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, Appellee

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

REPLY BRIEF

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SUMMARY OF ARGUMENT

The United States, Appellee, has raised an issue which was not one of the three issues designated in the Notice of Appeal and argued by the Appellant in his opening brief. That issue is whether the Court below erred in holding that Navajo law, and in specific *nalyeeh*, is "the law of the place." Because the United States failed to file a cross-appeal, its arguments in that regard are not properly before this Court.

Not one of the cases relied upon by the United States in its arguments in support of the Court's failure to enter default judgment deals with the situation, as here, in which the United States failed to meet the statutory deadline to file its answer. This failure warrants default. Mr. Harvey's complaint not being subject to Fed. R. Civ. P. 12(b)(6) dismissal warrants judgment against the United States.

The cases relied upon by the United States in support of the date set by the District Court for the accrual of Mr. Harvey's claim do not support the holding of the District Court. They rather support the conclusion that his claim accrued when Mr. Harvey's hand did not properly heal after the surgery.

The United States misinterprets Navajo law in its argument in support of dismissal of Mr. Harvey's claim. It incorrectly avers that *nalyeeh* requires a finding of negligence. It also incorrectly avers that a finding of negligence is a prerequisite for recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680.

ARGUMENT

I. THE ISSUE OF WHETHER NAVAJO LAW IS THE "LAW OF THE PLACE" IS NOT PROPERLY BEFORE THIS COURT.

The Appellant only raised three issues on appeal. He did not raise the issue of whether the Court below was correct in holding that Navajo law, and in specific *nalyeeh*, is "the law of the place" pursuant to 28 U.S.C. § 1346(b)(1). When Appellant filed his Notice of Appeal, the Appellee, the United States, was put on notice as to which issues were being appealed by the Appellant. If the United States wanted to appeal any issues which were not appealed by the Appellant, it had fourteen days to give notice of such issues. Fed. R. App. P. 4(a)(3). The United States did not file a cross-appeal.

The United States nonetheless in its Statement of the Issues lists as issue No. 3, "Whether state law or tribal law is 'the law of the place' under the FTCA, 28 U.S.C. § 1346(b)." Appellee's Brief at 1. The United States then argued extensively in an attempt to persuade this Court to overrule the holding of District Court that Navajo law, and in specific *nalyeeh,* is "the law of the case." See Appellee's Brief at 23-38.

This Court discussed the significance of cross-appeals in United States v. Madrid, 633 F.3d 1222, 1225 (10th Cir. 2011), stating, "The office of a cross-appeal is to give the appellee more than it obtained by the lower court judgment." It stated further, Id., citing Gregory A. Castanias and Robert H. Klonoff, Federal Appellate Practice and Procedure in a Nutshell 134 (2008), "'It is well settled that absent a cross-appeal, a party may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.'" Finally, it looked to the Supreme

Court in Greenlaw v. United States, 554 U.S. 237, 244-45 (2008), which stated that "[u]nder that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party." Id.

Pursuant to Greenlaw and Madrid, this Court may not alter the judgment of the District Court with regard to its "law of the place" holding to benefit the United States, as the nonappealing party. The United States failed to give notice that it wanted to appeal any issues not appealed by the Appellant. Simply stated, "Because claimant failed to file a cross-appeal, his arguments * * * are not properly before this court." Stewart v. Astrue, 552 F.3d 26, 29 fn 1 (1st Cir. 2009). Consequently, the District Court's holding that Navajo Law, and in specific *nalyeeh*, is "the law of the place," has become the law of the case.

In the alternative, if this Court holds that the cross-appeal requirement of Fed. R. App. P. 4(a)(3) does not apply to the United States, then the Appellant requests that he be given the opportunity to fully brief the issue as to what is "the law of the place." Also, in the alternative, if this Court holds that Arizona law is "the law of the place," then Appellant requests remand and upon remand the opportunity to name an expert witness.

II. THE DISTRICT COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

The Appellant and Appellee provide different statements of the Standard of Review on this issue. The Appellant, viewing this situation as a failure to comply with the 60 day deadline of Fed. R. Civ. P. 12(a)(2), pronounced the standard of review as *de*

novo. The Appellee, viewing the situation as the lower Court's sanction for failure of a party to properly cooperate in litigation of the case, pronounced the standard of review as abuse of discretion.

Whichever standard is applied requires the conclusion that the Court below either erred or abused its discretion in failing to enter default judgment.

Fed. R. Civ. P. 55(a) provides that "the clerk must enter the party's default" where there has been a failure to plead. There is no dispute that the United States failed to file its answer within the 60 days allowed by Fed. R. Civ. P. 12(a)(2). Rule 12(a)(2) provides that the United States "must serve an answer * * * within 60 days of service." Pursuant to Rules 55(a) and 12(a)(2) default should have been entered. The question then becomes whether judgment pursuant to Fed. R. Civ. P. 55(d) should have been entered. Rule 55(d) allows for judgment to be entered against the United States only if the claimant "establishes a claim or right to relief."

The cases relied upon by the Appellee to support its arguments do not deal with the situation, as here, in which the United States failed to meet the 60 day deadline in filing its answer. In Bixler v. Foster, 596 F.3d 751 (10th Cir. 2010), the defendant evaded service so was never served. The Court held that it did not have jurisdiction over the defendant. Id. at 761. In Katzson Bros., Inc., v. EPA, 839 F.2d 1396) (10th Cir. 1988), the plaintiff claimed that the EPA's service of process was improper and violated due

process. In Stewart v. Astrue, 552 F.3d 26 (1st Cir. 2009), there was no action from either party after remand.

This appears to be a case of first impression. Neither Appellant nor Appellee could find a case dealing with the United States' failure to comply with the 60 day deadline set by Fed. R. Civ. P. 12(a)(2). Cases which are similar to this situation are those that deal with the failure to timely file a notice of appeal in a criminal action. Those cases, however, differ from the case at bar because the relevant rule, Fed. R. App. P. 4(b)(4), allows for an extension of time after the time has run "upon a finding of excusable neglect." There is no such provision in either Fed. R. Civ. P. 12(a)(2) or Fed. R. Civ. P. 55 which provides the enforcement for Rule 12.

Nonetheless, the Court's discussion of "excusable neglect" in United States v. Torres, 372 F.3d 1159 (10th Cir. 2004) is enlightening. The Court first looked to the Supreme Court's discussion of excusable neglect in the bankruptcy setting. The Supreme Court held in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 384 (1993), that "a party may claim excusable neglect only if its failure to timely perform a duty was due to circumstance which were beyond its reasonable control."

The Court then looked to the reason for the delay in filing the criminal appeal. The reason for the delay was that the defense counsel confused the filing deadlines for civil and criminal appeals. Torres, 372 F.3d at 1163. The Court held that this confusion did

not amount to excusable neglect. Id. at 1163. The Court thusly found that the District Court abused its discretion in finding that the delay in filing was the result of excusable neglect and dismissed the appeal for lack of jurisdiction. Id. at 1164. This Court in United States v. Madrid, 633 F.3d 1222, 1227-8 (10th Cir. 2011), again held that the District Court had abused its discretion when it, in a similar circumstance, allowed an extension of time to file a notice of appeal.

In the case at bar, there was no reason ever given for why the United States did not meet the 60 day deadline. When there is not even as excuse given, there is no basis for a court to find that the delay was excusable neglect. Even if there were an excusable neglect provision in either Fed. R. Civ. P. 55 or Fed. R. Civ. P. 12(a)(2), it would be an abuse of discretion for the District Court to allow the United States an extension of time after it had failed to meet the 60 day deadline. The Court should find that the Court below abused its discretion.

The United States concludes its discussion stating that even if default were appropriate, that would not necessarily be sufficient to entitle plaintiff to a judgment citing Bixler, 596 F.3d at 762. Appellent's Brief at 16. Fortunately, Bixler provides guidance as to when entry of judgment is appropriate after entry of default.

Where default is appropriate, before a judgment may be entered, the court must consider whether the facts alleged in the complaint constitute a legitimate cause of action. Bixler, 596 F.3d at 762. On appeal, the defendant may not challenge the sufficiency of

the evidence. Nishimatsu Constr. Co., v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1075), relied on by Bixler, 596 F.3d at 762. Only if plaintiff's claims were barred or were subject to dismissal under Rule 12(b)(6), would judgment not be entered. Id.

In the case at bar, Mr. Harvey's claims were not subject to dismissal under Rule 12(b)(6). Consequently, the Court, pursuant to Bixler, should have entered judgment against the United States. It was error and or an abuse of discretion for the District Court to have failed to so do.

III. THE DISTRICT COURT ERRED WHEN IT SEPARATED PLAINTIFF'S CLAIM INTO TWO PARTS AND DISMISSED THE FIRST AS UNTIMELY.

The United States gives short shrift to Mr. Harvey's argument that because the District Court had determined that Navajo law is "the law of the place" the Court should have looked to Mr. Harvey's Navajo claim to determine when that cause of action accrued. It merely states at 18 of Appellee's Brief, that "the limitation period is determined exclusively by reference to federal law" and in a footnote on page 17 that "The 'law of the place' inquiry has no bearing on the accrual issue."

However 28 U.S.C. § 2401(b) sets forth a two year limitation period described as "within two years after such claim accrues." "Such claim" clearly refers back to the tort complained of. Applying federal law, once the District Court had determined that Navajo law is "the law of the place," then pursuant to § 2401(b) the claim whose accrual begins the two year limitation period is Mr. Harvey's Navajo claim. The Navajo demand for *nalyeeh* accrued when Mr. Harvey, in March of 2006, developed bad feelings because he

no longer believed the heath care providers' assertions that his hand would get back to normal. See, Benally v. Broken Hill Proprietary, Ltd., No. SC-CV-79-78, slip op. at ¶¶ 19-20 (Nav. Sup. Ct. 2001). His claim was received by the agency on May 1, 2006, well within the limitation period.

The United States then relies on two Tenth Circuit cases, Robbins v. United States, 624 F.2d 971 (10th Cir. 1980) and Gustavson v. United States, 655 F.2d 1034 (10th Cir. 1981), to support its assertion that Mr. Harvey's Arizona medical malpractice cause of action accrued when he was informed that his hand indeed was broken and that he needed to have surgery. Appellee's Brief at 18-22. However, these two cases actually support Mr. Harvey's contention that his claim accrued when his hand did not heal properly after the surgery.

In Robbins the plaintiff, in August of 1972, was given Prednisone for his psoriasis. Robbins then developed marks on the skin of his thighs, back and groin. In October of 1972 he was informed by a dermatologist that the marks were caused by the Prednisone and that they might be permanent. In 1976 he consulted a doctor who said that the marks would indeed be permanent. In 1977 he filed his administrative claim. The Court held that his cause of action accrued in October of 1972 when he knew that the Prednisone had caused the marks and they might be permanent. Robbins, 624 F.2d at 972-973.

Robbins, unlike the case at bar, is not a failure to diagnose case. The prescription of the Prednisone was an affirmative action by the health care providers. The injury was

readily recognizable--marks on the skin. In the case at bar the injury did not manifest itself until the hand did not heal properly after the surgery. Mr. Harvey did not know that he had suffered an injury until his hand did not get back to normal. Pursuant to Robbins, that is when his cause of action accrued. The Court below erred in holding otherwise.

Gustavson is a failure to diagnose case. Terry Newcomb, as a child, presented with a severe bedwetting problem. The real cause of the condition, vesico-ureteral reflux and the resulting infection was not diagnosed until 1973. At that time he was told by the health care provider that the failure to properly diagnose the condition years before had seriously damaged his kidneys. He was also told that he needed surgery. In 1977 his kidneys failed, and he went on dialysis. In 1977 he filed an administrative claim but died thereafter from complications of kidney failure. Gustavson, 655 F.2d at 1035-36.

The Court looked to United States v. Kubrick, 444 U.S. 111, 122 (1979), for guidance, quoting: "That he has been injured in fact may be unknown or unknowable until the injury manifests itself." Gustavson, 655 F.2d at 1036. The Court then looked to when the injury had manifested itself. It determined that in 1973 Newcomb knew that the failure to diagnose had caused serious damage to his kidneys: "[T]he evidence indisputably shows Newcomb knew of the injury (damage to his kidneys) * * *." Id. That is when the statute of limitations began to run.

In the case at bar, Mr. Harvey presented with a broken hand that went undetected for a couple of months. Upon detection, he, like Newcomb was told that he needed

surgery. Unlike Newcomb, he was not told that the delay in recognizing the true nature of his condition had caused damage to his hand. Rather, what he was told is that the surgery would completely mend his hand. [AA at 372] In line with Gustavson, because Mr. Harvey was not told that the delay had damaged his hand, his cause of action did not accrue on March 29, 2004, when he was told that his hand was broken and that he needed surgery. It accrued much later when his hand did not heal properly. The Court below erred in holding otherwise.

IV. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S *NALYEEH* CLAIM BECAUSE HE FAILED TO PROFFER EXPERT TESTIMONY.

The United States misinterprets *nalyeeh* and the requirements of the Federal Tort Claims Act (FTCA) in its argument supporting the District Court's dismissal of Mr. Harvey's claim. It first argues that *nalyeeh* requires a finding of negligence. It then argues that even if *nalyeeh* does not require a showing of negligence, the FTCA requires a finding of negligence before a claimant can recover against the United States.

The United States first avers that "the Navajo Code mandates the application of negligence principles." Appellant's Brief at 43. In support of this contention it cites a Navajo code provision which addresses recovery in the situation where there is injury that resulted from negligence. Id. at 44. The fact that the Navajo recognize the concept of negligence does not indicate, or otherwise imply, that negligence principles are mandated, as argued by the United States.

The United States also states: "It would be a misinterpretation of Navajo law to conclude that the concept of *nalyeeh* applies absent a finding of negligence." Id. at 44. However, *nalyeeh* does apply absent a finding of negligence. The concept of *nalyeeh* is summarized by J.R. Mueller, citing Hon. Robert Yazzie, as follows (emphasis added):

> Traditional Navajo tort law is based on nalyeeh, which is a demand that the victim 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, 3 (2002-2003) citing Hon. Robert Yazzie, Life Comes from It: Navajo Justice Concepts, 24 N.M. Rev. 175, 184-85 (1994).

The United States then argues that even if *nalyeeh* does not require a finding of negligence, the FTCA does. It states, citing Laird v. Nelms, 406 U.S. 797, 799 (1972), that liability will be imposed upon the United States only for "negligence or other form of 'misfeasance or nonfeasance.'" It cites 28 U.S.C. § 1346(b)(1) which requires a "negligent or wrongful act or omission" before liability can be imposed on the United States. Id.

By its own argument the United States acknowledges that the FTCA does not require negligence as a prerequisite for recovery. Rather, by its own terms the FTCA

allows recovery for a "wrongful act or omission" and by case law it allows recovery for "misfeasance or nonfeasance."

According to Black's Law Dictionary, (5th Edition 1979) at 902, misfeasance and nonfeasance are defined as follows: "'misfeasance' is the improper doing of an act which a person might lawfully do; and 'malfeasance' is the doing of an act which a person ought not to do at all." Wrongful is defined as: "Injurious, heedless, unjust, reckless, unfair. Infringement on some right." Id. at 1446.

The following are examples of claims which can be brought under the Federal Tort Claims Act which do not require a showing of negligence: (1) Invasion of Privacy, Birnbaum v. United States, 588 F.2d 319 (2nd Cir. 1978); (2) Waste, Myers. v. United States, 323 F.2d 580 (9th Cir. 1963); (3) Trespass, Hatahley v. United States, 351 U.S. 173 (1956); (2) (4) Bailment, England v. United States, 405 F.2d 862 (5th Cir. 1969); (5) Conversion, MacAvoy v. the Smithsonian, Inst., 757 F. Supp. 60 (D.D.C. 1991); (6) Wrongful Misuse of Trade Secrets, Kramer v. Secretary, Department of the Army, 653 F.2d 726 (2d Cir. 1980); (7) Interference with Visitation, Ruffalo v. United States, 590 F. Supp. 706 (W.D. Mo. 1984); (8) Wrongful Handling of Corpse, Kohn v. United States, 591 F. Supp. 568 (E.D.N.Y. 1984); and (9) Nuisance, Bartleson v. United States, 96 F.3d 1270 (9th Cir. 1996.

Clearly, there is no prerequisite for recovery under the FTCA that the plaintiff must first make a showing of negligence. Mr. Harvey can recover under the FTCA without a

showing of negligence. He can recover for the damage done by the wrongful misfeasance of the United States pursuant to his demand for *nalyeeh*.

The United States admits that there is no evidence as to what happened during the surgery. It then quotes the District Court stating that "[w]ithout admissible evidence regarding the May 5, 2004 surgery, Plaintiff is unable to fulfill his burden to prove that the surgery was negligently performed." Appellee's Brief at 49. Although the United States had control of the surgery, its failure to provide reliable evidence as to what occurred during that surgery is being held against Mr. Harvey. This is exactly the situation that res ipsa loquitur was designed to remedy.

CONCLUSION

Mr. Harvey prays for the relief stated in his Appellant's Brief. He further requests that the Court find that the United States failed to timely raise the issue of "the law of the place." Consequently, that issue is not properly before this Court and should not be considered. In the alternative, if this Court determines that "the law of the place" issue is properly before this Court, then Mr. Harvey requests the opportunity to fully brief that issue. Also, in the alternative, if this Court holds that Arizona law is "the law of the place," then Appellant requests remand and upon remand the opportunity to name an expert witness.

ORAL ARGUMENT STATEMENT

Because "the law of the place" is not properly before this Court, there is no need for oral argument on that issue. If the Court holds that it is properly before the Court, and Mr. Harvey is given the opportunity to fully brief the issue, then there would be no need for oral argument.

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 3635 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 March 7, 2012, I filed Reply 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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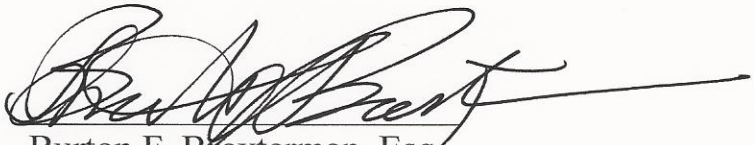

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