistent with the orders of this Court nor was it being fair to this veteran. This veteran and the others who have faithfully served our country expect to be treated fairly and properly, consistent with the US Constitution and the laws of this great country for which they have served and fought.

BACKGROUND

Petitioner is a veteran who is eligible for

treatment at the VA Hospital in Washington, DC. Petitioner went to VA Hospital in Washington DC over the course of several years seeking relief for back and ankle pain. (See, *Second Amended Complaint*, January 16, 2019, R.31, (APP-42)) Petitioner sought treatment for his back and ankle pain at the VA Hospital in Washington DC. *Id.*

Petitioner began seeking treatment for his back pain from the VA Hospital in Washington DC in December 2013. (See, *Second Amended Complaint*, January 19, 2019, R.31, (APP-42)). A nerve conduction exam (EMG) was ordered and administered in January 2014. It consists of passing electric current through the patient's body.

As the District Court related:

> [O]n January 9, 2014, Dr. Michael Pfeiffer, a neurologist at the Washington D.C. Veterans Administration ("VA") Medical Center, negligently performed an electromyography ("EMG") test on his left ankle that caused permanent injury and pain. *Decl. of Reuel Jacques Abale Gnalega*, ECF No. 60 [hereinafter Gnalega Decl.], ¶¶ 1, 5. According to Plaintiff's sworn statement, the electrical stimulation administered was so strong that he "was thrown off the chair and fell onto the floor." *Id.* ¶ 10. The attending VA neurologist then said "he would turn down the machine" and conducted the EMG

test twice more "before deciding to stop the test," which "hurt [Petitioner] very badly." *Id.* ¶ 20. Afterwards, Petitioner "remember[s] walking in the hallway of the VA hospital not knowing what had happened." *Id.* ¶ 23. He then began to suffer from "the tell tale signs of the survivor of a grave electrical shock: Amnesia, severe anxiety, [and] severe fatigue." *Id.* The EMG test also caused adverse physical effects. Petitioner suffered "swelling [. . .] at the location where the EMG machine was placed," and he "was badly shocked on [his] ankle and [he] developed a bump on it." *Id.* ¶ 29.

Memorandum (APP-9 – APP-10)

Petitioner suffered significant pain and incapacity due to the VA Hospital in Washington DC's negligent failure to properly diagnose and treat Petitioner after that electrocution event, and to employ qualified physicians treat Petitioner. On March 16, 2016, the VA Hospital in Washington, DC refused to continue to evaluate and treat Petitioner's back and leg pain. As a result, Petitioner has suffered incapacity from the chronic excruciating pain of the internal burns, the inability to walk without crutches, a possible foot amputation, and the inability to work. *See, Second Amended Complaint*, (APP-42), and *Declaration of Petitioner* (APP-24).

On May 31, 2017, Petitioner submitted a claim

letter to the VA of Washington DC – within two years of the VA Hospital's discharge and ending its (mis)treatment attempts to determine the cause, to (mis)inform Petitioner, and to resolve the leg pain of Petitioner.

REASONS TO GRANT THE PETITION

Issue 1: Whether Appellate review of a grant of summary judgment was *de novo*, (*Judicial Watch, Inc. v. Dep't of Def.*, 913 F.3d 1106, 1110 (D.C. Cir. 2019)), and whether, in such review, the Court of Appeals "examine[d] the facts in the record and all reasonable inferences derived there from in a light most favorable to' the non-moving party." *Feld v. Fireman's Fund Ins. Co.*, 909 F.3d 1186, 1193 (D.C. Cir. 2018);

It is well established that the appellate review of a District Court's grant of a motion for summary judgment is *de novo*. *Judicial Watch, Inc. v. Dep't of Def.*, 913 F.3d 1106, 1110 (D.C. Cir. 2019).

As this Court has recognized in such appellate review, like that of the District Court, must view the summary judgment record and the inferences to be drawn therefrom "in the light most favorable to [Appellant]." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 LEd.2d 176 (1962) cited by *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d

294, 260 U.S. App. D.C. 334 (D.C. Cir. 1987) at 297.

It is important for this Supreme Court to address this issue because there appears to be a misunderstanding by the US Court of Appeals in the District of Columbia regarding how to apply the proper standard of review of a District Court grant of a Motion for Summary Judgment.

> We review a district court's grant of a motion for summary judgment de novo. *Hermes Int'l v. Lederer De Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2d Cir. 2000). We will affirm the district court's grant of summary judgment if, construing the evidence in the light most favorable to the non-moving party, the record shows that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000).
>
> *Woodford v. Community Action of Greene County*, 268 F.3d 51, 2001 WL 1191393 (2nd Cir. 2000), in accord, *Sabre* at 64.

The US Court of Appeals for DC below appears to have ignored those standards in this case. No *de novo* analysis can be found in the Court of Appeals decision below, nor is there any analysis construing

the evidence in the light most favorable to the Petitioner, i.e., the non-moving party. Instead, the Court of Appeals appears to follow an abuse of discretion standard for review of a Motion for Summary Judgment.

The entire opinion of the Court of Appeals regarding the FTCA and its statute of limitations is:

> "Federal Tort Claims Act suit was properly dismissed because appellant did not present a written administrative claim to an appropriate federal agency within two years after his claim accrued. See 28 U.S.C. § 2401(b)."
>
> - *COA Order* (APP-1)

Where is the *de novo* analysis and examination of the facts in the record and all reasonable inferences derived there from shall be in a light most favorable to the non-moving party? *Diebold, Inc.*, etc..

From the anemic *COA Order*, we can only infer that the Court of Appeals implicitly adopted a different standard, namely abuse of discretion.

The Supreme Court should needs to grant this Petition in order to reinforce to the lower courts that a appellate review of grants of Motions for Summary Judgment are to be explicitly reviewed *de novo*, and, in turn, the Court of Appeals must examine the facts

in the record and all reasonable inferences derived there from in a light most favorable to the non-moving party.

Issue 2: Is a court obligated to treat the Federal Tort Claims Act's statute of limitations as running while the veteran remains under the exclusive control and care of the VA to correct his debilitating and traumatizing electrocution injury in an involuntary experiment that they caused, and thus allowing the VA to benefit from its illegal and/or immoral behavior.

At the time of period in question, the VA was, and remains, effectively a monopoly medical provider to Petitioner. It was (and remains) the exclusive medical provider to the veteran Petitioner. Unless the VA authorized a third party to provide medical services to Petitioner, Petitioner had no choice but to use VA's services and trust their diagnosis, or lack of diagnosis, and accept their treatment – no matter how incompetent or devious the physicians may have been. *Petitioner's Declaration* (APP-24).

As Petitioner's exclusive monopoly medical provider, the VA maintained undue influence over Petitioner with regard to his medical diagnosis and treatment for several years, feeding Petitioner misinformation about his injury. The District Court (and, in turn, the Court of Appeals) failed to

recognize that influence and that the VA was a source of misinformation about his condition, and what caused it.

> Under the "discovery rule" to determine when a tort action accrues, absent equitable tolling, "a cause of action accrues when the plaintiff has knowledge of (or by the exercise of reasonable diligence should have knowledge of) (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing." *Knight v. Furlow*, 553 A.2d 1232, 1234 (D.C.1989); see also, e.g., *Williams v. Mordkofsky*, 901 F.2d 158, 162 (D.C.Cir.1990).
>
> *Goldman v. Bequai*, 19 F.3d 666, 671-672 (D.C. Cir. 1994)

> As a general matter, "what a plaintiff knew and when [she] knew it, in the context of a statute of limitations defense, are questions of fact for the jury." *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1484 (D.C.Cir.1989). This court held in *Byers v. Burleson*, 713 F.2d 856, 861 (D.C.Cir.1983), that, under District of Columbia law, "[s]ummary judgment is not appropriate in a case applying the discovery rule if there is a genuine issue of material fact as to when, through the exercise of due diligence, the plaintiff knew or should have known of her

injury."

Goldman at 672.

The District Court below argued that:

> "no reasonable jury could conclude that Plaintiff did not "understand the basic nature of the treatment" on January 9, 2014, the date the EMG test was performed, or shortly thereafter. Plaintiff readily admits to the immediate effects of the electrical shock: he "was thrown off the chair and fell onto the floor," Gnalega Decl. ¶ 10;"

Memorandum (APP-10)

The District Court's argument is flawed in that it assumes a patient understands cause and effect of a medical complex medical condition, while receiving from his treating physicians – who are the "experts" at the VA – *misinformation* about his condition.

As noted aboye, the Petitioner's VA medical record is filled with entries by VA treating physicians that indicated that Petitioner was *cognitively impaired* for a long time, and that he was being fed misinformation by the many VA doctors who – apparently wished to cover for their fellow physicians.

Having denied discovery on those physicians, and not allowed the case to go forward, the District Court improperly substituted its own medical opinion, for that of a jury. "[W]hat a plaintiff knew and when [she] knew it, in the context of a statute of limitations defense, are questions of fact for the jury." *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1484 (D.C.Cir.1989).

This Court has found that the FTCA's §2401(b)'s time limits are non-jurisdictional and thus subject to equitable tolling. *United States* v. *Kwai Fun Wong.* 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015). Here, the Court ignored that the cognitively impaired Petitioner as being fed misinformation by the VA physicians, and, instead, substituted the Court's own non-medical judgment for that of a jury as to what the Petitioner knew and when he knew it.

The District Court, and in turn, the Court of Appeals that relied on the District Court's uninformed analysis, erroneously failed to correctly apply the statute of limitation under *Wong, Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) *(as intepreted by Wong),* and *Kubrick.*

Given the many Veterans with cognitive impairments who depend exclusively on the VA for their medical care, it is important to make clear that

the statute of limitations is tolled when the VA has fed misinformation to a cognitively impaired veteran; or, at least, leave that matter as a fact question for a judge or jury question in a trial after discovery is properly completed.

Issue 3: Whether it was violation of procedural due process under the Fifth Amendment for the District Court to prevent Petitioner from deposing and doing other forms of discovery on the VA doctors whose affidavits and records were, in fact, relied upon by the District Court in granting the Motion for Summary Judgment.

After denying the Respondent's Motion to Dismiss, the District Court ordered that discovery be allowed, including depositions, by the parties. The period for fact discovery was to scheduled to end on February 14, 2020. *District Court Sept 18, 2019 Discovery Order* (APP-17)

Petitioner served discovery requests on Respondent. In addition, Respondent and Petitioner were scheduling mutual depositions of Petitioner (Gnalega) and Respondent's key witnesses (Drs. Pfeiffer, Sandbrink, and Luce). In addition, Petitioner had served on Respondents extensive discovery requests, that remained pending.

On January 30, 2020, Petitioner filed a Motion to

Compel with the Court to require Respondent to provide complete responses Rule 26(a)(1) Document Responses and to Petitioner's pending document discovery requests. *Petitioner Jan 30, 2020 Motion to Compel* (APP-21).

On February 5, 2020, Respondent changed counsel of record, who then filed a Motion to Stay Discovery.

Before Petitioner had an opportunity to file his opposition to Respondent's Motion to Stay Discovery, the Court issued a minute order on February 10, 2020 denying Petitioner's Motion to Compel, and granting Respondent's Motion to Stay discovery. *District Court Feb 10, 2020 Minute Order*, APP-26. The Court's only reason for denying Petitioner's Motion to Compel was Petitioner's alleged failure to meet and confer with Respondent's counsel, as required by USDC Local Civil Rule 7(m). However, Petitioner had clearly stated in his motion that he attempted a good faith effort to resolve the discovery matter with opposing counsel – as required by Rule 7(m) – but Respondent was not cooperating with Petitioner's discovery requests.

Petitioner's unanswered discovery requests, including the Court's failure to allow depositions of the three VA doctors who attended to Petitioner, and the Declaration of Petitioner setting forth material disputed facts (*Jan 30, 2020 Declaration of*

Petitioner, (APP-24)) that there were unresolved, that required thorough discovery and fact finding.

The Court of Appeals denied the Petitioner's appeal of the discovery issue, claiming that review of discovery issues are subject to an abuse of discretion standard of review:

> "Although appellant argues that the district court incorrectly stayed discovery, he has not demonstrated that the additional discovery he sought was necessary or that the court abused its broad discretion to manage the scope of discovery. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) ("This court will overturn the district court's exercise of its broad discretion to manage the scope of discovery only in unusual circumstances.")."

- *COA Order* (APP-1)

There are several flaws in the Court of Appeal's reasoning which require reversal.

First, unless the matter is urgent, it was a violation of basic procedural due process under the Fifth Amendment of the US Constitution for the District Court to grant a motion to stay discovery before the time had passed for the opposing party to respond and be heard. Neither the District Court,

nor the Court of Appeals give any reasons why a motion to stay discovery was granted on an expedited basis, denying the District Court the benefit of waiting for a response by Petitioner. Failing to afford the Petitioner an opportunity to be heard before ruling on the Motion for Stay of Respondent was clearly an abuse of discretion by the District Court, and the Court of Appeals erred in not finding it so.

Second, District Court denied the Petitioner's Motion to Compel Discovery without any substantive reasons – but instead claimed only that Petitioner failed to comply with local rule 7(m). However, as noted above, the Motion to Compel had indicated that Petitioner had attempted to resolve the matter with opposing counsel. Even in the case of exercise of discretion, the District Court needs to give some reasons as to how Petitioner allegely failed to comply with local rule 7(m).

Meanwhile, the Court of Appeals substituted its own reasoning for the District Court denying basic discovery for Petitioner, namely that: "[Petitioner] has not demonstrated that the additional discovery he sought was necessary." *COA Order* (APP-1). However, the COA ignores the contents of the Motion to Compel, and the Opposition to the Motion for Stay filed by Petitioner. Furthermore, the Court of Appeals does not explain – nor could it explain -- how deposing affiants

regarding the disputed facts in their affidavit was not *necessary*. Given that issues surrounding statute of limitations regarding what Petitioner knew, or could have known, and when he knew it were factual questions for a fact finder, and not a pre-discovery summary judgment. *See, e.g., Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1484 (D.C.Cir.1989).

The COA ignored that upon the filing of Respondent's Motion for Summary Judgment, the District Court prematurely granted Appellee's request to stay all discovery, including the pending requests to depose and do other discovery on Pfeiffer, Dr. Sandbrink and Dr. Luce, while allowing the summary judgment motion of Respondent to proceed forward. (*Minute Order* (APP-16)

In his sworn affidavit in his opposition to Respondent's Motion for Summary Judgment, Petitioner stated that the EMG procedure was administered by a Michael Pfeiffer, Phd, who, unbeknownst to him at the time, had questionable credentials, if any, as a doctor. (*Declaration of Petitioner* (APP-24))

In its Memorandum granting Respondent's premature motion, the District Court clearly relied upon the two affidavits submitted by Respondent with its Motion for Summary Judgment, while preventing Petitioner from deposing or otherwise

doing discovery on those affiants. Doing discovery with regard to those affiants was clearly necessary as there were many facts in dispute, including which doctors performed which procedures, what occurred, and what were their qualifications. Denial of that discovery, while implicitly relying on those affiants, is a basic denial of procedural due process, and clearly an abuse of discretion.

Third, the COA Opinion cites *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) as a basis for its superficial treatment of the premature stay of discovery issue. *COA March 25, 2021 Order* (APP-1). However, *SafeCard*, and most of the cases relying on it, are FOIA cases. Because of the nature of FOIA cases, discovery is rarely done by the parties. The case below is a medical malpractice case, which typically (rather than atypically) requires the establishment of complex medical facts, including the facts to support (or not support) compliance with the statute of limitations. It is difficult to imagine a medical malpractice case that does not require the most basic discovery disclosures, including depositions of doctors whose affidavits and records the Court is relying upon implicitly or explicitly.

Failure to allow discovery to go forward, as originally scheduled by the District Court, in particular where the Court fails to wait for an opposition to the motion to stay discovery to be filed

by Petitioner, was clearly a violation of procedural due process, and an abuse of discretion.

CONCLUSION

For the reasons set forth herein, the Court of Appeals decision upholding the District Court's stay of discovery and grant of summary judgment, should be vacated and remanded for further procedings.

Respectfully submitted,

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