

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

THOMAS MOORE, INDIVIDUALLY  
AND ON BEHALF OF ALL WRONGFUL  
DEATH BENEFICIARIES AND HEIRS AT  
LAW OF CHARLES MOORE, DECEASED

THELMA COLLINS, INDIVIDUALLY  
AND ON BEHALF OF ALL WRONGFUL  
DEATH BENEFICIARIES AND HEIRS AT  
LAW OF HENRY DEE, DECEASED

PLAINTIFFS

V.

CIVIL ACTION NO. 5:08CV258-DCB-JMR

FRANKLIN COUNTY, MISSISSIPPI

DEFENDANT

**FRANKLIN COUNTY'S REPLY TO THE  
PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS**

COMES NOW the Defendant, Franklin County, Mississippi in Reply to the Plaintiffs' Opposition to the Defendant's Motion to Dismiss, and would state the following:

The Defendant, in the interests of justice and judicial economy, brought its motion to dismiss under Rule 12 with the full understanding that the Court would look only to face of the Complaint. The Complaint by its very nature is a mere collection of allegations crafted in a way so as to advocate the interests of the Plaintiffs, but which may never be supported by genuine evidence. Despite this burden, examining the Complaint alone, there is but one inevitable conclusion that, as a matter of law, this suit is time barred.

To their credit, the Plaintiffs have narrowed the scope of the issues now before the Court. The parties agree that a three year limitation period exists on actions brought under 42 U.S.C. §§ 1981, 1983, and 1985. However, the parties disagree on the date from which the limitation period runs.

## THE TIME TO FILE THE COMPLAINT WAS NOT TOLLED

Rather than squarely address the question of the accrual date of this claim, the Plaintiffs have suggested that the time for filing the Complaint was tolled.

The Plaintiffs assert that the “statute does not run until Plaintiffs are aware of the injury and of the responsible party.” (Response Page 7, citing *Harris v. Hegmann* 198 F 2d 153 (5<sup>th</sup> Cir.,1999)). The Plaintiffs would have this Court believe that as a matter of law, it is essential that a plaintiff know the identity of each and every member of a conspiracy, before a civil suit might be brought. Yet, *Harris v. Hagmann*, does not make such holding. *Harris* involves an inmate who was required by statute to exhaust his administrative remedies before he was permitted to file ‘a failure to provide medical care’ type claim in the federal court. *Id.* *Harris* reminds us that tolling provisions follow the state law on statute of limitations, while accrual follows federal law. *Id.* at 157. *Harris* is in fact a statutory tolling case rather than an accrual case. Most significantly, this test requiring ‘knowledge of the responsible party’, which Plaintiffs have created is not a controlling standard at all, but a simple statement of fact unique to Harris:

Without tolling, Harris’ (sic) suit is clearly prescribed. Harris’ (sic) allegations establish that he knew in October 1996 of the refusal to provide him medical care and the identity of the persons he believed responsible for the refusal. The question is whether the pendency of Harris’ (sic) state administrative proceedings tolled the prescriptive period.

*Id.* at 157

When do the claims against Franklin County accrue so as to respect the statute of limitations? Statutes of limitations exist to compel the exercise of a right within a reasonable time so that the opposite party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds. *Robinson v. Weaver*, 550 S.W.2d 18, 20 (1977). “As a

general rule, a plaintiff must exercise diligence in the prosecution of his cause of action. The party must plead and prove that he exercised due care to prevent the running of the statute or else he cannot overcome the properly asserted defense of limitations.” *Palmer v. Enserch Corp.*, 728 S.W.2d 431, 434 (1987). No such due care is pled, nor can it be proven in this case. In fact, the Complaint is silent as to any efforts by family members to pursue claims against the known tortfeasors, or efforts which would have revealed valuable information.

Admittedly and under limited circumstances, statutes of limitation may not begin to run until the violation could have been discovered by the offended party's exercise of reasonable diligence. *Id.* (*Jackson v. Speer*, 974 F.2d 676, 679 (5th Cir.1992)). “Knowledge of facts that would lead a reasonably prudent person to make inquiry which would lead to a discovery of the fraud is knowledge of the fraud itself.” *Id.* The facts pled in this Complaint clearly point to the complete absence of inquiry, despite numerous allegations that hint of liability. The Complaint demonstrates a lack of reasonable diligence by Plaintiffs.

“The cause of action accrues, so that the statutory period begins to run, when the plaintiff knows or has reason to know of the injury which is the basis of the action.” *Gonzales v. Wyatt*, 157 F.3d 1016, 1020 (5th Cir.1998). As the Complaint herein describes in great detail, the Plaintiffs considered that the Sheriff, at a minimum, favored the Ku Klux Klan over African-Americans, and that specific information Hutto gave was obviously false.

The Plaintiffs also rely on the non-binding secondary authority from Massachusetts of *Bennett v. F.B.I.* 278 F. Supp 2d 104 (D.Ct. Mass 2003), for the proposition that under the Federal Tort Claims Act, the arrest and release of the main suspects did not put the Plaintiffs on notice of FBI responsibility, where a government agent conspired to cover up the crime, hiding

the identities of the tortfeasors until much latter. Yet, Plaintiffs' reliance on *Bennett* is misplaced.

*Bennett v. FBI* describes a proposed exception to the rule of accrual at injury, as occurring only when the elements of the tort are “inherently unknowable” or “incapable of detection by the wronged party through the exercise of reasonable diligence”. *Id.* The *Bennett v. FBI* court acknowledged circumstances within other circuits which did not rise to this level:

“The subject matter unknown to the plaintiffs in both *Richman* and *Zeleznik* was the connection of the assailant with a federal agency, which the plaintiffs in each case did not discover until the two-year period for filing an FTCA claim had elapsed. According to the appellate panels of the First and Third Circuits deciding *Richman* and *Zeleznik*, respectively, the plaintiffs' knowledge of the identity of the tortfeasors provided them with sufficient information to investigate the tortfeasors' “legally recognized affiliations.” *Liuzzo v. United States*, 485 F.Supp. 1274, 1283 (E.D.Mich.1980). The court in *Richman* stated that “[the plaintiff] simply ... did not realize there was another party she might be able to make a claim against,” likening her situation to one in which a plaintiff has a duty to inquire as to other parties who may be responsible in tort through vicarious liability. *Richman*, 709 F.2d at 123. Thus, in *Richman*, the basis for the plaintiff's claims was not “inherently unknowable” according to the First Circuit's application of the discovery rule. Similarly, the Third Circuit in *Zeleznik* found no reason to deviate from the standard set forth in the “general rule,” standard absent a showing that the government “actively conceal[ed]” its own wrongdoing. *Zeleznik*, 770 F.2d at 23.

*Bennett* at 110, Citing *Richman v. United States*, 709 F.2d 122 (1st Cir.1983) and *Zeleznik v. United States*, 770 F.2d 20 (3rd Cir.1985).

The case at bar is much more akin to *Richman* and *Zeleznik*, insofar as the Plaintiffs did not have the identity of the government agent, but with some investigation could have made the same tentative and speculative linkages that are being offering today. The Plaintiffs could have discovered Seale and Edwards' affiliations many years ago, had they made any effort whatsoever within the limitations period.

The Plaintiffs also failed to cite another Bennett case, *Bennett ex rel. Estate of Bennett v. U.S.* 429 F.Supp.2d 270 (D.Mass., 2006), also secondary authority, which involved a claim brought by the family of another Bennett brother killed by the same FBI informant, and which resulted in the application of the statute of limitation as a complete bar. In *Estate of Bennett*, the court held:

“The test for whether a plaintiff should have discovered necessary facts is an objective one,” requiring, in the first instance, a determination “whether sufficient facts were available [at the time in question] to provoke a reasonable person in the plaintiff’s circumstances to inquire or investigate further.” *McIntyre v. United States*, 367 F.3d 38, 52 (1st Cir.2004). The First Circuit has explained that a “mere hunch, hint, suspicion, or rumor of a claim” is insufficient to trigger accrual of a claim, but such suspicions do trigger “a duty to inquire into the possible existence of a claim in the exercise of due diligence.” *Id.* (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d. Cir.1998)). Moreover, a plaintiff cannot defeat the reasonable diligence requirement by “bury[ing] her head in the sand.” *Skwira*, 344 F.3d at 77 (quoting *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir.1999)). “Once a duty to inquire is established, the plaintiff is charged with the knowledge of what he or she would have uncovered through a reasonably diligent investigation.” *McIntyre*, 367 F.3d at 52.

The *Estate of Bennett* case also says:

No support exists for this argument, and it flies in the face of both of applicable authority and practicality. No statute of limitations would have meaning if it were possible to avoid it simply by appointing a putative Rip Van Winkle as the estate administrator and plaintiff.... Thus the discovery rule does not require recalculation of the statute of limitations in light of the subjective knowledge, or ignorance, of each potential plaintiff. The [discovery rule] exception [to the general accrual rule] applies only when the cause of action is ‘inherently unknowable,’ ... not when it merely happens to be unknown by a particular potential plaintiff.

*Supra.*

Although the “inherently unknowable” standard is not the test within the Fifth Circuit, using this tool would still lead to the conclusion that the facts alleged could have been discovered

upon the exercise of due diligence.

The Plaintiffs herein allege a conspiracy between members of the Ku Klux Klan and the Defendant, Franklin County. (Complaint, Pages 2 and 3). The Plaintiffs also assert that the identities of James Seale and Charles Edwards were known in November, 1964 (Complaint, Page 11). Referring to Sheriff Hutto, the Plaintiffs allege at Page 11 of the Complaint “He told the agents that Dee’s sister Thelma Collins told Hutto that Charles Moore and Henry Dee were in Louisiana on May 9, 1964”. And, “On or about May 9, 1964, Sheriff Hutto falsely told Mazie Moore that her son and Henry Dee were in Albany, Louisiana, ...”. (Complaint, Page 10). It is also alleged that “On May 16, 1964, Evie Bell, Charles Moores’ cousin, went to the Sheriff Department to meet with Sheriff Hutto to inquire further about the disappearance of Charles Moore and Henry Dee... Hutto told the women that he had no information about the whereabouts of Moore or Dee and that he would try to locate them.” (Complaint, Page 10). Thus, on the very face of their Complaint, the Plaintiffs have alleged contact with Hutto that raises suspicions and a duty to investigate. However, the Complaint fails to detail any reasonable efforts made by the Plaintiffs to pursue these leads.

In addition to the above, the Complaint even goes so far to allege that Hutto visited two sisters of Henry Dee on October 31, 1964, and pressed them for “information about their contacts with the FBI concerning the murders” (Complaint, Page 11). This act demonstrates yet another suspicious event, without any follow up by the Plaintiffs.

The Plaintiffs assert that an environment of tolerance toward the Klan existed in Franklin County of the 1960’s. The Plaintiffs do not allege that they were unaware of this tolerance of crime and disparity towards African Americans. To the contrary, the Plaintiffs’ Complaint describes numerous discoverable events.

Specifically, the Plaintiffs allege that on the night of kidnappings the county was involved in a search of the Reverend Briggs' Church in Roxie. (Complaint, Pages 8 and 14). An event like this in the African-American community of Franklin County, cannot reasonably said to be "unknowable", and was certainly discoverable with reasonable efforts.

Likewise, the Plaintiffs allege that on May 23, 1964, Clyde Briggs was threatened by a county constable, Jack Davis, and that he was accompanied by a car load of Klan members. (Complaint, Page 13). This alleged relationship between Klan and county officers, was thus knowable more than forty years ago.

The Plaintiffs also allege that a man named Burl Jones was taken from the County Jail by Klan members and beaten. (Complaint, Page 16). If this allegation was true, it was reasonably discoverable, in 1964, to anyone who made prudent inquiry.

The Plaintiffs allege that a man named Robert Middleton, who was threatened by James Seale, reported the threat to Sheriff Hutto and was told there was nothing he could do. (Complaint, Page 17). If this allegation was true, it was knowable and reasonably discoverable in 1964.

Similarly, the Plaintiffs allege that Alton Alford complained about a beating he received for fraternizing with African Americans, but that his complaint was never investigated. (Complaint, Page 18). If this allegation was true, it was reasonably discoverable in 1965.

The Complaint also alleges that a man named Earl Hodge was killed by the Klan, and that Hutto did no investigation. (Complaint, Pages 18 and 19). If this allegation was true, it was reasonably discoverable.

The Plaintiffs' Complaint paints a picture of a County deeply involved with the Klan. It is simply unreasonable for the Plaintiffs to now suggest that they could not have known of this

alleged relationship until 2007. Despite all the alleged evidence of Klan and County collusion, the Plaintiffs did nothing until the Department of Justice renewed it's investigation.

To the extent that the Plaintiffs consider that knowing the identities of some conspirators, but not all, is sufficient to toll claims, it is important to note that conspiracy claims do not change the accrual period. The Fifth Circuit has held that when pleading a civil conspiracy under § 1983, as opposed to prosecuting a criminal conspiracy, the statute of limitations begins to run from the moment the plaintiff becomes aware that she has suffered an injury or has sufficient information to know that she has been injured. *Holmes v. Texas A & M Univ.*, 145 F.3d 681, 684 (5th Cir.1998); *Helton v. Clements*, 832 F.3d 332, 334-35 (5th Cir.1987). This accrual of the action does not require that the Plaintiffs are aware of each and every member of an alleged conspiracy. The Plaintiffs allege that Hutto was untruthful regarding the whereabouts of the two men, but this falsehood would be obvious by the end of 1964. Plaintiffs should have been aware of the alleged wrongs, yet did not seek to seek redress until August 2008, well beyond the limitations period.

#### **EQUITABLE TOLLING DOES NOT APPLY**

The Plaintiffs argue, alternatively, that equity demands tolling. However, demanding equity is a two edged sword, which in these circumstances cuts loose the claims of the Plaintiffs. An equitable maxim tells us that "equity aids the vigilant, not those who slumber on their rights". *National Assoc. of Governmental Employees v. City Public Service Board of San Antonio, Texas*, 40 F.3d 698, 708 (5th Cir.1994). This principle recognizes that a party may lose evidence, witnesses, and a fair chance to defend himself or herself after the passage of time from the date that the wrong was committed. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct.

2061, 2073, 153 L.Ed.2d 106 (2002). If the Defendant can show prejudice as a result of the long time that has passed without lawsuit, the case should be dismissed in the interests of justice.

The Plaintiffs allege in opposition that the Department of Justice opened a fresh investigation in 2007, and that it was only because of that investigation that County involvement became known. Though the Plaintiffs neglect to plead the fact that County involvement is only thinly and speculatively linked to the deaths at issue, this assertion of the fresh discovery begs the question, ‘Why didn’t the family pursue these remedies earlier?’ Quite simply, the Plaintiffs were waiting for the criminal justice system to give them answers, rather than avail themselves of the civil remedies which were always available to them. Thomas Moore, a Plaintiff in this action, set out on his well publicized “search for justice”<sup>1</sup>, yet according to his own documentary, he did not begin this process in earnest until after the turn of this century.

### **FRAUDULENT CONCEALMENT DOES NOT TOLL THE STATUTE OF LIMITATIONS**

The Plaintiffs assert that they are relieved of the statute of limitations, as they set forth a two part analysis of fraudulent concealment. Plaintiffs claim the Court must consider first the existence of some act preventing discovery, and second that due diligence would not have discovered the claim. (Opposition Memorandum, Page 13). The Plaintiffs allege that Sheriff Hutto and Deputy Shell intentionally misled the FBI by failing to tell them what they knew. Assuming, as the Plaintiffs have, that Defendants Hutto and Shell were misleading, any such continuing affirmative acts could not have survived their deaths.<sup>2</sup> The Plaintiffs cite the case of *Lundy v Hazlett*, 147 Miss 808, 821 (1927) for the position that “[c]ontinuing false

---

<sup>1</sup> The Plaintiff Thomas Moore was featured in ABC’s 20/20 program which aired in the year 2000 and examined this case including the review of the federal investigative files from the 1960’s, and interviews with FBI informant Ernest Gilbert. Additionally, Thomas Moore provides the central narrative in the Canadian Documentary “Search for Justice”, filmed after 2000 as an in depth effort to confront the murders and push the Federal Government to carry on the investigation.

<sup>2</sup> Paragraphs 24 and 25 of the Complaint identify both Hutto and Shell as deceased. Hutto in fact died in 1984, Shell died in 1978.

representations are affirmative acts that constitute fraudulent concealment, tolling the limitations period.” (Opposition Memorandum, Page 13). In *Lundy v. Hazlett*, the buyer of a tract of land brought suit against the seller for falsely representing the plot was fifty acres greater than its actual 316-acre size. The court, in deciding the purchaser was not barred by the six year statute of limitations, found that the representations by the seller “not only lulled the purchaser into security, and prevented her from investigating as to the number of acres in the tract, but constituted an express, fraudulent representation which was calculated to conceal, and did conceal, the true facts from the purchaser ...” after completion of the sale. *Lundy*, 147 Miss. at 822, 112 So. at 592-93. Significant in *Lundy* was that the suit was brought one year outside of the limitation period, and the defendant was very much alive and continuing to make representations. Neither Hutto nor Shell have the advantage of speaking for themselves at this point in time. There is simply no possible way to claim active concealment by the County, when those alleged to have concealed the fact have been dead long over twenty years.

The Plaintiffs claim that the County somehow stonewalled justice. The irony of this allegation is that much of this Complaint is taken from the investigation and a criminal trial brought by the federal government in the United States District Courts. The allegations of the Complaint clearly demonstrate that, from 1964, the investigation of the crime was conducted by federal authorities, who at all times had within its possession the investigative materials and authority to bring charges. The Complaint makes it clear that the federal government, and not the County, was in charge of this investigation in 1964. No law exists to suggest that a civil plaintiff may rest on the whims of the criminal justice system as an excuse for inaction.

Where the acts of concealment, if any, died with Hutto and Shell, and where the Plaintiffs did not make any genuine search until decades had passed, the theory of fraudulent concealment cannot relieve the Plaintiffs of the statutes of limitations.

**THE PLAINTIFFS' OPPOSITION ENTIRELY IGNORES THE ONE YEAR  
LIMITATION PERIOD AND NOTICE REQUIREMENTS  
REQUIRED TO MAINTAIN STATE LAW CLAIMS**

The Complaint clearly places the accrual date from all claims in July of 1964, yet even under their delayed discovery argument which attempts to shift the accrual date by admitting a discovery date of January 24, 2007, the Plaintiffs may not assert state law claims after the untimely filing of this suit on August 5, 2008. (Complaint Page 3, Paragraph 10). The Plaintiffs also completely ignore the notice requirements. Without authority, the Plaintiffs apparently want this Court apply an unknown number of years as a limitation period to these state law claims, rather than face the very specific language of Mississippi's Tort Claims Act (MTCA), codified at Miss. Code Ann. §11-46-11(3), which requires that "[a]ll actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after...". Miss. Code Ann. §11-46-11(3). Further, the Plaintiffs' argument completely ignores the MTCA requirement that ninety (90) days prior to maintaining an action they must file a notice of claim with the chief executive officer of the governmental entity. Miss. Code Ann. §11-46-11 (2).

The Plaintiffs argue that under *Caves v. Yarbrough*, 991 So.2d 142, 154 (Miss. 2008), that a delayed discovery rule applies to tort claims. *Caves* is clearly limited to medical malpractice claims, however assuming for the sake of this argument, on state law claims alone, that the Plaintiffs are correct, the Court need only return to the face of the Complaint, which

states that the Plaintiffs “did not become aware of the participation of Hutto or Shell as co-conspirators until the federal indictment was issued on January 24, 2007.” (Complaint Page 3, Paragraph 10). The Plaintiffs filed this suit on August 5, 2008, which was 194 days late.

The Plaintiffs make no effort to claim that they complied with notice requirements.

Obviously, the Plaintiffs are barred from pursuing state law claims. However, in the event that the decision to assert these state law claims was merely a strategic carrot dangled by the Plaintiffs so that the Defendant might inadvertently waive some limitation period under federal law, the Defendant asserts that no waiver is made. All federal claims must be considered under the separate limitations periods as described above, and must be dismissed as well.

### CONCLUSION

Based on the foregoing, the Defendant again moves this Court to dismiss the action against it, with prejudice. The tragedy of Moore and Dees will not be cured by ignoring the well founded statute of limitations which bars recovery in this action brought 40 years too late. The wrong done to those men, cannot justify another wrong. Although the allegations of the Complaint are not entirely accurate, they do demonstrate the abundance of available information which, with reasonable diligence, would have led the Plaintiffs to say they pursued this claim within a reasonable amount of time. They can not. Unfortunately, the Plaintiffs and Defendant relied on the federal government to pursue justice. All parties share the disheartening frustration in knowing that those federal efforts languished through the decades.

RESPECTFULLY SUBMITTED, this the 18<sup>th</sup> day of November, 2008.

FRANKLIN COUNTY, MISSISSIPPI,  
DEFENDANT

BY:           /s/ Michael J. Wolf            
MICHAEL J. WOLF

OF COUNSEL:

MICHAEL J. WOLF (MSB# 99406)  
PAGE, KRUGER & HOLLAND, P.A.  
P.O. Box 1163  
Jackson, Mississippi 39215-1163  
(601) 420-0333  
Fax (601) 420-0033

WILLIAM J. HALFORD, JR. (MSB# 2113)  
HALFORD LAW FIRM  
85 Main St. West  
P.O. Box 650  
Meadville, MS 39653  
(601) 384-2100  
Fax (601) 384-2121

JAMES A. TORREY, JR. (MSB# 8251)  
LANE B. REED (MSB# 10002)  
MARY KATHRYN KIRKPATRICK (MSB# 103000)  
MCGEHEE MCGEHEE & TORREY  
Post Office Box 188  
Meadville, MS 39653  
(601) 384-2343  
Fax (601) 384-5442

**CERTIFICATE OF SERVICE**

I, the undersigned attorney for Defendant, hereby certify that I have this day caused to be mailed, via U.S. postal service, first class, postage prepaid, a true and correct copy of the above and foregoing document to:

Dennis C. Sweet, III, Esq.  
Warren L. Martin, Jr., Esq.  
Sweet & Associates, P.A.  
158 East Pascagoula St.  
Jackson, MS 39201

This the 18<sup>th</sup> day of November, 2008.

/s/ Michael J. Wolf  
MICHAEL J. WOLF