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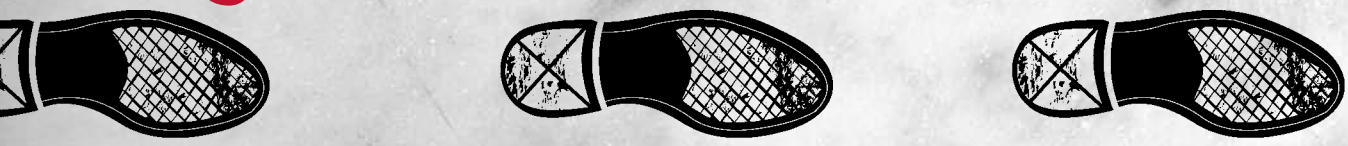
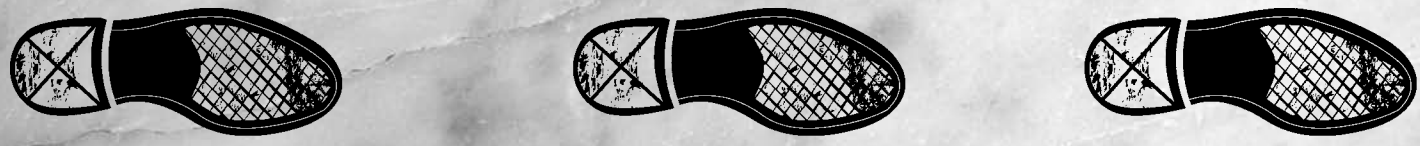
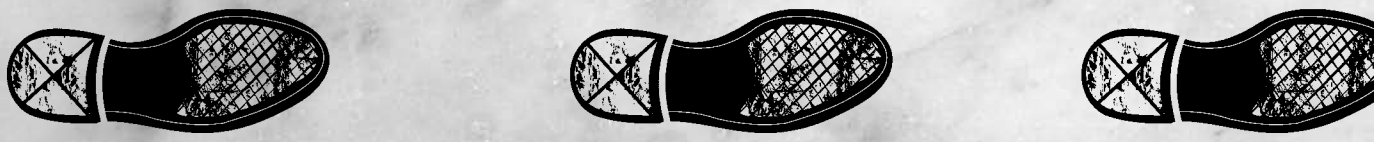


THE SUPREME COURT CONTINUES ITS MARCH TO THE RIGHT





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SHRIVER CENTER
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Denied Water Service Because of Race, African Americans Win $10.85 Million Jury Verdict

In most American communities, access to clean, safe water is taken for granted. Even where water is not delivered by municipal pipelines, residents can usually drill a well or tap into a spring for usable water. Nonetheless, in some areas the only accessible water is contaminated and unusable. Further, some of these areas lack usable water because of the race of the residents. The *Kennedy v. City of Zanesville* case involved precisely such a community—a neighborhood subjected to decades of needless suffering from the denial of water simply because most of its residents are African American.

Factual Background

Sixty miles east of Columbus, Ohio, just off Interstate 70 on the outskirts of the City of Zanesville is the small community of Coal Run. The neighborhood, on the eastern border of the city, is within Muskingum County. The Coal Run neighborhood is a close-knit community of approximately twenty-five to thirty households. Throughout its history, most Coal Run residents have been African American. The areas surrounding the Coal Run neighborhood, by contrast, are virtually all white.

Contaminated by years of mining in the area, the ground water in the Coal Run neighborhood cannot be used for any purpose, and Coal Run residents struggled for decades to get water for drinking, cooking, and bathing. Residents caught rainwater off their roofs, melted snow, hauled water in swimming pool liners in the back of pickup trucks, and paid for water haulers. The water collected by the Coal Run residents was stored in cisterns and pumped into their homes. Despite the residents' continuous efforts, bacteria, insects, and rodents infested the cistern water. Those who tried to use the contaminated groundwater ruined appliances, plumbing, and clothes.

Meanwhile, the white households surrounding Coal Run enjoyed clean and pure water pumped straight to their homes from a water-treatment plant about a mile from the Coal Run neighborhood. The two primary suppliers of water to these white households were the City of Zanesville and Muskingum County.

In various white areas outside Zanesville the city constructed water projects, among them a waterline that served the homes surrounding the Coal Run neighborhood. The waterline, built in 1954, stopped at the last house before the Coal Run neighborhood. The Coal Run residents were never permitted to connect to the line, while their white next-door neighbors received all the water that they needed.

In 1967 the county created the East Muskingum Water Authority, and over the next thirty-five years the water authority constructed water projects throughout the county, including most of the developed areas where water services were not already available. In 1990 the county itself also began funding and constructing water projects. The county developed a list of anticipated waterline projects and sought millions of federal and state dollars to fund them. Coal Run did not make the list. These projects ran miles from the water sources and even passed right by the Coal Run neighborhood. By 2002 the county and the water authority had completed a project that ended a few thousand feet from the Coal Run neighborhood, and the waterlines spread throughout the county. Completely surrounded by waterlines, Coal Run residents still had no water.

From the time the city began bringing water service near Coal Run in the 1950s, the Coal Run residents continually asked the city and later the East Muskingum Water Authority and county for water service. The requests came in every form—at meetings, personal inquiries, letters, petitions, calls, and so forth—but the city and county always said "no" and simply disregarded this predominantly African American community. An emblematic response to Coal Run residents' requests for water occurred in 2001 when Jerry and Richard Kennedy Jr., two Coal Run residents, attended a Muskingum County public hearing on funding water projects. As the Kennedys described, when they asked for water to the Coal Run neighborhood, a county commissioner told them that they would not see water unless President Bush dropped a spiral bomb in their neighborhood and it hit good water. The Kennedys were told that their great grandchildren would be lucky to see water. These types of denials went on for fifty years with one result: no water in Coal Run.

The Legal Claims

On July 26, 2002, thirty-four Coal Run residents filed with the Ohio Civil Rights Commission discrimination complaints in which they alleged a pattern and practice of discrimination by the City of Zanesville, Muskingum County, and Washington Township, which is another governmental entity within the county and outside the city limits, in violation of federal and state fair housing laws through their refusal to provide water service to the Coal Run neighborhood. The commission found probable cause to conclude that discrimination had occurred. On November 13, 2003, three residents filed in Ohio district court a class action complaint alleging that the city's and county's (along with Washington Township, which was later dismissed from the case) denial of water service since the 1950s violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) (42 U.S.C. §§ 3601 *et seq.*), Sections 1981 and 1982 of the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982), the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Ohio state fair housing law (Ohio Rev. Code Ann. §§ 4112.01 *et seq.*) (*Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (decision on summary judgment motions). The Fair Housing Advocates Association, a fair housing organization that had assisted the community in educating the residents regarding their rights and developing the facts supporting the residents' administrative complaints, also joined the complaint. The Ohio attorney general separately filed a discrimination complaint under state law in state court on behalf of the State of Ohio based on the Ohio Civil Rights Commission's probable-cause finding. The attorney general's case was later consolidated with the individual plaintiffs' complaint in federal court.

The case proceeded through several years of discovery—in-

cluding more than one hundred depositions and the review of hundreds of thousands of pages of documents. The extensive record confirmed two basic facts: (1) waterlines ran throughout the county, but a gap in coverage always precisely aligned with the Coal Run neighborhood, the only predominantly African American neighborhood in the county, and (2) the city and county had no plausible explanation for the difference in treatment of Coal Run.

The plaintiffs ultimately decided not to file for class certification and instead amended the complaint to name all individual Coal Run residents who chose to participate in the case. The primary benefits of a class action—that is, having a vehicle to identify and notify victims, protect the rights of unknown victims, and reach complete resolution of all potential claims—were not present in the case because all of the current and former residents of Coal Run could be identified and each could be given a direct opportunity to participate in the case. Moreover, a grant of a motion for class certification is invariably the subject of a defendant's interlocutory appeal, which causes substantial delay. The Coal Run residents simply could not afford any more delays in the resolution of the matter. Many residents who suffered for years without water passed away before the case even began, and another three plaintiffs—Helen McCuen, Bobby Kennedy, and Bryan Newman—passed away while the case was pending. After the amendment to include the individuals who sought to participate in the case, sixty-eight Coal Run residents were named as plaintiffs.

Legal Challenges

The city's and county's primary pretrial legal challenges to the plaintiffs' claims came in the form of multiple summary judgment motions. The motions focused on two arguments: that the plaintiffs' claims were barred by the statute of limitations and that the plaintiffs lacked standing.

Statute-of-Limitations Challenge. The plaintiffs' claims under the various antidiscrimination laws were all subject to a two-year statute of limitations, but the plaintiffs sought damages extending as far back as 1954 when the discriminatory denial of service began. We argued that the city and county engaged in a continuous and ongoing discriminatory practice of denying water to the Coal Run neighborhood and that, because the practice continued until after the plaintiffs filed discrimination complaints, it constituted a continuing violation. Under the continuing-violations doctrine, a plaintiff may challenge a practice that is manifested through an ongoing history of discriminatory acts and that continues into the limitations period.

The analysis of a continuing violation under the fair housing laws is controlled by the U.S. Supreme Court's decision in *Havens Realty Corporation v. Coleman* (455 U.S. 363, 380–81 (1982)). In that case the Court found that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [two years] of the last asserted occurrence of that practice" (*id.*). The continuing-violations doctrine under the fair housing laws is unique and based on a number of factors specific to the Fair Housing Act. First, as the Court recognized in a number of cases, the Fair Housing Act must be given "a generous construction" because it embodies a "policy of the United States that Congress considered to be of the highest priority" (*Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 209, 212 (1972)). Second, unlike other antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), the Fair Housing Act statutorily incorporates a continuing-violations doctrine by stating that a civil action must be commenced not later than two years after "the occurrence *or the termination* of an alleged discriminatory housing practice … whichever occurs last" (Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A) (emphasis added)).

The plaintiffs showed that the city and county had long-standing discriminatory practices of denying water services to the Coal Run neighborhood by (1) passing over the predominantly African American Coal Run neighborhood to construct water projects in predominantly white neighborhoods, (2) refusing requests for water service to the Coal Run neighborhood while simultaneously granting requests for water to predominantly white neighborhoods, and (3) allowing white households, but not African American households, to connect to existing waterlines bordering the Coal Run neighborhood. The district court examined these forms of discrimination and agreed with the plaintiffs that they constituted a continuing violation.

When seeking to invoke the continuing-violations doctrine, plaintiffs frequently face the argument that they merely complain of "continual ill effects from an original violation," which does not support a continuing violation (see *Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618, 625 (2007), superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending 42 U.S.C. § 2000e-5(e)). A continuing violation may be found only where there is an ongoing pattern of unlawful acts or an ongoing unlawful practice. The city and county raised this argument, but the plaintiffs were able to persuade the court that they were not challenging "one request and denial" that caused subsequent injuries but rather "a pattern of requests and denials" that each injured the Coal Run residents.

Raising a final argument against the application of the continuing-violations doctrine, the city and county asserted that the plaintiffs who moved from the Coal Run neighborhood more than two years before the filing of the complaint, that is, outside the statute-of-limitations period, should not benefit from the continuing-violations doctrine. The essence of the argument was that a discriminatory practice did not continue into the statute-of-limitations period against residents who moved from the neighborhood more than two years before the filing of complaints. We noted that this argument had been implicitly rejected in *Havens*, and the district court in our case agreed, stating:

> [The defendants'] assertion undermines the purpose of the [continuing-violations] doctrine which is to allow claims for actions against an ongoing *practice* of discrimination, which may not be recognized until a pattern takes form in the future. Merely because residents have moved away from the neighborhood outside the applicable statute of limitations period does not mean that they lose their claims for an on-

> going practice of discrimination, the earlier stages of which injured them while residing in the neighborhood.

(*Kennedy*, 505 F. Supp. 2d at 492). The district court thus found that each plaintiff was entitled to challenge the city's and county's discriminatory denial of water for the entire time that each plaintiff lived in the neighborhood; for some residents, this led to claims extending as far back as 1954 (*id.*).

Challenge to Plaintiffs' Standing. The city and county raised two arguments against some of the Coal Run residents' standing to bring fair housing claims challenging the denial of water to their neighborhood. First, the city and county argued that white residents of Coal Run could not avail themselves of the protections of the civil rights laws because they were not minorities. Second, the city and county argued that only residents who directly and explicitly requested water had standing to sue.

Standing of White Plaintiffs. Our response to the "no white plaintiffs" argument was that the Fair Housing Act permits any "aggrieved person"—defined as anyone who "claims to have been injured by a discriminatory housing practice"—to bring an action under the Act (42 U.S.C. § 3613). As described by the Supreme Court, this means that the Act confers standing as broadly as is permitted by Article III of the Constitution and that the touchstone for standing under the Act is whether the plaintiff suffered injury (*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103–4 n.9 (1979) (Clearinghouse No. 26,607)).

The district court found standing for the white plaintiffs and stated that "[t]he white Plaintiffs are not resting on injuries suffered by their black neighbors; they are instead seeking relief for specific injuries they themselves suffered: lack of public water service as a result of Defendants' alleged discrimination" (*Kennedy*, 505 F. Supp. 2d at 488).

Standing Under the Futile-Gesture Doctrine. In our response to the defendants' argument that only those residents who requested water had standing, we discussed the futile-gesture doctrine. In essence the doctrine holds that plaintiffs may be excused from any requirement to apply when such applying would be futile (*Pinchback v. Armistead Homes Corporation*, 907 F.2d 1447, 1451–52 (4th Cir. 1990)). The district court found such futility in Coal Run:

> The record shows that individuals from Coal Run tried on multiple occasions to get water for their families, but were unsuccessful, and likely frustrated by the rejection and finger-pointing between the actors in public water service. Further, because the Coal Run neighborhood is a small, close-knit community, there is a genuine issue of material fact as to whether those Plaintiffs who did not formally call Defendants, submit a petition, or attend a public meeting failed to do so because of their knowledge of Defendants' alleged discriminatory policies with respect to public water service.

(*Kennedy*, 505 F. Supp. 2d at 497).

The illogical nature of the city's and county's standing arguments is perhaps best illustrated by the experiences of plaintiffs Richard and Jeanene Kennedy. Richard and Jeanene are married and had lived together in Coal Run for more than forty years. Richard is African American, and Jeanene is white. Richard did request water a number of times, but Jeanene did not. Under the city's and county's argument, Jeanene would not have standing both because she is white and because she did not request water. However, when the city and county turned down her husband's requests, they also denied her water, and she suffered the same harms. Jeanene, as were the rest of the Coal Run plaintiffs, was appropriately granted standing (*id.* at 487–88).

Trial

Trial commenced in May 2008. Numerous aspects of the six-week presentation of evidence were significant, but two aspects stood out almost every day of the trial. First, with the assistance of our expert, Dr. Allan Parnell of the Cedar Grove Institute in North Carolina, and Rose Ehler, a paralegal with our firm, Relman & Dane, we created a series of maps that presented a picture of the discrimination in the Coal Run neighborhood. With Dr. Parnell, we obtained data regarding the racial demographics of Coal Run and the rest of the county and data regarding which households had water service in the county. The maps of these data were more powerful than any oral description of the evidence of discrimination. They showed how waterlines stretched to far-flung white households throughout the county and served the white households surrounding Coal Run while leaving a gap where the African Americans lived. These maps, which were presented to the jury virtually every day of the trial, served as a constant pictorial reminder of the racial divide in water service in Muskingum County.

The second aspect of the trial that stood out was the daily theme of the implausibility of the city's and county's excuses for not providing water service to Coal Run. The city's defense was essentially that it did not provide water service to anyone outside city limits. Although Coal Run was outside city limits, we were able to show numerous city waterlines spread out past the city's borders. In fact, 10 percent of all of the city's water customers lived, as did the Coal Run residents, outside the city.

The county argued that it did nothing wrong because it was new to the water business and provided water to Coal Run in a manner consistent with the sequence in which communities requested water. Because this argument ignored several fundamental facts, the jury easily rejected it. Most important, Coal Run received water from the county only after the Coal Run residents filed formal complaints of discrimination accusing the county of race discrimination. Before the filing of the complaints, the county had long lists of anticipated water projects in the county, but Coal Run never appeared on them. County officials did not consider including Coal Run in water projects going to neighboring white neighborhoods even when doing so would have made those projects to white neighborhoods more feasible. And, before the complaints were filed, county officials ridiculed and insulted Coal Run residents and ignored their requests for water.

The jury deliberated for two weeks and returned a verdict in favor of every single plaintiff on every single claim. The jury awarded each plaintiff a separate amount based on the number of years each lived in the neighborhood for a total award of $10.85 million.

Settlement

The defendants appealed to the Sixth Circuit. Although we and the Coal Run residents believed that the district court's rulings during the case and the jury's verdict were well founded, fully defensible, and likely to be upheld, we entered settlement negotiations with both the city and the county. A significant factor during the settlement negotiations was the potential harm of further delay. The residents of Coal Run had waited long enough, and even a complete victory in the appeal would have pushed off final resolution as long as two years. If the case were remanded for any issues, the delay would have been even longer. The phrase "justice delayed is justice denied" took on new meaning when we faced the realistic prospect that some residents might never see justice come to Coal Run if the appeals ran their course. The negotiations were simplified by the jury verdicts having awarded each plaintiff a specific amount, taking the question of the appropriate measure of damages out of the equation. The parties ultimately reached agreement, and the matter was fully and finally settled for $9.6 million.

■ ■ ■

The result was one of the largest fair housing verdicts ever, and the residents were united in saying that the biggest victory of the case was the vindication of their belief about why they had been denied water for so long. Before the case, the Coal Run residents were treated by so many in the surrounding communities as second-class citizens not even deserving of the most basic service of water. Residents thus were particularly gratified to have a jury of their peers reaffirm that they had all along been victims of racial discrimination. The Coal Run residents now move forward with their lives, with water and some compensation for the years of discrimination.

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