

No. 21-8209 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

FILED  
MAY 31 2022  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ALAN M LESCHYSHYN — PETITIONER  
(Your Name)

VS.

AbbVie Incorporated — RESPONDENT(S)  
Abbott Laboratories Incorporated  
ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Seventh Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALAN M LESCHYSHYN  
(Your Name)

FCI Safford, P.O. BOX 9000  
(Address)

Safford, AZ 85548  
(City, State, Zip Code)

NOT APPLICABLE  
(Phone Number)

Statement of Issues Presented for Review

I. One of the four elements for the doctrine of collateral estoppel, or issue preclusion under Arizona law is previous case. Did the lower court err or alternatively abuse its discretion in granting Defendants' motion for summary judgment, based on Defendants' response using collateral estoppel, where the record showed Plaintiff's Arizona case was contemporaneously filed and therefore there was no prior decision that existed at the time Plaintiff filed this case?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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

## RELATED CASES

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APPENDIX E - Not applicable

APPENDIX F - Not applicable

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

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

**OPINIONS BELOW**

For cases from **federal courts**:

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

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 is unpublished.

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

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 is unpublished.

For cases from **state courts**:

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

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 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix D to the petition and is

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

## **JURISDICTION**

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 21, 2022.

[ ] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 20, 2022, and a copy of the order denying rehearing appears at Appendix c.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

For cases from **state courts**:

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Altman v. Great West Cas. Co.	6,7
Azurix Corp. v. Synagro Technologies, Inc.	5
Crosby-Garbotz v. Fell in + for Cty. of Pima	5
Graham v. R.J. Reynolds Tobacco Co.	5,6
Southern Union Co. v. Southwest Gas Corp.	5,7

Statement of the Case

A) Procedural History

The Complaint was filed on February 17, 2017, by Leschyshyn in the United States District Court for the District of Arizona against AbbVie, Inc., et al, for injuries allegedly caused by their testosterone gel therapy, Androgel. The case was Tag-Along to a MultiDistrict Litigation (M.D.L.) case # 2545, and therefore transferred to the Northern District of Illinois, Eastern Division.

Contemporaneously to the filing of this Complaint, Leschyshyn filed a complaint against Dr. Patel for medical malpractice.

On June 1, 2020, AbbVie, Inc., et al, filed a Motion for Summary Judgment re: Statute of Limitations.<sup>2</sup>

On June 19, 2020, Leschyshyn provided a response in objection to this motion.<sup>3</sup>

On June 26, 2020, AbbVie, Inc., et al, filed a reply to Leschyshyn's objection.<sup>4</sup>

On January 29, 2021, Leschyshyn submitted a surreply to AbbVie, Inc., et al, objection based on collateral estoppel.<sup>5</sup>

On February 8, 2021, the Court granted AbbVie, Inc., et al, motion for summary judgment, agreeing to the collateral estoppel argument.<sup>6</sup>

On March 2, 2021, Leschyshyn filed a motion for reconsideration.<sup>7</sup>

On March 11, 2021, the Court denied the motion for reconsideration.<sup>8</sup>

On April 5, 2021, Leschyshyn filed a notice of appeal.<sup>9</sup>

On March 21, 2022, the Court of Appeals affirmed the District Court's order.<sup>10</sup>

On April 1, 2022, Leschyshyn filed a petition for rehearing and for rehearing en banc. It was denied on April 20, 2022. The Court of Appeals ignored Leschyshyn's argument on contemporaneously filed cases.<sup>11</sup>

<sup>1</sup> Dkt. 62

<sup>2</sup> Motion for Summary Judgment, Dkt. 53

<sup>3</sup> Plaintiff's Reponse & Objection, Correction, Dkt. 56 - 58

<sup>4</sup> Dkt. 54

<sup>5</sup> Dkt. 60

<sup>6</sup> Dkt. 61 - 62

<sup>7</sup> Dkt. 63

<sup>8</sup> Dkt. 64

<sup>9</sup> Dkt. 65

## Arguments and Authorities

I. One of the four elements for the doctrine of collateral estoppel, or issue preclusion under Arizona law is previous case. Did the lower court err or alternatively abuse its discretion in granting Defendants' motion for summary judgment, based on Defendants' response using collateral estoppel, where the record showed Plaintiff's Arizona case was contemporaneously filed and therefore there was no prior decision that existed at the time Plaintiff filed this case?

A. Standards of Appellate Review : Southern Union Co. v. Southwest Gas Corp., 165 F. Supp 2d 1010, 2001 U.S. Dist. LEXIS 22017 (Dist. of Az, July 30, 2001)  
"Under Arizona law, the doctrine of issue preclusion 'precludes relitigating an issue of fact in a later case when, [1] in a previous case, [2] the same issue was actually litigated, [3] a final judgment was entered, and [4] the party against whom the doctrine is to be invoked had a full and fair opportunity to litigate'" Crosby-Garbotz v Fell in & for Cty. of Pima, 246 Ariz. 54, 55, 434 P.3d 143, 144 (2019).

"There the difference in time of filing is so close, it is fair to treat the competing actions as contemporaneously filed."

Azurix Corp. v Synagro Technologies, Inc., 2000 Del. Ch. LEXIS 25, No. C.A. 17509, 2000 WL 193117 at \*3 (Del. Ch. Feb 3, 2000) (one action filed on Friday and another filed on Monday).

"Judge Wood's case was not prior litigation, but a contemporaneously filed case. In other words, the case pending before this Court is not a 'later, separate suit between the parties'". Graham v R.J. Reynolds Tobacco Co., 857 F.3d 1169, 1214 (11th Cir. 2017).

"After careful consideration, the Court easily concludes that collateral estoppel is inappropriate in this case. The Eleventh Circuit Court of Appeals recognizes that [b]oth issue preclusion operate across a two-lawsuit continuum... Accordingly, collateral estoppel does not operate to bar the Court

from considering the merits of Plaintiff's motion to remand because no prior decision existed at the time plaintiff filed this case." Altman v Great West Cas. Co., September 29, 2017 U.S. Dist. LEXIS 161244.

#### B. Discussion

Leschyshyn filed his case against Dr. Patel in the Superior Court of Arizona and the current case against the Defendants' contemporaneously on February 17, 2017.<sup>10</sup> For this reason, there was no prior decision on the issue of statute of limitations at the time Leschyshyn filed the case against the Defendants'. Therefore, the U.S. District Court cannot bar itself from considering the merits of Leschyshyn's argument using the unsound mind exception.

The above is consistent with Graham and Altman id.

Please note that the Defendants' should of been made aware of a potential statute of limitations issue shortly after receiving Plaintiff's Fact Sheet<sup>11</sup> on May 17, 2017, which included authorizations to obtain Leschyshyn's medical records. It was not until April 22, 2020<sup>12</sup> that Defendants' noted the potential issue with statute of limitations. Defendants' had approximately 2 year opportunity to litigate it prior to March 19, 2019,<sup>13</sup> final determination of the case against Dr. Patel.

<sup>10</sup> Dkt 13

<sup>11</sup> Dkt 49

<sup>12</sup> Dkt 52 Ex. 8 pg 2

## REASONS FOR GRANTING THE PETITION

The majority opinion from the Court of Appeals, by excluding Leschyskyn's main argument on contemporaneously filed cases, conflicts with the Court's opinions in Southern Union Co. v. Southwest Gas Corp. and Altman v. Great W. Gas. Co.

Southern Union Co. case was out of District of Arizona, which the parties in Leschyskyn's case agree that Arizona law governs, addresses the issue of first to file rule. In addition, in Altman, 11<sup>th</sup> Circuit addressed the issue of no prior decision existed at the time Plaintiff filed the case. Leschyskyn's opinion directly conflicts with both of these cases.

Consideration by the Supreme Court is necessary to secure and maintain uniformity on the same important matter. Rule 10(a) from Rules of the Supreme Court states "a United States court of appeals (i.e. 7<sup>th</sup> Cir.) has entered a decision in conflict with the decision of another United States court of appeals (i.e. 11<sup>th</sup> Cir.) as well as a departure from a lower court (i.e. Dist. of AZ) on the same important matter (i.e. collateral estoppel and contemporaneously filed cases), as to call for an exercise of this Court's supervisory powers."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Alan M Leschyshyn 38415408  
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Date: May 31, 2022