

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 27 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SUSANA E. VERDUZCO,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

KIMBERLY A. MULLIGAN, M.D.,

Defendant.

No. 20-15255

D.C. No. 2:19-cv-04745-DWL
District of Arizona,
Phoenix

ORDER

Before: CANBY, GOULD, and WATFORD, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the February 14, 2020 notice of appeal was not filed within 60 days after the district court's post-judgment order entered on November 15, 2019. *See* 28 U.S.C. § 2107(b); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SUSANA E. VERDUZCO,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

KIMBERLY A. MULLIGAN, M.D.,

Defendant.

No. 20-15255

D.C. No. 2:19-cv-04745-DWL
District of Arizona,
Phoenix

ORDER

Before: CANBY, GOULD, and WATFORD, Circuit Judges.

Appellant's motion for an extension of time seeks reconsideration of the court's February 27, 2020 order dismissing this appeal for lack of jurisdiction. The motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10; *see also* Fed. R. App. P. 26(b)(1) (court of appeals may not extend time to file notice of appeal except as provided in Fed. R. App. P. 4); *Bowles v. Russell*, 551 U.S. 205 (2007) (court lacks authority to create equitable exceptions to jurisdictional requirement of timely notice of appeal).

No further filings will be entertained in this closed case.



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

ly C. Dwyer
rk of Court

April 21, 2020

To: Susana E. Verduzco

From: Molly C. Dwyer, Clerk of Court
By: Stephanie M. Lee, Deputy Clerk

Re: Receipt of a Deficient Brief of Appellant on 04/21/2020

USCA No. 20-15255 Susana Verdúzco v. USA, et al

The opening brief cannot be filed for the following reason(s):

- *Case closed: This case has been dismissed. No further action is necessary.*
-

APPENDIX B

1 **WO**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Susana E, Verduzco,

10 Plaintiff,

11 v.

12 United States of America,

13 Defendant.
14

No. CV-19-04745-PHX-DWL

ORDER

15 Pending before the Court are (1) a motion to dismiss filed by the United States (Doc.
16 11) and (2) a motion for reconsideration, filed by *pro se* Plaintiff Susana E. Verduzco, of
17 an earlier order denying Plaintiff's motion for sanctions (Doc. 20). For the following
18 reasons, the motion to dismiss will be granted and the motion for reconsideration will be
19 denied.

20 **BACKGROUND**

21 On May 22, 2019, Plaintiff initiated this lawsuit by filing a complaint in the
22 Maricopa County Superior Court. (Doc. 1-3 at 20-52.) In a nutshell, the complaint asserts
23 a medical malpractice claim against Kimberly A. Mulligan, M.D. ("Mulligan"). (*Id.*)

24 On July 3, 2019, Plaintiff filed a motion for sanctions against defense counsel. (Doc.
25 1-4.)

26 On July 17, 2019, the United States removed this action to federal court on the
27 ground that "it is an action against a United States Department of Veterans Affairs
28 employee who was acting within the course and scope of her employment at or around the

1 time of the incident in question.” (Doc. 1.)

2 On July 18, 2019, the United States filed a notice of substitution—substituting itself
3 for Mulligan as the defendant—because “[t]he sole cause of action of negligence within
4 Plaintiff’s Complaint is a state law cause of action sounding in tort,” the Federal Tort
5 Claims Act “provides that a suit against the United States shall be the exclusive remedy for
6 persons with claims for damages resulting from the negligent or wrongful acts or omissions
7 of federal employees taken within the scope of their office or employment,” and the United
8 States Attorney’s Office has certified that, at the time of the conduct alleged in the
9 Complaint, Mulligan “was acting within the scope of her federal employment” as an
10 employee of the United States Department of Veterans Affairs (“VA”). (Doc. 5.)

11 On July 18, 2019, the United States separately filed a notice informing the Court
12 that, at the time of removal, Plaintiff’s motion for sanctions was pending. (Doc. 6.)

13 On July 19, 2019, the Court issued an order denying the sanctions motion. (Doc.
14 9.)

15 On July 24, 2019, the United States filed a motion to dismiss due to Plaintiff’s
16 failure to exhaust administrative remedies. (Doc. 11.)

17 On July 31, 2019, Plaintiff filed a motion for subpoena. (Doc. 15.) In that motion,
18 Plaintiff stated that she wishes to submit a subpoena to the “Phoenix VA Health Care
19 System’s Integrated Ethics Program Manager” so she can obtain a copy of “Defendant’s
20 privileging file.” (*Id.* at 2.) This file, Plaintiff argued, would help her overcome the
21 exhaustion issue because it would reveal that she filed an ethics/malpractice complaint
22 against Mulligan more than six months earlier. (*Id.*)

23 On August 2, 2019, the Court issued an order denying Plaintiff’s subpoena request.
24 (Doc. 17.) This order provided in relevant part as follows:

25 Plaintiff’s motion seems to be predicated on the notion that the filing of any
26 sort of complaint with the VA—such as an ethics complaint—will trigger the
27 six-month clock for exhaustion under the FTCA. This is inaccurate. The
28 FTCA provides that an action shall not be instituted against the United States
“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

1 writing and sent by certified or registered mail.” 28 U.S.C. § 2675(a)
 2 (emphases added). The Ninth Circuit has further explained that, to qualify
 3 as a “claim,” a submission to an agency must contain both “(1) a written
 4 statement sufficiently describing the injury to enable the agency to begin its
 5 own investigation, and (2) a sum certain damages claim.” *Warren v. U.S.*
Dep’t of Interior Bureau of Land Management, 724 F.2d 776, 780 (9th Cir.
 1984) (en banc).

6 Here, Plaintiff has not alleged that the ethics complaint she submitted to the
 7 VA more than six months ago included a “sum certain damages claim.” If
 8 the complaint didn’t include such a request, it will be meaningless for
 9 exhaustion purposes. Under these circumstances, the Court will not
 10 authorize the issuance of a subpoena to obtain a medical ethics committee’s
 11 file that contains sensitive and potentially privileged information.

12 Plaintiff may, however, resubmit a new subpoena request if she has a good-
 13 faith basis for asserting that her ethics complaint included a “sum certain
 14 damages claim” (which, to be clear, is different from an open-ended or vague
 15 demand for compensation). But any future motion should be limited to a
 16 request for a copy of the ethics complaint itself. Plaintiff has not explained
 17 why she needs the ethics committee’s entire file to mount a defense to the
 18 failure-to-exhaust claim.

19 (*Id.* at 3-4, footnote omitted).

20 On August 13, 2019, Plaintiff filed a “motion to re-consider sanctions.” (Doc. 20.)

21 DISCUSSION

22 I. Motion To Dismiss

23 The United States moves to dismiss based on Plaintiff’s failure to exhaust
 24 administrative remedies. (Doc. 11.) Specifically, the United States has submitted evidence
 25 showing that Plaintiff didn’t submit an administrative claim to the VA until May 21, 2019
 26 (Doc. 11-1), which was only one day before she filed this lawsuit, and that the VA hadn’t
 27 ruled upon that claim by the time this case was initiated. The United States therefore argues
 28 that exhaustion is lacking under 28 U.S.C. § 2675(a) and *D.L. v. Vassilev*, 858 F.3d 1242
 (9th Cir. 2017). (Doc. 11 at 3.)

In her opposition, Plaintiff argues she will be able to prove exhaustion once she is
 allowed to submit a subpoena to the VA, because the subpoena will result in the production

1 of documents proving that she actually submitted a medical malpractice claim to the VA
2 “sometime between November to December 2018 or between January or February 2019.”
3 (Doc. 16 at 1-2.)

4 In its reply, the United States argues that Plaintiff can’t overcome the exhaustion
5 hurdle because the document she initially submitted to the VA (before filing her formal
6 administrative claim in May 2019) didn’t contain a “sum certain damages claim” as
7 required by 28 U.S.C. § 2675(a). (Doc. 21.) In support of this argument, the United States
8 has provided a declaration from a VA official. (Doc. 21-1.) The declaration states that the
9 official met with Plaintiff on March 5, 2019 and that Plaintiff submitted a written document
10 during that meeting. (*Id.* ¶¶ 3-5.) A copy of that document is provided as an attachment
11 to the declaration. (*Id.* at 5-10.) Although the initial paragraph states that “I am writing to
12 inform you I am in the process of filing a civil suit against some of the staff members
13 [including Mulligan] seeking compensation for the life-changing irreversible brain injury
14 that resulted from the staff’s willful blindness, negligence, breach of good faith,
15 indifference, questionable medical record entries and misrepresentation of facts” (*id.* at 5),
16 the document does not contain a demand for any specific amount of damages.

17 The Court agrees with the United States that dismissal is required here due to
18 Plaintiff’s failure to exhaust administrative remedies. In *Vassilev*, the Ninth Circuit
19 explained that “[b]efore a plaintiff can file an FTCA action in federal court, . . . he must
20 exhaust the administrative remedies for his claim. An administrative claim is deemed
21 exhausted once the relevant agency finally denies it in writing, or if the agency fails to
22 make a final disposition of the claim within six months of the claim’s filing. The FTCA’s
23 exhaustion requirement is jurisdictional and may not be waived.” 858 F.3d at 1244. Here,
24 Plaintiff didn’t satisfy the exhaustion requirement through her submission of a formal
25 administrative claim on May 21, 2019 because that claim was submitted only one day
26 before she filed this lawsuit. Additionally, Plaintiff didn’t satisfy the exhaustion
27 requirement through her submission of a letter to a VA official in March 2019 because that
28 letter didn’t include a “sum certain damages claim.” *Warren v. U.S. Dep’t of Interior*

1 *Bureau of Land Management*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc).

2 II. Motion For Reconsideration

3 As noted, on July 19, 2019, the Court issued an order denying Plaintiff's motion for
4 sanctions against defense counsel. (Doc. 9.) This order explained that, "[a]lthough
5 Plaintiff accuses defense counsel of committing 'judicial interference in due process,
6 breach of fiduciary duties and deliberate misrepresentations of 22 U.S.C. § 702,
7 Malpractice Protection,' the factual summary contained in the motion shows that defense
8 counsel was simply trying to meet-and-confer in an attempt to avoid unnecessary motions
9 practice." (*Id.*, citation omitted.)

10 Plaintiff has now filed a motion for reconsideration of this order. (Doc. 20.) In this
11 motion, Plaintiff accuses defense counsel of "removing this case as a diversionary tactic"
12 and "submit[ing] a defective certification affirming that [Mulligan] was 'acting within the
13 scope of her federal employment . . . at the time of the incident.'" (*Id.* at 1-7.)¹

14 Plaintiff's request for reconsideration will be denied. Motions for reconsideration
15 are disfavored and should be denied "absent a showing of manifest error or a showing of
16 new facts or legal authority that could not have been brought to [the Court's] attention
17 earlier with reasonable diligence." LRCiv. 7.2(g). Reconsideration is an "extraordinary
18 remedy" that is available only in "highly unusual circumstances." *Kona Enters., Inc. v.*
19 *Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted). No such
20 extraordinary circumstances are present here. The United States properly removed this
21 case from state court and properly filed a certification that Mulligan was acting within the
22 scope of her federal employment at the time of the conduct alleged in the complaint.
23 Plaintiff's belief that Mulligan acted negligently and/or engaged in medical malpractice
24 does not mean that Mulligan was acting outside the scope of her employment as a doctor.
25 *Cf. MacDonald v. Chaney*, 2007 WL 274313, *2 (D. Ariz. 2007) (rejecting plaintiff's
26 argument that "committing malpractice is not within the scope of the employee's conduct"
27 under Arizona law).

28 ¹ Plaintiff raised similar arguments in her "Response to MIDP Project General Order"
(Doc. 13) and her "Response to Removal of Case" (Doc. 14).

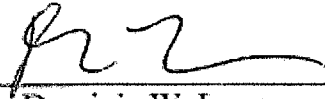
1 Accordingly, **IT IS ORDERED** that:

2 (1) The United States' motion to dismiss (Doc. 11) is **granted**;

3 (2) Plaintiff's motion for reconsideration (Doc. 20) is **denied**; and

4 (3) The Clerk of Court shall enter judgment accordingly and terminate this
5 action.

6 Dated this 24th day of September, 2019.

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10 _____
11 Dominic W. Lanza
12 United States District Judge
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APPENDIX C

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 3/23/20
AMY M. WOOD,
CLERK
BY: RB

SUSANA E. VERDUZCO,)
) Court of Appeals
) Division One
Petitioner,) No. 1 CA-SA 20-0063
)
v.) Maricopa County
) Superior Court
THE HONORABLE SHERRY STEPHENS,) No. CV2019-007642
)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
KIMBERLY A. MULLIGAN, M.D.,)
)
Real Party in Interest.)
)

ORDER DECLINING SPECIAL ACTION JURISDICTION

The court, Presiding Judge Samuel A. Thumma, Judge Randall M. Howe and Chief Judge Peter B. Swann, has considered the petition for special action filed by Petitioner. After consideration,

IT IS ORDERED, in the exercise of its discretion, the court declines to accept jurisdiction of the special action.

IT IS FURTHER ORDERED vacating this court's previous order in its entirety.

/s/

Samuel A. Thumma, Presiding Judge



AMY M. WOOD
CLERK OF THE COURT

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

Phone: (602) 452-6700

Fax: (602) 452-3226



DIVISION ONE
FILED: 04/27/2020
AMY M. WOOD,
CLERK
BY: DN

April 27, 2020

Jeff Fine, Clerk
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

Dear Mr. Fine:

RE: 1 CA-SA 20-0063

VERDUZCO v. HON STEPHENS/MULLIGAN
Maricopa County Superior Court
CV2019-007642

Certified copy of ORDER declining jurisdiction of special action is included herewith in the above entitled and numbered cause.

There are no physical record items to be returned to your Court.

Any electronically filed materials will be retained by the Court of Appeals.

AMY M. WOOD, CLERK

By dtn
Deputy Clerk

Enclosures (as noted)

c:

Susana E Verduzco
Khanrat Piensook
Hon Sherry K Stephens

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 5/8/20
AMY M. WOOD,
CLERK
BY: RB

SUSANA E VERDUZCO,) Court of Appeals
) Division One
Plaintiff/Appellant,) No. 1 CA-CV 20-0236
)
v.) Maricopa County
) Superior Court
KIMBERLY A MULLIGAN,) No. CV2019-007642
)
Defendant/Appellee.)
)
)
_____)

ORDER DISMISSING APPEAL

The court has reviewed the record pursuant to its duty to determine whether it has jurisdiction over this appeal. See *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465 (App. 1997).

The underlying action was removed to the United States District Court for the District of Arizona. The superior court subsequently declined to take action on a motion to correct an error due to the removal. Appellant filed a notice of appeal.

The order declining to take action is not substantively appealable because it does not resolve any claims. See A.R.S. § 12-2101(A); and *Pulaski v. Perkins*, 127 Ariz. 216, 619 P.2d 488 (App. 1980). Therefore,

IT IS ORDERED dismissing the appeal for lack of jurisdiction.

_____/s/_____
Melina Brill, Judge Pro Tempore

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-007642

01/27/2020

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

SUSANA E VERDUZCO

SUSANA E VERDUZCO
735 E PIERCE ST APT 8
PHOENIX AZ 85006

v.

KIMBERLY A MULLIGAN

KIMBERLY A MULLIGAN
1740 W. ADAMS ST.
PHOENIX AZ 85007

JUDGE STEPHENS

MINUTE ENTRY

The Court has received a Motion to Correct Clerical Error filed January 24, 2020. This
case was removed to federal court by Defendants on July 17, 2019. This Court has no
jurisdiction to hear this motion. Accordingly, no action will be taken on the motion.

APPENDIX M



IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 04/30/2020
AMY M. WOOD,
CLERK
BY: DN

SUSANA E VERDUZCO,) Court of Appeals
) Division One
Plaintiff/Appellant,) No. 1 CA-CV 20-0236
)
v.) Maricopa County
) Superior Court
KIMBERLY A MULLIGAN,) No. CV2019-007642
)
Defendant/Appellee.)
)
)
)

O R D E R

The record contains a superior court order finding that Appellant is eligible for a waiver of fees. Pursuant to A.R.S. 12-302(I), IT IS ORDERED the waiver remains in effect unless there is a change in Appellant's financial circumstances.

/s/ Amy M. Wood
CLERK OF THE COURT

A copy of the foregoing
was sent to:

Susana E Verduzco
Khanrat Piensook
Hon Jeff Fine

**Additional material
from this filing is
available in the
Clerk's Office.**