FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15021

FELISA TUNAC, on behalf of herself
and as the Personal Representative
of the Estate of Randy Tunac
(Veteran), Deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
For the District of Arizona
Roslyn O. Silver, Senior District Judge, Presiding

Argued and Submitted March 16, 2018
San Francisco, California

Filed July 30, 2018

Before: Richard A. Paez and Sandra S. Ikuta, Circuit Judge, and Lynn S. Adelman,*
District Judge

Opinion by Judge Ikuta

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* The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

SUMMARY**

Federal Tort Claims Act

The panel affirmed the district court's dismissal of a surviving spouse's suit against the United States under the Federal Tort Claims Act ("FTCA") for wrongful death and negligent malpractice.

The complaint alleged that a medical center operated by the Department of Veterans Affairs (VA) caused Randy Tunac's death by delaying urgently needed medical treatment.

The panel held that it had jurisdiction to the extent that the complaint alleged negligence by VA healthcare workers (defined as medical professionals and related support staff listed in 38 U.S.C. § 7316(a)(2)). The panel further held that the claims regarding negligence in VA operations must proceed under the congressionally-mandated pathway set forth in the Veterans' Judicial Review Act, and any appeal could only be heard by the U.S. Court of Appeals for the Federal Circuit.

The panel held that to the extent there was jurisdiction, those claims were barred by the FTCA's statute of limitations. The panel concluded that the two-year statute of limitations had long run when plaintiff filed her administrative claim, and her claims were barred by 28 U.S.C. § 2401(b). The panel further held that plaintiff's claim could not be equitably tolled.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Veronica L. Manolio (argued), Manolio & Firestone PLC, Scottsdale, Arizona, for Plaintiff-Appellant.

Adam R. Smart (argued), Assistant United States Attorney; Krissa M. Lanham, Deputy Appellate Chief; Elizabeth A. Strange, First Assistant United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Defendant-Appellee.

OPINION

IKUTA, Circuit Judge:

This appeal raises the question whether we have jurisdiction over a claim alleging that a medical center operated by the Department of Veterans Affairs (VA) caused Randy Tunac's death by delaying urgently needed medical treatment. We conclude that to the extent the complaint alleges negligence by VA healthcare employees (defined as medical professionals and related support staff listed in 38 U.S.C. § 7316(a)(2)), we have jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. The complaint's claims regarding negligence in VA operations, however, must proceed under the congressionally-mandated pathway set forth in the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), and any appeal can be heard only by the United States Court of Appeals for the Federal Circuit, *see* 38 U.S.C. § 7292. To the extent we do have jurisdiction, the claims are barred by the FTCA's statute of limitations.

I

Felisa Tunac, the surviving spouse of Randy Tunac, brought suit against the United States pursuant to the FTCA, for wrongful death and negligent malpractice. According to the complaint, Randy Tunac began a six-month deployment with the U.S. Navy in 1995. Before completing his deployment, he was diagnosed with lupus nephritis, otherwise known as kidney inflammation, and was medically retired from the military. After retirement, Randy Tunac continued to receive treatment for lupus at the Carl T. Hayden VA Medical Center in Phoenix, Arizona, but saw a private physician for separate cardiological issues. In 2009, Randy Tunac's private physician ordered him to make an appointment immediately at the VA medical center after his blood test showed signs of kidney failure. Randy Tunac promptly contacted the VA medical center, but was told that it could not schedule him for an appointment until October or November 2009.

Randy Tunac was finally seen at the medical center on December 2, 2009. A biopsy of his kidney confirmed that he had reached end-stage kidney disease, necessitating dialysis. However, the VA could not schedule dialysis immediately, and set his next appointment for December 30, 2009. Seven days before his appointment, Randy Tunac collapsed at work and was rushed to St. Joseph's Hospital, where he was pronounced brain-dead on arrival. Randy Tunac passed away on December 27, 2009 from respiratory failure stemming from renal failure. On January 14, 2010, the VA medical center sent a letter addressed to Randy Tunac notifying him that his active lupus nephritis required immediate treatment

or would result in "end stage kidney disease and even death."

In May 2014, Randy Tunac's widow, Felisa Tunac, saw media reports that gross mismanagement and unacceptable wait times at the Hayden VA Medical Center were contributing to otherwise preventable veteran deaths. After further investigation, she learned that an internal audit of the VA's operations confirmed the VA's negligence in follow-up, care coordination, quality, and continuity of care for its veteran patients.

Felisa Tunac filed an administrative claim with the VA on April 17, 2015. After the VA denied her claim on October 8, 2015, she brought this action in district court. Her complaint includes two counts: wrongful death and negligence/medical malpractice. For the first count, the complaint alleges that the VA and its employees caused Randy Tunac's death by failing to provide him with "adequate follow-up care and treatment to monitor Randy's condition and identify any potential relapses or adverse changes to his health"; "[f]ailing to schedule Randy for immediate (or even timely) treatment after the deterioration of his condition, as evidenced by his blood work in 2009"; and "[f]ailing to schedule Randy for immediate dialysis after the results of his kidney biopsy in December 2009." The complaint alleges that the United States and the VA are liable for the acts and omissions of the employees pursuant to the FTCA.

For the second count, the complaint alleges that the employees and the VA breached their duty to Randy Tunac" to provide him with timely, quality healthcare." Again, the complaint alleges that the

United States and the VA are liable for the acts and omissions of the employees pursuant to the FTCA.

The VA filed a motion to dismiss the complaint, arguing that the VJRA deprived the district court of jurisdiction over Felisa Tunac's claims, because they related to benefits decisions. The VJRA bars a district court from hearing claims relating to the provision of benefits to veterans. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1025 (9th Cir. 2012) (en banc) (*VCS*). The VA also argued that her claims were untimely under the FTCA, which bars tort claims against the United States unless an administrative claim is brought within two years after the claim accrues. 28 U.S.C. § 2401(b)

The district court noted the difficulty in determining whether it had jurisdiction over Tunac's claims, because the FTCA confers jurisdiction on district courts to hear claims alleging negligence against VA doctors, *VCS*, 678 F.3d at 1023 n.13, but the VJRA bars a district court from hearing claims relating to benefits decisions, *see id.* at 1025, which—read broadly—could include decisions causing delays in treatment. Nonetheless, after reviewing Ninth Circuit and out-of-circuit precedent, the district court concluded that it had jurisdiction to hear certain aspects of Felisa Tunac's claims. The district court then dismissed Tunac's claims as untimely because she filed her administrative claim nearly five years after the claims accrued. Tunac timely appealed.

II

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction." *Sinochem Int'l Co. v. Malaysia Int'l*

Shipping Corp., 549 U.S. 422, 430–31 (2007). Although we may "choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999), the Supreme Court has concluded that a judgment based on the statute of limitations is a judgment on the merits, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995). Accordingly, we must determine whether we have jurisdiction over this complaint before we can reach the government's argument that Tunac's complaint is barred by the statute of limitations. In order to determine our jurisdiction, we must address the relationship between the VJRA and the FTCA.

A

VCS explains both the history of judicial review of VA decisionmaking and the VJRA's effect on the scope of that review. *See* 678 F.3d at 1020–23. In brief, within a few years after Congress established the VA in 1930, it enacted legislation precluding judicial review of the VA's benefits decisions. *Id.* at 1020. After the Supreme Court interpreted the applicable preclusion provision as permitting courts to review a range of constitutional and legal challenges to veterans' claims against the VA, Congress enacted the VJRA (codified at various sections of Title 38 of the U.S. Code) to establish procedures for reviewing VA decisions and to expand the scope of the provision precluding judicial review. *See id.* at 1020–23.

In establishing new procedures, Congress "placed responsibility for reviewing decisions made by VA Regional Offices and the Board of Veterans' Appeals in a new Article I court, the United States Court of Appeals for Veterans Claims [(the Veterans

Court)]," *id.* at 1021 (citing 38 U.S.C. §§ 7251, 7261), which has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," 38 U.S.C. § 7252(a). The Veterans Court may "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary." *Id.* § 7261(a)(1). Decisions by the Veterans Court are "reviewed exclusively" by the United States Court of Appeals for the Federal Circuit, which "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." *VCS*, 678 F.3d at 1022 (quoting and citing 38 U.S.C. § 7292(a), (c), (d)(1)).

In addition to establishing this exclusive pathway for judicial review of benefits decisions, Congress enacted a new provision, eventually codified at 38 U.S.C. § 511, to "broaden the scope" of the prior preclusion provision and "limit outside 'court intervention' in the VA decisionmaking process." *Id.* at 1022 (quoting H.R. Rep. No. 100-963, at 27 (1988)). Under § 511, the Secretary of Veterans Affairs "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). Subject to enumerated exceptions, "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Id.*

In *VCS*, we addressed the scope of the jurisdictional limitation imposed by § 511. *See* 678 F.3d at 1022. After reviewing our precedents and out-of-circuit cases, we concluded "that § 511 precludes

jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations." *Id.* at 1025 (internal quotation marks and citations omitted). Said otherwise, the preclusion "extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases." *Id.*

VCS applied this test in considering claims by two nonprofit veterans organizations challenging, among other practices, both the adjudication of claims for benefits by the Veterans Benefits Administration (VBA) and the provision of medical treatment by the Veterans Health Administration (VHA). *Id.* at 1017. [1] As relevant here, the veterans organizations challenged "delays in the VHA's provision of mental health care," *id.* at 1026, including delays in the provision of medical treatment to veterans who were already "eligible for or receiving medical services," *id.* at 1017. We first held that mental health care was clearly a benefit under § 511(a), because the VA's regulations define "benefit" broadly as "any payment, service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." *Id.* at 1026 (alteration in original) (quoting 38 C.F.R. § 20.3(e)). Accordingly, we concluded that § 511 "undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim that the VA

[1] As we explained in *VCS*, the VA is comprised of the VBA, VHA, and the National Cemetery Administration. 678 F.3d at 1017 n.4.

unreasonably delayed his mental health care." *Id.* Because "there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly," *VCS* concluded that we lacked jurisdiction "to consider [the organizations'] various claims for relief related to the VA's provision of mental health care." *Id.* at 1028. *VCS* thus makes clear that we lack jurisdiction to review whether the VA unreasonably delayed medical care for an individual veteran as a scheduling matter, because such a claim requires review of a benefits decision.

B

Notwithstanding the expansive scope of § 511's preclusion of judicial review, *VCS* acknowledged that we continue to have jurisdiction to hear some claims brought by individual veterans under the FTCA. *See id.* at 1023 & n.13. The FTCA gives district courts "exclusive jurisdiction of civil actions on claims 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." 28 U.S.C. § 1346(b)(1). We noted in *VCS* that we had previously considered a veteran's FTCA claim and held that jurisdiction was appropriate because his claim that he did not receive a timely and correct diagnosis "would not 'possibly have any effect on the benefits [the veteran] has already been awarded.'" *Id.* at 1023 (quoting and citing *Littlejohn v. United States*, 321 F.3d 915, 921 (9th Cir. 2003)). *VCS* therefore

recognized that the FTCA "specifically confers jurisdiction on federal district courts to hear" claims involving medical negligence. *Id.* at 1023 n.13.

Our sister circuits have reached similar conclusions. In *Thomas v. Principi*, for instance, the D.C. Circuit held that it had jurisdiction under the FTCA over the veteran's claims that the VA negligently failed to inform the veteran about his diagnosis. *See* 394 F.3d 970, 973–75 (D.C. Cir. 2005). While acknowledging the broad definition of "benefit" in § 511, the D.C. Circuit rejected "any implication that all action or inaction by the VA represents a type of 'service,' and therefore automatically constitutes a 'benefit.'" *Id.* at 975. For instance, "if a VA doctor left a sponge inside a patient during surgery, section 511 would permit an FTCA malpractice suit in district court." *Id.* By contrast, claims that the VA "failed to render the appropriate medical services" because it denied the veteran's request for benefits "would require the district court 'to determine first whether the VA acted properly' in providing [the veteran] benefits." *Id.* (quoting *Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2000)). The D.C. Circuit ultimately concluded that the veteran's negligence and malpractice claims did not raise any "questions of law [or] fact necessary to a decision by the Secretary under a law that affects the provision of benefits" for purposes of § 511, and that the claims could therefore proceed under the FTCA. *Id.* at 974–75 (alteration in original) (quoting 38 U.S.C. § 511); *see also Anestis v. United States*, 749 F.3d 520, 524, 528 (6th Cir. 2014) (holding that a veteran could bring an FTCA claim for medical malpractice against a VA intake clerk because she was authorized to perform "evaluations of a veteran's mental and emotional state").

C

While acknowledging that we retained jurisdiction under the FTCA over certain negligence and medical malpractice claims brought by veterans against the VA, *VCS* admitted that we had not yet been able to "articulate a clear standard for evaluating our jurisdiction" in this context. 678 F.3d at 1023. We now articulate such a standard, at least for discerning whether a claim is one for medical negligence under the FTCA, instead of a claim that the VA acted improperly in handling a veteran's request for benefits, thus relating to a benefits decision. As we have previously indicated, Congress has given us guidance on this issue by enacting separate procedures for dealing with medical negligence claims. *See Littlejohn*, 321 F.3d at 921 n.5 (noting "the separate administrative procedures set up by the VA to deal with FTCA claims"); *see also VCS*, 678 F.3d at 1023 n.13 (noting the VA's "separate procedures for dealing with FTCA claims"). We now consider this guidance.

Just three years after enacting the VJRA, Congress enacted the Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, 105 Stat. 187 (the HCPA), which provided for increased pay of VA healthcare professionals, codified collective bargaining rights for such professionals, and made substantial revisions to the organization and administration of the VHA. Like the VJRA, the HCPA was codified in various sections of Title 38. *See id.* In connection with the HCPA's amendments to the organization and functions of the VHA, Congress added a provision, 38 U.S.C. § 7316, to cover how the federal government will respond to medical malpractice and negligence suits against VA

employees. This provision established that the FTCA would provide the remedy for "damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the [VA] in furnishing health care or treatment," but that this remedy would be "exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim." *Id.* § 7316(a)(1)[2]. The term "health care employee of the [VA]" is defined to mean "a physician, dentist, podiatrist, chiropractor, optometrist, nurse, physician assistant, expanded-function dental auxiliary, pharmacist, or paramedical (such as medical and dental technicians, nursing assistants,

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[2] In full, 38 U.S.C. § 7316(a)(1) provides:

> The remedy–
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> (A) against the United States provided by sections 1346(b) and 2672 of title 28, or
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> (B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28,
>
> for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

and therapists), or other supporting personnel." *Id.* § 7316(a)(2). In light of the specific list of healthcare professionals, we read the catchall phrase "other supporting personnel" to mean support staff directly engaged in patient care like the listed professionals.[3] *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011) (noting the use of *ejusdem generis* "to ensure that a general word will not render specific words meaningless").

Accordingly, § 7316 makes clear that, at a minimum, a plaintiff may bring medical malpractice and negligence claims against a "health care employee" of the VA under the FTCA. Said otherwise, when a plaintiff brings an action against a VA health care employee (meaning the professionals and related support staff listed in 38 U.S.C. § 7316(a)(2)) alleging injury from a negligent medical decision, the action may proceed under the FTCA and is not barred by the VJRA. Given that the FTCA provides the exclusive means for resolving such claims, we conclude that we have jurisdiction to hear them.

D

We now apply these principles to Felisa Tunac's complaint, and conclude that we have jurisdiction over certain claims that give rise to a "reasonable

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[3] The Sixth Circuit has determined this includes employees who do not possess the requisite training or skills to make medical determinations or assessments but are nonetheless authorized by the VA to do so. *See Anestis*, 749 F.3d at 524, 528 (rejecting the government's argument that the veteran did not bring a medical malpractice claim, because although the intake clerk "was not authorized to make clinical decisions, she did have the duty under VA internal policies, to determine whether [the patient] presented himself in a state of emergency").

inference" that VA medical professionals breached their duty of care. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For instance, the complaint alleges that "[t]he VA failed to properly order tests and/or evaluate Randy's recurring lupus condition." Although these statements do not expressly claim that a medical professional should have ordered the proper tests and performed proper evaluations, we may infer as much, given that generally only medical professionals order medical tests and evaluate medical conditions. Further, the complaint alleges that the VA and its employees "caused Randy's death through their wrongful acts and neglect," specifically by "[f]ailing to provide Randy with adequate follow-up care and treatment to monitor Randy's condition and identify any potential relapses or adverse changes to his health." Again, it is reasonable to read this allegation as referring to negligence by medical professionals, as generally they are responsible for monitoring a patient's condition and providing follow-up care and treatment. To the extent these allegations relate to claims of medical negligence on the part of medical professionals, they do not relate to benefits decisions, *see VCS*, 678 F.3d at 1025, and are cognizable under the FTCA. Accordingly, the district court did not err in concluding that it had jurisdiction over some of Tunac's claims.

We do not, however, have jurisdiction over the complaint's allegations that Randy Tunac's death was caused by the VA's failure "to schedule Randy for immediate (or even timely) treatment after the deterioration of his condition" or its failure "to schedule Randy for immediate dialysis after the results of his kidney biopsy in December 2009," and similar allegations relating to the negligence in scheduling appointments and treatment. As currently

drafted,[4] these allegations do not give rise to a reasonable inference that VA medical professionals breached their duty of care, but rather seek relief for the type of administrative negligence in scheduling appointments that must be channeled through the VJRA. *See id.* at 1026–28.[5]

III

Because we have jurisdiction over Tunac's claims that medical professionals at the VA medical center were negligent, we now turn to the question whether her claims are timely. "Under the FTCA, a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency 'within two years after such claim accrues.'" *Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir. 2001) (quoting 28 U.S.C. § 2401(b)).[6] Tunac filed her

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[4] The complaint does not allege, for instance, that VA medical professionals failed to inform the administrative staff in charge of scheduling appointments that Tunac's situation was dire and that he needed to be scheduled for dialysis immediately. The operative complaint simply states that the administrative staff delayed Tunac's appointment, independent of any decision or guidance by VA medical professionals.

[5] We reject Tunac's argument that *VCS* limited the VJRA's preclusion to those claims addressing *entitlement* to benefits, rather than the manner in which those benefits were provided to eligible veterans. As indicated above, *see supra* Section II.A., the organizations in *VCS* challenged delays in the provision of medical treatment to veterans who were already "eligible for or receiving medical services." 678 F.3d at 1017. We held that such claims involved a request for benefits because they asked this court to review "whether the VA handled those requests properly." *Id.* at 1028. Accordingly, we concluded that we lacked jurisdiction to hear those claims pursuant to § 511. *See id.*

[6] The full text of 28 U.S.C. § 2401(b) provides:

administrative claim with the VA on April 17, 2015. Accordingly, Tunac's claims are barred by the statute of limitations if they accrued before April 17, 2013.

"The date on which a claim accrues is determined by federal law." *Landreth ex rel. Ore v. United States*, 850 F.2d 532, 533 (9th Cir. 1988). "In a medical malpractice case under the FTCA, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause." *Id.* The plaintiff need not know who caused the injury, *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984), or that the injury was caused by negligence, *Winter*, 244 F.3d at 1090, in order for the claim to accrue.

The injury in this case is Randy Tunac's death on December 27, 2009. There is no dispute that Felisa Tunac knew of the injury on that date. Tunac also knew, or reasonably should have known, that the cause of the injury was the failure of the Hayden VA Medical Center to provide adequate treatment. The complaint alleges that despite warnings from a private physician that Randy Tunac needed immediate care, the Hayden VA Medical Center delayed scheduling her husband for a preliminary kidney biopsy. And despite the biopsy showing he was in end-stage kidney disease, the medical center failed

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> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

to treat Randy Tunac for nearly a month. Further, the complaint incorporates the January 2010 letter from the medical center warning that "[t]he consequence of not treating your lupus kidney disease includes end stage kidney disease and even death."

Tunac argues, however, that she did not learn of the cause of the injury until May 2014, when media reports alerted her to the Hayden VA Medical Center's systemic negligence in delaying patient care. But a claim accrues when a plaintiff "has knowledge of the injury and its cause, and not when the plaintiff has knowledge of legal fault." *Id.* (quoting *Rosales v. United States*, 824 F.2d 799, 805 (9th Cir. 1987)). As the Supreme Court has made clear, accrual does not wait until the plaintiff has "reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty to him had been breached." *United States v. Kubrick*, 444 U.S. 111, 125 (1979). In other words, Tunac's claim accrued when she knew that the medical center's failure to treat her husband and to provide adequate follow-up care caused her husband's death, not when she learned that the delays were caused by actionable negligence. The "[a]ccrual of a claim does not 'await awareness by a plaintiff that his injury has been negligently inflicted.'" *Winter*, 244 F.3d at 1090 (quoting *Kubrick*, 444 U.S. at 123).

Our cases holding that "a cause of action does not accrue under the FTCA when a plaintiff has relied on statements of medical professionals with respect to his or her injuries and their probable causes," *id.*, are not applicable here. In those cases, a plaintiff reasonably relied on a doctor's assurances that an injury was not caused by medical error, *see id.* at 1091

("[Plaintiff] was clearly told that the electrodes were not the cause of his infection."), or that there was no injury at all, *see Rosales*, 824 F.2d at 804 ("For several months after Victoria was born, doctors repeatedly assured the Rosaleses that the child's lazy lid was temporary and that no injury was present."); *Raddatz v. United States*, 750 F.2d 791, 796 (9th Cir. 1984) ("[T]he Navy doctor repeatedly assured [plaintiff] that her condition was a normal consequence of the perforated uterus."). In contrast, Tunac was aware that her husband's prognosis called for prompt intervention, and therefore knew or should have known that the VA's failure to provide timely treatment caused his death. There is no evidence that Tunac relied on inaccurate statements by a medical professional regarding the cause of her husband's death.

Accordingly, Tunac's claim accrued, at the latest, when she received the January 10, 2010 letter from the Hayden VA Medical Center explaining the consequences of delayed treatment of Randy Tunac's condition. Because the two-year statute of limitations had long run when Tunac filed her administrative claim in April 2015, Tunac's claims are barred by 28 U.S.C. § 2401(b).

Tunac contends that the statute of limitations should be equitably tolled because the VA concealed its negligent practices that caused delays in treatment across the Phoenix VA.[7] "To establish that equitable

[7] Tunac did not raise equitable tolling in her response to the motion to dismiss, and the district court did not address this argument in its order dismissing the complaint. Although we generally "do not consider an issue raised for the first time on appeal," we may "invoke our discretion to hear previously unconsidered claims," *Cold Mountain v. Garber*, 375 F.3d 884,

tolling applies," a plaintiff must show, among other things, that "fraudulent conduct by the defendant result[ed] in concealment of the operative facts." *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240–41 (9th Cir. 1996). As the previous discussion makes clear, any alleged concealment by the VA of a widespread problem regarding delayed treatment did not result in concealment of the operative facts—that the VA delayed Randy's treatment, possibly causing his death. Therefore, Tunac's claim cannot be equitably tolled. *See id.*[8]

AFFIRMED.

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891 (9th Cir. 2004), where, as here, "the issue presented is purely one of law and . . . does not depend on the factual record developed below," *id.* (quoting *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)).

[8] We **DENY** the government's motion to strike portions of the appellate record. The VA's audit of internal operations was referenced in the complaint and in Tunac's response to the motion to dismiss "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Although "mere mention of the existence of a document is insufficient to incorporate the contents of a document," the document is incorporated when its contents are described and the document is "integral" to the complaint. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Both conditions have been satisfied here: first, the complaint quotes from the internal audit and summarizes the audit's conclusion that the VA's actions were "unacceptable and troubling"; and second, the internal audit is clearly integral to the complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Felisa Tunac,	) No. CV-16-00982-PHX-ROS
Plaintiff,	)
v.	) **ORDER**
United States of	)
America, et al.,	)
Defendants.	)

Plaintiff Felisa Tunac believes medical providers with the United States Department of Veterans Affairs ("VA") caused the death of her husband, Randy Tunac. Over five years after Randy's death, Felisa filed an administrative claim based on Randy's death. After the claim was denied, Felisa filed the present suit. The United States has moved to dismiss, arguing the Court lacks jurisdiction over most aspects of the complaint. The United States also argues that even if jurisdiction were found to exist, Felisa's claims are barred by the statute of limitations. The United States' jurisdictional argument is incorrect but its timeliness argument requires the complaint be dismissed.

BACKGROUND[1]

In 1995, Randy began a deployment with the United States Navy. During that deployment, he experienced medical problems and was eventually

[1] The parties largely agree on the following version of events but, to the extent necessary, this factual background should be read as including factual findings relevant to the issue of subject matter jurisdiction. *See Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (internal quotation marks and citation omitted) ("A district court may hear evidence regarding jurisdiction and resolv[e] factual disputes where necessary.").

diagnosed with lupus nephritis, a serious kidney condition. Randy received treatment and recovered but, in 1997, the lupus relapsed and he was medically retired from the Navy. After leaving the Navy, Randy continued to receive treatment for his lupus at VA medical centers.

In 2001, Randy suffered a heart attack. As a result, Randy began seeing cardiologist David C. Wilcoxson, M.D, a doctor not affiliated with the VA. Between 2001 and 2009, Randy received treatment for his lupus from the VA and treatment for his heart condition from Dr. Wilcoxson. Sometime in the summer of 2009, Dr. Wilcoxson told Randy that recent bloodwork indicated Randy needed to be seen right away for additional treatment of his lupus. Randy called the Phoenix VA Medical Center but was told he could not be seen until October or November 2009. Randy was not seen until December 2009.

On December 2, 2009, Randy's kidney was biopsied and the VA learned he had end-stage kidney disease. The VA told Randy he needed to begin dialysis but the VA could not schedule him immediately. Instead, his next appointment was set for December 30, 2009. On December 23, 2009, Randy collapsed while at work. Randy was taken to St. Joseph's Hospital where he was "pronounced brain dead upon arrival." (Doc. 13 at 4). Randy died on December 27, 2009, survived by his wife Felisa and two sons.

At the time of Randy's death, Felisa "had no knowledge (and no reason to investigate) the timing of Veterans' appointments within the Phoenix VA." (Doc. 13 at 5). In May 2014, Felisa heard media reports about delayed patient care at the Phoenix VA. She

then investigated further and learned the Phoenix VA routinely failed to provide timely appointments and care. In April 2015, Felisa submitted a notice of claim to the VA asserting Randy's death was caused by the VA's failure to provide him treatment sooner. (Doc. 14-1 at 9). That claim was denied in October 2015. In April 2016, Felisa filed the current suit.

The amended complaint alleges two causes of action under the Federal Tort Claims Act ("FTCA"): wrongful death and medical malpractice. Both claims are based on the VA's alleged failures to provide "adequate follow-up care," schedule immediate treatment after Randy's bloodwork in the summer of 2009, and schedule immediate dialysis after Randy's biopsy on December 2, 2009. The United States responded to the complaint by moving to dismiss. According to the United States, this Court lacks jurisdiction to hear Felisa's claims because they involve the provision of veterans benefits and, by statute, disputes regarding veterans benefits cannot be heard by a district court. The United States also argues that, assuming jurisdiction exists, the allegations of the complaint establish Felisa's claims are barred by the statute of limitations. Felisa opposes the motion, arguing the United States' jurisdictional argument depends on a misreading of her claims. According to Felisa, her claims are not merely complaints about the timing of Randy obtaining VA benefits but also about the medical decisions by VA personnel. In addition, Felisa argues her claims are timely because they did not accrue until she had some reason to investigate the cause of Randy's death in 2014.

ANALYSIS

The jurisdictional argument presented by the United States is much more difficult than the statute of limitations argument. However, the Court has no choice but to address jurisdiction first. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.").

I. Subject Matter Jurisdiction Exists for Portions of Felisa's Claims

In its motion to dismiss, the United States argues "the crux of [Felisa's] claims" is inappropriate delay in the VA providing Randy with medical appointments. Under that view of the claims, the United States argues this Court lacks jurisdiction because the claims relate to the provision of VA benefits. The United States is correct that Felisa's claims can be read as based solely on delays in obtaining appointments. But the claims can also be read as based on medical malpractice. Under this latter reading, jurisdiction exists.

The United States' jurisdictional argument depends on construction and application of the Veterans' Judicial Review Act ("VJRA"). In 1988, Congress passed the VJRA in an attempt to make clear the limited role federal courts should play in reviewing the provision of veterans benefits. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1021 (9th Cir. 2012). The VJRA "made three fundamental changes to the procedures and statutes affecting review of VA decisions." *Id.* First, it established the United States Court of Appeals for Veterans Claims ("Veterans Court") to hear "*all* questions involving

benefits under laws administered by the VA." *Id.* at 1021 (internal quotation marks and citation omitted). Second, the VJRA gave the Federal Circuit exclusive jurisdiction to review decisions by the Veterans Court. And third, the VJRA expanded a preexisting statutory provision "precluding judicial review" of VA decisions by all other courts. *Id.* at 1022. This statute, 38 U.S.C. § 511, prohibited any court other than the Veterans Court and Federal Circuit from reviewing "questions of law and fact necessary to a decision . . . that affects the provision of [veterans] benefits." 38 U.S.C. § 511(a)).

As interpreted by the Ninth Circuit, the language of "§ 511 precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision by the Secretary [of Veterans Affairs] in the course of making benefits determinations." *Veterans for Common Sense*, 678 F.3d at 1025 (quotation marks and citations omitted). In other words, jurisdiction does not exist over any claim requiring a "district court to determine whether the VA acted properly in handling a veteran's request for benefits." *Id.* In the particular context of delayed treatment, the Ninth Circuit concluded § 511 "undoubtedly" deprives district courts "of jurisdiction to consider an individual veteran's claim that the VA unreasonably delayed his [medical treatment]." *Id.* at 1026.

On first reading, the Ninth Circuit's broad and potentially all-encompassing construction of § 511 would mean district courts lack jurisdiction to review any aspect of a veteran's request for benefits, including the amount or type of benefits received. This construction would prevent the Court from reviewing almost all claims involving VA medical care, including

medical malpractice claims, because such claims obviously "relate" to the type of care provided by the VA. But in the opinion giving § 511 this broad reading, the Ninth Circuit noted the FTCA "specifically confers jurisdiction on federal district courts to hear" claims "alleging negligence against VA doctors." *Id.* at 1023 n.13. In context, the Ninth Circuit was pointing out that negligence claims involving VA medical care were outside the scope of § 511. Unfortunately, the Ninth Circuit did not explain how its broad interpretation of § 511 could be reconciled with its contemporaneous observation that § 511 did not bar negligence claims.

The problem with the Ninth Circuit's interpretation of § 511 is that decisions relating to benefits decisions often involve allegations of negligence by VA doctors. For example, despite the Ninth Circuit claiming § 511 "undoubtedly" deprives district court of jurisdiction to hear claims based on delays in scheduling treatment, delays in scheduling treatment are an actionable form of medical malpractice. *See, e.g., Thompson v. Sun City Cmty. Hosp., Inc.*, 688 P.2d 605, 614-16 (Ariz. 1984) (medical malpractice cases involving delay in performing an operation). Accordingly, the Ninth Circuit's purported distinction that FTCA claims can proceed, while § 511 strips jurisdiction over any decision that "relate[s] to [a] benefits decision," is contradictory. More recent guidance from the Ninth Circuit still fails to explain how the FTCA and § 511 actually interact such that certain benefits decisions are pursued in the Veterans Court while FTCA claims are pursued in the appropriate district court. *See Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1175 (9th Cir. 2013) ("[I]f reviewing Plaintiffs' claim would require review of the circumstances of individual benefits requests,

jurisdiction is lacking."). Other courts have experienced similar struggles.

In *Thomas v. Principi*, the D.C. Circuit tried to explain how the FTCA and § 511 should interact. There, a veteran had applied for disability benefits and, in 1991, a VA doctor had diagnosed him with schizophrenia. 394 F.3d 970, 972. The VA did not reveal the diagnosis to the veteran at that time and the VA later denied his request for disability benefits. The veteran did not learn of his schizophrenia diagnosis until eight years later. Upon learning of his diagnosis, the veteran filed an administrative tort claim asserting "the VA's failure to disclose the schizophrenia diagnosis and to treat him resulted in greater medical problems, denial of state and federal benefits, and loss of income." *Id.* at 972. The administrative claim was denied and the veteran filed a complaint in district court alleging, among many other claims, medical malpractice. The district court dismissed all claims as barred by § 511.

On appeal, the D.C. Circuit formulated a test for identifying when a claim is barred by § 511: a claim is a claim for veterans benefits if it "would require the district court to determine first whether the VA acted properly in handling [the] benefits request." *Id.* at 974 (internal quotation marks and citation omitted). Applying this test, the D.C. Circuit believed the veteran's claim for medical malpractice could proceed to the extent it was premised on allegations the VA providers "failed to take responsibility by not ensuring and taking time to communicate the risks and choices that were available" to the veteran based on his diagnosis. *Id.* at 974. But the veteran's medical malpractice claim was barred by § 511 to the extent it was premised on allegations "that the VA failed to

render the appropriate medical care services that are delivered to alleviate a harmful medical condition." *Id.* In the D.C. Circuit's view, allegations that the VA failed "to render appropriate medical services" or denied "necessary medical care treatment" were barred by § 511 because they "would require the district court to determine first whether the VA acted properly in providing [the veteran] benefits." *Id.* at 975.

Despite concluding § 511 barred a claim based on the failure "to render appropriate medical services," the D.C. Circuit commented there was no question § 511 would not bar a veteran from pursuing a medical malpractice claim based on "a VA doctor [leaving] a sponge inside a patient during surgery." *Id.* at 975. But a suit based on such an event obviously would require the district court determine if the VA "render[ed] appropriate medical services." *Id.* The D.C. Circuit did not explain the distinction it was drawing between malpractice in the form of leaving behind a sponge and malpractice in the form of failing to treat schizophrenia appropriately. Moreover, the D.C. Circuit did not explain why countless medical malpractice claims against the VA are brought and resolved in district courts each year, despite those claims undoubtedly requiring courts to determine if the VA rendered "appropriate medical services." *Id.*

Perhaps recognizing problems with the logic of *Thomas v. Principi*, later decisions by the D.C. Circuit have described § 511 as only reaching situations where "underlying the claim is an allegation that the VA unjustifiably denied [ ] a veterans' benefit." *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570, 572 (D.C. Cir. 2016). This interpretation is more sensible and would prevent §

511 from barring most malpractice suits, such as a sponge left in during surgery, because most malpractice suits do not involve an unjustifiable failure to provide care. But even this later construction would mean a veteran could not file a malpractice claim if a doctor negligently failed to diagnose a veteran's condition and therefore provided no care for that condition. Even a cursory review of case law, however, shows veterans often succeed on FTCA claims based on the failure to provide appropriate care. *See, e.g.*, *Deasy v. United States*, 99 F.3d 354, 358 (10th Cir. 1996) (medical malpractice claim against VA based on failure to treat edema); *Laskowski v. U.S. Dep't of Veterans Affairs*, 918 F. Supp. 2d 301 (M.D. Pa. 2013) (awarding over three million in medical malpractice claim based on VA's "failure to provide proper PTSD treatment"). Thus, the D.C. Circuit's interpretation of § 511 focused on unjustifiable failures to provide care does not provide meaningful guidance for the present situation.

Other courts have not fared any better when they are called upon to make sense of § 511 in the context of claims for medical malpractice. For example, the Western District of Oklahoma dismissed a complaint as barred by § 511 where the underlying allegations were the VA negligently failed to diagnose a veteran's back problems. *Willess v. United States*, No. CIV-12-0585-HE, 2013 WL 1364155, at *2 (W.D. Okla. Apr. 3, 2013). The court concluded the veteran's claims were "a challenge to the VA's action or inaction with respect to his benefits" and § 511 barred the suit. *Id.* at *3. In another case, also involving an alleged failure to treat back injuries, the Tenth Circuit held § 511 prevented the suit from proceeding. *Turner v. United States*, 501 F. App'x 840, 842 (10th Cir. 2012). In reaching that conclusion, the Tenth Circuit

conceded the "gravamen" of the suit was whether "the VA committed malpractice" when it failed to treat the veteran's medical conditions. *Id.* at 843. But the court reasoned the district court had properly dismissed the suit because "the course of treatment chosen by the VA . . . is a benefits decision." *Id.* at 843. Neither of these courts explained why the particular medical malpractice claims at issue were subject to § 511 when many other types of malpractice claims are not. More importantly, the Tenth Circuit did not explain its own precedent affirming an FTCA judgment based on the VA failing to treat a medical condition. *See Deasy v. United States*, 99 F.3d 354, 358 (10th Cir. 1996) (award based on failure to treat edema).

In summary, the Court has been unable to locate instructive guidance for distinguishing between medical malpractice claims which can proceed in district court versus claims involving medical care barred by § 511. *See Fleming v. U.S. Veterans Admin. Med. Centers*, 348 F. App'x 737, 739 (3d Cir. 2009) (claim that VA misdiagnosed veteran barred by § 511)[2]; *Irvin v. United States*, 335 F. App'x 821, 824 (11th Cir. 2009) (medical malpractice claims barred by § 511); *Richardson v. Dep't of Veterans Affairs*, No. C05-1353C, 2006 WL 1348392, at *3 (W.D. Wash. May 16, 2006) (concluding claim for "medical malpractice . . . fall[s] within the ambit of the VJRA's comprehensive review system"). The few courts that have allowed malpractice claims to proceed in spite of an argument that § 511 applied offer only conclusory

[2] In a later suit filed by the same veteran, the Eastern District of Pennsylvania described the Third Circuit decision as addressing claims for "medical malpractice" based on the veteran being "wrongfully diagnosed." *Fleming v. Veterans Admin.*, No. CIV.A. 10-7226 FLW, 2013 WL 1148375, at *3 (E.D. Pa. Mar. 20, 2013).

reasoning in support. For example, the District of Hawaii held the proper way to approach this issue is to determine if the plaintiff is asserting tort claims or claims seeking review of benefits decisions. *Milnes v. Tripler Army Med. Ctr.*, No. 02-00365 BMK, 2007 WL 917288, at *3 (D. Haw. Mar. 23, 2007). If a plaintiff is asserting tort claims, § 511 has no application. But if a plaintiff is asserting claims seeking review of benefits decisions, § 511 bars district court involvement. While appealing, this approach would allow a veteran to avoid § 511 by simply couching his claims as tort claims, even if he were seeking review of an obvious benefits decision. The Southern District of Ohio offered a slight improvement in formulating the proper approach as requiring a court assess if a malpractice claim was a "collateral attack[]" on a benefits decision. *Wojton v. United States*, 199 F. Supp. 2d 722, 730 (S.D. Ohio 2002). If so, § 511 would prevent the court from hearing the claim. This guidance, however, is of little use because a malpractice claim can always be viewed as a "collateral attack" on the underlying benefits decision regarding the nature of medical care.

In light of existing case law, there does not appear to be an entirely coherent way of applying § 511 to claims of medical malpractice. Rather than a bright-line distinction between situations where § 511 applies and where it does not, courts seem to make fact-dependent determinations of whether particular claims are best resolved by the administrative system available for veterans benefits decisions or by the tort system by way of FTCA actions. Applying this somewhat vague framework to the present situation, the Court has jurisdiction to hear certain aspects of Felisa's claims.

Felisa is complaining the VA did not provide Randy with timely appointments and care. As noted earlier, general claims based on delays in appointments are barred by § 511. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1026 (9th Cir. 2012). But claims based on delays in appointments, when those claims actually sound in medical malpractice, are not barred by § 511. *See id.* at 1023 n.13. Therefore, to the extent Felisa's claims are based on general complaints about the wait times for Randy to obtain care, her claims are barred by § 511. That is to say, Felisa's claims divorced from particular medical decisions made by VA personnel cannot proceed. But to the extent Felisa's claims allege negligence in the course of Randy's treatment, including any inappropriate delays, § 511 does not apply. Because the VA knew of Randy's condition, the decision not to treat him sooner and the decision not to provide immediate care after his December 2 biopsy are actionable forms of negligence not barred by § 511.

Viewed generously, the complaint's claims are based on inappropriate medical decisions regarding Randy's course of treatment. The Court has jurisdiction to hear Felisa's claims when they are viewed in this manner. The Court must, therefore, examine the United States' argument regarding timeliness.

II. Both Claims are Untimely

The FTCA requires an individual wishing to assert a tort claim against the United States submit an administrative claim to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). Whether a claim was timely submitted under this statute often must await

discovery. But dismissal based on untimeliness is permitted when "the running of the statute is apparent on the face of the complaint." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). Here, the complaint and incorporated documents establish Felisa submitted an administrative claim on April 17, 2015. Thus, the crucial issue is whether the face of her complaint (including the incorporated documents) establishes her claims accrued before April 2013. It does.

Felisa argues the accrual date for her claims must be determined by looking to Arizona law. But it is well-established "[t]he date on which a [FTCA] claim accrues is determined by federal law." *Landreth By & Through Ore v. United States*, 850 F.2d 532, 533 (9th Cir. 1988). And under federal law, there are two slightly different accrual rules for FTCA claims depending on the nature of the claim at issue. Usually, an FTCA claim accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008). Under this rule, a claim arising from a car accident generally accrues "at the time of the accident." *Id.* at 1057. The accrual rule for medical malpractice claims, however, is slightly different

Malpractice claims do not accrue based solely on knowledge of the injury. Instead, they "accrue[] when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause." *Landreth*, 850 F.2d at 533. This requirement regarding discovery of the cause of an injury has resulted in some malpractice claims not accruing for years after a plaintiff learns of an injury. *See, e.g.*, *Winter v. United States*, 244 F.3d 1088, 1091 (9th Cir. 2001) (claim did not accrue until 1992 even

though injury discovered in 1989). Cases with delayed accrual, however, usually involve expert medical advice dissuading an individual from discovering an injury was due to malpractice. *Id.* (treating physician unable to diagnose cause of complaints for years); *Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987) (doctors assured parents child was normal but later determined child's "retardation" was due to malpractice). Delayed accrual is the exception and, generally speaking, "accrual does not await a plaintiff's awareness, whether actual or constructive, of the government's negligence." *Hensley*, 531 F.3d at 1056.

Application of the proper accrual rule to the present facts is straightforward. Felisa knew of the injury, *i.e.*, Randy's death, as of December 2009. And as for the cause of that injury, Felisa either knew or should have known as of December 2009 that the injury had been caused by the VA's delays. Felisa bases her claims on the VA's failure to provide "adequate follow-up care," failure to schedule immediate treatment after Randy's bloodwork in the summer of 2009, and failure to schedule immediate dialysis after Randy's December 2009 biopsy. These delays, however, were either known or should have been known as of December 2009.

Felisa disagrees with this analysis by arguing her claims did not accrue until 2014 when she heard media reports about "unacceptable and negligent medical treatment of veterans." (Doc. 18 at 7). But the existence of a widespread problem regarding delayed treatment at the Phoenix VA could not have changed Felisa's (actual or constructive) knowledge regarding Randy's treatment. That is to say, Felisa learning in 2014 that many other veterans had been kept waiting

for care did not change the facts regarding Randy's care. And as of the time of Randy's death, Felisa either knew or should have known about the particular sequence of events, including any delays, in Randy receiving care. Unlike other cases where accrual is delayed based on a lack of knowledge, the alleged delay in treating Randy's condition was not kept hidden. The dates Randy requested treatment, and the dates Randy received treatment, either were known by Felisa or were readily available to her at the time of Randy's death. In fact, a letter the VA sent to Randy in early 2010 made clear that delays might have contributed to Randy's death.

In a letter written to Randy in late December 2009 and received by Felisa in January 2010, the VA stated "[t]he consequence of not treating your lupus kidney disease includes end stage kidney disease and even death." (Doc. 14-1 at 11). It requested Randy contact the VA "to arrange to start your treatment as soon as possible." The letter stressed that immediate treatment was so important that if the VA did not hear from Randy within five days, it would "contact the police department to do a courtesy safety check." The letter's language that any delays might result in death should have placed Felisa on notice regarding the alleged cause of Randy's death. At the very least, this letter could have prompted Felisa to seek "advice in the medical and legal community" to determine if she had a viable claim based on the delayed care. *United States v. Kubrick*, 444 U.S. 111, 123 (1979); *see also Raddatz v. United States*, 750 F.2d 791, 796 (9th Cir. 1984) ("[P]laintiff has the duty to start investigating the legal liability of the defendant when he knows he has been injured and who has inflicted the injury."). Because Felisa knew of the injury and its

cause no later than January 2010, the administrative claim filed in 2015 was untimely.

Randy and Felisa may have been egregiously mistreated by the VA. Had Felisa taken immediate action, this Court likely would have jurisdiction to hear at least the portions of her claims involving medical malpractice. But the time for filing an administrative claim had expired by the time Felisa submitted a claim. "Regrettably, this is one of those unhappy cases in which a statute of limitations makes it impossible to enforce what [may] otherwise [be] a valid claim." *Hensley v. United States*, 531 F.3d 1052, 1058 (9th Cir. 2008). The claims must be dismissed.

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Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 14) is **GRANTED IN PART** and **DENIED IN PART**. The Clerk of Court is directed to enter a judgment of dismissal with prejudice.

Dated this 5th day of December, 2016.

s/ Hon. Roslyn O. Silver
Honorable Roslyn O. Silver
Senior United States District Judge

DEPARTMENT OF VETERANS AFFAIRS
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Via Certified-Mail, Return-Receipt Requested
7004 2890 0001 9184 8737

October 8, 2015

Veronica L. Manolio, Esq.
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9300 E. Raintree Drive, Suite 120
Scottsdale, Arizona 85260

Re: Administrative Tort Claim: TUNAC, Randy J.

Dear Ms. Manolio:

The Department of Veterans Affairs (VA) has thoroughly investigated the facts and circumstances surrounding your client's administrative tort claim. Our adjudication of your client's claim included a review of Randy Tunac's medical records, a review of the claim by medical reviewers in different parts of the country, and interviews of medical personnel.

Based on our investigation it appears the alleged harm occurred on December 27, 2009, when Randy J. Tunac pass away. A tort claim is barred unless it is presented within two years after the claim accrues, as

provided in section 2401(b), title 28, United States Code (U.S.C.). Accordingly, we deny your claim.

Further, the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680, under which your client filed his claim provides for monetary compensation when a Government employee, acting within the scope of employment, injures another by a negligent or wrongful act or omission. Medical negligence means there was a breach in the standard of care and that breach proximately caused an injury. The standard of care is the level at which similarly qualified medical professionals would have managed the care under the same or similar circumstances.

Our review concluded that there was no negligent or wrongful act on the part of an employee of the Department of Veterans Affairs (VA) acting within the scope of employment that caused Randy Tunac compensable harm. Accordingly, we deny the claim.

If your client is dissatisfied with this decision, he may file a request for reconsideration of his claim with the VA General Counsel by any of the following means:

(1) by mail to the Department of Veterans Affairs, General Counsel (021B), 810 Vermont Avenue, N.W., Washington, DC 20420; or
(2) by data facsimile (fax) to (202) 273-6385.

To be timely, the VA must receive this request within six months of the mailing of this final denial. The VA has six months to act on the reconsideration request. After that time, your client has the option of filing suit

in an appropriate U.S. District Court under 28 U.S.C. § 2675(a). 28 C.F.R. § 14.9.

In the alternative, if your client is dissatisfied with the denial of his claim, he may file suit directly under the FTCA, 28 U.S.C. §§ 1346(b) and 2671-2680. The FTCA provides that when an agency denies an administrative tort claim, the claimant may seek judicial relief in a Federal district court. The claimant must initiate the suit within six months of the mailing of this notice as shown by the date of this denial (28 U.S.C. § 2401(b)). In any lawsuit, the proper party defendant is the United States, not the Department of Veterans Affairs.

Sincerely,

s/Jeffrey D. Stacey

Jeffrey D. Stacey
Chief Counsel