No. 11-2164

IN THE UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

FRANCES LEON HARVEY,

Plaintiff, Appellant

UNITED THE STATES OF AMERICA,

Defendant, Respondent

On Appeal from the United States District Court
For the District of New Mexico
The Honorable M. Christina Armijo
Case No. 08-CV-107 MCA/CG

BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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JURSIDICTION

This personal injury claim against the United States was brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. Plaintiff-Appellant, Mr. Harvey, brought two claims. One was a Navajo Common Law demand for *nalyeeh*. The other was an Arizona medical malpractice claim. The District Court had jurisdiction pursuant to 28 U.S.C. § 1346(b). Final judgment was entered against Mr. Harvey, on June 30, 2011. [Appellant's Appendix (hereinafter AA) at 391] Mr. Harvey filed his notice of appeal on August 18, 2011. [AA at 392 & 394] This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred when it denied the motion for default judgment.

2. Whether the District Court erred when it held that Mr. Harvey's cause of action accrued on April 20, 2004, the date that he learned that his broken hand needed surgery.

3. Whether the District Court erred when it converted the Government's trial brief into a motion for summary judgment, granted it, and dismissed Mr. Harvey's claim.

STATEMENT OF THE CASE

The Court denied Plaintiff's motions for an extension of time for expert witness deadlines [AA at 93 & 97] which was based on the fact that Plaintiff was in prison and

unavailable for examination. [AA at 96 & 101] The Court granted a motion to re-set trial date [AA at 148], but never re-set identification of expert witness deadlines. [See AA at 261] The Court granted Plaintiff's motion for partial summary judgment [AA at 35], holding that Navajo law, and in specific, *nalyeeh*, is the "law of the place." [AA at 180] Believing that an expert witness is not required when applying *nalyeeh*, Plaintiff did not renew his motion to extend the deadline for naming experts. The Court granted Defendant's motion to dismiss certain claims [AA at 105], holding that Plaintiff's claims against the Defendant accrued on April 20, 2004, when Plaintiff knew that his hand was actually broken and needed surgery. [AA at 242] It thusly dismissed as time barred the failure to diagnose aspect of Plaintiff's claim. The Court denied Plaintiff's motion for default judgment [AA at 315] which was based on the fact that the Defendant's answer was filed a day late. [AA at 347] The Court converted Defendant's trial brief into a motion for summary judgment [AA at 349] and granted it because Plaintiff did not have an expert witness. [AA at 374]

STATEMENT OF FACTS

The incidents out of which Plaintiff's Complaint arose occurred within the boundaries of the Navajo Indian Reservation at Fort Defiance Indian Hospital (FDIH), which is located within the State of Arizona. Plaintiff, Francis Leon Harvey, is an enrolled member of the Navajo Tribe who resides on that portion of the Navajo Indian

Reservation which is located in the state of New Mexico. The Indian Health Service (IHS), an agency of the United States Government, operates FDIH. [AA at 37]

In February 2004, Mr. Harvey slipped and fell on the ice. On February 6, 2004, he went to the FDIH for treatment of his injuries. The medical record from February 6, 2004, states "X-rays all ok" even though the radiology report noted a fracture of his right hand. [AA at 128] Mr. Harvey was given Motrin for the pain. [AA at 126 & 371]

On March 5, 2004, Mr. Harvey returned to the Clinic. Again, the medical record states, "X-rays were ok." [AA at 129] On March 29, 2004, Mr. Harvey again returned to the clinic. X-rays were taken again. Again, the X-rays revealed "[a] fracture at the base of the fifth metacarpal involving the articular surface." The note indicates "needs to see ortho ASAP." [AA at 132A] Mr. Harvey was given a right hand splint. On March 30, 2004, Mr. Harvey went to Ortho. He was scheduled for follow up with orthopedics in two weeks. [AA at 133 & 371] On April 20, 2004, Mr. Harvey was seen at the Ortho Clinic. Mr. Harvey was told that he needed surgery [AA at 138] and that the surgery would completely repair his hand. [AA at 372]

Surgery was performed on May 5, 2004. There is no reliable evidence as to the details of that surgery in that the report that is in the medical records was never signed and was added to the record on May 15, 2006 when counsel for Mr. Harvey requested a copy of the medical records. [AA at 368-70] On June 10, 2004, Mr. Harvey went in as directed. [AA at 371] On the 16th of June he returned because his hand was swelling up

and he was experiencing pain. He was told that it would take a year for his hand to get back to normal. [AA at 372]

On March 21, 2005, Mr. Harvey returned to the clinic for a follow up on his hand. Having noted that the tinel's test was positive, the doctor's impression was that Mr. Harvey had right guyon canal-ulnar nerve entrapment. [AA at 179] Mr. Harvey was told by a health care provider that it would take another year for his hand to get back to normal. [AA at 372] Almost a year after the surgery, he was told for the first time he should do physical therapy. [Id.]

On April 20, 2006, when his hand had not returned to normal, Mr. Harvey filed an administrative FTCA claim against the Indian Health Service/Public Health Service. The agency acknowledged receipt on May 1, 2006. [AA at 138]

Had the FDIH properly treated his hand, it would have been completely healed in 6 weeks. Furthermore, the FDIH mislead Mr. Harvey as to the status of his hand and did little or nothing to assist in the healing process after the surgery. His right hand continues to be achy with the pain radiating up into his arm. He has greatly diminished use of his hand. He is right hand dominant. The constant, nagging pain has negatively affected his mental capacity. It also makes him feel restless. He has bad feelings against the FDIH.

After the agency denied his claim, the Plaintiff filed an FTCA claim proffering two theories of recovery: (1) an Anglo medical malpractice claim for failure to timely

diagnose and for negligent treatment once the condition was finally diagnosed; and (2) a Navajo common law demand for *nalyeeh* for his injury.

SUMMARY OF ARGUMENT

1. The Government filed its answer one day late. Pursuant to Fed. R. Civ. P. 55(d), the Court should have entered default judgment against the United States.

2. The Court held that Navajo law is the "law of the place." Nonetheless, it totally ignored Mr. Harvey's demand for *nalyeeh*, in its analysis as to when his cause of action accrued. The Court rather analyzed only the accrual of Mr. Harvey's Anglo medical malpractice claims. In so doing, it misapplied Ninth Circuit case law which holds that in a failure to diagnose case, the requisite injury for accrual of a cause of action is when the undiagnosed condition develops into "a more serious condition." The District Court held that when the FDIH finally realized that Mr. Harvey's hand was broken and that it needed more extensive care, i.e., surgery, the need for surgery was the requisite "more serious condition." However, Mr. Harvey's condition had not worsened. It was the same condition for which he had initially sought treatment, i.e., a broken hand.

The District Court also ignored Ninth Circuit case law which holds that a cause of action does not accrue during the time that a patient relies on representations of health care providers. Throughout his treatment, up until March 21, 2005, health care providers at FDIH assured Mr. Harvey that his hand would heal and be as good as new. It was after that date that his cause of action accrued.

3. The District Court held that Mr. Harvey could not prove his claim without an expert witness. Acknowledging that Navajo law is the "law of the place," the Court arrived at this holding via two assumptions which are not supported by Navajo law: 1. Proof of negligence is a prerequisite for a demand for *nalyeeh*; and 2. The Navajo Court, as a matter of comity, would apply the Arizona malpractice law requirement for expert witnesses to prove negligence. But, the right to *nalyeeh* does not require a showing of negligence. *Nalyeeh* has the power to correct wrongs of any kind. It is applied in all sorts of situations where someone is injured such as worker's compensation, wrongful discharge and insurance coverage. Furthermore, the Navajo Courts are limited by both statute and case law as to when they can apply a state's law as a matter of comity. The circumstances warranting application of a state's law are not present here. A Navajo Court would not apply Arizona medical malpractice law if this case were before it.

STANDARD OF REVIEW

All the issues on review in this appeal are either questions of law or compliance with federal rules and thus all are reviewed de novo. United States. v. Zuniga-Soto, 527 F.3d 1110, 1116-7 (10th Cir. 2008) (questions of law). United States. v. Tindall, 519 F.3d 1057 (10th Cir. 2008) (compliance with federal rules).

ARGUMENT

1. THE DISTRICT COURT ERRED WHEN IT DENIED THE MOTION FOR DEFAULT JUDGMENT.

Plaintiff applied, pursuant to Fed. R. Civ. P. 55 (d), for an entry of default judgment against the United States. [AA at 315] The basis for the motion was the fact that the United States did not file its answer within the allowed 60 days after service.

The Court denied this motion because "Plaintiff never objected to the answer as untimely or alleged any prejudice as a result thereof." [AA at 348] In so ruling, the Court did not look to the requirements of Rule 55(d). Rule 55(d) requires neither timeliness of objection nor a finding of prejudice.

Fed. R. Civ. P. 12(a)(2) provides that the United States must serve its answer to a complaint within 60 days after service on the United States Attorney. In this case, the United States Attorney was served on February 28, 2008 and filed its answer sixty-one days later on April 29, 2008. [AA at 21] It is undisputed that the Answer was untimely filed. [AA at 347] The United States has given no reason or explanation for the late filing. [See AA at 342]

Fed. R. Civ. P. 55(d) provides that default judgment may be entered against the United States if the Court is satisfied that the "claimant establishes a claim or right to relief by evidence that satisfies the court." Plaintiff's claim or right of relief is evidenced by Plaintiff's Complaint which sets forth a claim upon which relief can be granted. [AA at 11] The Defendant did not file any Fed. R. Civ. P. 12(b)(6) motions.

Furthermore, it would be patently unjust, if a Plaintiff is totally denied his claim for filing his claim one day late, but the United States does not suffer a comparable consequence for its late filing of an answer.

2. THE DISTRICT COURT ERRED WHEN IT HELD THAT PLAINTIFF'S CAUSE OF ACTION ACCRUED ON APRIL 20, 2004, THE DATE THAT HE LEARNED THAT HE NEEDED SURGERY.

Defendant brought a motion to dismiss as time barred Mr. Harvey's claim for failure to diagnose. [AA at 105 & 107] The Court granted the motion, holding that Plaintiff's cause of action accrued on, April 20, 2004, "when he learned that more extensive care (i.e., surgery) was required to treat an injury that health care providers originally believed could be taken care of with painkillers and an ice pack." [AA at 252] The Court erred in holding that there was a substantial change in the condition of Plaintiff's hand when the FDIH acknowledged that his hand was indeed broken and needed surgery. [Id.] In so holding, the Court completely ignored Plaintiff's claim sounding in *nalyeeh*, which the Court had ruled was the law of the case. [AA at 198-9] The Court also ignored Supreme Court and Ninth Circuit case law with regard to the accrual of medical malpractice causes of action.

A. Applying *nalyeeh,* Mr. Harvey's claim accrued when he developed bad feelings.

The relevant question in Defendant's statute of limitation motion is: When did Plaintiff's cause of action accrue? With the Court's having ruled that Navajo law, in

specific *nalyeeh,* is the law of the case, [AA at 180], then the relevant cause of action would be Mr. Harvey's demand for *nalyeeh*.

> Traditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus.

J.R. Mueller, Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums? 3 Tribal L.J. 1 (2002-2003) citing Hon. Robert Yazzie (Chief Judge of the Navajo Nation), Life Comes from It: Navajo Justice Concepts, 24 NM L. Rev. 175, 184-85 (1994).

A central purpose of *nalyeeh* is to restore harmony between the parties. Benally v. Broken Hill Proprietary, Ltd., No. SC-CV-79-98, slip op. at 4 (Nav. Sup. Ct. 2001). *Nalyeeh* has the power to correct wrongs of any kind. Dan Vicenti, et al., The law of the People-Dine 'Bibee Haz'a' nii; Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972. It is the duty of the Navajo Nation courts to insure that "parties injured on the Navajo Nation are treated justly and in accordance with Navajo custom and tradition." Nez v. Peabody Western Coal Company, No. SC-CV-28-97, slip op. at 8 (Nav. Sup. Ct. 1999).

Navajo tort law rests on the foundation of the idea of harmony. Mueller, Restoring Harmony through Nalyeeh at 185. There is a right to demand *nalyeeh* where there are

bad feelings and there is a breach of the social harmony. Thus, Mr. Harvey's right to claim *nalyeeh* accrued when he had bad feelings such that there was social disharmony.

Mr. Harvey was told by the health care providers at FDIH on April 20, 2004, that he needed surgery and that the surgery on May 5, 2004, would fix his hand. [AA at 372] Then on June 16, 2004, he was told that it would take a year for his hand to return to normal. [Id.] And when it wasn't better on March 21, 2005, he was told it would take yet another year. [Id.]. Finally, when his hand was not better by March of 2006, Mr. Harvey stopped believing the health care providers at FDIH that his hand would get better and developed bad feelings. [AA at 372-3] Thus, it was in March of 2006, that Mr. Harvey's right of *nalyeeh* accrued. Pursuant to the FTCA, Mr. Harvey had two years from that date to file his claim. 28 U.S.C. § 2401(b).

Plaintiff mailed his claim on April 20, 2006 within two months of the accrual of his right to *nalyeeh*. The agency acknowledged receipt on May 1, 2006. [AA at 138] This is well within two years of the accrual of the right of *nalyeeh* in March of 2006. The Court erred when it held that Plaintiff's cause of action accrued when he was told that he needed surgery. His Navajo cause of action accrued when he had bad feelings against the FDIH.

B. Applying Ninth Circuit law, Plaintiff's cause of action accrued when he became aware that his hand would not recover.

In spite of its holding that *nalyeeh* is the law of the case, the Court looked only to Mr. Harvey's Arizona medical malpractice claim in deciding Defendant's motion.

However, applying relevant Anglo case law, the entirety of Mr. Harvey's Anglo claim accrued long after April 20, 2011, the date set by the Court below.

A claim accrues under the FTCA when the injury manifests itself and the plaintiff is aware of who has inflicted the injury. United States v. Kubrick, 444 U.S. 111, 122-23 (1979). "It is well settled that the limitation period begins to run when the plaintiff has knowledge of injury and its cause." Rosales v. United States, 824 F.2d 799, 805 (9th Cir. 1987).

The Supreme Court and the Ninth Circuit require that there must be knowledge of both a proximately caused injury and who caused it in order for a cause of action to accrue. Knowledge of an injury that resulted from the conduct of the health care providers was exactly what Mr. Harvey did not know on April 20, 2004.

The Court below seems to assume that the broken hand is the required injury. It states that on April 20, 2004, Mr. Harvey through reasonable diligence should have become aware "the DFIH health care providers had originally mis-diagnosed a fracture that ultimately required surgery as, instead, a swollen and painful hand injury treatable with Motrin and ice." [AA at 252] By its holding the Court infers that the failure to timely diagnose the broken hand caused the broken hand.

a. In a failure to timely diagnose case, the cause of action accrues when the patient becomes aware that the pre-existing problem has developed into a more serious problem.

Mr. Harvey's Anglo claim, inter alia, is for failure to timely diagnose. This is different from the case where the health care provider affirmatively causes an injury. Where the health care provider affirmatively causes an injury, the injury is obvious. See, e.g., Davis v. United States, 642 F.2d 328 (9th Cir. 1981) (plaintiff was paralyzed by an injection of polio vaccine); Ashley v. United States, 413 F.2d 490 (9th Cir. 1969) (a nerve was contacted during an unsuccessful attempt to take a blood sample).

> When a claim of malpractice is based on a failure to diagnose, warn, or treat a patient for a pre-existing injury, rather than affirmative conduct creating the injury, *** a claim accrues under Sec. 2401(b) when: 'the patient becomes aware or through the exercise of reasonable diligence should have become aware of the development of a pre-existing problem into a more serious problem.'

Raddatz v. United States, 750 F.2d 791, 796 (9th Cir. 1984), quoting Augustine v. United States, 704 F.2d 1074, 1078 (9th Cir. 1983).

In a failure to diagnose a pre-existing condition case "identification of both the injury and its cause may be more difficult for the patient." Augustine, 704 F.2d 1084 at 1078. In that case, "the injury is not the mere undetected existence of the medical problem at the time." Id. "Rather, the injury is the development of the problem into a more serious condition." Id.

Raddatz, 750 F.2d 796, is instructive where injury is caused by an affirmative act of a health care provider as compared with where the injury is caused by a failure of the health care provider to diagnose, treat or warn. In Raddatz both kinds of situations were present. An Army doctor perforated the patient's uterus when he tried unsuccessfully to

insert an IUD. The doctor immediately told the patient what he had done. Over the next several weeks, the patient went several times to a Navy doctor. Id. at 793-94.

The Ninth Circuit Court of Appeals held that the cause of action against the Army accrued at the time the patient was informed that the Army doctor had perforated her uterus. Id. at 796. As for the failure to diagnose and treat cause of action against the Navy, the court held that that cause of action accrued when the civilian doctor informed the patient that her perforated uterus had developed an infection. Id.

Applying Raddatz to the case at bar requires a conclusion that Mr. Harvey's cause of action accrued when he became aware that his hand was never going to get back to where it was before the break. His pre-existing problem--the break, had become a more serious problem—continuous pain and permanent limited use of his hand. Id. at 796. He became convinced in March of 2006 that, in spite of what the health care providers told him, his hand was never going to get any better. [AA at 373] That is the date that his cause of action accrued. Mr. Harvey filed his administrative claim well within the two year period.

b. Under Ninth Circuit case law, a cause of action does not accrue while plaintiff relies on statements of medical professionals.

The Court below completely ignored Ninth Circuit case law that provides that an FTCA medical malpractice claim does not accrue while a patient relies on statements of health care professionals. The Ninth Circuit stated in Winter v. United States, 244 F.3d 1088, 1090 (9th Cir. 2001), "We have consistently held that a cause of action does not

accrue under the FTCA when a plaintiff has relied on statements of medical professionals with respect to his or her injuries."

"Patients may reasonably rely on assurances by physicians." Rosales v. United States, 824 F.2d 799, 804 (9th Cir. 1987). Furthermore, "it does not matter whether he relied on the statements of the doctor alleged to have committed the malpractice or another treating physician." Winter, 144 F.3d at 1092.

Mr. Harvey was continuously reassured by the health care providers at FDIH that his hand would get back to normal. On April 20, 2004, he was told that he needed the operation and that the operation would fix his right hand. [AA at 372] Consequently, Mr. Harvey reasonably believed that the surgery, scheduled for May 5, 2004, would "fix" his hand. There was no indication made to him by the health care providers that the delay in treatment would in any way impact the outcome. He was assured again on May 13, 2004, June 16, 2004, and March 21, 2005, that his hand would get back to normal with time. [Id.] On March 21, 2005, he was told it would take another year for his hand to get back to normal. [Id.] Due to these continuous reassurances by the health care providers at FDIH that his hand would heal and be back to normal, Mr. Harvey continued until March of 2006 to believe that his hand would return to normal. [AA at 373]

It is well settled law in the Ninth Circuit that Mr. Harvey's claim did not accrue while he relied on assurances by the health care providers at FDIH that his hand would get back to normal. In March 2006, when Mr. Harvey's hand did not get better, he no

longer trusted/relied on the health care providers. Pursuant to Rosales and Winter, that is when his claim accrued.

3. THE DISTRICT COURT ERRED WHEN IT CONVERTED THE GOVERNMENT'S TRIAL BRIEF INTO A MOTION FOR SUMMARY JUDGMENT, GRANTED IT, AND DISMISSED MR. HARVEY'S CLAIM.

At the pretrial conference the Defendant informed the court that it believed that the Court lacked jurisdiction unless the Plaintiff had an expert witness to prove medical negligence. Indicating that it was inclined to accept the Defendant's argument, the Court ordered both parties to file briefs.

After review of the briefs [AA at 286 & 301], the Court then converted the Defendant's arguments that the Court lacked subject matter jurisdiction into a motion for summary judgment, stating that "Plaintiff cannot establish a 'negligent or wrongful act or omission of any employee of the Government' in violation of the [FTCA]." [AA at 350] The court allowed 14 days for the parties to submit supplemental materials and arguments. [AA at 351] Mr. Harvey filed his arguments. [AA at 352] The Court then granted the motion, holding that Plaintiff cannot prove a "medical negligence claim" without a medical expert [AA at 374] and dismissed the case. [AA at 391]

Disregarding the fact that Mr. Harvey had made a demand for *nalyeeh* under Navajo Law, the Court focused totally on his medical malpractice claim brought pursuant to Arizona law. Acknowledging that Navajo Law is the law of the place, the Court tried to force the Anglo medical malpractice claim into Navajo concepts. When it could not

squeeze the Anglo claim into *nalyeeh*, it proclaimed that a Navajo Court would apply Arizona law to Mr. Harvey's claim as a matter of Comity. [AA at 386-7] Then, applying Arizona law, the Court determined that Mr. Harvey could not, as a matter of law, meet his burden of proof without an expert witness.

A. The Court erred in impliedly holding that *nalyeeh* requires proof of negligence as a prerequisite for recovery.

The Court did not come right out and state that a Navajo claim sounding in *nalyeeh* requires proof of negligence. Indeed, to so state would be contrary to Navajo common law. It rather asserted: (1) that Navajo Nation Courts "consistently have 'applied negligence and *nalyeeh* together;'" (2) the Navajo Code provides for negligence causes of action; and (3) "negligence is consistent with Navajo concepts of fault." [AA at 383-4] In support of this final assertion, the Court cites Casaus v. Diné College, 7 Am. Tribal Law 509, 513 (Nav. Sup. Ct. 2007), which is a wrongful discharge case having nothing whatsoever to do with negligence. From these assertions, the Court then made a logical leap, holding that "Plaintiff must prove that Defendant was negligent in order to prevail on his FTCA Medical Malpractice Complaint." [AA at 384]

Nalyeeh is similar to English tort law circa 1680: "In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Prosser, Wade and Schwartz, Cases and Materials on Torts 2-3 (9th ed. 1994) (citing Lambert v. Bessy, T.Raym. 421, 83 Eng. Rep. 220 (K.B. 1981)).

There is no prerequisite under Navajo Common Law that a person demanding *nalyeeh* must first prove negligence. "*Nalyeeh* has the power to correct wrongs of any kind." Dan Vicenti, et al., The law of the People- Diné Bibee Haz'a' nii; Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972, cited with approval in Bennally v. Navajo Nation, 5 Nav. R. 209 (1986). "If a Navajo was injured by the act of another, the victim could demand nalyeeh, which is a form of compensation or reparation." In Re Claim of Ray Joe Jr., 7 Nav. R. 66, 69 (Nav. Sup. Ct. 1993). "[T]he injured person has a personal right to seek nalyeeh for physical injuries contracted." Largo v. Eaton Corp. & Cutler-Hammer, Inc., No. SC-CV-09-99, slip op. at ¶ 25 (Nav. Sup. Ct. 2001).

Chief Judge Yazzie compared *nalyeeh* to insurance in In re Claim of Ray Joe Jr., No. A-CV-39-92, slip op. at ¶ 32 (Nav. Sup. Ct. (1993)) (Yazzie, Chief Judge):

> There is a Navajo common law of insurance, which is a method of sharing risks. In the past, when a Navajo was injured, he or she could rely upon family and clan members to provide for the necessities of life. If a Navajo was injured by the act of another, the victim could demand nalyeeh, which is a form of compensation or reparation. In either situation, the amount of support owing by the family, clan or another (including that person's family and clan) depended upon what they had. Nalyeeh is a form of distributive justice, where the concern is to address need in accordance with resources. Navajos shared the risks of life by giving what they had to those who suffered an injury. What was given depended upon what others actually had.

Under Navajo law, "some responsibility" is all that is required for *nalyeeh*. "Nalyeeh is not satisfied merely by receipt of workers' compensation from the employer when a third party has some responsibility for the accident." Benally v. Mobil Oil Corp., No. SC-CV-05-01 slip op. at 9 (Nav. Sup. Ct. 2003) (setting the standard for allowing a

nalyeeh claim against a third party where an employee has already received workers' compensation) (emphasis added).

Not surprisingly, there is no Navajo case law that holds that a showing of negligence is a prerequisite to a demand for *nalyeeh*. The following are just a few examples of wrongful conduct cases in which *nalyeeh* was applied: Casaus v. Dine' College, 7 Am. Tribal Law 509, 513 (Nav. Sup. Ct. 2007) (wrongful discharge); Nez v. Peabody Western Coal Co., Inc., 2 Am. Tribal Law 468 (Nav. Sup. Ct. 1999) (worker's compensation); Benalli v. First National Insurance Co. of America, No. SC-CV-45-96 (Nav. Sup. Ct. 1998) (insurance coverage).

Finally, *nalyeeh* is an equitable doctrine in the ancient European sense and a relationship value. Benally v. Broken Hill Proprietary Ltd, an Australian Corp., No. SC-CV-79-98, slip op at ¶¶ 17-21 (Nav. Sup. Ct. 2001). Equity is justice administered according to fairness as contrasted with strictly formulated rules. It denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse of men with men. Black's Law Dictionary at 484 (Fifth Edition 1979).

B. The Court erred in relying on Baldwin v. Chinle Family Court.

The Court relied on Baldwin v. Chinle Family Court, 7 Am. Tribal Law 643 (Nav. Sup. Ct. 2008), No. SC-CV-37-08 (Nav. Sup. Ct. 2008), to hold that "it strongly appears that expert medical testimony is necessary to establish the diagnosis and treatment of a

medical condition under Navajo law." The Court below then took another logical leap and concluded that a medical expert is required in the case at bar. [AA at 384]

The Court's analysis is faulty. First Baldwin does not involve a demand for *nalyeeh*. It is not a personal injury case. It is an action for Writ of Prohibition against the Family Court which had taken away the custody of a three year old child from its parents. Baldwin is simply not applicable to a demand for *nalyeeh* case.

Second, the focus of the Court in Baldwin was its concern that the Family Court had shifted the burden of proof from Social Services to the mother. Id. at 5. The Court's discussion about trained health care providers was incidental to its analysis. It was in the Court's list of evidence that the Family Court had either not obtained or had chosen to ignore in reaching its erroneous conclusion, that the Navajo Supreme Court included the fact that there was no evidence from a health care provider that the mother's mental condition affected her ability to care for her child. Id. at 3. Baldwin does not stand for the proposition that an expert witness is required where there is a demand for *nalyeeh*.

C. The Court erred in holding that the Navajo Courts would apply Arizona law to Mr. Harvey's claim as a matter of comity.

Noting that Navajo law is silent on the issue of expert testimony in a personal injury case, the Court then determined that a Navajo Court would apply Arizona law as a matter of comity. [AA at 385-6] The Court below misread Navajo law. A Navajo court most certainly would not apply Arizona law in the case at bar.

"[T]he Navajo Nation courts have jurisdiction over civil disputes on the Navajo Nation and a duty to insure that parties injured on the Navajo Nation are treated justly and in accordance with Navajo custom and tradition." Nez v. Peabody Western Coal Company, Inc., No. SC-CV-28-97, slip op. at ¶ 35 (Nav. Sup. Ct. 1999).

Section 204 of Title 7 of the Navajo Nation Code sets forth the law which the Navajo Courts are to apply:

> A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'áannii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áannii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the court.
>
> B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áannii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áannii.
>
> C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.
>
> D. Any matters not address by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áannii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.

Comity, pursuant to subsection D, is thus only to be applied when there is no Navajo statutory law, regulations or Diné bi beenahaz'áannii (Navajo Traditional, Customary, Natural or Common Law). In the case at bar there is Navajo Common Law which is applicable, i.e., *nalyeeh*. Thus, we don't even get to subsection D.

Furthermore, comity is not favored by the Navajo Supreme Court. The Navajo Supreme Court has stated that the "[u]se of comity is inappropriate where there is no action properly pending in another sovereign's court." Lela v. Peabody Coal Co., No A-CV-18-89, slip op. at ¶ 53 (Nav. Sup. Ct. 1990). Also it has set up stringent tests for its application. Bradley v. Lake Powell Medical Center, No. SC-CV-55-05 slip op. at ¶ 23 (Nav. Sup. Ct. 2007). There being no action pending in an Arizona court in the instant action, a Navajo court would definitely not apply Arizona law.

In this case, there is Navajo Common law which is applicable; *nalyeeh*. In Re Claim of Ray Joe Jr., 7 Nav. R. 66, 69 (1993). A Navajo Court does not need to look further for applicable law. The Court below erred in holding that a Navajo court would apply Arizona law as a matter of comity.

Finally, the Court below relied on cases in which the Navajo Courts looked to Anglo law for guidance to expand the umbrella of *nalyeeh*. [AA at 383-4] Those cases are inapposite here. The cases relied on by the Court below are cases in which *nalyeeh* would not have been applicable under the traditional Navajo concepts of *nalyeeh*. See e.g., Benally v. Mobil Oil Corp., 4 Am. Tribal Law 691 (Nav. Sup. Ct. 2003) which expands *nalyeeh* to cover the retained control doctrine which on first blush is contrary to the Navajo Common Law maxim that a person is only responsible for his own actions.

D. *Nalyeeh* requires that the parties respectfully talk out their dispute.

"Navajo common law liability has its own special rules." Jensen v. Giant Industries, AZ, Inc., No. SC-CV-51-99 slip op. at ¶ 23 (Nav. Sup. Ct. 2002). The trial court's discretion is limited by custom, Singer v. Nez, No. SC-CV-04-99 slip op. at ¶ 25. (Nav. Sup. Ct. 2001), citing Little v. Begay, 7 Nav. R. 353 at 354 (1998). "There are procedures for arriving at nalyeeh that involve the respectful talking out of a dispute. The person requesting nalyeeh should be willing to lay out all the facts of the problem and the injury, and the listener should acknowledge the request to talk out the problem and then participate in good faith." Id. at ¶ 38.

"Where there is an injury, Navajo common law requires the negotiation of the amount of nalyeeh, fn 3 based upon the effects of the injury and the ability of the tortfeasor and his or her relatives to make things right. The Navajo maxim is that it should be enough 'so there are no hard feelings.'" Benalli v. First National Insurance Co of America, No. SC-CV-45-96 slip op. at ¶ 65 (Nav. Sup. Ct. 1998) (Yazzie, Chief Justice). Footnote three states: "The term nalyeeh is often used in the sense of an amount of payment. It actually expresses the mode of payment, i.e., the respectful negotiation of the amount an offender should pay based upon the injured person's needs and the offender's ability to pay, including the ability of relative and clan members." Id.

Title 7 Navajo Nation Code, § 204 B provides for requesting advise from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áannii (Navajo Traditional, Customary, Natural or Common Law). The Court below, in fact did

hold a hearing "wherein the Honorable Robert Yazzie, former Chief Justice of the Navajo Supreme Court, provided, on behalf of the Court and the parties, general background information as to the concept of *nalyeeh*." [AA at 382 & 396 (transcript of hearing)]

The Honorable Robert Yazzie, described how Mr. Harvey's demand for *nalyeeh* would be resolved on the Navajo Nation. In doing so, he made general observations about the process [AA at 407-9]:

> So the question here becomes how do we reconcile the "it's up to him" freedom principle, with the *** "he acts as if he has no relatives" boundaries? *** I respect those around me, and I expect their respect for me**** When I'm an agent of injury to another, I am responsible if I misuse the talents and the knowledge that I have**** When I injure and hurt another, I have the obligation to work it out in a respectful way**** What does the person who has been injured need to rejoin the group? How can we make the person whole? *** The quote about enough so that there's no hard feelings, it is what is needed to restore the person to society**** Importantly, it is enough to show respect for the person and make him feel that what happened matters **** It is not concerned with the skill or intent of the practitioner, be that person a Western physician or a traditional healer.

The Honorable Yazzie then described the peacemaking process. The injured person has the right to choose to go to peacemaking. [AA at 420] Judge Yazzie suggested that the injured party and a representative of IHS (Indian Health Service) meet and talk about what happened and the extent of the damage. There is a facilitator for the process. That facilitator is certified by the Navajo Nation peacemaking organization. [AA at 431] The relatives play a big role, but neither judges nor lawyers are invited. [AA at 415] "[I]t's just a matter of bringing the parties together." [AA at 420]

He went on to state, "In another setting, adversarial system we're talking about, you know, lawyers asking questions about the degree of negligence. That's not what we're talking about in the nabik' i yat' i' kind of process. And I think the parties would be the ones to explain among themselves the nature of the problem and what could be done to remedy the problem." [AA at 426]

In response to a question from the Court about how fault and liability are determined under *nalyeeh*, Judge Yazzie explained the history of the Navajo Court system. It began in 1892, as a court of Indian Offenses. For the most part, Anglo concepts of law were applied. Then in 1982, the former Navajo Nation leader, Peter MacDonald, determined that Anglo legal concepts did not work for the Navajo people. He directed the Navajo Court to look to traditional concepts. From that day the judges have been trying to apply Navajo thinking. It has been a process. English concepts keep creeping in. However, if you think about *nalyeeh* purely in Navajo, then where there is a hurt, then there is a right to the process of *nalyeeh*. [AA at 434-5]

In the case at bar, Mr. Harvey has an unhealed hand. He has a right to demand *nalyeeh*. He has demanded *nalyeeh*. Mr. Harvey and a representative of the IHS now must respectfully talk out the situation. They can use a certified Peacemaker as a facilitator. There are no lawyers, no judges and certainly no expert witnesses. There is no cross examination. There is respectful speaking and listening.

Judge Yazzie was asked what would happen if the talks do not resolve the dispute. He responded that they could go to the court. [AA at 417] However, he noted in his experience there has always been resolution of disputes through the peacemaking process. [AA at 419]

When asked by the Court about how *nalyeeh* would work in an adversarial system he stated: "[W]e have to be talking about the standard that --what Melvin Belli was talking about, adequate compensation, adequate award; and to achieve that we have to talk about table of pains, table of penalties, we have to talk about numbers." [AA at 427]

It would thus be the role of the Court to assure the adequacy of the compensation. See., e.g., Benally v. Big A Well Service, Co, No. SC-CV-27-99 slip op. at ¶ 22 (Nav. Sup. Ct. 2000); Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 slip op. at 8-9 (Nav. Sup. Ct. 1999).

E. Mr. Harvey makes the following alternative arguments:

1. If the Court determines that Anglo style proof of negligence is necessary, then expert testimony is not allowed pursuant to Fed. R. Evid. 702.

The Government in its Pretrial Memorandum, [AA at 298], citing Lowery v. Montgomery Kone, Inc., 202 Ariz. 190, 193 ¶ 7, 42 P.3d 621, 624 (Az. App. 2002), acknowledges that, applying Arizona law, there is no need for an expert witness when there is a "fund of common knowledge which would permit laymen to reasonably draw a conclusion of negligence."

The Operative Report cannot be used by the Government as proof of what occurred during the surgery. Without evidence as to what happened during the surgery, a layman is in as good a position as a medical expert to determine what occurred during the surgery. Fed. R. Evid. 702 prohibits the use of an expert witness is this circumstance. Furthermore, the Operative Report is so untrustworthy that it cannot be used as the basis for an expert opinion pursuant to Fed. R. Evid 703.

The Operative Report does not meet the requirements of Fed. R. Evid. 803(6) (records of regularly conducted activity). The Operative Report is neither signed nor dated. The stamp of the Information Management Committee at Fort Defiance Indian Hospital states that the document "has been filed as incomplete." That stamp is dated 5/15/2006, two years after the surgery. [AA at 368-370]

The hearsay rule provides that evidence which is hearsay, with a few exceptions, is not admissible. Fed. R. Evid. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The Operative Report is hearsay. It is a written statement. It is not a statement made by a declarant while testifying at trial or at a hearing. Unless the Operative Report meets an exception to the Hearsay Rule, it is not admissible to prove the truth of the matters asserted therein.

Fed. R. Evid. 803 sets forth exceptions to the hearsay rule. Fed. R. Evid. 803(6) describes the records of regularly conducted activity exception to the hearsay rule as follows, in pertinent part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity**** unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Thus, in order for the 803(6) exception to the hearsay rule to apply, the record must be (1) made at or near the time of the event, (2) by a person with knowledge of the event, and (3) without indicia of lack of trustworthiness. The Operative Report is neither signed nor dated. This failure was acknowledged by the Information Management Committee on May 15, 2006. Stamped on the Operative Report is the notice that the document "has been filed incomplete." [AA at 368-70] Without a date, we do not know whether the Operative Report was created at or near the time of the surgery. We don't know if it was created by a person with knowledge because it was unsigned. Finally, and perhaps more importantly, without the signature of the surgeon, there is no indicia of trustworthiness that the document is an accurate description of the surgery.

The Operative Report does not meet the requirements of Fed. R. Evid. 803(6). It is hearsay without an exception and cannot be used as proof of the matters asserted therein.

Furthermore, because it is unsigned and undated, and thus untrustworthy, it is not of the type reasonably relied on by experts, Fed. R. Evid. 703, and thus cannot form the

basis of any expert opinions which relate to the propriety of what occurred during the surgery on May 5, 2004. Fed. R. Evid. 703 provides that experts can rely on evidence that is not admissible if it is "of a type reasonably relied upon by experts in the particular field." However, an unsigned, undated Operative Report is so inherently unreliable that, as a matter of law, it cannot be relied upon to form the basis of an expert opinion as to whether the standard of care was met during a surgery.

The Plaintiff prays that the Court hold that the Operative Report is hearsay and inadmissible to prove the matters asserted therein. The Plaintiff prays further that the Court determine, as a matter of law, that an unsigned, undated Operative Report cannot reasonably form the basis of an expert opinion as to the whether the standard of care was met during the surgery.

With no credible evidence as to what occurred during the May 5, 2004 surgery, expert testimony would provide no assistance to the trier of fact. Fed. R. Evid 702. Fed. R. Evid. 702 provides that an expert witness may testify only if his/her testimony will assist the trier of fact. Thus, the Court should hold that expert testimony is not allowed pursuant to Fed. R. Evid. 702.

2. If the Court determines that Anglo style proof of negligence is necessary, the Court below erred in rejecting Mr. Harvey's res ipsa loquitur argument.

Res ipsa loquitur is Latin for "the thing speaks for itself." According to Black's Law Dictionary (5th Edition 1979) at 1173, res ipsa loquitur is a "rebuttable presumption or inference that defendant was negligent, which arises upon proof that instrumentality

causing injury was in defendant's excusive control, and that the accident was one which ordinarily does not happen in absence of negligence." The occurrence "was such that in the ordinary course of things would not have happened if reasonable care had been used."

The surgery was under the complete and exclusive control of the Defendant. However, because the Operative Report [AA at 368-70] is not signed or dated, it provides no evidence as to what occurred during the surgery on Mr. Harvey's hand. See discussion supra. Thus, there is no evidence as to what happened during that surgery.

Furthermore, the Government does not dispute that "in the ordinary course of things" Plaintiff would have had complete recovery from surgery on his injured hand. Indeed, this is what Mr. Harvey was told to expect by the health care providers at FDIH before he had the May 5, 2004 surgery. [AA at 371-3]

The surgery was under the complete and exclusive control of the Defendant. The ordinary outcome of this surgery is complete recovery. Mr. Harvey does not have complete recovery from the surgery. Because the Plaintiff does not have complete recovery, there is, pursuant to res ipsa loquitur, a rebuttable presumption that the Defendant was negligent. Plaintiff prays that the Court find that there is a rebuttable presumption that the FDIH was negligent.

3. Applying equitable principles, the Court should give Mr. Harvey the opportunity to retain an expert.

If this Court determines that an expert witness is necessary for proof of negligence, Mr. Harvey prays that the Court, recognizing that *nalyeeh* is an equitable doctrine, in all

fairness, give Mr. Harvey the opportunity to retain an expert. Benally v. Broken Hill Proprietary Ltd, an Australian Corp., No. SC-CV-79-98 slip op. at ¶¶ 17-21 (Nav. Sup. Ct. 2001).

CONCLUSION

Mr. Harvey prays that the Court grant his motion for default judgment.

In the alternative he prays that the Court reverse the lower Court's dismissal of this case. He further prays that the Court remand this case to the District Court with instruction that Mr. Harvey and a representative of the Indian Health Services talk this dispute out with the assistance of a certified Navajo Peacemaker. The District Court would then make the determination as to the adequacy of the compensation and having made such determination, enter an appropriate order.

He prays further, in the alternative that if the Court will not order this case to a Navajo Peacemaker, that the Court hold 1) that Mr. Harvey's cause of action accrued after March of 2006; 2) that *nalyeeh* does not require proof of negligence; and 3) if *nalyeeh* does require proof of negligence then res ipsa loquitur creates a presumption of negligence with regard to the surgery.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 8234 words. I relied on my word processor and its Microsoft Office Word 2003 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Mickale C. Carter

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2011, I filed Appellant's Opening Brief electronically through the CM/ECF System which caused the following parties or counsel to be served by electronic means. On the same day, I served the same counsel one copy of the joint appendix by mail.

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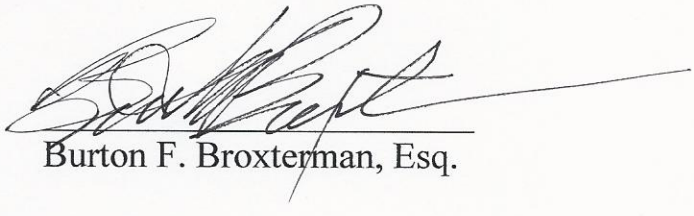

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANCIS LEON HARVEY,

Plaintiff,

vs. No. 08CV107 MCA/RLP

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on *Plaintiff's Motion for Partial Summary Judgment* [Doc. 17], filed October 6, 2008. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court grants the motion.

I. BACKGROUND

Plaintiff Francis Leon Harvey is an enrolled member of the Navajo Tribe who resides on that portion of the Navajo Reservation located in the State of New Mexico. The Fort Defiance Indian Hospital ("FDIH") is located on the Navajo Reservation, in the State of Arizona. Indian Health Services ("IHS"), an agency of the United States Government, operates FDIH pursuant to a lease with the Navajo Nation. [See Doc. 18 at 2].

In early February of 2004, Mr. Harvey fell on ice, hurting his right hand, right leg, and right rib area. On February 6, 2004, he presented at the walk-in clinic of FDIH, at which time health care providers gave him Motrin for the pain he was experiencing, and advised him to return in one month if his condition did not improve. It is undisputed that a note in

Mr. Harvey's medical record states, "X-rays all ok," even though the radiology department's report on the X-ray of his right hand noted a fracture of the base of the fifth metacarpal. [Doc. 1 at 2-3; Doc. 6 at 3; Doc. 54; Exhs. A, B].

Mr. Harvey returned to FDIH on March 5, 2004, continuing to complain of pain. A note made that day again stated that "X-rays were ok," and Mr. Harvey was provided more Motrin. [Doc. 1 at 3; Doc. 6 at 3].

On March 29, 2004, Mr. Harvey went back to FDIH and was X-rayed once more. Among other notations, the medical record from that visit states "[r]ight fifth metacarpal (digit) base fracture 2/6/04." [Doc. 54, Exh. E]. Additionally, Mr. Harvey "was told he needs to see ortho ASAP." [Id.; Exh. E].

On March 30, 2004, Mr. Harvey visited the FDIH's orthopedic clinic, where he was provided with a splint and directed to "use [it] part time for comfort." [Doc. 54; Exh. F]. He also was instructed to return to the clinic in two weeks. [Doc. 54; Exh. F].

When Mr. Harvey returned to the orthopedic clinic on April 20, 2004, it was recommended that he undergo surgery. [Doc. 1 at 3; doc. 6 at 3]. Accordingly, Mr. Harvey went back to the orthopedic clinic on May 3, 2004 for a pre-op appointment and, on May 5, 2004, underwent hand surgery performed by Dr. Victor Brown. [Doc. 1 at 3-4; Doc. 6 at 3-4; Doc. 54, Exh. H]. Notations in the medical record from May 3, 2004 reveal that both the surgery and "all adverse reactions" were discussed with Mr. Harvey. [Doc. 54, Exh. H]. Similarly, the consent form that Mr. Harvey signed that same day notes that "[c]ommon and important risks associated with the proposed operation . . . include infection, neural vascular

trauma, non-union, [and] arthritis." [Id.; Exh. I].

Mr. Harvey returned to the orthopedic clinic on May 10, 2004 for a follow-up appointment, and again on May 13, 2004 because his hand was hurting him. An X-ray revealed that the hand was not infected and was healing. Mr. Harvey's stitches were removed at that time, his hand was recasted, and he was instructed to return to the clinic in four weeks for cast removal and X-ray. [Doc. 1 at 4; Doc. 6 at 4].

On June 10, 2004, Mr. Harvey returned to the clinic to report that his hand was swollen and turning yellow. [Doc. 1 at 4; Doc. 6 at 4]. Mr. Harvey returned to the orthopedic clinic again on June 16, 2004. Notes from the medical record of that day explain that Mr. Harvey's "hand [was] swelling up[,]" but also that it was "healing well." [Doc. 1 at 4; Doc. 65; Exh. P]. According to Mr. Harvey, he was informed during the June 16, 2004 visit "that it would take a year for his hand to get back to normal." [Doc. 1 at 4].

Again on March 21, 2005, Mr. Harvey returned to the FDIH orthopedic clinic, complaining of pain. [Doc. 4 at 4]. An examination of his right hand revealed ulnar nerve entrapment, and medical-record notes from the visit show that Mr. Harvey was instructed to wear a wrist support and to go to physical/occupational therapy. [Doc. 65, Exh. Q]. According to Mr. Harvey, he was again told "that it would take yet another year for his hand to get back to normal." [Doc. 1 at 5].

By April of 2006, Mr. Harvey did not believe that his hand was "right." [Doc. 1 at 5]. Accordingly, on May 1, 2006, he filed an administrative claim (Form 95 *Claim for Damage, Injury, or Death*) with the Department of Health and Human Services, in which he described

the basis of the claim as a "[f]ailure to diagnose broken bone in right hand. Surgery to repair fell below the standard of care." In the box marked "Date and Day of Accident" Mr. Harvey wrote "May 2004." Mr. Harvey sought personal-injury damages in the amount of $300,000. [Doc. 54, Exh. K].

By letter dated July 10, 2006, counsel for Mr. Harvey advised that Mr. Harvey was amending the amount of his claim from $300,000 to $2,016,120. [Doc. 54, Exh. N]. The greater amount apparently is what Mr. Harvey believes is necessary to effect *nalyeeh*, which, under Navajo law, is a demand by a victim to be made whole for an injury. [Doc. 1 at 2]. By letter dated June 20, 2007 and received by counsel for Mr. Harvey on July 16, 2007, the administrative claim was denied as untimely. [Id., Exh. O at 1]. On January 29, 2008, Mr. Harvey filed his *FTCA Medical Malpractice Complaint*, alleging that providers at FDIH breached the applicable standard of care. [Doc. 1 at 6].

On October 6, 2008, Mr. Harvey filed *Plaintiff's Motion for Partial Summary Judgment* [Doc. 17]. In his motion, Mr. Harvey asks the Court to determine that the applicable law in this Federal Tort Claims Act ("FTCA") action is the tort law of the Navajo Nation, because the Navajo Nation is the "place" where the triggering act or omission occurred. [Doc. 18 at 8-18]. Alternatively, Mr. Harvey argues that, should the Court interpret "place" to mean "State," then the laws of the State of Arizona, including its conflict-of-laws provisions, apply, and similarly mandate that the law of the Navajo Nation control. [Id. at 19-24]. The United States responds that for purposes of the FTCA, courts have consistently interpreted "place" as meaning "State"; and that therefore, in this case, the applicable law is

that of the State of Arizona. [See generally Doc. 24].

Following the filing of Mr. Harvey's motion for partial summary judgment, the United States filed *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* [Doc. 53] on the ground that all claims of negligence preceding May 1, 2004 (the date two years prior to the filing of Mr. Harvey's administrative claim) must be dismissed as time-barred. [Doc. 54 at 1-2]. The Court addresses herein only the motion for partial summary judgment.

II. ANALYSIS

A. *Plaintiff's Motion for Partial Summary Judgment* [Doc. 17]

1. Standard of Review: Fed.R.Civ.P. 56

The Court may enter summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir.1995) (quoting Fed.R.Civ.P. 56©). A "genuine issue" exists where the evidence before the Court is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party as to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. See id. at 248.

When, as here, the movant is also the party bearing the burden of persuasion with regard to the claim on which a summary judgment is sought, the movant must show that the

record as a whole satisfies each essential element of its case and negates any affirmative defenses in such a way that no rational trier of fact could find for the non-moving party. See 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068, 1071 (10th Cir. 1998); Newell v. Oxford Mgmt., Inc., 912 F.2d 793, 795 (5th Cir. 1990); United Missouri Bank of Kansas City, N.A. v. Gagel, 815 F. Supp. 387, 391 (D.Kan. 1993). The admissions in a party's answer to a complaint are binding for purposes of determining whether the movant has made such a showing. See Missouri Housing Dev. Comm'n v. Brice, 919 F.2d 1306, 1314-15 (8th Cir. 1990). Similarly, the Court may consider any undisputed material facts set forth in the motion papers which are deemed admitted by operation of D.N.M. LR-Civ.56.1. See LaMure v. Mut. Life Ins. Co. of N.Y., 106 F.3d 413, 1997 WL 10961, at *1 (10th Cir. 1997) (unpublished disposition); Smith v. E.N.M. Med. Ctr., 72 F.3d 138, 1995 WL 749712, at *4 (10th Cir. 1995) (unpublished disposition); Waldridge v. American Hoechst Corp., 24 F.3d 918, 920-24 (7th Cir.1994) (approving use of local rule similar to D.N.M. LR-Civ. 56.1(b)).

Apart from these limitations, it is not the Court's role to weigh the evidence, assess the credibility of witnesses, or make factual findings in ruling on a motion for summary judgment. Rather, the Court assumes the admissible evidence of the non-moving party to be true, resolves all doubts against the moving party, construes all admissible evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in the non-moving party's favor. See Hunt v. Cromartie, 526 U.S. 541, 551-52 (1999).

2. The Federal Tort Claims Act

Under the doctrine of sovereign immunity, "'the United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" Weaver v. United States, 98 F.3d 518, 520 (10th Cir.1996) (*quoting* United States v. Sherwood, 312 U.S. 584, 586 (1941)). The threshold question in any suit in which the United States is a defendant, then, must be whether Congress has specifically waived sovereign immunity, and a plaintiff's recovery is limited by the express terms of the United States' waiver. Louis v. United States, 54 F.Supp.2d 1207, 1209 (D.N.M. 1999).

In this case, the FTCA sets the parameters of the United States' liability. Pursuant to the FTCA, the United States is made liable (within the scope of its waiver of sovereign immunity)

> for personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place* where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). It is the meaning of the phrase "the law of the place" that is in dispute here, with Mr. Harvey insisting that "place" means the Navajo Nation and the United States urging the Court to conclude that "place" means the State of Arizona. [See Doc. 18 at 10-19; Doc. 24 at 6-9].

Mr. Harvey puts heavy reliance on Cheromiah v. United States, 55 F.Supp.2d 1295 (D.N.M. 1999), and asks this Court to do the same, concluding, simply (though after extensive analysis) that "Cheromiah got it right." [Doc. 25 at 6]. Cheromiah was, among other things, an FTCA action brought by parents whose adult son died as a result of a bacterial infection that went both undiagnosed and untreated after four visits in five days to the emergency room of the Acoma Canoncito Laguna Hospital ("ACLH"). Id. at 1297. ACLH is located in the State of New Mexico, within the boundaries of Acoma tribal land, and is operated by IHS pursuant to a lease with the Acoma tribe. Id. Plaintiffs/parents sought partial summary judgment that the New Mexico Medical Malpractice Cap did not apply because the controlling law was the law of the Acoma tribe, *not* the law of the State of New Mexico. Id.

Notwithstanding that the district court found a "compelling logic" in parents' argument that, for purposes of 28 U.S.C. § 1346(b)(1), "the law of the place" was the law of the Acoma tribe because the alleged medical malpractice occurred with the boundaries of tribal lands, the court still carefully scrutinized (1) United States Supreme Court and federal district court interpretations of the phrase "the law of the place;" (2) legal principles authorizing tribal jurisdiction to be asserted over non-Indians; and (3) notions of tribal sovereignty. Cheromiah, 55 F.Supp.2d at 1301-08. This Court recognizes that the Cheromiah court's analysis is sound and proceeds in its own analysis in a like manner.

The meaning of the phrase "the law of the place" was considered in Hess v. United States, where the question presented was what law applied in an FTCA wrongful-death

action where death occurred on navigable waters within the territorial limits of the State of Oregon. Hess v. United States, 361 U.S. 314, 315 (1960). In Hess, the United States Supreme Court determined that because the "death and the wrongful act or omission which allegedly caused it occurred within the State of Oregon . . . liability must therefore be determined in accordance with the law of that place." Id. at 318. The Court further noted that, because the death occurred on navigable waters, Oregon law would require the determining court to look to maritime law. See id.

In rejecting the argument that death actually occurred on the dam on which the decedent had been working and, therefore, the applicable law was the law governing torts occurring on land, the Court explained:

> It is clear . . . that the term 'place' in the Federal Tort Claims Act means *the political entity*, in this case Oregon, whose laws shall govern the action against the United States 'in the same manner and to the same extent as a private individual under like circumstances.' There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law.

Hess, 361 U.S. at 318 n.7 (emphasis added; internal citation omitted). This Court does not construe Hess as concluding, as many other courts have, that, for purposes of the FTCA, "the law of the place" necessarily means the law of the State. See, e.g., LaFromboise v. Leavitt, 439 F.3d 792, 794 (8th Cir. 2006) ("[T]he most apposite precedents from the federal appellate courts support the view that 'place' means 'State.'") (and collecting cases); Federal Express Corp. v. United States, 228 F.Supp.2d 1267, 1269 (D.N.M. 2002) ("Plaintiffs ignore

the overwhelming load of case law that has interpreted the term 'law of the place' to refer to the substantive law of the state in which the tort occurred.") (and collecting cases). To the contrary, the Court in Hess was quite explicit that "[i]t is clear . . . that the term 'place' in the [FTCA] *means the political entity*. . . ." Id. (emphasis added). It just so happened in the facts presented in Hess, the political entity was the State of Oregon.

Notwithstanding the Hess Court's equating "place" (as used in the FTCA) with "political entity," the United States in the instant action asserts that "[t]he Supreme Court has recognized and never questioned the assumption that the singular Law of the Place, is that of the State." [Doc. 24 at 5-6]. It is true that the Supreme Court has stated that it "ha[s] consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." F.D.I.C. v. Meyer, 510 U.S. 471, 478 (1994). However, in neither Meyer nor any of the four cases[1] on which the Meyer Court relied for this assertion was the Court faced with the precise circumstance that presents itself here and that also arose in Cheromiah—determining "the law of the place" when the act or omission occurs in a location that implicates a political entity (*i.e.*, an Indian tribe)[2] within

[1] Those four cases are (1) Miree v. DeKalb County, Ga., 433 U.S. 25 (1977) (breach-of-contract action brought in diversity and arising out of crash of passenger jet); (2) United States v. Muniz, 374 U.S. 150 (1963) (FTCA action brought by inmates who sustained personal injuries while incarcerated); (3) Richards v. United States, 369 U.S. 1 (1962) (FTCA action arising out of airline crash in Missouri and implicating laws of Missouri and Oklahoma); and (4) Rayonier Inc. v. United States, 352 U.S. 315 (1957) (FTCA action arising from forest fire on government land).

[2] Indian tribes are recognized as political entities. As the Ninth Circuit has explained:

> "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political

a political entity (*i.e.*, a State). See Hess, 361 U.S. at 318 n.7 ("It is clear . . . that the term 'place' in the [FTCA] *means the political entity*. . . .").

To be sure, a number of federal courts have "assumed without discussion . . . that, in cases that arise on an Indian reservation within a State, the substantive law of the State is controlling. . . ." Louis v. United States, 54 F.Supp.2d 1207, 1209 (D.N.M. 1999); see also Red Elk on Behalf of Red Elk v. United States, 62 F.3d 1102, 1104-05) (8th Cir. 1995) (South Dakota law determined whether tribal police officer was acting within course and scope of employment when he raped teenaged girl); Red Lake Band of Chippewa Indians v. United States, 936 F.2d 1320, 1325 (Minnesota law applied in FTCA action arising from property damage ion reservation); Seyler v. United States, 832 F.2d 120, 121 (9th Cir. 1987) (Idaho law applied in FTCA action arising from personal injuries sustained as result of motorcycle accident on reservation road); Big Head v. United States, 166 F.Supp. 510, 513 (D.Mont. 1958) (Montana law applied in FTCA action for damages incurred when truck overturned on reservation road).

> communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (1982 ed.) (*quoting* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)). Tribal sovereignty is of "a unique and limited character." United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). The incorporation of tribes within the territory of the United States means that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." Id. However, "until Congress acts, the tribes retain their sovereign powers." Id.

State of Montana v. Gilham, 133 F.3d 1133, 1135-36 (9th Cir. 1998).

However, as the Cheromiah court noted, in none of these foregoing cases was application of tribal law actually raised as an issue. Cheromiah, 55 F.Supp.2d at 1306 ("The fact that [application of tribal law] has never been done, standing alone, does not mean that it is not what the law requires."). That this is so is significant because "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511 (1924); accord Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263 v. C. I. R., 75 F.2d 183, 184 n.2 (10th Cir. 1935).

Thus, it was the "assum[ption] without discussion[,]" noted by the court in Louis, that caused the United States District Court for the Southern District of California, in Quechan Indian Tribe v. United States, to reject as non-precedential those cases in which courts assumed without deciding that State law— rather than tribal law—was "the law of the place" and, instead, follow what it deemed the persuasive reasoning of Cheromiah. Quechan Indian Tribe v. United States, 535 F.Supp.2d 1072, 1103 (S.D.Cal. 2008).

In Quechan, the Quechan Indian Tribe ("the Tribe") brought an FTCA action against the United States to recover for property damage sustained by certain tribal cultural sites as a result of the United States' work in repositioning and maintaining electrical transmission pole lines. Among other things, the Tribe charged the United States with negligence, gross negligence, negligence per se, and public and private nuisance. The United States moved for partial summary judgment on the ground that California law applied, but that the Tribe was relying on state-law causes of action that were not actionable against a private person.

Quechan Indian Tribe, 535 F.Supp.2d at 1101. Although the Quechan court ultimately determined it was required to look only to California law in support of the Tribe's claims, its analysis is instructive and informs that of this Court.

In addressing the issue before it, the Court in Quechan undertook a thorough evaluation of Cheromiah and its reasoning, explaining why it found Cheromiah more persuasive than two FTCA cases decided by courts in the District of Arizona. After first considering the Cheromiah court's conclusion that, for FTCA purposes "the law of the place" was the law of the Acoma Tribe, the Quechan court noted that "[t]here [was] no controlling authority on the issue of whether 'law of the place' include[d] tribal law when the act or omission occurred within the boundaries of an Indian reservation." Quechan Indian Tribe, 535 F.Supp.2d at 1101-02. Recognizing that "[t]he Ninth Circuit ha[d] applied state law to tort actions occurring within reservation boundaries without discussion[,]" the Quechan court proceeded to emphasize that "'[s]uch unstated assumptions on non-litigated issues are not precedential holdings binding future decisions.'" Id. (*quoting* Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir.1985)). For that reason, the Quechan court went ahead and "examined authority in other jurisdictions to determine the appropriateness of applying tribal law in [the] FTCA action[]" before it. Quechan Indian Tribe, 535 F.Supp.2d at 1102.

The Quechan court's examination began with two District of Arizona cases that involved (1) the commission of dental malpractice in an IHS hospital located on the Navajo

reservation in Shiprock, New Mexico;[3] and (2) a fatal car accident that occurred within the geographical boundaries of the Navajo Nation.[4] The courts in both cases considered—but rejected as non-persuasive—the Cheromiah court's reasoning, explaining that a more convincing line of cases holds that when a negligent act or omission occurs on a federal enclave within a state, it is the state's law—and not tribal law—that applies. See Ben v. United States, 2007 WL 1461626, at *3 (D.Ariz. May16, 2007); Bryant ex rel. Bryant v. United States, 147 F.Supp.2d 953, 957-958 (D.Ariz. 2000). Both Ben and Bryant relied on Brock v. United States, in which the Ninth Circuit held that "the law of the place" means "the law of the state in which the negligence occurred[, and that] place referr[ed] to locality rather than jurisdiction. . . ." Brock v. United States, 601 F.2d 976, 978, 979 (9th Cir. 1979).

The Quechan court articulated three reasons for declining to rely on Ben and Bryant. First, the court "f[ound] reliance on Brock in the context of Indian law issues inappropriate, because Brock does not deal with the unique nature of Indian law and jurisdiction or Indian sovereignty." Quechan Indian Tribe, 535 F.Supp.2d at 1102. Second, the court took issue with Ben and Bryant to the extent they relied on cases that applied state law to acts occurring on Indian land without discussing applicable Indian law. And finally, the court opted not to follow district-court cases that themselves relied upon cases in which the relevant actions did not occur on the reservation. Id. at 1102-03.

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[3] Bryant ex rel. Bryant v. United States, 147 F.Supp.2d 953 (D.Ariz. 2000).

[4] Ben v. United States, 2007 WL 1461626 (D.Ariz. May 16, 2007).

Instead, the Quechan court agreed with the Cheromiah court's interpretation of the plain language of the statute and concluded that "the phrase 'the law of the place' can only be interpreted to mean the law of a recognizable entity having jurisdiction over the site where the act occurred, which is not necessarily the 'law of the state.'" Quechan Indian Tribe, 535 F.Supp.2d at 1103. Such an interpretation is consistent with the Tenth Circuit's determination that "a tribe, even though physically located within the geographic boundaries of a state, is . . . a sovereign." United States v. Barquin, 799 F.2d 619, 621 (10th Cir. 1986). Having so interpreted "the law of the place," the next question for the Quechan court, as it had been for the Cheromiah court, was whether a private person would be liable under tribal law for the acts alleged; if so, determined the court, Quechan law would apply. Id.

The question of when a private person is liable under tribal law was addressed by the United States Supreme Court first in Montana v. United States, 450 U.S. 544 (1981), and more recently in Strate v. A-1 Contractors, 520 U.S. 438 (1997). In Montana, the Supreme Court held that the Crow Tribe of Montana was without power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Montana, 450 U.S. at 565. However, citing Indian tribes' "inherent sovereign power" to exercise certain forms of civil jurisdiction over non-Indians on reservations, the Court explained that

> [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political

> integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-566 (internal citations omitted).

In Strate, the Court further clarified that Montana

> described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Strate, 520 U.S. at 446. Strate involved an automobile accident between two non-Indians on a public highway maintained by the State of North Dakota pursuant to a federally granted right-of-way over Indian reservation land. In concluding that neither Montana exception applied, the Court explained that the first exception was inapplicable because the activity in question did not involve "consensual relationships" entered into by the tribe in question (or its members) and nonmembers. With respect to the second exception, the Court first recognized that "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members." Id. at 457-458. The Court went on to explain, however, that "if Montana's second exception require[d] no more, the exception would severely shrink the rule" because the true triggering factor for the second exception is a tribe's "need[] to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" Id. at 459 (*quoting* Williams v. Lee, 358 U.S. 217, 220 (1959)). The Court concluded that this need did not exist

in the case of a state highway accident involving non-Indians. Strate, 520 U.S. at 459.

The situation is entirely different, however, where the alleged negligence occurs in a health-care facility that is located on the reservation and operated by a federal agency (IHS) pursuant to an agreement with the tribe on whose land the facility sits. This was a finding of the court in Cheromiah, and it is a finding of this Court as well. In such a situation, the United States clearly is engaged in "activity that directly affects the tribe's political integrity, economic security, *health, or welfare*." Strate, 520 U.S. at 446 (emphasis added). To be sure, the United States shares a special trust relationship[5] with Native Americans that is reflected in, among other things, the United States' obligation to provide Indians with high-quality health care. The Ninth Circuit commented on this obligation when it said the following about the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.* ("IHCIA"):

> Reviewing the text of the IHCIA and the relevant legislative history, one is struck by Congress' recognition of federal responsibility for Indian health care. In the language of the IHCIA itself, Congress declares that in order to fulfill its "special responsibilities and legal obligation to the American Indian people," the nation's policy is "to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy."

McNabb for McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987) (*quoting* 25 U.S.C. § 1602)). Indeed, Congress has specifically found that "[f]ederal health services to maintain

[5] This Court has previously considered the nature of the special trust relationship existing between the United States and Native Americans. See Tsosie ex rel. Estate of Tsosie v. United States, 441 F.Supp.2d 1100 (D.N.M. 2004).

and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C.A. § 1601(a). Thus, when the United States, pursuant to the special trust relationship, undertakes to provide medical care for the native population *and* provides that care in a negligent manner, the United States unquestionably engages in activity that directly affects the tribe's health and welfare. See Strate, 520 U.S. at 446. Accordingly, the Court determines that the instant situation is one that comes within the second exception set forth in Montana.

Because the facts of the instant situation fall within Montana's second exception to the general rule that tribal jurisdiction does not exist over the conduct of nonmembers, the Court concludes that, if the United States were a private person, it would be amenable to a personal-injury lawsuit in a court of the Navajo Nation. See 28 U.S.C. § 1346(b)(1). Because, in the instant situation, "the United States, if a private person, would be liable to [Mr. Harvey] in accordance with the law of the place where the act or omission occurred[,]" id., it follows that the applicable law is the law of the Navajo Nation.

Application of tribal law in the circumstances of this case is appropriate. As the United States Supreme Court has explained,

> Indian tribes occupy a unique status under our law. At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes.

> The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.

Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985). Notwithstanding the federal government's "plenary" power, however, "a tribe is a sovereign entity. . . ." Barquin, 799 F.2d at 621; see also Kerr-McGee Corp. v. Farley, 915 F.Supp. 273, 276 (D.N.M. 1995) ("Indian tribes and the federal government are dual sovereigns."). The Supreme Court long ago discussed the unique relationship shared by the United States and the tribes in the context of determining whether the Cherokee Nation is a "foreign state" within the meaning of the United States Constitution. Answering the question in the negative, the Court explained that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence[, as] the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." Cherokee Nation v. State of Ga., 30 U.S. 1, 16 (1831). That Indian tribes retain attributes of sovereignty over both their members and their territory is reflected in the federal government's longstanding policy of encouraging tribal self-government. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (internal citations omitted). It is this tribal self-government that, in turn, helps fuel a federal-tribal comity "aris[ing] out of mutual respect between sovereigns." Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). Finally, the Court takes judicial notice of the Navajo Nation Code, which is available on Westlaw, and particularly 7 N.T.C. § 701, which is viewed by the Navajo courts as a codification of *nalyeeh*, a Navajo common law concept applied by Navajo courts to tort claims. See, e.g.,

ROBERT YAZZIE, "LIFE COMES FROM IT": NAVAJO JUSTICE CONCEPTS, 24 N.M. L. Rev. 175, 184-185 (1994).

It is on the basis of the foregoing that this Court will grant *Plaintiff's Motion for Partial Summary Judgment.*

III. CONCLUSION

For the reasons stated more fully herein, the Court concludes that, for purposes of the FTCA, "the law of the place" in this matter is the law of the Navajo Nation. Accordingly, the Court will grant Francis Harvey's motion for partial summary judgment.

IT IS, THEREFORE, ORDERED that *Plaintiff's Motion for Partial Summary Judgment* [Doc. 17] is **GRANTED**.

SO ORDERED this 29th day of September, 2009, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANCIS LEON HARVEY,

Plaintiff,

vs. No. 08CV107 MCA/RLP

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* [Doc. 53], filed June 12, 2009. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court grants the motion.

I. BACKGROUND

The following facts and well-pleaded allegations are set forth in the *Complaint* and, for purposes of Defendant's motion to dismiss, are accepted as true and construed in a light most favorable to Plaintiff. See Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991).

Plaintiff Francis Leon Harvey is an enrolled member of the Navajo Tribe who resides on that portion of the Navajo Reservation located in the State of New Mexico. The Fort Defiance Indian Hospital ("FDIH") is located on the Navajo Reservation, in the State of Arizona. Indian Health Services ("IHS"), an agency of the United States Government,

operates FDIH.

In early February of 2004, Mr. Harvey fell on ice, hurting his right hand, right leg, and right rib area. On February 6, 2004, he presented at the walk-in clinic of the FDIH, at which time health care providers gave him Motrin and an ice pack for the pain he was experiencing, and advised him to return in one month if his condition did not improve. A note in Mr. Harvey's medical record states, "X-rays all ok," even though a radiology department report on the X-ray of his right hand stated that there was a fracture of the base of the fifth metacarpal. [Doc. 1 at 2-3; Doc. 6 at 3].

Mr. Harvey returned to the FDIH on March 5, 2004, continuing to complain of pain. A note made that day again stated that "X-rays were ok," and Mr. Harvey was provided more pain medication. [Doc. 1 at 3].

On March 29, 2004, Mr. Harvey went back to the FDIH and was X-rayed once more. A radiology department report on this X-ray stated that there was a fracture at the base of Mr. Harvey's fifth metacarpal. Mr. Harvey was then instructed to go to the hospital's orthopedic clinic "ASAP." [Doc. 1 at 3].

On March 30, 2004, Mr. Harvey visited the FDIH's orthopedic clinic, where he was provided with a splint to use for comfort. [Doc. 1 at 3]. He also was instructed to return to the clinic in two weeks. [Id.].

When Mr. Harvey returned to the orthopedic clinic on April 20, 2004, it was recommended that he undergo surgery. [Doc. 1 at 3]. Accordingly, Mr. Harvey went back to the orthopedic clinic on May 3, 2004 for a pre-op appointment and, on May 5, 2004,

underwent hand surgery performed by Dr. Victor Brown. [Id. at 3-4]. Notations in the medical record from May 3, 2004 reveal that both the surgery and "all adverse reactions" were discussed with Mr. Harvey, and also that all of Mr. Harvey's questions were explained and answered to his satisfaction. [Doc. 54, Exh. H]. Similarly, the consent form that Mr. Harvey signed that same day notes that "[c]ommon and important risks associated with the proposed operation . . . include infection, neural vascular trauma, non-union, [and] arthritis." [Id.; Exh. I].

Mr. Harvey returned to the orthopedic clinic on May 10, 2004 for a follow-up appointment, and again on May 13, 2004 because his hand was hurting him. An X-ray revealed that the hand was not infected and was healing. Mr. Harvey's stitches were removed at that time, his hand was recasted, and he was instructed to return to the clinic in four weeks for cast removal and X-ray. [Doc. 1 at 4; Doc. 6 at 4].

On June 10, 2004, Mr. Harvey returned to the clinic to report that his hand was painful, swollen, and turning yellow. [Doc. 1 at 4]. Mr. Harvey returned to the orthopedic clinic again on June 16, 2004. He was told that his hand was healing, but that it would take a year for the hand to return to normal [Doc. 1 at 4].

Again on March 21, 2005, Mr. Harvey returned to the FDIH orthopedic clinic, complaining of pain. [Doc. 1 at 4]. An examination of his right hand revealed ulnar nerve entrapment, and medical-record notes from the visit show that Mr. Harvey was instructed to wear a wrist support and to go to physical/occupational therapy. [Id.]. According to Mr. Harvey, he was again told "that it would take yet another year for his hand to get back to

normal." [Doc. 1 at 5].

By April of 2006, Mr. Harvey did not believe that his hand was "right." [Doc. 1 at 5]. Accordingly, on May 1, 2006, he filed an administrative claim (Form 95 *Claim for Damage, Injury, or Death*) with the Department of Health and Human Services, in which he described the basis of the claim as a "[f]ailure to diagnose broken bone in right hand. Surgery to repair fell below the standard of care." In the box marked "Date and Day of Accident" Mr. Harvey wrote "May 2004." Mr. Harvey sought personal-injury damages in the amount of $300,000. [Doc. 54, Exh. K].

By letter dated July 10, 2006, counsel for Mr. Harvey advised that Mr. Harvey was amending the amount of his claim from $300,000 to $2,016,120. [Doc. 54, Exh. N]. The greater amount apparently is what Mr. Harvey believes is necessary to effect *nalyeeh*, which, under Navajo law, is a demand by a victim to be made whole for an injury. [Doc. 1 at 2]. By letter dated June 20, 2007 and received by counsel for Mr. Harvey on July 16, 2007, the administrative claim was denied as untimely. [Id., Exh. O at 1]. On January 29, 2008, Mr. Harvey filed his *FTCA Medical Malpractice Complaint*, alleging that providers at the FDIH breached the applicable standard of care. [Doc. 1 at 6].

On June 12, 2009, the United States filed *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* [Doc. 53] on the ground that all claims of negligence preceding May 1, 2004 (the date two years prior to the filing of Mr. Harvey's administrative claim) must be dismissed as time-barred. [Doc. 54 at 1-2]. The United States makes clear that it "is not seeking to dismiss the claims related to the surgery,

which claims were timely filed." [Doc. 65 at 1].

II. ANALYSIS

A. *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* [Doc. 54]

1. Standard of Review: Fed.R.Civ.P. 12(b)(1), (h)(3)

The United States has moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and (h)(3), which allow for the dismissal of a claim for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1), (h)(3). Generally, motions to dismiss for lack of jurisdiction will come in the form of (1) a facial attack, in which case the movant merely challenges the sufficiency of the complaint, requiring the district court to accept the allegations in the complaint as true, or (2) a factual attack, where the movant goes beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends. Paper, Allied-Industrial, Chemical And Energy Workers Intern. Union v. Continental Carbon Co., 428 F.3d 1285, 1292 (10th Cir. 2005). The United States here has launched a factual attack, meaning this Court "must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence. . . ." Id. Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment; instead, only when resolution of the jurisdictional question is intertwined with the merits of the case is it necessary to convert a Rule 12(b)(1) motion into a Rule 56 motion. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995).

2. The Federal Tort Claims Act

Under the doctrine of sovereign immunity, "'the United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" Weaver v. United States, 98 F.3d 518, 520 (10th Cir.1996) (*quoting* United States v. Sherwood, 312 U.S. 584, 586 (1941)). The threshold question in any suit in which the United States is a defendant, then, must be whether Congress has specifically waived sovereign immunity, and a plaintiff's recovery is limited by the express terms of the United States' waiver. Louis v. United States, 54 F.Supp.2d 1207, 1209 (D.N.M. 1999).

In this case, the FTCA sets the parameters of the United States' liability. Pursuant to the FTCA, the United States is made liable (within the scope of its waiver of sovereign immunity)

> for personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). The FTCA also provides, in pertinent part, that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ." 28 U.S.C. § 2401(b). Finally, "the determination of when a claim, or cause of action, accrues is a matter of federal, not state, law." Kynaston v. United States, 717 F.2d 506, 508 (10th

Cir. 1983).

As an initial matter, it bears repeating that the United States *does not* seek dismissal of Mr. Harvey's claims to the extent those claims are based on the allegedly negligently performed surgery of May 4, 2004. [See Doc. 1 at 7 ("Surgery was performed on May 4, 2004. The surgeon fell below the standard of care in the timing, operative procedures, and the aftercare."); see also Doc. 65 at 1 ("Defendant is not seeking to dismiss the claims related to the surgery, which claims were filed timely.")]. Instead, as the United States correctly points out, Mr. Harvey has asserted two sets of claims: (1) those arising as a result of the initial February 6, 2004 alleged failure to diagnose and treat the fractured hand; and (2) those arising as a result of the alleged negligently performed surgery of May 4, 2004. [See Doc. 1 at 6-7]. Accordingly, the Court addresses only Mr. Harvey's claims of negligence to the extent they derive from the February 6, 2004 alleged failure to diagnose and treat his fractured hand.

Because the FDIH is located in the State of Arizona, the Court turns to Ninth Circuit authority to determine when a medical-malpractice claim accrues for purposes of the FTCA. See Landreth By and Through Ore v. United States, 850 F.2d 532, 533 (9th Cir. 1988) (noting that, in FTCA medical-malpractice case, "[t]he date on which a claim accrues is determined by federal law.").[1] The Ninth Circuit has held "[i]n a medical malpractice case

[1] On September 29, 2009, this Court entered a *Memorandum Opinion and Order* in which it determined that the substantive law to be applied in this FTCA action would be the law of the Navajo Nation. [See Doc. 68]. Notwithstanding the prior ruling that the law of the Navajo Nation would be the substantive law to be applied to Mr. Harvey's claims, federal authority makes clear, and this Court similarly determines, that, with respect to the issue of

under the FTCA, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause." Id. (*citing* United States v. Kubrick, 444 U.S. 111 (1979)). In other words, "[a] claim accrues when a plaintiff knows that he has been injured and who has inflicted the injury." Winter v. United States, 244 F.3d 1088, 1090 (9th Cir. 2001). Accrual *does not* depend upon the plaintiff's "'awareness . . . that his injury has been negligently inflicted.'" Id. (*quoting* Kubrick, 444 U.S. at 123).it feels Instead, "[i]t is well settled that the limitations period begins to run when the plaintiff has knowledge of injury and its cause, and not when the plaintiff has knowledge of legal fault." Rosales v. United States, 824 F.2d 799, 805 (9th Cir. 1987).

Further refining the rule of Kubrick, the Ninth Circuit has held that, in the specific context of failure-to-warn, -treat, or -diagnose claims, "a claim accrues under the FTCA when the plaintiff knows or should have known about the development of a pre-existing condition into a more serious medical problem." Ignacio v. United States, 1997 WL 129315, at *1 (9th Cir. Mar. 20, 1997) (unpublished) (*citing* Augustine v. United States, 704 F.2d 1074, 1078 (9th Cir. 1983). The rationale underlying this refinement is that the injury in such failure-to-act cases is

> the *development* of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment. In this type of case, it is only when the patient becomes aware or through the exercise of reasonable diligence should have become aware of the development of a

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accrual of claims asserted pursuant to the FTCA, federal law applies. Specifically, both the Ninth and Tenth Circuits have held that federal law determines when an FTCA medical-malpractice action begins to accrue. See Landreth, 850 F.2d at 533; Kynaston, 717 F.2d at 508.

> pre-existing problem into a more serious condition that his cause of action can be said to have accrued for purposes of section 2401(b).

Augustine, 704 F.2d at 1078 (emphasis in original). For this reason, the plaintiff in Augustine, having first learned in October 1975 that there was a bump on his upper left palate, but not knowing until November 1977 that this growth was cancerous, was not necessarily untimely in filing his administrative claim on April 17, 1978. As the Ninth Circuit explained,

> [t]he issue of accrual . . . thus depend[ed] upon when and if plaintiff discovered or through the exercise of reasonable diligence should have discovered that the failure of his doctors to diagnose, treat, or warn him led to his deteriorating physical condition. That, in turn, depend[ed] upon whether the attending dentists properly diagnosed Augustine's condition and adequately informed him of the need to obtain prompt supplemental care. . . .

Id.

In this case, Mr. Harvey contends that he first presented to the FDIH on February 6, 2004 with, among other things, a hurt hand, but that there was no medical intervention, no splinting or immobilization of his hand, no instructions not to move his fingers, and no consultation with orthopedics, notwithstanding that an X-ray revealed a fracture. [Doc. 1 at 6]. Instead, he was provided Motrin for the pain and told to return in a month if his condition did not improve. [Doc. 54; Exh. O at 2]. He alleges that he returned to the FDIH on March 5, 2004, but that "no health care provider bothered to look at the X-ray report." [Doc. 1 at 6]. Accordingly, he received nothing more than additional pain medication and was told that his

hand should start feeling better in a few weeks. [Doc. 54; Exh. O at 2]. It was not until March 29, 2004 that Mr. Harvey learned that his hand was broken and he was sent for an orthopedics consultation. [Doc. 1 at 6]. On April 20, 2004, Mr. Harvey was told he required surgery. [Doc. 1 at 3; Doc. 54; Exh. O at 2].

It thus would have been April 20, 2004 that Mr. Harvey should through reasonable diligence have become aware that FDIH health care providers had originally mis-diagnosed a fracture that ultimately required surgery as, instead, a swollen and painful hand injury treatable with Motrin and ice. He would also have known on April 20, 2004 that X-rays taken on February 6, 2004 should not have been noted in his medical record as "all ok." [See Doc. 54; Exh. A]. Accordingly, Mr. Harvey's failure-to-diagnose/failure-to-treat claims accrued on April 20, 2004, when he learned that more extensive care (*i.e.*, surgery) was required to treat an injury that health care providers originally believed could be taken care of with painkillers and an ice pack. See Augustine, 704 F.2d at 1078 (explaining that, in failure-to-diagnose/failure-to-treat cases, claim accrues when plaintiff learns or with reasonable diligence should have know of the development of the original problem into a more serious condition posing a greater danger to the patient or requiring more extensive treatment). Because Mr. Harvey did not file his administrative claim until May 1, 2006, the medical-malpractice claims that he asserts arose as a result of the initial February 6, 2004 alleged failure to diagnose and treat his fractured hand are time-barred.

III. CONCLUSION

For the reasons stated more fully herein, the Court will grant the United States' motion to dismiss.

IT IS, THEREFORE, ORDERED that *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* [Doc. 53] is **GRANTED**;

IT IS FURTHER ORDERED Plaintiff's medical-malpractice claims, to the extent they arise as a result of the initial February 6, 2004 alleged failure to diagnose and treat the fractured hand, be and hereby are **DISMISSED WITH PREJUDICE**.

SO ORDERED this 9th day of March, 2010, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANCIS LEON HARVEY,

Plaintiff,

v. Civil Action No. 2:08-cv-00107-MCA-CG

UNITED STATES OF AMERICA,

Defendant.

ORDER

THIS MATTER is before the Court on *Plaintiff's Application to Enter Default Judgment* [96] pursuant to Rule 55(d) of the Federal Rules of Civil Procedure. The Court has considered Plaintiff's application, Defendant's response, the relevant case law, and is otherwise fully advised in the premises.

"[F]ederal law favors the disposition of cases on the merits, and, as a result, a default judgment is a drastic sanction that should be employed only in an extreme situation." *Stewart v. Astrue*, 552 F.3d 26, 28 (1st Cir. 2009) (Internal quotation marks and citation omitted). A claimant seeking a default judgment against the United States bears the heavy burden to establish "a claim or right to relief by evidence that satisfies the court." *Jorden v. National Guard Bureau*, 877 F.2d 245, 251 n.23 (3rd Cir. 1989) (quoting Fed. R. Civ. Proc. 55(d)). "(W)hen the government's default is due to a failure to plead . . . the court typically

either will refuse to enter a default or, if a default is entered, it will be set aside." *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977) (Internal quotation marks and citation omitted).

Defendant was served with a copy of Plaintiff's complaint and summons on February 28, 2008 [5] and filed its answer sixty-one days later on April 29, 2008. [6] Although Defendant's answer was filed one day late under Rule 12(a)(2) of the Federal Rules of Civil Procedure, Plaintiff never objected to the answer as untimely or alleged any prejudice as a result thereof. Accordingly, this Court finds that *Plaintiff's Application to Enter Default Judgment* should be **DENIED**.

The Application is hereby **DENIED**.

SO ORDERED this 22nd day of April, 2011, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANCIS LEON HARVEY,

Plaintiff,

vs. No. 08CV107 MCA/CG

THE UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on *Defendant's Pretrial Memorandum* [Doc. 92] (therein seeking dismissal for lack of subject matter jurisdiction), *Plaintiff's Brief on the Issue of Proof of Negligence as a Prerequisite for Jurisdiction* [Doc. 93], and *Plaintiff's Supplemental Materials and Arguments to Converted Motion for Summary Judgment*. [Doc. 107]

The dispositive question in this case is whether Plaintiff, under the facts of this case, can proceed on his claim of medical negligence under the Federal Tort Claims Act (FTCA) where he has failed to proffer any expert medical evidence. I conclude that he cannot.

By Order of this Court on May 4, 2011 [Doc. 105], the parties were given notice of its intention to convert Defendant's motion to dismiss for lack of subject matter

jurisdiction into a motion fo summary judgment, and the parties were provided with an opportunity to respond to the changed status of the motion, with submissions of supplemental materials and argument. [Doc. 105] Having considered the submissions, the relevant law, and otherwise being fully advised in the premises, this Court herein renders summary judgment in favor of Defendant.

I. PROCEDURAL BACKGROUND

The facts underlying this action have been throughly set out in three previously entered *Opinions* of this Court. [Docs. 68, 81, 99] Those facts are incorporated herein by reference and will be restated only as is necessary to provide an understanding of, and place in context, the matter now under consideration.

On February 6, 2004, Plaintiff Francis Leon Harvey, an enrolled member of the Navajo Tribe who resides on that portion of the Navajo Nation located in the State of New Mexico, presented at the Fort Defiance Indian Hospital ("FDIH") walk-in clinic complaining of hand, leg, and rib pain resulting from a fall on ice. The FDIH is located on that portion of the Navajo Nation located in the State of Arizona, and is operated by Indian Health Services ("IHS"), an agency of the United States government.

Health care providers at the FDIH gave Plaintiff Motrin and an ice pack for pain, and noted in his medical record, "X-rays all ok." Notwithstanding this notation, a radiology department report of X-rays of Plaintiff's right hand stated that "[t]here is a fracture of base of the fifth metacarpal of the right hand which enters the carpometacarpal joint." [Doc. 54, Exs. A, B] Plaintiff returned to the FDIH multiple times in March of

2004, complaining of pain. [Doc. 1] On April 20, 2004, Plaintiff was informed by the FDIH's orthopedic clinic that surgery was recommended.

On May 5, 2004, Dr. Victor Brown, a surgeon at the FDIH, performed surgery on Plaintiff's hand. Notations in Plaintiff's medical records reveal that both the surgery and "all adverse reactions" were discussed with Plaintiff. [Doc. 54 Ex. H] Similarly, the consent form signed by Plaintiff notes the "[c]ommon and important risks associated with the proposed operation . . . include infection, neural vascular trauma, non-union, [and] arthritis." [Doc. 54, Ex. I]

Over the course of the next two years, Plaintiff continued to return to the FDIH, both for follow-up visits and also to be seen for pain, swelling, and other complaints. For instance, after his first follow-up appointment on May 10, 2004, Plaintiff returned to the clinic on May 13, 2004 because of pain in his hand. He went back on June 10, 2004 and April of 2006, complaining that his hand "was still not right." [Doc. 1 at 5]

On January 29, 2008, Plaintiff filed his *FTCA Medical Malpractice Complaint*, alleging that the FDIH had breached the standard of care in its treatment of Plaintiff's right hand, that this breach was the proximate cause of Plaintiff's injury, and that Plaintiff had incurred both economic and non-economic damages. [Doc. 1 at 6-8] Plaintiff demanded *nalyeeh* under Navajo common law, claiming that damages in the amount of $2,016,120 were necessary in order to "make Plaintiff whole" and "so that Plaintiff will have no hurt feelings against the health care providers and [the FDIH]." [Doc. 1 at 9]

On September 25, 2008, the Court entered a *Scheduling Order*, which required

Plaintiff to disclose his expert witnesses no later than December 23, 2008. [Doc. 15] On December 2, 2008, the Court entered an *Order Staying Discovery*, [Doc. 33] and on January 23, 2009, the parties filed a *Joint Motion for Extension of Discovery Deadlines*, requesting that "[e]xpert disclosures by Plaintiff be extended to May 18, 2009." [Doc. 36] The Court granted the motion. [Doc. 37] Although Plaintiff twice moved for an extension of this discovery deadline, the requested extensions were denied. [Docs. 43, 46 47, 50] Thereafter, Plaintiff filed an *Unopposed Motion to Judge M. Christina Armijo to Reschedule Trial on the Merits*, which this Court granted. [Docs. 51, 57] Plaintiff's *Unopposed Motion to Judge M. Christina Armijo to Reschedule Trial on the Merits* did not seek an extension of the discovery deadline for expert disclosures. [Doc. 51] Plaintiff never disclosed an expert witness in support of his medical malpractice claim.

On October 6, 2008, Plaintiff filed a motion for partial summary judgment, arguing that the applicable law in this matter is Navajo law, because that is the "law of the place" under the FTCA, 28 U.S.C. § 1346(b)(1) (1996). [Docs. 17, 18] This Court granted the motion by *Memorandum Opinion and Order* entered September 29, 2009. [Doc. 68] Although Defendant moved for reconsideration, this Court denied Defendant's motion by *Memorandum Opinion and Order* entered September 30, 2010. [Docs. 71, 99]

On June 12, 2009, Defendant filed *Defendant's Motion to Dismiss Certain Claims Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(h)(3)* on the ground that all claims of negligence preceding May 1, 2004 must be dismissed as time-barred. [Docs. 53, 54] This Court granted the motion by *Memorandum Opinion and Order* entered March 9, 2010.

[Doc. 81] Although Plaintiff moved for reconsideration, this Court denied Plaintiff's motion by *Memorandum Opinion and Order* entered September 30, 2010. [Docs.82, 99]

On September 7, 2010, this Court held a pretrial conference in this case. [Doc. 89] At the pretrial conference, Defendant informed the Court that it intended to file a pretrial memorandum arguing that the Court lacks subject matter jurisdiction over Plaintiff's *FTCA Medical Malpractice Complaint* because Plaintiff could not establish a negligent or wrongful act or omission of any employee of the Government in the absence of expert testimony. This Court ordered the parties to file simultaneous trial briefs on the issue on or before September 21, 2010. [Doc. 89] In response, Defendant filed *Defendant's Pretrial Memorandum* [Doc. 92] and Plaintiff filed *Plaintiff's Brief on the Issue of Proof of Negligence as a Prerequisite for Jurisdiction.* [Doc. 93]

On May 4, 2011, this Court issued an *Order* notifying the parties that it intended to convert Defendant's motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment because "resolution of the jurisdictional question is intertwined with the merits of the case." [Doc. 105 at 2, 3] Quoting Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). This Court provided the parties "with the opportunity to respond to the changed status of the motion, with the submission of supplemental materials and argument." [Doc. 105 at 3] In response, Plaintiff filed *Plaintiff's Supplemental Materials and Arguments to Converted Motion for Summary Judgment* on May 19, 2011. [Doc. 107] Defendant's converted motion for summary judgment is now ripe for decision.

II. ANALYSIS

A. Standard of Review

Summary judgment under Fed.R.Civ.P. 56© "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56©. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading. . . ." Fed.R.Civ.P. 56(e). Rather, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Id. Judgment is appropriate "as a matter of law" if the nonmoving party has failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lopez v. LeMaster, 172 F.3d 756, 759 (10th Cir. 1999).

In order to warrant consideration by the Court, the factual materials accompanying a motion for summary judgment must be admissible or usable at trial (although they do not necessarily need to be presented in a form admissible at trial). See Celotex, 477 U.S. at 324. It is not the court's role, however, to weigh the evidence, assess the credibility of witnesses, or make factual findings in ruling on a motion for summary judgment. Rather, the Court assumes the evidence of the non-moving party to be true, resolves all doubts against the moving party, construes all evidence in the light most favorable to the non-

moving party, and draws all reasonable inferences in the non-moving party's favor. See Hunt v. Cromartie, 526 U.S. 541, 551-52 (1999).

B. Negligence and the Navajo Common Law Concept of *Nalyeeh*

Defendant contends that this Court lacks subject matter jurisdiction over Plaintiff's *FTCA Medical Malpractice Complaint* because, under the facts of this case, Plaintiff cannot establish a "negligent or wrongful act or omission of any employee of the Government" in the absence of expert testimony. § 1346(b)(1). [Doc. 92] Plaintiff responds that expert testimony is not required because Plaintiff has demanded *nalyeeh* under Navajo law. [Docs. 93, 107]

"The United States, as sovereign, is immune from suit save as it consents to be sued." Lindstrom v. United States, 510 F.3d 1191, 1193 (10th Cir. 2007) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). "The litigant asserting jurisdiction must carry the burden of proving it by a preponderance of the evidence." Id.

"The FTCA waives sovereign immunity for actions against the United States resulting from injuries caused by the negligent acts of governmental employees while acting in the scope of their employment." Garcia v. United States Air Force, 533 F.3d 1170, 1175 (10th Cir. 2008). The United States may be held liable to the same extent as a private person "in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). Pursuant to this Court's September 29, 2009 *Memorandum Opinion and Order*, Navajo law is the law of the place in this case. [Doc. 68]

"Under Navajo common law, damages in personal injury actions are measured by

nalyeeh." Nez v. Peabody Western Coal Co., Inc., 2 Am. Tribal Law 468, 474 (Nav. Sup. Ct. 1999). *Nalyeeh* is "akin to, but not quite the same, as the Anglo-European concepts of restitution and reparation. The similarity is that *nalyeeh* requires payment or compensation to people who are injured, but it is quite different in its procedures." Benally v. Broken Hill Proprietary, Ltd., 3 Am. Tribal Law 518, 520 (Nav. Sup. Ct. 2001). "*Nalyeeh* has an additional procedural aspect which addresses relationships. *Nalyeeh* does not simply require restitution or reparation, but calls upon the person who has caused an injury or is responsible for an injury to talk out both compensation and relationships." Id. Generally, "the amount of *nalyeeh* to be paid should be enough so that there is no hard feelings" and "the parties to the dispute are restored to a harmonious relationship." Id. at 521 (Internal quotation marks and citation omitted). "Based on these principles, *nalyeeh* incorporates what might be expressed in Anglo terms as a procedural requirement and a substantive result." Allstate Indemnity Co. v. Blackgoat, 6 Am. Tribal Law 631, 636 (Nav. Sup. Ct. 2005). In addition to this Court's review of Navajo Nation Supreme Court case authorities, this Court held a hearing wherein the Honorable Robert Yazzie, former Chief Justice of the Navajo Supreme Court, provided, on behalf of the Court and the parties, general background information as to the concept of *nalyeeh.*

Plaintiff contends that "[w]here *nalyeeh* is demanded, there is no requirement for experts" because "there is no requirement for a showing of negligence in the Anglo sense of that legal concept." [Doc. 107 at 3] However, the Navajo Nation Supreme Court explicitly has rejected the argument that *nalyeeh* and negligence are mutually exclusive

legal doctrines. Joe v. Black, 7 Am. Tribal Law 588, 593 (Nav. Sup. Ct. 2007). In Joe, the Court noted that negligence is "part and parcel of *nalyeeh*," id. at 594, and that the Navajo Nation Courts consistently have "applied negligence and *nalyeeh* together," Id. at 593 (citing Benally v. Mobil Oil Corp., 4 Am. Tribal Law 686, 691-94 (Nav. Sup. Ct. 2003); Jensen v. Giant Industries, Arizona, Inc., 4 Am. Tribal Law 579, 584-85 (Nav. Sup. Ct. 2002)). Indeed, "the Navajo Nation Code mandates the application of negligence principles." Id.; see 7 Navajo Nation Code tit. 7, § 701(B) (2003) ("Where the injury was inflicted as the result of negligence, the judgment shall fairly compensate the injured party for his or her injuries or loss. The Court shall consider the comparative fault of the parties in making an award of damages.").

> That the concepts of negligence and comparative negligence, as expressed in the English terms of art, originated in the Anglo-American adversarial system does not per se make it incompatible with *nalyeeh*. [The Navajo Nation Supreme Court] has applied *nalyeeh* to cases involving disputed claims to worker's compensation and non-Indian insurers, concepts originating from Anglo-American law that might be characterized as "adversarial" as well.

Joe, 7 Am. Tribal Law at 593 (citing Allstate Indemnity Co., 6 Am. Tribal Law at 635; Broken Hill Proprietary, Ltd., 4 Am. Tribal Law at 691-94; Benalli v. First Nat'l Ins. Co. of America, 1 Am. Tribal Law 498, 508-509 (Nav. Sup. Ct. 1998)).

Plaintiff asserts that both Mobil Oil Corp. and Joe are distinguishable from this case because they involved "third party liability and multiple defendants." [Doc. 107 at 7] However, this is a distinction without a difference. In Mobil Oil Corp., the Navajo Nation Supreme Court considered whether the plaintiff's personal injury action was

barred by the plaintiff's own negligence. 4 Am. Tribal Law at 691. The Court held that the Navajo Nation "is a pure comparative negligence jurisdiction" and that the doctrine of *t' áá sh shi ákwiisdzaa*, or "I take responsibility for my own actions," is consistent with comparative negligence "as reduction of the award makes certain [that the plaintiff] takes responsibility for his own actions, but still compensates him for that part of injury caused by [the defendant]." Id. at 692.

In Joe, the Navajo Nation Supreme Court squarely rejected the notion that "it is legally impossible to proceed under both comparative negligence and *nalyeeh* together because they are incompatible doctrines." 7 Am. Tribal Law at 593. The Court held that

> there is no conflict between comparative negligence and *nalyeeh*. Comparative negligence serves the purposes of identifying who is responsible to make the injured party whole, and allocating the responsibility for the injury between them. The doctrine assures that an individual tortfeasor is responsible only for his or her actions, and is not responsible for the conduct of others. This is a Navajo principle, even if the Court uses Anglo-American legal language to describe it. *Nalyeeh* defines how the responsible parties, once identified and once their collective responsibility is allocated, make the injured party whole. They are indeed then not incompatible doctrines, but work together to bring people back in harmony.

Id. at 593-94 (Citation omitted). Thus, negligence is consistent with Navajo concepts of fault, because it ensures that the defendant is responsible only for his or her own wrongful conduct. Casaus v. Diné College, 7 Am. Tribal Law 509, 513 (Nav. Sup. Ct. 2007).

As the foregoing case authorities indicate, Plaintiff must prove that Defendant was negligent in order to prevail on his *FTCA Medical Malpractice Complaint*. See also Laird v. Nelms, 406 U.S. 797, 799 (1972) (holding that the FTCA contains "a uniform

federal limitation on the types of acts committed by its employees for which the United States has consented to be sued. Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of misfeasance or nonfeasance, on the part of the Government" (internal quotation marks and citation omitted)). "As a general rule, the tort of negligence has four components–a duty to the person injured, a breach of that duty, causation, and resulting damages." Jensen, 4 Am. Tribal Law at 584. This Court must determine whether Plaintiff can meet his burden of proof on these essential elements without expert testimony.

Baldwin v. Chinle Family Court, 7 Am. Tribal Law 643 (Nav. Sup. Ct. 2008), is instructive on this point. In Baldwin, the Navajo Nation Supreme Court considered whether the Navajo Nation had met its burden to prove that a minor child was "dependant" under Title 9 of the Navajo Nation Code, Section 1002(O)(2) (2005). Id. at 645. The Petition for Adjudication of Dependant Child alleged, in relevant part, that

> the child's mother "is diagnosed as being schizophrenic and is under doctor's care, and her ability to parent a child is questionable due to the fact that she has been involuntary committed for her behaviors." The Petition further states that the mother "had been involuntary [sic] committed twice during the past three years" and "no one brought forth notice to Court [sic] that she had a child."

Id. at 644 (alteration in original). A hearing was conducted on the Petition and Clara Teller, a Child Protective Service worker, testified that the child's mother had "revealed to her, 'she was schizophrenic, she's diagnosed as schizophrenic' and diabetic." Id. "No

evidence was produced before the Court that the mother's health care providers [had] been consulted as to inform the Court of Ms. Baldwin's present ability to care for the child or revealed any current condition which suggested an on-going inability of the mother to care for her child." Id. at 645.

The Court held that the evidence regarding the mother's health and mental state was insufficient to establish dependency under Navajo law.

> Diagnosis of an individual requires professional expertise; when such a diagnosis is used outside the context of its professional use it introduces the risks of mischaracterizations, inaccuracy and potential prejudice and bias. In the case at hand, a mother's disclosure of her condition utilizing laymen's language to another individual who has no knowledge of the scope of the diagnosis and does not possess the appropriate clinical training and experience in diagnosis, is harmful. While the mother's disclosure of the diagnosis was voluntary, it was done by an individual who also did not possess the full clinical training to describe how that diagnosis was used to design a treatment plan and whether the goals of that plan had or were being met.

Id. at 646. The Court explained that the Navajo concept of *k´é*, which "defines a peaceful and harmonious relationship which respects the present and future well being of the person," "requires that families be properly protected from nonexistent or faulty conclusions" based on lay testimony. Id. at 646-47.

Pursuant to Baldwin, it strongly appears that expert medical testimony is necessary to establish the diagnosis and treatment of a medical condition under Navajo law.

However, to the extent that Navajo law is silent, Title 7 of the Navajo Code, Section 204(D) (2003) provides that the issue "may be decided according to comity with

reference to the laws of the state in which the matter in dispute may have arisen."[1] The dispute in this case arose in the state of Arizona and, therefore, the Court turns to an analysis of Arizona law.

"In medical malpractice actions, as in all negligence actions, the plaintiff must prove the existence of a duty, a breach of that duty, causation, and damages. The yardstick by which a physician's compliance with [his] duty is measured is commonly referred to as the standard of care." Seisinger v. Seibel, 203 P.3d 483, 492 (Ariz. 2009) (Internal quotation marks and citation omitted) (alteration in original). "Arizona courts have long held that the standard of care normally must be established by expert medical testimony." Id. "Thus, except when it was a matter of common knowledge . . . that the injury would not ordinarily have occurred if due care had been exercised, a plaintiff could not meet the burden of production under the common law absent expert testimony." Id. (Internal quotation marks and citation omitted); see Dodson v. Pohle, 239 P.2d 591, 593 (Ariz. 1952) (holding that expert testimony was not required when a one-month old child

[1]The Navajo Nation courts first look to *Diné bi beenahaz'áanii*, Navajo traditional, customary, natural or common law, "whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts." Navajo Nation Code, tit. 7, § 204(A). "To determine the appropriate utilization and interpretation of *Diné bi beenahaz'áanii*," the court may receive "advice from Navajo individuals widely recognized as being knowledgeable about *Diné bi beenahaz'áanii*." Navajo Nation Code, tit. 7, § 204(B). Neither Plaintiff nor Defendant have provided this Court with any expert testimony regarding the application of *Diné bi beenahaz'áanii* to medical malpractice complaints and, therefore, it is appropriate to consider state law as a matter of comity. See Jensen, 4 Am. Tribal Law at 583-84 (reviewing principles of English-American common law to decide a question of Navajo law because the plaintiff had failed to follow the proper procedure to prove *Diné bi beenahaz'áanii* under Navajo Nation Code, tit. 7, § 204(B)).

was burned during an oxygen inhalation treatment in relevant part because the child's injury was unrelated to the ailment that prompted the treatment); Tiller v. Von Pohle, 230 P.2d 213, 214-15 (Ariz. 1951) (holding that expert testimony was not required when a cloth sack was left inside of a patient's abdomen following surgery). "The Arizona cases mirror the general common law rule," requiring expert medical testimony in medical malpractice actions. Seisinger, 203 P.3d at 492 n.7.

Plaintiff contends that expert testimony is not necessary in this case because "[i]t is undisputed that full recovery is the expected outcome" of Plaintiff's surgery, Plaintiff did not have a full recovery, and "[l]aymen could reasonably draw a conclusion that the reason that [Plaintiff] did not have [a] complete recovery was due to the negligence that occurred during the surgery." [Doc. 107 at 14-15] For support, Plaintiff relies on his affidavit, in which he averred that the FDIH orthopedic clinic had informed him that "the operation would fix [his] right hand." [Doc. 107-5] However, Defendant submitted evidence indicating that Plaintiff was informed of "all adverse reactions" associated with the surgery, including the risk of "infection, neural vascular trauma, non-union, [and] arthritis." [Doc. 54, Exs. H, I] Regardless, the issue is not the surgical outcome that Plaintiff expected but, rather, whether Plaintiff's injury is within the common knowledge and experience of laymen.

Plaintiff has failed to demonstrate that his hand injury is the type of injury that is "so grossly apparent that a layman would have no difficulty in recognizing it as having been caused by negligence." Faris v. Doctors Hospital, Inc., 501 P.2d 440, 445 (Ariz.

App. 1972) (internal quotation marks and citation omitted) (holding that the plaintiff's "vertebrae disk herniation" clearly is not "the type of 'injury' which is so grossly apparent that a layman would have no difficulty in recognizing it as having been caused by negligence."). His injury is not wholly unrelated to his surgical procedure and a person without medical training or knowledge would not clearly understand that Plaintiff's injury would not have occurred in an "open versus closed right 5th metacarpal base fracture internal fixation under fluoroscopic guidance" in the absence of negligence. [Doc. 54, Ex. I] Accordingly, the Court concludes that expert testimony is necessary for Plaintiff to prevail on his medical malpractice claim. In the absence of expert testimony, there are no genuine issues of material fact on Plaintiff's FTCA medical malpractice complaint and Defendant is entitled to judgment as a matter of law. Id. at 447.

The Court rejects Plaintiff's argument that the trier of fact reasonably may infer negligence based on the doctrine of *res ipsa loquitor*. [Doc. 107 at 13-14] *Res ipsa loquitor*

> allows a trier of fact to draw an inference of negligence when (1) the injury is "of a kind that ordinarily does not occur in the absence of negligence," (2) the injury is "caused by an agency or instrumentality subject to the control of the defendant," and (3) the claimant is not "in a position to show the particular circumstances that caused the offending agency or instrumentality to operate to her injury."

Sanchez v. Old Pueblo Anesthesia, P.C., 183 P.3d 1285, 1289 (Ariz. App. 2008) (quoting Lowrey v. Montgomery Kone, Inc., 42 P.3d 621, 623 (Ariz. App. 2002)). *Res ipsa loquitur* is applicable "'only when it is a matter of common knowledge among laymen or

medical [experts], or both, that the injury would not ordinarily have occurred if due care had been exercised.'" Id. (alteration in original) (quoting Ward v. Mount Calvary Lutheran Church, 873 P.2d 688, 693 (Ariz. App. 1994)). As previously explained, Plaintiff has failed to demonstrate that his hand injury is a matter of common knowledge among laymen or medical experts. The doctrine of *res ipsa loquitor* is inapplicable to this case.

Lastly, Plaintiff contends that expert testimony is irrelevant to this case because there is no admissible evidence regarding what happened during Plaintiff's surgery. [Doc. 107 at 10-13] Specifically, Plaintiff argues that Dr. Victor Brown's *Operative Report* is inadmissible hearsay because it is unsigned, incomplete, and filed two years after the completion of the surgery. [Doc. 107 Ex. 1] In the absence of "credible evidence as to what occurred during the May 5, 2004 surgery," Plaintiff contends that "expert testimony would provide no assistance to the trier of fact." [Doc. 107 at 13] As previously explained however, it is the Plaintiff that bears the burden to prove the essential elements of his medical malpractice claim by a preponderance of the evidence. Without admissible evidence regarding his May 5, 2004 surgery, Plaintiff is unable to fulfill his burden to prove that the surgery was negligently performed. Accordingly, the alleged inadmissibility of the *Operative Report* militates in favor of granting Defendant's converted motion for summary judgment.

III. CONCLUSION

Plaintiff failed to disclose or proffer any expert testimony in this case, as required

by prior orders of the Court and as mandated by the facts of this case and the law applicable thereto. Because Plaintiff has failed to proffer any expert testimony in support of his *FTCA Medical Malpractice Complaint*, this Court lacks subject matter jurisdiction.

IT IS THEREFORE HEREBY ORDERED that Defendant's converted motion for summary judgment is **GRANTED**.

SO ORDERED this 30th day of June, 2011, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge