

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG**

BRENT CLARK,

Plaintiff,

v.

**VIBEKE DANKWA and
PATRICIA CORBIN,**

Defendants.

**CIVIL ACTION NO.: 1:24-CV-17
(JUDGE KLEECH)**

**REPORT & RECOMMENDATION, RECOMMENDING THAT
DEFENDANTS' MOTION TO DISMISS [ECF NO. 18] BE GRANTED**

On November 28, 2023, *pro se* Plaintiff Brent Clark ("Plaintiff") filed a Complaint in Circuit Court of Monongalia, West Virginia against Defendants Dr. Vibeke Dankwa and Physician Assistant Patricia Corbin ("Defendants"). [ECF No. 1-1]. On February 12, 2024, the Complaint was removed to this Court. [ECF No.1].

On February 13, 2024, the Honorable Thomas S. Kleech, Chief United States District Judge, entered a Referral Order, referring this action to the undersigned United States Magistrate Judge in order to conduct a scheduling conference and issue a scheduling order, for written orders or reports and recommendations, as the case may be, regarding any motions filed, and to dispose of any other matters that may arise. [ECF No. 3].

On March 27, 2024, Defendants filed a Motion to Dismiss [ECF No. 18] and their Memorandum in Support thereof. [ECF No. 18-1]. On April 5, 2024, Plaintiff filed a Response. [ECF No. 23]. On April 17, 2024, Defendants filed a Response [ECF No. 25] to Plaintiff's Reply.

Upon consideration of the filings, and for the reasons stated herein, the undersigned now **RECOMMENDS** that Defendants' Motion to Dismiss [ECF No. 18] be **GRANTED**, and that the Complaint [ECF No. 1] be **DISMISSED WITHOUT PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a former inmate of the Federal Correctional Institution ("FCI") Morgantown, institutionalized during the period of December 17, 2018 to February 26, 2019. On December 17, 2018, Plaintiff allegedly suffered a head injury and "partially paralyzed arm" from falling in his cell. [ECF No. 1-2, at 5]. He was treated by a triage nurse on December 18, 2018. Id. Plaintiff fell a second time on a date between December 20, 2018, and December 29, 2018, after which he submitted two requests for medical care that went unanswered. Id., at 6.

Defendants are two individuals who were employed as medical professionals by FCI Morgantown during the relevant period. Plaintiff alleges that Defendants failed to examine or provide follow-up care for the above-noted head injuries. Specifically, Plaintiff alleges (1) medical negligence, (2) "loss of chance," (3) patient abandonment, (4) negligent infliction of emotional distress, and (5) negligent supervision. [ECF No. 1-2].

On February 26, 2019, Plaintiff was transferred to FCI Elkton.

Plaintiff has filed five federal civil actions,¹ including the instant action, and three state court actions² arising out of the same set of operative facts: Plaintiff's alleged falls in December 2018 while incarcerated at FCI Morgantown. All of these actions have either been dismissed or

¹ See Civil Action No. 3:20-CV-223 (N.D.W. Va.) (dismissed for lack of subject matter jurisdiction); Civil Action No. 5:21-CV-27 (N.D.W. Va.) (summary judgment entered in favor of the United States; monetary sanctions ordered against Plaintiff); 3:23-CV-8 (N.D.W. Va.) (dismissed for failure to state claim and two-year statute of limitations); 5:23-CV-9 (N.D.W. Va.) (dismissed for failure to state claim and two-year statute of limitations).

² See Case No. 22-C-298 (Cir. Court of Monongalia Cnty., WV) (removed to District Court); Case No. 22-C-302 (Cir. Court of Monongalia Cnty., WV) (removed to District Court).

the dismissals affirmed on appeal. However, the instant action and two prior federal civil actions involve the alleged lack of medical care provided subsequent to those falls.

On February 19, 2021, Plaintiff brought a suit against the United States alleging that Defendants “failed to provide any medically necessary standard of care, medical treatment, follow-up care and supervision of subordinates whatsoever, 12/18/2019 thru [sic] 2/26/2019, for the plaintiff’s head injuries that occurred 12/17/2018 and 12/19/2018 while housing in the Special Housing Unit at FCI Morgantown.” Clark v. United States, Civil Action No. 5:21-CV-27 (N.D.W. Va.) at ECF No. 1, at 6.

On November 28, 2022, Plaintiff’s claims were dismissed with prejudice because plaintiff failed to produce a credible expert opinion to substantiate his claims. Clark v. United States, 2022 U.S. Dist. LEXIS 236800, at *7 (N.D.W. Va. Nov. 28, 2022). Plaintiff was also sanctioned for “misrepresenting to the Court his own conduct and his retained expert’s conduct regarding preparation and transmission of the Supplemental Report.” Id., at *8. The Fourth Circuit affirmed the judgment on appeal. See Clark v. United States, No. 23-1076, 2023 U.S. App. LEXIS 23354 (4th Cir. Sep. 1, 2023). Furthermore, the Fourth Circuit held that “suit was resolved on the merits when the district court entered summary judgment against Clark” in Civil Action No. 5:21-CV-27. Clark v. Dankwa, No. 23-1300, 2023 U.S. App. LEXIS 28501, at *2 (4th Cir. Oct. 26, 2023).

On December 27, 2022, Plaintiff filed suit against the United States alleging that “a physician [Dr. Dankwa] employed by the Bureau of Prisons, provided inadequate medical care in violation [sic] of the Eighth Amendment to plaintiff while he was an inmate at FCI Morgantown.” Clark v. Dankwa, Civil Action No. 5:23-CV-9 (N.D.W. Va.) at ECF No. 5, at 1. The Court, again, dismissed Plaintiff’s claims because “(1) a Bivens type remedy was unavailable in this context and (2) even if the claim were valid, Plaintiff’s claims against Defendant Dankwa was ‘clearly barred

by the applicable statute of limitations, which in West Virginia is two (2) years.” ECF No. 18-1 at 3 (citing Clark v. Dankwa, Civil Action No. 5:23-CV-9 (N.D.W Va.) at ECF. 5). The Fourth Circuit affirmed the judgment on grounds that the FTCA’s Judgment Bar applied. See Clark v. Dankwa, No. 23-1300, 2023 U.S. App. LEXIS 28501 (4th Cir. Oct. 26, 2023). The Fourth Circuit further held that “any future claims arising out of those facts—whether brought under state or federal law—were barred.” Id., at *2.

II. LEGAL STANDARDS

A. FTCA Judgment Bar, 28 U.S.C. § 2676

“The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.” 28 U.S.C. § 2676. The FTCA judgment bar was enacted “to avoid duplicative litigation, multiple suits on identical entitles or obligations between the same parties.” Kempker v. Entzel, Civil Action No. 5:21-CV-19, 2022 U.S. Dist. LEXIS 242425, at *3 (N.D.W. Va. Jan. 12, 2022) (internal quotations and citations omitted).

B. Two-Year Statute of Limitations

Pursuant to the FTCA, 28 U.S.C. §§2671-2690, a plaintiff can recover exclusive money damages for negligent acts or omissions of federal government employees acting within the scope of their employment. See 28 U.S.C. § 2679. The FTCA serves as a limited waiver of sovereign immunity. See Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001). It allows the United States to be sued and held liable in tort “in the same respect as a private person under the law of the place where the act occurred.” Id., at 223; 28 U.S.C. § 1346(b)(1). The alleged negligent acts in this instant action occurred in West Virginia, therefore, the substantive law of West Virginia

applies. See Eichelberger v. United States, 2006 U.S. Dist. LEXIS 19250, at *6 (N.D.W. Va. Mar. 3, 2006).

In West Virginia, a medical negligence cause of action must be filed within two years of the date of an injury or “within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such medical injury.” See Sager v. Duvert, 895 S.E.2d 76, 78 (W. Va. 2023) (quoting W. Va. Code § 55-7B-4).

C. Legal Doctrine of *Res Judicata*

Res judicata, or “a matter judged,” precludes a plaintiff from relitigating claims that have already been decided by way of claim preclusion and issue preclusion. Claim preclusion prohibits a suit where a previous judgment forecloses litigation on the basis that the suit was decided in a previous case. Issue preclusion “... foreclose[es] relitigation of a matter that has been litigated and decided.” Clodfelter v. Republic of Sudan, 720 F.3d 199, 207 n.10 (4th Cir. 2013) (quoting Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). “[C]ourts may rely upon Rule 12(b)(6) to dismiss a complaint on res judicata grounds.” Knotts v. Bd. of Dirs. of JW Ruby Mem’l Hosp., No. 1:21-CV-50, 2022 U.S. Dist. LEXIS 234075, at *9 (N.D.W. Va. Dec. 9, 2022) (citing Andrews v. Daw, 201 F.3d 521, 524 n.1 (4th Cir. 2000)).

Under the doctrine of *res judicata*, a case may be dismissed when the moving party shows “(1) the judgment in the prior action was a final judgment on the merits; (2) the parties in both actions are the same or in privity; and (3) the claims in both actions arise from the ‘transactions or series of transactions.’” Knotts, 2022 U.S. Dist. LEXIS 234075 at *9 (citing Clodfelter, 720 F.3d at 210).

III. ANALYSIS

For the reasons discussed below, the undersigned **RECOMMENDS** that the Motion to Dismiss [ECF No. 18] be **GRANTED**.

A. Plaintiff's claims are barred by the FTCA judgement bar.

Plaintiff's previous FTCA claim against the United States in Civil Action No. 5:21-CV-27 was decided on the merits when the District Court entered summary judgment in favor of Defendant therein. What is more, as rightly argued by Defendants herein, "the Fourth Circuit expressly held that...any future claims arising out of allegations that Plaintiff received inadequate medical treatment while incarcerated at FCI Morgantown, whether brought under state or federal law, are barred by the FTCA's judgement bar." ECF No. 18-1, at 6; Clark v. Dankwa, No. 23-1300, 2023 U.S. App. LEXIS 28501, at *2 (4th Cir. Oct. 26, 2023). As provided by the statute, that judgment is a complete bar to any action filed by Plaintiff, "by reason of the same subject matter," against Defendants whose actions and omissions gave rise to this instant claim. See 28 U.S.C. § 2676. In other words, the instant case is against the same Defendants and is of the same subject matter, that being the lack of medical treatment provided to Plaintiff after the December 2018 falls.

Accordingly, because Plaintiff's claims are barred by the FTCA judgement bar, the undersigned hereby **RECOMMENDS** that the Motion to Dismiss be **GRANTED**.

B. Plaintiff's claims are barred by the two-year statute of limitations for a medical negligence cause of action under West Virginia law.

Plaintiff claims that the alleged acts occurred in FCI Morgantown located in Morgantown, West Virginia. Therefore, because the alleged negligent acts occurred in West Virginia, the substantive law of West Virginia applies. See Eichelberger, 2006 U.S. Dist. LEXIS 19250, at *6. In West Virginia, a plaintiff must file a medical negligence cause of action within two years of the

date of an injury or “within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such medical injury.” Sager, 895 S.E.2d at 78 (quoting W. Va. Code § 55-7B-4).

At the earliest, the statute of limitations began to run when Plaintiff fell and suffered a head injury, which was on December 17, 2018. [ECF No. 1-2, at 4]. At the latest date on which the statute of limitations began to run, as U.S. District Judge John Preston Bailey emphasized, was the date when Plaintiff was transferred to FCI Elkton, removing him from the District and out of the Defendants’ medical care, that being February 26, 2019. Id., at 5. Therefore, Plaintiff’s claims expired in February of 2021 at the latest. Because Plaintiff filed the instant action on November 28, 2023, Plaintiff’s claims exceeded the two-year statute of limitations for a medical negligence claim.

Accordingly, because the appropriate statute of limitations had passed when the instant action was filed, the undersigned hereby **RECOMMENDS** that the Motion to Dismiss be **GRANTED**.

C. Plaintiff’s claims are barred by the legal doctrine of *res judicata*.

A court may dismiss a suit under *res judicata* is proper if “(1) the judgment in the prior action was a final judgment on the merits; (2) the parties in both actions are the same or in privity; and (3) the claims in both actions arise from the ‘transaction or series of transactions.’” Knotts v. Bd. of Dirs. of JW Ruby Mem’l Hosp., No. 1:21-cv-50, 2022 U.S. Dist. LEXIS 234075, at *9 (N.D.W. Va. Dec. 9, 2022) (citation omitted).

The judgment in Clark v. United States, Civil Action No. 5:21-CV-27 (N.D.W. Va.) constituted a final judgment. The Fourth Circuit indicated that the judgment dismissing the

Plaintiff's claims were on the merits. Clark v. Dankwa, No. 23-1300, 2023 U.S. App. LEXIS 28501 (4th Cir. Oct. 26, 2023). Therefore, the first element of *res judicata* is satisfied.

The parties in Clark v. United States, Civil Action No. 5:21-CV-27 (N.D.W. Va.) are the same parties in the present case. In a FTCA action, "the United States is the only proper defendant." See Iodice v. United States, 289 F.3d 270, 273 n.1 (4th Cir. 2002). As Defendants rightfully point out, even if Defendants here were proper party-defendants, Defendants are in privity with the United States as current and former employees of the Bureau of Prisons as they are "so identified in interest with a party to former litigation that [they] represent[] precisely the same legal right in respect to the subject matter involved." Knotts, 2022 U.S. Dist. LEXIS 234075 at *10 (quoting Martin v. Am. Bancorporation Ret. Plan, 407 F.3d 643, 651 (4th Cir. 2005)). Therefore, the second element of *res judicata* is satisfied.

The claims in Clark v. United States, Civil Action No. 5:21-CV-27 (N.D.W. Va.) and the claims in the instant case arise from the same transaction, that being the allegations that Plaintiff received deficient medical treatment while incarcerated at FCI Morgantown. Therefore, the third element of *res judicata* is satisfied.

Accordingly, because the instant action meets the elements of *res adjudicata*, the undersigned **RECOMMENDS** that the Motion to Dismiss be **GRANTED**.

After reviewing the jurisdictional issue raised in Plaintiff's Response [ECF No. 23] to Defendants' Motion to Dismiss, the undersigned notes that Plaintiff fails to directly address or object to the arguments presented in Defendants' Motion to Dismiss. Instead, Plaintiff argues that this Court lacks subject matter jurisdiction because Defendants untimely removed the state court action by failing to do so "within 30 days after the receipt by the [D]efendant[s], through service or otherwise. 28 U.S.C. § 1446(b)(1). [ECF No. 23, at 2]. Defendants, however, indicate that

Defendant Dankwa received a copy of the summons and complaint on January 29, 2024 and Defendant Corbin received her copy on February 2, 2024. Defendants' Notice of Removal [ECF No. 1] was filed on February 12, 2024, within 30 days of both Defendants having received a copy of the summons and complaint.

Thus, the undersigned **FINDS** that this Court does have subject matter jurisdiction.

IV. CONCLUSION

Accordingly, the undersigned **RECOMMENDS** that the Motion to Dismiss [ECF No. 18] be **GRANTED** as set forth herein, pursuant to Rule 12(b)(6).

Any party shall have fourteen (14) days from the date of service of this Report and Recommendation to file with the Clerk of the Court **specific written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection.** A copy of such objections should also be submitted to the presiding United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitations, consistent with LR PL P 12.

Failure to timely file written objections to the Report and Recommendation as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Clerk of the Court is **DIRECTED** to provide a copy of this Report and Recommendation to all parties who appear *pro se* by certified mail, return receipt requested, to the last known addresses as shown on the docket, and all counsel of record, as applicable, as provided

in the Administrative Procedures for Electronic Case Filing in the United States District Court for
the Northern District of West Virginia.

Respectfully submitted on October 25, 2024.


MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE