FILED: May 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2489
(3:17-cv-00567-MHL)

JOANNE HALL

Plaintiff - Appellant

v.

DEPARTMENT OF VETERANS AFFAIRS

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 Motz, Judge Keenan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2489

JOANNE HALL,

Plaintiff - Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, District Judge. (3:17-cv-00567-MHL)

Submitted: January 22, 2019 Decided: January 24, 2019

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Joanne Hall, Appellant Pro Se. Joanne Hall 02/11/2019

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joanne Hall appeals the district court's order granting the Department of Veterans Affairs' motion to dismiss and dismissing without prejudice Hall's amended complaint for failure to comply with Virginia's statutory requirements for bringing a medical malpractice action. On appeal, we confine our review to the issues raised in the Appellant's brief. *See* 4th Cir. R. 34(b). Because Hall's informal brief does not challenge the basis for the district court's disposition, Hall has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we affirm the district court's judgment. 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 EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOANNE HALL,

Plaintiff,

v. **Civil Action No. 3:17cv567**

DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

MEMORANDUM ORDER

This matter comes before the Court on Defendant Department of Veterans Affairs's (the "DVA") Motion to Dismiss, or in the Alternative, a Motion for Summary Judgment[1] (the "Motion to Dismiss"). (ECF No. 10.) On November 1, 2018, Plaintiff Joanne Hall, *pro se*, responded.[2] The DVA did not reply and the time to do so has expired. The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. Accordingly, the matter is ripe for disposition. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1331.[3] For the reasons that follow, the Court GRANTS the Motion to Dismiss. (ECF No. 10.)

I. Procedural and Factual Background

Hall brought this suit when she moved to proceed *in forma pauperis* (the "Motion to Proceed"), (ECF No. 1), and submitted a proposed Complaint with her request, (ECF No. 1-1).

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[1] The DVA provided Hall with appropriate notice pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), as required by Eastern District of Virginia Local Rule 7(K).

[2] The Court, by its October 12, 2018 Order, granted Hall leave to file her response by this date. (*See* Oct. 12, 2018 Order, ECF No. 15.)

[3] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

On April 26, 2018, the Court provisionally granted Hall's Motion to Proceed and ordered Hall to file an Amended Complaint in compliance with the Court's instructions. (Apr. 26, 2018 Order, ECF No. 3.) On May 9, 2018, Hall filed the Amended Complaint. (ECF No. 4.) Having found that Hall complied with the April 26, 2018 Order, the Court directed the Clerk to file the Amended Complaint and arrange for service. (June 1, 2018 Order, ECF No. 5.)

Hall's Amended Complaint invokes the Federal Tort Claims Act (the "FTCA"), *see* 28 U.S.C. § 1346(b),[4] arguing that the DVA failed to properly diagnose and treat Hall's multiple ailments.[5] (Am. Compl. 1–3.)

On August 3, 2018, the DVA filed the Motion to Dismiss, asserting three separate grounds for dismissal. Hall did not file a response in this Court, but the DVA filed a Notice on August 16, 2018, informing the Court that Hall had sent the DVA correspondence directly ("Hall's Mailing," ECF No. 13-1). (Notice 1, ECF No. 13.) The DVA attached Hall's Mailing, which included a letter indicating Hall's intent to comply with the DVA's demand for a medical certification and supporting documents.

On October 12, 2018, the Court ordered Hall to explain her failure to respond to the Motion to Dismiss in a timely manner and to show cause why the Court should not grant the

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[4] This provision of the FTCA reads, in relevant part:

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, 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, 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. § 1346(b).

[5] For example, Hall claims the DVA "fail[ed] to diagnose Hypertension, Hemorrhage, and [a] Brain Aneurysm." (Am. Compl. 2.) Hall also provides a timeline that describes both her visits to the hospital and notes from her medical record. (Am. Compl. 2–3.)

Motion to Dismiss on the merits. (Oct. 12, 2018 Order, ECF No. 15.) The Court granted Hall leave to file her response within twenty days of the entry of the October 12, 2018 Order. On November 1, 2018, pursuant to the Court's order, Hall filed a response. The DVA did not reply.

II. Analysis: Motion to Dismiss

The DVA seeks dismissal on three separate grounds. First, the DVA argues that Hall named an improper defendant, because the FTCA waives the United States' sovereign immunity but does not subject the DVA to suit directly.[6] Second, the DVA argues that the Court lacks jurisdiction because Hall did not timely file her claims.[7] Finally, the DVA asks the Court to dismiss the Amended Complaint "should it be determined that [Hall] did not comply with the

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[6] This defect in the Amended Complaint does not constitute a fatal flaw. When a plaintiff improperly names a defendant in an FTCA suit, the Court may grant the plaintiff leave to amend her or his Complaint to properly name the United States as the proper party. *See, e.g., Webb v. Hamidullah*, 281 F. App'x 159, 161 n.4 (4th Cir. 2008) (noting that the district court properly named the United States as the proper defendant in its Judgment in an FTCA suit, even though the Amended Complaint and other filings did not expressly list the United States as a defendant); *see also Matter Forgods Prod. v. Salem Veteran's Affairs Med. Ctr.*, No. 7:14CV00091, 2014 WL 3965060, at *3 (W.D. Va. Aug. 12, 2014) (acknowledging the Court's authority to "grant[] the plaintiff leave to amend her complaint to add the United States as a defendant," though ultimately declining to do so).

Because the Court dismisses the Amended Complaint on other grounds, the Court will not grant Hall leave to amend.

[7] Specifically, 28 U.S.C. § 2401(b) requires a litigant to bring her or his claim "within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). The DVA represents that Hall's "request for reconsideration of the denial of her administrative claim was denied on April 13, 2017 and she received said denial on April 20, 2017." (Mem. Supp. Mot. Dismiss 7, ECF No. 11.) The DVA claims Hall "did not file her claim in this Court until over a year later, on May 9, 2018." (*Id.*)

But Hall originally sought to bring this suit well within the statute of limitations by filing her Motion to Proceed on August 11, 2017. The DVA does not cite to any statute or case law in support of its claim that May 9, 2018, the date of the filing of the Amended Complaint, controls for purpose of this statute.

Because Hall also fails to present any arguments related to the controlling date for the purpose of the statute of limitations, and because the Court dismisses the Amended Complaint on other grounds, the Court does not address this argument substantively.

mandatory expert certification requirements of [Virginia] Code [§] 8.01-20.1."[8] (Mem. Supp. Mot. Dismiss 7.) Because Hall failed to satisfy the statutory requirements to sustain this suit, the Court must dismiss the action.

To bring a medical malpractice suit in Virginia, a Plaintiff must obtain a written opinion signed by an expert stating that "based upon a reasonable understanding of the facts, the defendant . . . deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed."[9] Va Code. § 8.01-20.1. When a plaintiff serves a defendant with process, the complaint "shall be deemed a certification" that the plaintiff procured the necessary expert opinion *before* serving the defendant with the complaint.

Relevant here, Virginia Code § 8.01-20.1 states that "[u]pon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the

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[8] Virginia Code § 8.01-20.1 states, in relevant part:

> Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness . . . a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed.

Va. Code. § 8.01-20.1. The United States Court of Appeals for the Fourth Circuit has interpreted this code section to include complaints. *See, e.g.*, *Parker v. United States*, 475 F. Supp. 2d 594, 597 (E.D. Va. 2007), aff'd 251 Fed. App'x. 818 (4th Cir. 2007).

[9] An exception exists: a litigant need not obtain an expert certification "if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." Va. Code. § 8.01-20.1. Nothing in the record indicates that Hall's claims fall within this narrow exception, and Hall does not argue that it does.

defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested." Va. Code. § 8.01-20.1.

In a letter dated August 2, 2018, one day before the DVA filed its Motion to Dismiss, the DVA formally asked Hall to "provide, within 10 business days of . . . receipt of this request, a written Certification form" affirming that Hall obtained, before serving the DVA, "a written opinion signed by an expert certifying that the health care providers at the Veterans Affairs Medical Center deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." (Aug. 2, 2018 Letter 1, ECF No. 11-5.)

In the DVA's Motion to Dismiss, filed only one day after the DVA sent Hall their formal request, the DVA states "[a]llowing three days for mailing from August 2, the ten business day period will expire on August 17." (Mem. Supp. Mot. Dismiss 8, ECF No. 11.) The DVA received Hall's Mailing on August 16, 2018.

In its Notice, the DVA argues that the Court should nevertheless grant the Motion to Dismiss because Hall's Mailing "do[es] not satisfy the code's requirements[,] as they do not contain an expert certification that the health care providers at the Veterans Affairs Medical Center deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." (Notice 1, ECF No. 13.)

In her response filed in this Court, Hall represents that she is "[w]orking on other options[,] Legal/Medical proofing that are legitimate for the courts and work more in favor of this case, conducive for a fair trial as well." (Resp. 2, ECF No. 16.) Hall states that "no one[,] especially not any McGuire Hunter Holmes Medical Center, Department of Veterans Affairs doctors will do this letter in fear of losing their medical license I was told." (*Id.*) Hall argues

that the Virginia law requires "an admittance of [m]alpractice." (*Id.*) Hall misunderstands her burden.

The Virginia Code at issue does not require the DVA to admit malpractice. Instead, the statute requires a plaintiff to obtain a written, expert opinion stating that the defendant (1) deviated from the applicable standard of care and (2) the deviation was a proximate cause of the injuries claimed. *See* Va. Code. § 8.01-20.1. The statute does not require Hall to obtain this written, expert opinion from the DVA or from the medical staff that treated her originally. The statute does, however, require Hall to obtain this written, expert opinion (which could be from a different medical provider) *before* serving the defendant—here, the DVA—with process. Hall's Response implicitly acknowledges that she did not have a written, expert opinion that meets the statutory requirements to bring this suit at the time she served the DVA and that she still does not have a written, expert opinion that would comply with the statutory requirement.

Although the Court construes *pro se* pleadings liberally and provides *pro se* litigants with a fair and just opportunity to litigate their claims in court, the Court must dismiss the action. First, it appears Hall did not comply with the statutory requirements to sustain this FTCA suit by failing to obtain the necessary written, expert opinion prior to bringing this suit. *See* Va. Code. § 8.01-20.1. More importantly, Hall still has not obtained the necessary documentation—more than a year after bringing her original suit and over two months after the DVA put her on notice of the Virginia requirement.

The Court cannot justify granting Hall more opportunities to proceed with this suit. The Court has already granted Hall the opportunity to amend her Complaint once. The DVA put her on notice of Virginia's statutory requirements to bring and sustain this lawsuit. After missing the deadline to respond, the Court *sua sponte* granted Hall additional time to respond without

penalty. Although Hall complied with the Court's deadline, Hall's response cannot overcome the defects of her Amended Complaint. Specifically, the Court concludes that Hall failed to meet Virginia's statutory requirements, meaning that this suit cannot proceed. Mindful of Hall's status as a *pro se* litigant[10] and a disabled veteran, the Court dismisses the Amended Complaint without prejudice.

III. Conclusion

For the reasons stated above, the Court GRANTS the Motion to Dismiss, (ECF No. 10), and DISMISSES the Amended Complaint WITHOUT PREJUDICE. (ECF No. 4.)

Hall is ADVISED that, to the extent any right to appeal this decision might exist, written notice of appeal must be filed with the Clerk of Court within thirty (30) days of the date of entry hereof. Failure to file an appeal within that period may result in the loss of a right to appeal.

Let the Clerk send a copy of this Memorandum Order to all counsel of record and to Hall at her address of record.

It is so ORDERED.

/s/
M. Hannah Lauck
United States District Judge

Date: 11/8/18
Richmond, Virginia

[10] Hall describes herself as *pro se* "not by preference." (Resp. 1.) She states "lawyers are not free and [are] difficult to come by." (*Id.* 2.) Still, no right exists to counsel in a civil lawsuit, and a *pro se* litigant must still make her or his case.