

No. _____

**In The
Supreme Court of the United States**

—◆—
ANGELA PIEPER, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Does the Discretionary Function Exception to the Federal Torts Claim Act extend beyond policy decisions and protect non-policy actions?

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

Petitioners, were Plaintiffs-Appellants below, are: Angela Pieper as the Personal Representative of The Estate of Kristen Renee Hernandez, and all Similarly Situated Personal Representatives of the Estates of Deceased Persons Whose Deaths Were Caused by Toxic Exposure on or Emanating from US Army Base Ft. Detrick; Louise M. Mason on her own behalf and on behalf of All Similarly Situated Persons Suffering from Diseases Caused by Toxic Exposure on or Emanating From US Army Garrison, Ft. Detrick; Brandon F. White, on his own behalf, and on behalf of All Similarly Situated Persons Suffering from Fear of Diseases Caused by Toxic Exposure on or Emanating from US Army Garrison Ft. Detrick. Additionally, under Maryland Rule 15-1001 Wilfredo Hernandez, Emma Hernandez, Robert Andrew Thomas III and Randy White were identified as Use Plaintiffs of the Estate of Kristen Renee Hernandez.

Respondent, who was Defendant-Appellee below, is The United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Angela Pieper, Louise M. Mason, Brandon F. White, Wilfredo Hernandez, Emma Hernandez, Robert Andrew Thomas III, and Randy White respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1) is reported at *Pieper v. United States*, No. 16-2035, 2017 U.S. App. LEXIS 20796 (4th Cir. Oct. 20, 2017). The order of the United States District Court for the District of Maryland is reported at *Pieper v. United States*, No. CCB-15-2457, 2016 U.S. Dist. LEXIS 106007 (D. Md. Aug. 11, 2016).



STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 2017. The Court's jurisdiction rests on 28 U.S.C. §1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that “[t]he judicial Power shall extend to all

Cases, in Law and Equity, arising under * * * the Laws of the United States * * * .”

28 U.S.C. §2674 states that “[t]he United States shall be liable, * * * in the same manner and to the same extent as a private individual under like circumstances * * * .”

STATEMENT OF THE CASE

The application of the discretionary function exception is a narrow exception to the waiver of governmental liability under the Federal Tort Claims Act. The discretionary function exception is reserved solely for governmental *policy* decisions in order to protect the policy makers from being second guessed in their duties. (“Congress enacted this exception ‘to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort . . . [and] to protect the Government from liability that would seriously handicap efficient government operations.’” *Suter v. United States*, 441 F.3d 306, 310 (4th Cir. 2006). The exception, however, does not extend to the *implementation* of the policy decisions by the federal government. The sheer fact that a policy decision was made does not immunize all efforts to implement the policy.

In this case, the United States District Court for the District of Maryland determined that “the plaintiffs [did] not carr[y] their burden of showing that the

Army's waste management decisions were of the kind not susceptible to policy analysis." (ECF Doc. 31 at p. 12). Subsequently, the Fourth Circuit Court of Appeals affirmed the District Court in stating that the "Army's waste disposal and remediation practices at Fort Detrick fall squarely within the discretionary function exception to the FTCA." (Doc. 50 at page 9). Both the District Court and Appellate Court erred in their determinations because they failed to consider where the distinction between the discretionary policy decisions and the implementation of that policy decision lay. The discretionary function exception is only available to the policy decision and the actions taken in advancement of those decisions do not fall under a safe harbor provision simply because a policy decision was made.

As a result, the underlying courts have erroneously made the exception to the FTCA waiver the rule, have erroneously broadened the discretionary function exception to include the actions in furtherance of the policy decision instead of merely the policy decision, and have erroneously, inappropriately, and silently expanded the pleading standard required upon a plaintiff far beyond the reach of Rule 8 of the Federal Rules of Civil Procedure by forcing these plaintiffs to have essentially proven their case at the time of pleading.

a. Factual Background and District Court Proceedings.

Fort Detrick is and has been an active military base located within the city limits of Frederick, Maryland.

Beginning in the 1950's, the United States government utilized Fort Detrick as the home of the Army's biological warfare program until the program was terminated at the direction of President Nixon in 1969. From 1955 until the early 1970's, the Army "disposed of trichloroethylene ("THC"), tetrachloroethylene ("PCE"), and other hazardous chemicals by burying them in unlined pits in what is known as Area B-11 at Fort Detrick." (Doc. 50 at p. 4).

In 1974, the Army began to monitor the groundwater in and around the areas of Area B that contained the buried hazardous chemicals. In or around 1991, the monitoring efforts detected the presence of TCE contamination and by 1997 the Army confirmed that PCE and TCE from the waste disposal pits in Area B-11 had in fact contaminated groundwater under neighboring land. While the government did invest approximately 25 million dollars to reduce the PCE and TCE contamination, it expressly rejected further remediation efforts that it estimated would cost nearly a billion dollars and instead elected to merely "install[] protective caps to contain the waste, at a cost of 5.5 million dollars." (Doc. 50 at 4).

This lawsuit was brought by three proposed punitive class action representatives under theories of negligence against the United States for failing to adequately and timely prevent, abate, and remediate the contamination and threatened migration of the hazardous substances. (Amended Complaint at ¶ 20). The three classes sought to be formed were for those who had passed away from illnesses attributed to the hazardous

substances, those injured from illnesses attributed to the hazardous substances, and those living in fear from exposure to the hazardous materials.

Upon service of process in this matter, the United States of America immediately filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction under F.R.C.P. 12(b)(1) on the grounds that “the plaintiff cannot show an unequivocal waiver of sovereign immunity because its claims fall within the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. §2680(a).” (ECF Doc. No. 20 at page 1). Defendant/Appellee additionally argued that these issues had been previously addressed in the matter of *Waverley View Inv’rs, LLC v. United States*, 79 F.Supp. 3d 563 (D.Md. 2015), to which Plaintiff/Appellant pointed to additional legal documents and directives not previously addressed in *Waverley*.

On August 11, 2016, the District Court issued a thirteen-page reasoned opinion in which it analyzed the facts presented under the two-staged test put forward under *Suter v. United States*, 441 F.3d 306 (4th Cir. 2006) and reached a determination that “the plaintiffs have not shown that the Army’s waste disposal and remediation decisions were not susceptible to policy analysis” (ECF Doc. No. 31 at page 11) and granted the government’s motion.

b. The Fourth Circuit Court Opinion

The Fourth Circuit essentially adopted the analysis and reasoning of the district court. As was expressed

in the district court, the Fourth Circuit Court of Appeals applied the discretionary function exception in the same manner and found the Petitioners' reliance on the additional legal documents and directives not previously addressed did not alter the analysis previously used in the *Waverley* matter. The Fourth Circuit also opined, in agreement with the district court, that "the direction [the additional documents] provided was neither mandatory nor specific enough to bind the Army."

As with the district court, the court of appeals did not consider where the demarcation line was created between the making of the policy decision to dispose of the hazardous material and remediate it and the actions taken in disposing and remediating the hazardous material.

This petition followed.



REASONS FOR GRANTING THE PETITION

Petitioners seek a writ of certiorari because the discretionary function *exception* to the Federal Tort Claims Act has finally *become the rule*. The discretionary function exception (DFE) to the FTCA is intended to permit policymakers the freedom to make choices without fear of federal liability as a result of second-guessing by litigants or judges. It does not excuse a failure to undertake a duty owed or the exercise of that duty in a negligent fashion. Nor does it excuse the negligent conduct of the federal agents in implementing

the policy decisions that have been made. The FTCA was enacted, in the interests of justice, precisely to waive the sovereign immunity of the United States for certain torts committed by federal employees, subjecting the United States to tort liability “in the same manner and to the same extent as a private individual under like circumstances,” 28 U.S.C. §2674, and imposes liability as “a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Id.* §1346(b)(1).

The FTCA’s sovereign immunity waiver is subject to the discretionary function exception, which provides that the United States is not liable for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. §2680(a). In *United States v. Gaubert*, 499 U.S. 315 (1991), the Supreme Court formulated a two-part test to determine the applicability of the discretionary function exception. First, the exception applies only where the act involves judgment or choice and there is no “federal statute, regulation, or policy that specifically prescribes a course of action for an employee to follow.” *Id.* at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). Second, the exception “protects only governmental actions and decisions based on considerations of public policy.” *Id.* Statements of principles and objectives alone do not rise to the level of a “specific, mandatory directive” that

eliminates discretion. *OSI, Inc. v. United States*, 285 F.3d 947, 952 (11th Cir. 2002).

The Federal Tort Claims Act (FTCA) affords a limited waiver of sovereign immunity, making the federal government liable in the same manner and to the same extent as private individuals in like circumstances. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1637 (2015); 28 U.S.C. §2674. However, Congress has carved out an exception to this rule if the government conduct at issue is “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. §2680(a). The District Court erroneously dismissed this action on the basis of the discretionary-function exception.

A two-prong analysis governs analysis of a discretionary-function claim. The initial inquiry is whether the challenged conduct “involves an element of judgment or choice” by the government actor, rather than a prescribed course of action. *Berkovitz*, 486 U.S. at 536. If there is a federal statute, regulation or policy which dictates a specific course of action to be followed, then that mandatory action is non-discretionary and properly the subject of jurisdiction and the force of the FTCA. *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009), citing *Berkovitz*, 486 U.S. at 536. The second prong under *Berkovitz* is to determine “whether that judgment is of the kind that the discretionary function exception was designed to shield,’ i.e., whether the challenged action is ‘based on

considerations of public policy.’” *Suter v. United States*, 441 F.3d 306, 311 (4th Cir. 2006); *Berkovitz*, 486 U.S. at 536.

The circuit court and district court erred in dismissing this action on the basis of the DFE, as the underlying obligation – to dispose of toxic material agents that the United States had produced and remediate the grounds affected by the contamination caused by the United States – was not discretionary but obligatory. The alleged failure to carry this out in a timely fashion and the alleged failure to cure its improper disposal of the material does not give rise to second-guessing of the type the DFE forbids, but is exactly the type of actionable misconduct that the FTCA exists to remedy. The policy decisions that were made and that would be afforded the DFE were the decision *to dispose* of the toxic materials and then *to remediate* the grounds. Nobody is second-guessing the government’s decision to dispose of the materials and then to remediate them; rather, the dispute arises from the manner in which the government elected to fulfill those policy decisions.

The district court’s initial error was in simply accepting that the means to accomplish the ends were discretionary actions. Had the court properly distinguished the means from the ends, the initial motion to dismiss would have been denied.

Having started down the wrong path, the district court erred in finding that the array of Executive Orders and regulations that mandated action were more

in the nature of policy statements and too general to be binding. It hung its hat on statements that certain methods of disposal were preferred or contained language about taking certain actions “when appropriate.” These are not policy statements. What the orders and regulations made plain was that there was an ongoing obligation to dispose of, monitor, and remediate toxic waste. Many of these orders and regulations contained mandatory language (“shall implement”) that provided no policy discretion. While it is true that discretion as to the best way to carry that out in any given situation, considering the topography of the area, its residential nature, and the degree of toxicity of the materials, was accorded to government employees, the obligation to undertake the tasks effectively was compulsory.

Just as FTCA liability attaches to a federal employee who causes a motor vehicle collision, even though the driver has discretion to choose to drive to a destination, pick a route, determine the driving speed, and even when to pass another vehicle, the type of discretion accorded to government employees in assuring that they do not create another Love Canal¹ is mandatory. A failure to comply with this duty is actionable under the FTCA.

¹ Love Canal was a neighborhood in northern New York that was the site of a toxic environmental disaster that adversely affected the health of hundreds of residents and resulted in enactment of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9657. See *Rhodes v. Cty. Of Darlington, S.C.*, 833 F. Supp. 1163, 1173 (D.S.C. 1992).

A writ of certiorari should issue to determine whether the United States can be held responsible for injuries it caused due to environmental contamination as a result of its failure to adequately and timely prevent, abate and remediate the migration of hazardous substances it utilized near a residential area as part of a decades-old biological warfare program at Fort Detrick, Maryland. Petitioner-residents brought the action under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346 *et seq.*, as representatives of people who died from toxic exposure, who have suffered personal injuries from exposure to the contaminants in their neighborhood, and who fear the development of diseases, resulting from exposure.

A writ should issue because the obligation to dispose of the toxic material and remediate the grounds affected by the contamination was not discretionary. It was instead obligatory and created a duty to residents of the surrounding neighborhood. The circuit court's application of the DFE results in an expansion of the rule that consequently covers each and every decision made related to execution of policy. That was never the intent of the DFE and should not be expanded in such a manner. The Army knew for decades that toxic materials were leaching off of its property into the surrounding community, yet chose to not act to safeguard its neighbors until various regulations forced it to act to protect the surrounding environment and the citizenry. A decision against warning of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic, or political policy

decision that the DFE is intended to protect. *Summers v. United States*, 905 F.2d 1212, 1215-17 (9th Cir. 1990); *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 2007).

The regulations delegate mandatory responsibilities upon such individuals as the Assistant Secretary of the Army, Surgeon General, State Adjutant Generals, Chief Engineers, Chief of Information, Headquarters Department of the Army, Comptroller of the Army, Judge Advocate General, and other command staff. Importantly, each directive mentions the identity/role of the participant as listed in the prior sentence, followed by the word “will.” This is mandatory, and not discretionary.

Most, if not all of the mandated actions were carried out negligently, if they were followed at all, which resulted in the death and/or illness of the various plaintiffs.

Thus, because the discretion of whether to clean up Ft. Detrick is not at issue, but rather the manner in which the clean-up was conducted is, it is not discretionary and susceptible to policy analysis. Therefore, a writ of certiorari should issue to determine when something changes from policy analysis to action.



CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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