03-6056-cv

To Be Argued By:
BRENDA M. GREEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-6056-cv

TERESA T.; ZAZSHEEN P., minor child; MATTHEW T. GILBRIDE, Esq., PPA ZAZSHEEN P.,
Plaintiffs-Appellants,

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The plaintiffs invoked the subject matter jurisdiction of the district court (Alfred V. Covello, J.) under 28 U.S.C. § 1331 and § 2671 *et seq*. (the Federal Torts Claims Act, "FTCA"). As explained below, however, the district court lacked jurisdiction over the plaintiffs' complaint because they failed to file their administrative claims with the appropriate federal agency within the two-year statute of limitations mandated by the FTCA, 28 U.S.C. § 2401(b). The district court granted the United States' motion to dismiss on March 11, 2003; judgment entered for the United States on March 12, 2003. On March 17, 2003, the plaintiffs filed a timely notice of appeal. *See* Fed. R. App. P. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district properly found that the plaintiffs had not established any grounds for equitably tolling the statute of limitations for their claim under the Federal Tort Claims Act?

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Preliminary Statement

In this Federal Tort Claims Act ("FTCA") appeal, the plaintiffs forfeited their opportunity for judicial review because they failed to submit their administrative claims to the Government in a timely manner. In dismissing the plaintiffs' suit, the district court found that the plaintiffs' claims were submitted to the Government more than two

years after the statute of limitations expired and that there were no grounds for equitable tolling of the statute of limitations in this case.

In this Court, the plaintiffs allege that the district court erred by refusing to equitably toll the statute of limitations on their FTCA claims, but the district court's decision was correct. The plaintiffs cannot show that they actively pursued their judicial remedies, that they were induced by the defendant's conduct into allowing the statute of limitations to pass, or that there are any other grounds for tolling the statute of limitations. This Court should affirm the judgment below.

Statement of the Case

This is an appeal from the entry of judgment by the United States District Court (Alfred V. Covello, J.), after dismissal of the plaintiffs' complaint.

On September 21, 2001, the plaintiffs, Teresa T. and Zazsheen P., submitted administrative claims to the Department of Health and Human Resources, each in the amount of $100,000,000.00, for the loss of care and companionship of an infant sibling, trauma from prolonged child abuse, and physical injury. Joint Appendix, "JA" at 17, 28.

On June 14, 2002, the plaintiffs filed a complaint pursuant to the FTCA alleging that the Hill Health Center, a Federal Community Health Center, and its doctor, Dr. Robert Windom, acted or failed to act in such a manner that caused the plaintiffs to be subjected to severe child

abuse, to lose the companionship of their sibling, baby Shedina P., and to suffer the break-up of their family. JA 7-13.

On March 11, 2003, the district court granted the United States' Motion to Dismiss on the grounds that it lacked subject matter jurisdiction. JA 73-83. Judgment for the United States entered on March 12, 2003. JA 84. On March, 21, 2003 the plaintiffs filed a timely notice of appeal.

Statement of Facts and Proceedings Relevant to this Appeal

For purposes of this appeal, the following facts from the complaint are taken as true:

On October 24, 1996, Annette Pompano, Teresa's school nurse, contacted the Connecticut Department of Children and Families ("DCF") about bruises on Teresa and concerns about her recent weight loss. JA 7. Later that afternoon, DCF employee Marilyn Ortiz conducted an investigation and determined the family needed DCF treatment services. JA 7-8. On October 25, Pompano told Ortiz that the bruises were pressure marks that had not been present the day before the referral. JA 8.

On November 6, 1996, the case was assigned to Kenneth Armstrong, a social worker trainee who, on November 25, 1996, made a visit to Teresa's school to meet Tina Acompora. JA 8. Acompora expressed concerns about Teresa's weight, body odor, and unclean undergarments. JA 8-9. On December 16, 1996,

Acompora again contacted Armstrong and reported that Teresa lost an additional 6½ pounds during the Thanksgiving school recess. JA 9. On December 17, Teresa's school provided weight logs from the school nurse that documented Teresa's significant weight loss. JA 9.

On December 20, 1996, Robert Windom, M.D., of the Hill Health Center, a Federal Public Health Service, gave Teresa a full medical examination. JA 9-10. On December 30, 1996, Armstrong contacted Windom and provided him with all of the information from Teresa's school concerning Teresa's weight loss and the bruises reported on her neck. Windom expressed no concerns regarding her health or recent weight loss. JA 10.

On January 26, 1997, Teresa's eight-month old sister, Shedina, was transported to the emergency room where she was examined by Clifford Bogue, M.D. Dr. Bogue diagnosed Shedina's injuries as severe head trauma and rib fractures, and found them to be consistent with child abuse. JA 10-11. On January 29, 1997, Shedina died of her injuries. The complaint alleges that Teresa and her brother, and co-plaintiff, Zazsheen, witnessed the death of their baby sister. JA 11.

After Shedina's death, Teresa and Zazsheen went to Hill Health Center for a physical examination and were examined by Stephen Updegrove, M.D. Dr. Updegrove told the treatment worker that the systematic starvation of Teresa was obvious from her health records. JA 11.

On September 21, 2001, Zazsheen and Teresa filed completed SF-95 forms, making claims for injuries against the United States, and filed them with the Department of Health and Human Services. JA 12, 17, 28.

On June 14, 2002, the plaintiffs filed a complaint pursuant to the FTCA, 28 U.S.C §§ 2675(a), *et seq*., alleging that the Hill Health Center, a Federal Community Health Center, and Windom, acted or failed to act in such a manner that caused the plaintiffs to be subjected to severe child abuse and to lose the companionship of their sibling, baby Shedina. JA 12.

The plaintiffs alleged that "[h]ad Dr. Windom made proper diagnosis of just Teresa T.'s condition, the Department of Children and Families would have removed all three of the children from the care of their mother, thus preventing the further physical and emotional neglect of the children." JA 12.

On March 11, 2003, the district court dismissed the case for the lack of subject matter jurisdiction based on the plaintiffs' failure to file a timely administrative claim within the mandated two-year statute of limitations contained in the FTCA. The court found that the plaintiffs' claims accrued no later than the date of Shedina's death in January 1997, and thus that their claims should have been filed no later than January 1999. The plaintiffs' claims, filed in September 2001, were too late. JA 79-80.

Additionally, the district court rejected the plaintiffs' arguments for equitable tolling of the statute of limitations,

finding that they met none of the criteria for equitable tolling and that "the plaintiffs' failure to file a claim was not due to inequitable circumstances." JA 80-81.

With respect to the plaintiffs' substantive due process allegations, the court concluded that the plaintiffs' status as "abused and neglected children[] in state care" did not prevent them from filing a timely administrative claim. On this point, the court noted that counsel for the plaintiffs had begun representing the plaintiffs shortly after the events in this case and had "admitted[that] he was aware that the plaintiffs could assert claims against the United States, but did not pursue them, for fear that the government agencies would not help the plaintiffs if they brought suit against them." JA 81-82 (footnote omitted).

For the same reasons, the district court rejected the plaintiffs' procedural due process and equal protection arguments, noting again that the plaintiffs had the opportunity to file a claim within the limitations period through their attorney. JA 82.

On March 21, 2003, the plaintiffs filed a timely notice of appeal.

SUMMARY OF ARGUMENT

There is no dispute that the plaintiffs failed to file their claims against the United States within the FTCA's two-year statute of limitations. *See* 28 U.S.C. § 2401(b). The only question is whether the statute of limitations should have been tolled, but as the district court properly found, the plaintiffs met none of the criteria for equitable tolling.

Under well-established precedent, equitable tolling is only available in extraordinary circumstances. To warrant this relief, the plaintiffs must show that they exercised some diligence in attempting to file the claim within the mandated time period, and that some "extraordinary circumstance," such as malfeasance by the defendant, prevented the timely filing of the claim. *Pace v. DiGugliemo*, 125 S. Ct. 1807, 1814 (2005). Here, the plaintiffs are not entitled to equitable tolling because they did not act diligently during the limitations period and the United States did not induce or trick them into filing an untimely claim.

Furthermore, there are no other exceptional circumstances that would warrant equitable tolling in this case. The plaintiffs' status as minors does not toll a federal statute of limitations, and the plaintiffs' constitutional rights were not violated because, as the district court found, they were represented by counsel during the relevant time period and thus had access to the courts.

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE PLAINTIFFS WERE NOT ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. The FTCA

The FTCA is an express, limited waiver of the Government's sovereign immunity from suit.

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The Supreme Court has consistently held that "law of the place" in § 1346(b) means the state

where the act or omission took place. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). Thus, state law provides the source of substantive liability for causes of action cognizable under § 1346(b), and the FTCA is the exclusive remedy for such causes of action. *Id.*; *see also* 28 U.S.C. § 2679(b)(1) (FTCA is "exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim").

Moreover, with respect to tort claims against the United States, the "'limitations and conditions upon which the Government consents to be sued must be strictly observed.'" *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). One such limitation and condition is the time period in which tort claims must be presented to the United States: "A tort claim against the United States shall be forever 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). The purpose behind this time provision is "to require the reasonably diligent presentation of tort claims against the Government." *United States v. Kubrick*, 444 U.S. 111, 123 (1979).

Section 2401(b) has been construed as a substantive condition of the Government's limited waiver of immunity under the FTCA, and, therefore, satisfaction of the two-year limitations period is a jurisdictional prerequisite to recovery under the statute. *Id.* at 117-18. In other words, after the two-year statute of limitations has run, "a district court lacks subject matter jurisdiction over a plaintiff's

FTCA claim." *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999).

In addition, although the statute looks to state law to determine whether a valid cause of action exists, "[t]he date on which an FTCA claim accrues is determined as a matter of federal law." *Syms v. Olin Corp.*, 408 F.3d 95, 107 (2d Cir. 2005) (citations omitted).

2. Equitable Tolling

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court held that there is a "rebuttable presumption of equitable tolling applicable to . . . suits against the United States." *But see United States v. Beggerly*, 524 U.S. 38, 48-49 (1998) (equitable tolling not allowed in suits under the Quiet Title Act); *United States v. Brockamp*, 519 U.S. 347 (1997) (equitable tolling not allowed for filing tax refund claims under the Internal Revenue Code of 1986).

Although this Court has never expressly held that the *Irwin* rebuttable presumption of equitable tolling applies to suits under the FTCA, in, it has applied the doctrine in several cases. In *Kronisch v. United States*, 150 F.3d 112, 123 (2d Cir. 1998), for example, the Court stated that the FTCA statute of limitations "will be equitably tolled so long as defendants' concealment of their wrongdoing prevented plaintiff from becoming aware of, or discovering through the exercise of reasonable diligence, his cause of action." *See id.* at 122-23 (rejecting argument for tolling of FTCA statute of limitations); *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 720-21

(2d Cir. 1998) (same); *Celestine v. Mount Vernon Neighborhood Health Center*, 403 F.3d 76, 84 (2d Cir. 2005) (noting, in dicta, that equitable tolling of FTCA statute of limitations period might be required in certain cases). *See also Perez v. United States*, 167 F.3d 913, 915-17 (5th Cir. 1999) (FTCA claims subject to equitable tolling). *But see McIntyre v. United States*, 367 F.3d 38, 61 & n.8 (1st Cir. 2004) (expressing doubt about whether FTCA claims are subject to equitable tolling, in light of *Beggerly*, but rejecting claim for tolling on the merits).

Assuming that equitable tolling applies to FTCA claims, a plaintiff may "invoke the courts' power to equitably toll the limitations period," only in "'rare and exceptional circumstances.'" *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004) (quoting *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam)). *See also Irwin*, 498 U.S. at 96 ("Federal courts have typically extended equitable relief only sparingly."). To invoke this doctrine, the plaintiff must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 125 S. Ct. at 1814 (citing *Irwin*, 498 U.S. at 96). *See also Irwin*, 498 U.S. at 96 (equitable tolling allowed where claimant actively pursued remedies during the statutory period, or where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Doe*, 391 F.3d at 159 ("To qualify for [equitable tolling,] the petitioner must establish that 'extraordinary circumstances prevented him from filing his petition on time,' and that he 'acted with reasonable diligence throughout the period he seeks to toll.'") (quoting *Smith*, 208 F.3d at 17). As these cases make clear, this doctrine

"is an extraordinary remedy because if applied too liberally it threatens to undermine the purposes of statutes of limitations of allowing potential defendants predictability and repose." *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004).

3. Standard of Review

This Court reviews *de novo* the dismissal of a complaint for lack of subject matter jurisdiction. *Celestine*, 403 F.3d at 79-80. Although this Court has not so held, after *Irwin*, some courts have expressed doubt on whether the FTCA's statute of limitations is jurisdictional. *See, e.g.*, *Perez*, 167 F.3d at 915-17. In the event this Court concludes that the statute of limitations is not a jurisdictional prerequisite to suit, the district court's decision on whether to equitably toll the limitations period is within its sound discretion and as such, is reviewed on appeal under an abuse of discretion standard. *Zerilli-Edelglass v. New York City Transit Authority*, 333 F.3d 74, 81 (2d Cir. 2003).

C. Discussion

In this case, as the district court properly found, the plaintiffs failed to file their claims within the FTCA's two-year statute of limitations. The plaintiffs' claims accrued, at the latest, in January 1997 when their baby sister died, and thus their claims had to be filed by January 1999. 28 U.S.C. § 2401(b). The plaintiffs did not submit their claims to the government until September 2001, and thus they were filed too late. JA 79-80.

The plaintiffs claim, nonetheless, that the statute of limitations should be tolled. This Court should reject that claim because, as the district court properly found, the plaintiffs do not meet any of the criteria for equitable tolling.

1. The plaintiffs cannot show that they acted with reasonable diligence during the limitations period

To apply equitable tolling, the plaintiff must have acted "with reasonable diligence through the period it seeks to have tolled." *Johnson v. Nyack Hosp.,* 86 F.3d 8, 12 (2d Cir. 1996). When an plaintiff has not acted diligently to protect his legal rights, he cannot rely on equitable tolling. *See Iavorski v. United States Immigration and Naturalization Service,* 232 F.3d 124, 134 (2d Cir. 2000). "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam).

This Court applied these principles in *Iavorski.* In that case, an alien attempted to toll the statute of limitations for his time to file an appeal from the Immigration Judge's decision after his attorney failed to file the appeal. The alien claimed that the limitations period should be tolled because he thought his attorney had filed the appeal. This Court found, however, that the alien had not acted diligently because several years had passed and in that time the defendant never paid the fee for the appeal, learned the attorney had moved, and subsequently learned the attorney had stopped practicing law. The alien had not

taken affirmative steps to protect his rights which showed that he had not acted diligently. *Iavorski*, 232 F.3d at 134. *Contrast Perez*, 167 F.3d at 918 (allowing for equitable tolling under the FTCA when, during the limitations period, the plaintiff mistakenly sued the Texas National Guard instead of the United States Army when "the appropriate agency . . . received the claim").

This Court found that a plaintiff has not acted with diligence when he chooses to wait to sue in order to pursue a legal strategy. *Johnson*, 86 F.3d at 12-13. In *Johnson*, the plaintiff waited until after the statute of limitations had expired to sue a hospital that had revoked his surgeon's license. He claimed that he waited to pursue his case until another agency had found him not guilty of professional misconduct charges, because that finding would help him prevail in his suit against the hospital. While the plaintiff had strategic reasons for waiting to file, the Court found that the plaintiff's choice in waiting to sue did not necessitate forcing the defendant to face a law suit filed after the statute of limitations had elapsed. *Id.* at 12-13; *see also Veltri*, 393 F.3d at 326 (holding that a plaintiff "with actual knowledge of her right to sue may not rely on equitable tolling").

In the present matter, the plaintiffs have provided no evidence to suggest that they took any steps to protect their legal rights during the time they seek to have tolled. Although the plaintiffs' sister died in 1997, they failed to file their claims until 2001. During the two years following the death of their sister, when they were required by statute to file their administrative claim, they took no action even though their attorney was representing

them at the time, and even though the district court found that their attorney was aware of potential claims against the United States at the time. JA 81-82. Indeed, the first action taken by the plaintiffs was the filing of their claim *five* years after the allegedly neglect treatment of Teresa and four years after the death of Shedina. Therefore, the plaintiffs have not established that they acted with diligence and thus the district court properly decided that the statute of limitations should not be tolled.

2. The plaintiffs cannot show that any extraordinary circumstances prevented the filing of their claims within the statute of limitations

a. The plaintiffs were not induced or tricked by the United States into allowing the statute of limitations to pass

Courts have recognized equitable tolling when the defendant has "induced or tricked" the plaintiff into allowing the filing deadline to pass. *Irwin*, 498 U.S. at 96. For example, if a defendant engages in fraud or fails to perform a legal duty, the court may find that the defendant's conduct warrants equitable tolling of the statute of limitations. *Perez*, 167 F.3d at 918. When the defendant acts in a fraudulent way or fails in a legal duty, he has misled the diligent plaintiff and under equity the statute of limitations should be tolled.

In *Glarner v. United States*, 30 F.3d 697 (6th Cir. 1994), for example, the court allowed equitable tolling

because the hospital failed to perform a legal duty. The hospital, a VA hospital, had a legal duty to provide the plaintiff with a claim form but failed to do this. The plaintiff was proceeding *pro se*, and when the defendant failed to inform him of his rights he was misled and allowed the statute of limitations to elapse even though he was trying to act diligently. The court found that the statute of limitations should be tolled, because the hospital failed in its legal duty to provide the plaintiff with the appropriate form. *Id.* at 702. *See also Veltri*, 393 F.3d at 323-24 (tolling the statute of limitations when the defendant failed in its legal duty to inform the plaintiff of his right to appeal or file an action in court because Congress had mandated the disclosure).

Here, the plaintiffs do not allege -- because they cannot -- that the United States acted fraudulently or breached any legal duty that prevented the timely filing of their claims. The plaintiffs have the burden for determining if they have a viable claim under the FTCA. *Motley v. United States*, 295 F.3d 820, 824 (8th Cir. 2002). In *Motley*, the defendant was a federally supported health center covered by the FTCA. The plaintiffs claimed that they were unaware of the defendant's federal status and that they were never told it was covered by the FTCA. The court found that this was insufficient to toll the statute since the plaintiffs had a duty to investigate and were not misled in this case. The court noted that the plaintiffs had "ample time" to look up the law and determine if the defendant fell under the FTCA. Indeed, the court said that the plaintiffs' argument would at least require the plaintiffs "show that the information *could not* have been found by a timely diligent inquiry." *Id.*; *see also Gould v. United*

States Dep't of Health and Human Services, 905 F.2d 738, 745 (4th Cir. 1990); *but see Celestine*, 403 F.3d at 84 (discussing in dicta that the Second Circuit might consider equitable tolling when the plaintiff originally brought the action in state court within the state statute of limitations because he did not know that the defendant fell under the FTCA).

Although the plaintiffs do not claim that the United States breached any duty to them, they argue that the United States should somehow have protected the rights of children and assured that they filed a timely administrative claim. However, the United States is under no obligation to notify every prospective plaintiff of its involvement in all potential actions and "[t]he burden is on the plaintiff to discover the employment status of the tort-feasor and to bring suit within the applicable limitations period." *Gould*, 905 F.2d at 745.

Finally, the plaintiffs argue that even if the United States had no duty to them, the DCF should have secured for them an attorney to bring their tort claims. *See* Appellants' Br. at 27. But even assuming *arguendo* that the DCF had a duty to find legal representation for them, any breach of that duty by the DCF does not justify tolling the statute of limitations against a third party, the United States.

b. The plaintiffs have established no other extraordinary circumstances that might justify the tolling of the statute of limitations

The plaintiffs argue that the statute of limitations should be tolled (1) because, as abused and neglected children, the failure to meet the deadline was "out of [their] hands," (2) because the plaintiffs were minor children, (3) because the state statute of limitations would have provided a longer time for filing a claim, or (4) because the failure to toll the statute would violate their constitutional rights. These arguments are all without merit.

First, the plaintiffs argue that they could not file in time because they were trying to have the DCF place them and this lawsuit would have hurt this placement. Appellants' Br. at 23-24. Specifically, they contend that "the failure to meet a filing deadline was certainly 'out of the hands' of the plaintiffs. Their ability to access the relevant federal agency within the limitation period was not grounded on their minority, but on their status as abused and neglected children who were in the care, custody, and control of Connecticut Department of Children and Families." *Id.* at 24 (footnote omitted). They further argue that DCF should have known of their potential claim against the United States and secured them an attorney to pursue this claim, but failed to do so because "the representatives of the [DCF] were themselves

joint tort-feasors in the outrageous abuse and neglect of the plaintiffs." *Id.* at 27.[1]

Here there are no extraordinary circumstances that prevented the plaintiffs from exercising their rights. *See Bartus v. United States*, 930 F. Supp. 679, 682 (D. Mass. 1996). Although the plaintiffs were minor children within the custody of the DCF during the relevant time period, they were also represented by counsel during this time. Indeed, as the district court specifically found, their lawyer knew they had potential claims against the United States but failed to file a timely administrative claim. JA 81-82.

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[1] The liability of the DCF to the plaintiffs is not an issue in this case. On this point, the United States notes that the plaintiffs have already pursued a separate civil case against the DCF. In that case, the plaintiffs argued that "Connecticut child protection statutes give them a property interest in their protection from parental abuse." *Teresa T. v. Ragaglia*, 154 F. Supp. 2d 290, 302 (D. Conn. 2001). The district court rejected the plaintiffs' argument and dismissed the case. *Id.* at 305. The plaintiffs appealed, and this Court certified to the Connecticut Supreme Court the question of whether Connecticut's child protection statutes required DCF to remove a child if there is probable cause to believe the child is in imminent risk of harm. *Sealed v. Sealed*, 332 F.3d 51 (2d Cir. 2003). The Connecticut Supreme Court found that Connecticut law did not require the removal of a child but instead required the DCF to follow certain procedures which could include removal. *Teresa T. v. Ragaglia*, 865 A.2d 428 (Conn. 2005). In turn, this Court held that the "plaintiffs do not have a constitutionally protected entitlement to removal" and upheld the district court's decision. *Sealed v. Sealed*, 125 Fed. Appx. 338, 340 (2d Cir. 2005).

The plaintiffs take issue with the district court's finding on this point, but whether or not their lawyer knew about the potential for specific claims against the United States, there is no dispute that the plaintiffs were represented by outside disinterested counsel.

Moreover, the plaintiffs fail to explain how suing the federal government would have somehow adversely affected their state court action, an action to which the United States was not a party. Even if there were some legitimate strategic reason for delaying a suit against the United States while the state court action proceeded -- a reason the plaintiffs have never identified -- a strategic choice of this sort does not justify the tolling of the statute of limitations. *Johnson*, 86 F.3d at 12-13 (choice to pursue a legal strategy does not warrant tolling and expanding the time period when the defendant can be sued).

Second, the plaintiffs argue that the statute should be tolled because they were minor children. However, there is no basis to toll the statute of limitations for minority under federal law.

It has long been recognized that the FTCA statute of limitations is not tolled by a plaintiffs' minority. *Leonhard v. United States*, 633 F.2d 599, 624 (2d Cir. 1980). While the statute of limitations has been tolled for adults who are mentally handicapped, courts have found no basis to toll for minors since they have a guardian who can bring the suit in their place. *See McCall ex rel. Estate of Bess v. United States*, 310 F.3d 984 (7th Cir. 2002).

In *McCall*, the Seventh Circuit rejected a similar argument stating that "[c]ourts, however, are not free to construe the FTCA's statute of limitations broadly. As the Supreme Court made clear in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), courts must not construe the FTCA limitation provisions 'so as to defeat [their] obvious purpose, which is to encourage the prompt presentation of claims.' Additionally, because the FTCA waives the immunity of the United States and its statute of limitations is a condition of that waiver, courts should not 'extend the waiver beyond that which Congress intended.' *Id.* at 117-18." *Id.* at 988.

In *McCall*, as in the present matter, the birth mother had consulted legal counsel within the time frame in which a timely claim could have been filed, but chose not to pursue it at that time. Here, the plaintiffs' interest were properly represented by both their attorney and the "next of friend," their attorney's law partner, during the time that a timely administrative claim could have been filed.

Even when a child's parents have a conflict of interest, courts have not tolled the statute of limitations finding that it was sufficient that there was someone who could bring the claim. *Zavala ex rel. Ruiz v. United States*, 876 F.2d 780, 782 (9th Cir. 1989); *Pittman v. United States*, 341 F.2d 739 (9th Cir. 1965). In *Pittman,* the plaintiff, a minor, argued that the statute of limitations should be tolled in his FTCA suit against the Navy, because during the statutory period his father was seeking a promotion in the Navy, which was a conflict of interest. The court rejected this argument and refused to apply equitable tolling, because "Congress just did not want stale claims

lying around." 341 F.2d at 741-42; *see also Landreth ex rel. Ore v. United States*, 850 F.2d 532, 535 (9th Cir. 1988) (refusing to toll the statute of limitations during the time when the plaintiff had no guardian because of the policy seeking to ensure the "expeditious disposition of claims").

Third, the plaintiffs argue that the statute of limitations should be tolled because it would have been tolled in state court. Appellants' Br. at 25. The fact that a state statute of limitations might be tolled is irrelevant to determining whether, under federal law, the statute of limitations for a suit against the United States under the FTCA should be tolled. *Syms*, 408 F.3d at 107 (FTCA statute of limitations is matter of federal law); *see also Pipkin v. United States Postal Service*, 951 F.2d 272, 274-75 (10th Cir. 1991).[2]

In *Pipkin*, the plaintiff argued that equitable tolling should apply since the statute of limitations was longer in the state system. The court refused to follow the state scheme since there was a federally proscribed limitations period: "Congress has expressly stated the applicable limitation period for FTCA claims and reference to state law is therefore inappropriate." *Id.* at 275.

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[2] For this reason, the plaintiffs' reliance on *Caron v. Adams*, 638 A.2d 1073 (Conn. App. 1994), is misplaced, but that case is distinguishable in any event. In that case, the plaintiff had no next friend who could have sued the DCF, but here, the plaintiffs had a lawyer who could have filed suit on their behalf.

Plaintiffs cite *Albright v. Keystone Rural Health Center*, 320 F. Supp. 2d 286 (M.D. Penn. 2004) for the proposition that when the state has a longer statute of limitations and the status of the federal actor is difficult to determine, the federal court should toll the statute of limitations. However, even if this district court case could be considered persuasive authority, it is distinguishable here because in that case, the court found that the plaintiff acted diligently during the statutory period.

Here, the plaintiffs' attorney, and his partner, who are acting as the next of friend for the plaintiffs, by their own admission, JA 81-82, could have instituted an action, but, chose not to for strategic reasons. Although the plaintiffs believe that there were good reasons for failing to institute an action, this was a choice made by their legal representatives.

Finally, the plaintiffs claim that the district court's refusal to toll the statute of limitations violates their right of access to the courts to pursue their FTCA claim. Appellants' Br. at 32-36. The right to sue under the FTCA is a property interest that is protected by due process. *Zavala*, 876 F.2d at 784. However, courts have consistently held that so long as the plaintiffs have access to the courts the statute of limitations does not need to be equitably tolled. *Zavala*, 876 F.2d at 784.

In *Zavala*, for example, the plaintiff argued that because he was an abandoned minor, his Fifth Amendment right to be heard was violated by the failure to toll the statute of limitations. However, the court noted that either his parents or his guardian ad litem could have filed the

case for him. His guardian ad litem could even have filed for him before being appointed his official guardian. *Id.* (quoting *Crawford v. United States*, 796 F.2d 924, 926 (7th Cir. 1986). Here, as in *Zavala*, the plaintiffs had an opportunity to be heard. They had two years in which their counsel, and his partner acting as next friend, could have brought the action on their behalf in federal court. Since the plaintiffs had an opportunity to be heard, their due process rights were not violated.

Moreover, the plaintiffs' argument would effectively eviscerate the statute of limitations for FTCA claims, by transforming every refusal to toll the statute of limitations into a constitutional violation. They cite no authority for this remarkable proposition, and indeed it is inconsistent with abundant authority counseling courts to construe the statute of limitations in the FTCA strictly because it is a specific condition on the United States' waiver of sovereign immunity. *See, e.g.*, *Kubrick*, 444 U.S. at 117-18 ("We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended.").

In sum, the plaintiffs have established no extraordinary circumstances to justify the tolling of the statute of limitations in this case.

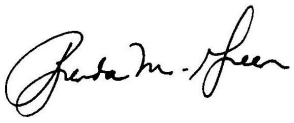
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 1, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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ADDENDUM

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2401(b)

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.