

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Case No: 02-14427-FF

JOSE GUILLERMO GARCIA, et. al.,

Appellants,

v.

JUAN ROMAGOZA ARCE, et. al.,

Appellees.

**On Appeal from the U.S. District Court
for the Southern District of Florida,
Hon. Daniel T.K. Hurley
Case No: 99-8364-CV-DTKH**

BRIEF OF APPELLANTS

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Defendants/Appellants, through the undersigned counsel, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, hereby certify that the following entities and persons have an interest in the outcome of this appeal:

Juan Romagoza Arce

Carolyn Blum

Jose Guillermo Garcia

Neris Gonzalez

James Green

Paul Hoffman

Judge Daniel T.K. Hurley

Kurt R. Klaus, Jr.

Carlos Mauricio

Susan Shaw Roberts

Joshua Sondheimer

Peter Stern

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT - cont.

Beth Van Shaack

Carlos Eugenio Vides-Casanova

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GLOSSARY OF TERMS

ATCA	Alien Tort Claims Act, 28 U.S.C. § 1350 (1994)
RE	Record Excerpts
Tr.	Trial Transcript
TVPA	Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1994)

STATEMENT REGARDING ORAL ARGUMENT

Defendants/Appellants, pursuant to Federal Rules of Appellate Procedure 34(a) and Eleventh Circuit Rule 34-3 request oral argument. Oral Argument could assist this Court in consideration of the issues raised herein, expressly the statute of limitations and equitable tolling thereof of causes of actions under the Torture Victim Protection Act and Alien Tort Claims Act, 28 U.S.C. § 1350. Oral argument could assist this Court regarding the record herein.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1291. The United States District Court for the Southern District of Florida had jurisdiction pursuant to 28 U.S.C. § 1350, the Alien Torts Claims Act, and Torture Victims Protection Act, 28 U.S.C. § 1350 n.l.

STATEMENT OF THE ISSUES

1. Did the trial Court abuse its discretion in equitably tolling the Statute of limitations?

a) Did either defendant fraudulently conceal his identification or whereabouts from any of the Plaintiffs?

STATEMENT OF THE CASE

The Plaintiff-Appellee, JUAN ROMAGOZA ARCE, filed his original complaint on May 11, 1999. R 1-1. On January 31, 2000, the trial court dismissed the complaint and amended complaint filed on January 6, 2000. R 1-36. On February 22, 2000, a second amended complaint was filed by JUAN ROMAGOZA ARCE adding Plaintiffs-Appellees, CARLOS MAURICIO and NERIS GONZALEZ. R 1-39. Defendants-Appellants filed their Answer and Affirmative Defenses on April 12, 2000. R 1-46. Defendants-Appellants filed their Motion for Judgment on the Pleadings, Statute of Limitations on April 27, 2001. R 3-98. The trial court denied Defendants' Motion for Judgment on the Pleadings, Statute of Limitations on June 1, 2001. R 3-117. Defendants-Appellants filed their Motion for Amendment of Judgment on June 2, 2001. R 3-118. The trial court rendered an order denying Defendants-Appellants' Motion for Amendment of Judgment on June 29, 2001. R 4-123.

Trial commenced on June 24, 2002. JOSE GUILLERMO GARCIA and CARLOS E. VIDES-CASANOVA moved for judgment as a matter of law, on the pleadings during trial . The motion was denied. The jury returned verdicts for

JUAN ROMAGOZA ARCE, CARLOS MAURICIO and NERIS GONZALEZ on July 23, 2002. R 8-247,248 and 249.

JOSE GUILLERMO GARCIA and CARLOS E. VIDES-CASANOVA moved for Judgment as a Matter of Law, New Trial, Statute of Limitations on July 30, 2002. R 8-251.

The trial court rendered an order denying the Motion for JOSE GUILLERMO GARCIA and CARLOS E. VIDES-CASANOVA on July 31, 2002. R 8-252. The trial court rendered Amended Final Judgments on August 1, 2002. R 8-257, 258, 259.

JOSE GUILLERMO GARCIA and CARLOS EUGENIO VIDES CASANOVA filed their Notice of Appeal on August 12, 2002. R 8-260.

STATEMENT OF THE FACTS

Appellee, JUAN ROMAGOZA ARCE, is a naturalized citizen of the USA who has resided in the USA since April of 1983.

Appellee, NERIS GONZALES, is a citizen of El Salvador who has resided in the USA since the mid-1980's.

Appellee, CARLOS MAURICIO, is a citizen of El Salvador who has resided in the USA since the mid 1980's.

Appellant, JOSE GUILLERMO GARCIA, is a citizen of El Salvador and has resided permanently in the USA since 1989. He was Minister of Defense of El Salvador from October 1979 until March, 1983

Appellant, CARLOS EUGENIO VIDES-CASANOVA, is a citizen of El Salvador and has resided permanently in the USA since 1989. He was Director of the National Guard of El Salvador from October 1979 until March 1983, and Minister of Defense of El Salvador from March 1983 until 1987.

Appellees claim they were unlawfully detained and tortured during the El Salvadorian Civil War by individuals under the direct command and control of the Appellants.

The Civil War in El Salvador lasted from the mid-1970's until 1992. This was a period of great unrest and violence in all Central America. In 1978 Nicaragua became a communist state after a bloody civil war deposed the U.S. backed Somoza regime.

The Civil War in El Salvador saw ten of thousands of casualties, innocent civilians, members of the communist insurgency and military were victims of extreme violence, kidnaping, torture, summary executions, bombings, etc. Twenty percent of the population of El Salvador immigrated.

Initially, El Salvador was ruled by a military dictatorship controlled by the wealthy colonialist oligarchy. In October, 1979, a coup by reform minded members of the military established a ruling junta. The junta and successive juntas instituted reforms while waging war against communist rebels and right wing death squads; that led to free elections, the adoption of a new constitution and the establishment of the democracy that El Salvador remains today.

JOSE GUILLERMO GARCIA was the first Minister of Defense appointed by the new junta in 1979 and served until March, 1983. CARLOS EUGENIO VIDES-CASANOVA was the Director of the National Guard from October, 1979

until March, 1983 and Minister of Defense from March, 1983 until 1987, serving the first freely elected President of El Salvador, Napoleon Duarte.

Both men were central in instituting democratic reforms, and defeating the communists and right wing death squads.

The United States of America was very active in El Salvador during the 1980's supporting the government with military and economic aid and advisors.

Both men were awarded legion of merit awards from the United States of America and had frequent continuing contact with the United States of America during their terms in office and after.

Both men became permanent residents of the United States of America in August of 1989.

JUAN ROMAGOZA ARCE was a medical student in El Salvador in December, 1980 providing free medical services in a rural area when he claims he was abducted, detained and tortured by members the National Guard.

NERIS GONZALEZ was an unwed pregnant merchant woman in December, 1979 when she claims she was abducted, detained and tortured in San Vicente, El Salvador.

CARLOS MAURICIO was a college professor in June, 1983 when he claims he was abducted, detained and tortured by the National Police in San Salvador, El Salvador.

All three Plaintiffs-Appellees immigrated to the United States of America in the mid 1980's and have resided primarily here continually since.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in equitably tolling the Statute of Limitations herein since neither defendant-appellant, JOSE GUILLERMO GARCIA nor CARLOS E. VIDES-CASANOVA, fraudulently concealed their identity or whereabouts from anyone.

The cause of action for JUAN ROMAGOZA ARCE arose on December 12, 1980, the cause of action for NERIS GONZALEZ arose on December 26, 1979 and the cause of action for CARLOS MAURICIO arose on or about June 13, 1983.

JUAN ROMAGOZA ARCE did not file suit until May 12, 1999, NERIS GONZALEZ did not file suit until February 22, 2000 and CARLOS MAURICIO did not file suit until February 22, 2000.

Both JOSE GUILLERMO GARCIA and CARLOS E. VIDES-CASANOVA were available for service and subject to the jurisdiction of the U.S.A. Federal Courts at all times after the causes of action arose.

Tolling the Statute of Limitations herein is not equitable since important evidence, and witnesses could not be found after the passage of 16 to 19 years.

ARGUMENT AND CITATIONS OF AUTHORITY

This action was brought pursuant to the ATCA, Alien Tort Claims Act, 28 U.S.C. § 1350 and the TVPA, Torture Victim Protection Act of 1991 28 U.S.C. § 1350 n. 1.

The statute of limitations for an action brought under either statute is ten years from the date the cause of action arose. 28 U.S.C. § 1350 n. 1. 2(c) and Estate of Winston Cabello v. Armando Fernandez-Larios, 157 F. Supp 1345 p. 1357,1360 (U.S. Dis. Ct. S.D. Fla. 2001) and cases cited therein.

The causes of action herein arose for NERIS GONZALEZ on or about December 26, 1979, for JUAN ROMAGOZA ARCE on or about December 12, 1980 and for CARLOS MAURICIO on or about June 13, 1983. NERIS GONZALEZ did not file suit until February 22, 2000, JUAN ROMAGOZA ARCE filed suit on May 12, 1999 and CARLOS MAURICIO filed suit on February 22, 2000. All actions were filed well outside the 10 year statute of limitations.

The statute of limitations is the rule and equitably tolling it the exception to the rule. The statute of limitations should only be tolled when extraordinary

circumstances beyond the Plaintiffs' control made it impossible to file their claims on time. Humberto Alvarez Machain v. U.S.A. et. al., 107 F.3D 696,700 and cases cited therein (U.S.C.A. 9th Cir, 1997) looking at the totality of the circumstances on a case by case basis.

The TVPA as enacted on March 3, 1992 provides for the statute of limitations of ten years after recorded discussions in the U.S. House of Representatives and U.S. Senate recognized the availability of equitable tolling to protect claimant's rights and to prevent U.S. Federal Courts from having to hear stale claims. 137 Cong. Rec. H 11244-04 p4 (Nov. 25, 1991), 1992 U.S.C.C.A. N. 84 p6 (Nov. 25, 1991), Senate Report No. 102-249, pp 7 and 10, (Nov. 26, 1991) 138 Cong. Rec. S. 2667-04 p 2,3, (March 3, 1992).

None of the factors requiring equitable tolling of the ten year statute of limitations herein exist. On the contrary, both JOSE GUILLERMO GARCIA's and CARLOS E. VIDES-CASANOVA's whereabouts and travels to the U.S.A. were widely reported by the media in El Salvador and even the media of the U.S.A. Their travels in and out of the U.S.A. were documented by the U.S.A. Immigration and Naturalization Services and available by a public records request

to anyone exercising due diligence in a search for either man.

Neither JUAN ROMAGOZA ARCE, NERIS GONZALEZ nor CARLOS MAURICIO, offered any evidence of something beyond their control preventing them from filing suit against either JOSE GUILLERMO GARCIA or CARLOS E. VIDES-CASANOVA during the ten years after their causes accrued. R-125.

Anderson v. Wisconsin Gas Company, 619 F. Supp. 635, 638 (U.S. Dis. Ct., E.D. Wisconsin, 1985).

The failure of JUAN ROMAGOZA ARCE, NERIS GONZALEZ or CARLOS MAURICIO to meet the time requirement of ten years is not excusable, the statute of limitations is set forth clearly in the TVPA. All claimants suing under the TVPA or ATCA are on notice that they have ten years from the accrual date to file suit. William F. Browning et. al., v. AT&T Paradyne, 120 F.3d 222, 224-226 (11th Cir. 1997).

“Statutes of Limitations are not arbitrary obstacles to the vindication of just claims, and therefore, should not be given a grudging application. They protect important social interests in certainty, accuracy and repose.” Cada v. Baxter Healthcare Corp., 920 F. 2d 446, 453 (7th Cir. 1990).

Neither should equitable tolling automatically extend the statute of limitations by the length of the tolling period or any definite term. Equitable tolling “equity”, requires a reasoned balancing of all relevant factors on a case by case basis to insure fundamental fairness and equal protection to the rights of all. Charles Dring v. McDonnell Douglas Corporation, 58 F. 3d 1323, 1327-1329 (8th Cir. 1995). Herein the trial Court failed to balance or weigh any factors. The trial court arbitrarily without explanation, taking testimony or considering the rights of all parties equitably tolled the statute of limitations over 9 years for NERIS GONZALEZ, over 8 years for JUAN ROMAGOZA ARCE and 6 years for CARLOS MAURICIO.

“Statutes of Limitations are designed primarily to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded or clouded, and witnesses disappeared or died.” Otto V. Burnett v. New York Central Railroad Company, 380 U.S. 428, 85 S.Ct. 1050, 1053-1061 (1965). Herein the plaintiffs-Appellees waited, the reason never being set forth, until their claims were so stale that no witnesses to any of the alleged

acts of torture could be located or produced for trial, no medical records, little or no records from the government of El Salvador, precluding the Defendants-Appellants from mounting a defense against claims 16-20 years old at the time of filing and 18-22 years old at the time of trial. During the interim President Duarte, President Magana and superiors of the Appellants died or disappeared. Those on duty or directly responsible for the alleged acts could not be identified let alone located because records had been destroyed over the years.

The Plaintiffs-Appellees herein were represented for free by some of the finest lawyers in the land doing pro-bono work for political public interest groups. The Defendants-Appellants were represented by the best lawyer they could afford at their expense. There were no witnesses to the actual acts of torture or injuries except the Plaintiffs themselves. The rest of the evidence was opinion evidence and historical memories of non-salvadoreans, academics, ambassadors, human-right activists and clergy. Again, because of the passage of time no fact witnesses could be identified or presented to contest the outrageous descriptions of torture by the Plaintiffs-Appellees.

This cause exemplifies why there are Statutes of Limitations. Equitable

tolling should be equitably applied when justice requires it not arbitrarily for the benefit of sympathetic claimants. Trial courts should have discretion but not abuse it.

The standard of review herein is abuse of discretion.

CONCLUSION

The trial court abused its discretion by not equitably or justly applying the doctrine of equitable tolling herein. To require JOSE GUILLERMO GARCIA and CARLOS E. VIDES-CASANOVA to defend themselves in a foreign forum against acts allegedly committed by others in another country over 16 years prior to being alleged during a horrible civil war violates any reasonable notion of equity, fundamental fairness or justice and requires reversal of the judgments rendered and dismissal of the causes of action herein, forthwith.

Respectfully submitted,

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