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June 10, 1983

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Washington, D.C. 20310

Theodore J. Garrish, Esq.
General Counsel
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Room 6A-245
Washington, D.C. 20585

Re: 28 U.S.C. § 2401(b) Claims of Talmon, Mary
Sue, and Talmon Dwayne Sexton

Dear Messrs. Hosenball, Spurlock and Garrish:

Pursuant to the Federal Tort Claims Act, 28 U.S.C. §§
2671 et seq., we hereby submit the following claims on
behalf of Talmon Sexton, Mary Sue Sexton, and the estate
of Talmon Dwayne Sexton. Decedent Talmon Dwayne Sexton
(Dwayne) sought medical treatment for acute lymphatic
leukemia at the Medical Division of Oak Ridge Associated
Universities in July of 1964. Denied information regard-
ing alternative treatments and the hazards of the ensuing
treatment, Dwayne became an unwitting experimental subject
in a negligently supervised and operated radiation
research program established and funded by the Atomic
Energy Commission (AEC) and supported with funding from
the National Aeronautics and Space Administration (NASA),
the Department of the Army (Army), and possibly other

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agencies of the federal government. On December 29, 1968, Dwayne Sexton died at the facilities of the Oak Ridge Medical Division of Oak Ridge Associated Universities.

As set forth hereafter, the denial of accepted medical therapy to Dwayne Sexton, his pain and suffering, his subsequent death and the unnecessary shortening of his life were due to the experimentation negligently and recklessly financed by the AEC, NASA, and the Army.

The negligent character of those government-sponsored experiments was revealed at a hearing conducted in September 1981 by the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology. At that time experts testified that the experimental procedures used on Dwayne Sexton were inappropriate and unethical by the accepted medical standards of the time, and materials supplied to the Subcommittee document that both NASA and the AEC were negligent in their funding and supervision of the experimental program. Moreover, although peer reviews of the radiation experimentation submitted to the federal government questioned the standards, procedures, ethics and quality of the research at Oak Ridge, operational funding continued to be provided for at least 8 more years. One such review submitted to the AEC in 1966 specifically noted, with regard to total body irradiation of leukemic patients, that "continuation of this type of experimentation could be criticized on ethical and possibly other grounds." Human Total Body Irradiation (TBI) Program at Oak Ridge: Hearing Before the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology, 97th Cong., 1st Sess. 248 (1981) [hereinafter cited as Hearing]. Confirming the inappropriate character of the experimental use of total body irradiation for leukemic patients at Oak Ridge is the testimony of Dr. Eli Glatstein of the National Cancer Institute that by "the end of the 1960's it was pretty clear that it was not an appropriate thing to do any longer. There were other ways to go." Hearing at 289-90.

The government's recklessness is further documented by the fact that the contracts which funded this research were initiated to obtain data for non-medical, non-therapeutic purposes. In order to obtain data on the effects of massive or prolonged doses of radiation, the

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following government agency contracts were performed at the Oak Ridge Medical Division under Contract No. AT-(40-1)-Gen. 33 and possibly others:

1. AEC contract--"Mechanisms of Radiation Injury";
2. AEC Contract/NASA Subcontract--"Radio Sensitivity in Man: A Study of Therapeutic and Accidental Whole Body Irradiation";
3. AEC contract--"Hematologic and Therapeutic Effects of Total-Body Irradiation (50R-100R) in Patients with Malignant Lymphoma, Chronic Lymphocytic and Granulocytic Leukemias, and Polycythemia Vera"; and
4. Department of Army study funded for the purpose of "determining what levels of single, repeated or protracted irradiation exposure result in alteration of the bacteriological flora of the persons exposed."

In all, the federal government provided at least \$26 million to the Medical Division at Oak Ridge, most of which was funded by the AEC, and at least \$2.2 million was funded by NASA. Hearing at 157.

The non-medical purposes of this research were admitted by members of the research staff at the Medical Division, who have stated that some of the radiation treatments were not the best available therapy for the experimental subjects, but were given in order to produce "base-line" data on the acute effects of radiation. Hearing at 49. As members of the research staff at Oak Ridge have further admitted, experiments they conducted were designed to meet the "urgent need . . . for information on hematologic effects in man, since the National Aeronautics and Space Administration was faced with potentially high levels of radiation exposures in space exploration," Hearing at 49, and to provide "clinical observations. . . needed to defend existing environmental and occupational radiation-exposure constraints from attack by well-meaning, but impractical, theorists." Hearing at 385.

The specific procedures to which Dwayne Sexton was subjected while at the Medical Division at Oak Ridge confirm that he was an unwitting subject in the above-described experimentation. Admitted to the Medical Division at Oak Ridge on July 29, 1965 and diagnosed as having acute lymphatic leukemia, Dwayne Sexton initially received chemotherapy and his illness was successfully put into remission. On August 5, 1965, an experimental

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procedure was initiated that involved extracting bone marrow from the body of Dwayne Sexton, irradiating that marrow, and injecting it into the body of Mary Sue Sexton. The Sextons were never fully informed as to the possible hazards of this treatment or alternatives available. A week and a half later, serum was withdrawn from Mary Sue Sexton and injected into Dwayne Sexton. For a period of 16 weeks following this experimental procedure all conventional treatment, including maintenance through chemotherapy was withheld from Dwayne Sexton. Following the withholding of such conventional treatment, Dwayne Sexton again became acutely ill with leukemia. At the insistence of Talmon and Mary Sue Sexton, chemotherapy was again initiated with Dwayne Sexton, and remission was again achieved. Dwayne continued to receive chemotherapy until December 1968, when he again relapsed.

On December 3, 1968, the research staff at the Oak Ridge Medical Division recommended that Dwayne Sexton be exposed to experimental procedures using total-body irradiation, and he accordingly received an average body dose of 265 rads in a special facility called the Medium Exposure Total Body Irradiator. Again, information regarding the possible risks and alternatives was not provided. Following the radiation exposure, Dwayne Sexton was immediately transferred to a second facility, the Low Exposure Total Body Irradiator, where he was hooked to special equipment designed to monitor symptoms of nausea, heart rate, respiration and other factors in order to obtain data reflecting Dwayne Sexton's acute reactions to the total body irradiation. Both facilities operated through funding from AEC and NASA.

Total body irradiation has the effect of suppressing the immune system, and thus inhibiting the body's capacity to defend itself from diseases, even those as minor as the common cold. Dwayne's medical records show that the day Dwayne received his radiation treatment, he already had a serious staph and pneumonia infection. Dwayne died on December 29, 1968. The immediate cause of death was uncontrolled staph infection circulating through his bloodstream.

The 1966 report to the AEC put the Commission on notice that the experimental procedures used at the Oak Ridge Medical Division were inappropriate for the treatment of leukemia. Characterizing as "premature" the procedure which involved the extraction and irradiation of

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bone marrow, that 1966 report specifically stated that there "are many theoretical reasons why this kind of treatment should not work," and further stated that such an experimental regimen "remains to be proven even in animal leukemia systems." Hearing at 248. With reference to total body irradiation, the 1966 study stated "[a]bundant data accumulated during the past 10 years on total body irradiation of leukemics and the ensuing complications resulting therefrom have been uniformly discouraging." Id. Although the AEC had thereby been informed of the inappropriate nature of the experimental procedures being undertaken at the Oak Ridge Medical Division, it negligently and recklessly continued to fund those experiments until 1974.

The medical experts who appeared at the September 1981 hearing explained the medical inadequacies of the treatment received by Dwayne Sexton while he was a subject in the negligently and recklessly funded experimental program at the Oak Ridge Medical Division. As Dr. Peter Wiernik, the Director of the Baltimore Cancer Research Center, testified, "in a disease that was already known to be yielding to chemotherapy such as acute lymphocytic leukemia, the goal there would be first time around: certainly don't do anything that might impair the child's chances of being a long-term survivor." Hearing at 295. "...I really don't believe that it was appropriate to withhold maintenance of chemotherapy in that child in order to perform the study." Hearing at 294.

As a consequence of his unwitting participation in the experimental procedures negligently and recklessly funded by the Atomic Energy Commission, the National Aeronautics and Space Administration, the Department of the Army, and possibly other governmental agencies, claimant Dwayne Sexton was denied needed therapy, sustained permanent injuries which shortened his life, and needlessly was subjected to the pain and suffering attendant with the experimentation. As a consequence of their son's unwitting participation in these experiments, claimants Talmon and Mary Sue Sexton have suffered great emotional distress since learning that their son was denied potentially life extending or life saving therapy. Pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., claimants Talmon and Mary Sue Sexton seek five million dollars (\$5,000,000) in damages for their personal

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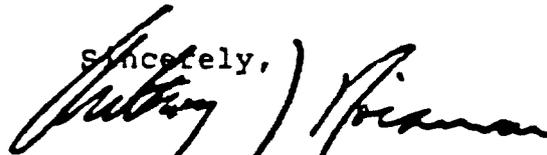
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injuries, and, as guardians of the estate of Dwayne Sexton, seek five million dollars (\$5,000,000) in damages for his personal injuries.

Claimants learned of the facts underlying their claims within the last two years.

We are prepared to discuss the above claims at your convenience.

Sincerely,



Anthony Z. Roisman
Executive Director

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Anthony Z. Roisman
Executive Director
Trial Lawyers for Public Justice P.C.
Suite 611
2000 P Street, N.W.
Washington, D.C. 20036

Re: Tort Claim of Talmon, Mary Sue and
Talmon Dwayne Sexton

Dear Mr. Roisman:

The Department of Energy has received your letter of June 10, 1983 and I have discussed its contents with members of the legal staffs of NASA and the Army. As the successor agency to the Atomic Energy Commission, DOE will be the primary agency for this matter pursuant to 28 CFR §14.2(b), and all further correspondence should be directed to the undersigned.

In addition to your letter would you please fill out or have your clients fill out the enclosed form 95. In addition would you please supply the information set out in 10 CFR §1014.4(a)(1-8). I have enclosed a copy of the relevant provisions of 10 CFR §1014 et seq governing the filing of DOE tort claims as well as a tort claim form.

When the form and the information required by the regulations are received, we will process your claim.

The requirements of the regulations are jurisdictional and may not be waived. I will be happy to assist you if I can. Please call (202) 252-8700 or write if any additional information is needed.

Sincerely,

Madelyn R. Creedon
Trial Attorney

bcc: Major Nardotti
Sarah Najjar
Dr. Clarence Lushbaugh
William Snyder ✓

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Mr. Sexton's full knowledge or informed consent. Dwayne suffered extreme physical, emotional, and psychological damage from the experiments conducted on him, was deprived of his best chance of survival, and died at the age of six. Mary Sue Sexton also suffered severe physical, emotional, and psychological damage from her participation in the experiment and, among other things, was unknowingly exposed to the risk of contracting Dwayne's leukemia. Both she and Dwayne's father, Talmon Sexton, were deprived of their right to decide upon their son's medical treatment and care and suffered severe physical, emotional, and psychological damage watching Dwayne needlessly suffer and die. They seek \$10 million in compensatory damages on behalf of themselves and Dwayne's estate.

JURISDICTION

2. This is a civil action for monetary relief under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Jurisdiction is proper under 28 U.S.C. § 1346(b).

3. Plaintiffs have exhausted their administrative remedies by presenting their claims in writing to the appropriate federal agencies on June 10, 1983, within two years after the claims had accrued, and filing this Complaint after six more months had elapsed without final disposition of their claims.

PARTIES

4. Plaintiffs Mary Sue Sexton and Talmon Sexton are citizens of the United States of America residing at 2333 Cranshaw Drive, Kingsport, Tennessee, and are the mother and father, respectively, of Dwayne Sexton, now deceased. They bring this action on behalf of themselves and the estate of their deceased son.

5. The defendant is the government of the United States of America and includes, inter alia, the now-defunct Atomic Energy Commission, the pertinent portion of which is currently a part of the Department of Energy; the National Aeronautics and Space Administration ("NASA"); and the Department of the Army, all of which are "federal agencies" as that term is defined by the Federal Tort Claims Act, 28 U.S.C. § 2671.

THE U.S. GOVERNMENT'S RADIATION RESEARCH

6. From at least 1954 through 1974, the United States government funded, supervised, and conducted medical research into the uses of and effects of nuclear radiation.

7. The primary government agency responsible for funding, supervising, and conducting this research was the United States Atomic Energy Commission ("AEC"), headquartered in Washington, D.C. The AEC was responsible for its own research and for research undertaken in accordance with contracts between the AEC and other federal

agencies, including NASA and the Army, which reimbursed the AEC for the relevant costs incurred.

8. For the most part, the AEC funded and supervised this research out of its Washington, D.C. headquarters through the Medical Research Branch of its Division of Biology and Medicine and the research was physically conducted at AEC-owned clinics around the country, including one such clinic in Oak Ridge, Tennessee.

9. Medical research into the uses and effects of nuclear radiation is an inherently dangerous activity.

10. In deciding to fund, supervise, and conduct such research, the United States government made a policy decision properly within its discretion which Mary Sue and Talmon Sexton do not complain of or seek to challenge in this case.

11. In implementing the decision to fund, supervise, and conduct such research, the United States government and the AEC, through its Washington, D.C. headquarters, had a duty to take the reasonable steps necessary to ensure that established medical and ethical standards for medical research would be followed and that United States citizens at AEC-owned clinics throughout the country would not be deprived of proper medical care and subjected to improper and unethical medical experimentation without their full knowledge and informed consent.

12. It is the United States government's and the AEC's violation of that duty which caused damage to the Sextons

and which Mary Sue and Talmon Sexton complain of and seek to challenge in this case.

13. As a result of the United States government's and the AEC's violation of that duty, the medical research funded and supervised through AEC headquarters in Washington, D.C. and conducted at the AEC-owned clinic in Oak Ridge, Tennessee did not comply with medical and ethical standards for such research, Dwayne Sexton was deprived of proper medical care, and both Dwayne and Mary Sue Sexton were, in fact, subjected to improper and unethical medical experimentation without their or Mr. Sexton's full knowledge or informed consent.

DWAYNE ENTERS THE AEC-OWNED CLINIC AT OAK RIDGE

14. The Sextons' first contact with the AEC-owned clinic in Oak Ridge, Tennessee was in July of 1965, when Dwayne was three-and-a-half years old. Dwayne had taken ill and the Sextons' family doctor had suggested that he be taken to the Oak Ridge clinic.

15. On July 27, 1965, Dwayne was admitted to the clinic ("Oak Ridge") and, shortly thereafter, diagnosed as having acute lymphatic leukemia.

16. At that time, the conventional treatment for acute lymphatic leukemia was chemotherapy. Under this course of treatment, several chemotherapy drugs were given either together in combination or, occasionally, in sequence, and

then maintenance chemotherapy was continued over several years.

17. In order to obtain a lengthy first remission, which was crucial to the victim's chances for survival, it was particularly important that this chemotherapy treatment be started as soon as the leukemia was detected, continued without interruption until a remission was documented, and then maintained.

18. Under this treatment, long-term survival, tantamount to cure, was achievable.

19. Dwayne's chances for survival were particularly good because his white blood count was not greatly elevated when acute lymphatic leukemia was diagnosed and he was in the age group associated with the highest percentage of long-term survivors.

THE FIRST EXPERIMENT:
NEGLIGENT PLANNING AND UNINFORMED CONSENT

20. When the doctors at the AEC-owned clinic in Oak Ridge diagnosed Dwayne's leukemia, they did not plan to give Dwayne the conventional treatment.

21. These doctors, whose work was funded, supervised, and conducted as part of the federal government's research into the effects and uses of nuclear radiation, planned to withhold conventional chemotherapy from Dwayne, giving him limited doses of chemotherapy for a short period of time, and to subject Dwayne and one of his parents to an experimental treatment involving nuclear radiation.

22. Specifically, the experimental treatment planned was to suck Dwayne's bone marrow out of his body, subject it to 10,000 rads of external radiation, inject it intramuscularly into the parent of Dwayne whose blood was most like Dwayne's and, after the passage of approximately two weeks, surgically remove that parent's lymph from his or her thoracic duct and inject the lymph into Dwayne's body.

23. This experimental treatment had never been tried before on any human being.

24. This experimental treatment had never been tried before on animals with leukemia.

25. According to the subsequent 1966 Report of the AEC's own Medical Program Review Committee, this experimental treatment was "based on rather sparse observations by others on animal model systems not including leukemia ... observations [which] should not [have been] accepted uncritically."

26. According to the same 1966 Report of the AEC's Medical Program Review Committee, "this immunotherapeutic approach to leukemia in humans [was] premature. There [were] many theoretical reasons why this kind of treatment should not [have] work[ed]."

27. For the foregoing and other reasons, in planning to subject Dwayne and one of his parents to this experimental treatment, the doctors at Oak Ridge negligently violated established medical and ethical standards for medical research.

28. After planning to subject Dwayne and one of his parents to this experimental treatment, the doctors at Oak Ridge explained the proposed treatment to Mary Sue and Talmon Sexton and urged them to consent to it.

29. In explaining this experimental treatment to Mary Sue and Talmon Sexton and urging them to consent to it, the doctors at Oak Ridge negligently failed to inform Mary Sue and Talmon of numerous material facts and negligently and materially misrepresented the nature and purpose of the treatment, the possible alternative treatments, the relative likelihood of success of each treatment, the risks involved, and the complications that might arise.

30. In explaining this experimental treatment to Talmon Sexton and urging him to consent to it, the Chief of Staff at Oak Ridge informed Talmon, in Mary Sue's absence, that it could cost over \$65,000 to have Dwayne treated in a regular hospital, but that the clinic at Oak Ridge was run by the federal government and would not cost the Sextons anything.

31. The doctors at Oak Ridge did not inform Mary Sue or Talmon Sexton of the facts set forth above in paragraphs 19 through 23 and 23 through 27.

32. The doctors at Oak Ridge did not inform Mary Sue or Talmon Sexton that, in subjecting Dwayne to the proposed experimental treatment, they intended to deprive Dwayne of conventional chemotherapy treatment.

33. The doctors at Oak Ridge did not inform Mary Sue or Talmon Sexton that, in subjecting Dwayne to the proposed experimental treatment, they did not have to deprive Dwayne of conventional chemotherapy treatment.

34. The doctors at Oak Ridge did not inform Mary Sue or Talmon Sexton that Dwayne's best known chance for survival was conventional chemotherapy treatment.

35. The doctors at Oak Ridge did not inform Mary Sue or Talmon Sexton that long-term survival could be achieved with conventional chemotherapy treatment.

36. To the contrary, the doctors at Oak Ridge informed Mary Sue and Talmon Sexton that the conventional chemotherapy treatment would only offer a short life for Dwayne at best.

37. The doctors at Oak Ridge informed Mary Sue and Talmon Sexton that the proposed experimental treatment was Dwayne's best chance for survival.

38. In reliance upon the misrepresentations made by the doctors at Oak Ridge and without knowledge of the material facts concealed by them, Mary Sue and Talmon Sexton consented to the proposed experimental treatment, convinced that it was Dwayne's best chance for survival.

39. This consent was not informed consent and was improperly, unethically, and negligently obtained. Being reasonable people, Mary Sue and Talmon Sexton would not have consented to this experimental treatment if they had been truthfully and fully informed.

40. After Mary Sue and Talmon Sexton consented to the experimental treatment, blood tests were run on both parents and it was concluded that Mary Sue's blood was more compatible with Dwayne's and that she would be the parent who participated in the experimental treatment.

41. In explaining Mary Sue's role in the experimental treatment and urging her to consent to it, the doctors at Oak Ridge did not inform Mary Sue that participation in the experiment might expose her to the risk of contracting Dwayne's leukemia.

42. Mary Sue consented to and took part in the experimental treatment without knowledge of both this risk and, as is set forth above, the true facts in regard to Dwayne's participation in the experimental treatment.

43. Mary Sue's consent was not informed consent and was improperly, unethically, and negligently obtained. Being a reasonable person, Mary Sue Sexton would not have consented to participate in this experimental treatment if she had been truthfully and fully informed.

THE FIRST EXPERIMENT: NEGLIGENT TREATMENT

44. From July 27, 1965, the date of Dwayne's admission, to August 5, 1965, the date the experimental treatment was initiated, the doctors at Oak Ridge withheld conventional chemotherapy treatment from Dwayne.

45. The withholding of conventional chemotherapy treatment during this time period was contrary to

established standards of medical care and without Mary Sue or Talmon Sexton's knowledge or informed consent.

46. On August 5, 1965, the experimental treatment was initiated. Dwayne was placed under general anesthesia and his bone marrow was sucked out through 17 punctures made in his legs, hips and breastbones. The bone marrow was subjected to 10,000 rads of external radiation and then injected intramuscularly into Mary Sue Sexton's arms and legs.

47. After the bone marrow was taken from Dwayne's body, he was given conventional chemotherapy treatment, which was continued for approximately two to three weeks.

48. Near the end of that two to three week period, Mary Sue Sexton was subjected to surgery so that her lymph could be drained through a tube inserted into her left thoracic duct, just above her collarbone, for approximately the following four days.

49. On August 25, 1985, after the cellular components of the lymph obtained from Mary Sue had been separated, they were injected intravenously into Dwayne's body.

50. With the commencement of these lymphocytic transfusions, the doctors substantially reduced Dwayne's chemotherapy and, shortly thereafter, before a remission of the leukemia had been documented, the doctors withheld Dwayne's chemotherapy completely.

51. The reduction and withholding of conventional chemotherapy treatment during this time period were contrary

to established standards of medical care and without Mary Sue or Talmon Sexton's informed consent.

52. On September 10, 1985, approximately two weeks later, Dwayne's bone marrow was examined and interpreted as demonstrating a remission.

53. This remission was subsequently attributed to the limited chemotherapy Dwayne had been given, rather than to the lymphocyte transfusions.

54. For approximately the following sixteen weeks, the doctors at Oak Ridge continued to withhold conventional maintenance chemotherapy treatment from Dwayne.

55. The doctors at Oak Ridge did not withhold this conventional maintenance chemotherapy from Dwayne because they thought withholding it was in Dwayne's best interests. They withheld conventional maintenance chemotherapy during this time period solely so they could determine more easily whether the experimental treatment had worked.

56. The withholding of conventional maintenance chemotherapy treatment during this time period was contrary to established standards of medical care and without Mary Sue or Talmon Sexton's informed consent.

57. Dwayne was discharged on September 28, 1965.

58. Participation in this experimental treatment was extremely painful for Dwayne and Mary Sue Sexton.

59. By subjecting Dwayne and Mary Sue Sexton to this experimental treatment, withholding chemotherapy after Dwayne's admission to Oak Ridge, reducing the chemotherapy

they had administered once they started the lymphocytic transfusions, terminating Dwayne's chemotherapy shortly thereafter, and withholding maintenance chemotherapy, all without Mary Sue or Talmon Sexton's informed consent, the doctors at Oak Ridge negligently and wrongfully violated established standards of medical research, including, but not limited to, the Nuremberg Code formulated at the Nuremberg War Crime Trials after World War II and ratified in the Charter of the United Nations and the 1964 Helsinki Declaration of the World Medical Association.

60. By subjecting Dwayne and Mary Sue Sexton to this experimental treatment, withholding chemotherapy after Dwayne's admission to Oak Ridge, reducing the chemotherapy they had administered once they started the lymphocytic transfusions, terminating Dwayne's chemotherapy shortly thereafter, and withholding maintenance chemotherapy, all without Mary Sue and Talmon Sexton's informed consent, the doctors at Oak Ridge negligently and wrongfully violated established standards of care, significantly increased the likelihood that any remission of Dwayne's leukemia would be brief, and effectively destroyed Dwayne's best chance for survival.

DWAYNE'S FIRST AND SUBSEQUENT RELAPSES

61. On December 17, 1965, thirteen weeks after documentation of Dwayne's first remission, the doctors at

Oak Ridge examined Dwayne's bone marrow and concluded that he had suffered his first relapse.

62. Given Dwayne's favorable treatment attributes upon admission to Oak Ridge, this was an extremely quick first relapse.

63. The negligent and wrongful experimental treatment to which Dwayne was subjected, including the withholding of conventional chemotherapy treatment, substantially contributed to and directly and proximately caused this extremely quick first relapse.

64. As a result of this extremely quick first relapse, Dwayne's life was shorter and both his and parent's lives were far more physically, emotionally, and psychologically painful than they otherwise would have been.

65. After the first relapse was diagnosed, chemotherapy was started and Dwayne was readmitted to the AEC-owned clinic at Oak Ridge, where he stayed until January 25, 1966, when remission was diagnosed as having been achieved. Conventional maintenance chemotherapy was continued after discharge.

66. From January 25, 1966 through November 28, 1968, Dwayne suffered at least three more relapses, complicated by systemic bacterial infections. With each such relapse, Dwayne was readmitted to the clinic and given intensive chemotherapy until remission and clearing of the infection were diagnosed. Each time, maintenance chemotherapy was continued after discharge.

67. On November 24, 1968, Dwayne was readmitted to the AEC-owned clinic at Oak Ridge for the last time. He had suffered another relapse and had another infection.

**THE SECOND EXPERIMENT:
NEGLIGENT PLANNING AND UNINFORMED CONSENT**

68. When Dwayne was readmitted to the clinic in November of 1968, the doctors advised Mary Sue Sexton (Talmon was at work) that Dwayne's leukemia would no longer respond to chemotherapy.

69. The doctors at Oak Ridge proposed that Dwayne be subjected to and urged Mary Sue Sexton to consent to a second experimental treatment involving nuclear radiation.

70. Specifically, the experimental treatment planned, total body irradiation, was to place Dwayne in a room called the METBI (Medium Exposure Total Body Irradiator), which had been specially constructed with AEC funds, and to expose his entire body to nuclear radiation for over three and one half hours.

71. This experimental treatment had never successfully been used before on any human being in Dwayne's condition.

72. There was a significant possibility that this experimental treatment would add to Dwayne's suffering and shorten his life.

73. The 1966 Report of the AEC's own Medical Program Review Committee, published over a year before this proposed experiment stated, "Abundant data accumulated during the

past 10 years on total body irradiation of leukemics and the ensuing complications resulting therefrom have been uniformly discouraging... [C]ontinuation of this type of experimentation could be criticized on ethical and possibly other grounds."

74. At the time that the doctors at Oak Ridge proposed this second experimental treatment, they were participating in a research program funded by NASA, through an inter-agency agreement with the AEC, seeking to determine the effects of exposure to radiation on human beings. NASA was trying to find out the biological risks that astronauts might encounter during space travel and was particularly interested in the immediate consequences of radiation exposure, such as nausea and vomiting.

75. At the time that the doctors at Oak Ridge proposed this second experimental treatment, they were also participating in a study funded by the Army, through an inter-agency agreement with the AEC, seeking to determine "what levels of single, repeated or protracted irradiation exposure result in alteration of the bacteriological flora of the persons exposed."

76. At the time that the doctors at Oak Ridge proposed this second experimental treatment, they knew that the AEC's Medical Program Review Committee had issued a report in 1966 which (a) concluded that the staff at the Oak Ridge clinic was "disadvantaged by relative intellectual and physical isolation"; (b) criticized the first experiment conducted on

Dwayne Sexton, as "premature" and "remain[ing] to be proven even in animal leukemia systems"; and (c), as is referred to in paragraph 73 above, explicitly noted that continuation of the type of treatment the doctors were now proposing for Dwayne "could be criticized on ethical and possibly on other grounds."

77. In planning to subject Dwayne to this experimental treatment, the doctors at Oak Ridge negligently violated established medical and ethical standards for medical research.

78. In explaining this experimental treatment to Mary Sue Sexton and urging her to consent to it, the doctors at Oak Ridge negligently failed to inform Mary Sue of numerous material facts and negligently and materially misrepresented the nature and purpose of the treatment, the possible alternative treatments, the relative likelihood of success of each treatment, the risks involved, and the complications that might arise.

79. The doctors at Oak Ridge did not inform Mary Sue Sexton of the doctors' earlier improper, unethical, and negligent conduct and its effects.

80. The doctors at Oak Ridge did not inform Mary Sue Sexton of the facts set forth above in paragraphs 71 through 76.

81. The doctors at Oak Ridge informed Mary Sue Sexton that the proposed experimental treatment was Dwayne's best chance for survival.

82. In reliance upon the misrepresentations made by the doctors at Oak Ridge and without knowledge of the material facts concealed by them, Mary Sue Sexton consented to the proposed experimental treatment, convinced that it was Dwayne's best chance for survival.

83. This consent was not informed consent and was improperly, unethically, and negligently obtained. Being a reasonable person, Mary Sue Sexton would not have consented to this experimental treatment if she had been truthfully and fully informed.

THE SECOND EXPERIMENT: NEGLIGENT TREATMENT

84. After Mary Sue Sexton consented to it, the second experiment was conducted. On December 3, 1968, Dwayne was placed in the METBI and his body was subjected to 353 rads of nuclear radiation for over three and one half hours, yielding an average body dose of 265 rads.

85. This dose of radiation was only somewhat less than the dose considered lethal to an average, healthy adult male.

86. Following this exposure, Dwayne was wheeled to a second room at the Oak Ridge facility called the LETBI (Low Exposure Total Body Irradiator), also specially built with AEC funds, where a special umbilicus belt was strapped to his body to monitor his physical responses to the irradiation.

87. The special monitoring device had been purchased with funds reimbursed by NASA for use in conjunction with the NASA radiation research program and the data obtained from monitoring Dwayne was recorded and stored in accordance with the procedures established for the NASA program.

88. Dwayne's medical records specifically note that he "amazingly did not have any nausea or vomiting during the time of exposure or immediately thereafter."

89. The total body irradiation to which Dwayne was subjected had the effect of suppressing his immune system, thereby inhibiting his body's capacity to defend itself from infection and disease.

90. On the day that the doctors at Oak Ridge subjected Dwayne to this total body irradiation, he already had a serious staph infection.

91. Dwayne's medical records state that he was taken to the LETBI facility after irradiation to provide him with "an as sterile environment as possible".

92. On information and belief, during this time period, just beneath the wooden flooring of the LETBI facility, approximately 50 cages of laboratory mice had been suspended on plastic cords so the doctors at Oak Ridge could study the effects of irradiation on the mice.

93. On information and belief, during this time period, twice a week, animal caretakers crawled beneath the floors of the LETBI facility to provide fresh food and water for the mice and carried the dirty cages through the patient area to an elevator down to the cage washer.

94. An individual review of the AEC's 1974 Medical Program Review Report noted that the LETBI facility was "highly prone to severe infestations of vermin."

95. The total body irradiation experiment in which Dwayne participated caused Dwayne great pain, compounded his poor health, and hastened his death by worsening his condition.

96. By subjecting Dwayne to this experimental treatment without Mary Sue or Talmon Sexton's informed consent, the doctors at Oak Ridge negligently and wrongfully violated established standards of medical research, including, but not limited to, the Nuremberg Code formulated at the Nuremberg War Crime Trials after World War II and ratified in the Charter of the United Nations and the 1964 Helsinki Declaration of the World Medical Association.

97. By subjecting Dwayne to this experimental treatment without Mary Sue or Talmon Sexton's informed consent, the doctors at Oak Ridge negligently and wrongfully violated established standards of medical care, added to Dwayne's suffering, and shortened his life.

98. On December 29, 1968, three and a half weeks after the total body irradiation, Dwayne died. The immediate cause of death was an uncontrolled staph and strep infection circulating throughout his bloodstream.

THE SEXTONS' DISCOVERY OF THEIR CLAIMS

99. Mary Sue and Talmon Sexton did not discover that the doctors at Oak Ridge or the federal government had caused them or Dwayne any injury until after June 10, 1981.

100. Until that time, Mary Sue and Talmon Sexton reasonably believed that the doctors at Oak Ridge had given Dwayne the best possible treatment and that Dwayne's pain, suffering, and death and their pain and suffering had been caused solely by Dwayne's leukemia.

101. Their discovery that both they and Dwayne had, in fact, been caused injury by the doctors at Oak Ridge and the federal government renewed the extreme pain and suffering Mary Sue and Talmon Sexton had already endured, added to it, and caused them to, among other things, file this lawsuit.

THE FEDERAL GOVERNMENT'S LIABILITY

102. The federal government is liable for the injuries suffered by the Sextons because the doctors at Oak Ridge were employees of the government for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

103. The federal government is liable for the injuries suffered by the Sextons because the doctors were agents of the government, which had the power to supervise the day-to-day activities at Oak Ridge and, if necessary, to control the detailed physical performance of the work conducted there.

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104. The federal government is liable for the injuries suffered by the Sextons because it implemented its decision to fund, supervise, and conduct inherently dangerous medical research into the uses and effects of nuclear radiation in a negligent and wrongful manner and, in so doing, directly and proximately caused the Sextons' injuries.

THE SEXTONS' DAMAGES

105. As a direct and proximate result of the government's negligent and unlawful conduct, Dwayne Sexton was unwittingly treated as a human guinea pig; suffered severe physical, emotional and psychological damage; was deprived of his best chance for long-term survival; lived a shorter and more painful life; and died at the age of six.

106. As a direct and proximate result of the government's negligent and wrongful conduct, Mary Sue Sexton was unwittingly treated as a human guinea pig; suffered severe physical, emotional, and psychological injury; unknowingly incurred the risk of contracting Dwayne's leukemia; and was deprived of her right to decide upon her and her son's medical treatment and care.

107. As a direct and proximate result of the government's negligent and wrongful conduct, Talmon Sexton suffered severe physical, emotional, and psychological injury and was deprived of his right to decide upon his son's medical treatment and care.

defendant United States of America for the following:

- a) Five million dollars (\$5,000,000.00) in compensatory damages to Mary Sue and Talmon Sexton,
- b) Five million dollars (\$5,000,000.00) in compensatory damages to the estate of Dwayne Sexton, and
- c) Such other and further relief as the court deems just and proper.



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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MARY SUE SEXTON, TALMON SEXTON,)
and the ESTATE OF TALMON)
DWAYNE SEXTON,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Civil Action No.
85-1728

MOTION OF DEFENDANT UNITED STATES
OF AMERICA FOR ORDER DISMISSING
COMPLAINT FOR IMPROPER VENUE

Defendant United States of America, by its attorneys, respectfully moves this Court, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and Local Rule 1-9, for an order dismissing the Complaint in this action. This motion is made upon the ground that venue is improper in the District of Columbia and is supported by the Statement of Points and Authorities attached

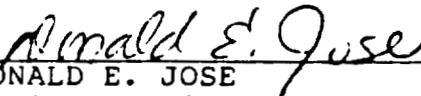
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hereto and the Complaint. Pursuant to Local Rule 1-9(c) a Proposed Order is attached.

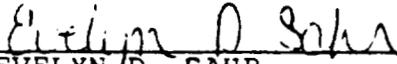
Respectfully submitted,

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U.S. Department of Energy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY SUE SEXTON, TALMON SEXTON,
and the ESTATE OF TALMON
DWAYNE SEXTON,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No.
85-1728

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF DEFENDANT
UNITED STATES OF AMERICA FOR ORDER
DISMISSING COMPLAINT FOR IMPROPER VENUE

I. PRELIMINARY STATEMENT

Plaintiffs instituted this medical malpractice action against the United States on May 28, 1985, seeking damages for alleged improper medical care provided to Talmon Dwayne Sexton and Mary Sue Sexton by the Oak Ridge Associated Universities Medical Division in Oak Ridge, Tennessee (hereinafter "Oak Ridge") during the mid 1960s.^{1/}

Jurisdiction for plaintiffs' action is based upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b), et seq. Complaint, ¶ 2. Plaintiffs Mary Sue Sexton and Talmon Sexton are residents of Tennessee and are the administrators of the estate of their deceased son, Talmon Dwayne Sexton. Complaint ¶ 4. The Oak

^{1/} In fact, Talmon Dwayne Sexton was suffering from a terminal condition and he received fine medical care which enabled him to live longer than the average person with his medical condition. This is a meritless case.

Ridge medical facility in which Dwayne Sexton was treated is located in Oak Ridge, Tennessee. Complaint ¶ 3. The acts or omissions upon which plaintiffs base their cause of action against the United States occurred in Tennessee. Complaint ¶¶ 20-43, 44-60, 61-67, 68-83, 84-101, 102-104.

Venue in the District Court for the District of Columbia in this action clearly is improper. The Federal Tort Claims Act's venue provision, 28 U.S.C. § 1402(b), allows suit to be brought against the United States only where the plaintiff resides or where the act or omission occurred. The District of Columbia meets neither of these criteria. This action, thus, must be dismissed for improper venue. See 28 U.S.C. § 1406.2/

II. ARGUMENT

VENUE IN THE DISTRICT OF COLUMBIA IS IMPROPER INASMUCH AS PLAINTIFFS RESIDE IN TENNESSEE AND THEIR CLAIM AROSE IN TENNESSEE

It is well-settled that the United States, as sovereign, "is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584 at 586 (1941); United States v. Testan, 424 U.S. 392 at 399 (1976). Absent such consent, suit against the United States is absolutely barred by the doctrine of sovereign immunity. The waiver of sovereign immunity, moreover, cannot be

2/ The United States would not oppose a transfer of this case to the Eastern District of Tennessee.

implied; it must be unequivocally expressed. United States v. Testan, supra; United States v. King, 359 U.S. 1 (1969).

Plaintiffs have instituted suit against the United States under the Federal Tort Claims Act which does provide a limited waiver of sovereign immunity. Suits instituted under the Act, however, must be pursued in compliance with the Act's provisions.

The venue provisions of the Federal Tort Claims Act are set forth at 28 U.S.C. § 1402(b), which provides:

Any civil action on a tort claim against the United States under subsection (b) of § 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. (Emphasis supplied.)

Section 1402(b) provides an express limitation on where suits against the United States may be brought. Buchheit v. United Airlines, Inc., 202 F. Supp. 811, 815 (S.D.N.Y. 1962); Misko v. United States, 77 F.R.D. 425 (D.D.C. 1978). Under section 1402(b), the only proper forum for the resolution of plaintiffs' claims in the instant action is the Eastern District of Tennessee. It is in that federal district, not the District of Columbia, that the plaintiffs reside and that the acts or omissions complained of in the complaint occurred.

Plaintiffs Talmon Sexton and Mary Sue Sexton admit in their complaint that they reside at 2333 Cranshaw Drive, Kingsport, Tennessee. Complaint, ¶ 4. Moreover, it has been held that the "residence" of an estate for purposes of the venue provisions of the Federal Tort Claims Act is the personal residence of the

estate's administrator or executor. See Buchheit v. United Air Lines, Inc., 202 F. Supp. 811 (S.D.N.Y. 1962). The "residence" of the estate of Talmon Dwayne Sexton therefore is also in Tennessee.

Examination of the numerous allegations in plaintiffs' complaint, moreover, clearly establishes that the acts or omissions on which plaintiffs rely in seeking to impose liability on the United States occurred exclusively in Tennessee. Of the over 100 paragraphs of allegations in plaintiffs' complaint all but a handful describe acts or omissions which occurred in Tennessee, and specifically at the Oak Ridge medical facility. Dwayne's immunotherapy (Complaint ¶¶ 44-60) and the total body irradiation treatments (Complaint ¶¶ 84-101) occurred at Oak Ridge; the experimental procedure which Dwayne's mother, Mary Sue Sexton, underwent occurred at Oak Ridge (Complaint ¶¶ 44-60); the discussions between the Sextons' and the doctors at Oak Ridge regarding these treatments as well as the Sextons' consent to the experimental treatments occurred at Oak Ridge (Complaint ¶¶ 20-43, 68-83), and the alleged misrepresentations by Oak Ridge doctors to Talmon and May Sue Sexton occurred at Oak Ridge (Complaint ¶¶ 20-43, 68-83). In fact, every incident of Dwayne Sexton's leukemia treatment, from the time he entered Oak Ridge in July, 1965 until his death in December, 1968 3/ occurred in Oak Ridge, Tennessee.

3/ For this Court's information, we note that the plaintiffs have already tried to pursue this same medical malpractice claim in the Tennessee state courts. The action was dismissed since the statute of limitations obviously had run. The FTCA statute of limitations also expired long before suit was filed. 28 U.S.C. § 2401(b).

The only allegation in plaintiffs' complaint which allegedly occurred outside of Tennessee is the allegation relating to the United States' decision to fund, supervise and conduct research at the Oak Ridge medical facility. See Complaint, ¶ 10. Plaintiffs, however, specifically admit that this "action" was a discretionary policy decision of the federal government which they do not seek to challenge.^{4/} Complaint, ¶ 10. In fact, plaintiffs specifically limit their claims against the United States to the government's alleged wrongful implementation of its decision to fund and supervise the research at Oak Ridge, Tennessee. Complaint ¶¶ 11, 104. Reference to the numerous allegations in the complaint establishes a fortiori that all of the acts and/or omissions relating to the implementation of research at the Oak Ridge Medical facility did, in fact, occur in Oak Ridge. Plaintiffs' cryptic reference to the fact that the Atomic Energy Commission was headquartered in Washington, D.C. (See Complaint, ¶ 11) should not be allowed to cloud this fact. Accord Buchheit v. United Air Lines, Inc., 202 F. Supp. 811 (S.D.N.Y. 1962) (where the United States allegedly was negligent in the operation and control of radar facilities, the negligence occurred, for purposes of § 1402(b), where the facilities existed.)

^{4/} In fact, plaintiffs could not prevail on a claim of negligent granting of research funds since both this Court and the U.S. Supreme Court have held that such a claim is barred by the discretionary function exception to the Federal Tort Claims Act. Relf v. United States, 433 F. Supp. 423 (D.D.C. 1977) aff'd 593 F.2d 1371 (D.C. Cir. 1979); United States v. Orleans, 425 U.S. 807 (1976).

In sum, there is no evidence whatsoever to support venue of this action in the District of Columbia. The only proper forum for the resolution of plaintiffs' claims under 28 U.S.C. § 1402(b) is the Eastern District of Tennessee. It is in that district, not the District of Columbia, that the plaintiffs reside and that their cause of action arose.

III. CONCLUSION

For the foregoing reasons, defendant United States of America requests that plaintiffs' action be dismissed pursuant to Rule 12 (b)(3) of the Federal Rules of Civil Procedure for improper venue.

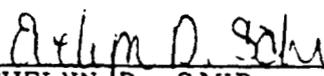
Respectfully submitted,

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UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion of Defendant United States of America for Order Dismissing Complaint for Improper Venue was served by first class mail, postage prepaid, this 25th day of July, upon:

Arthur H. Bryant, Esquire
Anthony Z. Roisman, Esquire
Trial Lawyers for Public
Justice, P.C.
2000 P Street, N.W., Suite 611
Washington, D.C. 20036

Evelyn D. Sahr
EVELYN D. SAHR

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157-16-89

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY SUE SEXTON, TALMON SEXTON)
and the ESTATE OF TALMON)
DWAYNE SEXTON,)

Plaintiffs,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Civil Action No. 85-1728

FILED

SEP 17 1986

MEMORANDUM AND ORDER

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

This hybrid wrongful death case is presently before the Court on defendant's motion for summary judgment. The facts material to the disposition made hereby are not in dispute.

Plaintiffs Mary Sue and Talmon Sexton seek damages from the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. (1965), for allegedly improper medical care provided to their infant son, Dwayne, by the Oak Ridge Associated Universities clinic ("ORAU") in the mid-1960's. ORAU, a non-profit Tennessee corporation owned by a consortium of educational institutions, operated a cancer research program in Oak Ridge, Tennessee, which was funded by the Atomic Energy Commission ("AEC"), a federal agency, pursuant to contract. In July, 1965, Dwayne Sexton entered the ORAU clinic with a diagnosis of acute lymphatic leukemia. His treatment included experimental immunotherapy, to which his parents consented, in

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ignorance, they say, of conventional alternatives which might have proved more beneficial had they been employed.¹ Dwayne died at age six on December 29, 1968, three and one-half years after his disease was diagnosed. Plaintiffs claim that their son was used as an "unwitting human guinea pig" for research in nuclear radiation, a tragic misadventure for which the government was responsible. Specifically, plaintiffs allege that the Division of Biology and Medicine of the AEC negligently implemented the funding, supervision and conduct of the research, by failing to take adequate precautions to assure the rights and safety of potential human research subjects.

The United States moves for summary judgment of dismissal on several grounds: (1) the statute of limitations under the FTCA has run on the cause of action; (2) the AEC's actions fall within the discretionary function exception to the FTCA's waiver of sovereign immunity; (3) the culpable conduct, if any, was that of ORAU which comes within the independent contractor exception to FTCA liability; and (4) the plaintiffs' amended complaint does not state a cognizable cause of action in tort upon which relief could be granted. Because the Court concludes that the FTCA's

¹ The record, however, contains a written consent form, signed by both Mr. and Mrs. Sexton, which makes specific reference to the "experimental" nature of the treatment and acknowledges that "more conventional" treatment was offered. (Deposition of Mary Sue Sexton of July 7, 1986, Exhibit 1).

two-year statute of limitations bars this action, defendant's motion for summary judgment will be granted without reaching the remaining issues.

Section 2401(b) of Title 28 provides that tort claims against the United States must be brought "within two years after such claim accrues." 28 U.S.C. § 2401(b) (1976). The parties are agreed that application of the statute to the circumstances of this case is controlled by Kubrick v. United States, 444 U.S. 111 (1979), in which the Supreme Court held that the FTCA's period of limitations begins to run when a prospective plaintiff is in possession of both knowledge of his injury and its cause; it does not remain dormant until he also knows (or suspects) that the government has been blameworthy with respect to it.

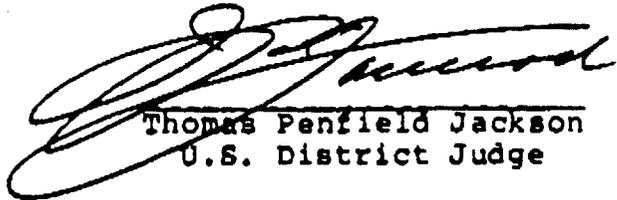
The Sextons knew of the "injury," i.e., Dwayne's death, on December 29, 1968. They also knew its "cause," namely, the failure of his life-threatening illness to respond favorably to admittedly experimental therapy. Yet they made no inquiries during the ensuing two years, nor for many years thereafter, to determine whether their consent to submit their son to the treatment had been ill-advised. And, of course, they made no claims until their administrative claim was presented in June of 1983.

In February, 1981, a journalist, with connections to a well-known syndicated columnist, communicated with the Sextons on several occasions regarding his own investigation of the activities of the ORAU clinic. In March of 1981, he wrote the Sextons about impending Congressional hearings on ORAU's cancer research, enclosing a copy of an AEC document critical of certain aspects of the ORAU research program and suggesting that Mrs. Sexton might expect to be a witness at the Congressional hearings. Whether or not their suspicions were yet aroused, the Sextons took no action looking to prosecution of a claim against the United States until their presentation of an administrative claim nearly 27 months later, although they acknowledge being aware of the governmental funding of the ORAU clinic from the beginning.²

In light of the above, the statute of limitations presents an absolute jurisdictional bar to the maintenance of this action filed on May 28, 1985, and the further discovery the plaintiffs plead to be allowed to take could not alter the undisputed, chronological facts already of record which mandate dismissal of this suit.

² The record discloses that, as early as the summer of 1982, the Sextons had commenced a wrongful death suit against ORAU in a Tennessee state court, claiming that fraudulent concealment of the true purpose of the experiment excused their delay in filing. The suit was nevertheless dismissed as barred by the state's three-year statute of limitations, and the dismissal was affirmed on appeal.

It is, therefore, this 17th day of September, 1986,
ORDERED, that defendant's motion for summary judgment is
granted, and the amended complaint dismissed with prejudice.



Thomas Penfield Jackson
U.S. District Judge