

SUMMARY OF THE CASE AND REQUEST FOR ARGUMENT

This is a medical negligence case that arises out of the July 27, 1946 births of Rowena Madrigal and Beverly Bowker, after which they were given to, and sent home with, the wrong mothers. As a result of the error, Madrigal and Bowker were deprived of being raised by their birth parents, and Michael Ryan was deprived of raising his natural daughter. Bowker and Madrigal were born at a federally operated hospital in Fort Yates, North Dakota, and therefore, Bowker's, Madrigal's and Ryan's ("claimants") claims are subject to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*

The District Court granted the United States' (the "hospital's") motion to dismiss pursuant to Fed.R.Civ.P. 12 (1), finding that the court lacked subject matter jurisdiction because claimants' claims were time-barred by the FTCA's two year statute of limitations. 28 U.S.C. § 2401 (b). Claimants have appealed that decision, arguing that the District Court's findings of fact were clearly erroneous when it determined claimants knew or should have known of their injury and its cause "sometime in the 1970s", and that the court mis-applied the law when it determined their claims were time-barred.

Claimants respectfully ask the Court for oral argument in the amount of 20 minutes because of the novel and important substantive issues raised herein.

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STATEMENT OF JURISDICTION

On June 16, 2005, plaintiffs/appellants Michael Ryan, Rowena Madrigal and Beverly Bowker commenced their lawsuit in the United States District Court for the Southeastern Division of the District of North Dakota. Appellants brought suit in the District Court because the claims they asserted included medical negligence claims against health care providers working for federally-funded clinics when the suspect medical care and treatment was provided. Those claims were governed by the Federal Tort Claims Act and thus, jurisdiction was alleged to be proper in the District Court pursuant to 28 U.S.C. § 1346.

On February 15, 2007, the Honorable Karen K. Klein granted the defendant United States' motion to dismiss for lack of subject-matter jurisdiction. See Addendum, No. 1. This was a final judgment. No post-judgment motions pertaining to the judgment were filed. In compliance with Fed.R.App.P. 4(a)(1)(B), Appellants timely filed their Notice of Appeal on April 16, 2007, less than sixty days after Magistrate Judge Klein entered judgment. This Court has jurisdiction over this matter because it has jurisdiction over appeals from final judgments of District Courts pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Was the District Court wrong in concluding that suspicion and rumor gave Appellants knowledge of their injuries and the cause thereof in the 1970s, thus time-barring their claims, when 2002 was the earliest that Appellants learned the truth that the Appellee hospital had sent two newborn infants home with the wrong parents? *United Sates v. Kubrick*, 444 U.S. 111; *Motley v. United States*, 295 F.3d 820 (8th Cir. 2002); *Garza v. United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002).

STATEMENT OF THE CASE

This is a medical negligence case that arises out of the birth, delivery and handling of appellants Rowena Madrigal and Beverly Bowker shortly after they were born in the Standing Rock Hospital in Fort Yates, North Dakota on July 27, 1946. On July 19, 2002, a DNA test established to a 99.4% certainty that Beverly Bowker had been sent home from the hospital as an infant with the wrong parents. J. App., p. 35. On January 12, 2004, a DNA test established indisputably that Rowena Madrigal had been sent home from the hospital as an infant with the wrong parents. J. App. at p. 37.

On September 12, 2002, Ryan, the paternal father of Bowker, filed his administrative tort claim with the Department of Health and Human Services. J. App., p. 38-40. On January 16, 2004, Bowker and Madrigal filed their administrative tort claims with the Department of Health and Human Services for having been given to the wrong parents at the time of their birth. J. App.. p. 41-61.

On June 16, 2005, Ryan, Bowker and Madrigal filed their Complaint against Appellees. J. App., p. 1-7. On December 30, 2005, the Government (“Hospital”) denied the administrative tort claims which had previously been filed. J. App., p. 62-64. On August 15, 2006, Hospital filed their Motion to Dismiss for Lack of Jurisdiction. Dist. Ct. Docket Nos. 16-18. Appellants timely opposed Hospital’s motion. Dist. Ct. Docket Nos. 21, 22. The Government timely replied to

Appellants' response. Dist. Ct. Docket No. 23. On February 15, 2007, the District Court granted the government's motion and entered judgment in favor of the government. J. App., p. 19-28. Appellants' Notice of Appeal was timely filed on April 16, 2007. Dist. Ct. Docket No. 30; Fed.R.App.P. 4(a)(1)(B).

STATEMENT OF FACTS

On July 27, 1946, Beverly Bowker and Rowena Madrigal were born at the Standing Rock Hospital in Fort Yates, North Dakota. J.App., p. 29-34. From the time of their birth to the time they were sent home, the infants were in the exclusive control of the hospital. J. App., p. 65-69. Bowker was the daughter of Grace Medicine and Michael Ryan. J.App., p. 32-34. Madrigal was the daughter of Susie Slow and Virgil Bowker. J. App., p. 29-31. Both were sent home to strangers – Bowker to Madrigal’s parents, and Madrigal to Bowker’s. J. App., p. 41-61, p. 29-34, p. 35-37, and p. 65-75. Madrigal was raised by Medicine and Ryan (J. App., p. 230, 254), while Bowker was raised by Virgil and Susie Bowker (J. App., p. 129.) Before this case arose, the Bowker family and the Medicine / Ryan family were unfamiliar with each other. J. App., p. 176.

The hospital’s error was not exposed until 2002, when, shortly after hearing about DNA testing, Ryan and Bowker were tested and learned they were father and daughter. J. App., p. 35. Similarly, in January of 2004, DNA tests proved that Ryan was not Madrigal’s father, and confirmed the previous finding that Ryan was Bowker’s father. J. App., p. 36, 37. Ryan filed his tort claim in September of 2002. J. App., p. 38-40. Bowker and Madrigal each filed their tort claim in January of 2004. J. App., p. 41-61.

The DNA tests ultimately proved true the unsubstantiated suspicions that appellants had occasionally heard and felt over the years since the girls' births.

A. Childhood Rumors

Such suspicions included rumors and speculation from the girls' childhoods. When Bowker was eight or nine years old, she was teased by other children for not looking like her parents. J. App., p. 97-98. At about the same time, and perhaps as a result of the teasing, Susie Bowker, the woman who raised Bowker as her daughter, told her that on the day she was born, Susie Bowker complained that she had been given the wrong baby. J. App., p. 101, 103. However, Susie Bowker's concerns were alleviated when she was assured by the doctor that there had been no mistake. J. App., p. 101-103, 130. When Bowker was no older than 15 years, an unknown girl at her school mentioned that Bowker might have been switched with another child at the time of her birth. J. App., p. 98. Madrigal also heard childhood rumors. She testified that family members told her she did not belong to Michael Ryan; and that she belonged with the Bowkers. J. App., p. 87-89. Madrigal did not know who the Bowkers were. J. App., p. 176.

B. Rumors And Speculation As Adults

The rumors and suspicions continued after the girls entered adulthood.

1. Beverly Bowker

At some point prior to 1983, Bowker and Madrigal met coincidentally at a hospital in Rapid City, South Dakota, and Bowker noted physical similarities between Madrigal and Bowker's brother. J. App., p. 94-98. In 1973 Bowker traveled from South Dakota to Colorado to meet Grace Medicine, and then to California to meet Ryan, to try to "find out if there were any truth to any of the rumors." J. App., p. 113. When Bowker told Grace Medicine about her curiosity regarding the identity of her true parents, Medicine did not say much and cried, making Bowker uncomfortable, so she left. J. App., p. 112-113. Because Ryan and Bowker looked nothing alike, Ryan's expression was "probably one of disbelief" when Bowker told him he might be Bowker's natural father. J. App., p. 114. During the visits Bowker tried to discuss the circumstances of her birth and the birth of Madrigal. J. App., p. 112-117. Bowker decided she looked more like the woman who raised her, Susie Bowker. J. App., p. 112, 114. Because Bowker still had a nagging question about whether something had happened at the hospital, she invited Medicine and Ryan to her college graduation in 1974, and occasionally called both Medicine and Ryan to inquire about their well-being after Susie and Virgil Bowker passed away. J. App., p. 115, 116. The issue of paternity did not come up again between Bowker and Ryan until July of 2002, when Ryan first

mentioned to Bowker the availability of DNA to determine parentage. J. App., p. 117.

2. Rowena Madrigal

Sometime in the 1970s, Bowker stopped at Madrigal's home in South Dakota to visit with her about the possibility of a baby switch. J. App., p. 177. Madrigal was quick to end the surprise visit. "Because you don't know what to do when somebody comes into your house like that and starts talking about that", Madrigal "kicked her out" and "told her to leave." J. App., p. 177. The quick exit precluded Bowker from even suggesting blood tests or anything else. J. App., p. 177-178. Madrigal did not meet with Bowker again. *Id.*

Madrigal talked about the rumors of her possibly being switched at birth with her husband Keith Rich, in 1977. J. App., p. 174, 177. At about the same time she tried to find a nurse who had worked at the hospital, and discovered the nurse was deceased. J. App., p. 177. In the 1980's, Madrigal remembers Michael Ryan first talking to her about the possibility of her being switched at birth. J. App., p. 178. At that time, Madrigal asked him "how would he know" and "he said he didn't." J. App., p. 178. In November of 2002, while talking with Grace Medicine at a hospital in Denver, Colorado, Medicine told Madrigal that she believed Bowker was her daughter, but that Madrigal should not "feel bad" because Medicine could still be Madrigal's mother, as well. J. App., p. 176-177.

Madrigal never met her real father, Virgil Bowker, who died before the DNA tests revealed the hospital's error. J. App., p. 116.

Madrigal described the life-long rumor this way:

A. See this was kind of a rumor all my life. And I never really knew anything about this until we got the swab tests, the DNA thing.

Q. And you wouldn't have known for sure?

A. I knew then that that was a possibility and I probably was their child, you know. But before then, I didn't.

Q. You didn't know for sure?

A. No. I didn't know for sure at all.”

J. App., p. 181.

3. Michael Ryan

The possibility of Rowena Madrigal not being his biological daughter did not enter Michael Ryan's mind until the mid-1970s when Bowker visited him in California, and told him she could be his daughter. J. App., p. 222-226. Ryan called his sister, a nurse, to inquire about testing to determine parentage. J. App., p. 224. His sister told him that blood tests were “questionable” and Ryan came away with the conclusion that such testing was unreliable and “would just add confusion to something that was already confused.” J. App., p. 224, 225. Thus, even though he knew it was a “possibility” that Bowker was his daughter, he “just

did not know”, and believed finding out was impossible. J. App., p. 226. Although Ryan had also heard the “rumors” about the baby switch, he does not recall the dates. J. App., p. 230-231.

Ryan went to Bowker’s graduation because he believed it was “a great honor to graduate from college” and because he thought “there was a possibility that she was my daughter.” J. App., p. 236. In 2002, while watching television, Ryan “finally heard about DNA” (J. App., p. 251, 267) and contacted Bowker. The first DNA tests were completed in July of 2002. Ryan does not recall ever mentioning the possibility to Madrigal that he might not be her father until after he received the July, 2002 DNA test results. J. App., p. 234. When Ryan told Madrigal about the test results, “there was practically no conversation” and Ryan sensed she may have been in shock. J. App., p. 234-235.

SUMMARY OF ARGUMENT

It is fundamental that a natural parent's desire for and right to the companionship, care and custody of his or her children is an interest far more precious than any property right. The child's right to be raised and nurtured by her birth parents is equally fundamental. Considering the preciousness of these rights, it is not difficult to imagine that, for decades, individuals have reasonably expected and believed that health care providers delivering children have protected that right by identifying and delivering children to their natural parents after their birth. The district court suggests otherwise, claiming that suspicions and rumors gave claimants notice that they had been deprived of their true family, and knowledge of a hospital abdication of its responsibility to protect this precious right. The district court's order implies that these claimants were either so prophetic in the 1970s that they knew upon the advent and their discovery of DNA¹ their worst fears would be realized; or so suspicious of the health care system that upon hearing rumors, they knew the hospital had switched two babies shortly after their birth.

Most telling in the district court's order was its inability to identify a date or event upon which claimants should have known the hospital had switched the two infants at birth. With more than 30 years of hindsight, such a date or event could

¹ The district court wrongly determined that Ryan considered submitting to DNA testing in the 1970s, which is not in the record because such testing was unavailable.

not be identified by the district court. Yet, the court expected claimants to know that day or event when it occurred – apparently sometime in the midst of a series of hunches and rumors during the 1970s. Finally, the district court’s decision apparently rests upon the faulty proposition that claimants failed to diligently investigate their claims by failing to pursue DNA or other reliable tests in the 1970s. The non-existence of such testing in the early 1970s exposes the district court’s clear error.

The district court committed clear error in its adjudication of material facts, and misapplied the law of discovery.

ARGUMENT

For the reasons set forth below, claimants respectfully ask this Court to reverse the district court's Memorandum Opinion and Order dismissing their claims, and to remand this matter back to the district court for trial.

A. Standard of Review

When a district court's decision to dismiss for lack of subject-matter jurisdiction is based upon an adjudication of disputed facts, this Court must review such factual findings for clear error. *Drevlov v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 470 (8th Cir. 1993). In such circumstances, the district court may be required, at the very least, to identify and explain the factual determinations it has made. *Williamson v. Tucker*, 645 F.2d 404, 413-14 (5th Cir. 1981) (cited in *Osborn*, 918 F.2d at 729, 730).

[I]t is important – and sometimes crucial – that the district court state the basis (including any factual determinations made) of a decision to dismiss for lack of subject matter jurisdiction. In the absence of such a statement, an appellate court can decide the appeal only with great difficulty and only in two limited circumstances. First, an appellate court may determine for itself, on the basis of the record and any statements made by the district court, what the basis of the district court's decision was and what, if any, implicit factual findings it made. ... Second, an appellate court may reverse a decision of the district court dismissing a case for lack of subject matter jurisdiction if it finds that the record cannot be construed in any way so as to support such a dismissal.

Id. at 414.

Once this Court has concluded its review of the factual determinations, it must then determine whether the district court’s application of the law is correct.

Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990).

B. The District Court Committed Clear Error by Finding that Suspicion and Rumor gave Claimants Knowledge of Their Injuries and the Cause Thereof in the 1970s, Time-Barring Their claims.

Under the Federal Tort Claims Act (“FTCA”), tort claims against the United States are time-barred unless presented to the appropriate federal agency “within two years after such claim accrues.” 28 U.S.C. 2401(b). The date a claim “accrues” for purposes of the FTCA is a question of federal law. *Motley v. United States*, 295 F.3d 820, 822 (8th Cir. 2002). In medical malpractice cases such as this, “the claim accrues when the ‘plaintiff actually knew or in the exercise of reasonable diligence should have known, the cause and existence of his injury.’” *Id.*, [quoting *Wehrman v. United States*, 830 F.2d 1480, 1483 (8th Cir. 1987)]. This means the courts have no authority to narrow the limitations period and “the statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it.” *United States v. Kubrick*, 444 U.S. 111, 118, 120 n 7, citing: *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955), and *Restatement (Second) of Torts* § 899, Comment, *e*, pp 444-45 (1979).

In the present matter, the district court concluded that in the 1970s, due to a “series of occurrences”, which were nothing more than hunches and suspicions, claimants had reasonable knowledge of their injury and its cause², and thus, the “period of limitations expired well before [they] filed their administrative claims.” Addendum No. 1, p. 9. Notably, the court could not identify when the statute began to run. Addendum No. 1, p. 5-10.

There is no dispute that claimants did not discover the fact of their injury or its cause until receiving the results of the DNA tests in 2002 and 2004. The question is, was the district court correct in concluding that discovery should have occurred sometime during the 1970s? This is a two prong analysis: first, whether the district court committed clear error regarding any of its factual determinations; and second, whether it correctly applied the law.

1. Critical factual findings of the District Court were clearly erroneous.

The Supreme Court has declared it to be “plain beyond the need for multiple citation that a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). Equally

² The “injury” being the fact that two infants had been raised for decades in the wrong families and thus deprived of relationships with their true families; the “cause” being the government hospital’s mistake of delivering them to the wrong mothers.

fundamental is the right of a child to be raised and nurtured by his parents, considering that “the forced separation of parent from child, even for a short time, represents a serious impingement upon both the parents’ and child’s rights.” *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) (internal quotation omitted) Accord: *Santosky*, 455 U.S. at 760: “[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship.” In light of these fundamental interests, for decades, individuals have reasonably expected and believed that health care providers delivering children have protected that right by identifying and delivering children to their natural parents after their birth.

The district court correctly identified its task, stating “the court must determine when plaintiffs actually knew or with reasonable diligence should have known the existence and cause of their injury” – the baby switch. Addendum No. 1, p. 5. It also correctly began its analysis: although a “claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, . . . such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.” Addendum No. 1, p. 5, citing: *Garza v. United States Bureau of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002) (internal citations omitted). Additionally, the court noted that a “plaintiff’s assertion of when he gained actual knowledge is not determinative if he did not act reasonably and, “in

effect, closed [his] eyes to evident and objective facts concerning accrual of [his] right to sue.” *Id.* The court even noted that the “assessment of whether a plaintiff acted reasonably is an objective one and the conclusion varies with the facts of each particular case.” *Id.*

Despite this framework, the district court arrived at the following conclusion:

This case presents a series of events in the 1970s which demonstrate plaintiffs had more than a hunch or suspicion that an injury had occurred. ... Although plaintiffs did not pursue the issue in the 1970s with formal DNA testing or blood tests, they had notice of the injury. Plaintiffs sought no DNA testing until 2002. Plaintiffs contend they did not realize technology was available for private DNA testing until recently, but the fact remains that Michael considered such tests decades earlier. The record demonstrates that the DNA testing in 2002 and 2004 was conducted as a result of decades of suspicion, questions, and inquiries by the plaintiffs. The 2002 and 2004 DNA testing confirmed the existence of the injury, but the series of occurrences during the 1970s show plaintiffs had reasonable knowledge of their injury and its cause.

... The court’s reasoning in this case rests on the series of occurrences unique to this case. All of the aforementioned events, when taken together, rise to the level of putting plaintiffs on notice of the existence and cause of their injury. They did not act with reasonable diligence in pursuing their rights. The period of limitations expired well before plaintiffs filed their administrative claims.

Addendum No. 1, p. 8-9. The court’s conclusion is not clear, and appears to be that claimants *knew* of the existence and cause of injury during the 1970s, which is incongruous with the undisputed facts. To further complicate its order, without

saying it, the court’s decision appears to hinge upon a conclusion that, had claimants sought DNA – or some other unidentified testing during the 1970s – they would have discovered the truth about the hospital’s mistake and the parentage of the girls. Thus, before analyzing the facts upon which the court’s decision is based, it would not be inappropriate for the case to be remanded solely for clarification by the district court concerning its findings and application of law. Nevertheless, analysis of the court’s decision requires reversal.

2. Factual determinations

The “series of events” during the 1970s, upon which the district court rested its reasoning, were these:

1. At some point prior to 1973, Bowker and Madrigal were introduced at a hospital in Rapid City, South Dakota. Bowker noted the physical similarities between Madrigal and Bowker’s brother.

2. In 1973, Bowker traveled from South Dakota to Colorado and California and met with Medicine and Ryan, respectively, “to find out if there were any truth to any of the rumors.” During the visits, Beverly discussed with both Medicine and Ryan the circumstances of her birth and Madrigal’s birth.

3. Over the years, Bowker continued to communicate with Medicine and Ryan because she had a “nagging question. If something happened at the hospital, if something really actually happened, I really wanted to know. I just wanted to know for sure, one way. . .”

4. In 1974 Bowker invited Ryan and Medicine to attend her college graduation, and they did attend.

5. Sometime in the 1970s, Bowker went to Madrigal's home and spoke to Madrigal "about being baby switched." Madrigal asked Bowker to leave.

6. Sometime in the 1970s, Madrigal attempted to contact a nurse at the hospital to inquire about the circumstances of her birth, but she abandoned her efforts when she learned the nurse was deceased.

7. Madrigal had conversations with Medicine about Medicine's belief that Bowker was Medicine's daughter.³

8. When Bowker went to Ryan's home in the 1970s, she told him she believed she was his daughter.

9. After meeting Bowker, Ryan asked his sister, a nurse, about the possibility of DNA⁴ testing or blood tests, who advised against such testing because she felt – apparently erroneously⁵ – that such tests were unreliable, and also the testing "would just add confusion to something that was already confused."

Addendum No. 1, p. 7-8.

Significantly, the court had an omniscient vantage, created by more than thirty years of hindsight. Even its capacity to gather information into a laundry list of incidents between strangers, spanning a decade and three states, did not give it the ability to identify an event or date at which it found claimants were on notice of their injuries or their cause. Instead, it carefully avoided having to pinpoint such

³ The record indicates these conversations likely occurred *after* the DNA test results were known. J. App., p. 177

⁴ Ryan never asked his sister about the possibility of DNA testing, and this finding of fact is without support in the record, most likely because DNA tests were not available in the 1970s.

⁵ The district court provided no support for its apparent conclusion that Ryan's sister "erroneously" believed blood testing was unreliable.

an event by claiming “the series of occurrences during the 1970s *show* plaintiffs had reasonable knowledge of their injury and its cause.” Addendum No. 1, p. 9 (emphasis added). Thus, its decision required claimants to do something over thirty years ago, which it could not do today. A review of the “occurrences” reveals why the court had discomfort in identifying an event or date.

The series of occurrences identified by the district court can generally be categorized into these six areas: noted physical similarities; failed investigatory explorations spurred by a desire to “know” the truth; visits, suspicious talk and rumors; a person search; hunches or beliefs; and inquiries into available testing. Understandably, because the other five categories lack substance to give notice⁶, it is upon the last of these – testing – that the district court *apparently* hangs its hat.⁷

Here are the relevant portions of the district court’s order concerning testing:

At some point after meeting Beverly in the 1970s, Michael asked his sister, a nurse, about the possibility of DNA testing or blood tests. She advised against such testing because she felt – apparently erroneously – that such tests were unreliable, and also the testing “would just add confusion to something that was already confused.”

⁶ One might argue the district court also relied upon the conversations between Madrigal and Medicine during which Medicine allegedly claimed she knew Bowker was her daughter. The problem is that review of the deposition testimony concerning these claims of knowledge indicates such conversations occurred *after* receipt of the DNA test results in 2002, rather than before, as the district court has implied. J. App., p. 177.

⁷ Appellants say “apparently” because, as referenced previously, the district court’s order is far from clear. Throughout, without support, the court indicates claimants had notice of their injury or “knew” of the baby-switch. Response to such blatantly inaccurate claims is difficult.

... Although plaintiffs did not pursue the issue in the 1970s with formal DNA testing or blood tests, they had notice of the injury. Plaintiffs sought no DNA testing until 2002. Plaintiffs contend they did not realize technology was available for private DNA testing until recently, but the fact remains that Michael considered such tests decades earlier.

Addendum No. 1, p. 8.

The first problem with this factual finding is that it is simply not supported or found in the record. There is no support for any contention that in the 1970s Michael Ryan had ever heard of DNA testing, or considered same. Thus, such a factual finding was made in clear error. Further, there is good reason such a finding could not be made – namely, DNA testing was not available in the 1970s. The district court’s conclusion that reliable – perhaps even DNA – testing was available lacks foundation. The district court provides nothing to indicate that in 1973, the early 1970s, or during the entire decade there was a reliable method of testing parentage – and for good reason. In 1982, Chief Justice Rehnquist explained why:

Traditional blood tests do not prove paternity. They prove non-paternity, excluding from the class of probable fathers a high percentage of the general male population. H. Krause, *Illegitimacy: Law and Social Policy* 123-136 (1971). Thus the fact that a certain male is not excluded by these tests does not prove that he is the child’s natural father, only that he is a member of the limited class of possible fathers. More recent developments in the field of blood testing have sought not only to “prove non-paternity” but also to predict paternity with a high degree of probability. See Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16

J.Fam.L. 543 (1978). *The proper evidentiary weight to be given to these techniques is still a matter of academic dispute.* See, e.g., Jaffee, Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: Response to Terasaki, 17 J.Fam.L. 457 (1979). Whatever evidentiary rule the courts of a particular state choose to follow, if the blood test evidence does not exclude a certain male, he must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others – to prove that, although not excluded by the blood test, he is not in fact the child’s father.

Mills v. Habluetzel, 456 U.S. 91, 98 n 4 (1982) (emphasis added). The problem has not just been recognized by the Supreme Court – especially concerning HLA tests which were becoming popular *after* the “series of occurrences” in this case. “[T]he scientific community has recognized the reliability of the HLA test to exclude paternity, but not to establish paternity. ... Washington courts have followed this reasoning as HLA blood tests have been used to conclusively *exclude* paternity but not to conclusively *establish* paternity.” *Finley v. Sullivan*, 902 F.2d 1578, **3 (unpublished 9th Cir. 1990). See Addendum at No. 2. Thus, even had testing been sought by claimants, they would have lacked the ability to submit or prove any claim, (or perhaps withstand a Rule 11 challenge). For example, Madrigal’s claim that Ryan was not her father (and Bowker’s claim that he was) would not have led the government or a court to the conclusion that the girls had been switched at birth. They merely would have responded by stating that such proof did not mean she was switched at birth. To expect these claimants to have known as much at the same time is unreasonable. Simply stated, there did not exist

in the 1970s, the facts, nor the science, behind which these claimants could submit a claim and prosecute a lawsuit in good faith. They would have been ridiculed. Neither the government, nor the district court, explored the reasons why claimants did not know of DNA testing until 2002, and the district court's conclusion that their discovery was late is clearly unsupported.

The district court did not have the facts before it that it found in its order. To find facts that did not exist constitutes clear error, and, therefore, the district court's apparent determination that claimants knew or should have known through the exercise of diligence is clearly erroneous. Consequently, the district court's application of the discovery rule to these facts was also in error.

2. Claimants were entitled to the application of equitable tolling.

The district court correctly noted that equitable tolling "is an exception to the rule, and should therefore be used only in exceptional circumstances." *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1330 (8th Cir. 1995). It is difficult to imagine circumstances more exceptional, and apart from noting the standard for applying equitable tolling, the district court failed to analyze the issue further. Furthermore, where claimants are affirmatively misled by a defendant or lulled into a false sense of security, the statute of limitations is equitably tolled. *Motley*, 295 F.3d at 824. Before being sent home with the wrong baby, Susie Bowker asked Dr. McGlaughlin, the doctor who delivered her baby, if the baby she had

been given was hers. The doctor insisted there had been no mistake and that she had been given her baby. J. App., p. 102-103. Susie Bowker's recollection is inherently believable. There is no reason for her to conjure up such a story, and her belief in the doctor's claim is reasonable. So, therefore, is the belief of claimants.

The district court cites the loss of medical records as support for its harsh use of the limitations period, but ignores that information indicating the baby switch could not have been discovered even if claimants had searched through the medical records decades ago. It is a certainty that their medical records exactly reflect the information that the hospital reported to the State of North Dakota. A search of their records would have shown exactly what is available on their birth certificates. J. App., p. 29-34. Moreover, the following evidence is indisputable, and admissible. Bowker and Madrigal were born within three hours of each other on July 27, 1946 at the Standing Rock Hospital in Fort Yates, North Dakota. The attending physician was a Dr. McGlaughlin, who personally signed both birth certificates and certified the facts of the births. *Id.* The hospital is on the Standing Rock Reservation and is currently operated, as it was at the time in question, by the United States.

The hospital switched the girls and delivered them to the wrong mothers between the time of their birth and the time they were sent home. There are no

varying degrees of error that were committed. The hospital switched the babies – the evidence is conclusive. The womens’ birth certificates, genealogy birth certificates and claimants testimony, combined with the DNA test results prove the hospital’s mistake. The babies were in the exclusive control of the hospital, and for them to be sent home with the wrong mothers was a breach of the hospital’s duty. J. App., p. 65-69.

The dramatic spectrum of the district court’s ruling is important. It is common to hear of a parent who risks his life to save the only daughter he has known. It is also common for a daughter to go to extraordinary lengths to maintain the love and respect of the only father she has known. The district court’s ruling suggests that plaintiffs should have easily disregarded such boundless love and respect in response to an outrageous and unbelievable rumor. That suggestion should not gain strength just because the outrageous and unbelievable rumor proved to be true.

CONCLUSION

The order of the district court dismissing this matter for lack of subject-matter jurisdiction should be reversed for the foregoing reasons. Claimants respectfully pray that the matter be remanded back to the district court for trial.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the following: (1) that this brief was prepared using Microsoft Word for Windows 2003 and contains 5,512 words; (2) that the brief has been prepared using Times New Roman font in 14 point size; and (3) that the computer diskette provided to the Court concurrently herewith that contains a copy of this brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June _____, 2007, two (2) copies of the foregoing brief and one diskette that contains a copy of the foregoing brief, that was scanned for viruses and is virus-free were served via Federal Express to:

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