No. SC-CV-06-10

SUPREME COURT OF THE NAVAJO NATION

John Doe BF,

Plaintiff/Appellant,

v.

Diocese of Gallup, et. al,

Defendants/Appellees

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

In its ruling dated January 19, 2010, in finding jurisdiction over Plaintiff's claims but dismissing the case with prejudice on the statute of limitations, the trial court made two errors that require reversal. First, the trial court ruled that when considering Defendant's motion for summary judgment, the Navajo Nation statute of limitations found at 7 Navajo Nation Code § 602(A)(4) does not provide for delayed discovery of an injury caused by sexual abuse. Second, the trial court ruled that when considering a motion for summary judgment, testimony from the Plaintiff is insufficient to create a dispute of a material fact sufficient to overcome summary judgment. Both of these erroneous findings fail to fully consider the relevant statutory language, the applicable case law and the facts that clearly point to a different finding in the case at bar. Plaintiff is entitled to reversal on these two issues because Navajo Nation law provides for a delayed discovery of injury which delays the accrual of a cause of action until the plaintiff discovers or should have discovered that the abuse caused his injuries, and when considering summary judgment, the Plaintiff's testimony in the form of an affidavit is sufficient to create a dispute of material facts to survive summary judgment.

STATEMENT OF FACTS

In and around 1984 or 1985, when the Plaintiff was 14 or 15 years old, Fr. Cichanowicz was Plaintiff's parish priest at Christ the King's parish in Shiprock, New Mexico. Second Amended Complaint, (hereinafter "Complaint") Attached as Exhibit 1, ¶ 4, 14. Christ the King parish was and is owned, operated and staffed by the Diocese of Gallup ("Diocese"), the Franciscan Friars Province of St. John the Baptist a/k/a The Province of St. John the Baptist of the Order of Friars Minor a/k/a the Franciscan Missionary Union of the Province of St. John the Baptist ("Franciscans") and 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. ("Guadalupe Order"). Id. ¶¶ 4 - 13. Christ the King parish is located on the Navajo Nation reservation. Id. at ¶ 4.

At all times material, Fr. Cichanowicz and Christ the King parish were under the direct supervision, employ and control of the Defendant Diocese, Defendant Franciscans and Defendant Guadalupe Order. Complaint, Exh. 1, ¶ 7. All acts of sexual abuse took place during functions in which the Fr. Cichanowicz had custody or control of the Plaintiff in Fr. Cichanowicz's role as a priest and authority figure at Christ the King parish located on the Navajo Nation reservation. Id. Defendant Diocese, Defendant Franciscans and/or Defendant Guadalupe Order provided training to Fr. Cichanowicz on how to perform the specific positions of a priest and a pastor at Christ the King parish on the Navajo Nation reservation. Id. at ¶ 8. Defendant Diocese, Defendant Franciscans and/or Defendant Guadalupe Order hired, supervised and paid assistants to Fr. Cichanowicz while he was a priest at Christ the King on the Navajo Nation reservation. Id. Fr. Cichanowicz performed much of his work on the premises of Christ the King parish that was owned by Defendant Diocese, Defendant Franciscans and/or Defendant Guadalupe Order which is the location of the sexual abuse described herein and which is located on the Navajo Reservation. Id. at ¶ 9. Defendant Diocese, Defendant Franciscans and/or Defendant Guadalupe Order were negligent in their supervision of Plaintiff, Fr. Cichanowicz and the Christ the King parish located on the Navajo Nation reservation. Id. ¶¶ 37 – 54.

In addition, Defendant Diocese, Defendant Franciscans and/or Defendant Guadalupe Order are directly liable for the sexual abuse of Plaintiff occurring on the Navajo Nation reservation because they are vicariously liable under the doctrine of respondeat superior for acts committed by Fr. Cichanowicz on the Navajo Nation reservation that were committed within the course and scope of his employment with the Defendants. Id., at ¶¶ 26, 33. Defendant Diocese,

Defendant Franciscans and/or Defendant Guadalupe Order are also directly liable for the sexual abuse of Plaintiff occurring on the Navajo Nation reservation because they aided and abetted Fr. Cichanowicz in sexually abusing the Plaintiff and ratified the acts of Fr. Cichanowicz occurring on the Navajo Nation reservation. Id., at 25, 27, 32, 34.

During 1984 through 1985, Plaintiff resided upon the Navajo Nation Reservation and was a member of the Navajo Nation. Complaint, Exh. 1, ¶ 2. During that same time, Fr. Cichanowicz also lived on the Navajo Nation reservation at Christ the King parish in Shiprock. Id., at ¶ 4. At some point in 1984 or 1985, Fr. Cichanowicz supplied Plaintiff with alcohol and then sexually abused Plaintiff while on the Navajo Nation reservation. Id., ¶ 14. The sexual abuse occurred two times with both occurring on the Navajo Nation reservation. Id.

Plaintiff was a child at the time of the sexual abuse and he did not recognize that the sexual contact by Fr. Cichanowicz had hurt him. In fact, at the time of the sexual abuse, the sexual acts performed mislead Plaintiff into believing that they were pleasurable. Aff. John Doe BF, Attached as Exhibit 2, ¶ 2. Plaintiff did not bleed as a result of the sexual contact. Id. Plaintiff did not bruise as a result of the sexual contact. Id. Instead, Plaintiff exhibited signs of sexual arousal, as did Fr. Cichanowicz. Id. Consistently, Fr. Cichanowicz disguised the true nature of the sexual abuse by representing to the Plaintiff that such sexual contact was normal, pleasurable and safe for a child. Complaint, Exh. 1, ¶ 40; Aff. John Doe BF, Exh. 2, ¶ 2. As a result, Plaintiff went through life not understanding that he had even been injured by the sexual contact. Aff. John Doe BF, Exh. 2, ¶ 2. As is the case with most sexual abuse victims, it was not until 2007 when Plaintiff was an adult, that Plaintiff became aware that he had been injured by the grooming and sexually abusive acts of Fr. Cichanowicz. Id.

Once Plaintiff realized that he had been injured by the sexual abuse, Plaintiff filed the current lawsuit on November 6, 2007. Complaint for Personal Injuries. On January 21, 2009, Plaintiff filed a Second Amended Complaint for Personal Injuries (Complaint, Exh. 1). In response, the Defendant Cichanowicz, Defendant Diocese, Defendant Franciscans and Defendant Guadalupe Order filed numerous motions to dismiss claiming that this Court lacks subject matter and personal jurisdiction and that Plaintiff's claims are barred by the statute of limitations. The trial court granted Defendant's motion to dismiss, finding that Defendants were subject to the court's jurisdiction, but dismissing the case on statute of limitations grounds. Plaintiff submits this appeal of the trial court's order granting Defendants' motion to dismiss.

STATEMENT OF ISSUES

The issues on appeal are:

1. Whether the trial court erred when it granted Defendant's motion for summary judgment.
2. Whether the trial court erred when it made a finding that Plaintiff's testimony was insufficient to create a dispute of material fact sufficient to overcome summary judgment.

ARGUMENT

I. NAVAJO NATION LAW PROVIDES FOR THE DELAYED DISCOVERY OF AN INJURY.

In this case, the applicable statute of limitations for Plaintiff's claims is 7 Navajo Code § 602. Specifically, 7 Navajo Code § 602 states, in part:

> A. There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following civil actions:
>
> 1. For personal injuries. . . .
>
> * * *
>
> 4. 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, whichever is earlier. This Subsection applies to and revives all injured parties' claims, regardless of whether the claim may have been barred in the absence of this Subsection.
>
> * * *

Even though there are no Navajo Nation cases that discuss the delayed discovery of a cause of action, the Navajo Nation statute states that this is the case in its plain language. A cause of action for sexual abuse and the related negligence does not accrue until the Plaintiff discovers the nature of the injury, the cause of the injury and the identity of the perpetrator. Id.

In the current case, Plaintiff did not discover the nature of his injuries resulting from Fr. Cichanowicz's sexual acts until well into adulthood in 2007. As discussed in the Complaint, Plaintiff was sexually abused by Fr. Cichanowicz in approximately 1984 or 1985 when Plaintiff was 14 or 15 years old. Complaint, Exh. 1, ¶ 14. Once Plaintiff was manipulated into having this type of physical contact with Fr. Cichanowicz, Fr. Cichanowicz then began to have sexual contact with the Plaintiff. Id. Prior to having sexual contact with Plaintiff, Fr. Cichanowicz provided alcohol to Plaintiff causing the Plaintiff to become intoxicated. Id.

The sexual abuse did not appear injurious to Plaintiff at the time of the abuse. In fact, at the time of the sexual abuse, the sexual acts performed misled Plaintiff into believing that the acts were pleasurable. Aff. John Doe BF, Exh. 2, ¶ 2. Plaintiff did not bleed as a result of the sexual contact. Id. Plaintiff did not bruise as a result of the sexual contact. Id. Instead, Plaintiff exhibited signs of sexual arousal, as did Fr. Cichanowicz. Id. Consistently, Fr. Cichanowicz disguised the true nature of the sexual abuse by representing to the Plaintiff that such sexual contact was normal, pleasurable and safe for a child. Complaint, Exh. 1, ¶ 40; Aff. John Doe BF, Exh. 2, ¶ 2. As a result, Plaintiff went through life not understanding that he had even been

injured by the sexual contact. Aff. John Doe BF, Exh. 2, ¶ 2. It was not until 2007, that Plaintiff became aware that he had been injured by the grooming and sexually abusive acts of Fr. Cichanowicz. Id.

This series of events is a common experience for those who are sexually abused as children. Often it is not until years after the sexual abuse that victims experience these negative outcomes. Clinician Mic Hunter observed that:

> Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. **Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.**

MIC HUNTER, *ABUSED BOYS* 59 (1991) (emphasis added).

There are many factors that combine to complicate connecting psychological symptoms experienced decades later to the sexual acts experienced as a child. Most sexual abusers are someone that the child knows and trusts. EchoHawk, Larry and Sanitago, Tessa, "Issue Paper: What Indian Tribes Can Do To Combat Child Sexual Abuse," *Tribal Law Journal*, Vol 4 (2007), Attached as Exhibit 5. These trusted adults often manipulate the child victim into thinking that the relationship and sexual abuse is built on mutual love. See Maxine Hancock & Karen Burton Mains, *Child Sexual Abuse: Hope for Healing*, 33 (1987).

In addition, most victims of sexual abuse experience heightened psychological symptoms that compromise the victim's ability to think clearly and function properly. Hundreds of research studies have conclusively shown that sexual abuse alters a child's physical, emotional, cognitive and social development and impacts their physical and mental health throughout their lifetime. A 2002 study by Elliot Nelson, M.D., et. al. reaffirmed that childhood sexual abuse has a profound negative impact throughout the victim's life. Nelson et. al.,

"Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study", *ARCH. GEN. PSYCHIATRY*, 59(2), 139-45, attached as Exhibit 3. This study examined both members of nearly two thousand same-sex twins (1159 female and 832 male). Id. at 139. Twins were used to separate the effects of childhood sexual abuse from possible negative effects of family background, such as parental alcohol related problems, fighting and conflict, physical abuse, and neglect. Id. at 143-44. The study looked at same sex twin pairs where one of the twins was sexually abused as a child and one was not. Id. at 139. The study found that a person with a history of childhood sexual abuse had a significantly increased risk for major depression, suicide attempt, conduct disorder, alcohol and/or nicotine dependence, and social anxiety. Id. at 142. These adverse outcomes alone make it very difficult for victims of childhood sexual abuse to discover that the sexual acts were injurious because many simply struggle to survive the onset of these major mental disorders.

Moreover, there is some support for the fact that sexual abuse of Native American children has an even more profound impact on them than in other populations. In the study by Irwin et al., "The Psychological Impact of Sexual Abuse of Native American Boarding School Children," *The Journal of the American Academy of Psychoanalysis and Dynamic Psychiatry* 23:461-473 (1995) attached as Exhibit 4, the authors found evidence that differences in Native American spiritual beliefs combined with being the most disadvantaged ethnic and racial group in America result in a greater cumulative negative impact upon the Native American child who is sexually abused. Consequently, Native Americans who were sexually abused as children are more likely to experience more psychological, physical and emotional problems and a more difficult time coping with the injuries related to the sexual abuse.

In addition, there is evidence that Native American children experience a greater incidence of sexual abuse than children in other racial and socioeconomic groups. In an article written by Larry EchoHawk, Assistant Secretary of the Interior and Head of the Bureau of Indian Affairs, Mr. EchoHawk states that "some estimate that one out of every four girls and one out of every six boys is molested in Indian country before the age of 18." EchoHawk, Larry and Sanitago, Tessa, "Issue Paper: What Indian Tribes Can Do To Combat Child Sexual Abuse," *Tribal Law Journal*, Vol 4 (2007) attached as Exhibit 5. This heightened occurrence of sexual abuse of Native American children may be explained by the fact that risk factors for sexual abuse of children such as poverty, unemployment, familial stresses, and violence occur at a higher rate among Native Americans living on reservations than for any other racial group in the Nation. Id.

Thus, the Plaintiff's experience of not being able to understand that he was injured by the covert sexual abuse by Fr. Cichanowicz until 2007 is consistent with the way that most other childhood sexual abuse victims experience their abuse.

At the time Plaintiff finally began to understand that he was a victim of child sex abuse by Fr. Cichanowicz in 2007, Plaintiff's claims then began to accrue under 7 Navajo Code § 602 A(1). According to 7 Navajo Code § 602 A (4), the two-year limitations period does not begin to run 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, whichever is earlier. Consequently, Plaintiff's Complaint is timely filed.

Unfortunately, the trial court misunderstood this delayed discovery of sexual abuse injury. In fact the trial court placed much weight on facts that were not even in the record or in

evidence. According to the Court "[s]o while [Plaintiff] 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." Order to Dismiss, Attached as Exhibit 6, ¶ 4. In this case, there is no evidence that Plaintiff was aware that the acts he engaged in were clearly abusive by society. See Aff. John Doe BF, Exh. 2. As outlined above, victims of child sex abuse often do not understand the acts perpetrated on them as abuse, as they are understood by society, because of the psychological manipulation of trust and power structures utilized by the perpetrator. The child understands the criminal acts of child sex abuse as acts built on mutual love, because their abusers exploit the child's trust and innocence to convince the child that the sexual acts are normal. Accordingly, here there is no evidence that the Plaintiff considered the sexual acts "abuse" at least prior to 2007. Id.

In addition, the trial court erroneously took the position that delayed discovery of injury is a novel legal position when just the opposite is the case. The delayed discovery of injury is a common legal concept. For example, in Martinez-Sandoval v. Kirsch, 118 N.M. 616, 618 - 620, 884 P.2d 507, 509-511 (N.M. Ct. App. 1994) the New Mexico Court of Appeals approved of the application of a delayed discovery rule in a case involving sexual abuse by a priest. Specifically, the Court ruled that:

> [t]he reasonable person who serves as the standard in this evaluation . . . is not detached outside observer assessing the situation without being affected by it. Rather it is a reasonable person who has been subjected to the conduct which forms the basis for the plaintiff's complaint . . . [W]e look at a 'reasonable person in the position of the Plaintiff [.]' If such an initially reasonable person would, by reason of the experience forming the

basis for the plaintiff's complaint, have his or her judgment altered in some way, such altered judgment then becomes the standard. The cause of action will not accrue until such an individual would have discovered the damage. In other words, if the defendant's conduct would, in an ordinary reasonable person, cause an injury which by its very nature prevents the discovery of its cause, the action cannot be said to have accrued. Accrual of the cause of action occurs when the ordinary reasonable person who had been subject to the experience would have discovered that the injury was caused by that experience.

Id., 118 N.M. at 621, 884 P.2d at 512, citing to Riley v. Presnell, 565 N.E.2d 780, 785-786 (Mass. 1991).

The same is true in Colorado. In Winkler v. Rocky Mountain Conference of the United Methodist Church, 923 P.2d 152, 158-159 (Colo. Ct. App. 1996), the Colorado Court of Appeals noted that a cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. According to the court, the critical inquiry of when an action accrues is the knowledge of the facts essential to the cause of action. Id.

Moreover, there are numerous foreign jurisdictions where the courts held that child sexual abuse claims did not accrue until discovery of the injury and the cause. See e.g., Callahan v. State, 464 N.W.2d 268, 271-73 (Iowa 1990) (adopting discovery rule in childhood sexual abuse case and denying summary judgment because there was a material issue of fact under the discovery rule); Osland v. Osland, 442 N.W.2d 907, 908-09 (N.D. 1989) (affirming trial court's use of the discovery rule in childhood sexual abuse action and stating that it is a fact question); Dunlea v. Dappen, 924 P.2d 196, 202 (Haw. 1996) (adopting the discovery rule for cases of childhood sexual abuse and holding that the time of discovery is a jury question); Powel v.

Chaminade College Preparatory, Inc., 197 S.W.3d 576, 584-85 (Mo. 2006) (holding that accrual begins on notice of injury and cause in childhood sexual abuse case).

Here, the sexual acts are very different than the injury caused by those acts. As discussed above, most childhood sexual abuse victims do not initially understand that they were even injured by the sexual acts. As is the case here, sexual abuse does not always appear injurious at the time of the abuse. In this case, the sexual acts performed misled Plaintiff into believing that they were pleasurable. Aff. John Doe BF, Exh. 2, ¶ 2. Plaintiff did not bleed as a result of the sexual contact. Id. Plaintiff did not bruise as a result of the sexual contact. Id. Instead, Plaintiff exhibited signs of sexual arousal, as did Fr. Cichanowicz. Id. Consistently, Fr. Cichanowicz disguised the true nature of the sexual abuse by representing to the Plaintiff that such sexual contact was normal, pleasurable and safe for a child. Complaint, Exh. 1, ¶ 40; Aff. John Doe BF, Exh. 2, ¶ 2. As a result, Plaintiff went through life not understanding that he had even been injured by the sexual contact. Aff. John Doe BF, Exh. 2, ¶ 2. It was not until 2007 that Plaintiff became aware that he had been injured by the grooming and sexually abusive acts of Fr. Cichanowicz. Id.

II. PLAINTIFF'S TESTIMONY IS SUFFICENT TO CREAT A DISPUTE OF MATERIAL FACTS TO OVERCOME A SUMMARY JUDGMENT MOTION.

In its Order to Dismiss on statute of limitations grounds, the trial court made an error when it attempted to give weight to the evidence that Plaintiff presented when considering summary judgment. The trial court ruled, in considering summary judgment, that Plaintiff's undisputed testimony, through his affidavit, was insufficient to establish that there were sufficient facts to defeat summary judgment on the issue of whether the statute of limitations had expired prior to Plaintiff filing his claim. Specifically, the trial court stated:

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. 1977)(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 [sic] 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.

Order to Dismiss, Exh. 6, pp. 7-8.

In this ruling, the trial court mistakenly confuses the standard for a directed verdict at trial with the evidence required to survive summary judgment. It is imperative to note that the Affidavit of John Doe BF is the only evidence that was presented to the Court. The Defendants did not present a single piece of evidence on the psychological state of the Plaintiff.

It is important to understand the procedural status of the Defendants' Motions in the trial Court. On July 10, 2009, Fr. Cichanowicz filed his Motion to Dismiss the Second Amended Complaint, seeking dismissal under Navajo Rules of Civil Procedure, Rule 12, claiming no jurisdiction and that the statute of limitations had expired. (Attached as Exhibit 7) There were no attachments or affidavits associated with this Motion. On August 21, 2009, the Franciscan Defendants joined in Fr. Cichanowicz's Motion to Dismiss and there were no attachments or affidavits associated with this motion. (Attached as Exhibit 8) Finally, on August 31, 2009, the Diocese of Gallup joined Fr. Cichanowicz's Motion to Dismiss and there were no attachments or affidavits associated with this motion. (Attached as Exhibit 9)

On September 10, 2009, Plaintiff filed his response to the defendants Motions to Dismiss, along with an affidavit of the Plaintiff that described that the sexual acts performed by Fr. Cichanowicz that misled Plaintiff into believing that the acts were pleasurable. Aff. John Doe BF, Exh. ¶ 2. Plaintiff did not bleed as a result of the sexual contact. Id. Plaintiff did not bruise as a result of the sexual contact. Id. Instead, Plaintiff exhibited signs of sexual arousal, as did Fr. Cichanowicz. Id. Consistently, Fr. Cichanowicz disguised the true nature of the sexual abuse by representing to the Plaintiff that such sexual contact was normal, pleasurable and safe for a child. Complaint, Exh. 1, ¶ 40; Aff. John Doe BF, Exh. 2, ¶ 2. As a result, Plaintiff went through life not understanding that he had even been injured by the sexual contact. Aff. John Doe BF, Exh. 2, ¶ 2. It was not until 2007, that Plaintiff became aware that he had been injured by the grooming and sexually abusive acts of Fr. Cichanowicz. Id.

According to Navajo Rules of Civil Procedure, Rule 12 (b):

> If, on motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,

and all parties shall be given a reasonable opportunity to present all material made relevant to such a motion by Rule 56.

As the Plaintiff submitted an affidavit in support of his response, Rule 12 (b) requires the trial judge to proceed as a motion for summary judgment under Rule 56. This procedure was confirmed during the oral argument of the Defendants' motions. See Transcript of Proceedings, Sept. 22, 2009, Attached as Exhibit 10, pp. 10-11, 39, 45.

It is here that the trial judge makes her first error. As discussed above, the trial judge makes much of the fact that the Plaintiff did not attend the summary judgment/motion to dismiss hearing and present his testimony. Moreover, the trial judge also voiced concern that Plaintiff did not present any other witnesses, such as psychological professionals. It appears that the trial judge confused a hearing on summary judgment with a court trial under Nav. Rules Civ. Pro. 42 (b).

According to Nav. Rules Civ. Pro., Rule 56 (c), summary judgment is proper if there is "no genuine issue of material fact and that the moving party [is] entitled to judgment as a matter of law." Jensen v. Giant Industries, Arizona, Inc., 8 Nav. R. 203 (Nav. S. Ct. 2002). A "material fact" is a fact that is required by the substantive law which defines the claim or defense, and it is a fact that may affect the outcome of the suit, based upon the substantive law definition. Id. A dispute is "genuine" if a "reasonable jury could return a verdict for the non-moving party" based upon a disputed fact. Id. It is not the trial judge's function to weigh the evidence and to determine the truth of the material facts before the court, but to decide whether there is a genuine issue for trial. Id. Summary judgment is an extreme remedy that should not be employed if there is the slightest doubt as to the existence of an issue of material fact. Benally v. Mobil Oil Corp., 8 Nav. R. 387 (Nav. S. Ct. 2003).

Moreover, when it comes to evidence in a summary judgment proceeding, the proper form of evidence is through the use of pleadings, depositions, answers to interrogatories, admissions and affidavits. Nav. Rules of Civ. Proc., Rule 56 (c). Affidavits submitted in support of and in opposition to summary judgment must be made on personal knowledge by a person who is competent to testify to the matters stated. Nav. Rules of Civ. Proc., Rule 56 (e). Under the Navajo Rules, there is no provision for the presentation of live testimony at a summary judgment hearing. Thus, the trial judge's requirement that the Plaintiff and his expert psychologist be in court and give testimony about the Plaintiff's psychological state is inconsistent with the Navajo Rules of Civil Procedure. Accordingly, the Plaintiff should not be punished for following these rules.

It should also be noted that the parties came before the trial judge on Sept. 22, 2009 for a status conference, and it was not certain that the parties would be arguing the motion to dismiss. See Exhibit 11, Notice of Status Hearing. The parties agreed to do so during the course of the proceedings, however, due to this uncertainty, it is even more improper for the trial court to focus repeatedly in its Order on the fact that Plaintiff did not present himself during oral arguments on the motion to dismiss. The notice of hearing entitled "Notice of Status Hearing" read: "[a]s counsels of record, you and each of you are required to notify your clients and be present at the time set with such evidence and witnesses as may be necessary for the hearing of said cause of action." Id. The notice did not specify that a motion to dismiss would be argued, nor did it specify that Plaintiff was required to attend the hearing, only that clients should be notified of the hearing. Id.

Moreover, the notice of status hearing does caution counsel to be present with such evidence and witnesses as may be necessary for the hearing of said cause of action, however the

notice does not specify that a motion to dismiss/summary judgment will be heard, rather it just gives notice of a status hearing. Id. Therefore, since Plaintiff's counsel had no advanced notice that it should present Plaintiff at the hearing or be ready with witnesses to argue its opposition to the motion to dismiss/summary judgment, Plaintiff should not be punished for failure to appear at the hearing.

In addition, when the trial judge made a determination that Plaintiff's unopposed and undisputed affidavit describing his psychological state after the sexual abuse was insufficient, the court erred as well. As discussed above, the trial judge is not to weigh the evidence or to determine whether the facts are true, because the rules require that during summary judgment the trial court is only to decide whether there is a genuine issue of material fact that should be determined by a jury. Jensen v. Giant Industries, Arizona, Inc., 8 Nav. R. 203 (Nav. S. Ct. 2002).

In the current case, Plaintiff's affidavit is undisputed and unopposed. There is absolutely no evidence in the record produced by the Defendants at all. In his affidavit, Plaintiff testified that he did not know that he was injured by the sexual acts perpetrated by Fr. Cichanowicz until 2007 at the earliest. This is a material and critical fact because the applicable statute of limitations does not begin to run until the Plaintiff in the exercise of reasonable diligence learns not only that he was injured by the acts, but also the **nature of the injury, the cause of the injury, and the identity of the party whose action or inaction caused the injury.** 7 Navajo Code § 602 A 4. Consequently, Plaintiff's undisputed and unopposed affidavit creates a dispute of genuine material fact which defeats summary judgment.

It is at trial that the trial court can weigh the evidence and make determinations of fact. Here, the trial court carried out this task at the summary judgment phase. As outlined clearly in

case law and statutory law above, said judicial action was improper. Plaintiff accordingly requests this Court reverse the trial court, denying summary judgment and remand his case to the trial court.

WHEREFORE, Plaintiff respectfully requests this Court reverse judgment by the trial court denying summary judgment, and remand his case to the trial court.

Dated:

Respectfully submitted,

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