FILED
SUPREME COURT

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NAVAJO NATION

IN THE SUPREME COURT OF THE NAVAJO NATION

John Doe BF,

Plaintiff/Appellants

vs.

DIOCESE OF GALLUP, FR. CHUCK CICHANOWICZ, a/k/a FR. CHARLES CICHANOWICZ, FRANCISCAN FRIARS PROVINCE OF ST. JOHN THE BAPTIST a/k/a THE PROVINCE OF ST. JOHN THE BAPTIST OF THE ORDER OF FRIARS MINOR, INC. a/k/a THE FRANCISCAN MISSIONARY UNION OF THE PROVINCE OF ST. JOHN THE BAPTIST, FRANCISCAN FRIARS PROVINCE OF OUR LADY OF GUADALUPE a/k/a THE PROVINCE OF OUR LADY OF GUADALUPE OF THE ORDER OF FRIARS MINOR, INC.

Defendants/Appellees.

Case No. SC-CV-06-10
Re: SC-CV-01-02

NOTICE OF APPEAL

Notice is hereby given that the above named Appellants appeal to the Supreme Court of the Navajo Nation from the Order entered in this action on January 19, 2010. Said Order was issued by the District Court of the Navajo Nation in Cause No. SR-CV-369-07-CV. A certified copy of the Order is attached as Exhibit "A".

Respectfully submitted this 11th day of February, 2010.

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this 11th day of February to:

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NAVAJO NATION DISTRICT COURT
DISTRICT OF SHIPROCK, NEW MEXICO

John Doe BF Plaintiff, vs. DIOCESE OF GALLUP, et. al., Defendants.	Case No. SR-CV-369-07-CV **ORDER TO DISMISS**

THIS MATTER COMES before this Court on a compliant filed by Plaintiff asserting personal injury caused from sexual acts engaged by the Defendant, Priest of the above named Diocese, when the Plaintiff was about 14 or 15 years of age, approximately 23 years ago, from the time Plaintiff filed his petition with this Court.

A hearing was held on September 22, 2009, two issues were discussed: (1) Whether Plaintiff met his burden to show jurisdiction by "specific facts", and (2) Whether Plaintiff's time was barred by Navajo Nation law. This Court concludes that this Court does have jurisdiction to hear this case. The Treaty of 1868 provides express authority of the Navajo Nation's jurisdiction over non-Indians regarding civil matters. See Ford Motor Company v. Todecheene, No. SC-CV-33-07, slip op. (Nav.Sup. Ct., December 18, 2008). However, the Court DISMISSES the case on the second issue, and it states its reasons below:

1. 7 Navajo Nation Code § 602 sets the limit of time within which a plaintiff may bring a cause of action for personal injury. This limitation is not jurisdictional, but it is a waivable defense. *Estate of Begay No. 2*, 6 Nav. R. 405, 406 (Nav. Sup. Ct. 1991). Plaintiff asserts that while the acts that were the result of his injury occurred very many

years ago, the time for bringing a personal injury suit did not begin until 2007, when he realized that problems he had experienced over the years were the result of these past acts. 7 Navajo Nation Code § 602(A)(4) states, "No cause of action accrues for personal injury or wrongful death until the party having the right to sue has discovered the nature of the injury, the cause of the injury, and the identity of the party whose action or inaction caused the injury, or until, in the exercise of reasonable diligence, in light of available knowledge and resources the party should have discovered these facts, which ever is earlier."

2. Plaintiff asserts that he was not aware of any physical or mental injury, until his cognitive insight in 2007, the sexual acts he had engaged in at the age of either fourteen or fifteen in 1984 or 1985 with Defendant, a priest employed by the Franciscan Friars Of Saint John the Baptist, a Catholic religious organization which at the time of the acts operated a church in Shiprock, New Mexico, which is within the territorial boundaries of the Navajo Nation. Plaintiff does not assert he was raped or physically forced to engage in sexual acts against his will, but he does allege that Defendant provided him with alcohol immediately prior to the two occasions he engaged in sexual acts with Defendant.

3. The Court notes this is not a case where a plaintiff is arguing that he should be allowed to proceed with his case on the basis of repressed memory. While the Navajo Nation has no law and no Navajo Nation court has permitted a case to go forward on the theory of repressed memory, other courts have. The repressed memory theory is when the trauma of abuse is so severe upon a juvenile that the memory of the event has been repressed for many years and utterly obliterated for what may be a significant period

of time. Various jurisdictions have permitted a lawsuit to proceed in spite of an otherwise limiting statute of limitations when a plaintiff can establish that the memory of the injurious event only recently surfaced and therefore the discovery of the injury did not occur until the memory was retrieved.

4. In this case Plaintiff asserts a different theory of discovery. He does not assert that he had ever lost recollection of the injurious acts, only that for twenty-two or twenty-three years (that is, until 2007) he did not realize that the acts he had always remembered had caused any injury. He asserts that in 2007, he was within the time permitted by Navajo law. He claims that between an "accrual" of a cause of action and the filing of his complaint on November 6, 2007, Plaintiff had some kind of personal insight or cognitive realization, that various manifestations of emotional and mental distress which he had previously experienced and continued to experience were the result of the two sexual acts he had engaged in with Defendant many years prior. So while he was aware that the acts he engaged in were clearly considered abusive by society, and he also was aware of the identity of the person who committed those acts of abuse, he was not aware that it was those particular acts that were the cause of his psychological suffering until 2007. Plaintiff's theory of his case could perhaps be labeled as "repressed insight" rather than repressed memory.

5. While the repressed memory theory has in some jurisdictions been accepted to extend an otherwise expired statute of limitations to permit a personal injury suit to go forward, the court is not aware of any jurisdiction that has accepted a theory as put forth by the plaintiff in this case. Certainly it has never been considered by a Navajo court. Plaintiff did not provide the Court with any other jurisdiction that embraces such a

theory. He did not present any case law from any jurisdiction that discusses this theory. He did not present the court with any legal or psychological literature that either discusses or supports this theory.

6. Plaintiff did not present the Court with any witnesses that could support Plaintiff's insight, such as witnesses that observed Plaintiff before and after the events in 1984 and 1985 who could testify that there were marked changes in his personality, attitude, etc., to support Plaintiff's assertion that there were emotional consequences from these particular actions, even if he could not realize their effects at the time. Plaintiff did not present any psychological or psychiatric professionals who had examined Plaintiff and who could support his theory, or support that this theory indeed applied to Plaintiff. In fact, Plaintiff himself did not even appear at the hearing to explain the timing of his insight.

7. Plaintiff's sincere assertion of his recent insight and his previous lack of insight can not be the only basis to extend the statute of limitations for personal injury actions from two years to twenty-three or twenty-four years.

8. The Court notes that 7 Navajo Nation Code §602(A)(5) permits certain kinds of personal injury cases to go forward on the basis of delayed discovery where a potential harmful act was known but the consequences of the act prohibit the discovery of the injury. In such cases there is a three year statue of limitations. Circumstances contemplated by this section would include injuries related to such causes as uranium, coal dust or asbestos exposure, where the exposure does not necessarily cause an injury, but if there was an injury it could not be detected for many years later because of the nature and effects of the injury.

9. The Court finds that based upon Plaintiff's affidavit, he was not asserting an injury that did not manifest itself until 2007. His insight was not the delayed development of an injury; it was not an injury at all, as claimed by the Plaintiff, himself. See Plaintiff's Affidavit dated September 09, 2009. The insight was the realization that the suffering he had long experienced only now had a clear cause. This insight appeared to "connect the dots" after a long period of *nitsahakees* (rumination).

10. The Court finds that Plaintiff's theory is too speculative and vague to accept on its own terms. First, if courts were to accept only the word of plaintiffs that their insights into their own mental suffering were enough to overcome many years between injury and insight of injury, it would inflict undue hardship on defendants to overcome charges based upon subjective perceptions, with the passage of potentially long periods of time obliterating the evidence that would or could support their defense. In light of this case, the above theory may seem harsh. However, the courts have to look at everyone's rights in an objective manner in order to maintain fairness within the judicial system.

11. Second, in this case we are dealing with only thoughts and the harm caused by thoughts. Plaintiff asserts that the sexual acts he engaged in with Defendant caused psychological harm although there was no physical harm. That harmful thinking which was caused by those acts was not clearly understood by Plaintiff until 2007. The problem is how to establish that the harmful thinking with which all us exhibit can be definitively traced to the particular source in question. For example, if a person gets lung cancer, how can it be shown this was the result of working in a uranium mine rather than smoking a lot of cigarettes? There must be more evidence shown by a Plaintiff than his

own belief that it was the uranium and not the cigarettes. How can it be objectively shown in addition to a plaintiff's own belief that one event and not another set a pattern of thinking in motion?

12. While the Court accepts that thought alone can cause quite a bit of actual damage to a person's life and well-being, in most cases a court cannot take any objective measure of how actions affect thoughts when the relevant thoughts occur so many years after the action has occurred. The relationship between cause and effect becomes too ineffable, slippery and blurred to say what or when the discovery of the nature of an injury or the cause of an injury has accrued when all we have to establish such an event is the person's own word that that was when it occurred.

13. The Court specifically asked Plaintiff to bring other witnesses or psychological professionals to support his assertions concerning the time and significance of his insight of 2007. He did not present any testimony or evidence other than what he himself stated. As noted above, he did not even appear himself to give the Court an explanation. A mental assertion is not sufficient to establish by a preponderance of evidence that the discovery of the nature or cause of an injury, particularly when, as in this case, the injury asserted is limited to emotional and mental consequences.

14. In other types of cases the Navajo Supreme Court has not permitted individuals to succeed in gaining relief when the only evidence establishing a claim is their own word. Some other kind of verifiable proof must also be provided. For example, while the Navajo Nation permits oral wills, it is not enough that the recipient of the will alone declare that an oral will had been made; all of the immediate family must be present to attest to the oral will or at least agree to its contents before a court can

recognize its existence . *In the Matter of the Estate of Howard*, 262, 263-67 (Nav. Sup Ct. 1997) (Includes discussion of previous court decisions trying to reach the appropriate measure of reliability concerning an oral will). Similarly, to establish a gift had been made, there must be some proof of a transfer of the gift from another person to the plaintiff. *Damon v. Damon*, 8 Nav. R. 226, 233 (Nav. Sup Ct. 2002) (To constitute an *intervivos* gift, donative intent must be shown by delivery and a vesting of irrevocable title in the recipient).

15. The Court finds that a similar objective standard of reliability needs to be shown in this case, where it is not sufficient to take only Plaintiff's own word that his insight did not occur at some time earlier and therefore outside the statue of limitations period. The Court understands that the issue at hand is a sensitive one. However, because of the seriousness of the claim and consequence that follows, supporting evidence is imperative.

16. The Court finds that Plaintiff did not establish by a preponderance of the evidence that he could not or should not have discovered the nature and cause of his injury "by the exercise of reasonable diligence, in light of available knowledge and resources," earlier than two years prior to November 6, 2007, when he filed his first complaint in this matter. The Court agrees with Defendants that Plaintiff did not file a claim within the required statute of limitations period.

Therefore, based upon the above findings of fact and conclusions of law, the Court DISMISSES this case WITH PREJUDICE.

SO ORDERED this 19th day of January 2010.

Trial Court Judge of the Navajo Nation

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE INSTRUMENT ON FILE IN THE COURTS OF THE NAVAJO NATION.

CLERK, COURTS OF THE NAVAJO NATION