



Moreno was an employee of Greater Philadelphia Health Action, Inc. (“GPHA”), a federally funded health center. (00-CA-4300). Because the Secretary of the Health and Human Services (“HHS”) deemed GPHA to be an HHS grantee and its employees to be employees of the Public Health Service, a federal agency, there was federal jurisdiction of this action pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346. On October 20, 2000, Honorable Eduardo C. Robreno of this court substituted the United States for Moreno and dismissed plaintiff’s claims against the United States without prejudice as a result of plaintiff’s failure to exhaust her administrative remedies. On February 2, 2001, the action against the remaining parties was remanded to state court.

On December 12, 2000, plaintiff filed an administrative claim with the HHS, alleging the negligence of Moreno in treating decedent. When no decision was received from the HHS after more than six months, plaintiff instigated an action in federal court on October 24, 2001 against the United States pursuant to the FTCA. (01-CA-5392).

On February 26, 2002, Markowitz filed an answer and cross-claim against Moreno in the remanded state court survival action, and as a result, on March 14, 2002, plaintiff’s survival action was once again removed to the United States District Court for the Eastern District of Pennsylvania because of Moreno’s presence in the lawsuit. (02-CA-1307). By an order dated April 11, 2002, 01-CA-5392 was consolidated with this action.

Presently before the court is a motion by defendant United States of America for summary judgment. Because plaintiff did not present her claim against the United States to the HHS within the two year limitations period and there is no basis here for tolling the time in which plaintiff had to make such a claim, the action against the United States is time-barred.

Accordingly, I will grant the United States' motion for summary judgment and enter judgment on behalf of the United States and against plaintiff.

### **FACTUAL BACKGROUND**

As necessary on a motion for summary judgment, the facts that follow are viewed and all reasonable inferences are drawn in favor of plaintiff as the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Decedent was born on April 1, 1933 with severe mental retardation. During his life, decedent only attained the mental age of four years. In 1988, decedent was placed in a Community Living Arrangement through Jewish Educational and Vocational Services ("JEVS"). While residing at the JEVS home, Phil Markowitz M.D., provided psychiatric treatment and prescribed psychiatric medications to decedent.

From June 16, 1994 until September 22, 1995, Dr. Carlos Moreno was decedent's primary physician. Moreno, who was an employee of Greater Philadelphia Health Action, Inc., saw decedent at Frankford Avenue Health Center on numerous occasions during this time. Moreno monitored decedent's blood levels and reported abnormal lithium levels to the medical coordinator at the JEVS home. Moreno did not prescribe any psychiatric medications for decedent.

In October 1995, decedent was admitted to Frankford Hospital ("Frankford") with possible acute rhabdomyolysis, a serious disease characterized by muscle breakdown. While hospitalized at Franklin, decedent was treated by Dr. Benjamin Franklin ("Franklin"). Franklin repeatedly advised decedent's sister, Miller, that decedent's condition was caused by an adverse

reaction to the medication that he had been prescribed at the JEVS home by Dr. Markowitz.

Decedent remained at Frankford until November 27, 1995, at which time he was transferred to Philadelphia Geriatric Center (“PGC”), where Charles Bongiorno M.D. was decedent’s attending physician. While at PGC, decedent’s condition deteriorated rapidly. Decedent developed multiple bed sores and also had a continuous fever, the cause of which was never diagnosed.

On September 9, 1997, decedent was transferred from PGC to Temple University Hospital (“Temple”) after his condition became unstable. He died on September 24, 1997, with the cause of death listed as sepsis, a severe illness caused by infection of the bloodstream.

#### **STANDARD OF REVIEW**

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Facts that could alter the outcome are “material”, and disputes are “genuine” if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.*

## DISCUSSION

Plaintiff alleges that Dr. Carlos Moreno, decedent's primary physician from June 13, 1994 until September 22, 1995, provided negligent medical treatment to decedent and that as a result of this negligence decedent suffered a fatal injury. Specifically, plaintiff alleges that Moreno was negligent in failing to adequately monitor or test decedent for toxicity and in failing to discontinue decedent's medications prescribed by his psychiatrist once his toxic condition was discovered.

As an employee of a federally funded health center, Moreno is deemed an employee of the Public Health Service, an agency of the United States, and negligence claims brought against him are governed by the provisions of the FTCA. Because the United States is the only proper defendant in a claim brought under the FTCA, allegations of Moreno's negligence have been brought against the United States. 28 U.S.C. § 2679.

As a sovereign, the United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The United States' sovereign immunity is only waived to the extent that Congress, by statute, consents to its waiver. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Congress has consented to such a waiver of sovereign immunity for actions sounding in tort against the United States and its agencies. *J.D. Pflaumer v. United States Dep't of Justice*, 450 F.Supp. 1125, 1132 n.11 (E.D.Pa. 1978). Specifically, the Federal Tort Claims Act ("FTCA") provides that claims may be brought against the United States "for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his employment." 28 U.S.C. § 1346(b).

Before a suit may be instituted against the United States, the FTCA requires that the

claim be presented to the appropriate federal agency, in this case the HHS. 28 U.S.C. § 2675(a). Additionally, the presentation of such a claim must occur within two years of its accrual. 28 U.S.C. § 2401(b). When the United States is substituted as a party, and as a result, an action is dismissed for failure to first present an administrative claim, the claim will be deemed timely if the claim “would have been timely had it been filed on the date the underlying civil action was commenced” and “the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.” 28 U.S.C. § 2779(D). As such, plaintiff’s administrative claim, which was filed on December 12, 2000, is deemed filed on September 21, 1999, the date that the underlying action was commenced in state court.

In its motion for summary judgment, the United States argues that because decedent was aware of his injury and its probable cause by October 31, 1995, plaintiff’s tort claims against the United States accrued at this time and the two year limitations period for filing an administrative claim expired on October 31, 1997. Plaintiff counters that the limitations period did not begin to run until decedent’s death, on September 24, 1997, thereby making this case timely when filed less than two years later, on September 21, 1999.

The United States Supreme Court has held that a claim brought under the FTCA accrues when the plaintiff knows both the existence and cause of his injury, regardless of whether at that time the plaintiff knows that the acts inflicting the injury constitute medical malpractice.<sup>1</sup> *United States v. Kubrick*, 444 U.S. 111 (1979). The Court explained that when a plaintiff knows that he has been harmed he “can protect himself by seeking advice in the medical and legal community,”

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<sup>1</sup> The determination of when a claim accrues for purposes of the FTCA is a question of federal law. *Zaleznik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985).

and cannot be excused from “promptly doing so.” *Id.* at 123. Whether a plaintiff possesses this requisite knowledge of his injury and its cause is measured by an objective standard. *Barren v. United States*, 839 F.2d 987, 991 (3d Cir. 1988). In determining when a cause of action under the FTCA accrues, the appropriate focus is not on what a plaintiff actually knew, but rather, on what a reasonable person should have known about his injury and its cause. *Id.*

Based on the record evidence, it is clear that a reasonable person would have known about decedent’s injury and its cause prior to the date of decedent’s death. It is undisputed that while decedent was hospitalized at Frankford Hospital (“Frankford”) in 1995 his injury from the medications was discovered. Plaintiff testified that at the time decedent was admitted to Frankford on October 5, 1995, and repeatedly thereafter, she was told by Dr. Franklin that decedent was having an adverse reaction to the psychiatric medications that had been prescribed to him by Dr. Markowitz while he resided at the JEVS home. Doc. 16, Ex. 10 at 60, 66 - 68. Plaintiff’s awareness of decedent’s injury and the fact that Moreno may have been at least partially responsible for decedent’s condition is evident from the fact that on October 31, 1995 she called the Frankford Avenue Health Center, where decedent had been seen by Moreno, to tell them that decedent was admitted to Frankford hospital and to inquire as to whether anyone at the Health Center or Moreno knew of anything that may have made decedent sick. Furthermore, the letter that plaintiff wrote to Bongiorno, decedent’s treating physician at PGC, on December 17, 1995, explaining that decedent’s condition was “brought about by an adverse reaction to drugs that were prescribed for him while at the JEVS home” is a clear indication that at that time she was aware of decedent’s injury and its possible cause. Doc. 16, Ex. 11. These undisputed facts establish that a reasonable person would have known about decedent’s injury and its cause by the

fall of 1995. At this time, a reasonable person would certainly have been on notice as to a possible negligence claim against Moreno, as he was after all, decedent's primary physician during the time when decedent was taking the allegedly harmful medications, and he was responsible for monitoring decedent's blood levels. Therefore, the cause of action against the United States, alleging the negligence of Moreno, accrued at the latest by December 1995 and the limitations period for filing an administrative claim or the underlying civil action based on the negligence of Moreno expired by December 1997.

Plaintiff does not contest her knowledge about decedent's injury or its cause. Instead, she points out that it is decedent's knowledge, and not her knowledge, that should concern the court in determining the date upon which this action accrued. Because there is no evidence that decedent, as a mentally retarded individual, was able to comprehend anything about his injury and its cause, she argues that the statute of limitations did not begin to run until the date of his death.

Admittedly, for purposes of determining the date upon which the statute of limitations commences in a survival action, one inquiry is when the decedent became aware of his injury and its cause. Although it is unclear what decedent was specifically told about his injury and it is clear that someone suffering from mental retardation to the extent that he would be unable to comprehend whatever he was told about his injury and its cause, decedent's actual knowledge is simply not the relevant focus in determining when this cause of action accrued under current Third Circuit precedent. In determining whether an individual knew or should reasonably have known of his actionable injury, the reasonable person standard is taken into account, not the standard of the mentally retarded. *See Barren v. United States*, 839 F.2d 987, 990-1 (3d Cir.

1988). In *Barren*, the court found that the test for when a claim accrues under the FTCA is an objective one, whether a plaintiff possessed facts that, as a reasonable person, he should have known of his injury and its cause. *Id.* The fact that a plaintiff suffers from a mental disability does not extend the statute of limitations. *Id.* at 992. The court further noted that although the statute creates a harsh result, extensions due to mental infirmities have been uniformly rejected, and limitation periods have been strictly construed, especially those involving a waiver of sovereign immunity. *Id.* As such, the court rejected an argument that the statute of limitations should be tolled because plaintiff's mental disability prevented him from recognizing his injury.

The concurrence in *Barren* explained that if a plaintiff's mental incapacity was considered in assessing when a medical malpractice claim should have been discovered, it would impermissibly inject a subjective element into the widely accepted objective test of reasonableness. 839 F.2d at 993 - 94. Because there is no authority for applying such a subjective standard in determining the date upon which an FTCA cause of action accrued for purposes of calculating the statute of limitations, the concurrence refused to adopt such an approach. *Id.* at 994.

Plaintiff's individual knowledge here is particularly pertinent because her knowledge of decedent's injury is instructive of when a reasonable individual would have possessed enough facts of the existence and cause of decedent's injury to commence the running of the statute of limitations. As decedent's sister, and only living relative, she closely monitored decedent's health and his treatment program. She visited decedent numerous times weekly and she spoke regularly to his doctors about his condition. Doc. 16, Ex. 10 at 59 - 61; Doc. 20, Ex. B at 62, 78,

79, 83 Although Miller may not have been decedent's legal guardian<sup>2</sup>, she accepted responsibility for decedent on his admission agreement with PGC and decedent and she gave permission for PGC to perform a skin biopsy on decedent's right leg. Doc. 20, Ex. I, J. These actions indicate Miller's close ties to decedent and her involvement in his health care. Miller was clearly receiving information on decedent's behalf and interacting with decedent's doctors on his behalf. Thus, the time when Miller became aware that an adverse reaction to medication was the cause of decedent's deteriorating condition is extremely instructive of when the medical negligence action against Moreno accrued.

Plaintiff also argues that there are extraordinary circumstances here that explain decedent's failure to bring this cause of action before decedent's death, and that as a result, the statute of limitations should be equitably tolled until the date of his death. Equitable tolling is appropriate to stop the statute of limitations from running on a federal claim in three situations: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d. Cir. 1994). Plaintiff argues that the first and second scenarios are applicable here. As a basis for equitably tolling this action against the United States, she argues (1) that defendants actively concealed relevant information from her about decedent's toxic reaction to his medications, and (2) that decedent's mental retardation prevented him from exerting his legal rights.

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<sup>2</sup> Plaintiff alleges that decedent's guardian was the Commonwealth of Pennsylvania. Doc. 20 at 6. There is no record evidence that substantiates this allegation.

Plaintiff claims that Moreno affirmatively misled her about decedent's condition and actively concealed information regarding the severity of his condition. However, there is simply no record evidence to support plaintiff's claim that Moreno engaged in affirmative acts of deception or concealment with regard to decedent's illness. As explained above, the record evidence clearly establishes that well before decedent's death, in the fall of 1995, plaintiff herself possessed enough knowledge of the salient facts of decedent's injury and its cause through Franklin to commence an investigation of Moreno's negligence. Any delay in filing this action seems more related to plaintiff's failure to exercise due diligence in investigating a claim against Moreno, than in Moreno's affirmative concealment of information regarding the cause of action. There is no evidence any information was concealed from plaintiff or decedent.

Contrary to plaintiff's argument, as the Third Circuit held in *Barren*, decedent's mental retardation does not provide the court with a basis for tolling the statute of limitations. Plaintiff cites *Lake v. Arnold* to support the proposition that a federal court may equitably toll the statute of limitations when a plaintiff is mentally retarded. 232 F.3d 360 (3d Cir. 2000). In *Lake*, the court found a unique situation for equitably tolling the statute of limitations on plaintiff's personal injury claim. The court found that because plaintiff's guardians, who were supposed to be protecting her rights, were the ones who sterilized her, the guardian system failed so that an equitable toll of the Pennsylvania statute of limitations was appropriate. *Id.* at 372. The court recognized that if the statute of limitations was not tolled for plaintiff's federal claims, her action would be time-barred because more than two years had passed since the actionable injury, her sterilization, occurred. *Id.* at 371 - 72.

*Lake* can be distinguished from the present action in three ways. First, *Lake* involved a

claim brought under § 1985, and not under the FTCA. Thus, unlike the instant action, where the FTCA statute of limitations applies, in *Lake* the court applied the Pennsylvania statute of limitations to the plaintiff's federal claim. Second, decedent's alleged guardian here, the Commonwealth of Pennsylvania, was not responsible for decedent's injury. Nor was decedent's sister. Additionally, there is no evidence that the Commonwealth deliberately failed to look out for decedent's best interests. Their relationship with the decedent does not provide a basis for equitably tolling the statute of limitations. *Id.* at 371. (Tolling is inappropriate when a third party injures a mentally disabled person and the guardian fails to exercise diligence in bringing the claim.). Moreover, the Third Circuit has found that a plaintiff's mental incompetence is not a basis for the court to toll the statute of limitations in federal actions. *Barren*, 839 F.2d at 992. Thus, decedent's mental infirmity alone does not equitably toll the statute of limitations. *Lake* is the exception, not the rule. While such a result may be harsh, as recognized by the Third Circuit, the Supreme Court has mandated that "limitations periods must be strictly construed, especially those involving a waiver of sovereign immunity." *Id.* The remedy for this admittedly harsh result under the statute of limitations enacted in the FTCA is with Congress, not the courts.

Finally, unlike the plaintiff's federal claims in *Lake*, this suit was not necessarily lost during the decedent's lifetime. After decedent died on September 24, 1997, plaintiff could have been immediately appointed administratrix of decedent's estate and thereby acquire the legal right to bring this survival action. At that time the statute of limitations for the cause of action against Moreno had not yet expired. Given that plaintiff knew of decedent's injury and its cause at the time of his death, there is no reason that she could not have brought this suit immediately upon being appointed administratrix. It is partially because plaintiff inexplicably waited almost

two years after decedent's death to commence this action that it is time-barred. The principles of equitable tolling simply do not apply to cases of "garden variety" neglect where the plaintiff failed to exercise a reasonable amount of diligence in pursuing a claim.

### **CONCLUSION**

At some point between October and December 1995,<sup>3</sup> sufficient facts were available to a reasonable person to know the existence and cause of decedent's injury, thereby causing the present negligence claim against the United States to accrue in the fall of 1995. Because plaintiff failed to present notice of her claim to the appropriate administrative agency within two years after its accrual and the time in which she had to make this claim was not tolled, her claim against the United States is time-barred. Accordingly, I will grant the United States' motion for summary judgment.

An appropriate order follows.

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<sup>3</sup> Because the statute of limitations has expired regardless of whether the decedent's injury was known in October or December, it is unnecessary for the court to determine the exact date that decedent's injury and its cause were known.

