

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

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| <b>George David Fossyl, et al.</b> | : | <b>Case No. 1:02-cv-722</b>            |
|                                    | : |  |
| <b>Plaintiffs,</b>                 | : | <b>Judge Michael H. Watson</b>         |
|                                    | : |  |
| <b>vs.</b>                         | : | <b>Magistrate Judge Black</b>          |
|                                    | : |  |
| <b>Thomas Aubrey Watson, et al</b> | : | <b><u>PLAINTIFFS' MEMORANDUM</u></b>   |
|                                    | : | <b><u>IN OPPOSITION TO</u></b>         |
| <b>Defendants.</b>                 | : | <b><u>SUPPLEMENTAL MOTION FOR</u></b>  |
|                                    | : | <b><u>SUMMARY JUDGMENT OF</u></b>      |
|                                    | : | <b><u>DEFENDANTS BROWN</u></b>         |
|                                    | : | <b><u>COUNTY, OHIO AND WINDELL</u></b> |
|                                    | : | <b><u>CRAWFORD (DOC. 143)</u></b>      |

**I. INTRODUCTION**

This civil rights action is not barred by the statute of limitations. This case has been pending on a motion for summary judgment on the merits since November, 2006. Doc. 100. Now, six months later, defendants have filed this tardy supplemental motion for summary judgment based on the affirmative defense of statute of limitations. This motion should be denied. The effort of defendants to claim that a recent Sixth Circuit decision somehow impacts on this case is futile. This case should go to trial.

**II. FACTS**

The case involves an effort by the family of Cheryl Fossyl to recover her remains and provide to Cheryl a decent and proper burial. Cheryl was murdered in 1977. Some of her remains were recovered in June 1977 in Brown County. Some were recovered in Adams County. Some have never been recovered. The County, acting through its policymakers (various Sheriffs ending with Crawford and through Prosecutor Grennan), has increased the risk of harm to those remains. Cheryl Fossyl was a witness to an earlier

murder, of Monroe Hines. She knew that Nick Tsanges, not Ralph Moore, killed Monroe Hines. Fearing that a thorough investigation of the Fossyl murder would put the conviction of Ralph Moore at risk, the County chose to lose photos of the recovery scene, at least 50 pages of field notes, audiotapes, and additional documents critical to recovering the remains. The County also failed to interview and timely prosecute the murderers, Tsanges' friends Tommy Watson and Mike Milligan, who were suspects early on in the case. Watson confessed in 2001. Had Watson confessed closer in time to the actual murder the chance of recovering all of Cheryl's remains would be greatly increased. David Fossyl depo, pp. 67-68. The County had reliable information linking the murderers to the case in 1977 but no interview was conducted of these suspects at that time. The law enforcement response to this murder was clearly different than the response to other murders in Brown County. These facts support a civil rights claim based on substantive due process and equal protection. See generally, Plaintiffs' Memorandum Opposing Summary Judgment. Doc. 106.

The only damages defendant on the civil rights claim is the County. The relief sought against defendant Crawford is injunctive. All of the facts that put the family on notice of their potential claims in this case were learned after Sheriff Wenninger took office in 2001, well within the two year period that preceded the filing of this action. David Fossyl depo, pp. 35, 46, 48-49. Moreover, this civil rights action is timely because the cover-up in this case was continuing and any delay in discovering the relevant facts is due to the misconduct of the defendants.

### **III. ARGUMENT - CONTESTED FACTS PRECLUDE SUMMARY JUDGMENT BASED ON STATUTE OF LIMITATIONS**

#### **A. Summary Judgment Standard**

Summary judgment may be granted only “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). “If ... the defendant disputes the plaintiff’s version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of [summary judgment].” *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). Where, as here, “the non-moving party presents direct evidence refuting the moving party’s motion for summary judgment, the court must accept the evidence as true.” *Terrance v. Northville Regional Psychiatric Hosp.*, 286 F.3d 834, 841 (6th Cir. 2002). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). Defendants in this case cannot meet this burden.

The party moving for summary judgment has the burden of showing conclusively that no genuine issue of material fact exists. The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn there from. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993 (1962); *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6<sup>th</sup> Cir. 1995) (in resolving a motion for summary judgment, the court “must afford all reasonable inferences, and construe the evidence in the light most favorable to the non-moving party”). The moving party’s summary judgment papers are to be closely scrutinized

while those of the non-movant are to be read indulgently. *U.S. v. Real Property Known as 311 Cleveland Ave. Hamilton Co.*, 799 F. Supp 824 (S.D. Ohio 1992).

Summary judgment motions based upon the affirmative defense of statute of limitations pose an extra burden on defendants as they bear the burden of proof with respect to the defense. *Cooley v. Strickland*, 2007 WL 623482 (6<sup>th</sup> Cir. Ohio). If material facts are in dispute regarding the defense, the matter should be submitted to the jury. Such is the case here.

## **B. Principles Underlying Civil Rights Act and Statutes of Limitations**

The defense of statute of limitations raises issues under both federal and state law. The applicable limitations period is determined by reference to state law. *Wilson v. Garcia*, 471 U.S. 261 (1985). In Ohio, §1983 claims must be brought within two years. *Owens v. Okure*, 488 U.S. 235 (1989). When a claim accrues is determined as a matter of federal law. *Wallace v. Kato*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1091 (2007).

The civil rights claim is based on the Civil Rights Act of 1871. The statute is critical in the enforcement of federal rights against state and local government civil rights violations. The statute was originally passed to address the power of the Ku Klux Klan over state and local authorities after the Civil War. *Wilson v. Garcia*, 471 U.S. 274, 276 (1985). The statute is intended to serve as an “effective remedy for the enforcement of federal civil rights...” *Id.* at 275. At issue in many civil rights cases is the government-citizen relationship. This is not an encounter between equals. Indeed, in many situations the government is more like a fiduciary or someone in whom the citizen places trust and confidence as opposed to an equal competitor in the business world.<sup>1</sup> It is important

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<sup>1</sup> See Saul B. Shapiro, “Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment,” Yale Law Journal, 1986.

therefore that the purpose of the civil rights statute and the people it serves not get lost through the unfair application of limitations principles.

A statute of limitations is a procedural device meant to protect defendants against plaintiffs who sleep on their rights. *Burnett v. New York Cent.R. Co.*, 85 S.Ct. 1050, 1054, 380 U.S. 424, 427 (1965). The danger protected against is that defendants will not have notice of the claims against them until memories fade, evidence is lost, and witnesses disappear. *Id.* But when justice requires that a plaintiff's claim be vindicated, the purpose of the statute of limitations is "frequently outweighed." *Id.* at 1055. In this case the defendants have always had access to all of the facts; the plaintiffs have never had access to all of the facts. Where, as here, defendants have actively misled the plaintiffs for years, there is ample cause to "outweigh" any concerns raised by the defendants.

**C. Contested Facts Preclude Summary Judgment on Defendants' Argument on Accrual Dates of Civil Rights Claims.**

This lawsuit was filed on October 8, 2002. Doc. 1. Defendants argue that the cause of action for substantive due process accrued against Crawford in 1993 and against the County in 1978. Defendants also contend that cause of action based on equal protection accrued in 1977. Contested facts preclude defendants from meeting their burden of proof on summary judgment on this issue. In fact, a reasonable jury could find that the civil rights claim accrued after October 8, 2000. The issue should be presented to a jury. The Sixth Circuit has held that "[i]n determining when the cause of action accrues in §1983 cases, we look to the event that should have alerted the typical lay person to protect his or her rights." *Cooley v. Strickland*, *supra* at 7, citing *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 856 (6<sup>th</sup> Cir. 2003).

Defendant Crawford is not sued individually. He is sued for injunctive relief only. He destroyed or is hiding the Sheriff's file on the Fossyl murder investigation. Plaintiffs seek an order that he produce that file. That claim is surely timely since to date he has not yet produced the missing file. Sheriff Crawford is also a policymaker and his actions bind the county. See Doc. 106, p. 29-31. Defendant Crawford claims that "plaintiff should have known of any alleged substantive due process claim against Sheriff Crawford by 1993 at the latest." Doc 143, p. 5. This date may also be used therefore to argue that the claim against the County accrued in 1993. Crawford cites (p. 6, n.5) to the following portion of the Dave Fossyl deposition for support:

13 Q. -- about this? When did you first speak  
14 with him?

15 A. When I found out that he was in office,  
16 and I can't give you a date.

17 Q. I can't either.

18 A. I don't know. But the same thing I  
19 just -- when I found out there was a new sheriff, I  
20 went and talked to him and asked him what he was  
21 doing on the case. And he said, it's an open case,  
22 we're still looking into it, but we don't have  
23 anything.

24 MS. BRANCH: Do you want to take a break?

25 MR. WALLACE: Go ahead. You can go ahead.

1 (Mr. Wallace left the room.)

2 A. We have no information, we have no clues,  
3 we have no suspects.

4 Q. How many times do you think you spoke with  
5 Sheriff Crawford?

6 A. Just the once.

David Fossyl depo., pp. 44:13 - 45:6. In fact the deposition shows that this conversation did not alert Mr. Fossyl as a typical lay person to protect his rights. Mr. Fossyl learned of Crawford's orders to Fetters not to pursue the investigation from an investigator hired by plaintiffs' counsel shortly before this civil rights suit was filed. David Fossyl depo., p. 46:21 - 47:8. And he did not learn about Crawford blocking a deathbed interview of murder eyewitness Jean Ann Chinn until Barry Creighton was working on the case. *Id.*, 48-49. His first conversation with Barry Creighton was in February 2001. David Fossyl depo. p. 34-35.

Dave Fossyl was 8 years older than Cheryl. He got married and moved from the family home when Cheryl was only 8-9 years old. He did not have a phone while Cheryl was growing up and visited Cheryl and his mother only when he happened to travel into Georgetown, approximately once each month. *Id.* at 10 – 12, 15-16. David Fossyl did not even know his sister was missing until the day her head was found. *Id.* at 20 – 21. David Fossyl was never interviewed by law enforcement as part of the murder investigation. *Id.* at 30. All he knew about the investigation over the years is what each sheriff chose to tell him. Dave's pattern was to stop in to the Sheriff's office shortly after

each new sheriff was elected simply to remind them about his sister's murder and to find out if anything had happened on the case. The 1993 conversation cited by defendants was like all of the others with previous sheriffs. This was a cold case. *Id.* at 76-77. Nothing about the conversation in 1993 cited by defendants would have alerted a typical lay person that the Cheryl Fossyl murder was anything but a typical cold case. Neither in 1993 nor at any other time did Sheriff Crawford admit to Fossyl any of the facts that led to this lawsuit and Dave Fossyl simply did not and could not know them. David Fossyl depo. p. 46:3-4. Nothing about the 1993 conversation would have alerted a lay person to hire a lawyer. Further, plaintiffs Martin Fossyl and Tonia Harris were not interviewed by law enforcement as part of the investigation prior to Wenninger taking office so they were not on notice of the claims until the same time as brother David. Martin Fossyl depo at 30-31; Tonia Harris depo at 40-41.

Defendant County also states that the claim against the County accrued in 1977 and/or 1978 but the County acted in part through its Sheriffs, policymakers in this matter, and the analysis above shows that the family had no awareness of the claims in this case until after Wenninger was elected Sheriff and took office in 2001.

This motion for summary judgment was belatedly filed based on the decision in *Cooey, II v. Strickland*, 2007 WL 623482 (6th Cir. 2007). That decision restated the fact that the discovery rule applies when determining when a civil rights cause of action accrues. In that case an inmate sought to challenge the method to be used at his execution by lethal injection. The court held that his claim was barred by the statute of limitations. He was sentenced to death in 1986. In 2001 lethal injection became the sole method of execution in Ohio. In April, 2002, the plaintiff received a letter from the

warden explaining exactly what chemicals and equipment are used to accomplish lethal injection. The lawsuit was not filed until June 10, 2004, more than two years after both of these events. The court held that either the widely known fact that lethal injection was the sole method or the specific letter received by the plaintiff served as an “event that should have alerted the typical lay person to protect his or her rights.” *Id.* at \*7. In that case the facts were undisputed and the trier of fact was the court since an injunction was at issue.

The instant case is dramatically different since the facts are hotly contested. The trier of fact on the damages claim is a jury. On this record a reasonable jury could easily conclude that only when the plaintiffs had contact with Sheriff Wenninger and his staff in 2001 did they learn enough to know that they should take action to protect their rights. The defendants have the burden of proof on this defense and the evidence outlined in their brief does not meet that burden. This contested fact is a jury question and not one to be determined as a matter of law.

**D. Contested Facts Preclude Summary Judgment Regarding Continuing Violation.**

The cover up in this case continued until well into the two year period preceding this lawsuit. Plaintiffs had to secure the appointment of a special prosecutor and overcome active resistance by the local prosecutor who sought to end the investigation into Cheryl Fossyl’s murder and who has intimidated Sheriff Wenninger from proceeding with the Fossyl case. On the theory of continuing violation, therefore these §1983 civil rights claims are timely.

The Sixth Circuit has identified two types of continuing violations that permit plaintiffs to sue for acts that occurred outside the limitations period. (1) prior violations

that continue into the present (as opposed to prior violations with only effects continuing into the present); and (2) where the plaintiff can show a “longstanding and demonstrable policy of” constitutional violations. See *Bell v. Ohio State University*, 351 F.3d 240, 247 (6<sup>th</sup> Cir. 2003). Most claims of continuing violations fail because they involve a discrete act in the past that has some present impact. *Bell*, (plaintiff complained of events leading to and including dismissal from medical school); *Sharpe v. Cureton*, 319 F.3d 259 (6<sup>th</sup> Cir. 2003)(plaintiff firefighters challenged transfers as retaliation for supporting mayor’s opponent in election); See also *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002)(Title VII, series of discreet discriminatory acts are not continuing violation; hostile workplace facts that are part of same unlawful practice meet continuing violation standard).

The instant case alleges a cover-up which by definition involves a “longstanding and demonstrable policy of constitutional violation.” This type of continuing violation was described in *Dixon v. Anderson*, 928 F.2d 212 (6<sup>th</sup> Cir. 1991) (en banc). The example offered by the court was a company that had an alleged policy of hiring only men for a certain position. Plaintiff, a woman, regularly orally applied for one of these positions. She never received a formal rejection but she was told that the company did not hire women for that position. These facts described a long standing policy of discrimination that fit the continuing violation standard since one of her rejections had occurred within the limitations period. *Id.*, 928 F.2d at 217, citing, *Roberts v. North American Rockwell Corp.* 650 F.2d 823 (6<sup>th</sup> Cir. 1981).

Similarly, here, the County, acting through its Sheriffs and Prosecutor Grennan had a long standing policy of cover-up in this case. The facts in the light most favorable

to the non-moving party show that for many years the County simply misled the plaintiffs regarding the facts of this case. The details of that ongoing coverup over the years are clearly set out in the merits memo of plaintiffs in opposition to summary judgment, Doc. 106, p. 6-14 and incorporated here by reference. These continuing acts support a finding that the lawsuit is timely.

**E. Contested Facts Preclude Summary Judgment Regarding Equitable Tolling.**

In the alternative, this case is timely filed under the doctrine of equitable tolling. Federal courts recognize that equitable principles will support tolling of the statute of limitations in appropriate cases. See e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Equitable tolling may be premised on misconduct by the defendant (often referred to as equitable estoppel). See *Leake v. University of Cincinnati*, 605 F.2d 255 (6<sup>th</sup> Cir. 1979); *Wright v. State of Tennessee*, 628 F.2d 949 (6<sup>th</sup> Cir. 1980); *Brown v. Made Corp.*, 646 F.2d 1163 (6<sup>th</sup> Cir. 1981). Equitable tolling may also be premised on plaintiff's "excusable ignorance and lack of prejudice to the defendant." *Leong v. Potter*, 347 F.3d 1117 (9<sup>th</sup> Cir. 2003). See, e.g., *Andrews v. Orr*, 851 F.2d 146 (6<sup>th</sup> Cir. 1988) (tolling applied where filing requirements were technically confusing). Equitable tolling is appropriate for both reasons in this case.

The County Sheriffs and Prosecutor Grennan abused their power as law enforcement officers and covered up and lost the evidence in this case. They should not be permitted to benefit from their misconduct. This case is similar to – but simpler than – *Bell v. City of Milwaukee*, 746 F.2d 1205 (7<sup>th</sup> Cir. 1984). In that action defendants covered up the facts surrounding the police misconduct that led to the death of Daniel Bell, causing Mr. Bell's family to be delayed for 20 years in filing a civil rights claim

based upon his death. The court wisely noted that facts like these should not encourage concealment. That sends the wrong message: The “issue is whether the conduct and representations of appellant were so unfair and misleading as to outbalance the public’s interest in setting a limitation on bringing actions.” *Id.*, 746 F.2d at 1231. The court noted that a police cover-up of the wrongful acts of a police officer is conduct “so unfair, misleading and outrageous as to outbalance the public’s interest in setting a limitation...” *Id.* The court also noted that the underlying facts had been sufficiently preserved in the police records that the case could be tried without prejudice to the defendants.

Another court in this district recently relied on *Bell* to hold that a civil rights lawsuit alleging cover-up filed 21 years after a murder was nonetheless timely filed. *Kammeyer v. City of Sharonville*, USDC, SD Ohio No 1:01-cv-0069 (Doc. 282, 4/25/05)(attached). In that case the defendant public officials hid evidence from the plaintiffs, destroyed evidence and lied to them about the investigation of the murders of their mothers. Judge Spiegel held that even though the plaintiffs had suspicions for years, equitable tolling was properly invoked to permit the case to proceed. “Certainly, the interests of the public are better served by tolling the applicable statute of limitations than they are by permitting an egregious set of circumstances conducted by public officials, if proven true, to go unchecked. Law enforcement officials are supposed to serve the interests of the public, not purposefully work against those interests.” *Id.* at 29.

The case at bar similarly presents strong arguments in favor of tolling. First, the plaintiffs have always needed the defendants to achieve their primary goal of locating Cheryl’s remains and if possible convicting her murderers. Plaintiffs are victims of crime. Defendants are in charge of the criminal case. It was only with the Wenninger

administration that the plaintiffs got the truth about their sister and got any substantial movement on this case. They were shocked to learn that the entire investigative file was missing twice during this investigation. They were shocked to learn that officers were ordered not to work the case and not to interview witnesses. They were shocked that their own lawyer and investigator were ordered to get out of town and the sheriff ordered by the prosecutor to stop working the case. They were further shocked to see the retaliation pursued against Sheriff Wenninger doing his duty in the Fossyl investigation. See Doc. 106. This misconduct hid the facts from the plaintiffs for years and the County must not benefit from such behavior. This case was timely filed.

#### **IV. CONCLUSION**

The motion for summary judgment based on statute of limitations should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2007, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Jennifer L. Branch  
Attorney for Plaintiffs