MCCOY v. UNITED STATES: THE EIGHTH CIRCUIT IMPOSES EXCESSIVE REQUIREMENTS IN ADMINISTRATIVE CLAIMS AND FAILS TO APPLY THE CONTINUOUS TREATMENT DOCTRINE TO PROPERLY POSTPONE A CLAIM'S ACCRUAL

INTRODUCTION

The federal government will waive its immunity from suit and allow parties injured by negligent actions of government employees to sue the United States in particular circumstances. In order to bring an FTCA suit, a claimant must meet certain prerequisites. One prerequisite includes filing an administrative claim with the appropriate federal agency within a two-year statute of limitations, which begins to run upon the claim's accrual. While a claim typically accrues at the time the injury occurs, medical malpractice claims accrue when the claimant knows of an injury and its cause. In certain cases, a claimant's receipt of continuous medical treatment can save a claim that the statute of limitations would otherwise bar as untimely. This "continuous treatment" doctrine can toll the running of the statute of limitations on the claim, postpone the accrual of the claim, or both. Federal courts are split on determining the adequacy of a particular administrative claim and the circumstances under which continuing treatment will make an otherwise barred claim timely.

In McCoy v. United States, Steven McCoy ("McCoy") brought a claim for personal injury against the United States as a result of medical treatment he received while incarcerated in federal prison. The United States Court of Appeals for the Eighth Circuit determined McC-

---

2. Kubrick, 444 U.S. at 117.
5. Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987).
7. See infra notes 91-94 and accompanying text.
8. See infra notes 125-310 and accompanying text.
9. 264 F.3d 792 (8th Cir. 2001).
Coy had not raised certain claims in his administrative allegations and thus could not raise them in his FTCA action in federal court.\textsuperscript{11} Specifically, the Eighth Circuit determined that McCoy had failed to claim continuing negligent treatment in his administrative claim, which therefore barred him from raising the issue of continuing negligent treatment in his FTCA action.\textsuperscript{12} Under the Eighth Circuit's accepted form of the continuing treatment doctrine, the McCoy court recognized that if a plaintiff claimed continuing negligent treatment, the accrual of his claim would have been postponed until the treatment ended.\textsuperscript{13} However, upon finding that McCoy did not claim continuing negligent treatment, the court determined McCoy's claim accrued in the midst of his treatment rather than at completion.\textsuperscript{14} As McCoy did not file his administrative claim within two years of accrual, the court ruled the statute of limitations barred his claim.\textsuperscript{15}

This Note will discuss the Eighth Circuit's erroneous determination in McCoy, which declared that the administrative claim was insufficient and that the continuing treatment doctrine did not apply to McCoy's claim.\textsuperscript{16} First, this Note will review the facts and holding of McCoy.\textsuperscript{17} Second, this Note will review federal statutes, regulations, and cases addressing the requirements of an administrative claim, the continuing treatment doctrine, and claim accrual.\textsuperscript{18} Finally, this Note will examine the Eighth Circuit's decision in McCoy and will present four arguments.\textsuperscript{19}

First, this Note will demonstrate that the McCoy court improperly assessed the adequacy of McCoy's administrative claim because McCoy claimed continuing negligent treatment in his administrative claim.\textsuperscript{20} Second, this Note will reveal that the court incorrectly placed strict requirements on the filing of an administrative claim because a federal regulation requires only sufficient information for the government to investigate the claim and review it for settlement.\textsuperscript{21} Third, this Note will show the court failed to recognize the continuing treatment doctrine applied to McCoy's FTCA claim, thereby postponing the claim's accrual because McCoy had claimed continuing negligent

\begin{thebibliography}{9}
\bibitem{11} McCoy, 264 F.3d at 792, 795.
\bibitem{12} Id. at 795.
\bibitem{13} Id.
\bibitem{14} Id. at 795-96.
\bibitem{15} Id. at 793, 795-96.
\bibitem{16} See infra notes 312-500 and accompanying text.
\bibitem{17} See infra notes 28-114 and accompanying text.
\bibitem{18} See infra notes 115-310 and accompanying text.
\bibitem{19} See infra notes 20-24, 311-500 and accompanying text.
\bibitem{20} See infra notes 326-49 and accompanying text.
\bibitem{21} See infra notes 350-421 and accompanying text.
\end{thebibliography}
treatment in his administrative claim. Finally, this Note will demonstrate that the McCoy court incorrectly relied on the Eighth Circuit’s ruling in Reilly v. United States in determining McCoy’s claim accrued before his treatment ended because McCoy had plead continuing negligent treatment, thereby postponing the accrual of his claim until the end of McCoy’s treatment. This Note will show that McCoy claimed continuing negligent treatment and provided the information required by federal regulation in his administrative claim. As a result, this Note will conclude that McCoy’s claim accrued when his treatment ended and the statute of limitations did not bar his claim.

FACTS AND HOLDING

In McCoy v. United States, the plaintiff, Steven McCoy (“McCoy”), was confined to federal prison from 1993 through April 16, 1999 for drug conspiracy. In December of 1994, a brown recluse spider bit McCoy on his right leg. Consequently, he sought treatment at the prison’s infirmary, where several attempts to treat the resulting infection failed. Prison doctors subsequently diagnosed McCoy with peripheral vascular disease and attempted an arterial bypass procedure, which also failed to resolve McCoy’s infection. As a result of the continuing infection, the physicians amputated McCoy’s right leg in 1995.

---

22. See infra notes 422-57 and accompanying text.
23. 513 F.2d 147 (8th Cir. 1975).
24. See infra notes 458-500 and accompanying text.
25. See infra notes 416-21, 453-57, 495-500 and accompanying text.
26. Id.
27. 264 F.3d 792 (8th Cir. 2001).
30. McCoy, 264 F.3d at 793.
31. Id. Peripheral vascular disease (“PVD”) is a condition in which the arteries that carry blood to the arms or legs become narrowed or clogged, slowing or stopping the flow of blood. DONNA OLEDORF ET AL., THE GALE ENCYCLOPEDIA OF MEDICINE 2221 (1999). The most common symptom of PVD is pain in the leg, particularly when walking and other symptoms may include numbness, tingling and weakness in the affected limb. Id. at 2222. In severe cases, patients may develop an ulcer or sore on the leg or foot that does not heal. Id. If left untreated, ulcers can become infected and in extreme cases, untreated PVD can lead to gangrene, a serious condition that may require amputation of a leg or a foot. Id. Many factors contribute to the disease, including smoking, high blood pressure, or diabetes. Id. A person who has PVD should immediately stop smoking. Id.
32. McCoy, 264 F.3d at 793.
In June 1996, McCoy discovered lesions developing on his left foot and sought treatment at the prison infirmary. Like the treatment for his right leg, the treatment for his left foot failed. Subsequently, several doctors at several different prison medical facilities treated McCoy’s illness. McCoy’s doctors did not begin to treat him for vascular disease in his left leg until January 1997. After doctors began vascular disease treatment, McCoy underwent an arterial bypass and additional procedures in an effort to cure the injury. These attempts also failed. McCoy’s left leg became gangrenous and on January 23, 1997, McCoy’s doctors amputated his left leg below the knee.

After the amputation of McCoy’s left leg, the stump wound did not heal. McCoy underwent additional surgeries to close the wound, including a stump revision, a bone resection, and a skin graft on the stump. In March of 1997, McCoy’s doctors began to suspect McCoy had Buerger’s Disease, a vascular disease, but did not tell him of their suspicion until April 1997. In addition, McCoy’s doctors did not advise him to quit smoking, which was the only known treatment for the disease. Doctors continued to treat McCoy for complications from the left leg amputation until his release from prison in April 1999.

McCoy filed his administrative claim with the Bureau of Prisons (“BOP”) on February 1, 1999, alleging malpractice in treating his pe-

33. Id. The amputation of the right leg was the basis of a suit prior to this case. Id. at 793 n.2. The amputation of McCoy’s left leg and the subsequent treatment was the basis of this case. Id. at 793-94.
34. McCoy, 264 F.3d at 793.
35. Id.
36. Id. Dr. James W. Morgan, who saw McCoy in approximately October of 1996, suggested McCoy be evaluated for vascular disease if the lesions did not improve. Appellant’s Brief at 1, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. 00-1375WMS). Despite the fact that there was no improvement, McCoy’s doctors did not order treatment or medication for vascular disease. Appellant’s Brief at 2, McCoy (No. 00-1375WMS).
37. McCoy, 264 F.3d at 793.
38. Id.
39. Appellant’s Brief at 2, McCoy (No. 00-1375WMS). Dr. Hugh Harris performed this procedure at the United States Medical Center for federal prisoners in Springfield, Missouri. Id.
40. McCoy, 264 F.3d at 793.
41. Id.
42. Id. Buerger’s Disease is a type of peripheral vascular disease causing inflammation in the veins, arteries and nerves resulting in restricted blood flow. Id. at 793 n.1 (citing DONNA OLEDORE ET AL., THE GALE ENCYCLOPEDIA OF MEDICINE 547-48 (1999)). Younger men between 20 and 40 who are heavy smokers are particularly susceptible to it. Id. No cure for the disease is known. Id. However, abstaining from tobacco use has been demonstrated to suppress the symptoms. Id. Amputation of the affected limb can result if it becomes gangrenous. Id.
43. McCoy, 264 F.3d at 793.
44. Id.
ripheral vascular disease, including the amputation of his left leg. The BOP rejected McCoy’s claim as untimely, claiming McCoy filed his administrative claim more than two years after the amputation of his leg. The BOP stated the FTCA required McCoy to file his claim within two years of his claim’s accrual. The BOP stated that because McCoy failed to file his administrative claim within the required two years, the statute of limitations barred McCoy’s claim.

McCoy then filed suit against the United States pursuant to the Federal Tort Claims Act ("FTCA"), the federal law which governs tort claims brought against the United States, in the United States District Court for the Western District of Missouri on August 5, 1999. In this action, McCoy alleged prison doctors had negligently failed to diagnose and treat his vascular disease, which resulted in his left leg’s amputation, medical bills, permanent disability, pain and suffering, loss of future income, and loss of enjoyment of life.

45. See id. (establishing McCoy’s administrative claim with the BOP was filed February 1, 1999 and was based in part on the amputation of his left leg); Plaintiff’s Administrative Claim, Standard Form 95, § 8 addendum, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (establishing McCoy alleged malpractice in treating his peripheral vascular disease). McCoy specifically alleged in his administrative claim that the BOP failed to properly take the following actions: 1) “Appreciate the seriousness of McCoy’s left heel lesion and treat it in a timely and adequate fashion;” 2) Treat McCoy’s “pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment;” 3) “Timely order an arteriogram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time where said disease was still treatable;” 4) “Read or appreciate the significance of Mr. McCoy’s history including his pre-existing peripheral vascular disease which resulted in the loss of his right leg;” and 5) “Refer McCoy to a vascular disease specialist in a timely manner when they knew or should have known McCoy was in need of treatment from a vascular specialist and that further testing was indicated.” Plaintiff’s Administrative Claim at § 8 addendum, McCoy (No. T-NER-99-75).

46. McCoy, 264 F.3d at 794.


48. McCoy, 264 F.3d at 794.

49. See McCoy v. United States, No. 99-3287-CV-S-RGC, slip op. at 1 (W.D. Mo. Dec. 8, 1999) (establishing McCoy filed suit on August 5, 1999 in United States District Court); McCoy, 264 F.3d at 793 (establishing McCoy’s claim was based on the FTCA).

50. McCoy, 264 F.3d at 790-94. In his FTCA claim, McCoy specifically alleged the prison physicians negligently acted in one or more of the following ways:

(a) [Failing] to make an accurate and complete diagnosis of McCoy’s condition; (b) [Failing] to appreciate the seriousness of McCoy’s left heel lesion and treat it in a timely and adequate fashion; (c) [Failing] to treat McCoy’s pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment; (d) [Failing] to timely order an arteriogram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time in which the disease is [sic] still treatable; (e) [Failing] to read or appreciate the significance of McCoy’s history including his pre-existing peripheral vascular disease which resulted in the loss of his right leg; (f) [Failing] to refer McCoy to a specialist in vascular disease or other qualified specialist in a timely manner when they
States filed a motion for summary judgment, arguing the statute of limitations barred McCoy's claim because the amputation of his leg occurred more than two years before he filed his administrative claim.\textsuperscript{51} McCoy argued the continuing treatment doctrine tolled the statute of limitations.\textsuperscript{52} Judge Russell Clark agreed with McCoy's contention and denied the government's motion for summary judgment.\textsuperscript{53} Subsequently, the government filed a motion to reconsider; Judge Clark changed his earlier decision and granted the United States' motion for summary judgment, stating the ongoing treatment had nothing to do with McCoy's claim and that his claims were over two years old.\textsuperscript{54}

McCoy appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, arguing that the statute of limitations did not bar his claim.\textsuperscript{55} Judge Kermit Bye, writing for the majority, affirmed the district court's decision.\textsuperscript{56} The Eighth Circuit noted that McCoy's claim fell under the FTCA.\textsuperscript{57} As such, the Eighth Circuit stated McCoy should have first presented his claim to the appropriate federal agency; only after denial of the claim by the agency could McCoy then proceed with judicial action.\textsuperscript{58} The Eighth Circuit also declared that the statute of limitations would bar McCoy's claim unless he presented the claim in writing to that agency within two years of the claim's accrual.\textsuperscript{59}

\begin{itemize}
  \item knew or should have known Mr. McCoy was in need of treatment from a specialist and that further testing was indicated; (g) [Failing] to prescribe adequate and proper medications, including, but not limited to, anti-coagulants when they knew or should have known that the Appellant's condition required treatment of the same; and (h) [Failing] to adequately advise the Appellant of the hazards of tobacco use and its debilitating effects upon his pre-existing disease when they knew or should have known the Appellant was suffering from vascular problems, which were aggravated by his tobacco use.
\end{itemize}

Appellant's Brief at 9-10, McCoy (No. 00-1375WMS).

\begin{itemize}
  \item 51. McCoy, 264 F.3d at 794.
  \item 52. Id.
  \item 53. McCoy, No. 99-3287-CV-S-RGC, slip op. at 3 (W.D. Mo. Dec. 8, 1999).
  \item Judge Clark did not provide the reasons for reversing his earlier order which denied the government's motion for summary judgment. Id.
  \item 55. McCoy, 264 F.3d at 792, 794.
  \item 56. Id. at 793, 796.
  \item 57. Id. at 793.
  \item 58. Id.
  \item 59. Id. See also 28 U.S.C. § 2401(b) which states:
  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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
\end{itemize}
McCoy contended the statute of limitations did not bar his claim. He stated that his administrative claim asserted not just negligence in amputating his leg, but also negligence in the failure to diagnose and care for his Buerger's Disease. McCoy argued that because his claim included both the amputation of his leg as well as the post-amputation treatment, the continuous treatment doctrine tolled the statute of limitations period. He further argued that policy should not have required him to file a claim against the doctors while they were still treating him.

The government countered, asserting the statute of limitations barred McCoy's claim. The government claimed McCoy's administrative claim alleged only malpractice in the amputation of the leg and did not claim negligence in the diagnosis or treatment of his Buerger's disease. As such, the government asserted McCoy could not, in the FTCA action, raise claims which he had not alleged in his administrative claim. In doing so, the government presented two basic arguments. First, the government argued McCoy could not raise the issue of negligent treatment of his vascular disease because he did not raise it in his administrative claim. Thus, the government reasoned that McCoy did not exhaust his administrative remedies regarding his treatment and diagnosis claims for peripheral vascular disease. Second, the government argued the court should not apply the continuous treatment doctrine because McCoy had failed to "allege continuing negligent treatment in his administrative claim." As such, the government contended McCoy's failure to raise this issue in his administrative claim limited his FTCA claim to the alleged negligent

60. McCoy, 264 F.3d at 793-94.
61. Id.
62. Id. The "continuous treatment" doctrine is founded on the notion that a patient has the right to trust and place confidence in his physician. Otto v. Nat'l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987). Because of this relationship between doctor and patient, the patient is excused from challenging his physician's quality of treatment until the treatment terminates. Otto, 815 F.2d at 988. In order for the doctrine to be applicable, the continuous treatment must be for the same injury or related injury which arose from the original negligent acts. Borgia v. City of New York, 187 N.E.2d 777, 779 (N.Y. 1962), aff'd, 204 N.E.2d 207 (N.Y. 1964).
63. Appellant's Brief at 11-12, McCoy (No. 00-1375WMS).
64. McCoy, 264 F.3d at 794-95.
65. Id. at 794.
66. Id.
67. Id. at 794-95.
68. Id. at 794. See also Appellee's Brief at 12, 14, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. 00-375) (stating McCoy's claim was always only for the amputation of his left leg until he began to allege negligent treatment for his Buerger's Disease in his brief to the Eighth Circuit).
69. Appellee's Brief at iii, McCoy (No. 00-375).
70. McCoy, 264 F.3d at 794-95.
amputation of his leg.71 Further, the government asserted that because the amputation occurred over two years prior to the filing of McCoy's administrative claim, the district court correctly ruled the statute of limitations barred his claim.72

The Eighth Circuit noted that according to the United States Supreme Court, an FTCA claim does not accrue until the plaintiff becomes aware of the injury, as well as its probable cause.73 Furthermore, the Eighth Circuit recognized the district court's finding, which stated that the statute of limitations barred McCoy's claim because he was aware the government had breached its duty at the time of amputation.74 The Eighth Circuit also noted the district court's determination that McCoy's allegation of continuous treatment had nothing to do with his claim.75 Additionally, the Eighth Circuit recognized that neither the government nor McCoy disputed that McCoy had filed his administrative claim over two years after doctors amputated his left leg.76

The Eighth Circuit observed that there were two variations of the continuing treatment doctrine used by federal circuit courts.77 In discussing the first version, the Eighth Circuit recognized that a plaintiff's cause of action accrued when the tortious continuing treatment ended, regardless of whether the plaintiff knew of the negligence before the treatment ended.78 Although the Eighth Circuit had previously utilized this version of the doctrine, Judge Bye stated this version of the doctrine did not assist McCoy because his administrative claim did not raise the issue of continuing negligent treatment.79 The Eighth Circuit noted that a plaintiff could not base any portion of an action against the United States on claims the plaintiff did not first

71. Id. at 793-94.
72. Id. at 795 (stating the government argued that the statute of limitations barred McCoy's claim because the amputation occurred more than two years prior to his filing); Appellee's Brief at i, iii, McCoy (No. 00-375) (establishing that the district court was correct in granting defendant's motion for summary judgment on those grounds).
73. McCoy, 264 F.3d at 793-94 (citing United States v. Kubrick, 444 U.S. 111, 122 (1979)).
74. Id. at 793-94.
75. Id.
76. Id. at 794.
77. Id. at 793, 795.
78. Id. (citing Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987)).
79. See id. at 793, 795 (establishing this version did not assist McCoy because his administrative claim did not raise the issue of continuing negligent treatment); Wehrman, 830 F.2d at 1480, 1483 (establishing this decision was in the Eighth Circuit and the decision established a plaintiff's cause of action accrued when the tortious continuing treatment ended, regardless of whether the plaintiff was aware of the negligent acts before that time). Judge Bye noted that the district court did not read McCoy's administrative claim to include a claim of failure to diagnose; the Eighth Circuit did not find that decision erroneous. McCoy, 264 F.3d at 795 n.3.
raise in an administrative claim with the appropriate agency. As the Eighth Circuit determined that McCoy had not plead continuous negligent treatment in his administrative claim, Judge Bye stated the first version of the doctrine did not toll the statute of limitations.

Under the second variation of the continuing treatment doctrine, the Eighth Circuit noted the entire course of treatment need not be negligent — only a part of the treatment must have been negligent for the continuing treatment doctrine to toll the statute of limitations. Therefore, the Eighth Circuit stated that this variation could toll the statute of limitations even if the subsequent treatment was not negligent, so long as the treatment was for the same injury from which the negligence arose. The Eighth Circuit determined that this rule allowed an injured party to receive corrective treatment for an injury instead of forcing the party to disrupt treatment in order to bring a malpractice action.

The McCoy court recognized the Eighth Circuit had not adopted this second variation of the continuing treatment doctrine. The Eighth Circuit stated it would not toll the statute of limitations in situations where the plaintiff was aware of the acts claimed to be negligent. The Eighth Circuit stated the district court did not err when it determined the statute of limitations barred McCoy’s claim because he knew of his physicians’ breached duties at the time the physicians amputated his left leg. Relying on Reilly v. United States, the Eighth Circuit stated McCoy’s continued treatment prior to the filing of his administrative claim did not alter this result because McCoy filed his action more than two years after the prison physicians amputated his left leg.

80. McCoy, 264 F.3d at 793, 795 (citing Provancial v. United States, 454 F.2d 72, 74-75 (8th Cir. 1972)).
81. Id. at 793, 795.
82. Id.
83. Id. (citing Otto v. Nat’l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987) (stating that “[w]here there has been a course of continuous medical treatment, a claim may not accrue until the end of that course of treatment, if the treatment has been for the same illness or injury out of which the claim for medical malpractice arose”)).
84. Id. (citing Otto v. Nat’l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987)). See also Ulrich v. United States, 853 F.2d 1078, 1080-81 (2d Cir. 1988) (discussing the two rationales supporting the continuing treatment doctrine).
85. McCoy, 264 F.3d at 793, 795.
86. Id. at 795.
87. Id. at 792, 795.
88. 513 F.2d 147 (8th Cir. 1975).
89. McCoy, 264 F.3d at 795-96 (quoting Reilly, 513 F.2d at 150). The Eighth Circuit in Reilly stated “[t]he fact that the appellant continued to receive treatment for her condition well into the two year period prior to the filing of her administrative claim does not change the result here. The reliance on the continuous treatment rule is misplaced, for the rule does not apply when the claimant is aware of the acts constituting negligence.” Reilly, 513 F.2d at 147, 150.
Judge Theodore McMillian dissented, finding that McCoy had raised a claim that his continuous treatment was negligent. The dissent stated that there were two versions of the continuous treatment doctrine — one which postpones the accrual of the action, and the other which tolls the statute of limitations from running. In examining the first version of the doctrine, the dissent acknowledged that ordinarily, a claimant’s cause of action accrued at the time the claimant knew, or through due diligence should have known, of his injury and its cause. The dissent further acknowledged that when the treatment of the claimant continued to be negligent, the claim would not accrue until the end of the tortious treatment regardless of whether the claimant knew of the negligent acts before that time.

In analyzing the second version, the dissent noted that continuous treatment could toll the statute of limitations where the doctors continued to treat the claimant for the same injury from which the claim arose. The dissent recognized McCoy had not only argued that his physicians were negligent in amputating his leg, but also argued that his physicians had committed negligence throughout the entire treatment of his peripheral vascular disease. Further, the dissent stated McCoy’s administrative claim had alleged continuing negligent treatment and appropriately put the government on notice of his claim of continuous negligent treatment. The dissent also determined that the claims raised by McCoy in his administrative claim were present in his FTCA complaint too. Reasoning McCoy had adequately raised the issues of continuing treatment in his administr-
tive claim as well as in his FTCA complaint, the dissent determined the court should have applied the continuing treatment doctrine to ascertain the date on which McCoy's cause of action had accrued.\footnote{McCoy, 264 F.3d at 796, 798 (McMillian, J., dissenting).}

The dissent stated McCoy's cause of action had accrued on January 23, 1997, the day the physicians amputated McCoy's left leg.\footnote{Id. at 796, 798-99 (McMillian, J., dissenting).} The dissent based his decision on two considerations: 1) McCoy's deteriorating condition and 2) the gravity of McCoy's injury.\footnote{Id. at 796, 798 (McMillian, J., dissenting).} Examining the facts in light of these considerations, the dissent determined that the amputation of McCoy's leg, in addition to the deterioration of his condition, put McCoy on notice of the existence of his injury, as well as the cause of his injury.\footnote{Id. (McMillian, J., dissenting).}

Next, the dissent determined that the continuous treatment doctrine tolled the running of the statute of limitations on McCoy's claim.\footnote{Id. at 796, 799 (McMillian, J., dissenting).} The dissent acknowledged that government doctors continuously provided McCoy's treatment from June 1996 through January 1997.\footnote{Id. (McMillian, J., dissenting).} Based on the facts, the dissent determined that even though McCoy's action accrued on January 23, 1997, the continuous treatment he received in the Springfield federal prison tolled the statute of limitations until at least December 16, 1997.\footnote{Id. (McMillian, J., dissenting).} Thus, the dissent concluded that because McCoy filed his administrative claim on February 1, 1999, he did so within the two-year statute of limitations.\footnote{McCoy, 264 F.3d at 796, 799-800 (McMillian, J., dissenting).}

The dissent reasoned that even if the Eighth Circuit had required the corrective treatment to be negligent in order to toll the statute, McCoy had demonstrated that his doctors provided negligent corrective treatment.\footnote{Id. at 796, 800 (McMillian, J., dissenting) (citing McCoy, 264 F.3d at 795-96 (stating "Wehrman provides no assistance to McCoy because he failed to raise an issue of continuing negligent treatment in his administrative claim" and McCoy did not toll the statute)).} The dissent opined that McCoy alleged that the amputation of his leg, as well as the treatment he received before and after the amputation, was negligent.\footnote{Id. (McMillian, J., dissenting).} Further, the dissent determined McCoy had sufficiently alleged the corrective treatment he received subsequent to the amputation of his leg was negligent, including the treatment of his peripheral vascular disease.\footnote{Id. (McMillian, J., dissenting).}
The dissent then discussed the majority's application of Reilly.\(^\text{109}\) The dissent interpreted the continuing treatment doctrine discussion in Reilly as addressing accrual of the cause of action rather than the tolling of the statute of limitations.\(^\text{110}\) The dissent determined that, although the court in Reilly discussed the continuous treatment doctrine in terms of the tolling of the statute of limitations, the analysis in Reilly indicated the Reilly court had actually focused on the accrual of the cause of action.\(^\text{111}\)

The dissent therefore stated it would have held that McCoy timely filed his claim.\(^\text{112}\) Specifically, the dissent stated McCoy timely filed his administrative claim because he had raised issues of continuous negligence in his administrative claim, which permitted him to raise the same issues in his FTCA claim.\(^\text{113}\) According to the dissent, McCoy's continuing course of treatment postponed the accrual of his claim until January 23, 1997, and the continuing treatment after the amputation tolled the statute of limitations until after February 1, 1997, making McCoy's administrative claim filed on February 1, 1999 timely.\(^\text{114}\)

BACKGROUND

A. FEDERAL STATUTES AND REGULATIONS GOVERNING FTCA ADMINISTRATIVE CLAIMS

Federal statute 28 U.S.C. § 2401 governs the period of time during which plaintiffs may commence an action under the Federal Tort Claims Act ("FTCA").\(^\text{115}\) In essence, 28 U.S.C. § 2401 bars a tort claim against the United States unless the plaintiff presented his claim to the appropriate federal agency within two years of the claim's accrual or within six months after the government denied the administrative claim.\(^\text{116}\) Specifically, 28 U.S.C § 2401 mandates the following:

---

109. Id. (McMillian, J., dissenting) (citing McCoy, 264 F.3d at 795-96).
110. Id. (McMillian, J., dissenting) (citing Reilly, 513 F.2d at 150).
111. Id. (McMillian, J., dissenting). The dissent noted that, in a footnote of Reilly, the court specifically discussed the continuous treatment doctrine in context of the accrual of the cause of action. Id. at 796, 802 (McMillian, J., dissenting).
112. Id. at 803 (McMillian, J., dissenting).
113. Id. (McMillian, J., dissenting).
114. Id. (McMillian, J., dissenting). McCoy motioned for rehearing and rehearing en banc which was subsequently denied by the Eighth Circuit Court. Id. at 792. Judge Bye, who wrote the majority opinion, voted to grant the petition for rehearing en banc. Id. at 792 n.*, 793. McCoy also filed a petition for writ of certiorari with the United States Supreme Court. McCoy v. United States, 122 S.Ct. 1909, 1909 (2002). The Court later denied McCoy's petition. McCoy, 122 S.Ct. at 1909.
(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) 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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.\textsuperscript{117}

While 28 U.S.C. § 2401 sets parameters for the timeliness of a claim, other federal statutes deal with additional prerequisites of an FTCA action.\textsuperscript{118}

In addition to 28 U.S.C. § 2401, which governs the time for commencing actions against the United States, federal statute 28 U.S.C. § 2675 mandates that presentation of a claim to a federal agency is a prerequisite to the initiation of a suit against the United States.\textsuperscript{119}

Section 2675 states in part:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. (establishing 28 U.S.C. § 2401 requires the presentation of a tort claim against the United States within two years of the claim's accrual); 28 U.S.C. § 2675 (1994) (requiring a claimant to present an administrative claim to a federal agency prior to the filing of an FTCA suit).
  \item \textsuperscript{119} 28 U.S.C. § 2675(a) (1994).
  \item \textsuperscript{120} 28 U.S.C. § 2675 (1994). 28 U.S.C. § 2675 also states in part:
    \item (b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.
\end{itemize}
Although §§ 2401 and 2675 require the making of an administrative claim in a timely manner prior to the presentation of an FTCA action, 28 C.F.R. § 14.2 sets the specific criteria for a suitable administrative claim.\textsuperscript{121}

Federal regulation 28 C.F.R. § 14.2 describes the specific requirements governing the filing of a proper administrative claim under 28 U.S.C. § 2401.\textsuperscript{122} Section 14.2(a) of the federal regulation states in part:

(a) For purposes of the provisions of 28 U.S.C. §§ 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.\textsuperscript{123}

Case law has further addressed what information an administrative claim must contain to be a valid prerequisite to an FTCA action as well as whether a particular claim fell within the FTCA's statute of limitations period.\textsuperscript{124}

\textsuperscript{121} See supra notes 115-20 and accompanying text (establishing 28 U.S.C. § 2401 requires the presentation of a claim within two years of the claim's accrual and that 28 U.S.C. § 2675 requires the presentation of an administrative claim prior to the filing of suit against the United States); 28 C.F.R. § 14.2 (2001) (setting forth requirements of an administrative claim).


\textsuperscript{123} 28 C.F.R. § 14.2(a) (2001).

\textsuperscript{124} See infra notes 125-310 and accompanying text.
B. Pertinent Court Decisions Regarding Claim Accrual, Administrative Claims, and the Continuous Treatment Doctrine

In 1979, the Supreme Court of the United States addressed the issue of when a medical malpractice claim accrues. In United States v. Kubrick, the United States Supreme Court determined a claim accrued when a claimant became, or should have become, aware of the facts constituting the negligent act, not when a claimant became aware of the negligence itself. In Kubrick, William Kubrick ("Kubrick") sued the United States in the United States District Court for the Eastern District of Pennsylvania, alleging medical malpractice. In April 1968, the Veterans Administration ("VA") admitted Kubrick to one of its hospitals for treatment of an infection in his right leg. As part of the post-surgical treatment, physicians irrigated the wound with an antibiotic called neomycin. Approximately six weeks after his release from the hospital, Kubrick began to experience a ringing in his ears and a loss of hearing. In January of 1969, a private physician advised Kubrick that the use of neomycin possibly caused his hearing loss. Kubrick made repeated attempts for an increase in his disability payments from the VA, but the VA consistently rebuffed his attempts. Kubrick subsequently filed suit in the United States District Court for the Eastern District of Pennsylvania against the government, alleging the physicians in the VA hospital negligently treated his infection.

Judge Edward Becker entered judgment for Kubrick, determining that even if Kubrick believed a relationship existed between the neomycin treatment and his hearing loss, the claim accrued when he became aware of the facts constituting the negligent act, not when he became aware of the negligence itself. The VA originally denied his claim in September 1969, and again on resubmission, on the grounds that the neomycin treatment was not related to the hearing loss and there was no negligence involved. The VA subsequently denied Kubrick's appeal in 1972, recognizing the use of neomycin may have caused his hearing loss, but that its use was acceptable in the medical community. The VA again recognized the neomycin may have caused the hearing loss and also acknowledged there was fault in the administration of the drug. The government did not raise this issue on appeal.

130. Id.
131. Id. at 113-14.
132. Id. at 114.
133. Id. at 114-15. The VA originally denied his claim in September 1969, and again on resubmission, on the grounds that the neomycin treatment was not related to the hearing loss and there was no negligence involved. Id. at 114. The VA subsequently denied Kubrick’s appeal in 1972, recognizing the use of neomycin may have caused his hearing loss, but that its use was acceptable in the medical community. Id. at 114-15. Upon reconsideration in 1975, the VA again recognized the neomycin may have caused the hearing loss and also acknowledged there was fault in the administration of the drug. Id. at 115 n.3.
134. Kubrick, 444 U.S. at 113, 115. Kubrick had not filed an administrative claim until after he had filed this action with the district court. Id. at 115 n.4. The district court found this issue moot because the VA denied Kubrick’s administrative claim on April 13, 1973. Id. The government did not raise this issue on appeal. Id.
mycin and his deafness, the statute of limitations did not begin to run until Kubrick knew of the possibility of negligent treatment. The court noted that the VA misled Kubrick into believing the VA doctors had not caused his loss. The court also considered that while Kubrick had consulted with private doctors regarding his condition, he was not aware of the act of malpractice until the private physician informed him that his doctor should not have used the neomycin. The court considered Kubrick's diligence in attempting to verify his claim against the VA as an important factor in its determination.

The government appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing the standard set forth by the district court allowed Kubrick to delay his claim's accrual until he discovered there was legal negligence, or until Kubrick got a professional medical opinion indicating that the physicians were negligent and that he should file suit. Judge Joseph Weis, writing for the Third Circuit, affirmed the district court's decision, stating the government had inaccurately interpreted the district court's rationale because the government disregarded a subsequent portion of the district court's opinion, which stated the statute of limitations began to run when "the plaintiff [had] reason [to] at least suspect that a legal duty to him had been breached." The United States filed a writ of certiorari and the United States Supreme Court granted certiorari to consider the time at which a claim accrues under the FTCA.

The Supreme Court reversed the decision of the Third Circuit, stating Kubrick's ignorance of his legal rights did not postpone the accrual of his cause of action. Rather, the Court declared Kubrick's claim had accrued when he became aware of the injury and its probable cause. In so deciding, Justice Byron White, writing for the majority, reasoned that a court should not treat a "plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause" in the same manner. The Court further opined that allowing a claim to accrue when a plaintiff became aware of his legal rights would interfere with the purpose of the statute of limitations, which is

136. Id. at 185.
137. Id.
138. Id.
142. Id. at 124-25.
143. Id. at 118.
144. Id. at 113, 122.
to force the diligent presentation of claims against the government.\textsuperscript{145} The Court noted that a plaintiff who was aware of the facts underlying his injury should not be excused from seeking out whether someone had infringed upon his legal rights.\textsuperscript{146} The Court reasoned that because Kubrick was aware of the facts underlying his injury in January 1969, his claim accrued at that time, not when a private doctor informed him in 1971 of the VA's negligence.\textsuperscript{147} The Court therefore determined Kubrick's lack of knowledge regarding his legal rights did not postpone his claim's accrual.\textsuperscript{148}

Justice John Paul Stevens, joined by Justices William Brennan and Thurgood Marshall, dissented, reasoning that Kubrick's numerous attempts to increase his disability benefits established he was in fact diligent in attempting to verify he had a legally actionable claim against the VA.\textsuperscript{149} The dissent also stated the Court had no basis for finding Kubrick could have been more diligent than he had been.\textsuperscript{150} Finally, the dissent noted that the factfinder and the evidence in the record, not the Court's speculation in a particular circumstance, should resolve the question of what constitutes diligence.\textsuperscript{151}

Then in 1987, the Eighth Circuit addressed the accrual of a medical malpractice claim in light of a claimant's continued treatment.\textsuperscript{152} In \textit{Wehrman v. United States},\textsuperscript{153} the United States Court of Appeals for the Eighth Circuit determined that where multiple doctors, as opposed to a single physician, continuously treated a patient, the patient could use the continuous treatment doctrine to postpone the accrual of his claim.\textsuperscript{154} In \textit{Wehrman}, Floyd Wehrman ("Wehrman") brought a medical malpractice action against the United States in the United States District Court for the District of Minnesota, alleging physicians at a VA hospital failed to inform him of viable surgical options and advised him against considering surgery.\textsuperscript{155} A brain injury, incurred in the course of his military service, had disabled Wehrman, who be-

\begin{footnotes}
\item[145.] \textit{Id.} at 123.
\item[146.] \textit{Id.} at 122-23.
\item[147.] \textit{See id.} at 114, 122-23 (establishing Kubrick was aware of the facts underlying his injury in 1969 and a private doctor later informed him of the VA's improper treatment in 1971); \textit{Kubrick}, 444 U.S. at 118 (establishing a plaintiff's claim accrues when he becomes aware of the injury and its probable cause).
\item[148.] \textit{See Kubrick}, 444 U.S. at 120-22 (establishing the Supreme Court disagreed with the Third Circuit's decision that a plaintiff's ignorance of his legal rights postponed a claim's accrual).
\item[149.] \textit{Id.} at 125, 128.
\item[150.] \textit{Id.} at 128.
\item[151.] \textit{Id.}
\item[152.] \textit{See infra} notes 154-71 and accompanying text.
\item[153.] 830 F.2d 1480 (8th Cir. 1987).
\item[154.] \textit{Wehrman v. United States}, 830 F.2d 1480, 1483-85 (8th Cir. 1987).
\item[155.] \textit{Wehrman}, 830 F.2d at 1480, 1481-82.
\end{footnotes}
gan to experience chest and throat pains in 1962, for which VA physicians advised him that the dangers of surgery made medical treatment preferable.\textsuperscript{156} However, several years of medical treatment did not improve his deteriorating condition.\textsuperscript{157} In February 1984, Wehrman consulted a private physician, who advised him that surgery was a viable option.\textsuperscript{158} Wehrman underwent the surgery in March of 1984, which resolved his injury.\textsuperscript{159} Consequently, Wehrman brought an administrative action, which the VA denied; Wehrman then filed his FTCA suit in the district court.\textsuperscript{160}

The government moved for summary judgment, stating the statute of limitations barred Wehrman's claim.\textsuperscript{161} Judge Harry MacLaughlin granted the government's motion, reasoning that because Wehrman could have gained access to his medical records, he should have been reasonably diligent in discovering his injury.\textsuperscript{162} In deciding the continuing treatment doctrine did not apply and the statute of limitations barred Wehrman's claim, the court relied on the fact that different physicians had treated Wehrman intermittently over the course of twenty-two years.\textsuperscript{163} The court reasoned that because Wehrman did not have a continued, personal, confidential doctor-patient relationship with a single physician, the continuing treatment doctrine did not apply.\textsuperscript{164}

Wehrman appealed the district court decision to the United States Court of Appeals for the Eighth Circuit, arguing the statute of limitations did not bar his claim because the continuing tortious treatment terminated less than two years prior to the filing of his administrative claim.\textsuperscript{165} Judge Max Rosenn, writing for the majority, vacated the district court's order and remanded the case for further proceedings to determine whether the continuous treatment doctrine postponed accrual, thereby permitting Wehrman's claim.\textsuperscript{166} The Eighth Circuit reasoned that even though Wehrman did have some access to his medical records over the years, the records would not have assisted him in assessing the viability of surgery because the records did not contain any information regarding surgical alternatives for his

\begin{itemize}
  \item \textsuperscript{156} Id. at 1482.
  \item \textsuperscript{157} Id. Over the course of 22 years, Wehrman received medical treatment for his condition and was continually advised that surgery was not a safe option. Id.
  \item \textsuperscript{158} Wehrman, 830 F.2d at 1482.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Id. at 1483, 1486.
  \item \textsuperscript{163} Id. at 1482, 1484-85.
  \item \textsuperscript{164} Id. at 1484-85.
  \item \textsuperscript{165} Id. at 1480-81.
  \item \textsuperscript{166} Id. at 1480, 1486-87.
\end{itemize}
condition.\textsuperscript{167} In addition, the Eighth Circuit noted that under the continuing treatment doctrine, a claim "[did] not accrue until the tortious continuing treatment [ended], even if the plaintiff [was] aware of the acts constituting negligence before that time."\textsuperscript{168} Furthermore, the Eighth Circuit stated that although a number of VA physicians had treated Wehrman, they were all from the same facility and none of those physicians had presented Wehrman with the option of surgery.\textsuperscript{169} The Eighth Circuit determined the physicians may not have merely intermittently treated Wehrman, but may have continually treated him, as Wehrman alleged.\textsuperscript{170} As such, the Eighth Circuit stated that material issues of fact remained and the district court improperly granted summary judgment.\textsuperscript{171}

In addition to addressing the affects of the continuing treatment doctrine on accrual of medical malpractice claims, courts have also reviewed the doctrine's effect on the tolling of the statute of limitations in medical malpractice claims.\textsuperscript{172} In \textit{Reilly v. United States},\textsuperscript{173} the United States Court of Appeals for the Eighth Circuit determined the statute of limitations barred the plaintiff's claim because her claim accrued more than two years prior to the filing of her administrative claim.\textsuperscript{174} In \textit{Reilly}, Patricia Reilly ("Reilly") sued the United States in the United States District Court for the District of Nebraska, alleging physicians at an Air Force hospital committed medical malpractice in treating her asthma.\textsuperscript{175} Reilly had suffered from asthma for about five years and experienced a severe attack on November 18, 1968.\textsuperscript{176} Her doctor placed her on a mechanical respirator and intubated her for approximately eighty hours following her attack.\textsuperscript{177} The use of the respirator caused a significant amount of scar tissue in her trachea, which necessitated additional treatments.\textsuperscript{178} The injury eventually impaired Reilly's ability to speak between April and August 1969.\textsuperscript{179} Another physician later informed Reilly that the mechanical respira-

\begin{itemize}
  \item \textsuperscript{167} \textit{Id.} at 1486.
  \item \textsuperscript{168} \textit{Id.} at 1483.
  \item \textsuperscript{169} \textit{Id.} at 1485.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.} at 1481, 1486.
  \item \textsuperscript{172} See infra notes 174-92 and accompanying text.
  \item \textsuperscript{173} 513 F.2d 147 (8th Cir. 1975).
  \item \textsuperscript{174} \textit{Reilly v. United States}, 513 F.2d 147, 149-50 (8th Cir. 1975).
  \item \textsuperscript{175} \textit{Reilly}, 513 F.2d at 148-49.
  \item \textsuperscript{176} \textit{Id.} at 149.
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} \textit{Id.} Tracheal stenosis caused the resulting scar tissue. \textit{Id.} In an effort to alleviate her breathing difficulties, Reilly underwent a subsequent tracheotomy in January 1969, and tracheal dilation treatment in April 1969. \textit{Id.}
  \item \textsuperscript{179} \textit{Reilly}, 513 F.2d at 149.
\end{itemize}
tor caused her condition.180 Reilly alleged her treating physician did not advise her of the dangers involved in using the respirator.181

The district court found for the United States and dismissed Reilly's action.182 Judge Robert Denney, writing for the court, reasoned that Reilly should have been aware of the cause of her action in August 1969 because the loss of her speech, which followed several months of treatment, was severe enough to put her on notice that her doctor may have mistreated her.183 Therefore, the court stated that because Reilly's claim accrued in August 1969, the passing of the two-year statute of limitations barred her administrative claim, which she filed on December 29, 1971.184

Reilly appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, arguing the district court erroneously found the statute of limitations had run because her continuous treatment tolled the running of the statute.185 Judge Gerald Heaney, writing for the court, affirmed the decision of the district court, determining the district court did not err in fact or law.186 The Eighth Circuit reasoned that the record of the trial court supported its finding that Reilly was aware of the causal relationship between her condition and the use of the respirator by January 1969.187 The Eighth Circuit added that once a plaintiff knew of the negligent acts that caused the alleged injury, the plaintiff had a duty to bring suit.188 The Eighth Circuit viewed Reilly's loss of speech from April to August 1969 as significant enough to put her on notice that her physicians had negligently treated her.189 As such, the Eighth Circuit opined that the district court was not clearly erroneous in determining Reilly should have known of her cause of action in August 1969.190 Finally, Reilly argued her continued treatment tolled the running of the statute of limitations.191 The Eighth Circuit rejected Reilly's argument, noting that the continuing treatment doctrine did not apply in Reilly's instance because she knew of the acts constituting negligence.192

180. Id.
181. Id.
182. Id. at 148.
183. Id. at 147, 150.
184. Id. at 148-50.
185. Id. at 147, 150.
186. Id. at 148, 150.
187. Id. at 147, 149 n.1, 149-50. The court based its reasoning on the cross-examination of Reilly, where she answered yes when asked if she knew in January 1969 that her "throat was blocked off because the tube was placed down there." Id. at 149 n.1.
188. Reilly, 513 F.2d at 149.
189. Id. at 150.
190. Id.
191. Id.
192. Id. The court stated that the rule was:
POSTPONE A CLAIM'S ACCRUAL

District courts have also addressed the effects of continuous treatment on the tolling of the statute of limitations in medical malpractice claims. In *Dundon v. United States*, the United States District Court for the Eastern District of New York determined the continuous treatment doctrine did not toll the statute of limitations on the plaintiffs' medical malpractice claim. However, the court did find that the plaintiffs' son's condition tolled the statute of limitations for the period during which the son laid comatose. The court also found that the plaintiffs' wrongful death claim fell within the two-year statute of limitations period because the plaintiffs filed their medical malpractice claim timely and their failure to present the medical malpractice claim at the administrative level did not bar their claim.

In *Dundon*, James and Mary Dundon ("plaintiffs"), the parents of James E. Dundon Jr. ("Dundon"), sued the United States for medical malpractice in the United States District Court for the Eastern District of New York, alleging misdiagnosis and negligence during the brain surgery performed on Dundon. Dundon was a Vietnam veteran who began experiencing severe depression and headaches while in the service. In July of 1970, Dundon slashed both wrists and stabbed himself in the abdomen. Military hospitals treated his wounds, but following his recovery, he continued to experience headaches and depression. Dundon received psychiatric treatment in VA hospitals, but his treating physicians did not perform a neurological examination and workup. On or about August 18, 1975, his doctors finally performed diagnostic procedures and informed Dundon and the plaintiffs that Dundon had a brain tumor. Dundon's doc-

---

193. See infra notes 195-226 and accompanying text.
tors tried to remove the tumor, but as a result of the surgery, Dundon lapsed into a coma and died twenty months later.204

The plaintiffs filed an administrative claim with the VA as required by the FTCA on January 18, 1979.205 The VA subsequently denied the claim, stating that the passing of the statute of limitations barred the claim under 28 U.S.C. § 2401.206 After the denial of their administrative claim, the plaintiffs filed an FTCA suit, alleging wrongful death and medical malpractice.207

The United States moved for summary judgment, asserting the statute of limitations barred the plaintiffs' entire claim and that the plaintiffs' failure to raise the medical malpractice claim in their administrative claim prohibited them from raising the issue in their FTCA suit.208 Judge Henry Bramwell denied the United States' motion for summary judgment, reasoning that the court should determine on the merits when the plaintiffs' claim accrued.209 The government argued the claim had accrued on August 18, 1975, when the doctors informed Dundon and the plaintiffs that Dundon suffered from an organic neurological disorder.210 Alternatively, the plaintiffs argued the claim accrued upon Dundon's death on September 30, 1979, over four years after doctors informed plaintiffs of the disorder.211 The court accepted the government's assertions, reasoning that Dundon could have become aware of the significant nature of his injury on August 18, 1975 at the earliest.212 Therefore, the court set August 18, 1975 as the accrual date of plaintiffs' claim.213

The court further established that the continuing treatment doctrine did not toll the statute of limitations because the doctrine required more continuous treatment than what Dundon received.214 The court stated that different doctors in different hospitals had treated Dundon intermittently, demonstrating his treatment was not continuous.215 Additionally, the court reasoned that Dundon could have sought outside medical advice concerning his injury.216

204. Id. Dundon's tumor exploded during a "shunt" operation and the tumor's contents spilled into Dundon's spinal fluid causing his coma. Id.
205. Dundon, 559 F. Supp. at 471.
206. Id.
207. Id. at 469, 471.
208. Id. at 470-71.
209. Id. at 472, 477.
210. Id. at 472.
211. Id.
212. Id.
213. Id.
214. Id. at 472-73.
215. Id. at 473.
216. Id.
Although the court did not toll the statute of limitations under the continuous treatment doctrine, it established the action as timely under another theory. The court determined that Dundon's comatose condition had tolled the statute of limitations because it prevented him from possibly pursuing a malpractice action. The court reasoned that the actions of the treating physicians, which resulted in Dundon's comatose state, prevented Dundon from understanding the extent and cause of his injuries, thus tolling the statute of limitations. The court determined the statute of limitations ran from the accrual date of the claim to the date on which Dundon lapsed into a coma, tolled for the period Dundon was comatose, and began to run again from Dundon's death until the filing of plaintiffs' administrative claim. As the plaintiffs filed their claim within twenty-one months from its accrual, the court determined the statute of limitations did not bar the claim. The court further determined that because the statute of limitations did not bar the medical malpractice claim, the plaintiffs timely filed their wrongful death action for the same reasons.

The government contended the plaintiffs failed to allege negligence in the surgery on Dundon in the administrative claim, to which the court determined the plaintiffs had placed the VA on adequate notice of the fact that they had based their claim on a failure to diagnose and a failure to properly treat Dundon. The court reasoned that the plaintiffs had completed the Standard Form 95, the form required for presentation of an administrative claim, thereby providing the VA with sufficient information to process their claim. The court stated the government narrowly interpreted the requirements for the administrative claim. Further, the court stated it would not allow the VA's narrow interpretation to interfere with what could have been a viable claim.

In addition to addressing the effect of continuing treatment on medical malpractice claims under the FTCA, courts have also determined the information that an administrative claim must contain in order to be a valid prerequisite to an FTCA suit. In "Provincial v.

---

217. Id.
218. Id. at 474-75.
219. Id.
220. Id. at 475.
221. Id.
222. Id. at 470, 475-76.
223. Id. at 476.
224. Id. at 477-79.
225. Id. at 477.
226. Id.
227. See infra notes 229-57 and accompanying text.
the United States Court of Appeals for the Eighth Circuit determined that a claimant could not amend his FTCA complaint to include a claim for medical malpractice when the claimant had not previously presented the medical malpractice claim to the appropriate federal agency in his administrative claim. In Provancial, Antoine Provancial ("Provancial") sued the United States in the United States District Court for the District of South Dakota, alleging negligent acts by federal officers that resulted in his loss of sight. Two employees of the Mission Police Department had arrested Provancial, a member of the Sioux Tribe in South Dakota, within the City of Mission for driving while intoxicated. The Department of the Interior Bureau of Indian Affairs had deputized the arresting officers, making them officers for the federal government, as well as officers for the City of Mission. The officers' deputization granted them power to arrest Provancial within the Rosebud Indian Reservation. The officers took Provancial to jail and detained him. Provancial filed an administrative claim against the United States with the Department of Justice, which forwarded the claim to the United States Department of the Interior. Provancial's claim demanded $250,000 for his loss of sight that allegedly resulted from his arrest and detention by two officers of the Mission, South Dakota police department. The Department of the Interior administratively denied Provancial's claim, after which he filed suit against the government in the United States District Court for the District of South Da-

228. 454 F.2d 72 (8th Cir. 1972).
229. Provancial v. United States, 454 F.2d 72, 74 (8th Cir. 1972), appeal after remand, 463 F.2d 760 (8th Cir. 1972).
230. Provancial, 454 F.2d at 73.
231. Id.
232. Id.
233. Id. The City of Mission is located within the boundaries of the Rosebud Indian Reservation. Id.
234. Id.
235. Provancial, 454 F.2d at 73.
236. Id.
237. Id. The Rosebud Tribal Police took Provancial to the Public Health Hospital at 10:00 a.m. on July 17, 1969. Id.
238. Provancial, 454 F.2d at 74.
239. Id. at 73.
kota, arguing that the officers had negligently failed to provide him with medical treatment for his eye injury.\textsuperscript{240}

At trial, Provancial moved to amend his complaint to include a medical malpractice claim against the physician who had treated his injury at the Rosebud Hospital.\textsuperscript{241} Judge Andrew Bogue denied Provancial's motion to amend, reasoning that the new claim he sought to add had not first been presented to, and denied by, the proper federal agency.\textsuperscript{242} Further, the court determined the arresting officers were not employees of the federal government under the FTCA.\textsuperscript{243} Because the FTCA only applied to acts committed by employees of the United States, the court determined it did not have jurisdiction over the case.\textsuperscript{244} Consequently, the district court found for the United States and dismissed Provancial's suit.\textsuperscript{245}

Provancial appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit.\textsuperscript{246} Provancial argued the district court should have construed the administrative claim denial letter from the Department of the Interior as a presentation of his medical malpractice claim to the United States Public Health Service and as a denial of the medical malpractice claim by the United States.\textsuperscript{247} Provancial based this argument on a statement in the letter that denied "the entire incident and denied the claim on behalf of the United States."\textsuperscript{248} Judge Elmo Hunter, writing for the Eighth Circuit, affirmed the district court's determination that Provancial did not originally present the medical malpractice claim to the United States Public Health Service, stating that therefore, the district court correctly determined Provancial could not amend his complaint to include such a claim.\textsuperscript{249}

The Eighth Circuit reasoned that the original claim sent to the Department of Justice consisted only of a claim for negligence against the two specifically named officers acting under the authority of the Bureau of Indian Affairs.\textsuperscript{250} The Eighth Circuit noted the Department of Justice forwarded the original negligence claim to the Depart-

\textsuperscript{240} Id. The court did not discuss the basis of the United States' denial of Provancial's administrative claim. Provancial, 454 F.2d at 72.

\textsuperscript{241} Id. at 74.

\textsuperscript{242} Id.

\textsuperscript{243} Id. at 73. The Eighth Circuit did not discuss the district court's reasoning in its decision as to why the officers were not federal employees under the FTCA. Provancial, 454 F.2d at 72.

\textsuperscript{244} Provancial, 454 F.2d at 73.

\textsuperscript{245} Id.

\textsuperscript{246} Id. at 72-73.

\textsuperscript{247} Id. at 74.

\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{250} Id. at 72-74.
ment of the Interior, which then examined the claim and denied it.  
Furthermore, the Eighth Circuit determined the second claim, which
Provancial sought to add to his complaint by amendment, presented a
different and new claim involving an agency other than the Depart-
ment of the Interior.  
The Eighth Circuit stated Provancial should have presented the new claim to the Department of Public Health.  
Therefore, the Eighth Circuit declared that because Provancial had
not presented the new claim to the proper federal agency and because
the agency had not then denied the claim, the district court had prop-
erly refused Provancial’s leave to amend his complaint.  
Taking into account the letter received by the Department of the Interior, the
Eighth Circuit found that even if the Department of the Interior’s de-
nial included the medical malpractice claim, the six month limitation
period under 28 U.S.C. § 2401(b) barred the medical malpractice
claim.  
The Eighth Circuit noted that neither party presented au-
thority indicating the Department of the Interior had power to act on
behalf of the Department of Public Health.  
Based on other find-
ings, the Eighth Circuit remanded the case to the district court for
further proceedings.  

The Eighth Circuit again addressed the sufficiency of a plaintiff’s
administrative claim in 1999.  In Walker v. United States, the
United States Court of Appeals for the Eighth Circuit ruled the dis-

tRICT court correctly determined that the plaintiff’s failure to timely
file an administrative claim barred her FTCA action.  
In Walker, Irene Walker (“Walker”) sued the United States in the United States
District Court for the Eastern District of Arkansas, alleging that em-
employees of the Army had committed medical malpractice in treating

251.  Id. at 74.  There was no information in the original claim to notify the Depart-
ment of Justice that another agency may be involved.  Id. at 74 n.1.
252.  Provancial, 454 F.2d at 74.
253.  Id. at 72, 74.
254.  Id. at 74.
255.  Id. at 74-75.
256.  Provancial, 454 F.2d at 75.
257.  Id.  The Eighth Circuit reversed the district court’s finding that the arresting
officers were not employees of the federal government within the meaning of the FTCA.
Id. at 72-75.  The court reasoned that because the Department of the Interior, Bureau of
Indian Affairs had deputized the officers, the officers therefore had the authority to
arrest Indians within the Rosebud Indian Reservation, which the officers would not
have possessed as mere employees of the City of Mission.  Id. at 75.  The court recog-
nized that under the FTCA, the term ‘Employee’ included persons employed by a federal
agency in an official capacity, regardless of whether the employment was temporary or
permanent or the government compensated the officers.  Id.  As such, the court stated
that the officers who arrested Provancial were employees of the Federal Government,
even though the government did not compensate them as employees.  Id.
258.  See infra notes 260-75 and accompanying text.
259.  176 F.3d 437 (8th Cir. 1999).
her knee. On June 30, 1993, Army physicians installed a prosthesis on Walker's left knee. While manipulating Walker's leg on September 7, 1993, the doctors inadvertently broke her leg.

On March 13, 1996, Walker filed an administrative claim with the United States describing both the surgery and the leg fracture as the basis of her claim. Walker also requested $750,000 in damages for personal injury as a result. However, Walker specified September 7, 1993 as the date of the accident which caused her pain on her Standard Form 95. Subsequent to the denial of her administrative claim, Walker brought an FTCA suit against the United States for medical malpractice.

Judge Susan Webber Wright decided the district court did not have subject matter jurisdiction over Walker's claim because Walker failed to assert any claim other than the fracture of her leg in the administrative claim. The court further stated that Walker had filed her administrative claim more than two years after she should have known of her leg fracture. Therefore, the court ruled the statute of limitations barred Walker's suit because the FTCA requires a claim's presentation within two years of the claims accrual.

Walker appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, per curiam, affirmed the district court's opinion, ruling the decision was not clearly erroneous. In reaching its decision, the Eighth Circuit reasoned that for a court to preside over an FTCA suit, the claimant must first present the claim to the appropriate federal agency within two years after the claim accrued. Furthermore, the Eighth

---

261. See Walker, 176 F.3d at 438 & n.1 (establishing Walker's suit alleged medical malpractice in treating her knee against army employees and that Walker brought suit in United States District Court for the Eastern District of Arkansas).

262. Walker, 176 F.3d at 438.

263. Id.

264. Id.

265. Plaintiff's Administrative Claim, Standard Form 95, § 12, Walker v. United States, 176 F.3d 437 (8th Cir. 1999).

266. Walker, 176 F.3d at 438.

267. Walker claimed the doctors at the Brooke Army Medical Center "committed malpractice by improperly sizing and installing the prosthesis; breaking her leg; and failing to diagnose, treat, and take proper medical and surgical action to correct the former errors." Id. at 438 (internal quotation marks omitted).

268. Walker, 176 F.3d at 438.

269. Id.

270. Id.

271. Id. at 437-38. The circuit court's opinion did not discuss Walker's basis of appeal. Walker, 176 F.3d at 437.


273. Id. (citing 28 U.S.C. § 2675(a); 28 U.S.C. § 2401(b); Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993), cert. denied, 510 U.S. 1109 (1994); Osborn v. United States, 918 F.2d 724, 728, 731 (8th Cir. 1990)).
Circuit noted the district court did not err in determining Walker had only presented a claim for the leg fracture because the administrative claim merely listed the date of the fracture, September 7, 1993, as the date of the accident.274 As Walker filed her administrative claim more than two years after the fracture of her leg, the Eighth Circuit ruled the district court was correct in determining the passing of the statute of limitations barred Walker's claim.275

Other courts have addressed the sufficiency of a plaintiff's administrative claim differently than the Eighth Circuit did in Provincial and Walker.276 In Harris v. United States,277 the United States District Court for the District of Puerto Rico ruled that although the FTCA required a plaintiff to file an administrative claim prior to judicial action, a plaintiff could raise a claim in the subsequent FTCA action that he had not previously raised in his administrative claim.278 In Harris, parents of schoolchildren ("Parents") sued the United States for the tortious treatment of their minor children by a schoolteacher.279 The Parents alleged in their claim that their sons suffered severe emotional distress as a result of their schoolteacher's "intimidation, threats, use of profane language, occasional use of force, harassment, and embarrassment in front of the class."280 The Parents also requested damages on their own behalf.281 The Parents alleged the teacher had negligently treated their children and that the school was negligent when it knew or should have known the teacher was unfit to teach classes.282 In addition, the Parents alleged the school negligently retained the teacher even after the Parents complained he had mistreated and abused the students in the classroom.283 The government moved to dismiss, averring the Parents raised claims in their

274. Id.
275. Id.
276. See infra notes 278-88 and accompanying text.
279. Harris, 797 F. Supp. at 93.
280. Id. The administrative claim alleged in part that:
   the acts complained of herein were caused by the negligent acts and/or omissions of Mr. William Pointer [the teacher] and/or the negligent acts and/or omissions of the Antilles Consolidated School which knew or should have known that Mr. Pointer was unfit to give classes and kept him employed even after the children's parents complained to the pertinent authorities that the kids were being mistreated and abused and that something was amiss in said classroom.

Id.
281. Harris, 797 F. Supp. at 93. The court did not elaborate as to what damages the parents of the children were seeking. Harris, 797 F. Supp. at 91.
282. Harris, 797 F. Supp. at 93.
283. Id.
FTCA action they had not previously raised in their administrative claim.284

Judge Raymond Acosta denied the government’s motion, stating that while similar court proceedings confined the parties to more rigid standards with regard to the presentation of a suit, the purpose of an administrative claim was simply to enable the government to investigate and adequately defend itself.285 Further, the court determined the administrative claim only needed to provide notice to the government of the injurious incident and a request for certain damages; the legal basis for the claim did not need to be specific and claimants could raise alternative theories of liability in their subsequent FTCA action.286 Therefore, the court reasoned that even if the Parents had only presented a supervisory liability argument against the school in their administrative claim, the court could have found the claim for the school’s negligence similar enough to the administrative assertions to provide the government with sufficient notice.287 As such, the court found the government’s argument unpersuasive and denied its motion to dismiss.288

The Eighth Circuit has also addressed the sufficiency of a plaintiff’s administrative claim in conjunction with continuous tortious conduct by a defendant.289 In Gross v. United States,290 the United States Court of Appeals for the Eighth Circuit ruled that the plaintiff’s administrative claim represented a sufficient prerequisite to his FTCA suit despite the government’s assertions that the plaintiff had failed to exhaust his administrative remedies.291 The Eighth Circuit also noted that the statute of limitations on the plaintiff’s claim started to run on the date of the last tortious act, not on the date he knew or should have known of his injury.292

In Gross, John Gross (“Gross”) sued the United States in the United States District Court for the District of South Dakota for inten-

284. Id. Specifically, the government argued the administrative demand concerned a general claim of negligence by the school in employing an unfit teacher, where the plaintiffs subsequently asserted there was an independent breached duty by the school to protect the students in their FTCA claim. Id. The court also rejected the government’s assertion that the court lacked subject matter jurisdiction and that the FTCA excluded supervisory negligence based on intentional torts, from coverage. Id. at 93-95.
285. Harris, 797 F. Supp. at 93, 95.
286. Id. at 93.
287. Id. at 94.
288. Id. at 94-95.
289. See infra notes 291-310 and accompanying text.
290. 676 F.2d 295 (8th Cir. 1982).
292. Gross, 676 F.2d at 300.
tional infliction of emotional distress.\textsuperscript{293} In 1965 and 1969, the Lake County Agricultural Stabilization and Conservation Service Committee ("ASCS") denied Gross's participation in a feed grain program.\textsuperscript{294} The committee also withdrew its prior determination that Gross was eligible for the program in 1968, 1970, and 1971, and demanded repayment of funds it had given to Gross for those years.\textsuperscript{295} Gross alleged the committee falsified statements and made other fraudulent attempts to exclude him from the program when it knew or should have known that doing so would cause Gross emotional distress.\textsuperscript{296} Gross filed his administrative claim with the United States Department of Agriculture ("USDA") on August 7, 1973, and subsequently filed his FTCA action in 1975 with the United States District Court for the District of South Dakota, arguing the ASCS had intentionally and tortuously barred him from participation in a USDA feed grain program.\textsuperscript{297}

Judge Fred J. Nichol, writing for the court, found for Gross, concluding the FTCA exception for intentional torts did not bar Gross's claim for intentional infliction of emotional distress and that the acts of the ASCS did not fall within the discretionary function protection exception of the FTCA.\textsuperscript{298} The court reasoned that Congress had intended to exclude only those intentional torts specifically listed by Congress in the FTCA.\textsuperscript{299} The court opined that because Congress had not listed intentional infliction of emotional distress as an "intentional torts" exception, the court should not exclude that tort.\textsuperscript{300} The court further stated that the discretionary function exception was limited to planning and policy making decisions, but that claimants could sue for decisions made at the operational level.\textsuperscript{301} Thus, because the


\textsuperscript{294} Gross, 676 F.2d at 297. The Lake County Agricultural Stabilization and Conservation Service Committee controlled participation in the feed grain program, which the United States Department of Agriculture ("USDA") administered. See \textit{id.} (establishing ASCS controlled participation in the feed grain program); Gross v. United States, 505 F.2d 1271, 1272 (Ct. Cl. 1974) (establishing the USDA administered the grain feed program).

\textsuperscript{295} Gross, 676 F.2d at 297.

\textsuperscript{296} \textit{id.}

\textsuperscript{297} See Gross, 508 F. Supp. at 1085, 1090 (establishing Gross filed his administrative claim on August 7, 1973); Gross, 676 F.2d at 297-98 (establishing Gross's suit grew out of action by the ASCS to bar Gross from participating in a feed grain program and that Gross filed his FTCA suit in 1975); \textit{supra} note 282 (establishing the ASCS controlled participation in an USDA administered program).

\textsuperscript{298} Gross, 676 F.2d at 295, 298.

\textsuperscript{299} Gross, 508 F. Supp. at 1090.

\textsuperscript{300} \textit{See id.} (stating the court should not exclude "intentional torts" not listed in 28 U.S.C. § 2680(h)); \textit{id.} at 1090 n.6 (listing intentional torts in 28 U.S.C. § 2680(h)).

\textsuperscript{301} Gross, 508 F. Supp. at 1090.
court determined the ASCS made its decisions in the grain feed program at the operational level, Gross could sue the ASCS under the FTCA. The district court concluded Gross’s claim for intentional infliction of emotional distress was valid and awarded him $35,000.

The government appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, arguing that Gross could not pursue his claim because he had failed to exhaust administrative remedies for the actions of the ASCS prior to 1969 and the statute of limitations barred his suit for actions that occurred prior to 1971. Judge Myron Bright, writing for the majority, determined the government interpreted Gross’s administrative claim too narrowly. The Eighth Circuit reasoned that although Gross primarily based his claims on acts beginning in 1969, Gross also specifically noted that the tortious acts of the government dated back to 1965. The Eighth Circuit stated that Gross had provided sufficient information to notify the government of his claim and provided an opportunity for the government to settle his claim. The Eighth Circuit further reasoned that if the tortious acts of the government were continuous in nature, the statute of limitations began running from the date of the last tortious act. However, because the Eighth Circuit could not determine the date on which the last tortious act occurred, it was unable to decide whether Gross timely filed his administrative claim. Therefore, the Eighth Circuit vacated and remanded the district court’s opinion regarding the statute of limitations issue.

ANALYSIS

In McCoy v. United States, the United States Court of Appeals for the Eighth Circuit determined the continuing treatment doctrine

---

302. Id. at 1090-91.
303. Id. at 1092.
304. Gross, 676 F.2d at 295, 297. The government also appealed, arguing a prior judgment Gross obtained in a prior Court of Claims action collaterally estopped Gross from pursuing his claim and that his claims were not actionable under the FTCA because the alleged violations were of the government’s own regulations, which involved a discretionary function, and fell within the intentional torts exception to the FTCA. Id. at 297.
305. Gross, 676 F.2d at 299.
306. Id.
307. Id.
308. Id. at 300.
309. Id. at 295, 300. The Eighth Circuit noted the district court made no specific findings on the tortious nature of the ASCS’s demand for a refund in 1971. Id.
310. Gross, 676 F.2d at 304. Senior Circuit Judge Floyd Gibson filed a dissent in which he argued intentional infliction of emotional distress fell under the intentional torts exception of the FTCA and therefore barred Gross’s claim. Id. at 304-05 (Gibson, J., dissenting).
311. 264 F.3d 792 (8th Cir. 2001).
did not apply to Steven McCoy's ("McCoy") Federal Tort Claims Act ("FTCA") suit because he had not raised the issue of continuing negligent treatment in his administrative claim. The Eighth Circuit based its decision on the rule that a litigant may not support any part of an FTCA action against the United States on claims which the litigant had not previously presented to the proper agency as part of his administrative claim. The McCoy court stated McCoy failed to raise continuing negligent treatment administratively, which barred him from raising continuing negligent treatment in his FTCA action. Further, the McCoy court determined that because McCoy failed to specifically plead continuous negligent treatment in his administrative claim, the rule articulated in Wehrman v. United States prevented the tolling of the statute of limitations on McCoy's claim.

In examining the manner in which other circuit courts have adopted the continuing treatment doctrine, the Eighth Circuit in McCoy rejected the notion that continuous non-negligent treatment can toll the statute of limitations. Relying on the decision of Reilly v. United States, the McCoy court stated that the continuing treatment doctrine could not toll the statute of limitations until a plaintiff finished receiving treatment if the injured plaintiff was aware of the negligent acts. Finally, the McCoy court upheld the district court's determination that McCoy's claim had accrued on January 23, 1997, when he became aware of his injury and its cause at the time doctors amputated his left leg. Because the court determined McCoy's claim accrued on January 23, 1997, and that he did not file his administrative claim until February 1, 1999, the court in McCoy opined the two-year statute of limitations period barred his claim.

In McCoy, the Eighth Circuit incorrectly held McCoy failed to allege continuing negligent treatment in his administrative claim and

313. McCoy, 264 F.3d at 795 (citing Provancial v. United States, 454 F.2d 72, 74-75 (8th Cir. 1972), appeal after remand, 463 F.2d 760 (8th Cir. 1972)).
314. Id.
315. 830 F.2d 1480 (8th Cir. 1987).
316. McCoy, 264 F.3d at 795. See also Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987) (stating that under the continuous treatment doctrine, a claimant's cause of action will not accrue until the negligent continuing treatment ends, regardless of whether the claimant is aware of the facts forming the basis of the negligence).
317. McCoy, 264 F.3d at 792, 795 (citing Otto v. Nat'l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987)).
318. 513 F.2d 147 (8th Cir. 1975).
319. McCoy, 264 F.3d at 795 (citing Reilly v. United States, 513 F.2d 147, 150 (8th Cir. 1975)).
320. Id. at 793, 795.
321. Id. at 793, 795-96.
that the statute of limitations therefore barred McCoy's claim.\textsuperscript{322} This Analysis will demonstrate that the Eighth Circuit misinterpreted the requirements for a valid administrative claim because federal regulations mandate only two basic requirements for a valid administrative claim, and this Analysis will distinguish the cases relied on by the Eighth Circuit in deciding that McCoy did not present a proper administrative claim.\textsuperscript{323} In addition, this Analysis will argue that the Eighth Circuit incorrectly determined the accrual date of McCoy's claim because McCoy had received continuous negligent treatment when his physicians failed to diagnose his peripheral vascular disease.\textsuperscript{324} Finally, this Analysis will argue that the Eighth Circuit in McCoy misapplied Reilly in determining that the statute of limitations did not toll McCoy's claim because McCoy had plead continuous negligent treatment, as opposed to continuous non-negligent treatment, in his claim.\textsuperscript{325}

A. McCoy Presented a Sufficient Administrative Claim Under the FTCA

The Eighth Circuit erroneously found that McCoy had insufficiently alleged continuous negligent treatment in his administrative claim as a prerequisite to his FTCA suit.\textsuperscript{326} As a general rule, the filing of an administrative claim with the appropriate federal agency is a prerequisite to an FTCA claim because the FTCA serves as a waiver of the federal government's sovereign immunity.\textsuperscript{327} According to 28 U.S.C. § 2675(a), unless a claimant first presents a tort claim against the United States to the appropriate federal agency and that agency denies the claim in writing and through the mail, the FTCA will bar the action.\textsuperscript{328} Further, the plaintiff must present the claim to a federal agency on an executed Standard Form 95 or by other writing, as required by the statute.\textsuperscript{329} Finally, the Standard Form 95 must be accompanied by a claim for money damages in a sum certain for injury alleged to have occurred by reason of the incident.\textsuperscript{330} However, the

\textsuperscript{322} See infra notes 326-500 and accompanying text.

\textsuperscript{323} See infra notes 326-421 and accompanying text.

\textsuperscript{324} See infra notes 422-57 and accompanying text.

\textsuperscript{325} See infra notes 458-500 and accompanying text.

\textsuperscript{326} See infra notes 327-404 and accompanying text.

\textsuperscript{327} See Walker v. United States, 176 F.3d 437, 438 (8th Cir. 1999) (establishing the filing of an administrative claim with the appropriate federal agency is a prerequisite to bringing an FTCA claim); Kubrick v. United States, 444 U.S. 111, 117-18 (1979) (establishing the FTCA waives the federal governments sovereign immunity), remanded by 614 F.2d 770 (3d Cir. 1980).

\textsuperscript{328} 28 U.S.C. § 2675(a) (1994).


\textsuperscript{330} Id. (establishing the information that is required for an administrative claim to be considered validly filed with the appropriate federal agency). See also Diane M.
Eighth Circuit in *McCoy* erroneously deemed it necessary to require a plaintiff to describe an administrative claim with more specificity than federal law requires.331

In determining McCoy had not plead continuous treatment in his administrative claim, the Eighth Circuit relied on *Provancial v. United States*332 to test the adequacy of McCoy's administrative claim.333 However, the *McCoy* court misinterpreted the holding in *Provancial* and applied it too broadly.334 In *Provancial*, the Eighth Circuit stated the plaintiff's failure to present his claim for medical malpractice to the United States Public Health Service ("Public Health Service") barred him from raising the medical malpractice claim in his FTCA action.335 In so deciding, the court noted that the medical malpractice claim was "distinct and different" from the negligence claim the plaintiff had originally presented to the United States Department of the Interior.336 The court further noted that the medical malpractice claim involved the Public Health Service to which the plaintiff had not previously presented his claim, and that this failure barred the plaintiff from amending his FTCA complaint to include the medical malpractice claim.337

From this decision, the Eighth Circuit in *McCoy* articulated the rule that a claimant may not present claims in an FTCA action which he did not first offer to the proper administrative agency.338 The Eighth Circuit reasoned that McCoy's failure to plead continuous negligent treatment in his administrative claim barred him from raising continuous negligent treatment in his FTCA suit.339 However, the


331. See infra notes 333-421 and accompanying text.
332. 454 F.2d 72 (8th Cir. 1972).
333. *McCoy*, 264 F.3d at 795 (citing *Provancial v. United States*, 454 F.2d 72, 74-75 (8th Cir. 1972)).
334. See infra notes 335-49 and accompanying text.
335. See *Provancial*, 454 F.2d at 72, 74 (establishing the district court correctly denied *Provancial* leave to add his medical malpractice claim because he did not file an administrative claim with the United States Public Health Service); 28 U.S.C. § 2675(a) (1994) (stating a person cannot bring a claim under the FTCA unless he first brings the appropriate administrative claim).
337. See id. at 74 (establishing *Provancial* had not presented his administrative claim to United States Public Health Service); 28 U.S.C. § 2675(a) (1994) (establishing a person cannot bring a claim under the FTCA unless he first brings the appropriate administrative claim).
338. *McCoy*, 264 F.3d at 792, 795 (citing *Provancial*, 454 F.2d at 74-75).
339. Id.
McCoy court misplaced its reliance on Provancial because McCoy is distinguishable from Provancial.340

McCoy is distinguishable from Provancial on two main grounds.341 First, in Provancial, the court determined that the claimant attempted to present two different types of claims — a negligence claim against the officers who arrested the claimant and a medical malpractice claim against the physicians who treated his injury.342 Unlike the plaintiff in Provancial who presented a negligence and medical malpractice claim, the plaintiff in McCoy presented only a medical malpractice claim.343 Furthermore, the two claims in Provancial each involved a different agency.344 The negligence claim against the federal officers in Provancial concerned the Department of the Interior and the medical malpractice claim involved the Public Health Service.345 Provancial presented the negligence claim to the Department of the Interior, but never presented the medical malpractice claim to the Public Health Service.346 Unlike Provancial, McCoy concerned a medical malpractice claim involving only the Bureau of Prisons ("BOP"), to which McCoy had presented his claim.347 Therefore, unlike the claimant in Provancial, McCoy presented his only claim to the only federal agency to which the FTCA required that McCoy present the claim.348 Because Provancial was thus distinguishable from McCoy, the Eighth Circuit incorrectly applied the administrative claim requirements in Provancial to McCoy.349

The Eighth Circuit did not rely solely on Provancial in considering the sufficiency of McCoy's administrative claim.350 The Eighth Circuit in McCoy also relied on Walker v. United States351 to uphold the district court's determination that McCoy's administrative claim

340. See infra notes 341-49 and accompanying text.
341. See infra notes 342-48 and accompanying text.
342. Provancial, 454 F.2d at 74.
343. Compare McCoy, 264 F.3d at 793 (stating McCoy claimed medical malpractice only), with Provancial, 454 F.2d at 74 (stating Provancial claimed medical malpractice and negligence).
344. Provancial, 454 F.2d at 74.
345. Id.
346. Id.
347. Compare McCoy, 264 F.3d at 793 (establishing McCoy presented his medical malpractice claim the Bureau of Prisons), with Provancial, 454 F.2d at 74 (establishing Provancial presented his negligence claim to the Department of the Interior, but did not present his medical malpractice claim to the Public Health Service).
348. Compare supra notes 342, 344-46 and accompanying text (establishing Provancial involved two claims which Provancial was required to send to two different agencies), with supra notes 343, 347 (establishing McCoy had only one claim involving only one federal agency).
349. See supra notes 341-48 and accompanying text.
350. See infra notes 351-59 and accompanying text.
351. 176 F.3d 437 (8th Cir. 1999).
did not include a claim that the doctors had negligently failed to diagnose and treat him.\textsuperscript{352} However, in light of the requirements set forth in 28 C.F.R. § 14, the holding in \textit{Walker} was flawed and the Eighth Circuit should have overturned \textit{Walker} in \textit{McCoy}.\textsuperscript{353} The Eighth Circuit in \textit{McCoy} should have overturned \textit{Walker} because \textit{Walker} required more detailed information than federal law mandated.\textsuperscript{354}

In \textit{Walker}, the Eighth Circuit affirmed the district court's finding that the statute of limitations barred the claimant's action.\textsuperscript{355} The Eighth Circuit in \textit{Walker} found no clear error in the district court's judgment that the injury that occurred on September 7, 1993 was the only injury Walker alleged in her administrative claim.\textsuperscript{356} The \textit{Walker} court upheld the district court's finding because Walker had listed September 7, 1993 as the date of the accident and the onset of her injury on the Standard Form 95 of her administrative claim.\textsuperscript{357} The Eighth Circuit in \textit{Walker} upheld the district court's decision despite the fact that Walker had described the basis of her claim as both the leg fracture in September 1993 and the June 1993 operation, and had attached medical records to the administrative claim for both incidents.\textsuperscript{358} The \textit{Walker} court ruled the district court did not err in determining that Walker had failed to plead medical malpractice, for the diagnosis and treatment following her fracture as alleged in her administrative claim barred her from raising the medical malpractice claim in her FTCA action.\textsuperscript{359}

\textit{Walker} required more specificity than either 28 U.S.C. § 2675 or 28 C.F.R. § 14 mandated for a valid administrative claim.\textsuperscript{360} Section 2675(a) bars an FTCA action “unless the claimant shall have first presented the \textit{claim} to the appropriate Federal agency.”\textsuperscript{361} However, the federal statute does not define what constitutes a "claim."\textsuperscript{362} For purposes of 28 U.S.C. § 2675, which directs a claimant to present an administrative claim prior to filing an FTCA suit, 28 C.F.R. § 14.2

\begin{footnotes}
\item[352] \textit{McCoy}, 264 F.3d at 792, 795 n.3 (citing \textit{Walker}, 176 F.3d at 438).
\item[353] See infra notes 355-67 and accompanying text.
\item[354] \textit{Id}.
\item[355] \textit{Walker v. United States}, 176 F.3d 437, 438 (8th Cir. 1999).
\item[356] \textit{Walker}, 176 F.3d at 437, 438.
\item[357] \textit{Id}.
\item[358] \textit{Id}. at 438.
\item[359] \textit{Id}. at 437-38.
\item[360] \textit{Compare Walker}, 176 F.3d at 438 (establishing the statute of limitations barred Walker's claim because she listed September 7, 1993 (the date physicians fractured Walker's leg) on her Standard 95 form and had not provided information sufficiently demonstrating claims in addition to the September 7th incident), with 28 C.F.R. § 14.2 (2001) (establishing a claimant must only request a sum certain for damages and notify the government of an incident causing the claimed injury in his administrative claim).
\item[361] 28 U.S.C § 2675(a) (1994) (emphasis added).
\item[362] \textit{Id}.
\end{footnotes}
specified only two administrative claim content requirements: 1) a claimant must request a definite amount of money damages; and 2) a claimant must notify the government of the incident causing the claimed injury.\textsuperscript{363}

Based on the requirements set forth in 28 U.S.C. § 14.2, Walker presented a valid administrative claim.\textsuperscript{364} First, Walker requested $750,000 in damages for personal injury as a result of her physician’s negligence, thus complying with the requirement that a claimant request a definite amount of damages.\textsuperscript{365} Second, Walker identified the manipulation of her leg, which resulted in its fracture, as the incident which caused her injury, thus complying with the second requirement of 28 C.F.R. § 14.2.\textsuperscript{366} Therefore, Walker’s administrative claim was a valid prerequisite to her FTCA suit as required by 28 C.F.R. § 14.2.\textsuperscript{367}

Similar to Walker, McCoy met the regulatory requirements set forth in 28 C.F.R. § 14.2.\textsuperscript{368} McCoy met the first requirement because he claimed on his Standard Form 95 a definite amount of $5,000,000 in damages for his personal injury.\textsuperscript{369} McCoy also complied with 28 C.F.R. § 14.2 by providing the government with notice of the “incident” which caused his injury; his claim alleged his treating physicians failed to appreciate the severity of his injury, failed to properly treat his peripheral vascular disease, and failed to refer him to a vascular disease specialist, among other allegations.\textsuperscript{370} McCoy’s administrative claim sufficiently gave the government notice that McCoy

\begin{footnotes}
\textsuperscript{364} See infra notes 365-67 and accompanying text.
\textsuperscript{365} Compare Plaintiff’s Administrative Claim, § 12, Walker v. United States, 176 F.3d 437 (8th Cir. 1999) (establishing Walker claimed $750,000 in damages for personal injury), with 28 C.F.R. § 14.2 (2001) (establishing a claimant must request a sum certain for damages in his administrative claim).
\textsuperscript{366} Compare Plaintiff’s Administrative Claim, § 8, Walker v. United States, 176 F.3d 437 (8th Cir. 1999) (establishing Walker provided her leg fracture on September 7, 1993 as the incident causing the claimed injury), with 28 C.F.R. § 14.2 (2001) (establishing a claimant must notify the government of the incident causing the claimed injury).
\textsuperscript{367} See supra notes 364-66 and accompanying text.
\textsuperscript{368} Compare supra notes 364-67 and accompanying text (establishing Walker complied with requirements for a valid administrative claim), with infra notes 369-73 and accompanying text (establishing McCoy complied with requirements for a valid administrative claim).
\textsuperscript{369} See 28 C.F.R. § 14.2 (2001) (stating that a claimant must make a claim for a sum certain on a Standard Form 95 or by other writing); Plaintiff’s Administrative Claim, Standard Form 95, § 12, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (showing McCoy requested $5,000,000 in damages for personal injuries on his Standard Form 95).
\textsuperscript{370} See 28 C.F.R. § 14.2 (2001) (establishing the section required a plaintiff to identify in his claim an incident which caused his injury); McCoy, 264 F.3d at 797 (McMillan, J., dissenting) (establishing McCoy alleged in his claim that his physicians failed to appreciate the severity of his injury, failed to treat his peripheral vascular disease, and failed to timely refer him to a vascular disease specialist). In addition, McCoy alleged his physicians failed to timely order testing that would have revealed the significance of
had based his claim on continuous treatment as opposed to a single incident.\textsuperscript{371} McCoy, like the claimant in \textit{Walker}, provided the information expressly required under 28 C.F.R. § 14.2 for a valid administrative claim.\textsuperscript{372} Consequently, because both Walker and McCoy presented adequate administrative claims under 28 C.F.R. § 14.2, the Eighth Circuit in \textit{McCoy} erroneously concluded that neither Walker nor McCoy provided adequate information in their administrative claim.\textsuperscript{373}

However, even though the Eighth Circuit in \textit{McCoy} did not overturn \textit{Walker}, \textit{McCoy} remained distinguishable from \textit{Walker} in one important regard.\textsuperscript{374} In \textit{Walker}, the claimant referenced only the leg fracture and knee operation in her administrative claim.\textsuperscript{375} Nothing in the Eighth Circuit's opinion in \textit{Walker} indicated the claimant had included any information regarding the treatment she received after the leg fracture on September 7, 1993 in her administrative claim.\textsuperscript{376} The claimant in \textit{McCoy}, in contrast to the claimant in \textit{Walker}, specifically referenced the fact that his treating physicians had failed to diagnose and treat his pre-existing peripheral vascular disease over the course of his treatment.\textsuperscript{377} Because of this major difference, McCoy's claim provided more information to the government than Walker's claim provided.\textsuperscript{378} In doing so, McCoy's claim, more thoroughly than Walker's claim, provided the BOP with sufficient information under 28 C.F.R. § 14.2 to know that his claim included continuing negligent treatment and enabled the government to fully investigate McCoy's claim.\textsuperscript{379} Therefore, because McCoy's claim included this information,
the McCoy court should not have strictly relied on Walker in reaching its decision.\textsuperscript{380}

Further, other jurisdictions have required less detail for administrative claims than those compelled by the Eighth Circuit in Walker.\textsuperscript{381} In Dundon v. United States,\textsuperscript{382} the United States District Court for the Eastern District of New York stated that a valid claim to an administrative agency "need do no more than provide sufficient information as to allow an agency to process a claim administratively."\textsuperscript{383} In Dundon, the government contended the plaintiff had only raised the issue of misdiagnosis in his administrative claim and that his failure to raise a claim for failure to properly treat his condition barred him from raising the claim in his FTCA action.\textsuperscript{384} The court, in rejecting the government's contention, stated that the administrative claim was sufficient in purpose and scope to alert the agency to the extent of the claimant's allegations.\textsuperscript{385} The court further determined that the purpose of the administrative claim was not to unnecessarily impede a claimant, but to provide the government with notice of the claim and allow it time to investigate the claim for purposes of settlement.\textsuperscript{386}

Similarly, McCoy's administrative claim sufficiently placed the BOP on notice to process his claim.\textsuperscript{387} Particularly, McCoy's administrative claim stated that he suffered the amputation of his left leg as a result of the government's negligence and that he endured pain and

\begin{flushleft}
\textsuperscript{380} See supra notes 374-79 and accompanying text.
\textsuperscript{381} See infra notes 383-404 and accompanying text.
\textsuperscript{382} 559 F. Supp. 469 (E.D.N.Y. 1983).
\textsuperscript{384} Id. at 476.
\textsuperscript{385} Id. at 476-77.
\textsuperscript{386} Id. at 476.
\textsuperscript{387} Compare Dundon, 559 F. Supp. at 476 (stating the government was put on sufficient notice of plaintiffs' medical malpractice claim in connection with surgeries, even though plaintiffs largely directed their administrative claims at a failure to diagnose and treat), with McCoy, 264 F.3d at 793, 797 (McMillan, J., dissenting) (stating McCoy alleged in his administrative claim to the BOP that his physicians failed to appreciate the severity of his injury, failed to treat his peripheral vascular disease, and failed to refer him to a vascular disease specialist which resulted in doctors amputating his left leg).
\end{flushleft}
suffering caused by the amputation. Furthermore, McCoy stated on his Standard Form 95 that the pain and suffering resulted from "the failure of physicians and others to adequately treat his left foot wound." In an attachment to his administrative claim, McCoy specifically stated that after the amputation, he suffered from open sores on his stump wounds and had to undergo several procedures subsequent to the amputation. In his claim, McCoy specifically charged the government with negligence in failing to: 1) appreciate the seriousness of his left heel injury; 2) treat his pre-existing peripheral vascular disease; 3) order timely testing which would have revealed he suffered from peripheral vascular disease; 4) read his medical history or appreciate its significance, including his peripheral vascular disease; and 5) refer him to a specialist for treatment. Based on the decision in Dundon and the information McCoy provided in the administrative materials, McCoy provided sufficient information to put the government on notice of his claim and to provide the government with enough information to process his claim administratively.

In addition, the United States District Court for the District of Puerto Rico also required less detail for administrative claims than the Eighth Circuit did in Walker. In Harris v. United States, the district court recognized that the standards applicable to court proceedings did not bind an administrative claim. On this distinction, the court established that the government's motion to dismiss, which the government based on allegations that the plaintiffs' failed to include all their claims in their administrative claim, was unpersuasive. Harris further reinforced the notion that a claim need only provide notice of incident and demand for damages of a certain amount; the plaintiff need not specify the legal basis for relief or alternate theories of liability, but may present these in a later judicial proceeding. Accordingly, the court refused to dismiss the claimant's assertion of an independent breach of duty in their FTCA suit because both theories raised by the claimants were compatible with the original conduct.

---

389. Id.
391. Id.
392. See supra notes 387-91 and accompanying text.
393. See infra notes 395-404 and accompanying text.
396. Harris, 797 F. Supp. at 93-94.
397. Id. at 93.
398. Id. at 94.
Similar to *Harris*, McCoy's administrative claim provided notice of the underlying facts of his claim. Although McCoy did not specifically use the words "continuous negligent treatment" in his administrative claim, McCoy's administrative claim included the pre-amputation and post-amputation treatment as the basis of his medical malpractice claim. Specifically, McCoy alleged in his administrative claim that his treating physicians failed to care for his pre-existing peripheral vascular disease, failed to order tests which would have shown he suffered from peripheral vascular disease, failed to appreciate or read his medical history, and failed to have a peripheral vascular disease specialist examine McCoy. The government asserted McCoy failed to allege continuing negligent treatment in his BOP administrative claim and was therefore barred from alleging it in his FTCA suit. However, McCoy's claim provided the facts underlying his claim and therefore met the requirements for a valid administrative claim, even if it did not meet the standards required in a judicial proceeding. Thus, the government's contention in *McCoy* that McCoy had failed to make a specific claim for continuous treatment, like the claim by the government in *Harris*, should have been unpersuasive because McCoy provided ample notice to the BOP of the facts underlying his claim.

Had the Eighth Circuit overturned *Walker*, McCoy's claim still would have met the administrative requirements set forth in other prior decisions of the court. In *Gross v. United States*, the plaintiff alleged that the government's tortious withholding of involvement

---

399. Compare Plaintiff's Administrative Claim, Standard Form 95 at § 8 addendum, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (establishing McCoy's administrative claim alleged that his physicians were negligent in treating his left foot wound, in treating his peripheral vascular disease, in failing to timely order proper testing, and in failing to refer McCoy to a vascular disease specialist), *with Harris*, 797 F. Supp. at 93 (stating plaintiffs' claim of supervisory negligence, in their administrative claim, provided the government with adequate notice of their claim that the school was independently negligent).

400. Plaintiff's Administrative Claim, Standard Form 95 at § 10, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75).

401. McCoy, 264 F.3d at 797 (McMillian J., dissenting).

402. Id. at 794-95.

403. See supra notes 360-73, 393-402 and accompanying text.

404. See supra notes 399-403 and accompanying text (establishing McCoy filed a valid administrative claim because he provided sufficient notice to put the government on notice that his claim concerned continuous negligent treatment). *See also McCoy*, 264 F.3d at 797 (McMillian, J., dissenting) (stating that even though only McCoy's complaint specifically alleged continuing negligence, the administrative claim provided the government with notice that McCoy's claim involved continuous treatment instead of a single incident).

405. See infra notes 407-15 and accompanying text.

406. 676 F.2d 295 (8th Cir. 1982).
in a grain program caused him emotional distress. The court determined the plaintiff's administrative claim for intentional infliction of emotional distress, although based primarily on events occurring in a single year, included references to wrongful actions committed prior to that year, and the court ruled the plaintiff could therefore sue for those allegedly tortious acts. The court reasoned that although the plaintiff primarily based his administrative claim on actions that arose in 1969 but did not detail incidents before 1969, the plaintiff had in fact asserted that the wrongful actions underlying his claim dated back until at least 1965, thereby providing "sufficient information to notify the Government of his claim and to give them a chance to settle." Thus, the court in Gross permitted the plaintiff to include claims in his FTCA suit which he did not detail in his administrative claim.

Similar to Gross, McCoy specifically referenced treatment received before and after the amputation in his administrative claim, although he did not provide details regarding treatment. In his administrative claim, McCoy alleged the physicians had failed to adequately diagnose and treat his peripheral vascular disease. The alleged failure to diagnose and treat McCoy's disease occurred both before and after the amputation of McCoy's leg. Like the administrative claim in Gross, McCoy's administrative claim sufficiently notified the government of his claim and provided the government with a chance to settle his claim. The Eighth Circuit erred in determining

---

407. Gross v. United States, 676 F.2d 295, 297 (8th Cir. 1982), appeal after remand, 723 F.2d 609 (8th Cir. 1983).
408. Gross, 676 F.2d at 299.
409. Id.
410. Id.
411. Compare Plaintiff's Administrative Claim, Standard Form 95, § 10, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (establishing McCoy alleged injuries stemmed from pre-amputation and post-amputation treatment), with Gross, 676 F.2d at 299 (establishing Gross primarily based his administrative claim on actions that started in 1969 and did not detail incidents before 1969, although he had noted that wrongful actions underlying his claims dated back until at least 1963).
412. Plaintiff's Administrative Claim, Standard Form 95, § 8 addendum, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75). The dissent states that although McCoy's administrative claim did not refer to Buerger's Disease by name, Buerger's Disease is a type of peripheral vascular disease, accounting for 5% of all peripheral vascular disease cases. McCoy, 264 F.3d at 797 (McMillian, J., dissenting) (citing Brief of Appellant at 3 n.4).
413. Plaintiff's Administrative Claim, Standard Form 95, § 10, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75).
414. Compare Gross, 676 F.2d at 299 (establishing the claimant in Gross, by referencing acts occurring as far back as 1965, had provided sufficient information to notify the government of the extent of Gross's claim), with McCoy, 264 F.3d at 797 (McMillian, J., dissenting) (stating that the administrative claim was clear enough to notify the government of McCoy's claim and that he based his claim on continuing treatment rather than an individual incident).
McCoy's administrative claim contended only negligence in the amputation of McCoy's leg because under Gross, McCoy provided sufficient information to notify the BOP that his claim included a claim of continuing negligent treatment.  

In McCoy, the Eighth Circuit determined McCoy had failed to claim continuous negligent treatment in his administrative claim and that this failure barred him from raising the issue of continuous negligent treatment in his subsequent FTCA suit. In reaching its decision, the court erroneously relied on Provancial and Walker. Provancial was distinguishable from McCoy because unlike McCoy, which involved a single claim and a single federal agency, Provancial involved two claims based on different torts and two different federal agencies. Although Walker should have been overruled in McCoy because it required more specificity than 28 C.F.R. § 14.2 mandated, Walker was distinguishable from McCoy because Walker did not provide as much information in her administrative claim as McCoy had provided in his administrative claim. Further, decisions in Dundon and Harris, which required administrative claims to contain only enough information to put the government on sufficient notice of the claim asserted, supported the argument that McCoy provided adequate information in his administrative claim to meet the requirements of federal regulation 28 C.F.R. § 14.2. Therefore, the Eighth Circuit incorrectly found that McCoy had failed to raise a claim of continuing negligent treatment in his administrative claim.

B. THE EIGHTH CIRCUIT ERRED IN DETERMINING THE ACCRUAL DATE OF McCOY'S CLAIM

Because McCoy's administrative claim sufficiently alleged continuous negligent treatment, the Eighth Circuit in McCoy also erred in setting January 23, 1997 as the accrual date for McCoy's claim. The FTCA, as stated in 28 U.S.C. § 2401, bars a tort claim against the

---

415. See McCoy, 264 F.3d at 795 (establishing the Eighth Circuit limited McCoy's claim to the amputation of his leg); Gross, 676 F.2d at 299 (establishing the claimant in Gross, by referencing acts occurring as far back as 1965, had provided sufficient information to notify the government of the extent of Gross's claim).
416. McCoy, 264 F.3d at 792, 795.
417. See supra notes 333-404 and accompanying text (establishing the Eighth Circuit improperly relied on Provancial and Walker); McCoy, 264 F.3d at 795 (citing Provancial, 454 F.2d at 74-75 and Walker, 176 F.3d at 438) (establishing the Eighth Circuit determined McCoy failed to claim continuous negligent treatment in his administrative claim).
418. See supra notes 341-48 and accompanying text.
419. See supra notes 352-80 and accompanying text.
420. See supra notes 381-404 and accompanying text.
421. See supra notes 326-420 and accompanying text.
422. See infra notes 423-57 and accompanying text.
United States unless the plaintiff either presented his claim to the appropriate federal agency within two years of the claim's accrual or brought his FTCA suit within six months after the government denied the administrative claim.\textsuperscript{423} The general rule is that a claim accrues at the time of injury; however, medical malpractice cases can be an exception to this rule.\textsuperscript{424} The Eighth Circuit in \textit{McCoy}, after deciding McCoy had not alleged continuing treatment in his administrative claim, relied on that general rule in deciding the district court did not err by determining that McCoy's claim accrued on January 23, 1997, the date prison physicians amputated McCoy's left leg.\textsuperscript{425} However, McCoy did not know of his physician's failure to diagnose his Buerger's Disease until April 1997, nearly four months later.\textsuperscript{426} Furthermore, the improper treatment McCoy received did not end until his release from prison in April 1999.\textsuperscript{427} Because McCoy's continuous treatment did not end until April 1999, his claim did not accrue until then.\textsuperscript{428} As such, the Eighth Circuit erred in determining McCoy's claim accrued on January 23, 1997, nearly three years before McCoy's continuing treatment ended.\textsuperscript{429}

In \textit{United States v. Kubrick},\textsuperscript{430} William Kubrick ("Kubrick") sued the government for medical malpractice under the FTCA, alleging doctors negligently treated him in April 1968 with a drug that caused him to lose his hearing.\textsuperscript{431} Six weeks after discharge from the hospital, Kubrick began to experience hearing problems.\textsuperscript{432} An ear specialist advised Kubrick in January 1969 that his hearing loss was probably caused by his doctors' use of neomycin.\textsuperscript{433} However, it was not until June 1971 that another physician confirmed neomycin had caused Kubrick's hearing loss.\textsuperscript{434} In ruling the statute of limitations barred Kubrick's claim, the Supreme Court reasoned that Kubrick's claim had accrued in January 1969, when Kubrick knew of his hearing loss and when a private doctor had informed him the drug possibly caused

\begin{footnotesize}
\textsuperscript{423} 28 U.S.C. § 2401(b) (1994).
\textsuperscript{424}  Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987) (citing United States v. Kubrick 444 U.S. 111, 118 (1979)).
\textsuperscript{425}  McCoy, 264 F.3d at 792-93, 795 (citing Wehrman, 830 F.2d at 1483).
\textsuperscript{426}  Id. at 793, 798 (McMillian, J., dissenting).
\textsuperscript{427}  Id.
\textsuperscript{428}  Id. at 798 (McMillian, J., dissenting) (stating McCoy's continuous treatment did not end until April 1999 when he was released from prison); McCoy, 264 F.3d at 795 (citing Wehrman, 830 F.2d at 1483) (establishing a claim accrues when continuing negligent treatment ends).
\textsuperscript{429}  See supra notes 423-28 and accompanying text.
\textsuperscript{430}  444 U.S. 111 (1979).
\textsuperscript{432}  Kubrick, 444 U.S. at 113-14.
\textsuperscript{433}  Id. at 114.
\textsuperscript{434}  Id.
\end{footnotesize}
the injury. In *Kubrick*, the fact that Kubrick did not know of the negligence until June 1971 did not postpone his claim's accrual. The rule derived from *Kubrick* was that a medical malpractice claim accrued when the plaintiff knew of both the existence and the cause of his injury, not at a later time when he became aware of his legal rights against the tortfeasor. After stating that McCoy had not plead continuing negligent treatment in his administrative claim, the Eighth Circuit in *McCoy* relied on the rule in *Kubrick* to determine the district court did not err in deciding that McCoy's claim accrued when doctors amputated his leg on January 23, 1999, because McCoy was aware of his injury at that time.

However, the Eighth Circuit erred in relying on the rule in *Kubrick* rule to determine that McCoy's claim had accrued on January 23, 1997 because when the negligent conduct of the tortfeasor is of a continuing nature, as McCoy had alleged, the rule in *Kubrick* does not apply. In *Wehrman v. United States*, the Eighth Circuit determined that the plaintiff's claim involved continuing tortious treatment, which prevented his cause of action from accruing until the tortious continuous treatment ended, even if he was aware of the underlying facts constituting negligence before the end of the treatment. In *Wehrman*, the court opined that the rule in *Kubrick* regarding the accrual date of a claim did not apply in cases involving continuous tortious treatment because there was no single incident identifiable as the cause of substantial harm. The court reasoned that the plaintiff justifiably regarded the cumulative effect of the government's conduct as actionable.

Comparable to the plaintiff in *Wehrman*, who alleged the Veterans Administration ("VA") failed to inform him of viable surgical treatments available to him, McCoy alleged the BOP physicians failed to inform him of the extent of his condition and failed to use treatments

435. See id. at 119-23 (establishing a court determines when a person's claim accrues when he knows of his injury and its cause); *Kubrick*, 444 U.S. at 114, 123 (establishing Kubrick knew of his injury and its cause in January 1969 and that Kubrick's claim was barred by the statute of limitations).
437. Id. at 118.
439. See infra notes 441-57 and accompanying text. See also *Gross*, 676 F.2d at 300 (stating that where the negligent conduct was continuous, the *Kubrick* rule did not apply).
440. 830 F.2d 1480 (8th Cir. 1987).
442. *Wehrman*, 830 F.2d at 1483, 1486.
443. Id. at 1483. The court vacated and remandéed the case for further proceedings. Id. at 1487.
which would have alleviated his symptoms. Additionally, the plaintiff in Wehrman alleged that the failure to advise him of alternative treatment was continuously negligent, regardless of the fact that many different physicians administered the treatment instead of a single physician. Likewise, McCoy received treatment which he alleged was continuously tortious although many doctors treated him for his injury. The Wehrman decision indicates that, because McCoy alleged continuous negligent treatment by a number of physicians working for the BOP, his claim would not have accrued until the end of the tortious treatment when he left prison in April 1999. Therefore, the McCoy court erred in finding McCoy's claim accrued on January 23, 1997.

The court in Wehrman also discussed alternative tests used by other courts in medical malpractice actions based on a failure to take action, as opposed to a negligent affirmative act to determine when a claim accrued. The Wehrman court stated the first test determined when a pre-existing medical condition could develop into a more serious condition. The Wehrman court then stated the second test ascertained when the facts of a case became grave enough "to alert a reasonable person that there may have been negligence related to the treatment received." However, in Wehrman, the Eighth Circuit declined to adopt either of these factors to limit the scope of the continuing treatment doctrine, finding it was not necessary to do so.

Because McCoy alleged continuing negligent treatment in his administrative claim, the Eighth Circuit incorrectly determined McCoy's claim accrued on January 23, 1997 by relying on the rules set forth in Kubrick. The Eighth Circuit in McCoy also erred because the rule established in Kubrick does not apply in cases where the plaintiff

444. Compare McCoy, 264 F.3d at 793-94, 797 (McMillian, J., dissenting) (establishing McCoy alleged negligence in failing to diagnose and treat his peripheral vascular disease and failing to advise him to quit smoking), with Wehrman, 830 F.2d at 1482 (establishing Wehrman alleged the VA failed to inform him of viable surgical treatments that were available to him).
445. Wehrman, 830 F.2d at 1485.
446. McCoy, 264 F.3d at 799 (McMillian, J., dissenting).
447. See supra notes 439-46 and accompanying text.
448. See supra notes 422-47 and accompanying text.
449. Wehrman, 830 F.2d at 1484.
450. Id. at 1480, 1484 (quoting Raddatz v. United States, 750 F.2d 791, 796 (9th Cir. 1984)).
451. Id. (quoting Sanders v. United States, 551 F.2d 458, 460 (D.C. Cir. 1977)).
452. Id. at 1480, 1484. The Eighth Circuit declined to adopt either factor limiting the continuing treatment doctrine finding it outside the scope of the appeal in Wehrman because the case was on appeal from summary judgment and the accrual of a claim is a question of fact. Wehrman, 830 F.2d at 1484.
453. See supra notes 431-48 and accompanying text.
based the claim on continuous tortious conduct. \(^{454}\) McCoy alleged continuous negligent treatment in his claim, which postponed the accrual of his claim until either his doctor informed him of the Buerger's Disease diagnosis in April 1997, or until the tortious treatment ended in April 1999. \(^{455}\) Regardless of which of these two dates McCoy's claim accrued on, McCoy filed his administrative claim on February 1, 1999, making his claim timely under the FTCA's two-year statute of limitations. \(^{456}\) Therefore, the McCoy court erred in finding that McCoy's claim accrued on January 23, 1997 and that the statute of limitations barred his claim. \(^{457}\)

C. THE EIGHTH CIRCUIT ERRED IN ANALYZING THE TOLLING OF THE STATUTE OF LIMITATIONS ON MCCOY'S CLAIM

Even if McCoy's claim accrued at the time of his amputation, the Eighth Circuit in McCoy misinterpreted the decisions in Reilly and Wehrman in determining the continuing treatment doctrine did not toll the statute of limitations on McCoy's claim because Wehrman addressed the accrual of a claim and Reilly only applied to claims of continuous non-negligent treatment. \(^{458}\) Generally, courts apply two versions of the continuous treatment doctrine. \(^{459}\) Under the first version of the continuing treatment doctrine, a plaintiff's cause of action accrues after the tortious continuing treatment ended, even when the plaintiff knew of the facts which comprised negligence before that time. \(^{460}\) Under the second version, subsequent continuing treatment, even if non-negligent, tolls the statute of limitations as long as the course of treatment was for the same illness or injury out of which the medical malpractice arose. \(^{461}\) The Eighth Circuit in McCoy adopted the first version of the doctrine in Wehrman and rejected the second version in Reilly. \(^{462}\) McCoy's claim qualified under the Wehrman version of the continuing treatment doctrine because he alleged his doctors had negligently treated him when they amputated his left leg,

\(^{454}\) See supra notes 439-43 and accompanying text.

\(^{455}\) See supra notes 444-48 and accompanying text.

\(^{456}\) See McCoy, 264 F.3d at 793 (establishing McCoy filed his administrative claim on February 1, 1999); supra note 455 and accompanying text (establishing that, because McCoy alleged continuous negligent treatment in his claim, the accrual of his claim was postponed until either his doctor informed him of the Buerger's Disease diagnosis in April 1997, or until the tortious treatment ended in April 1999).

\(^{457}\) See supra notes 422-56 and accompanying text.

\(^{458}\) See infra notes 459-500 and accompanying text.

\(^{459}\) McCoy, 264 F.3d at 795.

\(^{460}\) Id. at 792, 795.

\(^{461}\) Id. (citing Otto v. Nat'l Institute of Health, 815 F.2d 985, 988 (4th Cir. 1987)).

\(^{462}\) Id. at 795.
after they amputated his leg, and in treating his peripheral vascular
disease.\textsuperscript{463}

In \textit{McCoy}, the court misinterpreted the relevance of \textit{Wehrman} in its discussion of the continuing treatment doctrine because the court in \textit{Wehrman} discussed the accrual of a claim, not the tolling of the statute of limitations.\textsuperscript{464} In its discussion of \textit{Wehrman}, the court in \textit{McCoy} quoted \textit{Wehrman} as stating that "under the continuing treatment doctrine, a plaintiff's cause of action does not accrue until the tortious continuing treatment ends."\textsuperscript{465} The court in \textit{Wehrman} also stated that "where the tortious conduct is of a continuing nature, the rule in \textit{Kubrick} does not apply."\textsuperscript{466} \textit{Kubrick}, like \textit{Wehrman}, addressed the point at which a claim accrued, not the tolling of the statute of limitations.\textsuperscript{467} Therefore, the Eighth Circuit in \textit{McCoy} incorrectly discussed \textit{Wehrman} in the context of the tolling of the statute of limitations, which established when a claim is barred by the passage of time only after a claim's accrual date has been set.\textsuperscript{468}

Even if \textit{Wehrman} had concerned the tolling of the statute of limitations, the Eighth Circuit in \textit{McCoy} still incorrectly determined \textit{McCoy} did not file his claim in a timely manner.\textsuperscript{469} As maintained by the Eighth Circuit in \textit{McCoy}, under the rule in \textit{Kubrick}, \textit{McCoy}'s claim would have accrued on January 23, 1997 at the latest.\textsuperscript{470} Even if \textit{McCoy}'s claim had accrued on January 23, 1997, \textit{McCoy} still filed his claim timely.\textsuperscript{471} Because \textit{McCoy} had alleged continuous negligent treatment in his administrative claim, under the \textit{McCoy} court's interpretation of \textit{Wehrman}, the continuous negligent treatment would toll

\textsuperscript{463} See Plaintiff's Administrative Claim, Standard Form 95, § 10, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (establishing McCoy claimed negligence in treatment when doctors amputated his leg, afterwards and in treating his peripheral vascular disease); \textit{supra} notes 439-48 and accompanying text (establishing McCoy qualified under the \textit{Wehrman} rule).

\textsuperscript{464} See infra notes 465-68 and accompanying text.

\textsuperscript{465} McCoy, 264 F.3d at 795 (quoting \textit{Wehrman}, 830 F.2d at 1483) (internal quotation marks omitted).

\textsuperscript{466} \textit{Wehrman}, 830 F.2d at 1486 (citing \textit{Gross}, 676 F.2d at 300).

\textsuperscript{467} Compare \textit{Kubrick}, 444 U.S. at 123 (stating \textit{Kubrick}'s claim accrued in January 1969 as he was aware of his injury and its cause), \textit{with} \textit{Wehrman}, 830 F.2d at 1483 (stating that "under the continuing treatment doctrine, a plaintiff's cause of action does not accrue until the tortious continuing treatment ends").

\textsuperscript{468} See \textit{supra} notes 464-67 and accompanying text.

\textsuperscript{469} See \textit{infra} notes 470-74 and accompanying text.

\textsuperscript{470} McCoy, 264 F.3d at 794 (establishing a claim for medical malpractice accrues when a plaintiff is aware of his injury and its likely cause); McCoy, 264 F.3d at 793, 795 (establishing McCoy was aware of his injury and the cause at amputation on January 23, 1997).

\textsuperscript{471} See McCoy, 264 F.3d at 793, 795 (establishing McCoy’s claim accrued on January 23, 1997); McCoy, 264 F.3d at 799 (McMillian, J., dissenting) (establishing McCoy’s claim accrued on January 23, 1997); \textit{infra} notes 465-67 and accompanying text (establishing McCoy timely filed his claim).
the statute of limitation on McCoy's claim until his tortious treatment ended.\textsuperscript{472} The tortious treatment McCoy received did not end until his release from prison in April 1999, making the February 1999 filing of his administrative claim timely because McCoy filed the claim within the two-year statute of limitations period.\textsuperscript{473} Therefore, regardless of whether Wehrman applied to the accrual of a claim or the tolling of the statute of limitations, McCoy timely filed his claim within the two-year statutory period.\textsuperscript{474}

The Eighth Circuit in McCoy also misinterpreted Reilly by finding the continuing treatment doctrine did not toll the statute of limitations on McCoy's claim.\textsuperscript{475} In Reilly, a physician's use of a mechanical respirator in November 1968 injured Patricia Reilly's ("Reilly") trachea.\textsuperscript{476} As a result, Reilly experienced a series of respiratory problems and a loss of speech.\textsuperscript{477} The Reilly court ruled the district court did not err in determining Reilly's claim accrued by January 1969, when she became aware of her injury and its cause.\textsuperscript{478}

A close reading of Reilly reveals the court did in fact toll the statute of limitations on Reilly's claim until August 1969.\textsuperscript{479} The court in Reilly reasoned that Reilly's loss of speech between April and August of 1969 should have alerted her to the fact that her doctors may have negligently treated her.\textsuperscript{480} The court rejected Reilly's assertion that her continued treatment further tolled the statute of limitations, stating Reilly's continued treatment into the two-year period prior to the filing of her administrative claim did not change the court's decision.\textsuperscript{481} The court further determined Reilly misplaced reliance on the continuous treatment doctrine; the rule did not apply because she knew of the negligent acts.\textsuperscript{482} The statute of limitations barred

\footnotesize
\begin{itemize}
\item \textsuperscript{472} See McCoy, 264 F.3d at 795 (citing Wehrman, 830 F.2d at 1483) (stating that under continuing treatment doctrine, a claim accrues when the tortious treatment ends); McCoy, 264 F.3d at 797 (McMillian, J., dissenting) (establishing McCoy alleged continuing negligent treatment in his administrative claim).
\item \textsuperscript{473} See McCoy, 264 F.3d at 798 (McMillian, J., dissenting) (stating McCoy's tortious treatment did not end until his release from prison in April 1999 and McCoy filed his administrative claim in February 1999); 28 U.S.C. §2401(b) (1994) (establishing statute of limitations on a tort claim is two years).
\item \textsuperscript{474} See supra note 464-73 and accompanying text.
\item \textsuperscript{475} See infra notes 476-89 and accompanying text.
\item \textsuperscript{476} Reilly, 513 F.2d at 149.
\item \textsuperscript{477} Id.
\item \textsuperscript{478} Id. The hospital readmitted Reilly and doctors performed a lower tracheotomy at that time to aid her breathing. Id. The court also found it significant that Reilly herself testified that she was aware in January of 1969 that the use of the respirator had caused her throat problems. Id. at 149 n.1.
\item \textsuperscript{479} See infra notes 480-83 and accompanying text.
\item \textsuperscript{480} Reilly, 513 F.2d at 149-50.
\item \textsuperscript{481} Id. at 150.
\item \textsuperscript{482} Id.
Reilly's claim because the court only tolled her claim until August 1969 and Reilly did not file her administrative claim until December 1971.483

The court in McCoy utilized Reilly for the proposition that the continuing treatment doctrine did not toll the statute of limitations until treatment ended if the plaintiff was aware of the acts constituting negligence.484 However, the Eighth Circuit in McCoy misapplied Reilly because Reilly only applied to a claim involving continuous treatment that was non-tortious.485 The negligent act in Reilly consisted of a single tortious incident, the use of the mechanical respirator, which caused her to develop trachea stenosis.486 Reilly did not claim that the physicians who treated her after the injury negligently treated her.487 McCoy's claim, in contrast to the claim discussed in Reilly, alleged negligence in the diagnosis and the entire treatment of his peripheral vascular disease which resulted in the amputation of his left leg.488 Hence, the Eighth Circuit in McCoy misapplied Reilly in reaching its decision because McCoy's claim involved allegations of continuous tortious treatment, whereas Reilly only claimed a continuation of treatment, not continuous tortious treatment.489

The court in McCoy stated McCoy knew of his doctors' negligence when they amputated his leg and that the continuing treatment doctrine would therefore not aid him in avoiding the running of the statute of limitations, because he was aware of the negligent acts.490 However, the McCoy court made this decision after ruling that McCoy had not alleged continuous negligent treatment, as required by Wehrman, in his administrative claim.491 Focusing solely on the leg amputation, the court stated McCoy knew of his doctors' negligence when they amputated his leg and McCoy's continuing treatment did not postpone the expiration of his claim because he knew of the negligence.492 In actuality, McCoy had claimed continuous negligent treat-

483. Id. at 149-50.
484. McCoy, 264 F.3d at 795 (citing Reilly, 513 F.2d at 150).
485. See infra notes 486-89 and accompanying text.
486. Reilly, 513 F.2d at 149.
487. See id. at 147 (establishing Reilly failed to claim any tortious treatment occurred after the use of the mechanical respirator on November 18, 1968).
488. Compare Plaintiff's Administrative Claim, Standard Form 95, §§ 10, 8 addendum, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. T-NER-99-75) (establishing McCoy claimed his physicians were negligent in failing to appreciate the seriousness of his injury, to treat McCoy in a timely and adequate fashion, to treat McCoy's pre-existing peripheral vascular disease, to order necessary tests, and to refer McCoy to a vascular disease specialist), with Reilly, 513 F.2d at 147 (establishing McCoy claimed only the use of the mechanical respirator was negligent).
489. See supra notes 484-88 and accompanying text.
490. McCoy, 264 F.3d at 795-96.
491. Id. at 795.
492. Id. at 795-96.
ment and did not know of the acts constituting negligence (the failure to diagnose and treat his peripheral vascular disease) until his doctors informed him he suffered from Buerger's Disease in April 1997.\textsuperscript{493} Even assuming the continuous treatment did not extend past this date because McCoy knew of the acts which constituted negligence, he was still well within the two-year statutory period by filing his administrative claim on February 1, 1999.\textsuperscript{494}

The Eighth Circuit in \textit{McCoy} misinterpreted \textit{Reilly} and \textit{Wehrman} in determining the continuing treatment doctrine did not toll the statute of limitations on McCoy's claim.\textsuperscript{495} The court's reliance was flawed because \textit{Wehrman} concerned the accrual of a claim, not the tolling of the statute of limitations.\textsuperscript{496} Even if \textit{Wehrman} had concerned the statute of limitations and McCoy's claim accrued on January 23, 1997, the continuous tortious treatment McCoy received tolled the statute of limitations until his treatment ended in April 1999.\textsuperscript{497} Additionally, the Eighth Circuit should not have applied the standard set forth in \textit{Reilly} because \textit{Reilly} only applied to claims of continuous non-negligent treatment.\textsuperscript{498} Because McCoy alleged continuous negligent treatment in his administrative and FTCA claim, \textit{Reilly} was inapplicable.\textsuperscript{499} Thus, the Eighth Circuit incorrectly interpreted the relevance of \textit{Wehrman} and \textit{Reilly} in its discussion of the tolling of the statute of limitations on McCoy's claim.\textsuperscript{500}

CONCLUSION

In \textit{McCoy v. United States},\textsuperscript{501} the United States Court of Appeals for the Eighth Circuit declared that the Federal Tort Claims Act's ("FTCA") two-year statute of limitations period barred Steven McCoy's ("McCoy") medical malpractice claim.\textsuperscript{502} In doing so, the court upheld the district court's decision that McCoy had failed to raise a claim for continuing negligent treatment in his administrative claim, which barred McCoy from claiming continuing negligent treatment in

\begin{itemize}
  \item \textsuperscript{493} Appellant's Brief at 3-4, McCoy v. United States, 264 F.3d 792 (8th Cir. 2001) (No. 00-1375WMS).
  \item \textsuperscript{494} \textit{See id.} (establishing McCoy was informed he suffered from Buerger's Disease in April 1997); McCoy, 264 F.3d at 793 (establishing McCoy filed his administrative claim with the BOP on February 1, 1999); 28 U.S.C. § 2401(b) (1994) (establishing a two-year statute of limitations on tort claims).
  \item \textsuperscript{495} \textit{See supra} notes 458-94 and accompanying text.
  \item \textsuperscript{496} \textit{See supra} notes 464-68 and accompanying text.
  \item \textsuperscript{497} \textit{See supra} notes 469-74 and accompanying text.
  \item \textsuperscript{498} \textit{See supra} notes 475-89 and accompanying text.
  \item \textsuperscript{499} \textit{See supra} notes 490-94 and accompanying text.
  \item \textsuperscript{500} \textit{See supra} notes 458-99 and accompanying text.
  \item \textsuperscript{501} McCoy v. United States, 264 F.3d 792, 794, 796 (8th Cir. 2001), cert. denied, 122 S.Ct. 1909 (Mem) (2002).
\end{itemize}
Because the McCoy court determined there was no claim of continuing negligent treatment, the court considered only McCoy's claim for the amputation of his leg, which occurred on January 23, 1997. The court relied on Reilly v. United States, reasoning that because McCoy knew of his physicians' negligent acts, he could not toll the statute of limitations until the end of his treatment. As McCoy did not file his administrative claim until February 1999, the two-year statute of limitations barred his claim.

In McCoy, the Eighth Circuit incorrectly held McCoy had failed to allege continuing negligent treatment in his administrative claim. Furthermore, the Eighth Circuit, as exemplified in McCoy, required far more information for a valid administrative claim than the applicable statutes and related federal regulations mandate. In addition, the Eighth Circuit improperly found McCoy's claim accrued on the date physicians amputated his leg because he received continuing negligent treatment, which postponed the accrual of his cause of action until the treatment ended. Finally, the Eighth Circuit improperly relied on Reilly to determine the continuing treatment doctrine did not apply, reasoning that McCoy was aware of the negligent acts at the time doctors amputated his leg. The Eighth Circuit misapplied Reilly to McCoy because Reilly concerned non-tortious continuous treatment whereas McCoy concerned continuous negligent treatment.

McCoy exhibits the serious disparities existing between federal circuit courts in two specific regards. First, disparities exist between the circuit courts as to the requirements of an administrative claim as a valid prerequisite to an FTCA suit. Second, inconsistencies exist among the circuits as to whether the continuing treatment doctrine can either postpone the accrual of a claim or toll the statute of limitations on a claim. These two areas are ripe for reform because the disparities permit a claimant in one circuit to proceed with a claim, while another circuit would bar the same claim as untimely. Such results contradict the desire to achieve consistency in the law. As the

503. McCoy, 264 F.3d at 794-95.
504. Id. at 793, 795.
505. 513 F.2d 147 (8th Cir. 1975).
506. McCoy, 264 F.3d at 795 (citing Reilly v. United States, 513 F.2d 147, 150 (8th Cir. 1975).
507. Id. at 793, 796.
508. See supra notes 326-54 and accompanying text.
509. See supra notes 355-421 and accompanying text.
510. See supra notes 422-57 and accompanying text.
511. See supra notes 458-500 and accompanying text.
512. See supra notes 484-94 and accompanying text.
513. See supra notes 227-310 and accompanying text.
514. See supra notes 125-226 and accompanying text.
FTCA acts as a waiver of the United States' sovereign immunity, Congress has already addressed the amount of specificity required for a plaintiff to bring a valid claim under the FTCA, and federal courts are not free to broaden or narrow Congress's decree. In addition, the Supreme Court must step in and pronounce that claimants in medical malpractice suits may only utilize the continuing treatment doctrine where the treatment alleged has been continuously tortious. Doing so will achieve uniformity in the law among the federal courts, allow blameless claimants to postpone the accrual of their claims until treatment has ended, and prevent those who receive continuous non-negligent treatment from taking advantage of treatment to delay the presentation of their claim.

_Shawn P. Dontigney — '04_