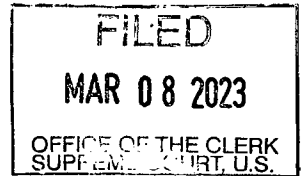


No. 22-7383
22A799

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Carlton Theodore Landis — PETITIONER
(Your Name)

vs.

David J. Robert, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

3rd Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlton Theodore Landis
(Your Name)

USP-McCreary, P.O. Box 3000
(Address)

Pine Knot, Kentucky 42635
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Can the Court sua sponte substitute the United States as a defendant in a diversity action brought under section (d)(1) of the Westfall Act?

Can the Court sua sponte substitute the United States under the Westfall Act without first making a determination regarding scope of employment?

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: David J. Kbbert, Ian Connors, J. Ray Ormond, J. Honkle, Hugh Herwitz, D. Langton, J. Savidge, M. Condit, Steese, Hackenberg, Cressinger, J. Sienkiewicz

RELATED CASES

- Landis v. Kbbert, et al., 21-CV-244, U.S. District Court for the Middle District of Pennsylvania. Judgment entered on
- Landis v. Kbbert, et al., No. 22-1265, U.S. Court of Appeals for the Third Circuit. Judgment entered on December 8, 2022.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	7

INDEX TO APPENDICES

APPENDIX A	Decision of Court of Appeals for the Third Circuit.	9
APPENDIX B	Decision of the District Court for the Middle District of Pennsylvania. . .	15
APPENDIX C	28 U.S.C. Section 1332, "	20
APPENDIX D	28 U.S.C. Section 2679.	26
APPENDIX E		
APPENDIX F		

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

<u>B&A Marine Co. v. American Foreign Shipping Co.</u> , 23 F. 3d 709 (2nd Cir. 1994).	7
<u>District of Columbia Ct. App. v. Feldman</u> , 460 U.S. 462 (1983).	5
<u>Gutierrez de Martinez v. Lamagno</u> , 515 U.S. 417 (1993).	6
<u>Nasuti v. Scannell</u> , 460 F. 2d 802 (1st Cir. 1990).	6
<u>Osborn v. Haley</u> , 549 U.S. 225 (2007).	5
<u>Salazar v. Ballesteros</u> , 17 Fed. App'x 129 (4th Cir. 2001).	6
<u>Sullivan v. Freeman</u> , 944 F. 2d 337 (7th Cir. 1991).	6
<u>U-Haul Int'l, Inc. v. Estate of Albright</u> , 626 F. 3d 498 (9th Cir. 2010).	6
<u>United States v. Smith</u> , 499 U.S. 160 (1991).	5

STATUTES AND RULES

28 U.S.C. § 2674.	4
28 U.S.C. § 2679.	4, 6
28 U.S.C. § 2679(b)(1).	5
28 U.S.C. § 2679(d)(1)-(3).	5

OTHER

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 2022 U.S. Dist. LEXIS 9949; 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 _____ 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 _____ 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 December 8, 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: _____, 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 May 17, 2023 (date) on March 22, 2023 (date) in Application No. 22 A 199.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1332 (a). See Appendix C

28 U.S.C. Sections 2679 (b)-(d). See Appendix D

STATEMENT OF THE CASE

A. Procedural History

On January 19, 2022, the District Court for the Middle District of Pennsylvania issued an order and opinion dismissing Petitioner's Complaint pursuant to 28 U.S.C. §1915(e).

Petitioner timely filed a Notice of Appeal to the Court of Appeals for the Third Circuit.

On December 6, 2022, the Court of Appeals for the Third Circuit entered judgment in favor of the District Court's order and opinion.

B. Factual Background

In the Middle District of Pennsylvania, Petitioner lodged a civil suit pursuant to diversity of jurisdiction, claiming that the respondents, acting outside of their scope of employment or office, violated Pennsylvania tort laws by maliciously and sadistically depriving Petitioner of recreation for nine (9) months.

The District Court dismissed the Complaint, claiming that Petitioner "cannot sue the individual BOP defendants under the Pennsylvania Constitution or Pennsylvania tort law. The proper avenue is to pursue a claim against the United States under the Federal Tort Claims Act ("FTCA)." See Landis v. Ebbert, 2022 U.S. Dist. LEXIS 9949 *5-6. In dismissing the case, the District Court did not conduct any analysis as to whether the respondents acted within their scope of employment.

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court's decision in regard to Petitioner's tort claims, claiming "Landis argues that defendants acted outside the scope of their employment in revoking his recreation privileges. In his view, state law should govern his tort claims because the Federal Tort Claims Act (FTCA) only applies to defendants acting within the scope of employment. See C.A. No. 22 at p. 5. Landis['] scope of employment allegation does not transform his tort claims to ones arising under state law. The FTCA is the proper vehicle for litigating tort claims against federal prison officials. See 28 U.S.C. §§ 2674, 2679." In affirming the District Court, the Court of Appeals did not conduct any analysis as to whether the respondents acted within their scope of employment.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals departed from the accepted and usual course of judicial proceedings and it sanctioned such a departure by the lower court.

"The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. See 28 U.S.C. § 2679(b)(1). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.' § 2679(d)(1), (2). Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA), 60 Stat. 842." Osborn v. Haley, 549 U.S. 225, 229-230 (2007). "Where the Attorney General refuses to issue such certification, the Act permits the employee to seek a judicial determination that he was acting within the scope of his employment. § 2679(d)(3)." United States v. Smith, 499 U.S. 160, Note 5 (Internal quotation marks omitted).

The essence of a judicial proceeding is the adjudication and rejection of a party's arguments. See District of Columbia Ct. App. v. Feldman, 460 U.S. 462, 480-481. The Westfall Act prescribes the manner and substance of a judicial proceeding. See 28 U.S.C. § 2679(d)(1)-(3).

The District Court deviated from the accepted and usual course of judicial proceedings under the Westfall Act when, during its initial screening of the complaint, it sua sponte substituted the United States as the defendant and dismissed Petitioner's state tort law claims pursuant to the FTCA without making a judicial determination in regard to Petitioner's scope-of-employment allegations. The Appeals Court sanctioned the lower court's deviation from the accepted and usual course of judicial proceedings under the Westfall Act when it concurred with the lower court's decision after Petitioner made the lower court's procedural mishaps evident to the Appeals Court via argument; Moreover, the Appeals Court deviated from the accepted and usual course of judicial proceedings under the Westfall Act when, during its de novo review, it substituted the United States as a defendant and dismissed Petitioner's state tort law claims pursuant to the FTCA without making a judicial determination in regard to Petitioner's scope-of-employment allegations.

To be sure, the essence of the problem with the decision of the District Court and Court of Appeals is as follows:

Firstly, the Attorney General was served process in this matter, but the Attorney General never sought, and therefore refused, to certify the respondents. See 28 U.S.C. § 2679 (d)(3). The Attorney General's decision to refuse to certify the respondents is conclusive unless challenged. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 423-24 (1993). The respondents never challenged the Attorney General's refusal to certify them, so the Attorney General's decision was conclusive for the purpose of removal; Thus, the Court should not have substituted the United States as a defendant and dismissed the state law tort claims pursuant to the FTEA. See U-Haul Int'l, Inc. v. Estate of Albright, 626 F.3d 498, 500-01 (9th Cir. 2010).

Secondly, the "Westfall Act doesn't empower the district court sua sponte to abrogate the federal government's sovereign immunity and subject it to the risk of liability. Heading the Act otherwise would have serious implications for the separation of powers. And, by failing to provide [Petitioner] and the United States with an opportunity to oppose... substitution, the district [and Appeals] court[s] denied [these] parties due process." Id.

Thirdly, even if the Court could sua sponte certify the respondents, it still deviated from judicial procedure by not considering whether the acts alleged by Petitioner fell outside of the respondents' scope of employment, which is a step the Court must take before it substitutes the United States as a defendant under the FTEA. See Nasuti v. Seconell, 906 F.2d 802, 808 (The Court must make a determination of the scope of employment issue to determine its subject-matter jurisdiction).

2. There are Circuits with vying views on the issue of sua sponte substitution.

The Ninth Circuit is of the view that a court cannot sua sponte substitute the United States pursuant to the Westfall Act without violating a party's due process rights. See U-Haul Int'l, Inc. v. Estate of Albright, *Supra*. The 7th Circuit is of the view that a court cannot sua sponte substitute the United States as a party. See Sullivan v. Freeman, 944 F.2d 337 (7th Cir. 1991). The 4th Circuit is also of the view that a court does not have sua sponte powers in this regard. See Salazar v. Ballesteros, 17 Fed. App'x 129 (4th Cir. 2001).

However, the 2nd Circuit is of the view that the Westfall Act permits the Court to sua

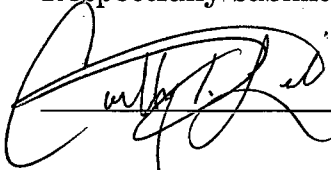
Sponte certify a federal employee in the absence of certification by the Attorney General. see B & A Marine Co. v. American foreign Shipping Co., 23 F.3d 709 (2nd Cir. 1994).

The Supreme Court has not addressed the issue of sua sponte certification, and Petitioner contends that this Court's intervention is necessary to settle the vying interpretations of the Westfall Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: April 12, 2023