

No. _____

SUPREME COURT OF THE UNITED STATES

JOHNNY TIPPINS, - Petitioner,

VS.

PATRICIA CARUSO, et. al., - Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Johnny Tippins #342855
Alger Max Correctional Facility
N6141 Industrial Park Drive
Munising, Michigan 49862

QUESTION PRESENTED

Should the United States Court of Appeals for the Sixth Circuit apply SARA amendment in CERCLA's discovery rule to Petitioner's 1983 Prisoner Civil Rights Action regarding exposure to p-CBSA. Where in *Wilson v. Garcia*, this Supreme Court decided to apply state statute of limitations personal injury provision to all 1983 actions. In 1986, Congress passed legislation, amending CERCLA, adding SARA's discovery statute of limitation for exposure to toxic substances; preempting the state statute of limitations under 42 U.S.C. § 9658 (a)(1)?

LIST OF PARTIES

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:

JOHNNY TIPPINS #342855- Petitioner

VS.

PATRICIA CARUSO; BARBARA MEAGHER; JOHN DOES;
JANE DOES; GEORGE KUBIN; JAMES C. KELLY; BLAINE
LAFLEER, Warden - Respondents

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

Petitioner Johnny Tippins respectfully prays that a writ of Certiorari issue to review the judgment below.

OPINION BELOW

For cases from federal courts

The opinion of the United States Court of Appeals appears at Appendix G to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix F to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix H to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix I to the petition and is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was March 21, 2018

A timely petition for rehearing was denied by the United States Court of Appeals on the following date April 24, 2018 and a copy of the order denying rehearing appears at Appendix H.

On May 17, 2018 the Clerk of this Court return submitted petition with instruction to correct ~~in~~ within 60 days from the above date where the Clerk's letter deemed the filing timely.

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

CONSTITUTIONAL AND STATUTORY PROVISION

INVOLVED

XIII Amendment

42 U.S.C. 1983

42 U.S.C. § 9658(a)(1), (b)(4)(A)

42 U.S.C. § 9601

MCL § 600.5805(10)

STATEMENT OF THE CASE

Velsicol owned and operated a plant in St. Louis, Michigan, where it manufactured the pesticide known as DDT from 1965 until the plant closed in 1978. (Complaint R1, Pg 10# 24-27) Mr. Tippins claims, Velsicol ~~and~~ released hazardous chemicals, including "para-Chlorobenzene Sulfonic Acid," or "p-CBSA," into the environment which contaminated St. Louis' water supply. (Id.) (Complaint filed in the Nwt-1, Litigation)

In April 2007, the City of St. Louis commenced a lawsuit against Velsicol and others concerning the alleged contamination of its water supply. The City of St. Louis suit was removed to the Eastern District of Michigan. (See City of St. Louis, Mi. v. Velsicol Chemical Corp., Case No. 07-cv-13683 (E.D. Mich).¹ The City asserted several claims based in part on Michigan's Natural Resources Environmental Protection Act ("NREPA"), nuisance, trespass, and negligence. (Id.) The United States on before of the Environmental Protection Agency, subsequently intervened in the litigation. (Id.) (at 3/25/10 Order R. 85). The parties entered into a settlement agreement whereby Velsicol insurer and Trust Funds, without admitting fault or liability, agreed to pay the City a total of \$ 265 million to replace its water supply. (Id. at 3/30/11 Joint Motion to Approve Settlement Agreement Ex. A, R 125-2). The ~~st~~ settlement agreement was approved

¹ The Court may take judicial notice of the pleadings and orders filed in this proceeding. See Jones v. City of Cincinnati, 521 F.3d 555, 562 (6th Cir. 2008) (Court may consider public records without converting a Rule 12(b)(6) motion into a Rule 56 motion.

by the court on March 31, 2011 and the case was dismissed with prejudice on May 1, 2012. (Id. at 3/31/11 and 5/1/12 Orders, R. 128, 130).

Mr. Tippins claims he first learned of the St. Louis litigation and the fact that the drinking water in St. Louis reportedly contaminated with p-CBSA in February 2014, (Complaint R.1, Page 1D#71). On February 9, 2014, after learning of the St. Louis litigation, Mr. Tippins initiated a grievance procedure complaining that during his incarceration at St. Louis 2004-07, he had complained to health care several times about stomach pain and fatigue, (Id.) Petitioner stated in his grievance that he became extremely ill after being transferred to Saginaw Correctional Facility, where he was diagnosed with hyperthyroidism, (Id.)

The Michigan Department of Corrections responded to Mr. Tippins' grievance by supplying two memoranda dated April 29, 2010 and May 10, 2010, that were purportedly distributed to the inmates at the St. Louis Correctional Facility advising them, among other things, that p-CBSA was in the drinking water. (Id. Pg 1D#73-74.)

In March 2014, Mr. Tippins filed a 1983 Prisoner Civil Rights lawsuit [Tippins v. Caruso, et.al., Case No. 14-cv-10956 (E.D. Mich.)] against Veliscol, several prison officials and the City of St. Louis officials on claims of violating his Eighth Amendment

Constitutional Right. (Compl. R.1 Pg ID# 30.)

In the Caruso litigation, the district court dismissed Velsicol sua sponte on the grounds that it could not be held liable as a state actor under § 1983. (7/1/14 Order R.9) On October 14, 2015, the district court adopted the magistrate's R&R and dismissed Petitioner's complaint with prejudice, holding that claims were time-barred by Michigan's three-year statute of limitations for personal injury actions. (10/14/15 Order, R.49) (See Appendix B)

On October 23, 2015, Mr. Tippins initiated a toxic tort action against Velsicol and the LePetomane Entities in the Gratiot County Circuit Court, seeking recovery for claims similar to the Velsicol Litigation filed in 2007, along with personal injury claim. Petitioner claims his exposure of high concentrated levels of p-CBSA from 2004-07 caused a variety of ailments, including stomach pain, headache, pain in the throat area, nausea, fatigue, loss of weight, and ultimately Graves' Disease. (Compl. R.1 Pg ID# 23, 29-30) (Tippins v. NWI-1, Inc., et.al, Case No. 16-cv-10140) (E.D. Mich.)

On November 30, 2015, Mr. Tippins filed a Motion to Supplement his original toxic tort complaint against Velsicol, presenting the Comprehensive Environmental Response, Compensation, and Liability Act discovery rule under 42 U.S.C. § 9658(a)(1), preempting the Michigan applicable limitation period under MCL § 600.5805(10). (See Appendix G. Pg ID 56-69) and Appendix O)

On January 15, 2016, the LePetomane Entities filed a notice of removal under 28 U.S.C. § 1452 (a) based on the fact that, per U.S.C. § 1334 (b), the claims asserted related to a core bankruptcy proceeding. See *In re Fruit of the Loom, Inc.*, Case No. 99-04497 (PJW) and *the City of St. Louis v. Velsicol Chem. Corp.*, Case No. 07-cv-13683 (E.D. Mich.) (See Appendix G)

In Mr. Tippins' Caruso litigation, he had filed several motion before the district court, arguing the date he received information from his grievance indicating that the drinking water at St. Louis was contaminated containing p-CBSA, February 19, 2014 is the federally required commencement date pursuant to 42 U.S.C. § 9658 (b)(4). And that his claims is not time barred because the State statute of limitations is tolled under CERCLA.

In the Notice of Removal, removing Defendants had claim it did not receive "certain pleadings" and the entire Gratiot County Circuit file was not forwarded to the district court. (See Appendix G at Pg 1D#2.) The LePetomane Entities along with Velsicol subsequently file separate motions to dismiss the complaint on the grounds that Mr. Tippins claims were time barred by the statute of limitations. Petitioner opposed the motions, relying on his argument established in the Supplemental Complaint, that in which, neither Defendants acknowledged in their respectful motions to dismiss. Where Mr. Tippins argued

his claims were timely under 42 U.S.C. § 9658 and *O'Connor v. Boeing North Am.*, 311 F.3d 1139 (9th Cir. 2002).

On August 12, 2016, the district court dismissed Mr. Tippins' complaint. (See Appendix E) And denied all post-judgment motions, declining to apply the CERCLA discovery rule statute of limitations, since the entire file was not forwarded to the district court as it should have.

In the Caruso litigation, on February 16, 2017, the district court denied Mr. Tippins' motions, declining to properly apply the CERCLA discovery rule tolling the state statute of limitations. (See Appendix F)

On appeal, the Sixth Circuit was asked to adopt the Ninth Circuit Court's decision in *O'Connor v. Boeing* and apply the appropriate federal statute 42 U.S.C. § 9658. On October 11, 2017 the Sixth Circuit decided, "Because Tippins failed to raise claims under the Comprehensive Environmental Response, Compensation and Liability Act in his complaint before the district court, we will not review them for the first time on appeal." (See Appendix H)

In Petitioner's Petition for Panel Rehearing, he argued Attorneys for Defendants in the NW1 litigation perpetrated a fraud on the Sixth Circuit and the district court for not filing all documents it had received pursuant to 28 U.S.C. § 1446(a). Mr. Tippins forwarded a copy of the Notice of Removal he received

from removing Defendants where all documents was attached to the Removal and all ~~Exhibits~~ Exhibits A, B, and C were forwarded to the district court.

On November 17, 2017, the Sixth Circuit denied Petition for Panel Rehearing and motion to extend time to file documents as moot. (See Appendix I)

While Petitioner awaits for the Sixth Circuit's decision in the Caruso appeal, he filed a motion to recall the mandate and appoint Special Master because of fraud perpetrated on the court by attorneys in the NWL Litigation. Consequently, on February 27, 2018, the Sixth Circuit panel denied the motion for Special Master. (See Appendix A)

On March 21, 2018, the Sixth Circuit decline to apply the discovery rule again to Mr. Tippins 1983 lawsuit. Citing, "Because § 1983 does not contain a statute of limitations, federal courts apply the state personal injury statute of limitations. See *Wilson v. Garcia*, 471 U.S. 261, 280 (1985)." And Sixth Circuit additionally stated, "Tippins lacked standing to bring an action under CERCLA." (See Appendix K)

In Mr. Tippins Petition for Panel Rehearing for the March 21, 2018 decision on appeal, the Sixth Circuit was asked to adopt O'Connor and the legislation Congress had passed, the SARA act 42 U.S.C. § 9601. Subsequently, April 24, 2018, the Sixth Circuit denied the Rehearing Petition.

Petitioner Johnny Tippins says pursuant to Rule 12.4 under the Supreme Court Rule, "When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices."

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

Question I

Petitioner Johnny Tippins states that this Court should grant this writ of certiorari. Because the Sixth Circuit Court of Appeals erred by affirming the district court's judgments in applying the three year state statute of limitations for his 1983 ~~Prisoner~~ Prisoner Civil Rights Eighth Amendment violation and his toxic tort action, pursuant to MCL § 600.5805 (10). Although this Honorable Court had previously decided in *Wilson v. Garcia*, 105 S. Ct. 1438 (1985), that section 1983 claims were best characterized as tort actions for the recovery of damages for personal injury and federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought. As this act applies to all personal injury claims.

In Mr. Tippins' complaints, he claimed his Eighth Amendment right was violated and exposure to the toxic substance p-CBSA caused him to contract Graves' Disease after drinking [St. Louis Correctional Facility] water that contain the contaminant. The district court in both instances should have applied the CERCLA discovery rule pursuant to 42 U.S.C. § 9658(a)(1), (b)(4) which preempts the state statute of limitations accrual rules.

The Sixth Circuit incorrectly determined because Mr. Tippins is not seeking costs associated with the cleanup of contamination, he lacks standing to bring an action under CERCLA. (See Appendix G)

In the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by Congress, Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 et. seq. In those amendments, a section was added to CERCLA which maintain establishes a discovery statute of limitations for toxic actions brought in State court. The section provides in relevant part:

42 U.S.C. 9658(a)(1). Actions under State Law for damages from exposure to hazardous substances cases:

(1) Exception to state statutes

In the case of any action brought under State law for personal injury or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

§9658(a)(1). The Act "federally required commencement date" as the date "the plaintiff knew (or reasonably should have known) that the personal injury or property damages... were caused or contributed to by the hazardous substances or pollutant or contaminant concerned." §9658(b)(4)(A).

Petitioner claims after online computers were installed in all Michigan Department of Corrections facilities, he learnt that the drinking water was contaminated and he proceeded by filing a prison grievance, February 9, 2014. On February 19, 2014, St. Louis Correctional Facility responded by forwarding two memoranda dated April 29, 2010 and May 10, 2010 informing Mr. Tippins that the drinking water was contaminated containing p-CBSA, a by product of DDT.

The memo further acknowledged that the St. Louis prison drinking water source was connected to St. Louis drinking water wells that in which, is contaminated with p-CBSA. And stated that three drinking water wells were allegedly taken offline from production as a precautionary measure. (See Notice of Removal Pg ID# 70-74) (Appendix G)

The district court had decline to apply the discovery rule to Mr. Tippins claims, by acknowledging, "CERCLA's statute of limitations is inapplicable to this case, as Plaintiff's lawsuit does not assert any underlying CERCLA action providing for cleanup and remedial activities. See *Knox v. AC & S, Inc.*, 690 F. Supp. 752, 757 (S.D. Ind., 1988)." (See Appendices E & F).

On appeal, the Sixth Circuit decline to adopt the Ninth Circuit's decision in *O'Connor v. Boeing N. Am.*, 311 F.3d 1139 (9th Cir. 2002), where that court had addressed the absence of an underlying CERCLA claim does not preclude application of the federal discovery rule." Id at 1148. "Section 9658 applies to actions that assert state law claims without an accompanying CERCLA claim."

Mr. Tippins says that the Sixth Circuit had erred in stating that he was required to raise a CERCLA claim in his complaint in order to pursue such claim on appeal. (See Appendix 10) The district courts and the Sixth Circuit was required to apply 42 U.S.C. 9658 because of exposure to the hazardous substance, p-CBSA. As those courts only recognized the personal injury actions under the state law.

"The purpose of § 9658 was to deal with the inadequacies of many state tort systems regarding the delayed discovery of the effect of a release of a toxic substance." *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089, 1093 (11th Cir. 1994) In Mr. Tippins complaints it was recognized that he was subsequently diagnosed with Graves Disease in 2007 while incarcerated at a different prison, Saginaw Correctional Facility. He did not have any knowledge that p-CBSA was in the drinking water at St. Louis prison.

Consistent with the requirements in *O'Connor* and with the explicit terms of § 9658(a), Mr. Tippins' complaints had established that he have brought an "action ... for personal injury ... which [is] caused or contributed to by exposure to any hazardous ~~sub~~ substance or pollutant or contaminant, released into the environment from a facility."

A "pollutant or contaminant" includes substances that "after release into the environment and upon exposure ... may reasonably be anticipated to cause death, disease, ...[or] cancer. 42 U.S.C. § 9602 (See 40 CFR § 302.4 designating hazardous substances, reportable

quantities and notification requirements)(Petitioner satisfies the first prong of 9658, the personal injury was caused or contributed to by exposure to the hazardous substance [p-CBSA] as that term is defined in CERCLA namely DDT.

The legislative history of the Superfund Amendments and Reauthorization Act of 1986 confirms this result it indicates that after receiving recommendations concerning the inadequacy of state laws, Congress fully intended § 9658 to alter the statute of limitations rules applicable to state law claims, regardless of whether plaintiffs also asserted CERCLA claims. See HR Rep. No. 99-962, 132 Cong. Rec. H9032-04 (1986) (discussing need for liberalization of state statute of limitations. HR Rep. No. 99-253 (I) (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2960 (viewing [**21] provision as "state procedural reform" and contemplating that federal rule would apply even in action brought in state court); see also Angeles Chem. Co., 51 Cal. Rptr. 2d. at 598-99 (describing focus in CERCLA's legislative history on remedy overly restrictive limitations periods for state law claims.)

The Ninth Circuit had determine on appeal in the O'Connor case that CERCLA's discovery standard applied because California's suspicion standard resulted in an earlier commencement date for the one-year limitations period that CERCLA's standard which required more

than suspicion alone, therefore the federal discovery rule under § 91658(a)(1) preempted the California ruling. Finding the district court erred by granting the owners summary judgment because there were genuine issues of material fact that a jury had to resolve regarding whether plaintiff's were on inquiry notice that the contamination caused their illnesses. And the federal discovery standard applies.

In Eastern District of Michigan, a district court applied the decision in O'Connor and ruled in the Plaintiffs' favor in *Barton v. NL Industries Inc.*, 2010 WL 4038738 *3 (E.D. Mich. Sept. 30, 2010). Finding O'Connor's decision persuasive, and the leading case on this issue. Given the fact, Mr. Tippins was diagnosed with Graves' Disease in 2007 which is considered the earlier commencement date under the Michigan state law. As mentioned in the federal statute § 91658(a)(1). "If the applicable limitations period for such action provides a commencement date which is earlier than the federally required commencement date, such period shall commence ~~at~~ on the federally required commencement date.

412 U.S.C. § 91658 (a)(1), is a tolling provision that applies to some state law tort actions stemming from exposure to ~~poison~~ hazardous substances. Where applicable, § 91658 prevents a state limitations period from commencing until a plaintiff knows or should know of both his/her injury and its cause. § 91658 defines when the three year Michigan statute of limitations begins to run.

In O'Connor, at 1150, "More than one inference can be drawn whether prior to the UCLA study, Plaintiffs should have inquired about a casual link between their illnesses and the Rocketdyne contamination See Id. The medical advice that Plaintiff's received from their doctors and publicity about potentially that causes of cancer reasonably could have led Plaintiff's to suspect that their illnesses resulted from causes unrelated to the Rocketdyne contamination.

"In their declarations, Plaintiffs state that their doctors did not advise them that their conditions might be related to or caused by Defendant's released of hazardous non-radioactive substances and radioactive contaminants. See *Maughan v. SW Servicing Inc.*, 758 F.2d 1381, 1385 (10th Cir. 1985) at 1389, ("Relevant factors to be considered include the undisputed fact that several of the plaintiff's in this case did ask their doctors what had caused the leukemia and all were told that cause was unknown.") "

"The district court's application of the "suspects or should suspect" rule under these circumstances would compel a plaintiff to file a suit against all suspected sources of chronic illness to prevent the running of the statute of limitations. See *Maughan*, 758 F.2d at 1387 (noting that a rule that a particular substance is suspected to cause [cancer] in some people would be absurd for it would force the plaintiff to file suit against all suspected sources of carcinogens, simply to prevent the statute

" 18: 11

from running.) *Franconia Assoes. v. United States*, 536 U.S. 129, 153
L.Ed. 2d 132, 122 S. Ct. 1993, 1996 (2002)

As mention in Petitioner's Complaint, at the time of diagnosis of Graves' Disease, he was not aware of any p-CBSA contaminant in 2007. When the statutory provision in 42 U.S.C. § 9658(b)(4)(A) states that, "federally required commencement date" as the date "the plaintiff knew (or reasonably should have known) that the personal injury or property damages... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

Mr. Tippins was not made aware that p-CBSA was in St. Louis drinking water until February 19, 2014. In fact, St. Louis prison had only made inmates at that facility aware of such p-CBSA contaminants in the drinking water in 2010. Where at that time Mr. Tippins was incarcerated at Ryan Correctional Facility in Detroit, Michigan. Opinions from lower courts (district and court of appeals) failed to properly identify and apply the appropriate federal statute to Mr. Tippins 1983 and toxic tort actions in the Eastern District of Michigan. § 9658 is the appropriate statute to apply in this matter because at the time the earlier commencement Petitioner was not aware of the presence of p-CBSA in St. Louis Correctional Facility drinking water.

Further from attachments at the Notice of Removal (which the magistrate had ~~struck~~ Exhibits from the record in the Caruso litigation) ~~DDT~~ DDT could cause Fraxus Disease when exposed to daily doses. (See Appendix G at Pg 10 414 and Pg 10 419) Again this information would not have been searched for until Mr. Toppins received two memoranda, informing him of exposure of p-CBSA.

In totality of this matter, the underlying CERCLA claim of the City of St. Louis v. Veliscol Chemical Corp., 708 F.Supp.2d 632 (E.D. Mich. 2010), establishes the permit of a private party owners to recover from prior private party owners to recover from prior private party properly owner certain costs associated with the cleanup of contamination caused by the prior owners, where the cleanup cost were necessary. Reg'l Airport Authority of Louisville v. LFG, LLC, 460 F.3d 697, 699-700 (6th Cir 2006).

The City of St. Louis sued Veliscol Chemical Corporation in 2007 along with other parties for costs associated with cleanup of p-CBSA contaminants in its drinking water supply and to replace its drinking water supply.

Consequently, March 30, 2011, a settlement agreement was reached with the City of St. Louis to receive a total of \$26.5 million from Defendants in this present matter that was

This Court is asked to take judicial notice in the City of St. Louis Litigation Appendix H, where the underlying CERCLA claim was established in the 1982 Consent Judgment.

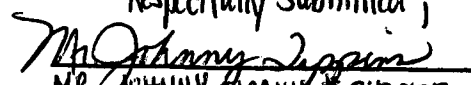
Set up with the government. Therefore Petitioner does have standing to assert an underlying CERCLA action. The Sixth Circuit was incorrect in ~~determining~~ determining his claim are untimely because Tippins did not know or could not have known of his cause of injury in 2007 when he complain to prison health care providers of becoming ill from contaminated water. Because as mention in his complaint, health care personnel had advised him that the drinking water at St. Louis prison was fine to consume and it would not cause such symptoms.

Because Mr. Tippins' CERCLA claim could survive a motion to dismiss, the district court err in denying the motion to amend. And the district court erred in applying personal injury state statute of limitations pursuant to MCL §600.5805(10) instead of the ~~discovery~~ discovery rule exception regarding toxic exposure under 42 U.S.C. §9658(a)(1). This Court is asked to grant this writ of certiorari in these regards.

CONCLUSION

Petitioner Johnny Tippins presents this petition for a writ of certiorari in support of this Court to grant relief and any other available relief the Court deems are appropriate and just.

Dated: May 24, 2018

Respectfully submitted,

MR. JOHNNY TIPPINS #342855
Alger Max Correctional Facility
16141 Industrial Park Drive
Muskegon, Michigan 49862