

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

CHRISTOPHER L. CARSON, individually
as Co-Executor of the Estate of Asa E. Carson, Deceased,

Plaintiff,

v.

Civil Action No. 3:14-16544

UNITED STATES OF AMERICA,

Defendant.

ANSWER

Comes now the United States of America (United States), by counsel, in answer to the complaint (ECF No. 1) and says:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. In answer to paragraph 1 of the complaint the United States admits the same.
2. In answer to paragraph 2 of the complaint the United States admits that this court is the appropriate venue.
3. In answer to paragraph 3 of the complaint the United States admits that Asa Carson presented two administrative tort claims to the Veterans Administration (VA); the first one in the sum certain amount of \$600,000 for alleged medical negligence, which was deemed denied when this action was filed. The second one in the sum certain amount of \$1,200,000 for alleged negligent hiring and credentialing. The latter claim was denied in writing on November

18, 2013. (Ex. 1). No claim was presented by plaintiff individually, and thus, the court lacks subject matter jurisdiction over any such individual claim.

4. In answer to paragraph 4 of the complaint the United States admits that on or about July 22, 2007, it hired as a temporary surgical oncologist Dr. Robert K. Finley, III (Dr. Finley) and credentialed Dr. Finley. Dr. Finley timely disclosed to the United States the 2010 investigation by the Iowa Board of Medicine and its resolution. (Ex. 4). The United States denies the remaining allegations.

5. In answer to paragraph 5 of the complaint the United States says that the information contained in plaintiff's Exhibit 3 speaks for itself.

6. In answer to paragraph 6 of the complaint the United States admits that it hired and credentialed Dr. Finley as a surgeon and that the Iowa Board of Medicine brought charges against him on April 9, 2010 (Ex. 4), which were resolved by a settlement agreement. (Ex. 4). The United States denies the remaining allegations.

7. In answer to paragraph 7 of the complaint the United States admits that Asa Carson was a patient of Dr. Finley in May and June of 2011, and that surgery and other procedures were performed, all as set forth in the medical record to which reference is made.

8. In answer to paragraph 8 of the complaint the United States denies the same.

9. In answer to paragraph 9 of the complaint the United States admits that based on the records in possession, there was a patient advocate meeting between VA employees and Mr. Carson's family. The United States further admits that Dr. Dening of Marshall University became involved in the surgical care of Mr. Carson.

10. In answer to paragraph 10 of the complaint the United States admits that Dr. Finley resolved by settlement the charges against him, as set forth in plaintiff's Exhibit 4.

11. In answer to paragraph 11 of the complaint the United States admits that it hired and credentialed Dr. Finley. The United States admits that Dr. Finley timely disclosed the charges brought by the Iowa Board of Medicine and their resolution. The United States admits that plaintiff's Exhibit 3 reflects that Dr. Canterbury reviewed the Iowa cases and reported their lack of merit.

12. In answer to paragraph 12 of the complaint the United States denies that it ignored any information it received about Dr. Finley.

13. In answer to paragraph 13 of the complaint the United States denies the same.

14. In answer to paragraph 14 of the complaint the United States denies the same.

15. In answer to paragraph 15 of the complaint the United States denies the same.

16. In answer to paragraph 16 of the complaint the United States admits that the medical records reflect that Mr. Carson returned to the VA on May 29, 2011 and was diagnosed with a perforated sigmoid diverticulitis . The United States denies the remaining allegations contained in paragraph 16.

17. In answer to paragraph 17 of the complaint the United States admits that the medical records reflect that on May 29, 2011, Dr. Finley operated on Mr. Carson as set forth in his operative report, to which reference is hereby made. The United States denies the remaining allegations contained in paragraph 17.

18. In answer to paragraph 18 of the complaint the United States denies the same.

19. In answer to paragraph 19 of the complaint the United States admits that the medical records reflect that Mr. Carson required further surgery on June 6, 2011, as set forth in Dr. Finley's Operative Report to which reference is made. The United States denies the

remaining allegations contained in paragraph 19. The United States denies the remaining allegations.

20. In answer to paragraph 20 of the complaint the United States admits that the medical records reflect that on June 9 and 16, 2011, Dr. Finley again operated on Mr. Carson as set forth in the medical records to which reference is hereby made. The United States denies the remaining allegations contained in paragraph 20 of the complaint.

21. In answer to paragraph 21 of the complaint the United States denies the same.

22. In answer to paragraph 22 of the complaint the United States admits that the records in its possession indicate that a patient advocate meeting took place as documented by Patient Advocate Randy Littlejohn, to which reference is hereby made.

23. In answer to paragraph 23 of the complaint the United States admits that Mr. Carson died on May 21, 2013. The United States lack sufficient knowledge or information about to admit or deny the allegations about Dr. Dening's surgery. The United States denies the remaining allegations contained in paragraph 23.

24. In answer to paragraph 24 of the complaint the United States denies the same.

25. In answer to paragraph 25 of the complaint the United States denies the same.

THIRD DEFENSE

The United States denies each and every allegation not admitted specifically herein.

FOURTH DEFENSE

The United States alleges as affirmative defenses lack of subject matter jurisdiction, failure to exhaust administrative remedies, the damage caps set forth in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680, and the Medical Professional Liability Act, W. Va. Code § 55-7B-1 et seq., (MPLA), and discretionary function exemption.

WHEREFORE, the United States prays this court enter judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, I electronically filed the foregoing *Answer* with the Clerk of the Court using the CM/ECF system and that I have served a copy by U.S. mail of such filing to the following:

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