UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7361

BEN W. BANE,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Cameron McGowan Currie, Senior District Judge. (2:17-cv-03371-CMC)

Submitted: March 29, 2019 Decided: May 16, 2019

Before AGEE, KEENAN, and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Ben W. Bane, Appellant Pro Se.

PER CURIAM:

Ben W. Bane, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and dismissing without prejudice Bane's complaint against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680 (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Bane v. United States*, No. 2:17-cv-03371-CMC (D.S.C. filed Oct. 25, 2018 & entered Oct. 26, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Ben W. Bane, #51157-018,

Plaintiff,

vs.

United States of America,

Defendant.

Civil Action No. 2:17-cv-3371-CMC-MGB

OPINION AND ORDER

Plaintiff brought this complaint pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346, alleging negligent medical care during his incarceration in the Bureau of Prisons ("BOP"). ECF No. 1. This matter is before the court on Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment. ECF No. 22. Because Plaintiff is proceeding *pro se*, a *Roseboro* Order was sent advising Plaintiff of the importance of a dispositive motion and the need for Plaintiff to file an adequate response. ECF No. 23. Plaintiff filed his response in opposition and a supplement to his response. ECF Nos. 25, 26.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(e), D.S.C., this matter was referred to United States Magistrate Judge Mary Gordon Baker for pre-trial proceedings and a Report and Recommendation ("Report") on dispositive issues. On September 10, 2018, the Magistrate Judge issued a Report recommending Defendant's motion be granted and this matter be dismissed without prejudice. ECF No. 31. The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and the serious consequences if they failed to do so. Plaintiff filed objections to the Report on September 28, 2018. ECF No. 34.

1. Standard

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

2. Facts

Plaintiff has been housed at three institutions during his incarceration: the Federal Holding Center in Citrus, Florida[1]; the Federal Correctional Complex in Forrest City, Arkansas, and the Federal Correctional Institution in Estill, South Carolina. Before he was sentenced, Plaintiff was diagnosed with a "painful left foot deformity" by Dr. Steven Blustein, who opined "the nature of this deformity will require surgical management in the future." ECF No. 1-1 at 8. Plaintiff was unable to have the surgery before he was incarcerated, and alleges his feet remained painful.

Plaintiff pursued medical treatment many times regarding his feet. He was placed on the waiting list for podiatry at Forrest City, and saw the podiatrist on March 9, 2012. ECF No. 1-1 at

[1] Plaintiff states he was unable to obtain his medical records from the Federal Holding Facility in Florida, where he was held for approximately ten months while awaiting sentencing. ECF No. 1 at 13.

15. That podiatrist, Dr. Khumato, noted bunions and a dislocated joint in Plaintiff's left foot. *Id.* at 16. Surgical correction was recommended to correct the hallux valgus deformity. *Id.* However, on December 6, 2012, the Utilization Review Committee ("URC") denied Plaintiff's "consult for podiatry."[2] *Id.* at 21. Per a Health Services Clinical Encounter note dated February 26, 2013, the instructions from the URC were to "treat conservatively with toe separators and pain management." *Id.* at 25. He was given toe separators and referred to commissary for insoles. *Id.* at 26. Although Plaintiff filed an administrative grievance charging lack of adequate medical treatment, it was denied and Plaintiff was instructed to follow up in sick call. *Id.* at 27. On April 25, 2013, the Warden responded to Plaintiff's continued grievance, noting "the Clinical Director has the option to treat your medical conditions with conservative measures." *Id.* at 32. Plaintiff appealed, but the appeal was denied by J.A. Keller, Regional Director, on July 1, 2013. *Id.* at 39.

A new consultation for podiatry was requested per a Health Services Clinical Encounter note "Chronic Care encounter" on May 1, 2013. *Id.* at 35. On May 2, 2013, the Clinical Director sent a memorandum to Plaintiff noting the request for Podiatry had been reviewed by the URC but did "not meet the medical criteria as determined by the URC and will be sent to the Regional Medical Director for decision." *Id.* at 37.

Plaintiff's feet were x-rayed on May 22, 2013, and the results reviewed by Health Services on June 21, 2013. *Id.* at 44, 45. Health Services requested a consultation with an

---

[2] This memo was sent "from W. Resto, Clinical Director." ECF No. 1-1 at 21.

orthopedist based on these x-rays. *Id.* at 45. On July 16, 2013, Plaintiff was seen by Dr. Sokoloff, an orthopedist at OrthoNow. *Id.* at 46. Medical records reveal Dr. Sokoloff noted "patient needs bilateral foot surgery. Start with left, more severe foot. Recommend bunion surgery and likely 2nd metatarsal phalange joint resection. Alternative would be custom fitted, wide toe box, stiff sole, cushioned shoes. . . . Please advise on how you would like to proceed." *Id.* at 50. On July 25, 2013, the URC denied the request for Prosthetics/Orthotics at an outside physician's office, and "referred for on-site consultation" for shoes as recommended. *Id.* at 59. On September 5, 2013, Plaintiff was seen by BOP Health Services, who had received Dr. Sokoloff's notes. At that visit, the provider noted "will write consult" and "please schedule surgery as recommended with assistance from podiatry." *Id.* at 63. However, on September 12, 2013, the orthopedic request was denied by the URC as it "did not meet the medical criteria as determined by the URC and will be sent to the Regional Director for decision." *Id.* at 64. There is no record of Regional Director action on this request.

On March 11, 2014, Plaintiff saw Health Services at Estill for his 14 day evaluation for admission. *Id.* at 66. The Acting Clinical Director, Dr. Reed, performed this evaluation. Medical records note Dr. Reed "will place request for an orthotis [sic] consult for custom shoes." *Id.* at 68. On March 26, 2014, the URC at Estill deferred the medical consult for surgery. *Id.* at 69. Plaintiff was seen by Carolina Foot Specialists, Dr. Brown, on April 24, 2014. *Id.* at 72. Dr. Brown requested Plaintiff "be allowed to return for casting of custom orthotics to alleviate load to the painful areas. He also needs to switch to a wider (4E) shoe to avoid pressure to the area." Dr. Brown noted "if this fails to alleviate the symptoms then I am recommending surgical

correction of the bunion and hammertoe deformity of the left foot." *Id.* at 73. On July 30, 2014, Plaintiff was seen by Positive Image Prosthetics and Orthotics for soft soled shoes and custom inserts. ECF No. 1-2 at 1.

A BOP Health Services Clinical Encounter note on May 7, 2015, requested a podiatry referral. *Id.* at 4. On October 13, 2015, another Health Services note referred Plaintiff to podiatry. *Id.* at 9. However, the URC denied the podiatry consult on December 2, 2015, and instead Plaintiff was "placed on waiting list for in-house orthotics clinic." *Id.* at 11. A Health Services note on April 7, 2016, includes "chronic foot pain x 5 year . . . [h]e has custom orthotic but has had no relief with these orthotics I will refer him back to podiatry." *Id.* at 18. Another Health Services note from October 4, 2016 again states "[h]e need [sic] casting for custom orthotic . . . orthotic has not provided this for him I will refer him back to podiatry for this custom fitting." *Id.* at 22. However, the next Health Services note on October 26, 2016, states the "consult for podiatry was denied disapproved" and referred him to the in-house orthotics clinic. *Id.* at 26. On January 23, 2017, a Health Services provider referred Plaintiff back to podiatry as his feet had not improved. *Id.* at 36. A note on March 7, 2017, states "Had been evaluated by 2 podiatrist who recommended surgery. A repeat podiatry consult is pending his podiatry consult was disapproved previously however he is still having pain in his feet despite custom fitted orthotics." *Id.* at 51. On March 16, 2017, Plaintiff was seen by Positive Image Prosthetics and Orthotics again, and received comfort tennis shoes and custom inserts. *Id.* at 55.

Plaintiff was seen by Podiatrist Dr. Brown again on April 18, 2017, at which time he described Plaintiff as a new patient[3] and recommended flat, cushioned shoes and reduced activity. *Id.* at 56-57. Plaintiff alleges the shoes furnished did not alleviate his pain, and his body continues to "deteriorate" due to his untreated foot deformity.[4] ECF No. 1 at 58.

3. Discussion

The Magistrate Judge recommended dismissal of any claims related to pre-March 2015 conduct because Plaintiff failed to exhaust his administrative remedies for that time period, and post-March 2015 claims because Plaintiff failed to file an expert affidavit with his Complaint for professional negligence. ECF No. 31.

Plaintiff objects to the Report's recommended dismissal, arguing he presented four expert physicians' written recommendations to the BOP for surgery and he has no way to obtain an expert affidavit as required by the South Carolina statute. ECF No. 34. He contends "no affidavits are required in this case since all (4) experts have furnished medical evaluations and recommendations that the BOP consulted them for and all (4) were received and are on file with this court." *Id.* at 6. He also argues this is not a malpractice case, but a "tort claim for negligence and breach of duty by the BOP, which does not require affidavits." *Id.* at 7. Regarding the exhaustion of administrative remedies for claims before March 2015, Plaintiff contends the BOP staff at Forrest City, Arkansas "committed a fraudulent act when they did not

---

[3] Records reflect Plaintiff previously saw Dr. Brown on April 24, 2014.

[4] Plaintiff states he has requested medical records beyond this date, but has not received them.

advise Plaintiff of the results of the evaluation and recommendation by Dr. Sokoloff, an Orthopedic Surgeon," who recommended surgery: Plaintiff argues that information was "intentionally concealed" from him until he received his medical records in April 2017. *Id.* at 7-8. Plaintiff requests he be allowed to continue with all claims, including those arising prior to March 2015, due to this "intended fraud and misrepresentation by the BOP medical and administrative staff at Forrest City." *Id.* at 9. Finally, Plaintiff requests his opposition to the Government's motion be reviewed by the "newly appointed District Judge assigned to Plaintiff's case." *Id.* at 11.[5]

a. Exhaustion of Administrative Remedies

The FTCA requires a claimant to present his claim to the appropriate agency, in writing, before instituting a case in court. *See* 28 U.S.C. § 2675(a). "It is well settled that the requirement of filing an administrative claim is jurisdictional and may not be waived." *Henderson v United States*, 785 F.2d 121, 123 (4th Cir. 1986).

The court agrees with the Magistrate Judge claims for actions or inactions before March 2015 were not administratively exhausted. Plaintiff filed a Form 95, "Claim for Damage, Injury, or Death," on February 15, 2017, alleging injury as of March 2015. ECF No. 1-1 at 4. While Plaintiff did file internal grievances regarding the purported denials of medical care for his feet at Forrest City, (*see, e.g.*, ECF No. 1-1 at 23), he did not file an Administrative Form 95, putting

[5] As noted above, this court's review is *de novo* because Plaintiff filed objections – the court has reviewed the record, motion, opposition, Report, and objections in making its ruling.

the Government on notice of a tort claim under the FTCA, until 2017, alleging injury as of March 2015. Plaintiff's arguments regarding his medical records do not excuse this failure, as he was aware his feet were not being treated despite recommendations to the contrary even without access to his medical records.

As the requirement of filing an FTCA administrative claim is jurisdictional, the court has no subject matter jurisdiction to act on Plaintiff's FTCA claim for actions before March 2015.

b. Negligence

As a plaintiff "has an FTCA cause of action against the government only if she would also have a cause of action under state law against a private person in like circumstances," the requirements of South Carolina law regarding professional negligence complaints are applicable.[6] *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991); *see also Littlepage v. United States*, 528 F. App'x 289, 292 (4th Cir. 2013). The court agrees with the Magistrate

[6] S.C. Code § 15-36-100 requires an affidavit be filed with the complaint in professional negligence cases (including those against licensed medical doctors, nurses, physician's assistants, podiatrists, and the like), and S.C. Code § 15-79-125 requires several pre-suit procedures specifically for medical malpractice cases. There appears to be some confusion in the case law regarding whether both statutes apply to FTCA cases in federal court. *Compare Grant v. United States,* C/A No. 3:17-cv-1377-CMC, 2017 WL 2265956, at *9 (D.S.C. May 24, 2017) *with Gamez-Gonzalez v. United States,* C/A No. 4:14-2668-JMC, 2017 WL 3084488 (D.S.C. May 17, 2017) *adopted by,* 2017 WL 3067974 (D.S.C. July 19, 2017). However, the courts in this district are in agreement that § 15-36-100 applies in FTCA cases. *See, e.g.*, *Craig v. United States*, C/A No. 2:16-cv-3737, 2017 WL 6452412, at *3 (D.S.C. Nov. 6, 2017), *adopted by* 2017 WL 6408968 (D.S.C. Dec. 15, 2017); *Gamez-Gonzalez*, 2017 WL 3084488, at *3; *Allen v. United States*, C/A No. 2:13-cv-2740, 2015 WL 1517510, at *3 (D.S.C. Apr. 1, 2015).

Judge Plaintiff's claims sound in professional negligence against licensed medical providers, not ordinary negligence, and therefore require an expert affidavit pursuant to S.C. Code § 15-36-100. *Delaney v. United States*, 260 F.Supp.3d 505, 509-10 (D.S.C. 2017) (finding the plaintiff's claim "rests on the specialized knowledge that medical professionals . . . possess . . ." and was therefore a medical malpractice claim); *Dawkins v. Union Hosp. Dist.*, 758 S.E.2d 501, 504 (S.C. 2014) (holding if the patient receives "allegedly negligent professional medical care" then expert testimony on the standard of the type of care is necessary, but if the patient receives "nonmedical, administrative, ministerial, or routine care," then it is an ordinary negligence action that does not require any expert testimony); *see Littlepage*, 528 F. App'x at 293-94 (reaching same conclusion regarding a similar requirement in North Carolina).

This case is not one challenging some nonmedical aspect of prisoner care, but directly implicates standard of care issues regarding the treatment of Plaintiff's medical complaints related to his feet. *See, e.g.*, ECF No. 1 at 2 (Plaintiff alleges he "was neglected by denying proper medical attention to plaintiff's feet for a prolonged period of time."). Further, Plaintiff alleges the "BOP's medical staff's actions are in violation of their code of medical conduct . . . because they have interfered, delayed, and actually denied the proper medical treatment for the deformity of both of my feet." *Id.* at 60. He also alleges the BOP's URC negligently denied his surgery after it was recommended by specialists. *Id.*

To the extent Plaintiff alleges professional negligence by BOP medical providers, an expert affidavit filed with the Complaint is required under § 15-36-100. Similarly, claims alleging negligence by URC members who are professionally licensed medical providers also

require an expert affidavit, as Plaintiff contends they negligently made decisions in their roles as healthcare providers regarding his medical care. Further, it appears the requests for surgery as reviewed by the URC were escalated to the Regional Director, who was a physician. Any claim alleging negligence by the Regional Director for denial of medical care would also require an expert affidavit.[7]

Although Plaintiff argues he has filed four expert statements noting he should have surgery, none conform to the requirements of the statute, as there is no affidavit by an expert witness specifying "at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." § 15-30-100(B). Instead, Plaintiff has simply filed as evidence his medical records, some of which contain recommendations for surgery. These do not satisfy the requirements of South Carolina law. Further, as Plaintiff appears to acknowledge, this is not a case "involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." § 15-30-100(B)(2). Therefore, Plaintiff's failure to file an expert affidavit with his Complaint is fatal to his case. *See* § 15-30-100(C)(1); *Craig v. United States*, No. 2:16-cv-3737, 2017 WL 6408968, at *1 (D.S.C. Dec. 15, 2018) (adopting Report and Recommendation at 2017 WL 6452412); *see also Littlepage*, 528 F. App'x at 295, 296.

---

[7] While any claims alleging negligence by URC members who were not medical professionals may not require an affidavit, claims against non-medical URC members would not survive, as the ultimate decision was made by the Regional Director.

4. Conclusion

After considering the record, the applicable law, the Report and Recommendation of the Magistrate Judge and Plaintiff's objections, the court agrees with the Report's recommendation the Complaint be dismissed without prejudice. Plaintiff has failed to exhaust FTCA administrative remedies for any claim of injury before March 2015, and failed to file an expert affidavit with his professional negligence claim. For the reasons above, the court adopts the Report and incorporates it by reference. Plaintiff's claims under the FTCA for conduct prior to March 2015 are dismissed as the court is without jurisdiction to consider them.[8] The remainder of Plaintiff's Complaint is dismissed without prejudice.[9]

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE

---

[8] It appears to the court Plaintiff's complaints amount to a garden variety *Bivens* claim for constitutional violations based on deliberate indifference to medical needs. A *Bivens* claim would not require FTCA administrative exhaustion on a Form 95, and would not require an expert affidavit be filed with the Complaint. *See Wilder v. Krebs*, C/A No. 3:17-cv-763, 2018 WL 4020211 at *2 (D.S.C. Aug. 23, 2018). (Of course, other exhaustion requirements would apply, as well as the statute of limitations). However, Plaintiff specifically stated this Complaint was brought under the FTCA and not under *Bivens*; therefore, the court is unable to construe this Complaint, as filed, as a *Bivens* claim. If Plaintiff were to bring a new *Bivens* claim for continuing deliberate indifference, he would first need to file a new administrative grievance (assuming one is not currently pending) and completely exhaust the BOP's administrative process (*see* ECF No. 31 at 8 n.1) before filing a new case in court.

[9] "A dismissal for failure to comply with S.C. Code 15-36-100 is without prejudice." *Gamez-Gonzalez v. United States*, No. 4:14-2668, 2017 WL 3084488, at *3 n.5 (D.S.C. May 17, 2017) (citing *Rodgers v. Glenn*, Civ. A. No. 1:16-16-RMG, 2017 WL 1051011, at *4 (D.S.C. Mar. 20, 2017)).

Senior United States District Judge

Columbia, South Carolina
October 25, 2018

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Ben W. Bane, # 51157-018,	**Case No. 2:17-cv-03371-CMC-MGB**
Plaintiff,	
v.	**REPORT AND RECOMMENDATION**
United States of America,	
Defendant.	

Plaintiff, proceeding *pro se* and *in forma pauperis*, brought this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., alleging negligent medical care. (Dkt. No. 1; *see* 28 U.S.C. § 1346.) This matter is before the Court upon a Motion to Dismiss, or in the alternative, Motion for Summary Judgment filed by the United States. (Dkt. No. 22.) For the reasons set forth herein, the undersigned recommends granting Defendant's motion.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1) and Local Rule 73.02(B)(2)(e), D.S.C., all pretrial matters in cases involving *pro se* litigants are referred to a United States Magistrate Judge for consideration.

BACKGROUND

In the instant action, Plaintiff complains about events that occurred while he was in federal custody from December of 2010 to April of 2017. Specifically, Plaintiff alleges that his medical needs have been "delayed to the point that they were denied" while housed at: (1) the Federal Holding Center ("FHC") in Citrus, Florida; (2) the Federal Correctional Complex ("FCC") in Forrest City, Arkansas; and (3) the Federal Correctional Institution in Estill, South Carolina ("FCI Estill"). (Dkt. No. 1 at 1–3.) Plaintiff expressly files this claim under the FTCA,

Appendix B

alleging that he was "neglected by denying proper medical attention to [his] foot for a prolonged period of time." (*Id.* at 2–3.) Specifically, Plaintiff alleges that from December 10, 2010, to October 13, 2011, while he was housed at the FHC in Florida, he was denied proper medical care "for [his] extremely painful foot." (Dkt. No. 1 at 2, 13, 17–18.) Plaintiff further alleges he did not receive proper medical care for his feet while he was at the FCC in Arkansas, from October 14, 2011 to March 10, 2014. (*Id.* at 2, 18–32.) Plaintiff alleges that his care did not improve once he arrived at FCI Estill on March 11, 2014, and that the negligent medical care continued through April of 2017. (*Id.* at 33–61.)

Plaintiff cites to his medical record, including records from FCI Estill, to support his allegations. (Dkt. Nos. 1; 1-1.) Plaintiff was seen by FCI Estill Health Services ("Health Services") on May 1, 2015, complaining that his "toe has been dislocated for four years." (Dkt. No. 1-2 at 2.) A "Sick Call Note encounter" dated May 7, 2015, references an "orthopedic consult dated 4/25/2014" that "suggest[ed] surgery if symptoms continue after having shoes." (*Id.* at 3.) On September 17, 2015, Plaintiff reported to Health Services, complaining of "left knee pain for over 2 months." (*Id.* at 5.) The examination notes from this date state, inter alia, "Full ROM to all extremities noted. No swelling or deformity, muscle with normal bulk and tone. Left knee w/o effusion, no crepitus, full ROM with hyperextension and forward extension. . . . Left knee xray will be ordered." (*Id.* at 6.) On October 13, 2015, Plaintiff reported to Health Services a "throbbing pain" in his left foot that he had experienced for more than five years. (*Id.* at 7.) Under, "Assessment," Health Services noted, inter alia: "Ankle, foot – Pain in joint, . . . He has a bunion, hammer toes of his 2nd-4th toes and a dislocation at the 2nd MP joint area of his left foot. He has custom orthotic but he has had no relief with these orthotics. I will refer him back to podiatry." (*Id.* at 8.) Health Services entered a consultation request for a podiatrist, with a

target date of December 1, 2015. (*Id.* at 9.) Health Services also scheduled chronic care visits for April 5, 2016 and September 29, 2016. (*Id.* at 10.) Plaintiff received counseling for "plan of care" on October 17, 2015. (*Id.*) The FCI Estill Utilization Review Committee denied the podiatry medical consult request on December 2, 2015, and indicated that they had placed Plaintiff on a waiting list for the "in-house orthotics clinic." (*Id.* at 11.)

On February 9, 2016, Plaintiff sought relief from Health Services for a skin abscess "just above his left knee" that was drained by a physician. (*Id.* at 12.) Exam comments from this date note that Plaintiff's problems with his left foot were "unchanged." (*Id.* at 14.) On April 7, 2016, Plaintiff sought relief from Health Services for, inter alia, "chronic left foot pain." (*Id.* at 16.) Exam notes on this date report a "normal exam" for Plaintiff's ankle, foot, and toes, with a "full range of motion, non-tender on palpation, normal bony landmarks, symmetric." (*Id.* at 17.) Administrative notes on this date report that "He has custom foot orthotic but has no relief with these orthotics. I will refer him back to podiatry." (*Id.* at 18.) On October 4, 2016, Plaintiff sought relief from Health Services for, inter alia, his "chronic left foot pain." (*Id.* at 22.) Under "Assessment," Health Services noted "Ankle, foot – Pain in joint, . . . Presents bilateral vagus, bunions, worse at left foot. Also left 2nd MP joint dislocation with pain at walking and swelling. Had been evaluated by 2 podiatrist who recommended surgery." (*Id.* at 24.) Health Services prescribed multiple pain medications for his foot, and requested a consultation with a podiatrist with a target date of October 24, 2016. (*Id.* at 25.) Administrative Notes dated October 26, 2016 state "His consult for podiatry was denied disapproved. The consult needs written [sic] for orthotics to see him in house for casting and custom orthotics to alleviate the load to the painful area of his left foot and for extra wide 4E shoes." (*Id.* at 26.) A new consultation request was

entered on October 26, 2016, for "prosthetics/orthotics" at the in-house clinic with a target date of November 1, 2016. (*Id.*)

On January 17, 2017, Plaintiff sought relief from Health Services for swelling in his leg, and he was prescribed an antibiotic. (*Id.* at 27–32.) Exam notes state "[b]oth feet with well deformities noted, with extensive areas of dry scaling skin, both heels and plantar aspect." (*Id.* at 31.) On January 23, 2017, Plaintiff reported to Health Services that: he "is doing much better, denied leg redness or swelling, also stated his callus like lesions on both feet are much better. Also still c/o bilateral hammertoe and bunion deformities, stated this condition has not improve[d] with wider shoes and claim[s] is doing worse." (*Id.* at 35.) Health Services entered a consultation request for a podiatrist, with a target date of March 22, 2017. (*Id.* at 36.) On February 2, 2017, Plaintiff reported to Health Services, complaining of "deformities in both [his] feet. . . . I know the MLP saw the left foot last time but I want him to see the right foot now." (*Id.* at 37.) The Assessment notes that "Ortho will see inmate today." (Id. at 38.) Treatment notes from "Licensed Prosthetist/Orthotist" David M. Puckett, with Positive Image Prosthetics and Orthotics, Inc., dated March 16, 2017, note: "[Plaintiff] presents with need for orthopedic shoes and inserts. Inmate requires some soft soled shoes and custom inserts. He has bunions and hammer toes and has gotten inserts and shoes in the past and has need for new shoes. Seen last visit for mmt for new shoes . . . custom tennis shoes and custom inserts x 1 pr and delivered today. We will f/u with inmate now prn." (*Id.* at 55.)

The Complaint alleges that four expert medical specialists have recommended Plaintiff have surgery on both of his feet, but the Bureau of Prisons ("BOP") has ignored these recommendations. (Dkt. No. 1 at 15–16.) Plaintiff alleges that as a result of the neglect and lack of medical care, he has equilibrium problems and suffers "deteriorating and irreversible harm."

(*Id.* at 6.) He seeks compensation for $ 43,000,000.00 against the United States. (*Id.* at 63.) In his Proper Form Complaint (Dkt. No. 1-4) attached as an exhibit to his Complaint (Dkt. No. 1), Plaintiff plainly states that he is only bringing a negligence claim under the FTCA and emphasizes that his "claim is not a *Bivens* claim, nor a claim for a constitutional violation." (Dkt. No. 1-4 at 21; *see Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).)

Plaintiff brought the instant action on or about December 13, 2017. (Dkt. No. 1.) On May 22, 2018, Defendant filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment. (Dkt. No. 22.) By Order filed May 23, 2018, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff was advised of the dismissal procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 23.) Plaintiff filed a Response in Opposition to Defendant's motion and a supplement to his response on June 11, 2018 and August 8, 2018, respectively. (Dkt. Nos. 25; 26.)

STANDARDS

A. Liberal Construction of Pro Se Complaint

Plaintiff brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, a pro se complaint is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means that only if the court can reasonably read the pleadings to state a valid claim on which the complainant could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the complainant's legal arguments for

him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

B. Rule 12(b)(6) Dismissal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a claim should be dismissed if it fails to state a claim upon which relief can be granted. When considering a motion to dismiss, the court should "accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). However, the court "need not accept the legal conclusions drawn from the facts" nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Further, for purposes of a Rule 12(b)(6) motion, a court may rely on only the complaint's allegations and those documents attached as exhibits or incorporated by reference. *See Simons v. Montgomery Cty. Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985). If matters outside the pleadings are presented to and not excluded by the court, the motion is treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(d).

C. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (citing

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In ruling on a motion for summary judgment, "'the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor.'" *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)); *see also Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990).

DISCUSSION

In its Motion to Dismiss, or in the alternative, Motion for Summary Judgment, Defendant contends that Plaintiff failed to exhaust his administrative remedies with respect to his allegations of negligence occurring prior to March of 2015, and argues that the entire action should be dismissed because Plaintiff failed to file "an expert affidavit contemporaneously with his Complaint." (Dkt. No. 22 at 4–13.) The undersigned addresses these arguments in turn.

A. Exhaustion

Defendant first asserts that any claims in the Complaint related to pre-March 2015 conduct should be dismissed because Plaintiff "filed no administrative claims related to those time periods." (Dkt. No. 22 at 5.) Plaintiff responds that the allegations in his Complaint establish that Plaintiff "made numerous attempts with administrative personnel, seeking a solution to his medical surgery." (Dkt. No. 25 at 11.)

~~Pursuant to the FTCA, a plaintiff is required to exhaust his or her administrative remedies~~ prior to bringing suit. Specifically, 28 U.S.C. § 2675 states in relevant part,

> 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.

not on Negligence claim

* 28 U.S.C. § 2675(a). Exhaustion of administrative remedies is a jurisdictional requirement; if the plaintiff has not exhausted his or her administrative remedies, the court must dismiss for lack of subject matter jurisdiction.[1] *See Plyler v. United States*, 900 F.2d 41, 42 (4th Cir. 1990); *see also McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L.Ed.2d 21 (1993); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986); *Rodgers v. Glenn*, Case No. 1:16-cv-16-RMG, 2017 WL 1051011, at *4 (D.S.C. Mar. 20, 2017) ("Inmates must exhaust the FTCA administrative process before suing."). not true

Here, the United States has put forth evidence that Plaintiff did not exhaust his administrative remedies with respect to the alleged negligence occurring prior to March of 2015. (Dkt. No. 22-2.) Specifically, the Declaration from Amy Williams, a Legal Assistant for the BOP, indicates that the BOP maintains "BOP records and official databases concerning . . . inmate administrative tort claims and location information" and that on searching these databases, she has found no record of any administrative tort claim submitted by Plaintiff to the BOP "for alleged negligence prior to March 2015." (*Id.* ¶¶ 1-7.) Plaintiff's allegations in the Complaint do not offer any basis to find that he exhausted his administrative remedies with respect to any claims for alleged negligence prior to March 2015. (Dkt. Nos. 1; 1-1; 1-2; 1-4; 1-5.) Plaintiff has only offered evidence that he sought administrative relief with respect to his claims of negligence "on or about March of 2015," while at FCI Estill. (Dkt. No. 1-5 at 1, 5.) Because Plaintiff has failed to exhaust his administrative remedies with respect to his allegations

[1] The BOP has a three-tiered formal administrative grievance process, in addition to an informal resolution process, as set out at 28 C.F.R. §§ 542 et seq. An inmate may complain about any aspect of his confinement by first seeking to informally resolve the complaint at the institution level. 28 C.F.R. § 542.13. If the matter cannot be resolved informally, the inmate may file a formal written complaint to the warden within 20 calendar days after the date upon which the basis for the request occurred. 28 C.F.R. § 542.14. The matter will be investigated, and a written response provided to the inmate. *Id.* If dissatisfied with the response, the inmate may appeal to the Regional Director within 20 days of the date of the Warden's response. 28 C.F.R. § 542.15(a). If dissatisfied with the regional response, the inmate may appeal to the General Counsel within 30 days of the Regional Director's response. *Id.* Appeal to the General Counsel is the final level of agency review. *Id.*

not w/ BOP committee fraud for not giving information from Oth. Surg on

of negligence occurring prior to March of 2015, any claims related to that time period must be dismissed for lack of subject matter jurisdiction. *See Joyner v. Kim*, Case No. 3:17-cv-2089-MBS-SVH, 2017 WL 3912977, at *2 (D.S.C. Aug. 15, 2017) (dismissing claims for medical malpractice under the FTCA where plaintiff failed to exhaust her administrative remedies), *adopted by*, 2017 WL 3896361 (D.S.C. Sept. 6, 2017); *Terrell v. United States*, Case No. 4:08-cv-2228-HFF-TER, 2009 WL 2762516, at *7 (D.S.C. Aug. 27, 2009) (dismissing claims of deficient medical care under the FTCA where plaintiff failed to file any administrative remedies with the BOP regarding those claims).

not med. malpractic

B. Merits

Defendant further contends that the entire action should be dismissed because Plaintiff has failed to file "an expert affidavit contemporaneously with his Complaint." (Dkt. No. 22 at 10–11.) As noted above, Plaintiff attempts to bring "a claim of negligence" under the FTCA against the Defendant, the United States of America. (Dkt. No. 1-4.) The FTCA provides that "[t]he United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

There is no dispute that Plaintiff did not file an expert affidavit with his Complaint, nor has he filed such an affidavit while the instant action has been pending. South Carolina law requires plaintiffs asserting medical malpractice claims to file "as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim." S.C. Code § 15-36-100. Complaints without the required affidavit must be dismissed. S.C. Code § 15-36-100(C)(1). "Multiple judges within this district . . . have held . . . Section 15-36-100 [is] part of the substantive law of South Carolina and, consequently, appl[ies] to actions filed in federal court." *Grant v. United States*, Case No.

not med malpractic

3:17-cv-0377-CMC, 2017 WL 2265956, at *9 (D.S.C. May 24, 2017). "The affidavit therefore is a mandatory prerequisite to the filing of a malpractice claim against the United States under the FTCA in this District." *Rodgers*, 2017 WL 1051011, at *4 (citing *Chappie v. United States*, Civ. No. 13-1790-RMG, 2014 WL 3615384 at * 1 (D.S.C. July 21, 2014); *Millmine v. Harris*, Case No. 3:10-cv-1595-CMC, 2011 WL 317643, at *2 (D.S.C. Jan. 31, 2011)). However, "[t]he contemporaneous filing requirement . . . is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." S.C. Code Ann. § 15-36-100(C)(2).

Accordingly, the Court must determine whether Plaintiff's cause of action sounds in medical malpractice or ordinary negligence. Plaintiff argues that his claim "is a Tort claim for negligence and breach of duty." (Dkt. No. 25 at 29.) He asserts that his claim is essentially that the BOP ignored the recommendations of "(4) physicians with expert skills in the field of Podiatry and Orthopedic medicine" regarding the proper medical treatment of Plaintiff's feet.[2] (*Id.*) The allegations in the Complaint and the Proper Form Complaint, and the submitted exhibits establish that Plaintiff is alleging that he did not receive proper medical treatment for his feet; he is complaining about his medical care. (Dkt. No. 1; 1-2; 26-1.) Such allegations do not sound in ordinary negligence, and he was therefore required to file the affidavit of an expert witness in accordance with § 15-36-100(B). *See, e.g.*, *Harrison v. United States*, Case No. 817-

[2] To the extent Plaintiff is alleging a deliberate indifference to his medical needs, such a claim would be properly couched as a claim of deliberate indifference to his serious medical needs in violation of his Eighth Amendment rights. Plaintiff, however, has expressly stated that he is only bringing a negligence claim under the FTCA and emphasizes that his "claim is not a *Bivens* claim, nor a claim for a constitutional violation." (Dkt. No. 1-4 at 21.) Because "[a] claim of deliberate indifference to a plaintiff's serious medical needs in violation of his Eighth Amendment rights is not actionable against the United States in a [FTCA] action," *Stevens v. United States*, Case No. 1:14-cv-206, 2016 WL 8671912, at *4 (N.D.W. Va. Mar. 8, 2016), *adopted by*, 2017 WL 1251003 (N.D.W. Va. Apr. 3, 2017), such a claim cannot survive dismissal here.

cv-02679-HMH-JDA, 2018 WL 2604870, at *6 (D.S.C. May 11, 2018) (quoting *Delaney v. United States*, 260 F. Supp. 3d 505, 510 (D.S.C. 2017) ("Plaintiff is alleging a medical malpractice claim 'masquerading as an ordinary negligence claim' because it rests on knowledge that medical professionals possess about effectively treating Plaintiff's injury, including what diagnostic procedures should have been used"), *adopted by*, 2018 WL 2573032 (D.S.C. June 4, 2018); *Craig v. United States*, Case No. 216-cv-03737-TMC-MGB, 2017 WL 6452412, at *3 (D.S.C. Nov. 6, 2017), (finding Plaintiff's allegations "about his medical care" do not "sound in ordinary negligence, and he was therefore required to file the affidavit of an expert witness"), *adopted by*, 2017 WL 6408968 (D.S.C. Dec. 15, 2017); *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177–78, 758 S.E.2d 501, 504 (2014) (distinguishing "between medical malpractice and ordinary negligence actions," stating "if the patient . . . receives 'nonmedical, administrative, ministerial, or routine care,' expert testimony establishing the standard of care is not required, and the action instead sounds in ordinary negligence"). Plaintiff's arguments to the contrary are unavailing. (Dkt. No. 25 at 27–30).

Because Plaintiff failed to file the affidavit of an expert witness, the undersigned recommends granting Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment (Dkt. No. 22) and dismissing Plaintiff's Complaint without prejudice.[3] *See, e.g.*, *Craig*, 2017 WL 6452412, at *3 (dismissing plaintiff's malpractice claim pursuant to FTCA for failing to file affidavit required by S.C. Code § 15-36-100); *Gamez-Gonzalez v. United States*, Case No. 4:14-2668-JMC-TER, 2017 WL 3084488, at *3 (D.S.C. May 17, 2017) (same), *adopted by*, 2017 WL 3067974 (D.S.C. July 19, 2017); *Allen v. United States*, Case No. 2:13-cv-2740-RMG, 2015 WL 1517510, at *3 (D.S.C. Apr. 1, 2015) (same); *Burris v. United States*,

[3] "A dismissal for failure to comply with S.C. Code 15-36-100 is without prejudice." *Gamez-Gonzalez*, 2017 WL 3084488, at *3 n.5 (citing *Rodgers*, 2017 WL 1051011, at *4).

Case No. 2:14-cv-00430-MGL-WWD, 2014 WL 6388497, at *2 (D.S.C. Nov. 14, 2014) (same); *Rotureau v. Chaplin*, Case No. 2:09–cv–1388-DCN, 2009 WL 5195968, at *6 (D.S.C. Dec. 21, 2009) (same); *see also Millmine v. Harris*, Case No. 3:10-cv-1595-CMC, 2011 WL 317643, at *2 (D.S.C. Jan. 31, 2011) (holding that pre-suit notice and expert affidavit requirements in S.C. Code Ann. § 15-36-100 and § 15-79-125 are "the substantive law of South Carolina").

CONCLUSION

It is therefore RECOMMENDED, for the foregoing reasons, that Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment (Dkt. No. 22) be GRANTED, and that Plaintiff's Complaint be dismissed without prejudice.

IT IS SO RECOMMENDED.

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

September 10, 2018
Charleston, South Carolina

FILED: July 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7361
(2:17-cv-03371-CMC)

BEN W. BANE

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Keenan, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk