

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8275  
Summary Calendar

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RAFAEL PORTILLO, JR.,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA  
and  
WILLIAM BEAUMONT ARMY MEDICAL CENTER,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(EP-91-CA-14-H)

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(June 30, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Rafel Portillo, Jr., appeals an adverse judgment in a medical malpractice Federal Tort Claims Act (FTCA) suit brought pursuant to 28 U.S.C. § 2671. Finding no error, we affirm.

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\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

## I.

The undisputed facts of this case are set forth in the district court's findings of fact as follows: On April 18, 1988, Portillo, a member of the Texas National Guard, was admitted to the William Beaumont Army Medical Center (Beaumont) in El Paso, Texas, for ankle surgery. At approximately 7:00 a.m., he was prepared for surgery, prior to which he voided his bladder. Spinal anesthesia was administered, the surgery was performed, and at approximately 10:45 a.m., Portillo was brought to the recovery room.

At 3:25 p.m., a recovery room nurse noted that Portillo had not voided and transferred him to the surgery ward. At approximately 3:40 p.m., a surgery ward nurse noted that Portillo had not urinated after surgery and that his bladder was distended; he was then catheterized. On April 20th, Portillo's patient record indicates that he developed a urinary-tract infection that was treated with antibiotics. Since the operation, Portillo has had recurring urinary-tract infections and chronic prostatitis, which he attributes to his post-surgery urinary-tract infection allegedly caused by the nursing staff's failure to monitor him adequately following his surgery and by the delay in catheterization.

## II.

On February 14, 1990, Portillo filed a claim with the Department of the Army for medical malpractice arising from the Beaumont nursing staff's alleged negligence. On July 11, 1990, his administrative claim was denied. On January 4, 1991, Portillo

commenced the instant action.

On December 18, 1991, Portillo sought leave of court to amend his complaint to add a new medical malpractice claim for negligent administration of spinal anesthesia resulting in an injury to his lower spine and assorted other problems. On March 2, 1992, the United States moved to dismiss the action (on the anesthesia claim) and grant summary judgment (on the catheterization claim). With respect to his catheterization claim, the government argued that (1) deposition testimony from Portillo's family physician and urologist established that at the time of surgery Portillo had a seven-year history of chronic prostate and urinary-tract infections; (2) all physicians deposed in the case agreed that there was no deviation from the standard of care; (3) Portillo's post-operative urinary-tract infection was caused not by the delay in catheterizing him, but from the catheterization itself; as to Portillo's anesthesia claim, the government contended that the anesthesia claim should be dismissed for lack of subject matter jurisdiction because Portillo had failed to present it with his administrative claim.

On March 19, the district court entered judgment in favor of the government dismissing the anesthesia claim and granting summary judgment for the United States on the catheterization claim. In its written reasons, the court determined that, because an administrative claim is a prerequisite to suit under the FTCA, it lacked jurisdiction to address the anesthesia claim and, because Portillo had failed to establish the essential elements of medical

malpractice on his catheterization claim, summary judgment was appropriate.

### III.

Portillo's argument, liberally construed, is that the district court committed reversible error because Portillo established proximate cause by showing that his bladder was distended as a result of the nursing staff's failure to monitor him. We review a summary judgment de novo. Abbott v. Equity Group, Inc., 2 F.3d 613, 618-19 (5th Cir. 1993), cert. denied, 114 S. Ct. 1219 (1994). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, 979 F.2d 1115, 1119 (5th Cir. 1992). The party opposing a motion for summary judgment must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). On appeal from summary judgment, we examine the evidence in the light most favorable to the non-moving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992).

Under 28 U.S.C. § 1346(b), the United States is liable for its torts if a private person would be liable for the same act or omission under local laws. Under the FTCA, liability for medical malpractice is controlled by state law. Ayers v. United States, 750 F.2d 449, 452 n.1 (5th Cir. 1985); see also Urbach v. United States, 869 F.2d 829, 831 (5th Cir. 1989); § 1346(b) (stating that

because the alleged medical malpractice occurred in Texas, its law controls).

Texas law requires a plaintiff in a medical-malpractice action to prove that the defendant's negligence proximately caused the plaintiff's injury. Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988). The plaintiff must establish a definite causal connection between negligence and injury. Id. The four elements of such a case are: "(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) actual injury to the plaintiff; and (4) . . . [proof that] the breach [was] a proximate cause of the injury." Urbach, 869 F.2d at 831.

Texas law provides that a physician has a duty to render care to a patient with the degree of ordinary prudence and skill exercised by physicians of similar training and experience in the same or similar community under the same or similar circumstances. Speer v. United States, 512 F.Supp. 670, 675 (N.D. Tex. 1981), aff'd, 675 F.2d 100 (5th Cir. 1982). In addition, a plaintiff in a Texas medical-malpractice action is required to provide expert medical testimony as to his familiarity with the pertinent standard of care, how the defendant breached the standard of care, and whether the breach proximately caused the injury. Ayers, 750 F.2d at 455.

The only contested issues are whether the medical personnel at Beaumont breached the duty they owed to Portillo and whether, if they did, the breach was a proximate cause of Portillo's injury. The Beaumont nursing staff's care of Portillo was evaluated by

three physicians in this case: Dr. Gonzales, Portillo's family physician; Dr. Lozano, Portillo's treating urologist; and Dr. Maldonado, a Beaumont urologist.

At his deposition, Gonzales testified that, although Portillo's prostrate condition could have been aggravated by the six-hour delay in catheterizing him, there was no deviation from the standard of care, and the decision when to catheterize him was a judgment call. He also opined that an earlier catheterization would have led to the same infection and that the delay did not cause any harm to Portillo.

Lozano testified that it was accepted medical practice to wait about six hours after surgery to see whether a patient will urinate voluntarily. Lozano reviewed the surgery records and confirmed that a urinary-tract infection is a common side effect from catheterization, there was no deviation from the standard of care respecting Portillo's catheterization, and there was no negligence with Portillo's care. Id. at 568-70.

Maldonado testified that the standard of care for post-surgery patients requires that catheterization be delayed until it is absolutely necessary because catheterization carries a risk of urinary-tract infection. He further opined that Portillo's treatment did not deviate from the standard of care because catheterization should be delayed until the patient complains of urinary retention or the bladder becomes distended, and, although Portillo's infection was a complication of his catheterization, it was not the result of any negligence or delay.

Texas law requires Portillo to prove negligence by expert testimony, but he failed to do so. See Rodriguez v. Pacificare of Tex., 980 F.2d 1014, 1020 (5th Cir.) (holding that summary judgment can be granted when the defendant presents expert affidavits and the plaintiff presents no such affidavits), cert. denied, 113 S. Ct. 2456 (1993). Deposition testimony unequivocally established that (1) the proper standard of care contemplated a six-hour waiting period after surgery for the patient to urinate by himself; (2) catheterization should be effected only if the patient complained or the bladder was distended; (3) a common side effect of catheterization was a urinary-tract infection; (4) such infections were caused by the invasive nature of the procedure and not the delay in commencing the procedure; (5) Beaumont personnel did not deviate from the standard of care in their treatment of Portillo; (6) Portillo developed a urinary-tract infection as a result of the catheterization itself and not of the delay in catheterization; and (7) the urinary-tract infection did not exacerbate his pre-existing urological and prostrate problems. Because Portillo presented no evidence to controvert these facts and failed to present any facts supporting negligence and causation, the district court did not err in granting summary judgment in favor of the United States.

B.

Portillo also argues, without pertinent citation, that the district court erred in dismissing his claim for negligent

administration of anesthesia because there was an "unexpected major med'l change in [his] Med'l Diagnosis after [he] file[d] [his] initial complaint"; because he was unaware of his injuries, he could not have included the anesthesia claim in the original filing. The FTCA requires a claimant to file an administrative claim with the appropriate federal agency prior to commencing an action against the United States for money damages. 28 U.S.C. § 2675(a). "Exhaustion of administrative remedies [under 28 U.S.C. § 2675(a)] is a jurisdictional prerequisite to suit under the Tort Claims Act, and absent compliance with the statute's requirement the district court was without jurisdiction." McAfee v. 5th Circuit Judges, 884 F.2d 221, 222-23 (5th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).

In Rise v. United States, 630 F.2d 1068, 1071 (5th Cir. 1980), we noted that the purpose of the exhaustion requirement is to ease court congestion, avoid unnecessary litigation, and promote fair settlement of tort claims against the United States; the purpose is served, and the exhaustion requirement is satisfied, when "a claim brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." Id. An FTCA claimant must therefore "provide facts sufficient to allow his claim to be investigated and must do so in a timely manner." Cook v. United States ex rel. United States Dep't of Labor, 978 F.2d 164, 166 (5th Cir. 1992).

In his administrative claim, Portillo apprised the government



that he sought compensation for urological injuries allegedly suffered as a result of Beaumont's failure to monitor him after the ankle surgery. Nowhere on the claim form, and not until he sought leave of court to amend his complaint approximately eleven months after instituting suit, did Portillo even allude to the new contention that Beaumont personnel negligently administered his anesthesia resulting in injuries to his lower spine and the onset of diabetes. Because the administrative claim did not give the government notice of any facts that would have led it to investigate the circumstances surrounding the administration of Portillo's anesthesia, the exhaustion requirement was not satisfied, leaving the district court without jurisdiction to address the claim; its dismissal was not error. See Bush v. United States, 703 F.2d 491, 494 (11th Cir. 1983) (holding that an administrative claim must specifically delineate facts that put the government on notice of each potential basis for relief).

The summary judgment is AFFIRMED.