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**OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(JUNE 28, 2019)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SANDRA G. HALE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
MICHAEL DEBAKEY MEDICAL CENTER
(VA HOSPITAL); CHRISTOPHER R. SANDLES;
ROBERT MCDONALD; PAUL WENZSLAWSH, PA;
DOCTOR JOHN MA, M.D.,

Defendants-Appellees.

No. 18-20071

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-226

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Sandra Hale—a disabled veteran—sued Dr. John Ma, a doctor at DeBakey VA Medical Center, and Paul Wenzlawsh, a physician assistant there, for misdiagnosing and mistreating her shoulder injury. Because they are federal employees and she brought a tort claim, she could not sue them individually, but she could sue the federal government under the Federal Tort Claims Act. 28 U.S.C. § 2679(b)(1). 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. When someone claims they are harmed by a medical professional 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. Cerda*, 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 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. Arnspiger*, 793 S.W.2d 948, 951

(Tex. 1990). But Hale does not present such an obvious case; she needed an expert.

The only one she tried to provide is herself. According to her designation, Hale served as a nurse for over 35 years. But the expert must be a doctor. Tex. Civ. Prac. & Rem. Code §§ 74.401(a), 74.403(a). Texas law does not consider a nurse sufficiently qualified to establish causation in a medical negligence case. *Id.* at § 74.403(a). Hale thus could not serve as her own expert and, failing to produce another, summary judgment was appropriate.

Hale also argues that the government was dilatory in filing its answer to her amended complaint, requiring a default judgment. The district court was well within its discretion in accepting the answer. *See* Fed. R. Civ. P. 15(a)(3) (establishing 14-day response period to amended pleadings "unless the court orders otherwise")

AFFIRMED.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION (AUGUST 18, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDRA G. HALE,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Civil Action No. 4:17-0226

Before: Nancy F. ATLAS,
Senior United States District Judge.

Plaintiff Sandra Hale, who proceeds *pro se*, alleges that she was injured when receiving medical treatment at the Michael DeBakey Veterans' Administration Medical Center ("MEDVAC"). The United States filed a Motion to Dismiss or for Summary Judgment [Doc. # 25] ("Defendants' Motion"), to which Plaintiff filed a Response [Doc. # 31], Defendants

filed a Reply [Doc. # 26], and Plaintiff filed a Supplemental Opposition [Doc. # 36]. In addition, Plaintiff filed a Motion for Partial Summary Judgment on the Pleadings or Partial Summary Judgment [Doc. # 32] ("Plaintiff's Motion"), to which Defendants filed a Response [Doc. # 35]. The parties' cross-motions are ripe for decision. Having considered the filings, the applicable legal authorities, and all matters of record, the Court concludes that the United States' Motion should be granted and that Plaintiff's Motion should be denied. In addition, Plaintiff's Motion for Extension of Time [Doc. # 38], filed on August 9, 2017, will be denied without prejudice.

I. BACKGROUND

Plaintiff is a sixty-one year old disabled veteran who brings suit against the United States of America; MEDVAC; Christopher Sandles, Director of MEDVAC; Robert McDonald, Secretary of the Veterans' Administration ("VA"); Paul Wenzslawsh, P.A., a federal employee; and John Ma, M.D., a federal employee. She also complains of Edward Boulay, an x-ray technician at MEDVAC, and an unnamed female "Instructor" of Mr. Boulay.[1]

Plaintiff alleges she was injured on March 18, 2014, when receiving routine CT scans and x-rays at

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[1] *See* First Amendment to Original Complaint [Doc. # 37] ("Amended Complaint"). Plaintiff timely filed her Amended Complaint on June 29, 2017, after the currently pending motions were briefed and before the July 6, 2017, deadline for amended pleadings. *See* Docket Control Order [Doc. # 34]. The Court also will refer to Plaintiff's original pleadings [Doc. # 1] ("Original Complaint") as appropriate.

MEDVAC.[2] She alleges that the x-ray technician, Mr. Boulay, "walked up to [Plaintiff] and, without warning and without giving her a chance to refuse, put heavy sandbags into both hands at the same time." *Id.* She further alleges that the sandbags caused immediate, sharp pain:

> The sandbags caused Ms. Hale's arms, shoulders, neck and spine to jerk violently towards the floor, producing immediate sharp pain in both shoulders and arms, neck and spine; with more pain in her weaker left shoulder and arm than her stronger right shoulder and arm. As of the date of this injury, Ms. Hale had no prior injuries to her shoulders, arms, neck or spine. Ms. Hale screamed in agony and begged Edward Boulay to remove the heavy sandbags because they had caused sharp pain, but he was dismissive of Ms. Hale's complaints and did not immediately respond to remove the sandbags; instead he remained behind the shielding in the x-ray room and

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[2] Amended Complaint, at 1, ¶ 1 (complaining of injury "on or about March 18, 2014"). In her Original Complaint, Plaintiff alleged that she was injured during a CT scan and x-ray performed on August 9, 2014, rather than March 18, 2014. With Defendants' Motion, the Government presented affidavits and records demonstrating that Plaintiff received only a CT scan, and no x-ray, at MEDVAC on August 9, but that she received both a CT scan and an x-ray on March 18. Plaintiff now agrees that the events in question occurred on March 18. *See* Amended Complaint, at 1, ¶ 1. *See also* Plaintiff's Motion, at 1 (stating that documentation in the record has "objectively verif[ied]" that MEDVAC employees used sandbags for Plaintiff's shoulder x-rays on March 18, 2014).

> had a brief discussion with the unknown female VA employee. Ms. Hale could hear him explain to the female VA employee that the purpose of the sandbags was to "level out" Ms. Hale's shoulders for the x-ray and that she needed to continue to hold them. The female VA employee then explained that it was not critical to the x-ray and that it was authorized to remove the sandbags since Ms. Hale was elderly and could not sustain the heavy weight and was obviously in pain.

Id. at 2, ¶ 2.[3] Ms. Hale reports that, in the subsequent months, she had "sharp" and "radiating" pain, a limited range of motion in her left shoulder and arm, and a "tilted" shoulder frame "with her left shoulder appearing to be noticeably higher than her right shoulder." *Id.* at 2, ¶ 3. She alleges that this tilted frame "could be easily seen in a mirror and should have been obvious to anyone observing for symmetry." *Id.*

On September 15, 2014, Dr. Ma, a federal employee named as a Defendant in this action, examined Plaintiff. Plaintiff states that she had extreme pain and limited mobility in her shoulder, and sought follow-up care because, as a former nurse, she suspected an injury of her soft tissue, tendon, or muscle. *Id.* at 3, ¶¶ 4-5. She alleges that, without first doing any imaging, Dr. Ma told Plaintiff to relax and

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[3] Mr. Boulay states in a declaration that he does not specifically recall Plaintiff on that date but that his regular practice was to place sandbags in patients' hands during x-rays. Declaration of Edward Boulay (Exhibit B to Defendant's Motion), at 1, ¶ 6.

then "suddenly jerked Ms. Hale's arm above her head," causing "sharp pain and tearing in her shoulders." *Id.* ¶ 5 (citing Exhibit F to Amended Complaint).[4] Plaintiff states that she was in so much pain that she "could not scream" and "was paralyzed." *Id.*

Plaintiff alleges that ultrasound records from February 2015 show "three full thickness tears in her left rotator cuff." *Id.* at 4, ¶ 8. She claims that, at a follow-up visit on March 4, 2015, Paul Wenzlawsh P.A., a federal employee named as a Defendant in this action, negligently relied on "outdated images from September 2014" rather than the February 2015 ultrasound results, and "wrongly diagnosed" Plaintiff with a muscle spasm rather than a torn rotator cuff. *Id.* at 5-6, ¶¶ 10-12 (citing Exhibit B to Amended Complaint).[5]

Plaintiff subsequently sought care outside MED-VAC. She states that in May 2015, Eileen Wu, M.D., diagnosed her with a "frozen shoulder" and recommended surgery by a shoulder specialist. *Id.* at 6, ¶ 14; *see id.* at Exhibit C (email purportedly from Dr. Wu's office dated May 8, 2015, informing Plaintiff that she had "a large full-thickness tear of [her] rotator cuff as well as a frozen shoulder").

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[4] Exhibit F to the Amended Complaint appears to be a partial record of Plaintiff's appointment with Dr. Ma on September 15, 2014. The document states that Plaintiff complained of "sharp, shooting shoulder pain" for the past month, that she rated her pain as "10/10," and that the pain began with shoulder x-rays in August 2014. The document does not reflect any assessment or impression from Dr. Ma or other medical professionals regarding Plaintiff's shoulder pain.

[5] Exhibit B appears to be partial records from Plaintiff's March 4, 2015 appointment.

Plaintiff alleges that her medical condition was caused by MEDVAC personnel, and worsened because of MEDVAC's inadequate medical diagnosis and treatment. She brings claims for negligence and gross negligence. She alleges that the Defendants' tortious conduct "caused [her] torn rotator cuffs, muscle injuries, spinal deformity, muscle weakness, nerve damage, calcified tendons and calcified muscles, frozen shoulder and other associated injuries," in addition to pain, suffering, and emotional distress. *Id.* at 13, ¶ 22 (j).

Plaintiff filed her administrative tort claim with the VA on July 6, 2016. *See* Defendants' Motion, at Exhibit C. The VA denied the claim on January 11, 2017. *See id.* at Exhibit D. She filed this federal suit on January 19, 2017, and seeks damages of $500,000 against each Defendant.

II. LEGAL STANDARDS

Both parties have filed dispositive motions. Defendants seek partial dismissal of Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, partial summary judgment. Plaintiff seeks summary judgment and also invokes Rule 12(c).

A. Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). The Supreme Court has explained that in considering a motion to dismiss under Rule 12(b)(6), a complaint must be liberally construed in favor of the plaintiff and all well-pleaded

facts taken as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

B. Judgment on the Pleadings

Rule 12(c) provides, "After the pleadings are closed —but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). The standard for judgment on the pleadings under Rule 12(c) "is the same as that for dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). The Court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Id.* The motion "should not be granted unless the plaintiff would not be entitled to relief under any set of facts that he could prove consistent with the complaint." *Id.*

C. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Little v. Liquid*

Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*); *see also Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex*, 477 U.S. at 322-23; *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008).

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The moving party, however, need not negate the elements of the non-movant's case. *See Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden by pointing out "'the absence of evidence supporting the nonmoving party's case.'" *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992)).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal citation omitted). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (internal citations omitted). In deciding whether a genuine and material fact issue has been created, the court reviews the facts and inferences to be drawn from them in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The non-movant's burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *See Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 545 n.13 (5th Cir. 2002), *overruled in part on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009). Likewise, "conclusory allegations" or "unsubstantiated assertions" do not meet the non-movant's burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (citation and internal quotation marks omitted). In the absence of any proof, the court will not assume that the non-movant could or would prove the necessary facts. *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

The Court may make no credibility determinations or weigh any evidence. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010) (citing *Reaves Brokerage Co.*, 336 F.3d at 412-413). The Court is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence. *Id.* (citing *Reaves Brokerage*, 336 F.3d at 413).

Affidavits cannot preclude summary judgment unless they contain competent and otherwise admissible evidence. *See* FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated"); *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 776 (5th Cir. 2000); *Hunter-Reed v. City of Houston*, 244 F. Supp. 2d 733, 745 (S.D. Tex. 2003). A party's self-serving and unsupported statement in an affidavit will not defeat summary judgment where the evidence in the record is to the contrary. *See In re Hinsely*, 201 F.3d 638, 643 (5th Cir. 2000).

Finally, although the Court may consider all materials in the record when deciding a summary judgment motion, "the court need consider only the cited materials." FED. R. CIV. P. 56(c)(3). "When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court. Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Malacara*

v. Garber, 353 F.3d 393, 405 (5th Cir. 2003) (internal citations and quotation marks omitted).

III. ANALYSIS

Defendants' Motion seeks to (1) dismiss all Defendants other than the United States, because the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), is Plaintiff's exclusive remedy; and (2) dismiss Plaintiff's claims regarding events before July 6, 2014, as time-barred. Plaintiff seeks judgment in her favor on the merits of her claims.

A. FTCA Defendants

The FTCA provides a limited waiver of sovereign immunity to allow tort claims against the federal government. *Pleasant v. United States ex rel. Overton Brooks Veterans Admin. Hosp.*, 764 F.3d 445, 448 (5th Cir. 2014); *Creel v. United States*, 598 F.3d 210, 213 (5th Cir. 2010). Under the FTCA, a person may present a claim to a federal agency for certain negligent or wrongful acts of federal employees:

> The head of each Federal agency . . . may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . .

28 U.S.C. § 2672. After exhaustion of the claim before the appropriate federal agency, a claimant may institute a civil action against the United States. 28 U.S.C. § 2675(a). *See* 28 U.S.C. § 1346(a) (district courts have original jurisdiction over civil actions against the United States).

The remedy provided by the FTCA is exclusive of all other remedies. In other words, the FTCA permits suits against the Government for torts committed by its employees, but precludes any suit against the individual employee.

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1) (emphasis added). *See In re FEMA Trailer Formaldehyde Prod. Liab. Litig. (Mississippi Plaintiffs)*, 668 F.3d 281, 287 (5th Cir. 2012).

In this case, Plaintiff alleges that all Defendants are federal employees, and the Government agrees. *See* Amended Complaint, at 8-13, ¶¶ 19-24; Certification of Scope of Employment (Exhibit 1 to Defendants' Reply [Doc. # 26]). The FTCA therefore requires Plaintiff to bring her FTCA claims against the United States only. *See* 28 U.S.C. § 2679(b)(1); *King v. U.S. Dep't of Veterans Affairs*, 728 F.3d 410, 413 n. 2 (5th Cir. 2013) (affirming dismissal of FTCA claims against individual defendants for lack of subject matter jurisdiction).

All Defendants other than the United States will be dismissed from this action. Plaintiff may continue to allege, as otherwise permitted, that the acts or omissions of federal employees caused her injury. However, she may only seek legal remedy from the United States.

B. FTCA Statute of Limitations

The Government seeks dismissal under the statute of limitations of Plaintiff's claims accruing before July 6, 2014. As stated above, the parties now agree that the sandbag incident, which Plaintiff identifies as the inception of her injury, occurred on March 18, 2014.

Tort claims against the United States are "forever barred" unless presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). Thereafter, if a person wants to challenge an agency's denial of a tort claim, he or she must file a civil action "within six months" after the agency mails its final denial. *Id.* Taken together, Section 2401(b)'s provisions permit *two years* from injury to administrative claim and then

six months from administrative denial to federal suit. *See Trinity Marine Products, Inc. v. United States*, 812 F.3d 481, 487-88 (5th Cir. 2016); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185, 189 (5th Cir. 2011), *abrogated on other grounds by United States v. Wong*, 135 S. Ct. 1625, 1638 (2015).

In this case, Plaintiff filed her administrative claim with the VA on July 6, 2016. Defendants' Motion, at Exhibit C. Under Section 2401(b), any claims that accrued before July 6, 2014, are "forever barred."

The Court next must determine when Plaintiff's claims accrued. In general, a cause of action under the FTCA accrues "when a plaintiff knows both her injury and its cause." *Trinity*, 812 F.3d at 487-88 (internal quotation marks and citation omitted). "An FTCA claimant's awareness of an injury involves two elements: '(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions.'" *Huerta v. United States*, 384 F. App'x 326, 328 (5th Cir. 2010) (quoting *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995)).

Plaintiff's pleadings clearly allege that she immediately knew, during the March 18, 2014, x-ray, that she was injured and that her injury was caused by the sandbags. Her Amended Complaint states that, when the x-ray technician placed sandbags in her hands, the sandbags caused "immediate sharp pain in both shoulders and arms, neck and spine" and that she "screamed in agony" from the pain. Amended Complaint, at 2. ¶ 2. By her own pleadings, Plaintiff's claim thus accrued on March 18, 2014. Because her administrative complaint was not filed within two years of accrual, any FTCA claim regarding

injuries suffered on March 18, 2014 is time-barred. *See Trinity*, 812 F.3d at 487-88.

Plaintiff invokes two doctrines that allow for an extension of limitations periods in certain cases. First, she argues for application of the continuing tort doctrine, arguing that Defendants' "repetitive wrongful acts" toll the limitations period. *See* Plaintiff's Motion, at 5 (claim "does not accrue until the tortious conduct ceases"). The Fifth Circuit has not decided squarely whether the continuing doctrine applies to FTCA claims. *FEMA Trailer*, 646 F.3d at 191. Nevertheless, even if the doctrine were applicable, it would not provide a basis for expansion of the limitations period because "claim accrual under the FTCA is based on awareness of the injury, not when the alleged wrongful conduct ends." *Id.* As stated above, Plaintiff was aware of her injury on March 18, 2014. Therefore, even assuming Plaintiff could prove that the Government has engaged in wrongful conduct since her injury, the continuing tort doctrine does not change the accrual date for her claims arising from the March 18, 2014, x-ray.

Second, Plaintiff argues that the limitations period should be equitably tolled. *See Wong*, 135 S. Ct. at 1633 (FTCA's limitations period is non-jurisdictional and thus subject to equitable tolling). Equitable tolling is a narrow remedy to be "sparingly applied," *Granger v. Aaron's, Inc.*, 636 F.3d 708, 712 (5th Cir. 2011), and the party asserting equitable tolling has the burden to justify its application. *Trinity*, 812 F.3d at 489. The Fifth Circuit "has recognized several grounds for equitable tolling, including where a plaintiff is unaware of the facts giving rise to the claim because of the defendant's intentional concealment of

them." *Id.* (internal citation and quotation marks omitted).

In this case, the facts as alleged by Plaintiff weigh strongly against application of equitable tolling. Plaintiff asserts in her briefing that her "injuries were not discovered until February 2015 and that the statute of limitations does not begin to run until that date." Supplemental Opposition [Doc. # 36], at 3. *See* Plaintiff's Motion, at 5 (claim "is not triggered until Plaintiff's true injuries were revealed in an ultrasound in February 2015-2016 and were undiscoverable until objectively verified by independent doctors and medical tests"). These assertions are contrary to the allegations in her Amended Complaint,[6] which was filed after Defendants' Motion. Moreover, they are unsupported by any competent evidence. Such assertions therefore are insufficient to defeat summary judgment. *See Chaney*, 595 F.3d at 229 (court is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence). Additionally, the Court notes that Plaintiff has presented no competent evidence of "intentional concealment" of the facts by Defendants, or any other grounds that might justify

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[6] Plaintiff's pleadings clearly allege that she was in immediate pain during the March 18, 2014, x-ray, and that her "tilted" shoulder frame was obvious and visible within several months. Amended Complaint, at 2, ¶¶ 2-3. Plaintiff further alleges that she sought care from Dr. Ma in September 2014 because she, a "former nurse," suspected injury to her soft tissue, tendon, or muscle. *Id.* at 3, ¶ 4. All of these facts indicate that Plaintiff was aware in 2014 of "'the facts giving rise to the claim'." *See Trinity*, 812 F.3d at 489 (quoting *Granger*, 636 F.3d at 712).

equitable tolling in this case. *See Trinity*, 812 F.3d at 489.

Plaintiff has failed to present any colorable argument for the application of either the continuing tort doctrine or equitable tolling. Plaintiff's claims regarding her alleged injuries from the March 18, 2014, x-ray are time-barred. Plaintiff may proceed with any claims against the United States that accrued on or after July 6, 2014.

C. Plaintiff's FTCA Claim

Plaintiff seeks entry of judgment in her favor on the merits of her FTCA claims. "The FTCA authorizes civil actions for damages against the United States for personal injury or death caused by the negligence of a government employee under circumstances in which a private person would be liable under the law of the state in which the negligent act or omission occurred." *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008) (citing 28 U.S.C. § 1346(b)(1), § 2674). Plaintiff brings claims for medical negligence (medical malpractice) and gross negligence.

Under Texas law, in an action for medical negligence or medical malpractice, the plaintiff bears the burden of proving (1) the physician's duty to act according to an applicable standard of care; (2) a breach of that standard of care; (3) injury; and (4) causation. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 2017 WL 2492003, at *4 & n. 29 (Tex. June 9, 2017) (citing *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004)). *See Ellis v. United States*, 673 F.3d 367, 373 (5th Cir. 2012); *Honey-Love v. United States*, 664 F. App'x 358, 362 (5th Cir. 2016). Gross negligence

requires a plaintiff to prove "by clear and convincing evidence that 1) when viewed objectively from the defendant's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and 2) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others." *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012).

At this early stage of the case, Plaintiff is not entitled to summary judgment because she has not adequately demonstrated the absence of a genuine issue of material fact on elements for which she bears the burden of proof. To take one example, the causation element for medical negligence requires Plaintiff to demonstrate by a "reasonable medical probability" or a "reasonable probability" that the Government caused her injuries, meaning that "it is more likely than not that the ultimate harm or condition resulted from such negligence." *Jelinek v. Casas*, 328 S.W.3d 526, 532-33 (Tex. 2010)) (internal quotation marks and citation omitted). *See Ellis*, 673 F.3d at 373. On the current record, although Plaintiff has alleged that federal employees caused her injuries, she has not presented competent evidence demonstrating a "reasonable medical probability" regarding causation, as would be required for summary judgment in Plaintiff's favor.

The Court further notes that, in most medical negligence cases, expert testimony is necessary to satisfy the plaintiff's burden of proof. *See Ellis*, 673 F.3d at 373 ("'[E]xpert testimony is necessary to establish causation as to medical conditions outside

the common knowledge and experience of [the finder of fact]'," quoting *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007) (alterations in original)); *Hannah*, 523 F.3d at 601 ("'Unless the mode or form of treatment is a matter of common knowledge or is within the experience of the layman, expert testimony will be required' to meet the plaintiff's burden of proof," quoting *Hood v. Phillips*, 554 S.W.2d 160, 165–66 (Tex.1977)) This expert testimony must consist not only of the expert's opinion, but must establish why the expert's conclusion is superior to other possible conclusions, based on verifiable medical evidence:

> It is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. . . . [W]hen the facts support several possible conclusions, only some of which establish that the defendant's negligence caused the plaintiff's injury, the expert must explain to the fact finder why those conclusions are superior based on verifiable medical evidence, not simply the expert's opinion.

Jelinek, 328 S.W.3d at 536 (internal quotation marks and citations omitted). *See Ellis*, 673 F.3d at 373. Plaintiff has not yet presented such evidence.

Summary judgment in Plaintiff's favor is denied.

D. Plaintiff's Motion for Extension of Time

On August 9, 2017, Plaintiff filed a Motion for Extension of Time [Doc. # 38], in which she continues to allege that she is in extreme pain, and that the Government is responsible for her injuries, and that the Government is slow to respond to her repeated

requests for medical treatment. Plaintiff requests that her entire case be "suspended until such time Plaintiff notifies the Court that she is medically able to continue." *See* Proposed Order [Doc. # 38-1].

Plaintiff's motion is denied without prejudice. If, given the rulings in this Memorandum, Plaintiff believes that an extension of time continues to be necessary, she may file a renewed motion for extension of time. Plaintiff is instructed that, if she files a renewed motion, such motion must (1) be accompanied by documentation supporting Plaintiff's contention that she is currently unable to consult with a medical expert witness or otherwise pursue her claims in this lawsuit and, (2) request a specific amount of time, with facts and documentation supporting why the requested amount of time is warranted.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the United States' Motion to Dismiss or for Summary Judgment [Doc. # 25] is GRANTED. All Defendants other than the United States are DISMISSED with prejudice from this lawsuit. Plaintiff's claims against the Government that accrued before July 6, 2014, are DISMISSED as time-barred. Plaintiff may proceed with this lawsuit against the United States Government for her FTCA claims that accrued on or after July 6, 2014, but all other claims in this lawsuit are dismissed. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment on the Pleadings or Partial

Summary Judgment [Doc. # 32] is DENIED. It is finally

ORDERED that Plaintiff's Motion for Extension of Time [Doc. # 38], is DENIED without prejudice. Plaintiff is INSTRUCTED that, if she files a renewed motion, such motion must (1) be accompanied by documentation supporting Plaintiff's contention that she is currently unable to consult with a medical expert witness or otherwise pursue her claims in this lawsuit and, (2) request a specific amount of time, with facts and documentation supporting why the requested amount of time is warranted.

SIGNED at Houston, Texas, this 18th day of August, 2017.

/s/ Nancy F. Atlas
Senior United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (JULY 29, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SANDRA G. HALE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; MICHAEL DEBAKEY MEDICAL CENTER (VA HOSPITAL); CHRISTOPHER R. SANDLES; ROBERT MCDONALD; PAUL WENZSLAWSH, PA; DOCTOR JOHN MA, M.D.,

Defendants-Appellees.

No. 18-20071

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-226

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

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:
/s/ Gregg J. Costa
United States Circuit Judge