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Appendix A

A-1

Opinion and Judgment of the United States Court of Appeals
for the Fifth Circuit

November 20, 2025

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 20, 2025

Lyle W. Cayce
Clerk

No. 25-40183

HOWARD LAWRENCE ELLSWORTH, III; THERESA LYNN
ELLSWORTH,

Plaintiffs—Appellants,

versus

DALLAS TEXAS DEPARTMENT OF VETERAN AFFAIRS; PLANO
TEXAS DEPARTMENT OF VETERAN AFFAIRS; UNITED STATES OF
AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CV-710

Before HIGGINBOTHAM, HO, and DOUGLAS, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge:*

The plaintiffs appeal the dismissal of their medical-malpractice claims under the Federal Tort Claims Act (FTCA). We AFFIRM, albeit on other grounds.

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No. 25-40183

I

Healthcare professionals employed by the Department of Veterans Affairs (VA) treated Howard Ellsworth for diabetes from 2016–2022. In February 2020, Ellsworth reported elevated A1C levels, extreme thirst, excessive urination, and nighttime incontinence. He complained of poor treatment to his doctor, asserting he would not have such symptoms if the doctor had “do[ne] his job the right way” and “actually act[ed] like a doctor.”

Two years passed. Ellsworth submitted a complaint to the Office of the Inspector General in March 2022, alleging staff at the Dallas and Plano VA facilities failed to properly diagnose and treat his diabetes. He raised similar allegations in a Standard Form-95 (SF-95) filed that July with the Office of the General Counsel, listing himself as the “claimant” and his wife, Theresa, as a witness and property owner. The inspector general found no wrongdoing in June 2022, and the general counsel denied the SF-95 in March 2023. The general counsel’s denial letter informed Mr. Ellsworth of his right to seek redress in district court within six months.

The Ellsworths filed this suit *pro se* under the FTCA in August 2023, alleging the VA’s medical personnel provided Mr. Ellsworth with negligent medical care that caused his kidney disease.¹ The government moved to dismiss the second amended complaint under FED. R. CIV. P. 12(b)(1) and (6).

In June 2024, Mrs. Ellsworth filed her own SF-95, noting she held Mr. Ellsworth’s power of attorney. The VA denied her claim, finding (1) it contained the same allegations as her husband’s previously denied SF-95,

¹ 28 U.S.C. § 1346(b)(1).

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and (2) the agency lacked jurisdiction over her claim because the couple had already elected a judicial remedy.

In March 2025, the magistrate judge recommended the district court (1) dismiss Mrs. Ellsworth's claims under Rule 12(b)(1) for failure to exhaust administrative remedies, (2) dismiss the Ellsworths' claims under Rule 12(b)(6) as barred by the statute of limitations, and (3) deny their request for leave to amend as futile.² The plaintiffs filed objections. The district court adopted the memorandum and recommendation in full, dismissing the case with prejudice. The plaintiffs timely appealed *pro se*. We have jurisdiction under 28 U.S.C. § 1291.

II

We review a dismissal for lack of subject-matter jurisdiction *de novo*.³ In doing so, we “may rely on the complaint, undisputed facts in the record, and the court’s resolution of disputed facts.”⁴ We also review a dismissal for failure to state a claim *de novo*, asking whether the complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁵ *Pro se* litigant filings are “liberally construed.”⁶

² The plaintiffs also alleged various VA regulatory violations and a *Bivens* claim. The magistrate judge recommended the court dismiss the former for lack of subject-matter jurisdiction based on sovereign immunity and the latter for failure to state a claim. The plaintiffs have abandoned these claims on appeal.

³ *Fugedi v. Initram, Inc.*, 150 F.4th 690, 692 (5th Cir. 2025).

⁴ *Morris v. Thompson*, 852 F.3d 416, 419 (5th Cir. 2017).

⁵ *Butler v. S. Porter*, 999 F.3d 287, 292 (5th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

⁶ *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted).

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We review a denial of leave to amend for abuse of discretion.⁷ Although leave “should [be] freely give[n] . . . when justice so requires,” the district court may deny leave if the “amended complaint would fail to state a claim upon which relief could be granted.”⁸

III

On appeal, the plaintiffs assert (1) Mrs. Ellsworth satisfied the exhaustion requirement, (2) Mr. Ellsworth’s claims are not time-barred, and (3) dismissal should have been without prejudice. We take each issue in turn.

A

First, we address exhaustion, as it is a jurisdictional prerequisite to reaching the VA’s Rule 12(b)(6) challenge to Mrs. Ellsworth’s claims. A plaintiff seeking money damages for injuries caused by government-employee negligence must first present the claim to the appropriate federal agency and receive a written denial.⁹ Failure to exhaust administrative remedies is a jurisdictional bar under the FTCA.¹⁰

The government argues Mrs. Ellsworth failed to exhaust her administrative remedies before filing suit because the VA was not on notice of her intent to bring personal-capacity claims.¹¹ In Mr. Ellsworth’s

⁷ *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 312 (5th Cir. 2002).

⁸ FED. R. CIV. P. 15(a)(2); *Stripling v. Jordan Prod. Co. LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000).

⁹ 28 U.S.C. § 2675(a).

¹⁰ See *McNeil v. United States*, 508 U.S. 106, 111–12 (1993); *Coleman v. United States*, 912 F.3d 824, 834 (5th Cir. 2019) (collecting cases).

¹¹ The government concedes Mr. Ellsworth properly exhausted his administrative remedies before filing suit, and we agree. Mr. Ellsworth filed written complaints to the inspector general and general counsel explaining the nature of his alleged injuries and demanding a sum certain. The former denied his claim in August 2022 and the latter in

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administrative claims, his wife is listed as a witness and an owner of property damaged by his incontinence. The narratives describe her as his spouse, detail her logistical involvement in his medical care, and itemize the damages to their shared property. The personal injuries alleged and damages sought, however, are largely particular to Mr. Ellsworth. The administrative claims do not name Mrs. Ellsworth as a victim, claimant, or personal representative, nor do they bear her signature.

Relying on out-of-circuit precedent and a decision from the Eastern District of Louisiana, the magistrate judge “found that merely being listed on a form . . . is insufficient to establish that the claimant’s spouse independently presented the claim to the appropriate Federal agency.”¹² Accordingly, the magistrate judge concluded Mr. Ellsworth “is the only one who submitted a claim to the [VA] that was finally denied” and Mrs. Ellsworth “has not brought any cause of action against the Government” as “each claim is solely based on [Mr. Ellsworth’s] allegations of the treatment and care he received.”

We have yet to address this issue squarely, and district courts in this circuit have taken different approaches. Some hold that just listing a spouse on an administrative claim fails to give the government notice of a derivative claim.¹³ This strict-presentment approach aligns with the general rule that

March 2023. The general counsel’s denial letter started the six-month clock to appeal the VA’s decision, and Mr. Ellsworth timely filed suit in August 2023.

¹² See *Champagne v. United States*, 573 F. Supp. 488, 493 (E.D. La. Oct. 20, 1983); *Heaton v. U.S.*, 383 F. Supp. 589, 590–91 (N.Y. 1974).

¹³ These cases typically involve loss of consortium, which Texas law recognizes as a separate and independent cause of action held by either spouse arising from the other spouse’s negligent injury. *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978); see, e.g., *Walker v. United States*, 471 F. Supp. 38, 41–42 (M.D. Fla. 1978), *aff’d*, 597 F.2d 770 (5th Cir. 1979) (in loss-of-consortium case, “one spouse may not presume that his or her own independent claim is automatically raised or implied in the administrative claim of the other

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provisions abrogating the federal government's sovereign immunity must be construed narrowly in favor of the sovereign.¹⁴ Other courts apply a more relaxed standard, holding a plaintiff's failure to file a separate administrative claim or comply with all procedural requirements does not necessarily bar her relief under the FTCA.¹⁵ These cases emphasize the remedial purpose of the

spouse. . . . [O]ne spouse may not rely on the administrative claim of another spouse."); *Wilke v. United States*, No. 1:07cv465 LG-JMR, 2009 WL 590450, at *1-3 (S.D. Miss. Mar. 5, 2009) (dismissing wife's derivative loss-of-consortium claim where husband listed wife as spouse on his personal-injury administrative claim but wife did not sign it or separately assert loss-of-consortium); *Storey v. United States*, No. 3:16-CV-00194-NBB-RP, 2017 WL 3396405, at *2 (N.D. Miss. Aug. 8, 2017) (same); *Poynter v. United States*, 55 F. Supp. 2d 558, 564 (W.D. La. 1999) (same); see also *Chickaway v. United States*, 823 F. Supp. 2d 452, 455-57 (S.D. Miss. 2011) (dismissing father's derivative claim arising from son's wrongful-death injuries because administrative claim filed by decedent's mother did not mention father, despite the fact that father was a wrongful-death statutory beneficiary under state law). Courts outside this circuit have held similarly. See, e.g., *Pipkin v. U.S. Postal Serv.*, 951 F.2d 272, 273 (10th Cir. 1991) (wife's failure to assert an administrative claim for loss of consortium apart from her husband's administrative claim deprived court of subject-matter jurisdiction).

¹⁴ *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008).

¹⁵ See, e.g., *Lightell v. United States*, No. CIV.A. 86-4338, 1987 WL 15954, at *1 (E.D. La. Aug. 19, 1987) (holding that although wife was not listed as claimant on form submitted by husband, form provided adequate notice of her loss-of-consortium claim because her address was listed and the government received a copy of complaint from related lawsuit where wife raised loss-of-consortium claim); *Forrest v. United States*, No. CV 16-2405, 2016 WL 4080908, at *1-2 (E.D. La. Aug. 1, 2016), on reconsideration in part, No. CV 16-2405, 2016 WL 9560201 (E.D. La. Dec. 2, 2016) (government had sufficient notice of son's claim, although he was not listed on mother's wrongful-death claim filed on his father's behalf and he did not file a separate claim, because the amount sought was great enough to alert the government to multiple claimants); *Eskine v. United States*, No. CV 95-1364, 1995 WL 495903, at *1-2 (E.D. La. Aug. 18, 1995) (characterizing the FTCA's notice requirement as "minimal" and holding wife's failure to file separate administrative claim did not divest the court of jurisdiction over her claim because her husband's SF-95 identified her as a claimant and specified her loss-of-consortium damages); *Champagne*, 573 F. Supp. at 490-94 (holding that although not all plaintiffs signed the SF-95, agency had notice of their wrongful-death claims because all were listed as claimants); *Green v. United States*, No. CIV.A. 02-616, 2003 WL 1733520, at *2-5 (E.D. La. Mar. 31, 2003), on reconsideration, No. CIV.A. 02-616, 2003 WL 21500553 (E.D. La.

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FTCA's "minimal" notice requirements, as they are "meant to benefit claimants and in no way are designed to preclude them from their day in court. . . . [They] are intended to lessen the court case load through fair settlement, not procedural default."¹⁶

In sum, where courts have found jurisdiction lacking, the administrative complaint typically names the spouse but contains no additional facts alerting the government to the spouse's independent claims or injuries. Conversely, courts have maintained jurisdiction where the administrative complaint provides *some* notice of the spouse's derivative claim, *i.e.*, listing the spouse's address, seeking a large sum in a wrongful-death suit, naming the spouse as claimant, or detailing the spouse's independent injuries in the body of the claim. In any case, "[t]he purpose of the FTCA's administrative-presentment requirement is to allow the federal agency promptly to investigate and, if appropriate, settle claims."¹⁷ That requirement is satisfied when the plaintiff, in writing, (1) "brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations" and (2) places

June 24, 2003) (claimant's failure to name his 11 siblings as claimants on the SF-95 did not bar siblings' wrongful-death claims because government was on notice of additional claimants given the large damages sought); *see also* 28 C.F.R. § 14.4(a)(3) (authorizing the government to request additional information from the claimant in response to wrongful-death claims).

¹⁶ *Pleasant v. United States ex rel. Overton Brooks Veterans Admin. Hosp.*, 764 F.3d 445, 450 (5th Cir. 2014) (quotations and citation omitted); *see also Adams v. United States*, 615 F.2d 284, 288 (5th Cir. 1980), *decision clarified on denial of reh'g*, 622 F.2d 197 (5th Cir. 1980) (notice requirement "provid[es] for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government").

¹⁷ *Pleasant*, 764 F.3d at 449.

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a value on the claim.¹⁸ And whether that requirement is met is necessarily a fact-specific inquiry.

Here, the plaintiffs assert in briefing that Mrs. Ellsworth has suffered “her own distinct injury: emotional distress and loss of consortium.” But nothing in Mr. Ellsworth’s administrative claims suggest his wife has suffered such an injury or intends to pursue her own loss-of-consortium claim. The only facts specific to Mrs. Ellsworth and relevant to emotional damages or loss of consortium are her involvement in scheduling Mr. Ellsworth’s medical care; that alone is insufficient to put the agency on notice that she suffered emotional distress and loss of consortium.¹⁹

It may be said, however, that the agency was on notice of Mrs. Ellsworth’s claim for property damages, as she was listed as a “property owner” on the SF-95 and the narrative details precise damages of \$28,030.09 to the couple’s mattress, washer and dryer, and linens at the address listed as their home. Indeed, we have described the FTCA’s notice requirement as “minimal,” requiring only “the skeletal facts of the claim sufficient to enable the agency to investigate.”²⁰ Under Texas law, the

¹⁸ *Id.*

¹⁹ The plaintiffs emphasize Mrs. Ellsworth has had power of attorney since March 2022, but the SF-95 does not mention this fact. In any case, the fact that Mrs. Ellsworth may, as her husband’s power of attorney, *submit* a claim on his behalf does not put the agency on notice of Mrs. Ellsworth’s *individual* claims. 28 C.F.R. § 14.3(b) (“A claim for personal injury may be presented by the injured person . . . or legal representative.”).

²⁰ *See Adams*, 615 F.2d at 289, 292 (“Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim. . . . A federal court’s power to adjudicate a tort claim brought against the United States depends solely on whether the claimant has previously complied with the minimal requirements of the statute.” (citing 28 U.S.C. § 2675)); *Martinez v. United States*, 728 F.2d 694, 696 (5th Cir. 1984).

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property at issue here is owned by Mr. and Mrs. Ellsworth in equal parts.²¹ So the SF-95's explanation of the damage to the Ellsworths' shared property, along with listing Mrs. Ellsworth as a property owner, puts the government on notice of property-damage claims for both spouses. With a generous gloss, Mr. Ellsworth's SF-95 sufficiently put the agency on notice of *some* claim belonging to his wife, albeit for property damage, not for loss-of-consortium or emotional damages.²²

But other problems await. We conclude the district court erred in finding Mrs. Ellsworth failed to exhaust her administrative remedies but find dismissal proper under Rule 12(b)(6), as we will explain.

B

The Ellsworths' claims are time-barred. The FTCA's statute of limitations provides "[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."²³ Claim accrual occurs at the time of the plaintiff's injury or, in the medical-malpractice context, when the plaintiff has the information necessary to discover "both his injury and its

²¹ See *Farmers Tex. Cnty. Mut. Ins. Co. v. Okelberry*, 525 S.W.3d 786, 793 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (explaining presumption under Texas law that all property, other than separate property, acquired by either spouse during the marriage is community property).

²² But see *Whittlesey*, 572 S.W.2d at 669 ("[I]t cannot be said that the character of the deprived spouse's recovery for loss of consortium is community property. . . . [R]ecovery for personal injuries in Texas . . . is the separate property of that spouse."). Moreover, Mrs. Ellsworth's attempt to file her own SF-95 ten months after initiating this lawsuit changes nothing. The FTCA's plain language requires a claimant present her claims in writing *before* filing suit. 28 U.S.C. § 2401(b); see *Cook v. United States ex rel. U.S. Dept. of Labor*, 978 F.2d 164, 166 (5th Cir. 1992) (submission of an administrative claim is "a jurisdictional *prerequisite* to filing suit" (emphasis added)).

²³ 28 U.S.C. § 2401(b).

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cause.”²⁴ In the latter case, the plaintiff “need not know the legal or medical significance of an act or an injury for the cause of action to accrue.”²⁵ Instead, the plaintiff need only possess “knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then with that advice, to conclude that there was a causal connection between the treatment and injury.”²⁶

Mr. Ellsworth presented his administrative claim to the VA on March 10, 2022, at the earliest (complaint filed with inspector general) or July 21, 2022, at the latest (SF-95 filed with general counsel).²⁷ Yet he argues his claim accrued in June 2022—between the submission of two administrative complaints with identical allegations—when he received a diagnosis of kidney disease. The government argues Mr. Ellsworth’s claim accrued much earlier than June 2022—in September 2019, at the earliest, when he became aware that his “treatment must not be working properly” and “told [the doctor] to stop being a piece of s--- doctor, stop neglecting my care, and to provide proper care,” or in February 2020, at the latest, when Mr. Ellsworth knew of his increased A1C levels, thirst, urination, and nighttime incontinence, and told his doctor that he believed the doctor’s poor quality of care had caused his symptoms.

²⁴ *Johnson v. United States*, 460 F.3d 616, 621 (5th Cir. 2006) (quoting *United States v. Kubrick*, 444 U.S. 111, 120 (1979)).

²⁵ *MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995).

²⁶ *Id.* (citation omitted).

²⁷ The record is unclear on the precise date Mr. Ellsworth filed his SF-95. Mr. Ellsworth’s SF-95 is signed April 27, 2022, but it bears a “2022 Jul 28” stamp by the Office of General Counsel and a handwritten received date of “8/8/22.” The plaintiffs allege Mr. Ellsworth submitted the form on July 21, 2022, in the second amended complaint.

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The district court agreed with the government, and so do we. Mr. Ellsworth claims his doctor admitted that he misdiagnosed him in September 2019, after Mr. Ellsworth had “cussed him out for his unprofessional standards” and “his gross negligence . . . by refusing to properly test and diagnose” him. Mr. Ellsworth asserts he urinated uncontrollably and had nighttime incontinence by February 2020, and had enough sense of his injury and its cause to confront his doctor and demand better care. Mr. Ellsworth may not have known the full significance of his symptoms at that time, *i.e.*, kidney disease, but he (1) was aware of his symptoms, (2) sought professional advice in response, and (3) expressed his opinion that the poor treatment had caused his state.²⁸

It follows that Mr. Ellsworth’s claim accrued in February 2020 and limitations ran in February 2022.²⁹ As he filed his administrative complaint in March 2022 at the earliest, Mr. Ellsworth’s claims are time-barred. These time limits are jurisdictional; the district court did not err in granting dismissal under Rule 12(b)(6).³⁰ The limitations period also bars Mrs. Ellsworth’s property-damage claim, as it accrued the same time as her husband’s claims in February 2020, when their property was damaged by his excessive urination.

C

Finally, we turn to whether the district court abused its discretion in denying leave to amend and dismissing this suit with prejudice. Rule 15 is a liberal standard that favors leave, but that preference has no purchase when

²⁸ See *MacMillan*, 46 F.3d at 381.

²⁹ 28 U.S.C. § 2401(b) (barring claim under FTCA if not brought within two years of accrual).

³⁰ *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998).

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amendment cannot cure the defect.³¹ Mr. Ellsworth filed his administrative complaint over two years after his injury accrued, and Mrs. Ellsworth's claims are derivative of his personal-injury claims. And the plaintiffs have already twice amended their complaint—once as a matter of course, and the other after the government filed its first motion to dismiss.³²

* * *

Although the district court erred in dismissing Mrs. Ellsworth's claims on exhaustion grounds, we AFFIRM the dismissal of her and Mr. Ellsworth's claims.

³¹ See *Stripling*, 234 F.3d at 872–73.

³² See *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387 (5th Cir. 2003) (“[L]eave to amend properly may be denied when the party seeking leave has repeatedly failed to cure deficiencies by amendments previously allowed and when amendment would be futile.”).

**United States Court of Appeals
for the Fifth Circuit**

United States Court of Appeals
Fifth Circuit

FILED

November 20, 2025

Lyle W. Cayce
Clerk

No. 25-40183

HOWARD LAWRENCE ELLSWORTH, III; THERESA LYNN
ELLSWORTH,

Plaintiffs—Appellants,

versus

DALLAS TEXAS DEPARTMENT OF VETERAN AFFAIRS; PLANO
TEXAS DEPARTMENT OF VETERAN AFFAIRS; UNITED STATES OF
AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CV-710

JUDGMENT

Before HIGGINBOTHAM, HO, and DOUGLAS, *Circuit Judges*.

This cause was considered on the record on appeal and the briefs on
file.

IT IS ORDERED and ADJUDGED that although the district
court erred in dismissing Mrs. Ellsworth's claims on exhaustion grounds, we
AFFIRM the dismissal of her and Mr. Ellsworth's claims.

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IT IS FURTHER ORDERED that each party bear its own costs on appeal.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.



Certified as a true copy and issued
as the mandate on Feb 04, 2026

Attest: *Jyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix B

B-1

Order of the United States Court of Appeals for the Fifth Circuit
Denying Rehearing

January 28, 2026

**United States Court of Appeals
for the Fifth Circuit**

United States Court of Appeals
Fifth Circuit

FILED

January 28, 2026

Lyle W. Cayce
Clerk

No. 25-40183

HOWARD LAWRENCE ELLSWORTH, III; THERESA LYNN
ELLSWORTH,

Plaintiffs—Appellants,

versus

DALLAS TEXAS DEPARTMENT OF VETERAN AFFAIRS; PLANO
TEXAS DEPARTMENT OF VETERAN AFFAIRS; UNITED STATES OF
AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CV-710

**ON PETITION FOR REHEARING
AND REHEARING EN BANC**

Before HIGGINBOTHAM, HO, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 28, 2026

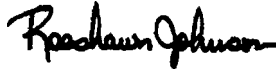
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 25-40183 Ellsworth v. Dallas TX DVA
USDC No. 4:23-CV-710

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Roeshawn Johnson, Deputy Clerk
504-310-7998

Mr. Howard Lawrence Ellsworth III
Mrs. Theresa Lynn Ellsworth
Ms. Whitney Tharpe

Appendix C

C-1

Memorandum Opinion and Order of the
United States District Court for the Eastern District of Texas
Granting Motion to Dismiss

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

HOWARD LAWRENCE ELLSWORTH,
III, et al.,

Plaintiffs,

v.

DALLAS TEXAS DEPARTMENT OF
VETERAN AFFAIRS, et al.,

Defendants.

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CIVIL ACTION NO. 4:23-CV-00710-
SDJ-AGD

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

The above-referenced case was referred to the undersigned United States Magistrate Judge for pre-trial purposes in accordance with 28 U.S.C. § 636. Pending before the court is the Government's Motion to Dismiss Plaintiffs' Second Amended Complaint (Dkt. #33). Having considered the Motion, Plaintiffs' Response (Dkt. #34), the Government's Reply (Dkt. #36), Plaintiffs' Sur-Reply (Dkt. #37), the Government's and Plaintiffs' respective rebuttals (Dkt. #39; Dkt. #40), and all other relevant pleadings (including, but not limited to, Dkt. #47; Dkt. #48; Dkt. #52; Dkt. #53; Dkt. #54; Dkt. #55; Dkt. #56; Dkt. #57; Dkt. #58; Dkt. #59; Dkt. #60; Dkt. #61; Dkt. #62; Dkt. #63; and Dkt. #65), the court recommends that the Government's Motion to Dismiss (Dkt. #33) be granted, and Plaintiff's case be dismissed as discussed herein.

BACKGROUND

On August 8, 2023, Plaintiff Howard Lawrence Ellsworth, III ("Plaintiff")¹ filed the instant lawsuit against Dallas Texas Department of Veteran Affairs, and Plano Texas Department of

¹ The court refers to Howard Lawrence Ellsworth, III, only, as Plaintiff. While Plaintiff and his wife, Theresa Lynn Ellsworth, are both listed as plaintiffs in the instant lawsuit, Plaintiff has not alleged any cognizable claim as it relates

Veteran Affairs (Dkt. #1). Plaintiff filed a First Amended Complaint on September 13, 2023, (Dkt. #6), and a Second Amended Complaint on February 6, 2024 (Dkt. #26).

Plaintiff's Second Amended Complaint, the live pleading, alleges broadly that doctors with the Department of Veterans Affairs provided insufficient medical care to him related to his diagnosis of and treatment for diabetes between 2016 and 2022 (Dkt. #26 at pp. 4–15). Plaintiff also asserts a *Bivens* claim against a criminal investigator for the Department of Veterans Affairs (Dkt. #26 at pp. 10–13).² Plaintiff seeks to recover court fees; monetary relief of \$10,528,030.09 as “a low estimate and request of the [r]elief owed for [l]oss of [e]arnings and [p]ain and [s]uffering throughout 2016–2023”; punitive damages in the amount of \$22,222,222.22; and injunctive relief in the form of the Government paying for Plaintiff's healthcare, revocation of the medical licenses of three Department of Veterans Affairs doctors, and revocation of law enforcement privileges and licensure through the federal government for a Department of Veterans Affairs criminal investigator (Dkt. #26 at pp. 17–19).³

Plaintiff alleges he attempted to resolve this matter directly with the Department of Veterans Affairs. Specifically, on March 10, 2022, Plaintiff submitted a Report to the United States Department of Veterans Affairs, Office of Inspector General (the “March 10, 2022, Report”) (Dkt. #26, Exhibit 1). In the March 10, 2022, Report, Plaintiff names himself as the “victim,” at least four individuals as “wrongdoers,” and claims the wrongdoers committed medical malpractice, fraud, waste, and abuse, Veterans Affairs policy violations, and falsified records and documents (Dkt. #26, Exhibit 1 at pp. 1–2). Plaintiff alleges that he sent correspondence in May 2022, to

to Theresa Lynn Ellsworth. As such, the court recommends, *infra*, that any claims asserted by Theresa Lynn Ellsworth be dismissed.

² See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

³ To the extent Plaintiff intended to raise allegations of property damage, any such claims have been abandoned in the filing of his Second Amended Complaint. Therefore, the court does not address alleged property damage herein.

Stephen R. Holt, then Executive Medical Center Director with Veterans Affairs; Denis McDonough, the Secretary of Veterans Affairs; Congressman Michael Burgess; Senator Ted Cruz; Vice President Kamala Harris; and President Joseph R. Biden (Dkt. #26, Exhibits 5 & 6). Then, on July 21, 2022, Plaintiff submitted a Standard Form-95 to the United States Department of Veterans Affairs, Office of the General Counsel – Torts Law Group (the “July 21, 2022, SF-95”) (Dkt. #26, Exhibit 2). The July 21, 2022, SF-95 lists Plaintiff as the “claimant” and includes several pages of allegations against the same “wrongdoers” from the March 10, 2022, Report (Dkt. #26, Exhibit 2 at pp. 1, 3–8).

On June 14, 2022, in connection with the March 10, 2022, Report, the United States Department of Veterans Affairs Office of the Inspector General sent a Memorandum to Plaintiff, stating that it found no evidence of wrongdoing (the “OIG Memo”) (Dkt. #26, Exhibit 3). The OIG Memo stated that “the allegations have been promptly and fully investigated,” and the resulting action taken was to remind the Plano Veterans Affairs Outpatient Clinic “of the scheduling expectations” for setting appointments (Dkt. #26, Exhibit 3 at p. 4).

On March 8, 2023, in connection with the July 21, 2022, SF-95, the United States Department of Veterans Affairs, Office of the General Counsel – Torts Law Group sent correspondence to Plaintiff (Dkt. #26, Exhibit 4). This correspondence noted: “Our review concluded there was no negligent or wrongful act on the part of a VA employee acting within the scope of employment that caused compensable harm. Accordingly, we deny the claim.” (Dkt. #26, Exhibit 4 at p. 1). This correspondence also notified Plaintiff that he “may file suit directly under the FTCA, 28 U.S.C. § 1346(b) and 2671-2680.” (Dkt. #26, Exhibit 4 at p. 1).

Following Plaintiff’s Second Amended Complaint, filed February 6, 2024, (Dkt. #26), the Government filed a Motion to Dismiss Plaintiffs’ Second Amended Complaint, (Dkt. #33), on

March 5, 2024. On the same day, Plaintiff filed a Motion in Opposition to Defendant's Motion for Dismissal (Dkt. #34), which the court construes as a Response to the Government's Motion to Dismiss. On March 12, 2024, the Government filed its Reply (Dkt. #36). The next day, on March 13, 2024, Plaintiff filed his Sur-Reply (Dkt. #37). On March 14, 2024, the Government filed a Motion for Leave to File Rebuttal to Plaintiff's Sur-Reply, (Dkt. #38), which the court granted (Dkt. #42). Thus, the Government's Rebuttal was deemed filed on March 14, 2024 (Dkt. #39). Also on March 14, 2024, and without leave of court, Plaintiff filed his Rebuttal to the Government's Rebuttal (Dkt. #40). The Government's Motion to Dismiss is fully briefed and ripe for consideration. As noted previously, the court has considered all pleadings in this case, including all additional pleadings related to the motion to dismiss.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may challenge the subject matter jurisdiction of a particular case. FED. R. CIV. P. 12(b)(1). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995)). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming*, 281 F.3d at 161 (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

When a party files a Rule 12(b)(1) motion along with other Rule 12 motions, "the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming*, 281 F.3d at 161 (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977)). "This requirement prevents a court without jurisdiction from prematurely dismissing a case with

prejudice.” *Ramming*, 281 F.3d at 161 (citing *Hitt*, 561 F.2d at 608). “The court’s dismissal of a plaintiff’s case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction.” *Ramming*, 281 F.3d at 161 (citing *Hitt*, 561 F.2d at 608).

Federal Rule of Civil Procedure 12(b)(6)

“To survive a motion to dismiss [pursuant to Federal Rule of Civil Procedure 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).⁴ A court generally may not “go outside the complaint” in considering a Rule 12(b)(6) motion but may consider “the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citation omitted); *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

PROPER PARTY

Plaintiff sued the Dallas Texas Department of Veterans Affairs and the Plano Texas Department of Veterans Affairs as Defendants, but these are not the proper parties to the instant lawsuit. Rather, the United States is the proper party and should be substituted as Defendant. *Maleche v. Solis*, 692 F. Supp. 2d 679, 685 (S.D. Tex. 2010) (“Suits against federal defendants (i.e., federal agencies and officials acting in their official capacity) are suits against the United

⁴ To assess the sufficiency of a complaint, the court first identifies conclusory allegations and disregards them, for they are “not entitled to the assumption of truth,” and then considers whether the remaining allegations “plausibly suggest an entitlement to relief.” *Iqbal*, 556 U.S. at 681. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

States.”). Accordingly, Dallas Texas Department of Veterans Affairs and Plano Texas Department of Veterans Affairs should be dismissed from the lawsuit, and the United States should be substituted as Defendant.

ANALYSIS

Federal Rule of Civil Procedure 12(b)(1)

Before considering the merits of Plaintiff’s Second Amended Complaint, the court must first determine whether Plaintiff has established this court’s subject matter jurisdiction. The Government’s Motion to Dismiss moves the court to dismiss Plaintiff’s Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) (Dkt. #33). Specifically, based on its Statement of Issues, the Government moves (1) to dismiss any claims asserted by Theresa Lynn Ellsworth for lack of subject matter jurisdiction; and (2) to dismiss alleged violations pertaining to fraud, waste, and abuse and a failure to follow Veterans Affairs policies for lack of subject matter jurisdiction based on sovereign immunity (Dkt. #33 at p. 2).

1. Theresa Lynn Ellsworth Should Be Dismissed from This Case.

The Government argues that the Second Amended Complaint establishes that Theresa Lynn Ellsworth failed to submit her claim to the appropriate administrative agency, thereby failing to exhaust her administrative remedies before filing suit (Dkt. #33 at pp. 4–5). As Plaintiff brought his Second Amended Complaint pursuant to the Federal Tort Claims Act (“FTCA”), exhaustion of administrative remedies is a prerequisite to filing suit. The FTCA provides that

[a]n 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.

28 U.S.C. § 2675(a).

While the Government argues that Theresa Lynn Ellsworth failed to meet this prerequisite, Plaintiff suggests the administrative exhaustion requirement was met because Theresa Lynn Ellsworth is listed as an owner of property on the March 10, 2022, Report (Dkt. #26, Exhibit 1) and a witness on the July 21, 2022, SF-95 (Dkt. #26, Exhibit 2). Courts have found that merely being listed on a form, however, is insufficient to establish that the claimant's spouse independently presented the claim to the appropriate Federal agency. *See Champagne v. United States*, 573 F. Supp. 488, 493 (E.D. La. Oct. 20, 1983) (“In *Heaton v. U.S.*, 383 F. Supp. 589 (N.Y.1974), the administrative claim did not relate any injury to Plaintiff's wife. She was only mentioned as his wife and she did not sign the claim. The court held that this separate and individual claim of the wife should have been clearly delineated. The fact that the wife did not sign the claim was an important factor to the court. The court distinguished this case from those involving the rights of children and stated that when an adult claimant improperly presented a claim, the courts ‘insist on strict compliance with the ‘technicalities.’”). *Champagne* distinguished claims that failed to strictly comply with the technicalities of the administrative exhaustion prerequisite where a widow filled out the form for her decedent-husband, an attorney signed for the client-claimant, or where a parent filled out the form on behalf of a minor child. *Id.* at 493–94. The court noted that the agencies were put on notice of who the claimant was in each instance. *Id.*

Here, it cannot be said that the Department of Veterans Affairs was on notice that Theresa Lynn Ellsworth intended to bring a separate claim. Theresa Lynn Ellsworth is not listed as a victim on the March 10, 2022, Report, nor is she listed as a claimant on the July 21, 2022, SF-95 (Dkt. #26, Exhibits 1 & 2). Additionally, Theresa Lynn Ellsworth did not sign the July 21, 2022, SF-95, a claim that was presented to the Department of Veterans Affairs and was finally denied (Dkt. #26, Exhibit 2). Thus, it was not Theresa Lynn Ellsworth who submitted a claim. Plaintiff is the only

one who submitted a claim to the Department of Veterans Affairs that was finally denied (Dkt. #26, Exhibit 1, 2, 3, &4).

Further, a plain reading of the Second Amended Complaint reveals that Theresa Lynn Ellsworth has not brought any cause of action against the Government. Rather, each claim is solely based on Plaintiff's allegations of the treatment and care he received from healthcare providers at the Department of Veterans Affairs (*See generally* Dkt. #26). Accordingly, the court does not have subject matter jurisdiction over any claims allegedly raised by Theresa Lynn Ellsworth, and she should, thus, be dismissed from this case.

2. The United States' Sovereign Immunity as to Certain of Plaintiff's Claims

Regarding the Government's liability, the United States is generally immune from suit unless it has specifically waived immunity. *See Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) ("[T]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (internal quotation marks and citation omitted). Where the United States has waived immunity,

the district courts . . . shall have 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, 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)(1).

Plaintiff's Second Amended Complaint alleges "that these locations and named employees have committed Medical Malpractice, Fraud, Waste, and Abuse, other VA policy Violations, and Falsifying Records and Documents." (Dkt. #26 at p. 2). Plaintiff also asserts a *Bivens* action against a criminal investigator at the Department of Veterans Affairs (Dkt. #26 at pp. 10–13).

a. Alleged Violations of 38 C.F.R. §§ 0.601–0.603

Plaintiff generally alleges violations of 38 C.F.R. §§ 0.601–0.603 in his first two causes of action, which he refers to as Complaint #1 and Complaint #2 (Dkt. #26 at pp. 4–9). While it is questionable that Plaintiff's presentation of such allegations meets the pleading standards of the Federal Rules of Civil Procedure, the court liberally construes Plaintiff's pleadings due to his *pro se* status. It seems Plaintiff seeks to assert a private right of action against the Government to enforce the internal policies of the Department of Veterans Affairs, which are promulgated by statute. Title 38 of the Code of Federal Regulations Part 0 sets forth the "Values, Standards of Ethical Conduct, and Related Responsibilities" for the Department of Veterans Affairs. The specific sections Plaintiff alleges the Government violated are (1) § 0.601 – Core Values; (2) § 0.602 – Core Characteristics; and (3) § 0.603 – Customer Experience Principles. 38 C.F.R. §§ 0.601–0.603.

Plaintiff does not cite, and the court is not aware of, any authority that gives Plaintiff the ability to bring suit against the Government for alleged violations of such internal policies. Rather, it "has consistently been held[] that 'the FTCA was not intended to redress breaches of federal statutory duties.'" *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (collecting case) (internal quotation marks and citations omitted). Thus, as a private right of action does not exist under §§ 0.601–0.603, and the Government has not waived immunity to suit for the same, Plaintiff's claims under these sections should be dismissed.

b. Alleged Violations of 38 C.F.R. Chapter 1 Part 17 § 17.4010(a)(3)–(4), § 17.4040(a)(1)(ii)

In Plaintiff's "Complaint #3," he alleges violations of 38 C.F.R. §§ 17.4010(a)(3)–(4) and 17.4040(a)(1)(ii) (Dkt. #26 at pp. 9–10). Section 17.4010 sets forth the requirements for veterans to receive healthcare from eligible entities and providers in the community, and § 17.4040

regulates the access standards for community care and provides timelines for scheduling healthcare services. 38 C.F.R. §§ 17.4010, 17.4040. As with Plaintiff's claim for violations of 38 C.F.R. §§ 0.601–0.603, discussed, *supra*, Plaintiff's allegation that the Government violated §§ 17.4010 and 17.4040 does not give rise to a private right of action. *Johnson v. Sawyer*, 47 F.3d at 727. Accordingly, Plaintiff's claim for violations of §§ 17.4010 and 17.4040 should similarly be dismissed because there is no private right of action, and the Government has not waived immunity to the same.

Federal Rule of Civil Procedure 12(b)(6)

The court now turns to Plaintiff's remaining causes of action, alleged medical malpractice and a *Bivens* action. The Government moves the court to dismiss these remaining causes of action based on Federal Rule of Civil Procedure 12(b)(6), alleging Plaintiff has failed to state a claim for which relief can be granted (Dkt. #33 at p. 2).

1. Alleged Medical Malpractice

In Plaintiff's Second Amended Complaint, "Complaint #1," "Complaint #2," "Complaint #3," and "Complaint #5" each alleges medical malpractice. Plaintiff's cause of action for alleged medical malpractice falls within the United States' waiver of immunity as the United States has waived immunity for claims that arise from torts committed by federal employees. "Under the Federal Tort Claims Act, liability for medical malpractice is controlled by state law." *Ayers v. United States*, 750 F.2d 449, 452, n.1 (5th Cir. 1985) (citing *United States v. Muniz*, 374 U.S. 150, 152–53 (1963)). Prior to bringing suit against the United States, a plaintiff must first exhaust his or her administrative remedies. 28 U.S.C. § 2675(a). To do so, a plaintiff must file a formal complaint within two years of the accrual of the alleged injury. 28 U.S.C. § 2401(b). "The [FTCA] does not define, however, when a claim 'accrues.'" *Johnson v. United States*, 460 F.3d 616, 621

(5th Cir. 2006). “The general rule under the FTCA is that a tort action accrues at the time of a Plaintiff’s injury.” *Id.* (citing *United States v. Kubrick*, 444 U.S. 111, 120 (1979)). “For FTCA medical malpractice cases, however, *Kubrick*, adopted a ‘discovery rule’ for claim accrual, under which the time starts to run when the plaintiff has the information necessary to discover ‘both his injury and its cause.’” *Id.* (quoting *Kubrick*, 444 U.S. at 120).

Plaintiff argues that he met the administrative exhaustion requirement because he filed his complaint with the Department of Veterans Affairs on March 10, 2022, and again on July 21, 2022 (Dkt. #26 at pp. 1, 2). Plaintiff asserts that his injury accrued on June 8, 2022, when he was made “aware of his Kidney Disease.” (Dkt. #34 at p. 1). Plaintiff does not explain how the alleged June 8, 2022, accrual date falls between his March 10, 2022, Report and his July 21, 2022, SF-95, both of which allege wrongdoing based on the same set of facts from 2016-2020. Regardless, it is Plaintiff’s assertion that his formal complaint was timely presented to the Department of Veterans Affairs, satisfying his administrative exhaustion requirement.

The Government’s position is that Plaintiff failed to bring his complaint within two years of the accrual of the injury, thereby rendering his cause of action time-barred (Dkt. #33 at pp. 7–9). The Government argues the date of accrual was March 30, 2020, “when [Plaintiff] was aware of both causation (i.e., the VA doctor not doing his job the right way and not acting like a doctor) and his resulting injury (worsening A1C, urinating excessively and uncontrollably at night, and extreme thirst).” (Dkt. #22 at p. 8).

The court agrees with the Government to the extent that the accrual date was well before Plaintiff’s alleged accrual date of June 8, 2022. For instance, in the March 10, 2022, Report, Plaintiff claims that in September 2019, Plaintiff’s doctor “finally admit[ted] the misdiagnosis after [Plaintiff] cussed him out for his unprofessional standards for practicing medicine and his

gross negligence in [Plaintiff's] care by refusing to properly test and diagnose [Plaintiff]." (Dkt. #26, Exhibit 1 at p. 2). Then, Plaintiff states that in February 2020, he began urinating uncontrollably and had nighttime incontinence (Dkt. #26, Exhibit 1 at p. 2). Thus, by Plaintiff's own admission in the March 10, 2022, Report, Plaintiff was aware of the injury (bladder issues) and the cause ("gross negligence in [Plaintiff's] care") by at least February 2020. As such, Plaintiff had two years to present his complaint to the Department of Veterans Affairs; that is, by February 2022. Given that Plaintiff did not mail his complaint to the Department of Veterans Affairs until July 21, 2022, Plaintiff's claims are time-barred and should be dismissed.

Reviewing Plaintiff's July 21, 2022, SF-95 further confirms that Plaintiff's claims are time-barred. Plaintiff's July 21, 2022, SF-95 claims that in September 2019, Plaintiff had an appointment with a Veterans Affairs doctor (Dkt. #26, Exhibit 2 at p. 3). Plaintiff stated that if he had the medical issues the doctors claimed he had, "th[e] treatment must not be working properly." (Dkt. #26, Exhibit 2 at p. 3). Plaintiff stated that he "told [the doctor] to stop being a piece of shit doctor, stop neglecting my care, and to provide proper care and to run an A1C test. [The doctor] declined and we ended the check-up." (Dkt. #26, Exhibit 2 at p. 3). Then in February 2020, Plaintiff had another appointment with this doctor because Plaintiff "had been urinating excessively, extremely thirsty, and urinating [himself] uncontrollably at night while [he] slept." (Dkt. #26, Exhibit 2 at p. 3). At this appointment, Plaintiff's A1C test results came back at an elevated level (Dkt. #26, exhibit 2 at p. 3). Plaintiff "even stated to [the doctor] as he was going over the results, this would not have gotten as bad as it did, if [the doctor] was doing his job the right way and was actually acting like a doctor." (Dkt. #26, Exhibit 2 at p. 3). Thus, Plaintiff knew of the injury (bladder issues and elevated A1C levels) and the cause ("neglecting my care" and "this would not

have gotten as bad as it did, if [the doctor] was doing his job the right way and was actually acting like a doctor”) by February 2020 at the latest.

While Plaintiff claims he was not aware of the injury until June 8, 2022, when he was made aware of his kidney disease, this is not the standard. “The putative plaintiff, however, need not know the legal or medical significance of an act or an injury for the cause of action to accrue.” *MacMillian v. United States*, 46 F.3d 377, 381 (5th Cir. 1995). Rather, the putative plaintiff must only be “aware of enough facts to trigger the statute of limitations more than two years before [he] filed [his] claim.” *Johnson v. United States*, 460 F.3d at 621–22. As admitted by Plaintiff, he was aware of the cause (alleged negligent treatment) and the injury (bladder issues and elevated A1C levels) in February 2020.⁵

While it is possible that doctors at the Department of Veterans Affairs may have provided negligent care leading to Plaintiff’s alleged kidney disease,⁶ his claims are time-barred based on his accrual date of February 2020. *See Kubrick*, 444 U.S. at 125 (“It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.”).

2. Alleged Bivens Action

In Plaintiff’s “Complaint #4,” Plaintiff alleges that Allan Marx, a criminal investigator for the Department of Veterans Affairs, contacted Plaintiff and his wife at the Dallas, Texas Veterans Affairs location and presented them with “a warning of threat of arrest for trespassing, harassment,

⁵ The Government notes that Plaintiff alleges damages based on medication he was prescribed in March 2022 (Dkt. #33 at pp. 8–9). This does not affect the accrual date because the medication allegedly prescribed would affect the extent of Plaintiff’s injury or causation, which is not relevant in determining an accrual date. *MacMillian*, 46 F.3d at 381. Additionally, Plaintiff made a judicial admission in his First Amended Complaint that he never took the medication he was prescribed (Dkt. #6 at p. 11). Thus, the medication cannot be a basis for his alleged injury.

⁶ The court makes no determination of negligence.

and disorderly conduct.” (Dkt. #26 at p. 12) (cleaned up). Accordingly, Plaintiff asserts a *Bivens* action against Mr. Marx for allegedly violating Plaintiff’s “First Amendment Right to communicate [his] grievances and complaints to the Department of Veterans Affairs” (Dkt. #26 at pp. 12–13).

The Government addresses this cause of action in its Motion to Dismiss, acknowledging that it does not have any representation authority for Mr. Marx (Dkt. #33 at p. 9). However, the Government raises two issues with this cause of action. First, the Government asserts that, to date, Mr. Marx has not been served with summons and the Second Amended Complaint (Dkt. #33 at p. 9). Second, the Government notes that *Bivens* actions do not apply to allegations of violations of a party’s First Amendment rights (Dkt. #33 at p. 9).

In reviewing the docket for the instant lawsuit, the court agrees with the Government that Plaintiff has not served Mr. Marx in this matter.⁷ There is nothing to indicate that summons has issued nor that summons has been returned regarding Mr. Marx. Without being served, the court cannot exercise personal jurisdiction over Mr. Marx. “For a federal court to exercise personal jurisdiction over a defendant, the plaintiff must submit evidence that the defendant has been properly served.” *Williams v. Licari*, 692 F. Supp. 3d 647, 654 (E.D. Tex. 2023). Plaintiff does not respond to this assertion from the Government, and the court has not found evidence that Mr. Marx has been served. Accordingly, the court finds that Mr. Marx has not been served, and any claims against Mr. Marx should be dismissed for lack of personal jurisdiction.

Even if Mr. Marx had been served, Plaintiff’s *Bivens* action should still be dismissed. As noted by the Government, the United States Supreme Court “ha[s] never held that *Bivens* extends to First Amendment claims.” *Egbert v. Boule*, 596 U.S. 482, 498 (2022) (internal quotation marks

⁷ Although Plaintiff initiated this cause of action against Mr. Marx, Plaintiff did not name Mr. Marx as a defendant in this lawsuit.

and citation omitted). “Recognizing any new *Bivens* action ‘entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.’” *Id.* at 499 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). “Extending *Bivens* to First Amendment violations would pose an acute risk of increasing such costs.” *Id.* “Federal Employees ‘face[d with] the added risk of personal liability for decisions that they believe to be a correct response to improper [activity] would be deterred from’ carrying out their duties.” *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)). “We are therefore ‘convinced’ that, in light of these costs, ‘Congress is in a better position to decide whether or not the public interest would be served’ by imposing a damages action.” *Id.* (quoting *Bush*, 462 U.S. at 390). Plaintiff’s arguments to the contrary are unavailing. Accordingly, Plaintiff’s cause of action against Mr. Marx should be dismissed.

The Remaining Pending Motions

Plaintiff filed several motions during the pendency of the Government’s Motion to Dismiss.

- April 22, 2024 – Plaintiff’s Motion for Sanctions (Dkt. #47);
- May 17, 2024 – Plaintiff’s Motion for Sanctions for Causing Unnecessary Delay (Dkt. #52);
- July 17, 2024 – Plaintiff’s Emergency Motion for Case to Proceed to Discovery and Trial (Dkt. #54);
- August 19, 2024 – Plaintiff’s Motion to Deny Defendant’s Motion for Dismissal AND Motion to Proceed to Trial (Dkt. #57);
- January 13, 2025 – Plaintiff’s Motion to Deny Defendant’s Motions for Dismissal (Dkt. #61); and
- January 13, 2025 – Plaintiff’s Motion for Case to Proceed to Trial (Dkt. #62).

Because the court recommends herein that the Government’s Motion to Dismiss should be granted, the court further recommends that Plaintiff’s remaining motions be denied as moot.

Futility of Amending Complaint

“Generally, . . . a pro se litigant should be offered an opportunity to amend his complaint before it is dismissed.” *Brewster v. Dretke*, 587 F.3d 764, 767–68 (5th Cir. 2009). “Granting leave to amend is not required, however, if the plaintiff has already pleaded his ‘best case.’” *Id.* “[P]leading review is not a game where the plaintiff is permitted to file serial amendments until he finally gets it right.” *Whiddon v. Chase Home Fin., LLC*, 666 F. Supp. 2d 681, 693 (E.D. Tex. 2009) (quoting *U.S. ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 404 (5th Cir. 2004)).

Further, the court acknowledges the Fifth Circuit’s preference for dismissing cases on jurisdictional grounds without prejudice. *See Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020) (explaining that a court’s dismissal of a case resulting from a lack of subject matter jurisdiction should be made without prejudice). However, as explained, *supra*, Plaintiff’s claims in his Second Amended Complaint based on alleged medical malpractice (Dkt. #26) are time-barred. Additionally, the Government is immune from suit as to the alleged statutory violations, and a *Bivens* action cannot stand on an alleged First Amendment violation. Accordingly, allowing Plaintiff an opportunity to replead would be futile, and his Second Amended Complaint should be dismissed with prejudice.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the court recommends that the Government’s Motion to Dismiss (Dkt. #33) be **GRANTED** based on Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted. The court further recommends that Plaintiff’s pending motions (Dkt. #47; Dkt. #52; Dkt. #54; Dkt. #57; Dkt. #61; Dkt. #62) be **DENIED as moot**. The court finally

recommends that Plaintiff's case be **DISMISSED WITH PREJUDICE**. Any request for relief not addressed by this report and recommendation should be denied as **MOOT**.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 13th day of March, 2025.


AILEEN GOLDMAN DURRETT
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

HOWARD LAWRENCE
ELLSWORTH, III, et al.,

Plaintiffs,

V.

DALLAS TEXAS DEPARTMENT OF
VETERAN AFFAIRS, et al.,

Defendants.

§ 87(2)(b)

CIVIL ACTION NO. 4:23-CV-00710-
SDJ-AGD

**MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Before the Court is the Report and Recommendation of the United States Magistrate Judge (“Report”), this matter having been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. The Report recommends that the Government’s Motion to Dismiss (Dkt. #33) be granted based on Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted. The Report further recommends that Plaintiff’s pending motions (Dkt. #47; Dkt. #52; Dkt. #54; Dkt. #57; Dkt. #61; Dkt. #62) be denied as moot. The Report also recommends that Plaintiff’s case be dismissed with prejudice, and any request for relief not addressed by the Report be denied as moot.

On March 21, 2025, Plaintiff filed a Motion for Leave to File Objections to the Magistrate Judge's Report and Recommendation (Dkt. #67) along with timely

objections to the Report (Dkt. #68). Plaintiff's Motion for Leave to File Objections to the Magistrate Judge's Report and Recommendation is hereby **GRANTED** and Plaintiff's objections are deemed as filed on March 21, 2025. The Court has conducted a de novo review of Plaintiff's objections (Dkt. #68) and the portions of the Report to which Plaintiff specifically objects. Having done so, the Court is of the opinion that the findings of the Magistrate Judge are correct and adopts the Magistrate Judge's Report as the findings of the Court.

It is therefore **ORDERED** that the Government's Motion to Dismiss (Dkt. #33) is **GRANTED** based on Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted. It is further **ORDERED** that Plaintiff's pending motions (Dkt. #47; Dkt. #52; Dkt. #54; Dkt. #57; Dkt. #61; Dkt. #62) are **DENIED as moot**. It is further **ORDERED** that Plaintiff's Motion for Leave to File Objections to the Magistrate Judge's Report and Recommendation (Dkt. #67) is **GRANTED**. It is further **ORDERED** that Plaintiff's case is **DISMISSED WITH PREJUDICE**.

It is finally **ORDERED** that any request for relief not addressed by the Report (Dkt. #66) is **DENIED as moot**.

So ORDERED and SIGNED this 28th day of March, 2025.


SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Appendix D

D-1

**Final Judgment of the United States District Court
for the Eastern District of Texas**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

HOWARD LAWRENCE
ELLSWORTH, III, et al.

v.

DALLAS TEXAS DEPARTMENT OF
VETERANS AFFAIRS, et al.

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CIVIL ACTION NO. 4:23-CV-00710-
SDJ-AGD

FINAL JUDGMENT

Pursuant to the Court's Memorandum Adopting Report and Recommendation of United States Magistrate Judge, the Court hereby issues its Final Judgment, effective upon entry.

It is therefore **ORDERED** that the Government's Motion to Dismiss (Dkt. #33) is **GRANTED** based on Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted. It is further **ORDERED** that Plaintiff's pending motions (Dkt. #47; Dkt. #52; Dkt. #54; Dkt. #57; Dkt. #61; Dkt. #62) are **DENIED** as moot. It is further **ORDERED** that Plaintiff's Motion for Leave to File Objections to the Magistrate Judge's Report and Recommendation (Dkt. #67) is **GRANTED**. It is finally **ORDERED** that Plaintiff's case is **DISMISSED WITH PREJUDICE**.

All relief not previously granted is hereby **DENIED**.

So **ORDERED** and **SIGNED** this 28th day of March, 2025.


SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

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