

No. 17-7870

**IN THE
SUPREME COURT OF THE UNITED STATES**

SASCHA LYNCH,
Petitioner,

v.

PFIZER, INC., G.D. SEARLE & CO.
Respondents.

PETITION FOR REHEARING

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING.....	1
REASONS FOR GRANTING REHEARING.....	1
1. Review in Evans Case Likely to Change Ninth Circuit Statute of Limitations Bar Ruling In the Present Case	1
2. The Ninth Circuit's Decision in Gregg v. State of Hawaii DPS and Simmons v. United States Contradicts Its Ruling In Lynch v. Pfizer	4
3. District Court States Civil Pro Se Plaintiff's Difficulties in Understanding How to Maneuver Federal Rule of Civil Procedure Needs Representation.....	5
CONCLUSION.....	10
CERTIFICATION OF COUNSEL (RULE 44).....	11
CERTIFICATION OF COMPLIANCE WITH RULE 32(a).....	11
CERTIFICATION OF SERVICE.....	12
Appendix "A"	
<i>Henderson v. Pfizer</i> , No.05-8344 R (2005) Reporter's Transcript of Proceedings Monday, February 21, 2006	App. 1
Appendix "B"	
<i>Henderson v. Pfizer</i> , No.05-8344 R (2005) Reporter's Transcript of Proceedings Monday, August 28, 2006.....	App. 3

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Acosta-Huerta v. Estelle</i> , 7 F.3d 139, 144 (9th Cir. 1993)	6
<i>Ashcroft v. Iqbal</i> , 556 U.S. 622 (2009)	5
<i>Bassett v. ABM Parking</i> , No. 16-35933 (9th Cir. 2018),	1, 5
<i>Daubert v. Merrell Dow Pharm., Inc.</i> 509 U.S. 579 (1993)	6
<i>Erickson v. Pardus</i> , 551 U.S. 89 (2007), 127 S. Ct. 2197 (2007)	9
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	9
<i>Evans, et al. v. Arizona Cardinals Football Club, LLC., et al.</i> , No. 17-16693 (2018)	1, 2, 10
<i>First American Financial Corp. v. Edwards</i> , No. 10-708, 136 S.Ct. 1533 (2016).	2
<i>Folex Golf Industries, Inc. v. O-Ta Precisions Industries Co.</i> , No. 15-56905 (9 th Cir. 2017)	8
<i>Folex Golf Industries, Inc. v. O-Ta Precisions Industries Co.</i> , No. 11-55463 (9th Cir. 2012)	8
<i>Gabelli et al. v. Securities and Exchange Commission</i> , 568 U.S. __ (2013)	2
<i>Gregg v. State of Hawaii DPS</i> , No. 14-16785 (9 th Cir. 2017)	4
<i>John Doe One et al. v. CVS Health Corporation, et al.</i> No. 2:18-01280 (Feb. 16, 2018)	4
<i>Leer v. Murphy</i> , 844 F.2d 628, 634 (9th Cir.1988)	6
<i>Lynch v. Pfizer, Inc.</i> , No. 16-55494 (9 th Cir. 2017)	1
<i>McCarthy v. G.D. Searle & Co.</i> , CV-85-6406-IH	3
<i>Scusa v. Pfizer, Inc., et al.</i> , Case No. 1:13-cv-00524 (2013)	3
<i>Simmons v United States</i> , 805 F.2d 1363 (9th Cir. 1986)	4
<i>Spokeo v. Robins</i> , 136 S. Ct. 1540, 1548 (2016).	5

FEDERAL RULES

Federal Rule of Civil Procedure 8(a)(2).....	9
Federal Rules of Civil Procedure	5, 7
Federal Rules of Evidence 702.....	6, 7
Supreme Court of the United States Rule 44.1	1
Supreme Court of the United States Rule 44.2	1

FEDERAL CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, § 2	1, 8
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FEDERAL STATUTES

28 U.S.C. §1915	5, 6
28 U.S.C. §2106	8

PETITION FOR REHEARING

Pursuant to Supreme Court of the United States Rule 44.2 or in the alternative Rule 44.1, Ms. Lynch respectfully petitions this Court for an order granting the Petition for Writ of Certiorari. A denial of a writ does not mean the Supreme Court either agrees or disagrees with the decision of the Court of Appeals, only that a decision was made that the matter would not be reviewed at that time.

REASONS FOR GRANTING REHEARING

While Ms. Lynch's petition for certiorari was awaiting consideration by this Court, on February 21, 2018, the Ninth Circuit Court of Appeals ruled on what constitutes Article III standing or the lack thereof in *Bassett v. ABM Parking*, No. 16-35933 (9th Cir. 2018), concluding that Congress cannot eliminate the constitutional floor of the injury-in-fact requirement by statutorily granting plaintiffs the right to sue when they would otherwise lack standing.

1. Review in *Evans* Case Likely to Change Ninth Circuit Statute of Limitations Bar Ruling In the Present Case

While Ms. Lynch's petition for certiorari was awaiting consideration by this Court, on February 23, 2018, a vehicle for review of unquestionable importance relevant to the case at issue is *Evans, et al. v. Arizona Cardinals Football Club, LLC*, et al., No. 17-16693 (2018), which brings a question of error in granting a motion to dismiss on statute of limitations grounds regarding latent medical conditions and is an intervening case of substantial effect to *Lynch v. Pfizer, Inc.*,

No. 16-55494 (9th Cir. 2017). The narrow scope questions before the Ninth Circuit pertains to the definition of “inquiry notice” and “presumptive knowledge” that, which was cited in this present matter barring on statute of limitation grounds for a latent injury. Fraudulent concealment is another cause of action in this case as it is in *Evans*, where this Court stated,

“The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury... statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.”

Gabelli et al. v. Securities and Exchange Commission, 568 U.S. __ (2013) (reversed and remanded). Under either California or federal authority, Ms. Lynch pleading with particularity the facts giving rise to her claim of fraudulent concealment tolled the statute of limitations. How then can the Court of Appeals apply a different standard in the present case when an allegation of fraud is one of the main component parts in Ms. Lynch’s cause of action?

The Ninth Circuit’s April 21, 2017 Memorandum reasoning citing a statute of limitations bar to Ms. Lynch’s latent injury is an abuse of discretion and a misapprehension of the facts since the 2008 pathology report was unknown to the Court at the time of its’ ruling, and the findings showed no concrete injury existed in 2008. Therefore, Ms. Lynch lacked standing to pursue an unripe claim. See *First American Financial Corp. v. Edwards*, No. 10-708, 136 S.Ct. 1533 (2016). Without actual knowledge of the pathology report, the Court of Appeal, the district court and yes, even respondents mistakenly concluded an injury in fact occurred in 2008

giving credence to the concrete injury which made ripe her cause of action in 2014 filed within the statute of limitations period filed in the present case supporting a second private right cause of action and the plausibility of that claim.

The discovery rule requires Ms. Lynch to have alleged an inability to have made an earlier discovery despite reasonable diligence. The inability is apparent under the learned intermediary doctrine, where the manufacturer's duty to warn extends only to the prescribing physician who then assumes responsibility for advising the individual patient of risks associated with the Cu-7. Physicians nor could health professionals warn patients regarding an association of the Cu-7 to cancer without receiving a warning from the manufacturer. Since the expertise relied on then as well as now are learned intermediaries with whom the manufacturer to date has not yet warned of the cancer risks derived from the Litton Bionetics scientific testing evidence surrounding the implantation of the intrauterine prescription drug known as the Cu-7 (in particular to those I made inquiry to in pursuit of this lawsuit) to inform the ultimate end user, the manufacturer is liable. *Scusa v. Pfizer, Inc., et al.*, Case No. 1:13-cv-00524 (2013) (remanded).

The absence of knowledge of those required to administer the 1972-1986 implant along with sealing of court files such as the case of *McCarthy v. G.D. Searle & Co.*, CV-85-6406-IH, held in the National Archives Riverside Trust Fund (request was made in the 2015 Complaint to unseal file—district court refused and case cannot be found anywhere online), prevents such information from being found. The

case file was sealed in 2006 according to employees at the Fund. Ms. Lynch was hard pressed to find in library archives the 1985 Business Week article attached to the Complaint in support of the allegations that the scientific evidence information was altered in order to receive FDA approval for the Cu-7.

2. The Ninth Circuit's Decision in *Gregg v. State of Hawaii DPS* and *Simmons v. United States* Contradicts Its Ruling In *Lynch v. Pfizer*

The Court of Appeal's reasoning fails when quantification of how it defines its meaning of diligence. In *Gregg v. State of Hawaii DPS*, No. 14-16785 (9th Cir. 2017)(citing *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) *Gregg* alleged plausible facts that she neither knew nor reasonably should have known she was injured by the LTS program before January 2012 until "she consulted a professional therapist." The Court of Appeals recognized that a layperson is incapable in ascertaining not only an injury, but also the extent of the injury if and when it manifests.

The district court and thus the Court of Appeals relied upon respondents' argument in their Appellee's Brief that, "Despite being on notice various appreciable injuries from 2002 through 2008, she waited until December 2015 to file her complaint." The "appreciable injuries" referenced were listed in the patient pamphlet and cannot be litigated as a known adverse reaction. (see. *John Doe One et al. v. CVS Health Corporation*, et al. No. 2:18-01280 (Feb. 16, 2018). The inclusion of cancer was not listed. In 2002, at the time the Cu-7 was surgically removed, an EMB was performed with test results showing no malignancy existed. The results

were the same in 2008. Therefore, Ms. Lynch was blamelessly ignorant to any future diagnosis of cancer. Unless the Court expected Ms. Lynch to adhere to “the third time’s the charm” theory is ludicrous, she had no reason to suspect a cancer diagnosis neither in between nor beyond either EMB test results. This Court and the Ninth Circuit concluded *Spokeo I, II and III* require concrete injury. *Bassett v. ABM Parking*, (citing *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016)). After *Ashcroft v. Iqbal*, 556 U.S. 622 (2009), a court must conduct a close comparison between the essential elements of proof and the factual allegations in a complaint to determine whether a claim has been adequately stated to overcome a statute of limitations motion to dismiss.

3. District Court States Civil Pro Se Plaintiff’s Difficulties in Understanding How to Maneuver Federal Rule of Civil Procedure Needs Representation

The Central District of California and the Ninth Circuit Court of Appeals in 1993 set up a program to assist non-prisoner pro se plaintiff’s with meritorious or complex appeals “to access quality representation.” It is understood there is no constitutional right to a court-appointed attorney except in criminal cases. However, when the district court made clear Ms. Lynch (then Henderson) needed a lawyer to not make mistakes many attorneys make, she considered her chances (if the case landed in a different courtroom) would be better than average. The availability from the courts to assist pro se plaintiff’s to navigate through the process is of great value without question. Pursuant to 28 U.S.C. §1915, on December 21, 2015, a Motion for Request for Appointment of Counsel was filed to handle the complexity in large part

in presenting arguments on the plausibility standard, the causal connection between respondents' product and Ms. Lynch's concrete injury through her expert witness, and cross-examination of respondent's expert witnesses.

Ms. Lynch stated in her Complaint the availability of a well-qualified causation expert witness under *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993) and Federal Rules of Evidence 702, but for health reasons the expert would need to provide the reliable testimony via Skype or some other video telecommunications medium used in federal courts. One of the requirements under §1915 for the court not to take up the motion is a case considered frivolous -- a status refuted by Circuit Court Judges O'Scannlain and Watford, nor did either court state a claim for relief had not been met. The circuit court placed the Request under *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993),¹ as no argument presented. Such was not the case given the well-pleaded arguments given to present a meritorious cause of action. Due to the nature of the district court's prior comments, application of the statute seemed appropriate under the "exceptional circumstances" requirement and granting it would not have been cumbersome to the court. To demonstrate, excerpt pages from two certified transcripts were attached in support of the Motion based on comments made by district court judge the Honorable Manuel L. Real in the prior 2005 Action. They read as follows:

¹ "Issues raised in a brief which are not supported by argument are deemed abandoned.... We will only review an issue not properly presented if our failure to do so would result in manifest injustice." *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.1988) (citations omitted).

“THE COURT: Miss Henderson, I suggest that probably you get yourself a lawyer, because there is no Reply to the Answer. We don’t do things by paper. What we do is when we get a Complaint and an Answer. There may be counterclaims, if there are counterclaims, but I think you should get yourself a lawyer if you are going to proceed in this matter, so that – because you have to apply the rules, and the rules of Federal Civil Procedure are somewhat difficult as are the Rules of Evidence, and so I suggest to you that you get a lawyer. I’m going to grant this Motion to Strike your Reply and your Notice of Errata. That doesn’t do anything to you. The case is going to go on, but I suggest you get a lawyer so you don’t have that problem again. Okay.”

Certified Transcript, Monday, February 21, 2006 (p. 3:11-20)

When the court addressed expert witness testimony on Monday, August 28, 2006, it stated,

“THE COURT: The Federal Rules of Civil Procedure put that in operation for attorneys who by whatever means have made some wrong determinations. And this is the way for the court to help them modify or correct their mistake. It says here that plaintiff has never communicated any information about the expert’s background, experience, or the context or basis of the expert’s opinion. And I have a note that on August 11th plaintiff filed with the court Dr. Bank’s[sic] declaration containing his original signature and served copies by mail. Plaintiff was put – well, and I put together a package that has included all of the expert’s information – everything that the rule requires. And last, but not least, it says here defendant will not have sufficient time to depose Dr. Bank[sic]. But the court’s – One of the problems with Dr. Banks is that he’s not qualified to give an opinion on causation.”

Certified Transcript, Monday, August 28, 2006 (p. 6:2-18)

Since the district court chose not to allow this case to go forward leading to discovery, which would have put to rest the court’s and respondent’s erroneous belief that Ms. Lynch had a cause of action in 2008 barred by statute of limitations, the expert witness issue was not addressed. Discovery would have prevented the

district court from committing judicial misconduct, the same, in which it committed and faced reversal in *Folex Golf Industries, Inc. v. O-Ta Precisions Industries Co.*, No. 11-55463 (9th Cir. 2012). Here, the Court of Appeals found Judge Real erred barring the plaintiff's claim on statute of limitations grounds "*concluding as a matter of law the plaintiff did or should have gained knowledge of the facts giving rise to a cause of action,*" foregoing there as here, the genuine issue of material facts in this case. The criteria used by the Court of Appeals in *Folex* leading to reversal was that the district court "concluded as a matter of law plaintiff's had actual knowledge of its claim." In contradiction of their reversal measurement, the Court should have also found as a matter of law Ms. Lynch did not have actual knowledge of an injury barring her claim. How then, with circumstances being the same, ruling on the outcome is different?

If this Court finds the judicial imbalanced measurement of the Ninth Circuit unfairly applied in this case, the writ of certiorari should be granted. In an unpublished opinion, the Ninth Circuit reversed and remanded for a second time the matter of *Folex Golf Industries, Inc. v. O-Ta Precisions Industries Co.*, No. 15-56905 (9th Cir. 2017).² ("We are permitted under 28 U.S.C. §2106 to reassign in this case, therefore reassignment is warranted.").

This case presents three aspects where Ms. Lynch has 1) already presented a complaint meeting the plausibility standard, 2) Article III standing to sue, 3) a latent injury tolled by the delayed discovery rule, and 4) proven causation by

² Source: Metropolitan News-Enterprise – Friday, November 3, 2017
U.S. Ninth Circuit Yanks Judge Manuel Real Off a Case.
<http://www.metnews.com/articles/2017/real110317.htm>

acknowledgement of the district court and respondents. For now, one judge's "plausible" products liability claim is another judge's "threadbare recital of the elements" and practitioners are left without much guidance. Undoubtedly, had Ms. Lynch been granted the requested counsel, the controlling legal principle facts of her case would have been argued in a manner best communicated in federal court by "quality representation."

This Court's ruling in a precedential case *Erickson v. Pardus*, 551 U.S. 89 (2007), 127 S. Ct. 2197 (2007), outlined in there a precursor of what federal judges are called upon to administer in their courtrooms. The per curiam 7-1 decision states:

"The Court of Appeals' departure from the liberal pleading standards set forth by Federal Rule of Civil Procedure 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is "to be liberally construed," *Estelle v. Gamble*, 429 U.S. 97 (1976) and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice")."

Ms. Lynch is aware the deck is stacked, as one would expect from Pfizer given that respondents were aware this case was docketed before receiving the waiver forms provided by the Clerk of Court sent to be served on them. Respondents knew Wednesday, February 28, 2018 of the disposition of the case and filed the waiver Thursday March 1, 2018. Service of the waiver forms via certified mail³ through the

³ United States Postal Certified Mail Tracking No. 70170660000093267408

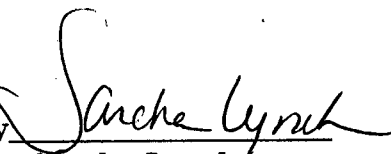
United States Post Office did not arrive to its counsel's office until the following Monday, March 5, 2018 the decision not to file a waiver --- a tactic used to dissuade a court with a heavy caseload to forego this meritorious cause of action. Why is it meritorious? Respondents along with the district and circuit courts acknowledged Ms. Lynch's second private right injury in fact cause of action. And that private right falls under the delayed discovery rule, which does not run until the "plaintiff did or should have gained knowledge of the facts giving rise to a cause of action," was met December 9, 2015 well within the statute of limitations period.

CONCLUSION

The Court should defer consideration of this petition for rehearing pending resolution of the *Evans* proceedings in the court of appeals. In the alternative, the petition for writ of certiorari should be granted.

DATED: April 9, 2018

Respectfully submitted,

By 
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