IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

DONNA HOUCK,	)	Civil Action Number: 1:19-cv-02038-JMC
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

The United States of America ("Defendant" or the "United States") moves this Court for an Order dismissing this action for lack of subject matter jurisdiction. The Court lacks subject matter jurisdiction because all of Plaintiff's allegations arise out of an assault and battery, which is exempt from the waiver of sovereign immunity, and because the allegations do not involve the provision of medical care as required for coverage of a federally-funded community health care center under the Federal Tort Claims Act. For these reasons, the complaint[1] should be dismissed.

STATEMENT OF FACTS

Plaintiff alleges that she was a patient of Low Country Health Care Systems, Inc., ("LCHCS") on or about September 19, 2011, when she presented for gynecological medical care and treatment by Dr. Robert Jones, a physician employed by LCHCS, "an entity receiving

[1] The allegations in the complaint are similar to the allegations of assault and battery by Dr. Robert Jones in two related cases before this Court: *Linda Lee v. United States of America*, Civil Action No. 1:19-cv-02039-JMC and *Deidra Lee v. United States of America*, Civil Action No. 1:19-cv-02037-JMC.

federal grant money from the united States Public Health Service pursuant to 42 U.S.C. § 254b, 254c, 256, or 256a." Compl. ¶ 3. She claims that Dr. Jones "placed his hand in Plaintiff's face, creating fear and anxiety, and that he "began improperly touching, molesting, and groping Plaintiff's breasts and vagina without her consent." Compl. ¶¶ 9-10. Plaintiff was able to escape the examination room and the building. *Id.* at ¶¶ 14-16. She alleges that Dr. Jones was "charged with criminal assault and battery offenses as a result of his elicit actions that occurred on September 19, 2011." *Id.* at ¶ 17. Plaintiff also alleges that Dr. Jones was acting at all times within the scope of his employment. Dr. Jones is not a party to this action and has not been certified as acting within the scope of his employment.

Plaintiff alleges that LCHCS was negligent in one or more of the following ways: (1) failing to provide adequate care and treatment to Plaintiff; (2) failing to provide a safe and respectful environment; (3) failing to exercise reasonable care for the safety and well-being of the Plaintiff; (4) failing to properly supervise and entrust its employees, agents and individuals under their control; (5) failing to conduct and adequately investigate allegations of elicit actions at its facility; (6) failing to discipline or remove Dr. Jones from his position; (7) failing to respond to the victims of Dr. Jones elicit actions; and (8) failing to exercise the degree of care which a reasonably prudent person would have exercised under the circumstances. Compl. ¶ 25.

STANDARD OF REVIEW

The party invoking federal jurisdiction bears the burden of proof. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Renne v. Geary*, 501 U.S. 312, 316 (1991); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Thus, Plaintiff in this case is required to establish subject matter jurisdiction over her claims. *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir.

1999). A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction challenges the court's authority to hear the matter brought by the complaint. *Davis v. Thompson*, 367 F. Supp. 2d 792, 799 (D. Md. 2005).

According to the Fourth Circuit, "[w]hen a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). *See also Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (providing that the court may look beyond allegations of complaint to determine if there are facts to support jurisdictional allegations). The moving party should prevail if the material jurisdictional facts are not in dispute, and the moving party is entitled to prevail as a matter of law. *Falwell v. Lynchburg*, 198 F. Supp. 2d 765, 772 (W.D. Va. 2002) (citations and quotations omitted).

ARGUMENT

The United States is entitled to an order dismissing this case for lack of subject matter jurisdiction. The allegations in the complaint arise out of the intentional act of sexual assault and battery by Dr. Robert Jones. The United States is immune from suit for these claims.

Law

The United States, as sovereign, is immune from suit unless it has consented to be sued. *United States v. Sherwood*, 312 U.S. 584 (1941). Further, the United States may define the terms and conditions upon which it may be sued. *Soriano v. United States*, 352 U.S. 270 (1957). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-

2680, constitutes a waiver of sovereign immunity, with certain specific limitations. *United States v. Sherwood*, 312 U.S. 584 (1941); *Carr v. Veterans Admin.*, 522 F.2d 1355 (5th Cir. 1975); *Childers v. United States*, 442 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971). The limitations on the Federal Tort Claims Act's waiver of sovereign immunity are to be strictly construed. *United States v. Sherwood*, 312 U.S. 584 (1941). Exceptions to the waiver of sovereign immunity "receive a generous construction with ambiguities resolved against those seeking recovery from the government." *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986). Only when Congress has "clearly and unequivocally expressed its consent to suits against the United States may courts entertain such actions." *Id.*

I. Plaintiff's Claims are Barred by 28 U.S.C. § 2680(h) Which Precludes Claims Based on Assault and Battery.

Although Plaintiff's claims in this action sound in negligence, they are barred by 28 U.S.C. § 2680(h) as claims "arising out of assault [or] battery." Dr. Robert Jones's intentional acts of sexual assault constitute assault and battery. *See Thigpen v. United States*, 618 F. Supp. 239, 245 (D.S.C. 1985) (finding that Naval hospital employee's sexual assault of two patients constituted assault and battery because neither of the patients consented), *aff'd*, 800 F.2d 393 (4th Cir. 1986).

The United States Supreme Court in *United States v. Shearer*, 473 U.S. 82 (1985), analyzed exception to the waiver of sovereign immunity in 28 U.S.C. § 2680(h) and held as follows:

> Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a

> Government employee. Thus, "the express words of the statute" bar respondent's claim against the Government.

473 U.S. at 55 (citing *United States v. Spelar*, 338 U.S. 217, 219 (1949) (emphasis in original)). Thus, section 2680(h) should be read broadly effectively barring any claim involving an assault or battery when a government employee committed the act.

The Fourth Circuit has similarly ruled. *See Perkins v. United* States, 55 F.3d 910, 916 (4th Cir. 1995) (providing that "[a]n allegation of 'negligent supervision' will not render an otherwise unactionable claim actionable so long as the negligent supervision claim depends on activity of the supervised agent which is itself *immune*"); *Thigpen*, 800 F.2d at 395 (Section 2680(h) bars FTCA claims that allege the negligence of supervisors but depend upon the existence of an assault or battery by a government employee as many assaults can be attributed easily enough to someone's negligence in permitting the attack to take place, and to hold such allegations actionable under the FTCA would undermine Congress' clear intent to limit its waiver of immunity in § 2680(h)).

Here, Plaintiff's claims arise out of the sexual assault by Dr. Robert Jones and are, therefore, excepted from the waiver of sovereign immunity under the FTCA. Plaintiff cannot recast this intentional tort action into a negligent supervision and retention action to avoid the sweeping language of the exception to the waiver of sovereign immunity found in section 2680(h). In any event, claims related to negligent supervision and retention are likewise barred because the United States did not owe Plaintiff a duty with regard to the employment relationship between Dr. Jones and LCHCS.

Plaintiff also cannot rely on the United States Supreme Court's decision in *Sheridan v. United States*, 487 U.S. 392 (1988), which clarified that § 2680(h) does not bar negligence

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