

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

ZULAY RENDON, Individually and as : CIVIL ACTION
parent and natural guardian of :
KARINA GARCIA, a minor :
 :
v. :
 :
 :
 :
UNITED STATES OF AMERICA, et al. : NO. 99-5912

MEMORANDUM

Ludwig, J.

February 22, 2001

Defendant United States of America moves to dismiss the second amended complaint as time-barred under the Federal Tort Claims Act, 28 U.S.C. § 2401(b). Fed. R. Civ. P. 12(b)(1).¹ Jurisdiction results from the substitution of the United States as a defendant. 28 U.S.C. § 1346. The motion will be granted.

¹ “When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.” Davis v. United States, No. CIV. A. 97-7122, 1998 WL 401640, at *1 n.1 (E.D. Pa. July 9, 1998) (quoting Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)). In considering a Rule 12(b)(1) motion:

If the defendant raises no challenge to the facts alleged in the pleadings, the court may rule on the motion by accepting the allegations as true. If the defendant contests any allegations in the pleadings, by presenting evidence, the court must permit the plaintiff to respond with evidence supporting jurisdiction. The court may then determine jurisdiction by weighing the evidence presented by the parties. However, if there is a dispute of a material fact, the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination.

Gould Electronics Inc. v. United States, 220 F.3d 169, 177 (3d Cir. 2000) (citations omitted).

The facts in this medical malpractice action are summarized in Rendon v. United States, 98 F. Supp. 2d 646, 647-48 (E.D. Pa. May 19, 2000).² Plaintiff Zulay Rendon sues as the natural guardian of her minor daughter, Karina Garcia. The issue presented involves the application of the discovery rule under the two-year Federal Tort Claims Act statute of limitations, 28 U.S.C. § 2401(b). It may be factually formulated as follows: By September 17, 1997, would a reasonable person³ have realized that Karina's ultimate injury – the progression from a potentially treatable condition, slipped capital femoral epiphysis, to a severe debilitation, avascular necrosis – resulted from the omission of a government physician? Id. at 649; see Oberlin v. United States, 727 F. Supp. 946, 948 (E.D. Pa. 1989) (“The [FTCA] statute of limitations begins to run when the tort

² On September 17, 1999, plaintiff filed this action in the Philadelphia Court of Common Pleas. On November 24, 1999, it was removed here by the United States. On January 11, 2000 the United States was substituted for defendant Philadelphia Health Services (PHS). On February 16, 2000, the United States moved to dismiss on two grounds – first, that plaintiff had not exhausted her administrative remedies; and second, that the claim was time-barred. On May 17, 2000, the action was dismissed pending administrative review by HHS, 28 U.S.C. § 2675, and a ruling on the limitations issue was deferred. Rendon, 98 F. Supp. 2d at 648-50.

On September 19, 2000, having exhausted administrative review, plaintiff filed a second amended complaint. It is undisputed that the second amended complaint is substantially identical to the other complaints, excepting the allegation that six months had passed since plaintiff submitted her administrative claim to HHS. Second amended complaint ¶¶ 2-6.

³ Plaintiff mother's limited education and understanding of English, and her limited interaction with the health care system, pltf.'s mem. at 25, are subjective considerations that should not affect this analysis. See United States v. Kubrick, 444 U.S. 111, 123-24, 100 S. Ct. 352, 360, 62 L. Ed. 2d 259 (1979).

claimant has reason to know that an act or omission by the government medical personnel had been the cause of the injury.”) (citing Drazan v. United States, 762 F.2d 56, 59 (7th Cir. 1985)). It is well-settled in our Circuit that “timebars with respect to the filing of claims against the United States must be strictly construed.” Livera v. First Nat’l State Bank of New Jersey, 879 F.2d 1186, 1195 (3d Cir. 1989).

In its renewed motion to dismiss,⁴ the United States again argues that the latest accrual date, as established by the contents of plaintiff’s administrative claim, was August 4, 1997.⁵ Plaintiff’s position is that she had no reason to suspect the nature of her daughter’s condition until October 26, 1998, when a doctor first explained avascular necrosis to her. Pltf.’s mem. at 21 n.2. Moreover, until February 9, 1999 she was unaware that the government physician’s

⁴ Following oral argument on January 23, 2001, the parties were given the opportunity to submit further matters of law or fact to be considered in ruling on the government’s motion. In response, plaintiff asserted that “a sufficient factual record has been developed,” but if “the Court requires additional facts,” plaintiff had certain requests for admissions. Pltf.’s supp. mem. at 2. Further, “[d]epending upon the United States[’] response to those Requests for Admissions, the deposition of Carlos Dore, the treating and supervising physician of Karina Garcia may be necessary.” Id.

At this stage, however, because neither party maintains that factual disputes exist, or that the record is insufficiently developed, additional discovery will not be pursued.

⁵ “[I]t is clear that plaintiff’s claim accrued on November 20, 1996, the day of Karina Garcia’s fall at the school and the day before which she was required to undergo surgical repair to her right hip. At the latest, the accrual date is August 4, 1997.” Govt.’s supp. mem. at 5.

negligent treatment in July and August of 1996 was the cause of Karina's continuing problem.⁶ Pltf.'s mem. at 10-11.

Here, it is undisputed that in the summer of 1996, plaintiff's then 10-year old daughter was evaluated for pain in her right hip by a PHS physician. Second amended cmplt. ¶¶ 13-18. On October 8, 1996, she was again seen at PHS when she fell at home.⁷ On November 20, 1996, when Karina fell down a flight of stairs at school,⁸ plaintiff was advised at St. Christopher's Hospital that the same hip was "split" and would require surgery and insertion of screws. Pltf.'s

⁶ February 9, 1999 is the date of the report of plaintiff's expert, Marc Manzione, M.D. However, when plaintiff discovered "that the doctor who caused [Karina's] injury was legally blameworthy," is immaterial. United States v. Kubrick, 444 U.S. at 123, 100 S. Ct. at 360 ("We thus cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted."); Arvayo v. United States, 766 F.2d 1416, 1422 (10th Cir. 1985) (the "contention that a cause of action does not accrue under the FTCA in a failure to diagnose, treat, or warn case until [plaintiffs] are aware – informed – of a possible connection between a misdiagnosis and an injury [is not accepted because it] could possibly toll the statute indefinitely").

⁷ According to plaintiff, on October 4, 1996, Karina was walking down a flight of stairs at home when "her right leg gave out causing her to miss a step and hurt her left foot." Pltf.'s mem. exh. 1 (Rendon decl. ¶ 11). On October 8, 1996, plaintiff was told at PHS that Karina had possibly broken two toes, and was referred to St. Christopher's Hospital for physical therapy. Id. On October 25, 1996, plaintiff and her daughter met with a doctor at the Orthopedic Clinic at St. Christopher's, who advised Karina not to participate in gym class, and to return in one month. Plaintiff stated that "Karina was still having hip pain during this time and the broken toes only made it more difficult for her to walk. She continued to have the complaints of hip pain during this time." Id. Her fall at school was not quite a month later.

⁸ "Karina Garcia's right hip gave out on her as she was walking down a stairway causing her to fall to the ground. The collapse of the hip was a result of her hip injury suffered in the previous summer." Second amended cmplt. ¶ 22.

mem. exh. 1 (Rendon decl. ¶ 13). On November 22, 1996, Karina’s condition was diagnosed as a “right slipped capital femoral epiphysis.”⁹ Govt.’s mem. exh. B at 123; second amended cmplt. ¶ 23. Subsequently, the pain continued, culminating with the removal of the screws at St. Christopher’s on August 4, 1997, at which time an arthrogram revealed “abnormalities consistent with avascular necrosis.” Second amended cmplt. ¶ 26.

As observed in the ruling on the original motion, the increase in pain experienced prior to August 4, 1997 may have been attributable to the fall or the screws. Rendon, 98 F. Supp. 2d at 649-50. However, by that point, a reasonable person in plaintiff’s parental position would have remembered the sequence of events starting with the child’s complaints in the summer of 1996. At that time, the hip was evaluated at PHS as normal and she was discharged with a supply of Motrin. Thereafter, the fall at home in October and at school in November, the insertion of the screws, the numerous post-surgical hospital visits, and the diagnosis of necrosis the following August¹⁰ occurred. These should have

⁹ This was conveyed to plaintiff in a discharge summary, signed by plaintiff on November 22, 1996, which shows an “admission diagnosis” of “Right slipped capital femoral epiphysis.” Govt.’s mem. exh. B. at 123.

¹⁰ Although plaintiff maintains that she was first advised of the necrosis at Shriners’ Hospital on October 26, 1998, pltf.’s mem. exh. 1 (Rendon decl. ¶ 17), a “Preregister Outpatient” form from St. Christopher’s, dated August 1, 1997, shows a diagnosis of avascular necrosis. Govt.’s mem. exh. B at 15. Nursing records and a “short stay form” dated August 4, 1997 both show a preoperative diagnosis of slipped capital femoral epiphysis (or “scfe”), and a postoperative diagnosis of avascular necrosis (or “avn”). Id. at 22, 39. Moreover, on August 26, 1997, a note from a “clinic nurse” to Karina’s school requested the rearrangement of Karina’s schedule to minimize stair climbing because “[s]he has
(continued...)

conveyed to plaintiff that a proper diagnosis had not initially been made and that follow-up investigation was needed.¹¹ All of these problems involved the child's right hip. It is difficult to dispute that plaintiff's duty to investigate was triggered when she was advised in November, 1996 that Karina's hip was "split." It is indisputable that investigation was required of her when Karina's screws were removed in August, 1997 and she "still experienced the same pain in her hip." Pltf.'s mem. exh. 1 (Rendon decl. ¶ 16).

This conclusion comports with Barren by Barren v. United States, 839 F.2d 987 (3d Cir. 1988). In Barren, following a 13-month tour of duty in Korea, plaintiff went to a VA hospital in January, 1972, complaining of anxiety (heart palpitations) and a skin rash. Id. at 988. He received treatment pending final determination of whether his problems were service-related. On January 24, 1973, the VA concluded that the skin ailment was service-related, but his anxiety problem was not, and denied his disability claim as to that condition. Id.

In late January, 1974, after the VA denied his appeal and rejected his request for hospitalization, Barren's family had him admitted to the Scranton State Psychiatric Hospital; and on February 18, 1974, to the Abington Memorial Hospital. There, he was diagnosed as suffering in part with depression neurosis.

¹⁰(...continued)
a slipped capital femoral epiphysis with some avascular necrosis of the R femoral head." Id. at 147.

¹¹ According to plaintiff, seven follow-up visits at St. Christopher's took place over a period of eight months – on November 26 and December 6, 1996, and January 27, March 12, April 17, June 24 and July 18, 1997. Pltf.'s mem. exh. 1 (Rendon decl. ¶ 14).

Id. at 988-89. On October 30, 1977, the VA reversed itself and found Barren's anxiety condition to have been service-related.

On September 7, 1979, Barren filed an administrative claim, asserting that the VA had negligently failed to admit him for in-patient care and that the treatment he received was substandard. The government moved to dismiss the complaint as time-barred. Barren responded that his mental condition rendered him incapable of perceiving the government's negligence until October, 1977, when he was notified of the VA's reversal of its prior position. Id. at 989. In rejecting that argument, our Court of Appeals held that the FTCA statute of limitations began to run when Barren possessed sufficient facts to have enabled a reasonable person to discover the alleged malpractice. Id. at 991. Because Barren should have discovered the injury and its cause through the exercise of reasonable diligence prior to October, 1977, and there was "no reason why th[e] opinion of malpractice could not have been elicited as early as 1974[.]" his claim was time-barred. Id. at 990.

Here, from the objective standpoint of reasonable discovery, plaintiff has not shown why her daughter's complaints and the information available to her were not insufficient to apply the FTCA discovery rule prior to the limitations cutoff date of September 17, 1997. See Sexton v. United States, 832 F.2d 629, 633 (D.C. Cir. 1987) ("where the government agents' negligence takes the form of omission, a plaintiff's understanding of the basic nature of the treatment should suffice to begin the statute running"). Ala Barren, when plaintiff first took Karina

for treatment and tests to a government facility, she was told that the child's right hip was normal, and the "alleged malpractice was a substantial factor in [her] inability to recognize that very malpractice." Barren, 839 F.2d at 991. Nevertheless, the limitations "rule cannot be subjectively applied." Id. at 992. Based on the deterioration of the condition and extensive treatment required following the original alleged misdiagnosis, plaintiff should "have recognized that the treatment [Karina] had received from the [government] was not adequate, and that [she] had been harmed as a result." Id. at 991. See also Augustine v. United States, 704 F.2d 1074, 1078 (9th Cir. 1983) (claim accrues when a reasonable person should have "become aware of the development of a pre-existing problem into a more serious condition").

Moreover, plaintiff's expert, Dr. Manzione, based his conclusions on facts known as of August 4, 1997,¹² and "[t]here is no reason why this opinion of

¹² The report:

It is likely that the fall on 11/20/96 resulted in some displacement of the right femoral epiphysis. If a complete diagnostic work-up and appropriate clinical work-up had been pursued [in July and August, 1996], the diagnosis of slipped capital femoral epiphysis could have been established and appropriate treatment (i.e. internal fixation) could have been carried-out prior to 11/20/96. In this situation, further displacement could have been avoided. Earlier diagnosis and treatment would have also lessened the likelihood that avascular necrosis would develop. In my opinion, the delay in diagnosing slipped capital femoral epiphysis in this case was a major and significant factor in the development of the current right hip problem.

Govt.'s mem. exh. B at 170.

(continued...)

malpractice could have not been elicited” as early as then.¹³ Barren, 839 F.3d at 990. Or: given her expert’s view of the case, had plaintiff sought “advice in the medical and legal community” on or before August 4, 1999, she would have learned of this cause of action for medical malpractice. Kubrick, 444 U.S. at 123, 100 S. Ct. at 360. In these circumstances, she has not met her burden of showing why the United States should not be dismissed as a defendant.

Episcopal Hospital objects to the dismissal because of its cross-claim for contribution or indemnification. The Hospital cites United States v. Yellow Cab Co., 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1950) for the proposition that the United States in a FTCA action may be sued for contribution as a third-party defendant. There, however, jurisdiction existed independently of the claim for contribution. Moreover, the Hospital’s cause of action for contribution against the United States would arise only when it “has paid, or had a judgment rendered against [it] . . . for, more than [its] . . . fair share of common liability.” Sea-Land

¹²(...continued)

While the report refers to an x-ray dated January 30, 1998, and reports from reevaluations of Karina on March 20 and October 26, 1998, it states that the right hip arthrogram taken on August 4, 1997 showed “abnormalities consistent with avascular necrosis and resultant chondrolysis.” Id. at 169. The opinion of malpractice – that Karina’s avascular necrosis could have been prevented by a timely diagnosis of slipped capital femoral epiphysis – was formulated as of August 4, 1997.

¹³ Plaintiff observes that “a reasonable person does not immediately request medical records upon discharge following surgery or treatment.” Pltf.’s supp. mem. at 17. While this may be true, postponing the accrual of her claim “would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.” Kubrick, 444 U.S. at 123, 100 S. Ct. at 360. Plaintiff had two years after notification of her child’s serious medical condition within which to file suit – i.e., by August 4, 1999.

Service, Inc. v. United States, 874 F.2d 169, 171 (3d Cir. 1989). Inasmuch as the Hospital does not presently have such a claim, there is no basis for jurisdiction.

The United States no longer being a party to this action, and absent diversity among the remaining defendants, 28 U.S.C. § 1332, supplemental jurisdiction will not be exercised. This action will be remanded to the Philadelphia Court of Common Pleas.

Edmund V. Ludwig, J.

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UNITED STATES OF AMERICA et al. : NO. 99-5912

ORDER

Ludwig, J.

AND NOW, this 22nd day of February, 2001, defendant United States of America's motion to dismiss is granted, jurisdiction is relinquished, and this action is remanded to the Philadelphia Court of Common Pleas.

Edmund V. Ludwig, J.