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**OPINION OF THE FIFTH CIRCUIT
(JULY 11, 2019)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SANDRA G. HALE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF VETERANS AFFAIRS;
STEPHEN SEDER, Doctor; RAJANI POTU, Doctor;
BAYLOR UNIVERSITY SYSTEM; MICHAEL
DEBAKEY MEDICAL CENTER (VA HOSPITAL),

Defendants-Appellees.

No. 19-20164

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-1189

Before: JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM*

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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Sandra Hale, a disabled veteran, sued Dr. Stephen Seder, a dentist at DeBakey VA Medical Center, and Dr. Rajani Potu, a physician there, from injuries that resulted when her dentures were improperly disinfected. She also brought claims against the government for negligent hiring and improper training. Because Seder and Potu are federal employees and she brought a tort claim, she could not sue them individually. 28 U.S.C. § 2679(b)(1). But she could sue the federal government for their alleged actions under the Federal Tort Claims Act. *Id.* The district court later granted summary judgment to the government, and we review that decision *de novo*. *Coleman v. United States*, 912 F.3d 824, 828 (5th Cir. 2019).

The FTCA allows private citizens to sue the federal government when federal employees commit torts for which a private person would be liable under state law. *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008). Though Hale strains against this in her briefs, her complaint alleges a health care liability claim. Even her claims for negligent hiring are considered health care liability claims in Texas. *See Garland Cnty. Hosp. v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004). When someone claims they are harmed by a medical professional attempting to treat them but whose care falls below the accepted standards of medical care, that claim is for health care liability. Tex. Civ. Prac. & Rem. § 74.001(a)(13); *see also Loaisiga v. Cerdá*, 379 S.W.3d 248, 256 (Tex. 2012) (describing the expansive application of Texas's Medical Liability Act).

In Texas, expert testimony is generally required to establish the standard of care, to determine whether the medical professional breached it, and to determine

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whether that breach caused the alleged injuries. *Ellis v. United States*, 673 F.3d 367, 373 (5th Cir. 2012) (quoting *Jelinek v. Casas*, 328 S.W.3d 526, 538 (Tex. 2010)). Of course, not every case requires it: if a surgeon operates on the wrong knee or leaves a sponge inside, no expert testimony is required. *Haddock v. Arnsperger*, 793 S.W.2d 948, 951 (Tex. 1990). But this case required an expert. Though Dr. Seder was fined \$600 by the Texas Department of Agriculture for using the wrong chemical to disinfect her dentures, an expert was required at minimum to establish that the denture cleaning caused any injuries.

Hale designated an expert toxicologist to testify. But by law the expert must be a doctor or, for dental treatment, a dentist. Tex. Civ. Prac. & Rem. Code §§ 74.401(a), 74.403(a). Because her expert cannot demonstrate that any breach of a duty of care caused her injuries, summary judgment was appropriate.

AFFIRMED.

**ORDER OF THE DISTRICT COURT
(MARCH 13, 2019)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDRA G. HALE,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Civil Action No. 4:16-CV-1189

Before: Alfred H. BENNETT,
United States District Judge.

Before the Court are Defendant United States' Motion for Summary Judgment (the "Motion") (Doc. # 150), Plaintiff's Response and Cross-Motion (Doc. # 151 and # 154), Defendant's Reply (Doc. # 152), Defendant's Response to Plaintiff's Cross-Motion (Doc. # 153 and # 155), and Plaintiff's Motion for Ruling on All Dispositive Motions (Doc. # 163). Having reviewed the parties' arguments and applicable legal authority, the Court grants the Motion.

I. Background

This dispute arises from a visit to a dentist at the Michael DeBakey VA Medical Center in Houston, Texas. Doc. # 14 at 1. On May 6, 2014, Plaintiff alleges that she suffered oral injuries resulting from upper and lower partials, *i.e.*, false teeth, improperly disinfected and placed in her mouth by Dr. Stephen J. Seder, a dentist. *Id.* at 1-4. Additionally, Plaintiff alleges that her primary doctor, Dr. Rajani Potu, failed to conduct appropriate testing and treatment concerning her oral injuries during a May 9, 2014 visit. *Id.* at 4-5. As a result, Plaintiff sued Dr. Seder, Dr. Potu, and the United States (among others) for negligence. *Id.* Now, the United States moves for summary judgment, arguing that Plaintiff's expert is unqualified to present evidence on multiple elements of her negligence claims.¹

II. Legal Standard

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. "A genuine dispute as to a material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. [Courts must construe] all facts and inferences in the light most favorable to the nonmoving party. But, summary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *Rogers v. Bromac Title Services, L.L.C.*, 755

¹ As outlined in the Court's October 28, 2016 Order, Plaintiff's claims proceed against only the United States pursuant to the Federal Torts Claim Act. Doc. # 53 at 6-7.

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F.3d 347, 350 (5th Cir. 2014) (internal citations omitted).

a. Federal Tort Claims Act (“FTCA”)

“The United States shall be liable . . . [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances.” FTCA, 28 U.S.C. § 2674 (West Supp. 2019). When a plaintiff asserts a negligence claim against the United States, state law applies if “the negligence alleged is in the nature of medical malpractice.” *Quijano v. United States*, 325 F.3d 564, 567 (5th Cir. 2003); *see also Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008) (“State law controls liability for medical malpractice under the FTCA.”). Additionally, courts are to apply “state-law requirements on expert witnesses in medical malpractice cases.” *Muniz v. United States*, CIV.A. No. H-12-1813, 2015 WL 1058097, at *13 (S.D. Tex. Mar. 9, 2015) (citing *Pesantes v. United States*, 621 F.2d 175, 179 (5th Cir. 1980)). Accordingly, an analysis of Texas law is appropriate because Plaintiff alleges that she suffered her injuries in Texas. *See* Doc. # 14 at 1.

b. Texas Medical Liability Act (“TMLA”)

Under Texas statutory law, an allegation of medical malpractice is properly asserted as a “health care liability claim.” *See* TMLA, Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (West Supp. 2019) (“Health care liability claim’ means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related

to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract."). Specifically, the elements of a health care liability claim based on negligence are (1) the existence of a legal duty to act according to an applicable standard of care, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017).

Furthermore, the TMLA has an expert report requirement that "deter[s] frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that [her] claim has merit." *Id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.401(a) ("In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician") and 74.403(b) ("In a suit involving a health care liability claim against a dentist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a dentist or physician").

As a threshold issue, under the FTCA, "[t]he plaintiff must establish the standard of care . . . before the factfinder may consider whether the defendant breached that standard of care to the extent it constituted negligence." *Hannah*, 523 F.3d at 601.

III. Analysis

As explained above, to proceed with her negligence claim against the United States based on Dr. Seder's conduct, Plaintiff must establish the standard of care that she alleges Dr. Seder breached as a dentist while acting within the scope of his federal employment. *Hannah*, 523 F.3d at 601. Similarly, to proceed with her negligence claim against the United States based on Dr. Potu's conduct, Plaintiff must establish the standard of care that she alleges Dr. Potu breached as a primary care physician while acting within the scope of her federal employment. *Id.* Additionally, under Texas law, Plaintiff must establish those standards of care with a qualified expert. *See Tex. Civ. Prac. & Rem. Code Ann. §§ 74.401(a), 74.403(b).*

Here, the deadline for Plaintiff to designate her experts was April 30, 2018. Doc. # 136 at 1. Plaintiff designated Dr. Thomas Dydek as her only expert witness. *See Doc. # 140 and # 141.* Dr. Dydek has degrees in mechanical engineering, environmental science, and toxicology. *See Doc. # 140, Ex. 1 at 1.* He is not a licensed physician or dentist.² Therefore, under the FTCA and the TMLA, Dr. Dydek does not qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care for physicians or dentists and the alleged injury suffered by Plaintiff. *See Tex. Civ. Prac. & Rem. Code Ann. §§ 74.401(a), 74.403(b).*

Accordingly, because Plaintiff has failed to present necessary expert evidence in support of her negligence

² Furthermore, Dr. Dydek's conclusions and opinions in his expert report do not seem to be based on any examination of Plaintiff or the partials giving rise to this dispute. *See Doc. # 141 at 7.*

claims against the United States based on the conduct of Dr. Seder and Dr. Potu, the Court grants the Motion.

IV. Conclusion

For the foregoing reasons, the Motion is hereby GRANTED, and all of Plaintiff's remaining claims are DISMISSED.³

It is so ORDERED.

/s/ The Honorable Alfred H. Bennett
United States District Judge

March 12, 2019
Date

³ The United States' Motion to Suspend Scheduling Order (Doc. # 169) and Motion for Expedited Hearing (Doc. # 171) are hereby DENIED as moot.

**ORDER OF THE FIFTH CIRCUIT DENYING
PETITION FOR REHEARING
(AUGUST 9, 2019)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SANDRA G. HALE,

Plaintiff-Appellant,

v.

**UNITED STATES OF AMERICA; DEPARTMENT
OF VETERANS AFFAIRS; STEPHEN SEDER,
Doctor; RAJANI POTU, Doctor; BAYLOR
UNIVERSITY SYSTEM; MICHAEL DEBAKEY
MEDICAL CENTER (VA HOSPITAL),**

Defendants-Appellees.

No. 19-20164

**Appeal from the United States District Court
for the Southern District of Texas**

Before: JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM

**IT IS ORDERED that the petition for rehearing
is DENIED.**

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ENTERED FOR THE COURT:

/s/Gregg J. Costa

United States Circuit Judge