APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Richard Balter, **Plaintiff,**	)	
v.	)	**1:17cv1188 (AJT/JFA)**
United States of America, **Defendant.**	)	

MEMORANDUM OPINION

Richard Balter, a federal inmate proceeding pro se, has filed a complaint pursuant to the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 2671 et seq.[1] Defendant has filed a Motion for Partial Dismissal and Partial Summary Judgment, along with a memorandum of law and exhibits in support thereof. Dkt. Nos. 36-38. Plaintiff has filed an opposition, as well as an affidavit and Statement of Disputed Facts. Dkt. Nos. 42-44. Defendant filed a reply. Dkt. No. 45. This matter is now ripe for adjudication. For the reasons stated below, defendant's motion will be granted, and this matter will be dismissed.

I. Background

Plaintiff is an inmate incarcerated at FCC Petersburg. Amend. Comp. ¶ 5. On March 24, 2015, plaintiff fell in the shower because another inmate left soap on the shower floor and plaintiff, who is blind, did not know the soap was there. Id. ¶ 8, Ex. 1. As a result, plaintiff twisted his ankle. Id. ¶ 8. In June and July of 2015, he went to see the medical staff every day regarding severe pain in his lower back and right leg, as well as numbness in his right foot. Id. ¶

[1] Although plaintiff's complaint may be liberally construed to raise other claims, he has repeatedly stated that he is only raising claims pursuant to the FTCA. See, e.g., Dkt. No. 4; Pl.'s Opp. at 7-8.

9. Plaintiff was evaluated by Physician Assistant Hall on July 20 and 23, 2015, and prescribed plaintiff 800 milligrams of Ibuprofen three times a day for 180 days. Id. ¶ 11, Exs. 2-3.

A radiology report of a lumbar spine and pelvic x-ray dated July 27, 2015, states that the findings are "negative except for moderate degenerative disc disease" and "mild osteoarthritis of the hips." Id. ¶ 14, Exs. 6-7. That same day, plaintiff was evaluated by Physician Assistant Hall. Id. at Ex. 8. On July 28, 2015, Dr. DiCocco prescribed acetaminophen with codeine, to be taken twice a day, and gabapentin, also to be taken two times a day, each for fourteen days. Id. ¶ 13. During a period of four to six weeks, plaintiff was prescribed "Ibuprofen 700 mg., Tylenol Acetaminophen/Codine [sic] 300/30 mg., Prednisone 5 mg., Percocet, Oxoxodone [sic] 5 mg., Codine [sic], Gabapentin 600 mg., Indomethocin 50 mg., Morphine Sulfate 20 mg., Ketorolac Tromethamine Injection 30 mg., Naproxen 250 mg., [and] Baclofen 10 mg." Id. ¶ 60, Exs. 9-10.

On August 5, 2015, Dr. DiCocco noted that plaintiff's pain and numbness "raise[] the question of spinal cord/lumbosacral compromise" and ordered that plaintiff be scheduled for a lumbar and sacral MRI on "an urgent basis if not emergent basis." Id. ¶ 14, Ex. 4. This MRI was ordered to look for evidence of "HNP or neoplastic process or trauma." Id. ¶ 14. The MRI was never scheduled. Id. ¶ 19. On August 6, 2015, plaintiff's morphine was increased to 40 milligrams daily. Id. "A few days prior to August 9, 2015," plaintiff was in severe pain, however, an unnamed lieutenant "made a diagnosis causing" plaintiff to not be seen by the medical staff. Id. ¶¶ 55-57.

On August 9, 2015, plaintiff was in severe pain, vomiting, incontinent, confused, and unresponsive to verbal stimuli. Id. ¶¶ 63, 67. The medical staff ordered that plaintiff be taken to the John Randolph Medical Center because of a suspected drug overdose. Id. ¶¶ 58, 68, 70, Ex. 19.

While plaintiff was at the hospital, an August 10, 2015 MRI of his lower spine revealed the following:

- L2-3 level: minor bulge and mild facet arthrosis without central canal comprise or neural foraminal narrowing.
- L3-4 level: minor bulge and mild facet arthrosis and mild to moderate central canal stenosis.
- L4-5 level: right paracentral protrusion with large disc protrusion with inferior migration that results in severe central canal stenosis with moderate bilateral neural foraminal narrowing.
- L5-S1 level: minor bulge and mild facet arthrosis without significant central canal compromise or neural foraminal narrowing.

Id. at Ex. 11. The findings were that plaintiff had a herniated disc and compression fracture of the LS spine. Id. ¶ 30, Ex. 13. Finally, plaintiff was found to be in acute renal failure. Id. ¶ 29, Ex. 12.

On August 14, 2015, plaintiff underwent spinal surgery. Id. ¶ 31, Ex. 14. A few days after the surgery, plaintiff informed the surgeon that his right leg and foot were numb. Id. ¶ 42. On September 28, 2015, Dr. Winbush noted that plaintiff had changes to the vertebroplasty at L5 and degenerative changes of the spine. Id. ¶ 32, Ex. 15. Several months after the surgery, plaintiff informed Dr. Prakash that his right leg and foot were numb, and an MRI was approved on December 3, 2015, however, the MRI did not occur until thirteen months later. Id. ¶ 43-45, Ex. 16. The MRI revealed a pinched nerve; however, plaintiff has been told that nothing can be done until he is evaluated by the orthopedic surgeon. Id. ¶ 47. As of March 15, 2017, plaintiff had not seen the orthopedic surgeon. Id. ¶ 48. Regarding his spinal injury, the staff at Petersburg were negligent in (1) assuming it could be resolved with pain medication and (2) failing to order the emergent MRI. Id. ¶¶ 33-34.

II. Motion to Dismiss

A. Standard of Review

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a complaint or its claims may be dismissed for lack of subject-matter jurisdiction. When a defendant challenges the existence of subject-matter jurisdiction, courts may "regard the pleadings as mere evidence on the issue [ ] and may consider evidence outside [those] pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir.1991); see Virginia v. United States, 926 F.Supp. 537, 540 (E.D.Va.1995) (noting that, upon a defendant's challenge to the existence of subject-matter jurisdiction, the court is to "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject[-]matter jurisdiction exists"). As the party asserting jurisdiction, it is plaintiff's burden to prove that federal jurisdiction over his claim is proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir.1982).

B. Analysis

Generally, the United States and its agencies enjoy sovereign immunity from suit unless Congress has explicitly abrogated such immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). The FTCA provides a limited waiver of that immunity insofar as it allows the United States to be held liable "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 ... 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)(2); see Suter v. United States, 441 F.3d 306, 310 (4th Cir. 2006), cert. denied, 127 S.Ct. 272 (2006). "[A] waiver of the Government's sovereign immunity will be strictly construed, in

terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted).

Before a plaintiff can bring an FTCA claim to federal court, however, he must have exhausted his claim by presenting it to the appropriate federal agency, and the agency must have denied the claim in writing. 28 U.S.C. § 2675(a). The claim must be presented to the appropriate agency within two years of the accrual of the claim, or it is "forever barred." 28 U.S.C. § 2401(b). To properly "present" a claim to a federal agency, the plaintiff must provide a written statement "sufficiently describing the injury to enable the agency to begin its own investigation," GAF Corp. v. United States, 818 F.2d 901, 905 (D.C. Cir. 1987), as well as provide "a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death," 28 C.F.R. § 14.2(a); see also Ahmed v. United States, 30 F.3d 514, 516-17 (4th Cir. 1994). Exhaustion of remedies is a jurisdictional requirement, and a court may not entertain an FTCA suit based on an unexhausted claim. See McNeil v. United States, 508 U.S. 106, 113 (1993); Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986).

Since 2015, plaintiff has only filed one administrative tort claim related to the provision of medical care. Def.'s MSJ, Harris Decl. More specifically, on October 25, 2016, plaintiff filed a Standard Form 95 claiming "negligent malpractice and failure/refusal by [Petersburg] medical staff to provide adequate, effective, competent, effective [sic] and timely medical care for spine illness/injury/conditions rendering me disabled and in severe pain and distress." Id. at Att. 4. Thus, defendant asserts, plaintiff's claims based on (1) the alleged drug overdose, (2) any actions taken by non-medical staff, and (3) any actions taken after October 2016, are unexhausted.

Plaintiff does not dispute that he did not properly exhaust the claims listed above, however, he asserts that his lack of exhaustion is not fatal to his claims for two reasons. First, plaintiff argues that he did not need to exhaust the unexhausted claims because the administrative remedies were "unavailable" pursuant to the standard set out in Ross v. Blake, 136 S.Ct. 1850

(2016). Pl.'s Opp. at 4-6. In Ross, the Court held that, under the Prison Litigation Reform Act ("PLRA"), "a prisoner need exhaust only 'available' administrative remedies," and then laid out three situations in which administrative remedies would be considered "unavailable." Ross, 136 S. Ct. at 1856, 1859-60. The Court's analysis was based on the statutory language of 42 U.S.C. § 1997(e)a, which "contains one significant qualifier: the remedies must indeed be 'available' to the prisoner." Id.

Plaintiff's Ross argument fails because Ross does not apply to FTCA cases, which must be exhausted pursuant to 28 U.S.C. § 2675(a), not § 1997. See Mendoza v. United States, 661 F. App'x 501, 502 (9th Cir. 2016) ("We reject [plaintiff's] contention that exhaustion under the Prison Litigation Reform Act satisfies the requirement to exhaust under the FTCA."); West v. United States, 2018 WL 3384909, at *7 (S.D.W. Va. June 13, 2018) ("[T]he exhaustion requirements concerning FTCA and Bivens actions differ.") (citations omitted), report and recommendation adopted, 2018 WL 3381418 (S.D.W. Va. July 11, 2018); Elliott v. Wilson, 2017 WL 1185213, at *13 (D. Minn. Jan. 17, 2017) ("The FTCA imposes an exhaustion requirement separate from that found in § 1997e(a).") (citations omitted), report and recommendation adopted, 2017 WL 1180422 (D. Minn. Mar. 29, 2017).

In addition, Ross should not be extended to apply to FTCA claims because § 2675(a) does not contain the same, or even similar language, limiting exhaustion only to administrative remedies that are available, as provided for in § 1997. See 28 U.S.C. § 2675(a) ("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.").

Thus, assuming without deciding that administrative remedies were "unavailable," it would not excuse plaintiff's lack of exhaustion.

Plaintiff's second argument is that his claims should be deemed exhausted because he brought his problems to the attention of prison officials. Pl.'s Opp. at 6-7. At the same time, plaintiff properly states that "[l]itigants must strictly comply with the procedural requirements of the FTCA."[2] Id. at 6. Plaintiff never filed a claim requesting a sum certain regarding his claims based on (1) the alleged drug overdose, (2) any actions taken by non-medical staff, and (3) any actions taken after October 2016. Because plaintiff did not strictly comply with the FTCA's exhaustion requirements, these claims cannot be deemed exhausted.

Accordingly, plaintiff's claims based on (1) the alleged drug overdose, (2) any actions taken by non-medical staff, and (3) any actions taken after October 2016 are unexhausted and will be dismissed for lack of jurisdiction.

III. Motion for Summary Judgment

A. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party," and "[a] fact is material if it might affect the outcome of the suit under the governing law." Variety Stores v. Wal-Mart Stores, Inc., 888 F.3d 651, 659 (4th Cir. 2018). Once the moving party has met its burden to show that it is entitled to judgment as a matter of law, the nonmoving party "must show that there is a genuine dispute of material fact for trial... by offering sufficient proof in the form of admissible evidence." Id. (quoting Guessous v.

[2] It is also noted that plaintiff's references to the exhaustion requirements under the PLRA are inapposite as the PLRA exhaustion requirements differ from the FTCA exhaustion requirements.

Fairview Prop. Invs., LLC, 828 F.3d 208, 215 (4th Cir. 2016)). In evaluating a motion for summary judgment, a district court should consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences from those facts in favor of that party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

B. Analysis

As previously stated, the FTCA provides a limited waiver of the United States' sovereign immunity to allow actions seeking monetary relief for injuries "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." 28 U.S.C. § 1346(b)(1). The government is only "liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and the extent of its liability is determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1). Here, where plaintiff's allegations surround events taking place in Virginia, Virginia law governs the manner and extent to which the United States may be liable as a defendant. Accordingly, the Virginia Medical Malpractice Act ("VMMA"), Va. Code §§ 8.01-581.1, et seq., provides the framework upon which to analyze plaintiff's FTCA claims. See Starns v. United States, 923 F.2d 34 (4th Cir. 1991) (applying VMMA in FTCA action involving federally operated health care providers in Virginia).

> As a threshold matter, the Virginia Medical Malpractice Act ("VMMA"), Va. Code §§ 8.01-581.1, et seq., requires that a party alleging medical malpractice obtain an expert certification of merit prior to serving process upon defendant. Va. Code § 8.01-20.1. Significantly, the failure to comply with this certification requirement is grounds for dismissal. Equally significant is that the VMMA provides only a limited exception to the certification requirement; the requirement may be excused only where "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.

Parker v. United States, 475 F. Supp. 2d 594, 596-97 (E.D. Va. Feb. 1, 2007) (citations omitted), aff'd, 251 F. App'x 818 (4th Cir. 2007). "This exception applies only in 'rare instances.'"

Baxter v. United States, 2016 WL 3618363, at *4 (E.D. Va. July 6, 2016) (quoting Beverly Enters.–Va., Inc. v. Nichols, 441 S.E.2d 1, 3 (Va.1994)).

Plaintiff does not dispute that he has not yet obtained an expert certification. Rather, he argues that he was not required to obtain one because the evidence clearly establishes that defendant's negligence was the proximate cause of him not receiving an MRI, as well as his pain and "permanent damage." Pl's. Opp. at 11. Plaintiff also states that defendants knew or should have known that a delay in the MRI might cause additional damage and pain. Id. at 11-12.

Plaintiff began to complain of pain in June 2015, and was evaluated by medical staff on July 20 and 23, 2015, at which point he was prescribed Ibuprofen. In addition, plaintiff was evaluated on July 27, 2015, and had a lumbar and pelvic x-ray that same day. The next day, plaintiff was prescribed pain medication. On August 5, 2015, an emergent lumbar MRI was requested, and even though it was not scheduled by the Petersburg medical staff before plaintiff went to the hospital on August 9, 2015, one was performed at the hospital on August 10, 2015.

"Where... a plaintiff calls into question a quintessential professional medical judgment, the matter can be resolved only by reference to expert opinion testimony." Parker, 475 F.Supp.2d at 597 (internal quotation marks and citation omitted). A physician's decision to prescribe or recommend certain courses of treatment for a patient's pain is a question of professional medical judgment, and an expert certification is therefore required to challenge it. See Id. at 597 ("[I]t is difficult to imagine that a factfinder, equipped solely with an average person's common knowledge and experience, may appropriately judge, inter alia, (i) what actions the prison medical staff should have taken when plaintiff complained of headaches... and (iii) what the proper course of treatment was for plaintiff's condition."). In addition, whether a delay of five days in performing an emergent MRI breached the standard of care is not within the common knowledge of the jury. See Bond v. United States, 2008 WL 4774004, at *3 (E.D. Va. Oct. 27, 2008) (holding VMMA certification required for plaintiff's claim that two-month delay

in examination of finger caused by defendants constituted improper treatment). Finally, the existence of plaintiff's other underlying medical concerns only renders the decision on when or what type of treatment to provide further outside the realm of a juror's common knowledge. For these reasons, plaintiff cannot escape the expert certification requirement.

Plaintiff has informed the Court that he is in the process of seeking an expert certification. However, submitting the required certification at this point in this matter would not comply with the requirements of the VMMA. "If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions ... and may dismiss the case with prejudice." Va. Code § 8.01-20.1. Because plaintiff had not obtained an expert certification at the time this matter was served on defendant, and defendant is only "liable in the same manner and to the same extent as a private individual under like circumstances," this matter will be dismissed.

C. Procedural Arguments

Plaintiff asserts several procedural reasons why he believes summary judgment should not be granted in this matter. First, plaintiff claims that, "in this district summary judgment cannot be granted prior to discovery," and that, in general, discovery is essential prior to granting of summary judgment. Pl.'s Opp. at 9-10. Plaintiff is incorrect that summary judgment cannot be granted in this district without discovery. In addition, Federal Rule of Civil Procedure 56(d) allows for discovery "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Here, where the only issue presented on summary judgment is whether plaintiff has obtained an expert certification as required by the VMMA, he has not established that he is unable to present facts essential to justifying his opposition. Therefore, discovery is not necessary prior to ruling on defendant's Motion for Summary Judgment because plaintiff has not "specified legitimate needs

for further discovery." Strag v. Bd. of Trustees, Craven Cmty. Coll., 55 F.3d 943, 953 (4th Cir. 1995) (alteration and citation omitted).

Second, plaintiff contends that Local Rule 56(a) states that no motion for summary judgment "shall be considered until the completion of the briefing schedule," and because no briefing schedule has been conducted in this matter, summary judgment cannot be granted. Pl.'s Opp. at 9. Plaintiff is incorrect, as Local Rule 56(a) contains no such restriction.

Third, plaintiff asserts that the court could appoint an expert pursuant to Federal Rule of Evidence 706. Because, for the reasons stated above, any expert certification obtained at this time would not comply with the requirements of the VMMA, appointing an expert at this time would not prevent granting of summary judgment.

Fourth, plaintiff asserts that defendant's motion is actually a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and as such, it fails because Virginia Code § 8.01-20.1 is not jurisdictional. Plaintiff is incorrect that defendant's motion is a Rule 12(b)(1) motion, thus his jurisdictional argument need not be addressed.

Finally, plaintiff claims that defendant's motion is actually a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and therefore, summary judgment cannot be granted. In support of its motion, defendant relies on plaintiff's certification that he did not obtain a written opinion from an expert medical witness, but rather that his case falls under the common knowledge exception in Virginia Code § 8.01-20.1. Def.'s MSJ at Ex. 3. Because this document is not part of plaintiff's complaint, defendant properly filed a motion for summary judgment.

IV. Constitutionality of Virginia Code § 8.01-20.1

Plaintiff asserts that Virginia Code § 8.01-20.1 is "a complete block to access to the courts." Amend. Compl. ¶ 88. In other words, plaintiff appears to argue that Virginia Code § 8.01-20.1 is unconstitutional because it denied him his right to access the courts. Inmates have a

right to meaningful access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977)); Lewis v. Casey, 518 U.S. 343 (1996). To state a claim for denial of access to the courts, plaintiff must establish that he suffered an "actual injury or specific harm." Hause v. Vaught, 993 F.2d 1079, 1084-85 (4th Cir. 1993). Actual injury requires the inmate "to demonstrate that his nonfrivolous, post-conviction or civil rights legal claim has been frustrated or impeded." Jackson v. Wiley, 352 F. Supp. 2d 666, 679-80 (E.D. Va. 2004) (citing Lewis v. Casey, 518 U.S. 343 (1996))

> In other words, Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Lewis, 518 U.S. at 355. Because plaintiff is neither attacking his sentence nor asserting a claim that his civil rights were violated, any alleged impairment of his ability to pursue his FTCA claim is not a violation of his constitutional right to access the courts. See also Walker v. Zenk, 323 F. App'x 144, 147 (3d Cir. 2009) ("[A]s the District Court ... noted, because [plaintiff] is a prisoner, the injury requirement is not satisfied by just any type of frustrated legal claim. A prisoner must allege that official acts thwarted his non-frivolous challenge to his conviction or prison conditions. [Plaintiff's] tort claim falls into neither category of legal challenges. Accordingly, he did not state a claim for denial of access to the courts.") (internal quotation marks and citations omitted).

V. Conclusion

For the reasons stated above, defendant United States of America has established that certain claims asserted by plaintiff are unexhausted, and that defendant is entitled to summary judgment as to the remaining claim. Therefore, defendant's motion will be granted. In addition, plaintiff has not established that Virginia Code § 8.01-20.1 violates his First Amendment right to

access the courts. Finally, any pending motions will be denied, as moot. An appropriate Order shall issue.

Entered this 27th day of March 2019.

Alexandria, Virginia

/s/
Anthony J. Trenga
United States District Judge

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6741

RICHARD BALTER,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-01188-AJT-JFA)

Submitted: December 19, 2019 Decided: December 23, 2019

Before NIEMEYER, AGEE, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Richard Balter, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Balter appeals the district court's order denying relief on his complaint filed pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Balter v. United States*, No. 1:17-cv-01188-AJT-JFA (E.D. Va. Mar. 27, 2019). 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

FILED: March 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6741
(1:17-cv-01188-AJT-JFA)

RICHARD BALTER

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Agee, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

(A) *Federal Tort Claims Act*

28 U.S. Code § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409ato quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62; May 24, 1949, ch. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, § 50(b), 65 Stat. 727; July 30, 1954, ch. 648, § 1, 68 Stat. 589; Pub. L. 85–508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 88–519, Aug. 30, 1964, 78 Stat. 699; Pub. L. 89–719, title II, § 202(a), Nov. 2, 1966, 80 Stat. 1148; Pub. L. 91–350, § 1(a), July 23, 1970, 84 Stat. 449; Pub. L. 92–562, § 1, Oct. 25, 1972, 86 Stat. 1176; Pub. L. 94–455, title XII, § 1204(c)(1), title XIII, § 1306(b)(7), Oct. 4, 1976, 90 Stat. 1697, 1719; Pub. L. 95–563, § 14(a), Nov. 1, 1978, 92 Stat. 2389; Pub. L. 97–164, title I, § 129, Apr. 2, 1982, 96 Stat. 39; Pub. L. 97–248, title IV, § 402(c)(17), Sept. 3, 1982, 96 Stat. 669; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104–134, title I, § 101[(a)] [title VIII, § 806], Apr. 26, 1996, 110 Stat. 1321, 1321–75; renumbered title I, Pub. L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1327; Pub. L. 104–331, § 3(b)(1), Oct. 26, 1996, 110 Stat. 4069; Pub. L. 111–350, § 5(g)(6), Jan. 4, 2011, 124 Stat. 3848; Pub. L. 113–4, title XI, § 1101(b), Mar. 7, 2013, 127 Stat. 134.)

(B) Federal Rule of Civil Procedure 8

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Notes

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

(C) Federal Rule of Civil Procedure 9

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed.

But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. §1292(a)(3).

Notes

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

(D) Federal Rule of Civil Procedure 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible

for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Notes

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

(E) Federal Rule of Civil Procedure 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency,

or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining

it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Notes

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

(F) Virginia Code § 8.01-20.1.

Certification of expert witness opinion at time of service of process.

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 pursuant to subsection A of § 8.01-581.20 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. This certification is not necessary 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.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

2005, cc. 649, 692; 2007, c. 489; 2013, cc. 65, 610.