

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

ROBERTA L. MINARD, Administrator  
of the Estate of Wilbur J.R. Minard,  
Deceased, and ROBERTA L. MINARD,  
Individually as the surviving spouse of  
Wilbur J.R. Minard, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 4:07-cv-0261-JAJ

**ORDER**

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This matter comes before the court pursuant to defendant's September 28, 2007, motion to dismiss (docket number 6). Plaintiff resisted defendant's motion on October 24, 2007 (docket number 9) and filed an amended complaint on the same date (docket number 11). Defendant filed its reply brief on November 19, 2007 (docket number 14).

**I. Summary of the Parties' Arguments**

In its motion, the defendant argues that dismissal is proper both under Fed. R. Civ. P. 12(b)(1) because this court lacks subject matter jurisdiction over this lawsuit, and under Fed. R. Civ. P. 12(b)(6) because plaintiff's lawsuit fails to state a claim upon which relief can be granted. More specifically, defendant argues that the crux of plaintiff's lawsuit is not medical malpractice or tort, but rather centers around a lack of benefit being provided, *i.e.*, payment for helicopter transportation to the United States Department of Veterans Affairs hospital in Iowa City. As such, defendant contends that plaintiff's recourse lies before the Court of Appeals for Veterans Claims, not this court.

Plaintiff resists defendant's motion, arguing that this lawsuit is a negligence action based upon medical malpractice by doctors employed by the Veteran's Administration

Medical Center in Iowa City, properly filed in this court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Plaintiff further contends that defendant's motion to dismiss for failure to state a claim should be denied because the amended complaint, which plaintiff filed contemporaneously with the resistance, satisfies the notice pleadings requirements of Fed. R. Civ. P. 8.

In reply, defendant claims that plaintiff's amended complaint still does not allege medical malpractice, arguing that plaintiff's amended complaint does not allege that the VA Hospital in Iowa City did not provide reasonable and proper care to plaintiff. Moreover, defendant argues that there is no allegation that the delay in between presentment at the emergency room in Centerville and the subsequent treatment in Iowa City was the fault of anyone at the VA Hospital in Iowa City. Finally, defendant contends that there is no information in the amended complaint from which the court can find that the defendant owed a duty of care to the decedent prior to his presenting at the VA Hospital in Iowa City.

## **II. Applicable Legal Standard**

The Supreme Court recently clarified the applicable standard under Rule 12(b)(6) in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). Previously, a court would not dismiss a complaint pursuant to Rule 12(b)(6) according to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46 (1957). The Bell Atlantic Court rejected Conley's "no set of facts" standard and instead determined that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic, 127 S. Ct. at 1969.

In order to adequately state a claim, the plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. at 1965. “Factual allegations must be enough to raise a right to relief above the speculative level,” Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004)). The Supreme Court clarified Conley to stand for the “breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.” Bell Atlantic, 127 S. Ct. at 1969. When analyzing the adequacy of a complaint's allegations under Rule 12(b)(6), the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. Id.; see Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002); Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (“when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint”)(citations omitted)). “The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims.” U.S. v. Aceto Agr. Chem. Corp., 872 F.2d 1373, 1376 (8th Cir. 1989) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984)).

### **III. Analysis**

Plaintiff’s amended complaint removed all specific allegations regarding defendant’s failure to provide helicopter transportation to the VA Hospital in Iowa City. Presumably, this moots defendant’s arguments regarding subject matter jurisdiction, since defendant’s reply brief, while renewing its original objection, really argues only that plaintiff failed to plead a prima facie case of medical malpractice, *i.e.*, “Plaintiffs’ Amended Complaint does not cure the failure to state a claim upon which relief can be granted . . .” In the amended complaint, plaintiff alleges the following:

4. On or about April 29, 2004 Plaintiff's decedent Wilbur J.R. Minard was taken by Plaintiff to the Emergency Room at Mercy Hospital, Centerville, Iowa because of severe pain in his legs. He arrived at Mercy Hospital at approximately 2:50 p.m. on April 29, 2004 and was examined by Robert Hatchett, D.O., the Emergency Room physician who diagnosed a vascular occlusion in Mr. Minard's left leg. Mr. Minard had no health insurance and the department of Veterans Affairs Medical Center in Iowa City, Iowa was his primary healthcare provider.
5. Dr. Hatchett was concerned about the severity of the vascular condition in Mr. Minard's left leg, which he considered to be life threatening. Dr. Hatchett telephones the Veterans Medical Center in Iowa City to express his concern and to emphasize the need for Mr. Minard to be treated by a vascular surgeon within six hours. Initially, he could not get through. But, when he did, he stressed the importance of treatment within the six hour window. By the time Mr. Minard was examined and treated by the VA doctors more than six hours had passed and Mr. Minard had suffered irreversible vascular and other injuries which resulted in the severe deterioration of his health and, ultimately, his death, on May 2, 2004.
6. Defendant was negligent in one or more of the following:
  - a. Failing to respond in an appropriate and timely manner to Mr. Minard's critical medical condition and need for immediate care;
  - b. Failing to have a system in place to effectively handle emergency cases such as Mr. Minard's;
  - c. Failing to provide appropriate and necessary medical care and treatment to Mr. Minard; and
  - d. Compromising Mr. Minard's chance of survival.
7. The negligence of the Defendant was a proximately cause of the death of Wilbur J.R. Minard and of the damages sustained by the Plaintiff, individually, and by Wilbur J.R. Minard and his Estate.

Under the “Jurisdiction” section of plaintiff’s amended complaint, plaintiff alleges that “[t]his Court has jurisdiction of the subject matter under 28 U.S.C. § 1346(b)(1). Section 1346(b)(1) provides, in pertinent part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Under the “Nature of Action” section of plaintiff’s amended complaint, plaintiff alleges

This is an action under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) as amended, for the wrongful death of Wilber J.R. Minard, an honorably discharged Viet Nam veteran of the United States Army, and for loss of spousal companionship, society, consortium, services and support by the surviving spouse of Wilber J.R. Minard, deceased, arising out of the negligence of the Department of Veterans Affairs in failing to provide timely and proper medical care and treatment to decedent Wilbur J.R. Minard.

The Federal Tort Claims Act (FTCA) provides, in pertinent part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries

resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2674.

The FTCA waives federal sovereign immunity and grants federal district courts jurisdiction over a certain category of claims against the United States only to the extent that a private person, under like circumstances, would be liable to the plaintiff under the substantive law of the state where the alleged wrongful conduct took place (in this case, [Iowa]).” Green Acres Enterprises, Inc. v. U.S., 418 F.3d 852, 856 (8<sup>th</sup> Cir. 2005). “[I]n other words, the claim must be such that a similarly situated private party would be liable for the same conduct in [Iowa].” Id. Under Iowa law, “[t]o establish a prima facie case of medical malpractice, the plaintiff must demonstrate the applicable standard of care, the violation of the standard of care, and a causal relationship between the violation and the harm allegedly suffered by the plaintiff.” Philips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001) citing Kennis v. Mercy Hosp. Med. Ctr., 491 N.W.2d 161, 165 (Iowa 1992).

Defendant’s motion to dismiss is denied. Accepting as true all of the factual allegations contained in the amended complaint and viewing them in a light most favorable to the plaintiff, plaintiff has sufficiently pleaded her case to be entitled to conduct discovery and offer evidence in support of her claims. As pleaded, plaintiff’s cause of action is a medical malpractice claim, properly brought in this court pursuant to the FTCA.

Upon the foregoing,

**IT IS ORDERED** that defendant’s motion to dismiss (docket number 6) is denied.

**DATED** this 19<sup>th</sup> day of December, 2007.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA