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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1523

CHRISTINA KNAPP; DOUGLAS KNAPP,
Appellants

v.

UNITED STATES OF AMERICA,

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-20-cv-00694)
District Judge: Honorable Malachy E. Mannion

Argued on May 4, 2022

Before: GREENAWAY, JR., KRAUSE, and PHIPPS, *Circuit Judges*

(Opinion filed: August 25, 2022)

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OPINION[*]

GREENAWAY, JR., *Circuit Judge*

I. Introduction

Like rules of a board game, procedural rules established by law have underlying purposes. These rules safeguard objectives; provide for the orderly administration of justice; ensure predictability; facilitate strategic thinking; and, very often, serve as a best attempt to obtain consistent results. Yet, unlike a board game—where deviating from the rules is frequently inconsequential—straying from a procedural rule established by law can be ruinous. This possibility of ruin looms large even in Federal Tort Claims Act ("FTCA") cases, where "the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent." *McNeil v. United States*, 508 U.S. 106, 113 (1993).

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Justice Stevens, who wrote the above-quoted language from *McNeil*, quite possibly never imagined the facts of this case. These facts involve a unique state mechanism for commencing an action, and a narrowly-drawn provision of the FTCA that may save an otherwise time-barred suit. The viability of the underlying action ultimately hinges on whether the Westfall Savings Clause, that narrowly-drawn provision of the FTCA, can save Appellants' suit. We think that it cannot. As a result, we shall affirm the District Court's ruling.

II. Background

a. Factual Background

Federally-qualified health centers ("FQHC") are community-based health care providers that receive funding from the federal government to provide services in underserved areas throughout the United States.[1] On May 14, 2015, Appellant Christina Knapp ("Appellant" or "Knapp") went to the Pike County Family Health Center (the "Health Center"), an FQHC in Hawley, Pennsylvania. There, she sought treatment for a red rash on her forehead and hairline, as well as stiffness in her jaw.[2] Certified

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[1] These health care centers provide services via general community health centers, migrant health centers, centers for homeless populations, and centers for residents of public housing. U.S. Health Resources & Services Administration, *Federally Qualified Health Centers* (May 2018), https://www.hrsa.gov/opa/eligibility-and-registration/health-centers/fqhc/index.html.

[2] This action was brought by Appellants Christina and Douglas Knapp. Appellant Christina Knapp was the patient of Certified Registered Nurse Practitioner Eileen Arenson at the Pike County Family Health Center. In the background section, the term "Appellant" (singular) or "Knapp" refers to Christina Knapp. In other parts of the opinion, "Appellants" (plural) or "the Knapps" refers to both Christina and Douglas Knapp.

Registered Nurse Practitioner Eileen Arenson attended to Knapp and recorded that Knapp was experiencing pain in her face and scalp, which were believed to be from bug bites and a tick found embedded in her toe the prior week. Arenson diagnosed Knapp with Lyme Disease and prescribed her Doxycycline for 21 days. They scheduled a follow-up appointment for four weeks later.

About one week after this initial visit, Knapp developed a rash on her palms and thumb. A few days later, Knapp and her husband returned to the Health Center, but were told by the receptionist that no one could see her and Arenson would only be in the office the following day. Later that evening, Knapp contacted the Health Center's on-call doctor, who advised her to visit the emergency room if the rash was still present in the morning. The doctor speculated that the cause could be Rocky Mountain Spotted Fever, but also advised Knapp to immediately stop taking the Doxycycline in case it was a reaction to the drug. Knapp stopped taking the medication.

The next day, Knapp contacted the Health Center to schedule an appointment with Arenson that same morning to address the persistent rash. By the appointment, Knapp had developed a fever, chills, aches, and bloodshot eyes in addition to the rash. Knapp and her husband alerted Arenson to the possibility of Rocky Mountain Spotted Fever. Arenson stated that she was not familiar with the disease, and advised Knapp to resume the Doxycycline for the remainder of the prescription. That day, the Health Center also did blood work for Rocky Mountain Spotted Fever and Lyme Disease. Both tests were negative.

Knapp's condition continued to worsen, and she soon became very weak and found it difficult to eat or drink. She also fainted in the shower, causing a bruise and swelling. Knapp ended the medication regimen on June 3, 2015, then returned to the Health Center the next day for an appointment with Arenson. Knapp's rash had spread to her neck and chest. Arenson told Knapp that she suspected the issue was myalgia and ordered more blood work. Within a week of the follow-up session, Knapp's condition deteriorated, and she went to the emergency room. Once there, an emergency room physician ordered tests for Lyme Disease and a chest x-ray before discharging her with directions to drink extra fluids and eat regularly.

A week after this discharge, Knapp continued to feel ill and unable to consume food or fluids. She was admitted to the hospital to receive IV treatment and begin medication for other suspected causes. Knapp was eventually told that she may be suffering from rheumatoid arthritis and was advised to obtain a new family physician. Knapp, still ill, returned to the Health Center to see a rheumatologist, who prescribed more medication.

After seeing this rheumatologist, Knapp went to another health center whose physician suggested several other possible causes and advised that she take new medication. Following additional visits to this new health center and a recommendation to seek treatment at another area hospital, Knapp learned on July 15, 2015 that she was suffering from microscopic polyangiitis and stage 3 chronic kidney disease caused by the Doxycycline prescribed by Arenson.

b. Procedural History

i. *Initial State Action: The Writ of Summons*

On May 26, 2017, Knapp and her husband ("Appellants") filed a praecipe for a writ of summons ("writ of summons") in the Court of Common Pleas of Pike County against the Health Center and Arenson. Pennsylvania law permits a plaintiff to commence a civil action by either filing with the prothonotary a writ of summons or a complaint. Pa. R. Civ. P. 1007; *c.f.* Fed. R. Civ. P. 3. The mere filing of a writ of summons is sufficient to toll the statute of limitations under state law. *Lamp v. Heyman*, 366 A.2d 882, 885 (Pa. 1976). A writ of summons is not required to include factual or jurisdictional allegations, nor does it need to assert the plaintiff's cause of action. *See* Pa. R. Civ. P. 1351; *c.f.* Fed. R. Civ. P. 8(a). Appellants' writ of summons contained a single sentence requesting that the prothonotary "[k]indly issue a summons in [the above-captioned] civil action." App. II, 1 (cleaned up).

Appellants' writ was served on Arenson and the Health Center on June 20, 2017. Three days later, counsel for the Health Center contacted Appellants' counsel and informed him that the Health Center received federal funding, so the claim was subject to the Federal Tort Claims Act.[3] The FTCA requires plaintiffs to first present their claims

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[3] The FTCA shields federal employees from personal liability for tortious conduct committed while acting within the scope of their employment. 28 U.S.C. §§ 1346(b)(1) and 2679(b)(1). The Public Health Service Act specifically protects its employees from personal liability for injuries allegedly caused by the performance of medical functions. *See generally* 42 U.S.C. § 233. Medical providers at community health centers receiving federal funding, such as those that work at the Pike County Family Health Center, are deemed employees of the Public Health Service pursuant to the Federally Supported Health Centers Assistance Act ("FSHCAA"). 42 U.S.C. § 233(g)–(n). The FSHCAA

to the appropriate federal administrative agency, here HHS, before filing suit in a court of law. 28 U.S.C. § 2675(a). It also grants federal courts exclusive jurisdiction over these claims. 28 U.S.C. § 1346(b)(1). Despite these prescriptions, Appellants' counsel faxed and hand-delivered the applicable administrative tort claim form to the local Health Center on June 28, 2017. By July 18, 2017, Arenson came into possession of the form. On July 19, 2017, she forwarded it to a manager in the human resources department at Wayne Memorial Community Health Center, which operates the Pike County Family Health Center. That same day, the human resources manager emailed the form to a senior attorney in HHS. HHS never acted on the claim.

ii. *Knapp I*

On July 17, 2018, Appellants filed a complaint in federal district court against the United States pursuant to 28 U.S.C. § 2675(a).[4] Appellants' complaint identified July 15, 2015 as the accrual date, when Appellant Christina Knapp received a diagnosis and learned that the Doxycycline had caused the polyangiitis and kidney disease. Therefore, the applicable FTCA two-year statute of limitations expired on July 17, 2017.[5] *See* 28

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extends the protections of the Public Health Service Act to employees at these health centers. 42 U.S.C. § 233(g)(1)(A).

[4] Section 2675(a) deems a claim denied after six months without a response from an administrative agency. The provision then permits a claimant to file an action in federal court. In this case, Appellants' claim would have been deemed denied in January 2018.

[5] The two-year limitations period expired on Saturday, July 15, 2017. Therefore, the limitations period was extended to Monday, July 17, 2017 by operation of Fed. R. Civ. P. 6(a)(1)(C).

U.S.C. § 2401(b). The Government moved to dismiss the action or, alternatively, for summary judgment, because Appellants failed to timely present their claim to HHS. The District Court granted summary judgment in favor of the Government on February 28, 2020, and in *Knapp I* this Court affirmed that ruling on November 10, 2020.

iii. *Knapp II*

Prior to our ruling in *Knapp I*, Appellants filed a complaint in Pennsylvania state court alleging identical claims as they had raised in the recently dismissed suit from federal court.[6] As required by the FTCA, the United States was substituted as defendant and removed the action to federal court. *See* 28 U.S.C. § 2679(d)(2)**.** Once there, the Government moved to dismiss the action as time barred or, alternatively, for failure to exhaust administrative remedies. The District Court dismissed the suit as time barred, because Appellants' writ of summons, the operative filing within the statute of limitations, failed to comport with Federal Rule of Civil Procedure 3.[7]

Now, on the second trip to our Court, Appellants argue that the second district court erred in ruling that the federal rules govern the commencement of the suit; therefore, the writ of summons was sufficient to commence the action for purposes of the FTCA. Appellants concede that "the District Court should have dismissed . . . Appellants' Complaint." Appellants' Br. at 7. But, they argue, the dismissal should have

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[6] Appellants initially filed a writ of summons in the state court.

[7] Fed. R. Civ. P. 3 ("A civil action is commenced by filing a *complaint* with the court.") (emphasis added).

been without prejudice so that Appellants could take advantage of the federal Westfall Savings Clause, since the state writ of summons tolled the statute of limitations. The Government maintains that Appellants' suit is time barred, because the Federal Rules of Civil Procedure govern and, regardless, the Westfall Savings Clause does not apply to FSHCAA cases.[8]

Despite the initial question presented on commencement, we now unpack the case on appeal and rule on other grounds supported by the record.

III. Jurisdiction and Standard of Review

Federal district courts have exclusive jurisdiction of civil claims under the FTCA, 28 U.S.C. § 1346(b)(1), and pursuant to 28 U.S.C. § 1291, we have jurisdiction over appeals from a district court's final order. Where our jurisdiction may be in doubt, we must exercise our "independent duty to satisfy ourselves of our appellate jurisdiction regardless of the parties' positions." *Papotto v. Hartford Life & Acc. Ins. Co.*, 731 F.3d

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[8] Whether the Westfall Savings Clause applies to the FSHCAA was not raised as an initial question presented on appeal, but we requested and received supplemental briefing on the following questions:

> 2b. Under *Hui v. Castaneda*, 559 U.S. 799 (2010), which components of the Federal Tort Claims Act, as amended by the Westfall Act, including but not limited to 28 U.S.C. §§ 2401(b), 2675(a), and 2679(d)(5), are incorporated by the Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233(g)-(n)?
>
> 2c. If the FSHCAA incorporates the Westfall Savings Clause, 28 U.S.C. § 2679(d)(5), does the Savings Clause apply to actions removed under the FSHCAA?

Because we rule on other grounds, we do not address this issue in our opinion.

265, 269 (3d Cir. 2013) (quoting *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999)).

We review de novo questions of subject matter jurisdiction, statutory interpretation, and motions to dismiss. *Baer v. United States*, 722 F.3d 168, 172 (3d Cir. 2013) (citation omitted); *Stiver v. Meko*, 130 F.3d 574, 577 (3d Cir. 1997); *Talley v. Wetzel*, 15 F.4th 275, 286 n.7 (3d Cir. 2021) (citation omitted). As relevant to this decision, we may affirm the district court's ruling on any grounds supported by the record. *Beasley v. Howard*, 14 F.4th 226, 231 (3d Cir. 2021) (citing *Watters v. Bd. of Sch. Dirs. of City of Scranton*, 975 F.3d 406, 412 (3d Cir. 2020)).

IV. Discussion

a. Legal Standard

i. The FTCA

The FTCA shields federal employees from personal liability for tortious conduct committed while acting within the scope of their employment.[9] 28 U.S.C. § 2679(c). The remedy provided by the Act, 28 U.S.C. § 1346(b), is the exclusive remedy for alleged personal or property damage. 28 U.S.C. § 2679(b)(1). As a prerequisite to suit under the Act, claimants must exhaust administrative remedies before "[a]n action shall . . . be instituted upon a claim against the United States." 28 U.S.C. § 2675(a). Both the Supreme Court and our Court have held that this exhaustion requirement is jurisdictional.

[9] The FTCA constitutes a limited waiver of the Government's sovereign immunity. *D.J.S.-W. by Stewart v. United States*, 962 F.3d 745, 749 (3d Cir. 2020).

McNeil v. United States, 508 U.S. 106, 113 (1993); *Shelton v. Bledsoe*, 775 F.3d 554, 569 (3d Cir. 2015) (citing *Rosario v. Am. Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1231 (3d Cir. 1976)).[10]

Lawsuits under the FTCA are also subject to a two-year statute of limitations or, if a presented claim is denied by the agency, a claimant must bring suit against the United States within six months of the mailing of the denial. 28 U.S.C. § 2401(b). These limitations periods are not jurisdictional and may be tolled under certain circumstances. *United States v. Wong*, 575 U.S. 402, 405 (2015).

ii. Tolling the FTCA: The Westfall Savings Clause

Although federal employees acting within the scope of their employment currently enjoy absolute immunity from personal liability for alleged tortious conduct, this absolute immunity was solidified only through the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act") in 1988.[11] Following a decision by the Supreme Court limiting federal employee immunity to only situations where employees exercised

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[10] Plaintiffs bear the burden of demonstrating that the appropriate federal agency timely received their claim. *Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009).

[11] Prior to January 13, 1988, federal employees usually enjoyed judicially-created immunity in suits arising from alleged tortious conduct committed within the scope of their employment. *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (discussing immunity for allegedly tortious conduct within the scope of the federal employee's duties); *see also*, David A. Morris, *Employees' Immunity from Personal Liability*, Fed. Tort Claims § 7:4 (explaining that "the courts generally granted immunity to the employees"). Courts often granted immunity to employees because they recognized a need for a balance between holding accountable "public officers who have been truant to their duties," and curbing abuses by litigious members of the public. *Barr v. Matteo*, 360 U.S. 564, 571 (1959).

discretion within the scope of their duties, *Westfall v. Erwin*, 484 U.S. 292, 298–99 (1988), Congress passed the Westfall Act to absolutely shield federal employees from liability for a "negligent or wrongful act or omission . . . while acting within the scope of [their] office or employment." Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat 4563.[12]

Importantly, the Westfall Act also contains a "savings clause" for plaintiffs who mistakenly file in the wrong forum. 28 U.S.C. § 2679(d)(5). This provision "saves from being barred by the statute of limitations certain timely claims filed in the wrong forum, such as in a state or a federal court rather than with the appropriate administrative agency." *Santos ex rel. Beato v. United States*, 559 F.3d 189, 193 (3d Cir. 2009). Thus, a plaintiff's suit filed in state court and then dismissed for failure to exhaust administrative remedies will be credited with the date that she filed the claim in the state court as long as: (1) the claim in the underlying civil action would have been timely had it been filed in the correct forum, and (2) the claim is presented to the appropriate federal agency within 60 days after dismissal of the civil action. 28 U.S.C. § 2679(d)(5)(A)–(B).

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[12] In *Westfall*, the Supreme Court specified that absolute immunity applied only to employees who, at the time of the alleged tortious conduct, were exercising discretion within the scope of their duties. *Westfall*, 484 U.S. at 298–99. The Court worried that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to [discretion]." *Id*. at 296. This was so, it reasoned, because "[w]hen an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct." *Id*. at 296–97. Yet, harkening to its holding in *Howard v. Lyons*, the Court expressed that Congress was "in the best position to provide guidance" and invited the body to pass "[l]egislat[ive] standards governing the immunity of federal employees involved in state-law tort actions." *Westfall*, 484 U.S. at 300.

b. Analysis

i. The District Court Had Jurisdiction

The District Court opinion presently on review issued a single conclusion that "Fed. R. Civ. P. 3 dictates when the plaintiffs' action was commenced for purposes of the FTCA." App. I, 13. Because Fed. R. Civ. P. 3 requires a "complaint with the court," but Appellants' state court complaint was not filed until after the two-year statute of limitations, Appellants' action was time barred. Fed. R. Civ. P. 3. The Parties presented only this conclusion for our review. However, in a supplemental briefing order, we asked the parties to address whether the district court had jurisdiction to hear the suit.[13] We address this issue here.

The parties' supplemental briefs took diametrically opposed perspectives as to the district court's jurisdiction.[14] But, by oral argument, Appellants and the Government

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[13] If there is any doubt about our or the district court's jurisdiction to hear a case, we have an "obligation to determine the threshold issue of subject matter jurisdiction." *In re Caterbone*, 640 F.3d 108, 111 (3d Cir. 2011) (citation omitted); *see also Papotto*, 731 F.3d at 269 (citations omitted).

[14] Appellants initially asserted that the district court lacked jurisdiction because at the time they filed their suit in *state* court, they had yet to exhaust their administrative remedies. Appellants' supplemental brief, however, did not explain why the federal District Court lacked jurisdiction at the time they filed a complaint in federal court (July 2018) or when their earlier-filed state-court action was removed to the District Court (April 2020). The Government argued in its briefing and at argument that the District Court had subject matter jurisdiction because Appellants filed their administrative claim, waited for it to be constructively denied, then filed their complaint. To the Government, "[t]he problem with plaintiffs' suit is not that they filed their state tort suit too early under [§ 2675(a),] but that their administrative claim was untimely." Government's Supplemental Br. at 4. At oral argument, Appellants took the same position as the Government. Appellants stated that the first case was dismissed for statute of limitations

both took the position that Appellants had presented their claim to HHS, but late.[15] We agree with both parties that the form was presented to HHS, but late. Therefore, the District Court had jurisdiction to hear the suit.[16]

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purposes. *See* Audio Recording: Oral Argument in *Knapp v. United States*, 21-1523, 13:12 and 14:50 (May 3. 2022) (on file with the Court).

[15] *See* Audio Recording: Oral Argument in *Knapp v. United States*, 21-1523, 35:27.

[16] Judge Krause disagrees and would hold that, contrary to *Staple*, a plaintiff must satisfy § 2675(a)'s jurisdictional exhaustion requirement at the time when the action is first commenced in state court. *See J.H. ex rel. Gallegos v. Cnty. of Kern*, 2014 WL 1116985, at *2-3 (E.D. Cal. Mar. 19, 2014); *Estate of George v. Veteran's Admin. Med. Ctr.*, 821 F. Supp. 2d 573, 580 (W.D.N.Y. 2011); *Edwards v. District of Columbia*, 616 F. Supp. 2d 112, 116 n.3 (D.D.C. 2009). Under the FTCA, the term "instituted" as used in § 2675(a) is synonymous with the term "commenced" as used throughout the statute, *see McNeil v. United States*, 508 U.S. 106, 112 (1993), and both the FSHCAA and the Westfall Act distinguish between when an action is "commenced" in state court and when it is later removed and "deemed a tort action brought against the United States," 28 U.S.C. § 2679(d)(1); 42 U.S.C. § 233(c). Moreover, because the FTCA "envisions and applies to cases that are initially filed in state court[,] . . . state law should govern when the case commences." *Farina v. Nokia Inc.*, 625 F.3d 97, 110 (3d Cir. 2010); *see also Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533 (1949) (commencement of cause of action "created by local law . . . is to be found only in local law"); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (state law determined whether state PCRA petition had been properly filed for purposes of federal habeas statute). Under Pennsylvania law, a praecipe suffices to commence an action, Pa. R. Civ. P. 1007, and Appellants filed their praecipe on May 26, 2017, long before their administrative claims were properly exhausted on January 19, 2018. Accordingly, Judge Krause would hold that both the District Court and this Court lack jurisdiction under § 2675(a) and, without reaching the merits of Appellants' Savings Clause arguments, would remand to the District Court with instructions to dismiss without prejudice.

That the district court below had jurisdiction was also substantially the conclusion we reached in *Knapp I*. Through a series of forwarded messages, HHS came into possession of Appellants' SF-95 administrative tort claim form on July 19, 2017. Appellants filed a complaint in the first district court on July 17, 2018, as permitted by § 2675(a) because it had been more than six months without a response from HHS. *See* 28 U.S.C. § 2675(a). Because it was undisputed that Appellants' cause of action accrued on July 15, 2015, and their claim did not reach HHS until July 19, 2017, the district court granted summary judgment in favor of the Government the first time the case appeared in federal court. We later affirmed.[17]

[17] In our prior decision, we went on to explain that "[i]n fact, as the District Court noted, Appellants never presented their claim to <u>any</u> federal agency; rather they faxed and hand delivered the SF-95 to the Pike County Health Center." *Knapp I*, 836 Fed. App'x at 90 (emphasis in original). The District Court in *Knapp I* cited an Eleventh Circuit decision holding that health centers are not federal agencies, therefore Appellants failed to present their claim within the statute of limitations. *Knapp v. United States*, No. 18-1422, 2020 WL 969624, at *9 (M.D. Pa. Feb. 28, 2020) (citing *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 845 (11th Cir. 2013) (affirming dismissal of an FTCA complaint where the claimant submitted the SF-95 to the health center within two years of the accrual of her claim, but did not submit the SF-95 to HHS until after the two years had elapsed since a health center is not a federal agency)).

This argument about health centers not being federal agencies did not arise in the District Court opinion presently on review nor in the underlying *Knapp II* motion to dismiss. The Government argued this point, however, in its motion to dismiss or, in the alternative, motion for summary judgment in *Knapp I*. We have not yet decided this issue, though the Fifth and Eleventh Circuits have done so. *Hejl v. United States,* 449 F.2d 124, 126 (5th Cir. 1971) (holding that the state agency that operated a federally-funded program was not the appropriate federal agency for purposes of the FTCA); *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 845 (11th Cir. 2013) (stating that the health center was not a federal agency and affirming dismissal of an FTCA complaint where claimant submitted the administrative tort claim form to the health center within two years of the accrual of her claim, but the form did not reach HHS until after the two years had elapsed).

In this opinion, we again conclude that the district court had jurisdiction to hear this suit.

ii. The Westfall Savings Clause Cannot Apply

Likely cognizant of the harsh outcome that could result from an unwary plaintiff mistakenly filing suit before submitting a claim to the appropriate federal agency, when Congress passed the Westfall Act, it also amended the FTCA to include a savings clause, which tolls the statute of limitations in such a circumstance. *Santos ex rel. Beato*, 559 F.3d at 193.

The Westfall Savings Clause provides that:

> (5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—
>
> > (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
> > (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

28 U.S.C. § 2679(d)(5)(A)–(B).[18]

Assuming, without deciding, that this Court would take the view that Appellants presented their claim to the agency, though haphazardly, the claim still reached HHS two days late.

[18] If the federal agency fails to act on the presented claim within six months, it shall be deemed a denial and claimants may then file an action in federal district court. 28 U.S.C. § 2675(a).

The text of Section 2679(d)(5) sets a threshold requirement limiting the Savings Clause to only cases: (i) "in which the United States is substituted as the party defendant," and (ii) the case "is dismissed for failure first to present a claim pursuant to section 2675(a) of [Title 28]." 28 U.S.C. § 2679(d)(5). Appellants do not meet the second requirement of this threshold as a matter of law and fact.

First, the United States substituted itself as a defendant and removed the case on April 27, 2020. This action could not be dismissed for failure to present to the agency before that date as a matter of law: the United States was not yet a party. *Staple v. United States*, 740 F.2d 766, 768 (9th Cir. 1984) ("It follows that the issue of federal court jurisdiction under section 2675(a) does not arise until after removal to district court, for only there does the action become one against the United States."); *see also D.L. ex rel. Junio v. Vassilev*, 858 F.3d 1242, 1246 (9th Cir. 2017) ("Federal jurisdiction under the FTCA is determined at the time of removal."). Second, on or after April 27, 2020, the action could not be dismissed for failure to first present to the agency as a matter of fact: Appellants presented to HHS *before* filing the federal suit. Appellants' claim arrived on July 19, 2017, and it was deemed denied on January 19, 2018. *See* 28 U.S.C. § 2675(a). Thus, by the time Appellants filed their complaint in state court on April 3, 2020, and it

was removed by the Government on April 27, 2020, the action could not have been dismissed for failure to present.[19] It was properly dismissed for untimeliness.[20]

Yet, even assuming *arguendo*, that Appellants did not present their claim, they may still not avail themselves of the Westfall Savings Clause. Subsection (d)(5)(B), requires the wrong-forum claim to be presented to the appropriate federal agency within 60 days of the action being dismissed. 28 U.S.C. § 2679(d)(5)(B). There have been three dismissals over the past two years, but Appellants have failed to present their claim to HHS within 60 days of any of these dismissals.

Appellants' claims were dismissed by district courts on February 28, 2020 and March 8, 2021. We affirmed the first dismissal on November 10, 2020 and the second dismissal is presently before the Court. After the first dismissal on February 28, 2020, the 60-day limitations period required Appellants to have presented their claims by April 28, 2020. Even if one were to argue that Appellants were pursuing the claim on appeal and were therefore not required to present the claim by April 28, 2020, by the time of our determination in *Knapp I* (November 10, 2020), Appellants would have needed to take

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[19] Likewise, the action could not have been dismissed for failure to present as a matter of fact in *Knapp I*. There, Appellants filed their complaint in federal district court on July 17, 2018. That date also fell after Appellants had presented their claim to HHS.

[20] Appellants do not, nor can they, assert that other grounds exist for tolling their claim, such as fraudulent concealment.

some step to present their claim as required by the Savings Clause. That sixty-day deadline lapsed on January 1, 2021.[21]

The lack of substitution and removal in the first case is also of no consequence. Because Appellants' first dismissal in *Knapp I* was from an action originally filed in federal court, there was no occasion for substitution and removal. *See* 28 U.S.C. § 2679(d)(1)–(3),(5); *see also* 42 U.S.C. § 233(c). That fact, however, does not affect the case presently before us. The decision that Appellants currently appeal arose from a state-court filing where the United States substituted itself as defendant and removed the case to federal court. Thus, surely when the second district court dismissed this case on March 8, 2021 the claim should have then been presented to HHS.[22] The time for doing so expired on May 8, 2021.[23]

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[21] It does not appear that Appellants sought cert in the Supreme Court after *Knapp I*. It may be argued that Appellants have been appealing the entire time, but the statutory language provides for only a 60-day window. Appellants also do not present authority to support a contention that the claim need not be presented as long as there is an active appeal of the dismissal. Nevertheless, just as Appellants' counsel filed the state complaint while appealing the *Knapp I* decision, he could have also submitted a claim to HHS while appealing the decision in our Court.

[22] *See*, *supra*, note 21. Appellants do not present authority to support a contention that the claim need not be presented as long as there is an active appeal of the dismissal.

[23] At argument, Appellants also asserted that their prior dismissals would have needed to be without prejudice for them to invoke the Westfall Act. *See* Audio Recording: Oral Argument in *Knapp v. United States*, 21-1523, 50:16 (May 3. 2022) (on file with the Court). Appellants did not provide any authority during argument that suits must be dismissed *without* prejudice to invoke the Westfall Act. On the contrary, the Westfall Savings Clause does not specify the type of dismissal needed. Sub-provision (d)(5)(B) states only that the claim must be "presented to the appropriate Federal agency within 60 days after dismissal of the civil action." 28 U.S.C. § 2679(d)(5)(B). Indeed, *Brooks v. HHS Medical Group, Inc.*, 513 F. Supp. 3d 1069 (S.D. Ill. 2021), a case that Appellants

Accordingly, the Westfall Savings Clause ultimately cannot apply to save the case.

V. Conclusion

We may affirm the District Court's ruling on any ground supported by the record. *Beasley*, 14 F.4th at 231. Therefore, for the foregoing reasons, we will affirm the District Court.

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directed our attention to at oral argument, may undermine Appellants' view. In that case, there was no dismissal at all. The Southern District of Illinois only stayed a suit that was filed too early while the plaintiff pursued administrative exhaustion. *Brooks*, 513 F. Supp. 3d at 1084–85.