HOT OFF THE PRESSES: TWO NEW SUPREME COURT DECISIONS AFFECT GOVERNMENTAL ENTITY LIABILITY

By.

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"Death comes like a thief in the night," and so does the deadline for FDCC newsletter submissions. When I nonchalantly agreed to provide a submission for our section newsletter, I failed to anticipate that the Super Blood Moon would result in a substantial uptick in crazy litigation at the start of February. Thus, when our fearless leader, Kay Hodge, politely reminded me of my upcoming deadline, I did the lawyerly thing – I procrastinated. But, thankfully, Justice Clarence Thomas and the Notorious RBG are always there to pull me out of the fire. On January 22, 2018, the United States Supreme Court released two opinions which can impact cases involving governmental entities. So, without further ado, here they are:

"Peaches" and Probable Cause

District of Columbia v. Wesby, No. 15-1485, 2018 WL 491521 (Jan. 22, 2018)

In *Wesby*, Justice Thomas provided an extensive discussion of probable cause and qualified immunity. And, we'll get to that discussion in a minute. But, the facts of this case are too good ignore (and they are central to Justice Thomas's analysis). On March 16, 2008, District of Columbia police officers received a complaint about loud music and illegal activities in a house that had been vacant for several months. Upon their arrival, the inside of the house was in disarray and looked like a vacant property. The officers smelled marijuana and observed beer bottles and cups of liquor on the floor, which was so dirty that one of the partygoers refused to sit on it during questioning. They found a make-shift strip club in the living room, and a naked

woman and several men in an upstairs bedroom. Many partygoers scattered when they saw the officers, and some hid. Some partygoers told the officers that they were there for a bachelor party – but could not name the bachelor. Each partygoer said that someone had invited them to the party, but no one could say who. Two women "working" the party identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. But Peaches was not actually at the party. When officers spoke by to Peaches by phone, she initially she claimed that she was renting the house and had given the partygoers permission to have the party. She then became evasive and hung up the phone. Ultimately, the officers got Peaches on the phone again and she admitted that she did not have permission to use the house. The officers then contacted the owner of the house, who confirmed that he had not given Peaches (or anyone else) permission to be in the house. The officers then arrested the partygoers for unlawful entry.

The partygoers sued for false arrest under the Fourth Amendment, and the trial court took the unusual step of granting summary judgment in the partygoers' favor. Under District of Columbia case law, probable cause to arrest for unlawful entry required "evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner." The trial court found that the officers lacked any such evidence. On appeal the D.C. Circuit affirmed, and further affirmed denial of qualified immunity based upon the lack of such evidence. In short, the police officers couldn't prove that the partygoers didn't subjectively think they were allowed to be at the party; therefore, the officers couldn't possess probable cause.

Justice Thomas came to rescue of the police officers, and was particularly critical of the opinions below. He found: "Considering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late night party." Justice Thomas was particularly critical of the panel majority of the D.C. Circuit for two reasons. First, the panel viewed the facts one-by-one and explained them away, rather considering circumstances as a whole. Second, the panel mistakenly believed that it could dismiss any circumstances that were "susceptible of an innocent explanation." For example, the panel brushed aside the drinking and lap dancing as "consistent with" a bachelor party. Justice Thomas found that the proper inquiry was "whether a reasonable

officer could conclude – considering all of the surrounding circumstances, including the plausibility of the explanation itself – that there was a 'substantial chance of criminal activity.'" And, the almost humorous facts recited above certainly support such a reasonable conclusion.

Not content to grant victory solely on the probable cause issue, Justice Thomas also found that the officers were entitled to qualified immunity. In short, even assuming that the officers lacked probable cause to arrest the partygoers, they reasonably but mistakenly concluded that probable cause was present.

Grace Period or Stop the Clock?
Tolling of State Statutes of Limitations in Supplemental Jurisdiction Cases

Artis v. District of Columbia, No. 16-460, 2018 WL 491524 (Jan. 22, 2018)

This one doesn't quite roll off the tongue like "Peaches and Probable Cause." Nevertheless, *Ardis* presents an interesting case in which Justice Roberts teams up with the more-liberal members of the Court. As you know, plaintiffs routinely file state law claims along with federal claims in federal court. When trial courts dismiss federal claims, they routinely dismiss the state law claims without discussion and without prejudice to refile in state court. The issue in *Ardis* concerned the time within which the state law claims must be refiled in state court. The applicable statute is 28 U.S.C. § 1367(d), which provides:

> The period of limitations for any [state] claim [joined with a claim within federal court competence] shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer period.

The plaintiff in *Ardis* refiled her state law claims 59 days after dismissal of her federal suit. I'm no math major, but 59 days is longer than 30 days. So, it appears that the plaintiff missed her time to refile.

But, a crafty lawyer argued that the word "tolled" in Section 1367(d) "stopped the clock" on the statute of limitations for plaintiff's state law claims. When she initially filed in federal court, nearly two years remained on her three-year state law statute of limitations. According to the Plaintiff, that statute of limitations was frozen-in-place during the federal litigation. So, when the federal trial court dismissed without prejudice to refile, the clock restarted and Plaintiff possessed nearly two years to refile in state court – not the 30 days referenced in Section 1367(d).

The counter-argument is the one adopted by the District of Columbia state court. It matches with my initial reading of Section 1367(d). Under that interpretation, the state law statute of limitations continues to run after the filing of litigation, but the plaintiff is given a 30 day "grace period" to refile in state court. If the statute of limitations expires before dismissal of the federal claims, and if the plaintiff waits more than 30 days to refile, the state law claims are barred.

Justice Ruth Bader Ginsburg wrote the opinion adopting the plaintiff's argument. Relying first upon Black's Law Dictionary, she found that "[o]rdinarily, 'tolled,' in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off." Ultimately, she announced the following rule for the statute: "the limitations clock stops the day the claim is filed in federal court and, 30 days postdismissal, restarts from the point at which it had stopped." "Including 30 days within § 1367(d)'s tolling period accounts for cases in which a federal action is commenced close to the expiration date of the relevant state statute of limitations. In such a case, the added days give the plaintiff breathing space to refile in state court."

Justice Ginsburg's decision has wide-ranging implications for state-court litigation across the United States. At least in the great state of Alabama, it overrules the Alabama Supreme Court's decision in *Weinrib v. Duncan*, 962 So.2d 167 (Ala. 2007) which adopted a "grace period" reading of Section 1367(d).