

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David Bourke)
) No. 20-cv-4427
 Plaintiff,)
) (Judge Alonso)
 -vs-)
) (Magistrate Judge Valdez)
 United States of America,)
)
 Defendant.)

**PLAINTIFF'S MOTION TO RESOLVE
STATUTE OF REPOSE AFFIRMATIVE DEFENSE
IN ADVANCE OF EXPERT DISCOVERY**

“Conducting an evidentiary hearing limited to a discrete, potentially dispositive issue is an authorized and frequently a sensible method for expediting the decision of cases.” *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999). Accordingly, plaintiff requests that the Court resolve defendant’s affirmative defense of the statute of repose before the parties undertake the burden and expense of engaging experts on the merits of plaintiff’s medical malpractice claim.

Grounds for this motion are as follows:

1. Plaintiff is a long-time employee of the Veterans Administration at the Hines VA Hospital.
2. Plaintiff became seriously ill in October of 2014 and unsuccessfully sought to show that his illness was a workplace injury,

compensable under the Federal Employees' Compensation Act (FECA). Plaintiff also believed that his injuries had been exacerbated by medical malpractice on the part of physicians employed at Hines. Plaintiff therefore filed a timely claim under the Federal Tort Claims Act (FTCA).

3. The Secretary of Labor denied plaintiff's FECA claim on January 27, 2020. Four days later, on January 31, 2020, the VA denied plaintiff's FTCA claim. (ECF No. 7-2 at 33.) Plaintiff filed this FTCA action on July 28, 2020.

4. This Court initially dismissed plaintiff's complaint, but the Seventh Circuit reversed, *Bourke v. United States*, 25 F.4th 486 (7th Cir. 2022). On remand, the government asked the Court to dismiss the case as time-barred by the four-year statute of repose, and the Court denied the motion, concluding that "a more developed record [is required] to evaluate whether Illinois's statute of repose bars Plaintiff's claim and whether any exception applies." (ECF No. 28 at 8.)

5. The Court in its order on the second motion to dismiss concluded that it was required to follow the decision of the Seventh Circuit in *Augutis v. United States*, 732 F.3d 749 (7th Cir. 2013) that the Illinois statute of repose applied to FTCA action (ECF No. 28 at 4). The Court also rejected plaintiff's argument that he could not have filed a FTCA action

until the resolution of his FECA action. (ECF No. 28 at 5.) The Court identified two factual questions that it could not resolve on a motion to dismiss:

Two exceptions, though, can toll the statute of repose in medical malpractice cases. The first is the fraudulent concealment exception, which permits tolling where a defendant “fraudulently conceals the cause of action from the knowledge of the person entitled thereto...[.]” 735 ILCS §13-215. The second is the ongoing negligent treatment exception. This exception tolls the statute of repose where a plaintiff shows an ongoing course of continuous negligent medical treatment. *Cunningham v. Huffman*, 154 Ill.2d 398, 406 (1993). (ECF No. 28 at 4.)

6. Fact discovery is now complete. The statute of repose issue is ripe for resolution by the Court. If the Court rules for defendant on this issue, the case will be over in this court and the parties would avoid the burden and expense of expert discovery.

7. Plaintiff believes that the facts surrounding the statute of repose could be fully and fairly resolved either on summary judgment or at a short (probably not more than two hours) bench trial, without any expert testimony.

8. The Seventh Circuit approved this procedure in a case with a similar “discrete, potentially dispositive issue.” *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999). *Robinson* was a disparate impact challenge to the hiring practices of the Sheriff of Cook County. The

district judge refused to allow the case to proceed as a class action, finding that Robinson was an inadequate class representative. The parties disputed whether the statistical evidence established a disparate impact; resolution of that issue required expert testimony. As in this case, to avoid what would be an unreasonable burden and expense of presenting expert testimony, the plaintiff suggested that the district court first resolve whether plaintiff's evidence could overcome the affirmative defense of whether defendant had a "compelling business reasons" for rejecting plaintiff's application for employment. The district court accepted this proposal, which the Seventh Circuit described as "an authorized and frequently a sensible method for expediting the decision of cases." *Id.* at 1157.

9. As in *Robinson*, plaintiff requests that the Court resolve defendant's affirmative defense of the statute of repose before the parties bear the burden and expense of retaining experts on the medical malpractice issues.

10. Counsel for the parties have discussed this procedure and the government does not agree to plaintiff's proposal.

WHEREFORE plaintiff requests that the Court resolve, either by summary judgment or at a brief bench trial, defendant's affirmative defense of the statute of repose before the parties undertake the burden and

expense of engaging experts on the merits of plaintiff's medical malpractice claim.

Respectfully submitted,

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