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**SUPREME COURT OF THE NAVAJO NATION
NO. SC-CV-06-10**

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SUPREME COURT
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NAVAJO NATION

John Doe BF,

Plaintiff-Appellant,

v.

Diocese of Gallup, et al.,

Defendant-Appellees.

APPELLEE BRIEF BY THE FRANCISCAN DEFENDANTS

On Appeal from the District Court for the District of Shiprock
Cause No. SR-CV-369-07
The Honorable Genevieve Woody, Presiding

ORAL ARGUMENT REQUESTED

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I. SUMMARY OF THE PROCEEDINGS

Defendant The Province of St. John the Baptist of the Order of Friars Minor (the “Province of St. John the Baptist”), and Defendant The Province of Our Lady of Guadalupe of the Order of Friars Minor (the “Province of Our Lady of Guadalupe”) (collectively, the “Franciscan Defendants”), respectfully submit this Appellee Brief to address the arguments presented in Appellant’s Brief. The Franciscan Defendants also adopt by reference and join the arguments of the other Appellees in their respective briefs. *See* N.R.C.A.P. Rule 11(f).

A. Statement Of The Case.

In November 2007, Plaintiff filed suit alleging sexual abuse by a former priest that occurred in 1984 or 1985 when Plaintiff was 14 or 15 years old. *2nd Am. Compl.* at ¶ 14. Plaintiff does not maintain that he repressed memories of the sexual abuse, that he was otherwise unaware that the sexual abuse occurred, or that he did not know the identity of the alleged perpetrator. *See id.* Instead, Plaintiff claims that he did not understand the connection between the sexual abuse and resulting injuries until 2007, twenty-two or twenty-three years after the fact. *Plt’s Aff., Aplt’s Br. Ex. 2.* Plaintiff did not support the objective reasonableness of his personal belief with the opinion of a psychologist or other expert. He did not do so in briefing or arguing the motions, in expert disclosures required by the district court’s order, or at any other time.

The statute of limitations accrues upon the earlier of (1) when a plaintiff actually discovers an injury, its cause, and who caused the injury, or (2) when, through reasonable diligence, a plaintiff should have discovered these facts. The district court correctly dismissed on statute of limitations grounds. Plaintiff's own testimony of his two-decade inability to connect the alleged sexual abuse with the resulting injuries is insufficient to demonstrate a genuine issue of material fact regarding either the subjective or objective standards above. Furthermore, Plaintiff did not adequately demonstrate mental incapacity necessary to toll the statute of limitations.

B. Course Of Proceedings.

Plaintiff filed his original Complaint on November 6, 2007, and filed his First Amended Complaint shortly thereafter on November 13, 2007. The Franciscan Defendants and the Diocese of Gallup answered on or around February 7, 2007, and on or around March 21, 2008, Defendant Chuck Cichanowicz ("Fr. Cichanowicz") moved to dismiss for lack of subject matter jurisdiction pursuant to N.R.C.P. 12(b)(1). On or around October 24, 2008, Plaintiff moved for leave to amend to attempt to cure jurisdictional deficiencies of the First Amended Complaint. *Mot. to Amend* at 2. The district court granted Plaintiff leave to amend after a January 21, 2009 status conference. *See Feb. 18, 2009, Order.*

The Second Amended Complaint asserts claims of assault, battery, negligence, and other causes of action arising out of alleged sexual abuse by a former priest that occurred in 1984 or 1985 when Plaintiff was 14 or 15 years old. *2nd Am. Compl.* at ¶¶ 14, 24, 32, 38-41. On or about July 10, 2009, Fr. Cichanowicz moved to dismiss pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction), Rule 12(b)(2) (lack of personal jurisdiction), and Rule 12(b)(6) (failure to state a claim because of the statute of limitations). *Cichanowicz' Mot. to Dismiss 2nd Am. Compl.* at 1, 6. The Franciscan Defendants and the Diocese of Gallup joined in Fr. Cichanowicz's motion. *See* Joinder filed on or about August 24, 2009, and Joinder filed on or about August 31, 2009.

On September 1, 2009, the district court served its Notice of Status Hearing setting a hearing for September 22, 2009. The Notice provided that “[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.”

On September 10, 2009, Plaintiff served his Opposition response to the motions. *See Plaintiff's Cert. of Service.* Plaintiff's Opposition referenced his affidavit (the “Affidavit of John Doe BF”). *Plt's Opposition*, at 4.¹ Plaintiff filed

¹ Plaintiff did not actually file the affidavit until after the hearing, but as Plaintiff noted in his brief, the filing and reliance on the affidavit converted the motion from a motion to dismiss to a motion for summary judgment. *See Plt's Opposition*, at 15.

the Affidavit of John Doe BF at some point after the September 22, 2009, hearing. *See Sept. 22, 2009 Tr.* 49 (portions of the transcript are attached hereto as Exhibit A). In Plaintiff's Opposition, Plaintiff argued that "Plaintiff did not discover the nature of his injuries resulting from Fr. Cichanowicz's sexual acts until well into adulthood in 2007." *Plt's Opposition*, 13. Plaintiff did not argue that he had not been injured until 2007, but rather that Plaintiff did not understand that he had been injured by the sexual contact until 2007. *See id.* at ¶ 14 ("Plaintiff went through life not understanding that he had even been injured by the sexual contact."); and *Sept. 22, 2009 Tr.* 40 (The sexual abuse occurred in 1984 or 1985 and "[t]echnically, Plaintiff was injured at that time.")

All Defendants served replies prior to the September 22, 2009, hearing and all parties indicated willingness to proceed with arguments on the motions without objection. *Id.* at 4. Specifically, Plaintiff's counsel stated that, "[w]e are prepared to argue, if that is what this Court would have us do. We'll just leave it to the pleasure of the Court, Your Honor." *Id.*

Plaintiff did not submit an affidavit from an expert psychologist or other expert in connection with his Opposition to the motions. *See Plt's Opposition*. The district court's May 19, 2009, N.R.C.P., Rule 16(b) Scheduling Order provided that "Plaintiff shall identify experts by September 30, 2009" and that all parties "shall identify lay witnesses by December 21, 2009." Plaintiff did not file

or serve an expert disclosure by September 30, 2009, or at anytime before or after the Court's January 19, 2010, Order of Dismissal. Similarly, Plaintiff did not file or serve a lay witness disclosure.

In the Order of Dismissal, the district court recognized that “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.” *Id.* at ¶ 3. The district court understood Plaintiff to have not argued “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.” *Id.* at ¶ 4. Thus, Plaintiff's theory, according to the district court, was that “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 those particular acts . . . were the cause of his psychological suffering until 2007.” *Id.*

Regarding the Plaintiff's Affidavit, the district court reasoned that Plaintiff “was not asserting an injury that did not manifest itself until 2007.” *Id.* at ¶ 9. Plaintiff's “insight was not the delayed development of an injury”; instead, it “was the realization that suffering he had long experienced only now had a clear cause.” *Id.* The district court understood Plaintiff, in essence, to maintain that this “insight appeared to ‘connect the dots’ after a long period of *nitsahkes* (rumination).” *Id.*

The district court rejected Plaintiff's theory. It reasoned that

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. . . . [T]he courts have to look at everyone's rights in an objective manner in order to maintain fairness within the judicial system.

Id. at ¶ 10. The district court noted that Plaintiff did not present evidence from “any psychological or psychiatric professionals who had examined Plaintiff and who could support his theory, or support that this theory indeed applied to Plaintiff.

Id. at ¶ 6. The court concluded that “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.” *Id.* at ¶ 7.

C. **Summary Of Allegations And Affidavit Facts Relevant To Issues On Appeal.**

Plaintiff alleges that, “in approximately 1984 or 1985, when Plaintiff was 14 and/or 15 years old,” Fr. Cichanowicz provided Plaintiff alcohol, caused Plaintiff to become intoxicated, and sexually abused Plaintiff on two separate occasions. *2nd Am. Compl.* at ¶ 14. Plaintiff turned 18 in 1988. *See id.* At the age of approximately 37, Plaintiff filed the Complaint in 2007, approximately 22 or 23

years after the alleged sexual abuse. *See id.* Plaintiff now resides in Oregon. *Id.* at 2. Fr. Cichanowicz currently resides in Indiana. *Cichanowicz Mot. to Dismiss 2nd Am. Compl.* at 5.

Plaintiff maintains that his cause of action did not accrue until May 2007. Plaintiff contends that paragraphs 15-18 of the Second Amended Complaint all establish “that he . . . simply did not discover that he’d been injured by the sexual abuse” until May 2007. *Tr.* 32. Those paragraphs allege that the sexual abuse and surrounding circumstances caused Plaintiff to develop psychological coping mechanisms that prevented Plaintiff from taking legal action until May 2007 (¶ 15), Plaintiff did not discover that he had been injured until May 2007 (¶ 16), Plaintiff’s injuries did not manifest themselves and were not ascertainable to Plaintiff until May 2007 (¶ 17), and the nature of the injuries suffered by Plaintiff made it impossible for him to connect the injuries to the sexual abuse until May 2007 (¶ 18).

Plaintiff further contends that the sexual contact did not appear injurious to him at in 1984 or 1985, was pleasurable, and did not cause physical injury. *Aff. of John Doe BF*, ¶ 2. According to Plaintiff, Fr. Cichanowicz represented that the sexual contact was normal, safe for a child, and were acts of friendship and guidance. *Id.* Plaintiff concludes that, as a result, he “went though life not understanding that I had even been injured by the sexual contact.” *Id.* Plaintiff

maintains that, not until May of 2007, did he realize “that the sexual contact by Fr. Cichanowicz had injured” Plaintiff. *Id.* ¶ 3.

Plaintiff also alleges that Fr. Cichanowicz “threatened” to “expose” Plaintiff “if Plaintiff told anyone about the sexual abuse.” *2nd Am. Compl.* at ¶ 14.

Plaintiff does not allege that he repressed memories or otherwise did not recall the acts of sexual abuse, does not allege that, by the age of 18, he did not know that Fr. Cichanowicz’ alleged behavior was criminal and otherwise morally prohibited. Plaintiff did not submit an affidavit from, or designate for trial, an expert psychologist or other expert regarding his alleged inability to recognize the connection between the alleged abuse and resulting injuries.

II. ARGUMENT

A. The District Court Properly Applied The Statute Of Limitations In Rejecting Plaintiff’s Delayed Discovery Argument.

Plaintiff filed his Complaint on November 6, 2007, approximately 22 or 23 years after the abuse alleged to have occurred in 1984 and 85. *See 2nd Am. Compl.* at ¶ 14. Plaintiff agrees that the two-year limitations period applicable to personal injury claims applies to his claims. *See 7 N.N.C. § 602(A)(1); Aplt’s Br.* at 4-5. However, Plaintiff maintains that his claims did not accrue until May 2007. *Id.* at 6. Plaintiff does not maintain that he repressed memories or that he was otherwise unaware that the alleged sexual abuse occurred or unaware of the identity of the alleged perpetrator. Instead, Plaintiff claims that he did not understand the

connection between the sexual abuse and resulting injuries until 2007, twenty-two or twenty-three years after the fact. *2nd Am. Compl.* at ¶ 18.

Plaintiff's allegations and factual assertions fail to establish delayed discovery as a matter of law. Accordingly, this Court should affirm the district court's decision that the statute of limitations bars Plaintiff's claims.

B. The Accrual Provision Imposes Both Subjective And Objective Standards; Plaintiff's Subjective Assertions Are Insufficient To Establish Delayed Discovery.

"[T]he time period in which one must file suit begins when the cause of action accrues." *Young v. Begay*, 3 Nav. R. 134, 134 (1982). The statute of limitations accrues upon the earlier of (1) when a plaintiff actually discovers an injury, its cause, and who caused the injury, or (2) when, through reasonable diligence, a plaintiff should have discovered these facts. 7 N.N.C. § 602(A)(4)²; *see also Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004) (under the federal discovery rule, claims accrue and "[t]he statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury.") The accrual provision thus imposes both a subjective standard of actual knowledge, and an objective standard. *Alexander*, 382 F.3d at 1216 (discovery

² "No cause of action accrues for personal injury . . . 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." (emphasis added.)

depends upon whether the plaintiff “knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm.”).

Plaintiff failed to allege sufficient facts to establish delayed discovery under the accrual provision’s subjective standard or the objective standard. Even assuming the truthfulness of Plaintiff’s allegations and affidavit facts, those allegations and facts are legally insufficient.

1. Plaintiff Failed To Satisfy The Accrual Provision’s Subjective Standard.

Plaintiff alleges that he was unable to discover his injuries because it was impossible for him to “connect symptoms and injuries to the acts of sexual abuse.” *2nd Am. Compl.* at ¶ 18. Plaintiff’s does not disclaim knowledge of the alleged sexual abuse, or disclaim knowledge of injury. To the contrary, Plaintiff’s allegations implicitly demonstrate Plaintiff’s awareness that the alleged sexual abuse was actionable. Assault and battery causes harm as a matter of law and is actionable without demonstrating a bodily injury. Thus, Plaintiff had knowledge of all the facts needed to assert a cause of action as by the time he reached 18 years old, approximately in 1988.

While there may be circumstances where a wrongful act does not carry with it an awareness of harm, “[a]n assault, however, which by definition is perceived as unconsented to and offensive, causes harm as a matter of law.” *DeRose v. Carswell*, 242 Cal. Rptr. 368, 371 (Cal. Ct. App. 1987), (the court dismissed

allegations of delayed discovery of sexual abuse where complaint alleged assault) superseded by statute, as recognized in *O'Connor v. Boeing N. Am., Inc.*, 114 F Supp 2d 949, 954 n.5, (D. Cal. 2000); see 17 N.N.C. § 314 (“A person commits assault if he or she: 1. Attempts to commit a battery upon the person of another, or 2. By any unlawful act, threat or menacing conduct causes another person to reasonably believe that he or she is in danger of receiving an immediate battery.”); 17 N.N.C. § 316 (“A person commits battery if he or she unlawfully and intentionally strikes or applies force to the person of another.”).

Plaintiff’s alleged inability to recognize all alleged results of the sexual abuse does not mean that the cause of action did not accrue because of delayed discovery. “The limitations period is not tolled simply because a plaintiff does not know the full extent of her injury; the statute begins to run once she knows or should know sufficient facts to constitute a cause of action.” *Martinez-Sandoval v. Kirsch*, 118 N.M. 616, 622, 884 P.2d 507, 513 (Ct. App. 1994), Plaintiff knew of the facts constituting assault and battery, which is actionable without knowledge of the full extent of resulting injuries. As a result, Plaintiff had actual knowledge regarding actionable conduct from the time of the 1984 and 1985 alleged abuse, and from the time he reached adulthood in 1988. Therefore, Plaintiff cannot establish the lack of subjective knowledge necessary to demonstrate delayed discovery under the discovery statute.

2. Plaintiff Failed To Satisfy The Accrual Provision's Objective Standard.

A plaintiff's subjective lack of knowledge is immaterial to establish delayed discovery if the plaintiff cannot also demonstrate lack of knowledge under the accrual provision's objective standard. Under 7 N.N.C. § 602(A)(4), even in the absence of a plaintiff's actual knowledge of actionable facts, the cause of action accrues when "in the exercise of reasonable diligence, in light of available knowledge and resources, the party should have discovered these facts." Plaintiff cites *Martinez-Sandoval* for the general standard for what a plaintiff "should have discovered" is that of an objective reasonable person standing in the Plaintiff's shoes. *Aplt. Br.* 9. In looking at a "reasonable person in the position of the Plaintiff," Plaintiff contends that "[i]f such an initially reasonable person would, by reason of the experience forming the basis of the plaintiff's complaint, have his or her judgment altered in some way, such altered judgment then becomes the standard." *Id.*

Plaintiff thus argues for an objective reasonable person standard that assumes that the objective reasonable person had his or her judgment altered as a consequence of sexual abuse. As argued in section II. C. below, Plaintiff's argument more properly falls under the statute of limitation's provision for tolling due to mental incapacity, rather than the accrual provision. Even under the accrual

provision, however, Plaintiff's arguments fail because they are unsupported by expert testimony.

The Navajo Rules of Evidence recognize that there are circumstances where experts may be necessary to provide testimony regarding "scientific, technical, or other specialized knowledge." N.R.E. 23. Courts have found expert testimony necessary for a fact finder to consider certain medical and psychological matters. *See, e.g., Segura v. K-Mart Corp.*, 2003-NMCA-013, ¶ 26, 133 N.M. 192, 62 P.2d 283 ("[A] plaintiff seeking admission of medical bills must not only establish through expert testimony that medical bills are reasonable and related to the claimed injuries; the plaintiff must also lay a foundation establishing an exception to the hearsay rule."); *Lopez v. Southwest Comty Health Servs*, 114 N.M. 2, 7, 833 P.2d 1183, 1188 (Ct. App. 1992) ("[I]n a medical malpractice case, because of the technical and specialized subject matter, expert testimony is usually required to establish departure from recognized standards in the community."). Plaintiff cannot establish that psychological coping mechanisms prevented him from taking action in the absence of expert testimony from a psychologist or psychiatrist.³ *C.f.*

³ The necessity of expert psychological or psychiatric evidence is implicit in Plaintiff's citation to articles and treatises. *See Aplt. Br.* at 6-8. However, Plaintiff did not submit to the district court an affidavit establishing the sources to be scientifically reliable, non-hearsay, or otherwise admissible. Moreover, these sources, do not support that an adult is not able to understand the harm resulting from childhood sexual abuse. Plaintiff does cite from a book titled *Abused Boys* for the proposition that "[s]ome 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." To the extent admissible, scientifically reliable, and procedurally proper, this quote establishes only

Kevin J. v. Sager, 2000-NMCA-012, ¶ 15, 28 N.M. 794, 999 P.2d 1026 (expert psychological testimony found necessary under New Mexico’s childhood sexual abuse accrual statute to establish “when Plaintiff knew or had reason to know of the connection between the alleged abuse and the injuries he allegedly suffered”).

Plaintiff had opportunity to, but did not provide affidavit or other testimony from a psychologist or other expert. He did not do so in briefing or arguing the motions, in expert disclosures required by the district court’s order, or at any other time. In this regard, this case is very similar to *Black v. Bigman*, 8 Nav. R. 177, 181 (2001) (upholding a Rule 12(b)(6) dismissal on limitations grounds where the plaintiff “did not take advantage of his opportunity to give the court more information about the circumstances surrounding the [delayed] ‘discovery’ of a fraud claim.”)

To counsel’s knowledge, the *Black* case is the only delayed discovery case addressed by the Navajo Supreme Court. In *Black*, the plaintiff’s father, Kettle Black, sold grazing permits to the defendant. *Id.* at 179. About 38 years after the sale, and 22 years after Kettle Black’s death, plaintiff Kenneth Black filed suit to invalidate the permit transfer to the defendant. *Id.* Black alleged that the fraud was discovered on or about March 3, 1998. Notwithstanding this allegation, the

that there may be “some effects” that are not readily apparent to some victims of childhood sexual abuse. It does not show that there are “no effects” apparent to Plaintiff. *See Bolden v. Village of Corrales*, 111 N.M. 721, 722, 809 P.2d 635, 636 (Ct. App. 1994) (a limitations period is not tolled simply because a plaintiff does not know the full extent of his injury).

Navajo Supreme Court upheld the Rule 12(b)(6) dismissal on statute of limitation grounds. *Id.* at 179, 181.

The Court reasoned that, “[w]hile fraud is difficult to detect because it is often done in secret, Black did not show the court whether he made inquiries about his father’s estate at the time of his death.” *Id.* at 181. In addition, and similar to this case, “Black did not take advantage of his opportunity to give the court more information about the circumstances surrounding the ‘discovery’ of the fraud in terms how the information was obtained or how and why the fraud was concealed.” *Id.* Here, Plaintiff’s allegations and affidavit facts do not indicate any action that Plaintiff took from his adulthood in 1988 until May 2007 at which time, Plaintiff avers, he simply “realized that the sexual contact by Fr. Cichanowicz had injured” him. *Plt’s Aff.* ¶ 2.

The procedural status in this case is even more favorable for dismissal than the procedural status in *Black*. The *Black* court dismissed under Rule 12(b)(6). *Black*, 8 Nov. R. at 181. In this case, as Plaintiff argues, Plaintiff’s submission of an affidavit converted the motions from Rule 12(b)(6) motions to Rule 56 motions for summary judgment. *See Aplt’s Br.* at 13. Rule 12(c) provides that

if, in a motion for judgment on the pleadings, matters outside the pleadings are presented to 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 reasonable opportunity to present all material made relevant to such a motion by Rule 56.

Here, it is Plaintiff's own act of submitting his Affidavit that converted the motions to Rule 56. The Court's notified the parties be ready with such "evidence and witnesses as may be necessary for the hearing" on the motions. Sept. 1, 2009 *Notice*. Plaintiff's counsel informed that Court that, "[w]e are prepared to argue, if that is what this Court would have us do." *Sept. 22, 2009 Tr.* at 4. Notwithstanding having converted the matter to Rule 56 and availing himself of the opportunity of presenting all evidentiary material relevant to the motions, Plaintiff submitted no information from a psychologist and no information about the period from adulthood in 1988 until May 2007. Plaintiff's factual showing is clearly inadequate to demonstrate a genuine issue of fact. Having chosen the procedural status of the case, Plaintiff cannot now complain of lack of opportunity.

The Court in *Black* found it significant that Black's "pretrial statement, with a list of witnesses and the nature of their testimony," contained "nothing to indicate that knowledge of the alleged transfer was not available within a reasonable period of time after the sale or discoverable upon a reasonable inquiry." *Black*, 8 Nav. R. at 181. In this case, Plaintiff did not identify any expert or lay witnesses to address the objective reasonableness of his claimed inability to connect his knowledge of the alleged abuse with his knowledge of resulting injuries. Just as the *Black* court found the absence of such information significant, the district court here noted that "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.” *Order to Dismiss* ¶ 6. Moreover, Plaintiff did not “present the Court with any witnesses that could . . . support Plaintiff’s assertion that there were emotional consequences from these particular actions, even if he could not realize their effects at the time.” *Id.*

As a result, the district court determined that 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.” *Id.* ¶ 10. In so doing, the district court correctly recognized that statutes of limitation serve the important purpose of requiring the filing of suit before memories fade and claims become stale. This purpose is especially important “given the unique circumstances of the Navajo Nation.” *Watts v. Sloan*, 7 Nav. R. 185, 187 (1995). Because “many people live in remote locations” within the Navajo Nation, “the passage of time makes it more difficult to contact witnesses and obtain evidence” than in other jurisdictions. *Id.* “The Navajo Nation Council recognized these difficulties when it reduced the statute of limitations for tort actions from six years to two years.” *Id.* In reducing the limitations period, the Council stated that the previous period of six years “created an unfair and unreasonable burden to adequately defend such actions, due to the inability to locate essential witnesses and material evidence pertaining to such

claims after the passage of such a long period of time.” *Id.* (quoting Navajo Nation Council Res. No. CF-1-82, subpara. 4 (February 2, 1982)). The burden is certainly even greater after twenty plus years, where Plaintiff resides in Oregon and Fr. Cichanowicz resides in Indiana. *See also Estate of Goldtooth Begay No. 2*, 6 Nav. R. 405, 406 (1991) (“The law, using statutes of limitations, and equity, using the principal of laches, requires that disputes be put to rest after a reasonable period of time.”)

The district court correctly found, as in *Black*, that the statute of limitations barred Plaintiff’s claim in the absence of an adequate showing under the objective standard of the accrual provision.

C. Plaintiff Did Not Adequately Allege Mental Incapacity Necessary to Toll the Statute of Limitations Under The Tolling Provision.

Plaintiff claims, in essence, that the two incidents of sexual abuse altered his judgment and “caused Plaintiff to develop various psychological coping mechanisms which prevented Plaintiff from taking legal action until May 2007.” *Plt’s Br.* at 9-10; *2nd Am. Compl.* at ¶ 15. Because Plaintiff’s argument rests on Plaintiff’s alleged impaired mental capacity due to “psychological coping mechanisms,” Plaintiff’s arguments are more appropriately analyzed under 7 N.N.C. § 602(G) which specifically addresses tolling of the statute of limitations due to “mental incapacity,” rather than 7 N.N.C. § 602(A)(4), which generally addresses accrual. *See Stinbrink v. Farmers Ins. Co.*, 111 N.M. 179, 182, 803 P.2d

664, 667 (1990) (noting that a specific, or special, statute controls over a general statute).

The Navajo Code recognizes only limited circumstances that toll the statute of limitations. Specifically, 7 N.N.C. § 602(G) provides for tolling only due to “disability of minority, mental incapacity or imprisonment”:

G. If a person entitled to bring an action is at the time the cause of action accrues under disability of **minority, mental incapacity or imprisonment**, the period of disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the time after removal of the disability which is allowed to others.

(Emphasis added). These circumstances are not present here. Plaintiff turned 18 in 1988, and his allegations fall short of establishing a “mental incapacity.”

Title 7 of the Navajo Code and Navajo case law do not appear to define “mental incapacity.” The common definition of “mental incapacity” is “an inability through mental illness or mental retardation of any sort to carry on the everyday affairs of life or to care for one’s person or property with reasonable discretion.” *Webster’s Third New International Dictionary*. Courts have applied standards similar to this definition in addressing similar tolling arguments. In *Florez v. Sargeant*, 917 P.2d 250 (Ariz. 1996), the Arizona Supreme Court rejected the tolling argument of a plaintiff in a priest abuse case. There, the plaintiff claimed that he was of “unsound mind” within the meaning of A.R.S. § 12-502, a tolling statute similar to 7 N.N.C. § 602(G). *Id.* at 253. The *Florez* court rejected

the tolling argument holding that “[t]he focus of the unsound mind inquiry is on a plaintiff’s ability to manage his or her ordinary daily affairs. It does not focus on the plaintiff’s ability to pursue the subject matter of the litigation at issue.” *Id.* at 254.

Here, Plaintiff does not allege that he is unable to carry on the “everyday affairs of life” or “ordinary daily affairs.” He alleges merely that the alleged sexual abuse caused “Plaintiff to develop various psychological coping mechanisms which prevented Plaintiff from taking legal action.” *2nd Am. Compl.* at ¶ 17. This allegation falls short of establishing that, since 1988, Plaintiff has been under the disability of a mental disorder. Plaintiff’s allegations focus on Plaintiff’s alleged inability to pursue the litigation, not on his ability to manage ordinary daily affairs. As a result, the allegation is insufficient to establish tolling due to mental incapacity.

III. CONCLUSION

The Court should affirm the district court’s dismissal of Plaintiff’s claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellee Brief of the Franciscan Defendants was served by first-class mail on June 4, 2010 to the following individuals:

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11
12 **NAVAJO NATION DISTRICT COURT**

13 **JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO**

14 John Doe BF,
15 Plaintiff,

16 vs.

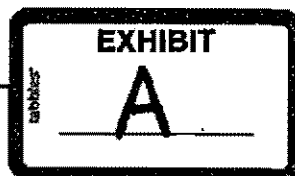
Case No. SR-CV-369-07-CV

17 DIOCESE OF GALLUP, et al.,

18 Defendants.
19

20 TRANSCRIPT OF PROCEEDINGS

21 On the 22nd day of September 2009, at approximately 9:12
22 a.m., this matter came on for hearing on a Status Conference before
23 the HONORABLE GENEVIEVE WOODY, Judge of the Navajo Nation Court,
24 Shiprock District.



JUSTINE HANNAWEEKE, CCR
Official Court Reporter

1TR-

1 had scheduled this week for a trial, but then when I looked
2 at the Scheduling Order we had different dates, as far as
3 discovery is concerned and other matters that needed to be
4 addressed, and I wasn't too sure if the parties were ready.

5 Furthermore, the Court had received motions to dismiss
6 and I guess I just need information from all Counsels as to
7 where we're at, what we need to do, so that we can either go
8 towards scheduling a trial, or whether the parties are ready
9 today to argue the motion to dismiss. Okay.

10 Plaintiff?

11 MR. KEELER: Your Honor, we had filed our response
12 to the motion to dismiss, and this morning we did receive the
13 reply. We are prepared to argue, if that's what this Court
14 would have us do. We'll just leave it to the pleasure of the
15 Court, Your Honor.

16 THE COURT: Okay.

17 MR. NICHOLS: Your Honor, I was waiting for the
18 affidavit from the Plaintiff in this case to file a reply,
19 and it was not forthcoming, so I filed a reply this morning
20 and provided a courtesy copy to Your Honor, I'd be happy to
21 give you another one. We're ready to argue the motion, the
22 motion to dismiss, and would ask that we do so so we can have
23 a ruling on the jurisdictional issues.

24 THE COURT: Okay. Counsel?

25 MR. ISAACSON: Your Honor, On behalf of the

1 they connected. You know, I think that had something to do
2 you know, that time with that priest, you know, sexually
3 abuse. They don't even say sexual abuse they had sexual
4 contact with me. But it doesn't until much later.

5 So that's why I submitted those articles, Your Honor,
6 that's Not just a case in this kid's case. This is case in
7 almost all the kids that are sexually abused in this manner
8 by a familiar.

9 This is not a case where somebody -- Father Cichanowicz
10 didn't jump out of shadows and rape this kid.

11 Father Cichanowicz had a relationship with this kid, he
12 groomed this kid. He made this kid think that everything
13 that Father Cichanowicz did provide to him was about God's
14 love and was about his love for this kid until his sexual
15 acts surely couldn't be inconsistent with that.

16 Your Honor, the Navajo statute, the statute of
17 limitations 7 Navajo Code Section 602 provides that a person
18 can bring lawsuit regarding personal injuries, like in this
19 case two years from discovering the nature of the injury, the
20 cause of the injury and the identity of the parties causing
21 the injury.

22 What we have here, Your Honor, incomplete second
23 amended complaint, paragraphs that plead paragraphs 15, 16,
24 17 and 18 that all say that he did simply did not discover
25 that he'd been injured by the sexual abuse.

32TR-

JUSTINE HANNAWEEKE, CCR
Official Court Reporter

1 Counsel.

2 MR. NOAKER: Yes.

3 THE COURT: So is your argument that the harm was
4 not -- that Plaintiff realized that he was harmed until May
5 of 2007, or that the harm occurred prior to that? I guess I'm
6 still confused about the argument. When did the Plaintiff
7 realize he was harmed until May of 2007, or was it prior to
8 May of 2007?

9 MR. NOAKER: Excellent question, because I
10 obviously didn't make that very clear.

11 Your Honor, in this case, the sex abuse occurred back
12 in '84, '85. So the sexual acts occurred over time.
13 Technically, Plaintiff was injured at that time.

14 The Navajo statute though requires the defendant to
15 know -- I'm sorry -- the Plaintiff to know that he's been
16 injured. And let's use -- I think you heard a back injury
17 analogy by one of the counsel here, and that may be helpful.

18 In sexual abuse when ten years later, 15 years later,
19 and in this case, 20 years later, you're experiencing
20 depression. How would you possibly know that that depression
21 had anything to do with being injured as a child? And that
22 is like to go with the back injury or physical injury. That
23 is like having an accident when you're a kid. Heal up and
24 everything and then when you're 40, you know, your right knee
25 starts giving you trouble.

40TR-

JUSTINE HANNAWEEKE, CCR
Official Court Reporter

1 If Your Honor has any questions, I'll address it. If
2 not, I'll just sit down.

3 THE COURT: I have no questions, Counsel.

4 MR. PETERSON: Thank you.

5 MR. KEELER: Your Honor, I have nothing additional
6 to add at this point

7 THE COURT: Okay. Any other arguments, Counsel?

8 MR. NOAKER: Your Honor, one thing I would
9 request, having been called a liar here, which is 20 years in
10 my career, first time in court, I would seek leave to give
11 fax file that affidavit. I'll call my office and I don't
12 know why they didn't file it. I can get it filed. I
13 apologize for that. I got to admit, I'm a little riled up
14 being called a liar in front this court.

15 Your Honor, regarding Montana, the only other argument
16 I have regarding Montana, the second prong of Montana. That
17 it has to be catastrophic event and the sexual abuse of
18 children on this Navajo Nation reservation; if that is not a
19 catastrophic event I can't imagine what would be.

20 I've been trying to imagine what could occur -- the
21 systematic -- this is -- there are three cases filed against
22 this same perpetrator, Your Honor. The systematic systematic
23 sexual abuse of the children on this reservation is a
24 catastrophic event. I think -- this is no question that the
25 second prong of Montana if Montana applies at all is met