
Appeal No. 07-1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL W. RYAN, ROWENA B. MADRIGAL,
and BEVERLY M. BOWKER,

Plaintiffs/Appellants,

-vs-

UNITED STATES OF AMERICA,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION

APPELLEE'S BRIEF

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

On June 16, 2005, Michael W. Ryan (Michael); Rowena B. Madrigal (Rowena); and Lillian Marie Bowker, also known as Beverly Marie Bowker (Beverly), filed this action seeking damages for emotional injuries they allegedly suffered as a result of care provided to Rowena and Beverly when they were infants. Specifically, plaintiffs alleged that employees of a federal agency switched the infants while they were at the Standing Rock Hospital, and sent the infant girls home with adults who were not their biological parents. The United States filed an Answer denying that it was liable for plaintiffs' damages, alleging that this case was barred by the applicable statute of limitations, and asserting that the District Court does not possess subject matter jurisdiction over this case because it has not waived its immunity from suit under the Federal Torts Claims Act (FTCA). The parties exchanged written discovery and deposed several fact witnesses. After the fact discovery deadline expired, the United States filed a Motion to Dismiss under Rule 12(b)(1), arguing that the District Court lacked subject matter jurisdiction over the case because plaintiffs' claims were barred by the statute of limitations. The District Court granted the United States' Motion to Dismiss. Plaintiffs filed a timely appeal.

The dispositive issues in this case have been decided authoritatively in this Circuit, and the briefs and record adequately present the facts and legal arguments. Oral argument would not significantly aid this Court in its decision-making process.

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STATEMENT OF ISSUES

- 1. Whether the District Court's Finding That a Series of Events in the 1970s Put Plaintiffs on Notice of Their Injury and its Cause Was Clearly Erroneous.**

Title 28, United States Code, Section 2401(b)

Garza v. United States Bureau of Prisons, 284 F.3d 930 (8th Cir. 2002)

Ingram v. United States, 443 F.3d 956 (8th Cir. 2006)

Motley v. United States, 295 F.3d 820 (8th Cir. 2002)

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

- 2. Whether the District Court Correctly Concluded That Plaintiffs Did Not Meet Their Burden of Proving That They Are Entitled to Equitable Tolling.**

Motley v. United States, 295 F.3d 820 (8th Cir. 2002)

Shempert v. Harwick Chem. Corp., 151 F.3d 793 (8th Cir. 1998)

STATEMENT OF THE FACTS

A. Beverly Marie Bowker (also known as Lillian Marie Bowker).

Beverly, who will turn 61 this month, was born at Standing Rock Hospital in Fort Yates on July 27, 1946. J.A. at 2 at ¶ 4. Shortly after she was born, Beverly claims she was sent home with Susie Slow Bowker and Virgil Bowker, who were not her biological parents. Id. at ¶ 6.

Beverly was a pre-teen when she first suspected that she was not raised by her biological parents. When she was eight or nine, Beverly heard rumors and comments from other children who teased her about belonging to another family because she did not look like Susie Slow Bowker or Virgil Bowker. J.A. at 97-98, 111. Apparently, Beverly reported the teasing to Susie Slow Bowker, who allegedly told Beverly about her own suspicions that Beverly may have been switched with another child at birth. J.A. at 102-103. Specifically, Susie Slow Bowker claimed that after she delivered a baby girl, someone brought the baby to her, but the next time a baby was brought to her, it was a different child. Id. Allegedly, Susie Slow Bowker expressed concern about a switch, after which a physician assured Susie Slow Bowker that she had received her biological child. Id.

When she was in junior high or high school, Beverly heard rumors from relatives of plaintiff Michael Ryan (who she claims is her biological father)

suggesting that she and plaintiff Rowena had been switched at birth. J.A. at 98-100. Then, sometime between 1963 and 1973, Beverly met Rowena. J.A. at 84, 94-95. Beverly recalled the meeting “very clearly at the time” because Rowena’s features and voice were similar to her oldest brother’s features and their general resemblance “kind of caught [Beverly] off guard at the time.” J.A. at 95-96. In light of the rumors she heard as a child and adolescent, Susie Slow Bowker’s story, and Rowena’s appearance, Beverly’s curiosity was aroused and she would occasionally think about the possible switch and wonder about the truth. J.A. at 99, 111.

In the early 1970's, probably 1973, Beverly traveled from South Dakota to Colorado and then to California, to meet Michael Ryan, and Grace Medicine (Grace), who she suspected were her biological parents. J.A. at 112-117. Her first stop was in Denver, Colorado, where Grace lived at the time. She called Grace and then stopped by her apartment to see her. The purpose of Beverly’s visit was to meet Grace, see if she looked like Beverly, and try to find out if there was any truth to the baby-switch rumors she heard as a child. J.A. at 112-113. They discussed the fact that Beverly and Rowena were both born on July 27, 1946, at the same hospital, and Beverly’s suspicion about a switch. J.A. at 112-117.

Next, Beverly drove to Vallejo, California, to meet Michael Ryan. Id. Michael and his second wife, Marie, met Beverly and her children at a fast-food

restaurant. J.A. at 113-114. Again, the purpose of this visit was to meet Michael and find out if the rumors, that she was switched with Rowena when they were infants, were true. J.A. at 112-117.

In 1974, Beverly invited both Michael and Grace to her college graduation ceremony where she was awarded her Bachelor of Science Degree from Black Hills State College in Spearfish, South Dakota. J.A. at 87, 115. Though neither Michael nor Grace lived close to Beverly, both of them attended the ceremony.

After these visits, Beverly would occasionally call Grace and Michael “just to inquire about their well-being.” J.A. at 116. When asked what prompted these calls, Beverly testified: “I guess I always had this nagging question. If something happened at the hospital, if something really actually happened, I really wanted to know [whether they were her biological parents].” *Id.* So when Michael suggested that she participate in a DNA test and offered to pay for it, she readily agreed. J.A. at 111, 118.

On July 3, 2002, almost 30 years after she traveled to Colorado and California for the sole purpose of investigating whether the rumors about the alleged baby switch were true, Michael and Beverly submitted saliva samples for paternity testing. Michael filed an administrative tort claim in September 2002; Beverly filed her administrative tort claim in January 2004. J.A. at 135-139.

B. Rowena B. Madrigal.

Rowena, who also will turn 61 this month, alleges that she was born at Standing Rock Hospital in Fort Yates, North Dakota, on July 27, 1946. Shortly after she was born, Rowena claims she was sent home with Grace, who was not her biological mother. J.A. at 2. She lived with Grace, her maternal grandmother, and occasionally Michael Ryan until she was three. J.A. at 175. At age three, Rowena's grandmother (Grace's mother) assumed sole responsibility for her care.

Id.

As she was growing up, Rowena was told (by her grandmother and her grandmother's sister) that she was not Michael's child, that Michael and Grace were not together anymore because Rowena did not belong to either of them, and that she belonged to the Bowkers who lived in Cheyenne River. J.A. at 175-176. When Rowena was 14, Grace confirmed this information when she told Rowena that she was not Michael's biological child and that she belonged with the Bowkers. J.A. at 176.

Sometime in the 1970s, Beverly and her friend stopped at Rowena's home to visit with Rowena "about being baby switched." J.A. at 177. Rowena asked Beverly to leave. J.A. at 177-178.

In 1977 while she was married to Keith Rich, Rowena talked to Mr. Rich about the rumors that she had been switched with another infant at birth. J.A. at

174, 177. She decided to investigate the matter, and found the name of a nurse who worked at the Standing Rock Hospital. J.A. at 177. When she tried to contact the nurse, she learned that the nurse was deceased. Id. Apparently, she did not pursue the matter further at the time.

In the 1980s, Grace told Rowena that Beverly had come to visit her suggesting that Grace was Beverly's biological mother, and that Rowena and Beverly had been switched at birth. Rowena also spoke to Michael about the fact that she may have been switched at birth in the 1980s. J.A. at 178.

During her deposition, Rowena testified that she had heard rumors (about being switched with Beverly when they were infants) all her life and that she knew in the 1970s and 1980s that she was probably the Bowkers' biological child. J.A. at 181.

In January 2004, 44 years after Grace told her that she was not Michael's biological daughter, and 27 years after she tried to locate a nurse who worked at the Standing Rock Hospital to find out whether the baby-switch rumors were true, Rowena agreed to undergo a DNA paternity test with Michael. J.A. at 3 at ¶ 12; J.A. at 175, 179. Four (4) days after receiving the test results, she filed a tort claim. J.A. at 204-208.

C. Michael W. Ryan.

Michael alleges that his biological child was switched with another child when they were infants, and that he has suffered damages as a result.

Michael was not present at the birth of Rowena in July 1946. J.A. at 226-227. In fact, at the time of her birth, it appears that the identity of Rowena's father was either not known, or not communicated to the officials who prepared her birth certificate in August 1946. J.A. at 292. The original unaltered version of the "Certificate of Birth" produced by plaintiffs in discovery indicates that the identity of Rowena Beatrice Medicine's father was "not legally determined." Id.

In July 1946, Michael was living in Chicago, trying to find work as a professional boxer. J.A. at 227. The child, who he assumed was his daughter, was two (2) or three (3) months old before he met her for the first time. J.A. at 230. Consequently, he has no first-hand-knowledge of the circumstances surrounding her birth.

Michael testified that it never entered his mind that Rowena was not his biological daughter until the mid-1970s when Beverly came to visit him in Vallejo, California. J.A. at 222-226. According to Michael, Beverly came to visit him on that occasion because she believed she was Michael's biological daughter. J.A. at 223. After the visit, Michael spoke with Grace about Beverly's claims and considered securing blood tests to determine whether Beverly was his natural

daughter. J.A. at 224-226, 253. He also spoke to his sister, who was a nurse at the time, about the possibility of taking blood tests to resolve this issue, but she told him that “blood tests are questionable.” J.A. at 224. Apparently, Michael’s sister also discouraged him from pursuing the tests because it would “just add confusion to something that was already confused.” J.A. at 224-226. In any event, Michael decided not to pursue the matter further at that time for reasons he could not articulate, despite the fact that he thought that there was a possibility that Rowena had been switched with Beverly at the hospital where they were born.¹ J.A. at 226, 267. (“My biological daughter noticed she did not look like siblings who came later. We figured what was possible wrong but could not prove anything.”)

At some point, after Beverly visited Michael in California, Michael recalls receiving an invitation to Beverly’s college graduation, which he accepted. When asked why he attended her college graduation, Michael testified:

A. Well, I thought myself that that’s a great honor to graduate from college or whatever, and that is the reason I went, because I thought that -- at that point in time I thought that there was a possibility that she was my daughter.

J.A. at 236.

¹Michael also recalls hearing rumors that the hospital had switched Rowena and another infant girl at birth, but did not recall when or where he heard these rumors. J.A. at 230.

In 2002, 28 years after he attended Beverly's graduation and 56 years after Beverly and Rowena were born, Michael asked Beverly to join him in getting a DNA test to determine paternity.² Beverly agreed. Michael filed a tort claim in September 2002. J.A. at 264-265.

D. United States' Tort Claim Investigation.

Plaintiffs alleged that 61 years ago, employees of the United States were negligent in the care provided to plaintiffs Rowena and Beverly while they were in the Standing Rock Hospital. Given that six decades have passed, it should come as no surprise that all of the employees who were working in the hospital at the time are either retired or deceased. The United States searched the records available to it and found no personnel files for employees who worked at the hospital. J.A. 294-297. Likewise, it found no records pertaining to independent contractors retained to provide health care services at the hospital. Id. It also has had no success in locating policies, procedures, or guidelines for patient care used at the time. Id.

Since these records are not available, and neither plaintiffs nor the United States located witnesses with personal knowledge of the events that

²In light of information Michael submitted in the tort claims process, it appears that this test and his tort claim was prompted by his search for resources to patent, manufacture, and market a prosthetic foot he designed. J.A. at 267-273.

occurred on or about July 27, 1946, the parties are left to speculate about what happened and who is responsible.

SUMMARY OF THE ARGUMENT

In analyzing the United States' challenge to subject matter jurisdiction on the basis that plaintiffs' medical negligence claims are time-barred, the District Court employed the "discovery rule" to determine when plaintiffs' claims accrued. J.A. at 22.

Under the discovery rule, a claim accrues when the plaintiffs "actually knew or in the exercise of reasonable diligence should have known, the cause and existence of [their] injury." Ingram v. United States, 443 F.3d 956, 962 (8th Cir. 2006). In the exercise of due diligence, plaintiffs must inquire into the possible existence of a claim when they have a hunch or suspicion of a claim, or hear a hint or rumor of one. Garza v. United States Bureau of Prisons, 284 F.3d 930, 935 (8th Cir. 2002). Those who fail to exercise such due diligence, risk dismissal because the limitations' period begins to run "when a reasonably diligent person (in the tort claimant's position) *reacting to any suspicious circumstances* of which he might have been aware would have discovered the government cause." Id. at 934-935 (emphasis added). In other words, plaintiffs had a duty to file a claim when they were "armed with the facts about the harm done to [them]." Ingram, 443 F.3d at 962 (citation omitted).

In light of the evidence offered in support of the Motion to Dismiss, the District Court correctly found that during the 1970s, plaintiffs gathered facts leading them to believe they were not raised by their biological parents, and that they had been switched at the hospital where they were born. Thus, the District Court correctly concluded that the events about which plaintiffs testified, when considered together, put plaintiffs on notice of the existence and cause of their injury in the 1970s, and that they did not act with reasonable diligence in pursuing their rights. J.A. at 27. The fact that DNA tests ultimately confirmed that Michael was likely Beverly's biological father, and that Michael was not Rowena's biological father, does not affect the accrual analysis. It only makes their legal claim more persuasive. Accordingly, the District Court correctly held that "the period of limitations expired well before plaintiffs filed their administrative claims." J.A. at 27.

The District Court also correctly concluded that plaintiffs were not entitled to equitable tolling. Plaintiffs suggest that they offered evidence sufficient to prove their case, and due to the nature of the case, the District Court erred in denying their request for equitable tolling. Plaintiffs exaggerate the inferences which may reasonably be drawn from the evidence offered to the District Court. The fact that Michael is likely the biological father of Beverly, and likely not the biological parent of Rowena, does not prove that Beverly and Rowena were

switched at the Standing Rock Hospital,³ and it certainly does not prove that employees of the United States were negligent. Plaintiffs did not prove that the United States was in exclusive control of the infants while they were in the Hospital; they did not prove that the doctor who delivered the infants, and allegedly assured Susie Slow Bowker that she was given the correct child, was an employee of the United States; they did not prove that the United States had inadequate policies or procedures in place to prevent an infant switch; and they did not disprove other potential events which may have caused Beverly and Rowena to be raised by adults who were not their biological parents. Consequently, the District Court accurately observed that “due to the passage of time, the scarcity of records available, and the deaths of many of the individuals involved, the facts of this case invite speculation and suggest numerous possible theories,” and that “[t]his case demonstrates the reasons enumerated for establishing a statute of limitations period.” J.A. at 27, 28. Accordingly, the District Court correctly concluded that equitable tolling was not appropriate in this case. J.A. at 28. The United States respectfully requests that its decision be affirmed.

³Plaintiffs appear to concede this point. Appellants’ Br. at 22.

ARGUMENT

A. Standard of Review.

On appeal, the standard of review of the District Court's decision regarding whether it possessed subject matter jurisdiction depends on whether the District Court's conclusion was based on disputed or undisputed facts. See Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990). If the District Court's decision to dismiss for lack of subject matter jurisdiction was based on the Complaint alone, or on the Complaint supplemented by undisputed facts evidenced in the record, this Court's review is "limited to determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed." Osborn, 918 F.2d at 730 (citations omitted); Appley Brothers v. United States, 164 F.3d 1164, 1169-1170 (8th Cir. 1999). If the District Court relied on its own determination of disputed factual issues, this Court must then review those findings under the "clearly erroneous" standard. Id.

In this case, the jurisdictional question centers on the whether plaintiffs' claims were time barred under 28 U.S.C. § 2401(b). The District Court reviewed the pleadings and evidence offered by the parties, and concluded that plaintiffs' claims were time-barred, and that plaintiffs had not met their burden of proving they were entitled to equitable tolling. Some of the operative facts on which it relied were undisputed, some were disputed. Accordingly, this Court is tasked

with determining whether the District Court’s factual findings were clearly erroneous, and reviewing the District Court’s findings with regard to undisputed facts and application of the law *de novo*. Appley, 164 F.3d at 1170 (citation omitted).

B. The District Court’s Finding That a Series of Events in the 1970s Put Plaintiffs on Notice of Their Injury and its Cause Was Not Clearly Erroneous.

1. Compliance with the Statute of Limitations Is a Jurisdictional Prerequisite to Suit Under the FTCA.

The United States, as sovereign, is immune from suit unless it waives its immunity and consents to be sued. United States v. Dalm, 494 U.S. 596, 608 (1990); Miller v. Tony and Susan Alamo Found., 134 F.3d 910, 915 (8th Cir. 1998). “This consent must be unequivocally expressed in statutory text, and the scope of a sovereign immunity waiver is strictly construed in favor of the sovereign.” Id. (citations omitted). The FTCA, the statute under which plaintiffs claim their suit arises, is a limited waiver of sovereign immunity with respect to tort claims against the United States, subject to substantive exceptions and conditions. Smith v. United States, 507 U.S. 197, 203-204 (1993). The “limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.” Lehman v. Nakshian, 453 U.S. 156, 161 (1981). Further, these terms of the United States’ consent to be sued “define that court’s jurisdiction to entertain the suit.” Lehman,

453 U.S. at 160 (citation omitted). In other words, the “federal courts have jurisdiction over claims under the FTCA only to the extent that the United States has waived its sovereign immunity.” Ingram, 443 F.3d at 959.

The statute of limitations set forth under 28 U.S.C. § 2401(b) is a “condition of the waiver of sovereign immunity under the FTCA.” Id. at 959. Although this statute may be subject to equitable tolling, this Court has clarified that compliance with this statute is a *jurisdictional prerequisite* to suit. Id. at 959-961.

Accordingly, the District Court was compelled to resolve material issues of disputed fact and determine whether the action was timely-filed, before exercising jurisdiction and considering the merits of plaintiffs’ claims. Id.

2. The District Court Correctly Ruled That the Statute of Limitations Barred Plaintiffs’ Claims and Causes of Action.

Under the FTCA, a tort claim against the United States is barred “unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.” 28 U.S.C. § 2401(b). When a claim accrues is determined by *federal law*. K.E.S. v. United States, 38 F.3d 1027, 1029 (8th Cir. 1994); Garza, 284 F.3d at 936; Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002).

The general rule is that a claim accrues at the time of the alleged injury. Motley, 295 F.3d at 822. However, in this case, the District Court found it appropriate to apply the “discovery rule” in evaluating when plaintiffs’ causes of

action accrued because it considered the nature of plaintiffs' case to state a cause of action for medical negligence. J.A. at 22-23.

“[I]n medical malpractice cases, 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.’” Ingram, 443 F.3d at 962.

Knowing the cause and existence of an injury, however, is not the same as knowing that a legal right has been violated. Motley, 295 F.3d at 822. “Once a plaintiff knows or should know that he has been injured and who has inflicted the injury, ‘[t]here are others who can tell him if he has been wronged, and he need only ask.’” Id. (quoting United States v. Kubrick, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L. Ed. 2d 259 (1979)).

Ingram, 443 F.3d at 962; Knudsen v. United States, 254 F.3d 747, 751-52 (8th Cir. 2001) (“Accrual occurs at that point even if the injured person does not know that the injury is legally redressable.”).

Under the discovery rule, a plaintiff has a duty to inquire into the facts of the case and promptly pursue his or her legal rights. United States v. Kubrick, 444 U.S. 111, 123 (1979) (“A plaintiff . . . armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute[.]”); Ingram, 443 F.3d at 962 (“A plaintiff has a duty . . . ‘to seek advice regarding the possibility of legal action’ once she is ‘armed with the facts about the harm done to [her].’” (citation

omitted)); Motley, 295 F.3d at 823 (“Once aware of the injury, plaintiffs had a duty to exercise due diligence in investigating its cause.”); Brazzell v. United States, 788 F.2d 1352, 1356 (8th Cir. 1986) (plaintiff “ought to be charged with . . . knowledge [of the cause] as soon as she could have discovered . . . the cause by asking a doctor”); Osborn, 918 F.2d at 732 (““Medical malpractice suits have been conditioned by the exercise of due diligence by those injured.”” (citation omitted)).

In the exercise of due diligence, plaintiffs must inquire into the possible existence of a claim when they have a hunch or suspicion of a claim, or hear a hint or rumor of one. Garza, 284 F.3d at 935 (“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.*’” (citation omitted) (emphasis added)). Those who fail to exercise such due diligence, risk dismissal because the limitations period begins to run “when a reasonably diligent person (in the tort claimant’s position) *reacting to any suspicious circumstances* of which he might have been aware would have discovered the government cause.” Id. at 934-35 (emphasis added).

In this case, all three plaintiffs were on notice of facts giving rise to suspicions that, in the exercise of due diligence, should have prompted them to investigate their claims in the 1970s. All her life, Beverly heard rumors that she might have been switched with another child when she was an infant. When Susie

Slow Bowker relayed the story about people in the hospital bringing her two different babies, Beverly became more suspicious. She vividly recalls meeting Rowena for the first time and noticing the similarities between Rowena's features and her oldest brother's features. Obviously, by 1973, when she traveled from South Dakota to Colorado and then to California for the sole purpose of meeting Grace and Michael and investigating whether there was any truth to the baby-switch rumors she heard as a child, she was "armed with the facts about the harm [allegedly] done to her." See Ingram, 443 F.3d at 962. By then, she knew that Rowena was born on the same day, allegedly in the same hospital, and had located and met Grace and Michael, who she suspected were her biological parents. Confirming that this information was significant to Beverly, in 1974 she invited Grace and Michael to attend her college graduation. They both attended.

Although the District Court was not convinced that the rumors Beverly heard as a child were sufficient, without more, to put her on notice; it was persuaded that the other events summarized above, when considered together, "demonstrate that plaintiffs were aware of their injury many years before the DNA tests." J.A. at 24. This conclusion was not clearly erroneous. Accordingly, from the 1970s (and arguably earlier), Beverly had a duty to investigate the situation and secure information, such as blood tests and legal advice, and file her tort claim.

The District Court correctly concluded that her failure to pursue her claim in the 1970s or 1980s bars it in 2005. See J.A. at 26-27.

Likewise, Rowena heard rumors, all her life, that she might have been switched with another child at birth. When Rowena was 14, Grace confirmed these rumors when she told Rowena that she was not Michael Ryan's biological daughter. Further, other relatives alerted her to the fact that she might be the biological child of the Bowkers who lived in Cheyenne River. In the 1970s, Beverly visited her to discuss the possibility that she and Beverly had been switched when they were infants. Later, she learned that Beverly had visited Grace as well, again raising suspicions which would have led a reasonably-diligent person to investigate her claim. In 1977, Rowena attempted to contact a nurse who worked at the hospital, apparently beginning an investigation into the facts that she alleged in her complaint. Subsequently, she had conversations with Grace about Grace's belief that Beverly was her biological daughter.

As with Beverly's claim, the District Court was not persuaded that Rowena was on notice of her injury by rumors alone, but instead, found that Beverly's 1970s visit to Rowena's house where they discussed "being baby switched;" Rowena's attempt to contact a nurse at the hospital to inquire about the circumstances of her birth; and Rowena's conversations with Grace about Grace's belief that Beverly was Grace's biological daughter, were sufficient to put her on

notice of her injury and its cause. J.A. at 25-26. This finding was not clearly erroneous. By abandoning her investigation without pursuing it to completion, Rowena waived her right to pursue her claims and causes of action today. The District Court's decision to dismiss her claim was correct.

Finally, Michael was armed with facts sufficient to begin an investigation in the mid-1970s when Beverly came to visit him. At that time, Beverly and Michael discussed the fact that Beverly and Rowena were born on the same day, in the same hospital. The information Beverly provided him on the day they met was obviously convincing because, when she invited him to her graduation approximately a year later, he accepted the invitation. Michael went to the graduation because he was proud of Beverly, who he suspected was his biological daughter.

Moreover, sometime after Beverly's visit, Michael told his sister (who was a nurse) about Beverly's claim that she was his biological daughter and asked her about the possibility of confirming paternity with blood tests.⁴

⁴Allegedly, his sister discouraged the tests, advising that they would not show anything. This advice was incorrect. As early as the 1950s, blood tests were routinely used to determine paternity. See Breithaupt v. Abram, 352 U.S. 432, 438-439 (1957) ("Many States authorize blood tests in civil actions such as paternity proceedings."); Cortese v. Cortese, 76 A.2d 717, 719 (N.J. 1950) (outlining the value of blood testing as a "wholesome aid in the quest for truth" in paternity matters). Poor advice from his sister about what the blood tests would or would not show does not excuse him from pursuing the matter further. Kubrick, 444 U.S. at 123-124; Osborn, 918 F.2d at 731 (noting that "[w]hether the advice

The District Court’s conclusion that these events, in combination, “demonstrate that plaintiffs had more than a hunch or suspicion that an injury had occurred,” (J.A. at 26), was not clearly erroneous. Michael’s suspicions and beliefs regarding his biological relationship with Beverly gave rise to a duty to inquire further. Garza, 284 F.3d at 934-935. A duty which he ignored until 2002. To excuse Michael from promptly seeking the advice in the medical and legal community to investigate and protect his claim, would undermine the purpose of the statute of limitations. Kubrick, 444 U.S. at 122-123. Like the District Court, this Court should decline plaintiffs’ invitation to do so.

Once plaintiffs became aware of the possibility that Rowena and Beverly had been switched at birth, they were aware of the harm and had a duty to exercise due diligence in investigating their claim and causes of action. Plaintiffs may not close their eyes to evident and objective facts concerning the accrual of their rights for 30 years and still be permitted to pursue their claim. Garza, 284 F.3d at 935; 28 U.S.C. § 2401(b). Enforcement of the limitations period is particularly important

received is competent or incompetent makes no difference to the accrual of his claim.”).

Further, DNA tests have been available since the 1980s. See www.dna.gov/uses; and www.ncjrs.gov. Certainly by the late 1990s, use of DNA tests to determine paternity was routine. Michael’s claim that he did not personally learn about the availability of DNA tests until 2002, does not toll the limitation period because a reasonable person exercising due diligence would have looked into paternity testing methods (like blood tests) after he learned about the suspicious circumstances -- in the 1970s. See Garza, 284 F.3d at 935.

in cases like this where prejudice to the United States is well-established.⁵

Accordingly, their claims and causes of action should be dismissed because they are barred by 28 U.S.C. § 2401 (b).

⁵In light of the lack of records, an accurate response to plaintiffs' claims that the United States was negligent in failing to provide appropriate nursing services and adequate trained personnel is challenging, at best. It is possible that the United States could have raised the discretionary function exception to claims under the FTCA, if it had more information about the practice and procedures plaintiffs claim are unreasonable. See United States v. Gaubert, 499 U.S. 315, 324 (1991) ("When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be *presumed* that the agent's acts are grounded in policy when exercising that discretion." (emphasis added)); Larson v. Miller, 76 F.3d 1446, 1457 (8th Cir. 1996) (en banc) ("We agree with the district court's assessment that decisions to 'investigate, hire, fire and retain' employees are generally discretionary.). As it stands, both parties are left wondering about the standards of infant care and security employed at the time. Had plaintiffs brought their claims earlier, it is very likely that this information would have been available.

Plaintiffs' delay in bringing their claims has also resulted in the United States' inability to raise the independent contractor exception to FTCA as a defense in this case. Given that all the personnel records and independent contractor agreements have either been destroyed, pursuant to record retention policies or otherwise unavailable, there is no way of knowing whether the medical professionals who provided patient care at the Standing Rock Hospital in July 1946 were independent contractors or employees acting within the scope of their employment with a federal agency. In 1934, Congress enacted legislation allowing the Secretary of the Department of Interior to enter into contracts with state and local governments and private corporations for medical services to Native Americans. See 25 U.S.C. § 452. Upon information and belief, the United States Department of Interior exercised the discretion it was granted and retained the services of independent contractors to provide health care services to Native Americans. Therefore, it is possible that some or all of the people providing care to plaintiffs Rowena and Beverly and their mothers in late July 1946 were independent contractors. Plaintiffs' 20-60 year delay in pursuing their claims has resulted in the United States' inability to locate these records, and assert the defense. Prejudice to the United States is obvious and extraordinary.

To avoid the consequences resulting from their turning a blind eye to evident and objective facts, which should have prompted them to investigate their claims years ago, plaintiffs argue that the District Court's conclusions regarding notice were clearly erroneous because it could not identify a specific date or event which put them on notice and started the statute of limitations. Plaintiffs' argument is not supported by the law.

While it is true that, on occasion, courts analyzing statute of limitation arguments will describe factual events that they conclude start the limitations period as "obvious," or "specific," or "definitive," these terms do not create new elements for a statute of limitations analysis or affect a party's burden of proof. The question is not whether there is a specific "definitive" or "unequivocal" accrual event. The question is when did plaintiffs actually know, or when, in the exercise of reasonable diligence, should they have known, the cause and existence of their injury. "The assessment of whether a plaintiff has acted reasonably is an objective one and the conclusion varies with the facts of each particular case." Garza, 284 F.3d at 935. Thus, in some cases, the event is easy for a court to determine. In other cases, it is not. In those cases in which the accrual event is easy to determine, words like "definitive" and "unequivocal" are occasionally used. In cases in which it is more difficult, courts consider all the circumstances

and ultimately reach a decision about when plaintiffs had notice of information sufficient to prompt an investigation or file a claim.

In this case, plaintiffs claim that they did not actually know about their claim until they received the results of the DNA tests. In fact, they go so far as to argue that it is the only event which gave them, or could have given them, the requisite knowledge necessary for their claims to accrue. The District Court appropriately rejected this argument because it is a misinterpretation of the law.

While there is no doubt that plaintiffs knew about their injury when they received the first DNA test results in 2002, that is not the issue. The issue is when, in the exercise of reasonable diligence, should plaintiffs have known about the cause and existence of their injury. Plaintiffs need not secure enough evidence to prove their claim before a court may conclude that their causes of action accrued. To the contrary, plaintiffs must have only discovered the “acts constituting the alleged malpractice.” Osborn, 918 F.2d at 732 (quoting Reilly v. United States, 513 F.2d 147, 148 (8th Cir. 1975)). When considering all the facts and circumstances about which plaintiffs testified in their depositions, the District Court was correct in concluding that plaintiffs had notice of the existence and cause of their injury in the 1970s. J.A. at 27. Given that the end of the 1970s occurred more than 22 years after plaintiffs filed their tort claims, the District

Court's conclusion that plaintiffs' claims were barred by the two-year statute of limitations was correct.

Plaintiffs also contend that the District Court's factual findings were clearly erroneous because it concluded that DNA tests were available in the 1970s and barred plaintiffs' claims because they neglected to secure such tests at that time.⁶ The District Court made no such finding. To the contrary, the District Court concluded that there was sufficient information available to plaintiffs to put reasonable persons on notice of their injury *without the need for paternity tests* formally resolving the issue. Specifically, the court noted:

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. Plaintiffs, especially Beverly and Michael, were actively investigating and questioning the circumstances surrounding births of Rowena and Beverly. *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 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*.

⁶Plaintiffs argue "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." Appellants' Br. at 18.

J.A. at 26-27.

Thus, the District Court found that the series of events in the 1970s demonstrate that they were on notice of their injury and its cause more than 20 years before they arranged for the DNA tests. The fact that plaintiffs ultimately secured DNA tests confirmed the fact that they were on notice of the claim. However, it did not rule that plaintiffs' failure to secure DNA tests in 1970 was fatal to their claim. It was their failure to comply with the duty to further investigate and pursue their claim that was fatal to their case. Consequently, plaintiffs' efforts to justify reversal by arguing that the District Court "apparently hangs its hat" on a finding that Michael knew about DNA testing or blood testing in the 1970s should be rejected. See J.A. 26-27.

Accordingly, the District Court's factual findings were not clearly erroneous and its legal findings were correct. Its conclusion that plaintiffs' claims are barred by the statute of limitations set forth in 28 U.S.C. § 2401(b) should be affirmed.

C. The District Court Correctly Concluded That Plaintiffs Did Not Meet Their Burden of Proving That They Are Entitled to Equitable Tolling.

As the District Court observed, plaintiffs bear the burden of showing that they are entitled to equitable tolling and this burden is heavy because it is invoked only in exceptional circumstances. See J.A. at 27 (citing Motley, 295 F.3d at 824.). In fact, equitable tolling is "reserved for circumstances that are truly beyond

the control of the plaintiff.” Shempert v. Harwick Chem. Corp., 151 F.3d 793, 798 (8th Cir. 1998) (citations omitted).

In support of their claim that they have offered evidence of exceptional circumstances justifying equitable tolling, plaintiffs claim the United States “affirmatively mislead and lulled” them into a false sense of security when Dr. McLaughlin allegedly assured Susie Slow Bowker that she was given the child she delivered. This allegation was spurious and properly rejected by the District Court. The alleged statement made by Dr. McLaughlin to Mrs. Bowker is double hearsay and inadmissible. Even if this statement was admissible and appropriate to consider in the context of this motion (which the United States does not concede), it would not be sufficient to prove affirmative fraud. Further, plaintiffs did not prove, nor can they, that Dr. McLaughlin was an employee of the United States. Plaintiffs’ plea for equitable tolling on this ground must, therefore, be rejected.

Plaintiffs’ suggestion that the District Court ignored information relevant to its equitable tolling analysis should, likewise, be rejected because plaintiffs did not offer evidence of some of the facts they listed, and they exaggerated the inferences which may be reasonably drawn from the evidence they offered. See Appellants’ Br. at 24-25. Other than speculation, plaintiffs did not prove that employees of the United States switched Rowena and Beverly while they were at the Hospital. They could not even prove that employees of the United States were in exclusive control

of Rowena and Beverly while they were in the hospital. Further, plaintiffs disclosed no evidence regarding the nursing services they claim were negligent, and training they claim was inadequate. Consequently, plaintiffs did not offer “conclusive evidence” that the Hospital switched the infants. See Appellants’ Br. at 24-25. They simply assume these facts.

However, it is possible that an independent contractor, or a volunteer, or a relative who visited Susie Slow Bowker or Grace switched the infants by picking up one infant and returning her to the wrong location. It is possible that Michael Ryan and Susie Slow Bowker had a relationship resulting in conception of Beverly (although Michael denies this). It is possible that the infants were switched some place other than the Standing Rock Hospital.

While the United States concedes that these theories are speculative, they are no less speculative than the theories offered by plaintiffs. The fact remains that NO ONE knows what happened on or about July 27, 1946. Plaintiffs cannot meet their burden of proof by simply asking this Court to *infer* that a federal employee was responsible for switching the infants. This is the very type of speculation and conjecture which this Court may not consider. See Kneibert v. Thompson Newspapers, Michigan, Inc., 129 F.3d 444, 455 (8th Cir. 1997); Kiemele v. Soo Line R.R. Co., 93 F.3d 472, 474 (8th Cir. 1996). Plaintiffs must actually link an employee of the United States with the negligent conduct. “It is never enough for

the plaintiff to prove merely that the plaintiff has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant.” Victory Park Apt., Inc. v. Axelson, 367 N.W.2d 155, 160 (N.D. 1985) (quoting W. Prosser & W. Keeton, *Law of Torts* 248 (5th ed. 1984)).

As the District Court concluded, equitable tolling is not appropriate in this case because plaintiffs waited more than 25 years after learning of facts sufficient to investigate and bring their claims and causes of action. See J.A. at 27. The witnesses who have personal knowledge of the events that took place in July 1946 are either unavailable, incompetent or unwilling to testify, or deceased. Specifically, all the employees who were working in the hospital at the time are either retired or deceased. Both Susie Slow Bowker and Virgil Bower, who raised Beverly, and are the alleged biological parents of Rowena, passed away in 2003 and 1997, respectively. Since Grace is unwilling to testify and Michael did not attend the birth of his daughter, there are no witnesses with personal knowledge of the alleged baby-switch available.

Further, the United States has searched and can find no personnel files for employees who worked at the hospital and no records pertaining to independent contractors retained to provide health care services. J.A. at 294-297. Plaintiffs produced no such records either. Similarly, the United States’ search for policies,

procedures, or guidelines for patient care used at the Standing Rock Hospital in 1946, was unfruitful.

Had this lawsuit been brought 30 years ago, there is no question that more witnesses would have been able to offer testimony about the facts plaintiffs allege. Even ten years ago, there would have been more information available than there was in 2002. Plaintiffs' delay in pursuing the issue resulted in great prejudice to the United States, which was limited in the defenses available to it.⁷ Additionally, plaintiffs' delay makes it virtually impossible for them to meet their burden of proof, even if this case were to survive a jurisdictional challenge.

As the District Court observed, “[t]his case demonstrates the reasons enumerated for establishing a statute of limitations period.” Witnesses are deceased or unavailable, records are lost or destroyed, lack of information leads to speculation and conjecture. J.A. at 27, 28. The District Court’s decision in this regard was correct, and should be affirmed.

⁷See note 5.

CONCLUSION

For the reasons set forth above, the United States respectfully requests this Court to AFFIRM the District Court's dismissal of plaintiffs' claims and causes of action.

Respectfully submitted this 13th day of July, 2007.

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CERTIFICATE OF COMPLIANCE

Also, pursuant to 8th Cir. R. 28A(d), the undersigned certifies that the computer CD provided with this brief has been scanned for viruses and that it is virus-free.

Dated: July 13, 2007.

/s/ Shon Hastings
SHON HASTINGS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of North Dakota and is a person of such age and discretion as to be competent to serve papers.

That on July 13, 2007, she dispatched two copies of the APPELLEE'S BRIEF, and one CD containing the full text of the Brief, by placing the copies and the CD in a Federal Express packet addressed to the person hereinafter named, at his last known address:

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The undersigned further certifies that on July 13, 2007, she dispatched to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, by Federal Express, the original and nine copies of the APPELLEE'S BRIEF and a CD containing the full text of the Brief.

/s/ Margo Kern

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