

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

HERNAN MORENO, : 4:CV-07-1225
Plaintiff : (Judge McClure)
v. : (Magistrate Judge Smyser)
UNITED STATES OF AMERICA, :
Defendant :

M E M O R A N D U M

August 5, 2009

BACKGROUND:

On July 26, 2007, the plaintiff, a federal prisoner, proceeding *pro se*, commenced this action by filing a complaint. On July 25, 2007, the plaintiff filed an amended complaint. This is a case brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The plaintiff claims that as a result of inadequate medical care he became blind in one eye.

The matter was initially referred to United States Magistrate Judge J. Andrew Smyser.

The court now has before it a Report and Recommendation of Magistrate Judge Smyser, in which he recommends that the defendant's motion to dismiss and for summary judgment be granted and that the case file be closed. Objections have

been filed by plaintiff.

The plaintiff's administrative tort claim raised the issue of damage to his eye as a result of the surgery on his eye and the lack of an interpreter. The administrative tort claim did not raise any issue concerning the lack of pain medication. As the plaintiff failed to exhaust administrative tort remedies regarding his medication claim, the magistrate judge concluded that the defendant is entitled to summary judgment on that claim.

Furthermore, the magistrate judge concluded that the physicians who performed the eye surgery were independent contractors and not employees of the United States and the United States did not have the power to control the details of their performance as surgeons. Therefore, the United States is not liable for any negligence on the part of these physicians and plaintiff's claim regarding the surgery and any negligence on the part of the physicians should be dismissed.

The remaining claim is plaintiff's claim regarding the BOP's failure to provide an interpreter during his medical visits. The magistrate judge concluded that the responsibility for obtaining an interpreter lay with the physicians and not the United States. Accordingly, it was recommended that the claim regarding the lack of an interpreter be dismissed.

In his objections, plaintiff states that the Federal Tort Claims Act was

amended by Congress in 2008 so as to provide liability of the United States for actions of independent contractors. The court has been unable to locate any such amendment to the Federal Tort Claims Act which would affect this case.

The remainder of the objections restate plaintiff's arguments concerning negligence of the physicians. The United States is not liable for the negligence of the independent contractor physicians.

We agree with the conclusions of the magistrate judge for the reasons set forth in his 17-page Report and Recommendation and, therefore, will grant the motion of defendant for summary judgment.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

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ORDER

August 5, 2009

For the reasons set forth in the accompanying memorandum,

IT IS ORDERED THAT:

1. Plaintiff's objections to the report and recommendation are overruled.
2. The report and recommendation of United States Magistrate Judge J. Andrew Smyser (Rec. Doc. No. 40, filed July 17, 2009) is approved and adopted in full.
3. Defendant's motion for summary judgment (Rec. Doc. No. 21, filed October 3, 2008) is granted.
4. Final judgment is entered in favor of the defendant and against the plaintiff on all claims.

5. Any appeal from this order shall be deemed frivolous, lacking probable cause and not taken in good faith.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge