SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, **Plaintiff,** **v.** **JOSEPH R. PRICE,** **VICTOR ZABORSKY,** **and** **DYLAN WARD,** **Defendants**	**Civil Action No. 0008315-08** **The Honorable Brook Hedge** **Next Event: February 14, 2011** **Witness Lists Due**

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COUNTS ONE, THREE AND FOUR, or in the alternative, MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Joseph R. Price, Victor Zaborsky, and Dylan Ward, by and through their undersigned attorneys, hereby submit the following Reply Memorandum of Points and Authorities in support of their Motion to Dismiss Counts One, Three, and Four of the Plaintiff's Complaint and/or Amended Complaint, or in the alternative, Motion for Partial Summary Judgment as to Counts One, Three and Four of Plaintiff's Complaint/Amended Complaint:

REPLY ARGUMENT

A. Limitations – Wrongful Death

1) Statute of Limitations not tolled by alleged "fraudulent concealment" of Defendants' wrongdoing

Plaintiff's Opposition evidences a fundamental misunderstanding of the District of Columbia's statute of limitations jurisprudence. Although some jurisdictions have held that fraudulent concealment of the identity of the party responsible for a wrongful death tolls the

limitations period,[1] this is not the law in the District of Columbia.[2] To the contrary, our Court of Appeals has expressly and unambiguously held that the statute of limitations for wrongful death, like other intentional torts, begins to run when the plaintiff learns of the wrongful death itself. When the identities of the allegedly liable parties are fraudulently concealed, but the existence of the cause of action itself is known, the running of the statute of limitations does not toll. *Estate of Chappelle v. Sanders*, 442 A.2d 158-159 (D.C. 1982).[3] In *Chappelle*, the plaintiff Estate was aware of the existence of its wrongful death cause of action. However, the defendant Retta Sanders, who was identified and known as the owner of the involved automobile, denied that her car was involved in an accident when questioned. Despite her attempt to conceal her identity as a potential tortfeasor,[4] the Court held that the statute of limitations was not tolled. *Id.* at 158-159. In so ruling, the Court adopted the line of holdings cited in Am.Jur.2d Limitations of Actions, § 146 (1970), which stated: "Concealment of the identities of parties liable, or concealment of the parties, has been held not to constitute concealment of the cause of action and not to be available

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[1] Plaintiff cites no authority from this jurisdiction—nor could it—holding that the fraudulent concealment of the allegedly liable parties tolls the statute of limitations. Rather, in an effort to dissuade this Court from following binding D.C. authority, Plaintiff cites a number of non-D.C. cases from jurisdictions that apply different tolling rules from the one adopted and followed by the District of Columbia and various other jurisdictions. See Plaintiff's Opposition, p. 12-13. In at least one instance, Plaintiff actually misstated the holding of the non-D.C. cases, when in reality, that jurisdiction followed a similar tolling rule to that of the District. See, *e.g., Gomez v. City of Torrance*, 311 Fed. Appx. 967, 969 (9th Cir. 2009) (Evidence sufficient to show that defendants falsified report, thereby fraudulently concealing the existence *of a cause of action.*"(emphasis added)).

[2] The District of Columbia is not alone in its application of the tolling exception for statute of limitations. Other jurisdictions have adopted and follow the same rule that fraudulent concealment of the liable parties does not toll the statute of limitations. *See, e.g., Smith v. Sinai Hosp. of Detroit*, 394 N.W.2d 82, 87 (Mich. App. 1986) ("The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute."); *Lim v. Superior Court*, 616 P.2d 941, 943 (Ariz. 1980); *Guebard v. Jabaay*, 381 N.E.2d 1164, 1168 (Ill. 1978); *International Broth. of Carpenters and Joiners of America, Local 1765 v. United Ass'n*, 341 So.2d 1005, 1006 (Fla. App. 1976).

[3] *See also, U.S. ex rel. Miller v. Bill Harbert Intern. Const.*, 505 F. Supp. 2d 1, 9 (D.D.C. 2007) ("the doctrine of fraudulent concealment will toll a statute of limitations only insofar as the injury to the plaintiff and its cause is concealed by the defendants. Once a plaintiff becomes aware of these two pieces of information, however, the clock begins to run for statute of limitations purposes. Neither a lack of knowledge of the specific pattern of fraudulent activity, or an inability to know the particular identities of some of the perpetrators of the fraud alters this result.").

[4] Under D.C. law, the owner of an automobile is legally responsible for the negligence of the automobile's operator. See D.C. Code §50-1301.08.

to avoid the running of the statute of limitations." *Id.* Ms. Sander's concealment in *Chappelle* represents an "apples to apples" comparison with the alleged concealment by Defendants in the present case and, thus, mandates the same result.[5] Where the cause of action is known to the plaintiff, a person's denial of involvement in the underlying tort does not toll the statute of limitations.

Here, in an effort to avoid the plainly dispositive holding of *Estate of Chappelle*, Plaintiff advances the facile argument that "concealment of the identity of liable parties" means solely when a defendant literally conceals his actual identity, not where a defendant conceals that he is a liable party.[6] This is a nonsensical argument and a plain misreading of *Chappelle* and the cases cited therein.[7] *Id.* at 159, citing *Lim v. Superior Court*, 616 P.2d 941, 943 (Ariz. 1980) (fraudulent concealment of identity of defamer did not toll statute of limitations because a complaint naming fictitious defendants could have been filed within the statute of limitations); *Guebard v. Jabaay*, 381 N.E.2d 1164, 1168 (Ill. 1978) (in medical malpractice case, where plaintiff alleged defendant hospital and doctors fraudulently concealed identity of negligent doctor, held that "plaintiff's allegations here that these defendants concealed their identity from her will not invoke the fraudulent concealment provisions of the Limitations Act"). In *Lim v.*

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[5] Plaintiff's Opposition cites a footnote from the per curiam plurality opinion in *Diamond v. Davis*, 680 A.2d 364, 380, n. 14 (D.C. 1996) to support its tolling argument. *Diamond* provides no such support. The circumstances and issues in *Diamond* were materially different than in the present case and in *Chapelle*. Moreover, in the very same footnote cited by Plaintiff, the judge in *Diamond* expressed its decision created no tension with *Chappelle*. *Id.* Further, it was noted that: "In *Estate of Chappelle*, however, we held that fraudulent concealment of the identities of the allegedly liable parties, when the existence of the cause of action itself was known, did not toll the running of the statute of limitations." *Id.* at 393, n.15 (citations omitted).

[6] See Plaintiff's Opposition, p. 13-14.

[7] Tellingly, the Court of Appeals held that the statute of limitations was not tolled as to *either defendant*, only one of whom (the lying driver) concealed his actual identity. As Plaintiff reads *Chappelle*, we are to understand that if the driver, instead of misidentifying himself to hide his involvement, had instead given his real name but falsely stated he was not driving the car at the time of the accident, the statute would have been tolled. Such a reading produces an obvious absurdity and inconsistency with *Chappelle's* holding as to the automobile owner.

Superior Court, 616 P.2d 941 (Ariz. 1980), a plaintiff in a defamation suit "acknowledged the statutory period had run[,] but argued that the statute had been tolled because petitioners had fraudulently concealed the identity of the alleged defamers." *Id.* at 942. However, the court held that "[t]he Statute of Limitations was not tolled because of the failure to identify the alleged defamers. The alleged defamation occurred in November 1976, and a complaint naming fictitious defendants, with a subsequent amendment to name the alleged defamers once their identity was determined, could have been filed."[8] *Id.* at 943. In *Guebard v. Jabaay*, 381 N.E.2d 1164 (Ill. 1978), a medical malpractice case, the plaintiff patient alleged the statute of limitations had been tolled because all of the defendants allegedly conspired together in not disclosing to plaintiff the true identity of the doctor who performed her surgery and, in fact, told her that a different doctor was the surgeon. *Id.* at 1165-1166. The court observed that were it to accept the plaintiff's argument, it would "mean that the cause of action accrues when the person injured learns, or reasonably should have learned, of the identity of the person responsible for his injury, even though he earlier knew of the injury itself." The court rejected this argument, holding that "plaintiff's allegations here that these defendants concealed their identity from her will not invoke the fraudulent concealment provisions of the Limitations Act." *Id.* at 1168.

Another case cited by Plaintiff, *Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 (D.C. Cir. 1967) (applying D.C. law) illustrates Plaintiff's misapplication of the tolling exception in the present case. In *Emmett*, a medical malpractice case, the defendant withheld documents that prevented plaintiff from knowing that a potential medical malpractice

[8] The cause of action for defamation is generally held to run from the time of publication; however, courts have also held that "when the publication is likely to be concealed from the plaintiff or published in a secretive manner which would make it unlikely to come to the attention of the injured party," the statute is tolled." *Dube v. Likins*, 167 P.3d 93, 110 (Ariz. 2007) (citing cases). Here again, the rule is applied to toll the statute where the fact of the injury itself is concealed from the plaintiff, not the identity of the tortfeasor.

claim existed (i.e., the cause of action) *and* the identities of those committing the malpractice (i.e. the defendants). The *Emmett* Court held that under D.C. law, the statute of limitations was tolled because both the existence of the malpractice claim and the actual identities of the potential tortfeasors were fraudulently concealed. *Id.* at 937-938. The circumstances in *Emmett* are completely inapposite to the circumstances in the present lawsuit. Unlike in *Emmett*, the facts giving rise to the existence of a wrongful death cause of action to the Estate of Robert Wone were not fraudulently concealed. Regardless of what information Plaintiff contends was concealed from it, there was no concealment of the fact that Robert Wone was stabbed, which gave rise to actual notice of tortious conduct and the existence of a wrongful death claim. There is absolutely no question that Plaintiff had sufficient facts to identify a particular cause of action, *i.e.*, the wrongful death of Mr. Wone.

To the extent Plaintiff alleges fraudulent concealment, such alleged concealment is the Defendants' denying that they were liable parties. Indeed, all of the alleged wrongful acts purportedly taken by Defendants – destroying evidence, lying to police, etc., are alleged to have been done to conceal Defendants' identities as the liable parties, not the stabbing and existence of a claim for the wrongful death of Mr. Wone. These alleged wrongful acts, like those addressed in *Chappelle* and the cases cited therein, *e.g.*, unlawfully fleeing the scene of an accident, lying to investigators, filing false insurance documents, disposing and withholding records, conspiring with others to conceal the true identity of a tortfeasor, etc., are alleged acts that purportedly concealed the identifies of the tortfeasors, not the cause of action itself or the existence of a wrongdoer. Consequently, as a matter of law, the statute of limitations for the

Estate' wrongful death claim was not tolled by the Defendants' allegedly fraudulent concealment of their being the liable parties.[9]

2) Plaintiff had notice within one year of Mr. Wone's death of both the cause of action and of the allegedly liable parties

Assuming, *arguendo*, that District of Columbia law required notice of both the cause of action *and* the potentially liable parties, there is no question that in this "inquiry notice" jurisdiction, Plaintiff had sufficient notice of both the cause of action and the potentially liable parties, well within one year of Mr. Wone's death, and certainly prior to one year before the filing of the Complaint.

As stated in Defendants' Motion, it is well established that "a claim accrues when the plaintiff knows of (1) an injury, (2) its cause, and (3) some evidence of wrongdoing." *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 771 (D.C. 1998), citing *Diamond*, 680 A.2d at 379-380; *Bussineau v. President and Directors of Georgetown College,* 518 A.2d 423, 425 (D.C.1986). Applying the District's inquiry notice rules to the question of what—were it required—quantum of knowledge a plaintiff need have of the identities of potential tortfeasors, it becomes overwhelming clear that here, Plaintiff had far more than the required quantum of knowledge of the wrongful death claims against Defendants for the statute to have started running more than a year before Plaintiff filed suit.

Defendants deny any involvement in Robert Wone's death, but their Motion assumed the truth of the allegations contained in the Complaint, as it must, and was premised upon Plaintiff's undisputed knowledge of numerous facts/allegations, many of which were taken from the

[9] Plaintiff's Opposition notes that the Estate could have filed a "John Doe" action within a year of Mr. Wone's death, then dismisses the notion by baldly claiming it to be impractical. See Plaintiff's Opposition, p. 11. Although Defendants have not suggested that Plaintiff had to file a "John Doe" action, certainly it could have done so, with minimal effort and almost no use of judicial resources.

Complaint. Plaintiff's Opposition has not raised or otherwise alleged any dispute of material fact. Instead, Plaintiff's Opposition reasserted many of the undisputed material facts relied upon by Defendants in their Motion. Thus, Plaintiff's bald, conclusory statements that the limitations issue regarding accrual is generally fact-intensive are irrelevant.

For the purposes of the present Motion only, it is uncontested that the following material facts were known to Plaintiff within weeks of the occurrence:

1) On August 2, 2006, Robert Wone was stabbed while in the then-residence of Defendants Price, Zaborsky, and Ward;[10]

2) At 11:49 p.m., Defendant Zaborsky called 9-1-1;[11]

3) The only occupants of the house were Mr. Wone and the Defendants;[12]

4) The knife used to stab Mr. Wone was one kept in the house by Defendants;[13]

5) Mr. Wone died as a result of the August 2, 2006 stabbing;[14]

6) On August 3, 2006, each of the Defendants told the police that he believed an intruder entered the house and stabbed Mr. Wone;[15]

7) It was publicly reported on August 14, 2006, that the MPD stated in an affidavit that the crime scene had been tampered with and, at a press conference, the MPD stated that it did not believe the Defendants' accounts regarding the night of August 2, 2006;[16]

8) On August 16, 2006, it was publicly reported that a search warrant had been requested for Defendant Price's office because the crime scene was believed to have been tampered with;[17]

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[10] See Plaintiff's Opposition, p. 2.

[11] See Plaintiff's Opposition, p. 2.

[12] See Plaintiff's Oppositon, p. 4.

[13] See Plaintiff's Opposition, p. 4.

[14] See Plaintiff's Opposition, p. 2.

[15] See Plaintiff's Opposition, p. 2.

[16] See **Exhibit 2** of Defendants' Motion.

[17] See **Exhibit 3** of Defendants' Motion.

9) By October 9, 2006, the MPD had publicly stated that it did not believe that an intruder killed Mr. Wone;[18]

10) Katherine Wone and Plaintiff's attorneys held a press conference one year after Mr. Wone's death, where Plaintiff's counsel publicly pondered Defendants' involvement in Mr. Wone's death and its alleged cover-up and questioned Defendants' cooperation with the MPD;[19]

In order to conclude that knowledge of the aforementioned facts and allegations were sufficient to provide Plaintiff with the required notice sufficient to begin the running of the limitations period, one need only look to the Plaintiff's Amended Complaint and Opposition to the present Motion, wherein the Estate acknowledges that its wrongful death claim is premised upon and evidenced by: "the fact that Defendants were the only known occupants of 1509 Swann Street, NW, at the time that Robert Wone was assaulted and killed; the fact that the knife used to stab Robert Wone was in the custody and control of Defendants at all relevant times; the utter lack of evidence of an intruder; the fact that Robert Wone was incapacitated at the time of the stabbing, which is inconsistent with Defendants' intruder theory; and the evidence indicating that Defendants altered and staged the crime scene after Robert Wone was murdered."[20] When one compares the allegations contained in Plaintiff's Opposition and Amended Complaint with the aforementioned undisputed facts known weeks after the occurrence, it is apparent that the two are virtually identical. Stated another way, the allegations upon which Plaintiff has expressly based the wrongful death case are precisely those allegations that were known in 2006 to Plaintiff and her counsel, who were retained less than one week after Mr. Wone's death

[18] See **Exhibit 4** of Defendants' Motion.

[19] Eric Holder speaking at a press conference at Covington & Burling (Aug. 6, 2007), available at Asian American Focus: Robert Wone Press Conference Part 4 of 4, http://www.youtube.com/watch?v=QLGyorY7S-c&feature=related and Part 3 of 4, http://www.youtube.com/watch?v=Ci8S3LNrf-g&feature=related.

[20] See Plaintiff's Opposition, p. 4-5, citing Plaintiff's Amended Complaint, ¶ 48.

Plaintiff contends that it should not have been required to have been placed on notice by the publication of newspaper reports, which were "little more than rumor and speculation."[21] This contention lacks merit when one considers that the named source of the information contained in the press articles identified by Defendants were members of the Metropolitan Police Department, the very entity upon whose theories Plaintiff claims wholesale reliance. The October 2008 affidavit was, in fact, prepared by the MPD, which contained the same speculative theories contained in the MPD statements made more than two years earlier. In reality, the theories of the MPD were known to Plaintiff immediately. Plaintiff's allegations in support of the wrongful death claim include that Defendants' accounts, including the statements relating to an intruder, were not believed by the police and that the Defendants altered and staged the crime scene.[22]

Again, these allegations were not first made after November 27, 2007. Rather, within weeks of the death, the MPD publicly stated all of these allegations in search warrant affidavits and to the press. Plaintiff's claimed reliance on the October 2008 MPD affidavit also conveniently ignores the fact that Plaintiff's counsel threatened filing the lawsuit against Defendants several months before the October 2008 affidavit was released. As stated in Defendants' Motion (and noticeably not referenced at all in Plaintiff's Opposition), Plaintiff's attorneys contacted Defendants' criminal counsel in late July/early August 2008 to advise that they were going to file a lawsuit against the Defendants. Plaintiff's Opposition further contradicts itself by claiming that the October 2008 affidavit was the first evidence of wrongdoing by any of the Defendants, but elsewhere admitting that "up to and throughout 2007,"

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[21] See Plaintiff's Opposition, p. 16.

[22] See Plaintiff's Amended Complaint, ¶ 48 c., e., f., and g., and Plaintiff's Opposition, p. 4-5.

Mrs. Wone and Plaintiff's attorneys knew that the Police believed that the Defendants had withheld information.

Further, contrary to Plaintiff's assertion, Defendants' Motion does not argue that Plaintiff was required to "solve the case" before the MPD.[23] In fact, Defendants' contention is and has been that the Plaintiff's Complaint is misguided and based upon nothing more than unsupported, speculative theories of the MPD, most of which were formed before any investigation was conducted. Notwithstanding, the unsupported and speculative theories of the MPD were known to Plaintiff within months of Mr. Wone's death. Accordingly, rather than filing her misguided Complaint in November 2008, the Plaintiff was perfectly capable of filing the same misguided complaint more than two years earlier. Again, because the District is an inquiry notice jurisdiction, "evidence as insubstantial as hints, suspicions, and rumors-of an injury, its cause in fact, and some evidence of wrongdoing" have been deemed sufficient to provide the knowledge necessary for a statute to begin to run. *Diamond*, 680 A.2d at 393 (emphasis added). Plaintiff's failure to do so bars the wrongful death claim.

3) Plaintiff's perplexing plea for additional discovery

Plaintiff has failed to preserve its argument that more discovery is necessary before summary judgment can be rendered because Plaintiff did not comply with Super. Ct. Civ. R. 56(f) in multiple respects. Rule 56 (f) states:

> When affidavits are unavailable. -- Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[23] It must be noted that Plaintiff asserted multiple times that it did not have evidence supporting its wrongful death claim against Defendants until the October 2008 MPD affidavit, but fails to mention the significance that the affidavit does not aver that Defendants were responsible for the death of Mr. Wone.

Plaintiff's Opposition does not contain an affidavit explaining why further discovery is necessary in order for this Court to rule on the Defendants' present Motion. Regardless of the fact that Plaintiff did not present an affidavit, the stated explanation in its Opposition as to why more discovery is needed does not meet the threshold requirements for delaying a summary judgment ruling. A court may only deny or postpone a summary judgment ruling to permit discovery if the party opposing the motion "adequately explains" why it cannot present facts needed to defeat the motion at the time it files its opposition. *Travelers Indem. Co. v. United Food & Commer. Workers Int'l Union*, 770 A.2d 978, 994 (D.C. App. 2001). In *Travelers*, the Court explained:

> Further, the party opposing summary judgment must specify why additional discovery is necessary. *See Ben Ezra, Weinstein, & Co., Inc., v. America Online, Inc.*, 206 F.3d 980, 987 (10th Cir. 2000) ("A party may not invoke Fed. R. Civ. P. 56 (f) by merely asserting that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. Rather, the party must demonstrate precisely how additional discovery will lead to a genuine issue of material fact."); *Dowling v. Philadelphia*, 855 F.2d 136, 139-40 (3d Cir. 1990) (interpreting Rule 56(f) as "imposing a requirement that a party…specify, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained").

Id. Plaintiff's Opposition does not come close to meeting the Rule 56(f) requirement, stating merely that there is an "incomplete summary judgment record" and that further discovery "*may* lead to the discovery of new information."[24]

Perhaps the most telling evidence that Plaintiff's call for more discovery is nothing more than an attempt to obfuscate the real issues is that, in addition to asserting in one (1) page that it needs to conduct more discovery in order to oppose Defendants' Motion, Plaintiff's Opposition consisted of *twenty-three (23)* additional pages of argument. It is absolutely dumbfounding that Plaintiff is trying to invoke a need for more discovery when in the very first page of its Opposition, Plaintiff "puffs" that Defendants' Motion is "audacious" and that this is a "textbook

[24] See Plaintiff's Opposition, p. 19 (emphasis added).

case" of fraudulent concealment. The reality is that Defendants' Motion presents a straightforward legal question regarding whether Plaintiff's wrongful death Complaint was filed post-limitations, and the answer to that question is also straightforward: Plaintiff's wrongful death claim was not timely filed. This conclusion is supported by the facts stated in Defendants' Motion as having been known to the Plaintiff well before November 27, 2007, none of which were disputed by the Plaintiff's Opposition. Plaintiff's knowledge of those basic facts caused the limitations period to begin to accrue, regardless of whether Defendants theoretically concealed any additional facts. Plaintiff's request for more discovery is nothing more than an effort to delay the inevitable entry of summary judgment.

B. Spoliation

Plaintiff's Opposition, despite conceding that its spoliation claim fails to the extent that they alleged that Defendants were responsible for Robert Wone's death, nonetheless makes a half-hearted attempt to save the spoliation count by arguing for far too broad of an application of the limited third-party spoliation cause of action outlined by the D.C. Court of Appeals in *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. App. 1998). Although Defendants have always asserted and continue to assert that they had no involvement in Robert Wone's stabbing, the mere fact that Plaintiff's spoliation count vaguely concedes that the Defendants may be telling the truth does not permit the cause to survive.[25] In *Holmes*, the Court limited the cause of action for spoliation of evidence solely to cases where "the spoliator is not a party to the underlying lawsuit." *Id.* at 848. Neither the *Holmes* decision nor any subsequent D.C. court opinion has expanded the cause of action for spoliation.

[25] Both Plaintiff's wrongful death count and negligence count expressly allege that Defendants directly and proximately caused the death of Robert Wone. See Plaintiff's Amended Complaint, ¶ 48 and ¶ 57.

This Court should be further compelled to dismiss Plaintiff's spoliation claim because to allow the claim to proceed would stand in direct contradiction to the very purpose for which the *Holmes* Court established the limited cause of action in the first place. In *Holmes*, the Court explained that the purpose of recognizing a third-party spoliation cause of action was to afford some remedy "to those whose expectancy of recovery has been eliminated or severely hampered through the negligent or reckless acts of another." *Id.* at 849. In the present case, however, Plaintiff's Complaint relies on the alleged spoliation of evidence, i.e. that Defendants "altered and staged the crime scene,"[26] as evidence in support of its wrongful death claim against Defendants. As stated in Defendants' underlying Motion and in Section A., *supra*, Plaintiff's expectancy of recovery has not been eliminated as a result of spoliation, but rather by Plaintiff's own failure to file the wrongful death claim within the applicable statute of limitations.[27]

C. Conspiracy

Despite Plaintiff's assertion to the contrary, the well-reasoned and roundly accepted edict that one cannot conspire to be negligent is not in conflict with the laws of the District of Columbia. Plaintiff's lone cite in support of this inaccurate assertion is to a single statement made, in *dicta*, by a federal court in *Okusami v. Psychiatric Inst. of Wash., Inc.*, 959 F.2d 1062 (D.C. Cir. 1992), after it had already affirmed dismissal of the appellant's civil conspiracy count. No District of Columbia Court has ever expressed approval of this statement. In fact, in the nearly two decades since the *Okusami* decision was rendered, not a single District of Columbia state or federal court has cited *Okusami* for any proposition relating to conspiracy. Notably absent from Plaintiff's Opposition is an argument to rebut the sound holdings of the many courts

[26] See Plaintiff's Amended Complaint, ¶ 48.a.

[27] Although the present Motion does not seek dismissal of Count 2 – Negligence of Plaintiff's Complaint, it must be pointed out that the Complaint's factual allegations regarding spoliation of evidence are completely unrelated to the allegations contained in the negligence count, i.e., the failure to render aid.

cited in Defendants' Motion that because civil conspiracy is an intentional tort, it is illogical to conclude that persons can conspire to be negligent. See, e.g. *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985); *Witcher v. Reid*, 70 Va.Cir. 415, 420 (2006)(citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1997).

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants Joseph Price, Victor Zaborsky, and Dylan Ward respectfully request that this Honorable Court dismiss Counts One (Wrongful Death), Three (Spoliation of Evidence), and Four (Conspiracy) of Plaintiff's Complaint/Amended Complaint with prejudice; or, in the alternative, enter summary judgment in Defendants' favor as to Counts One (Wrongful Death), Three (Spoliation of Evidence), and Four (Conspiracy) of Plaintiff's Complaint/Amended Complaint, and grant Defendants such further and additional relief as is deemed appropriate.

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[28] Admitted pro hac vice pursuant to Court's 10/18/10 Order.

[29] Admitted pro hac vice pursuant to Court's 2/26/10 Order.

[30] Admitted pro hac vice pursuant to Court's 8/2/10 Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2010, a copy of the foregoing Reply Memorandum of Points and Authorities was served via e-filing to:

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