IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LENROY BROWN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

99-C-0400-C

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In this civil action for monetary relief brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, pro se prisoner plaintiff Lenroy Brown contends that medical personnel employed by defendant United States of America at the Federal Correctional Institution in Oxford, Wisconsin, negligently failed to treat his symptoms of abdominal pain and kidney stones in a timely fashion. Jurisdiction is present. See 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. In response to defendant's motion, plaintiff filed a document with the court entitled “Cross-Move [for] Summary Judgment and Pursuant to Rule 56, F.R.C.P.,” together with a brief and two affidavits in support of his motion and in opposition to defendant's motion for summary

judgment. The documents could not be considered as a cross-motion for summary judgment, however, because they were not filed until after the deadline for filing dispositive motions and did not conform to this court's summary judgment procedures.

Instead, I construed plaintiff's documents as a response to defendant's motion for summary judgment and extended until August 14, 2000, the deadline for plaintiff to respond to defendant's proposed findings of fact in accordance with summary judgment procedure. I also extended to August 24, 2000, the time in which defendant was to respond to plaintiff's proposed findings. Plaintiff has filed his proposed findings together with another affidavit and a document titled "Motion to Correct Judicial Oversight and Objection Not to Consider Plaintiff's Cross-Move Summary Judgment Filed Under Rule 56(c) F.R.C.P." Because the outcome will not be changed by any response defendant might file, it is unnecessary to wait for its response before deciding this motion.

Because I find that plaintiff has not supplied expert testimony in support of his medical negligence claim as required by Wisconsin law, defendant's motion for summary judgment will be granted. From the pleadings and the parties' proposed findings of fact, I find the following to be material and undisputed for the sole purpose of deciding this motion.

FACTS

Shortly after arriving at the Federal Correctional institution in Oxford, Wisconsin,[1] plaintiff went to the medical clinic complaining of pain in his stomach and sides and a burning sensation when urinating. An examination revealed he had kidney stones. Plaintiff was given shots and pills for the pain. Several times in the fall of 1993 plaintiff received shots for the pain. In 1994, he filed an administrative remedy for lack of medical treatment. In response, the Bureau of Prisons informed plaintiff he was receiving treatment as required. He continued to receive shots for pain in 1994. Plaintiff requested he be transferred to the Federal Medical Center in Rochester, Minnesota, but his request was denied. On at least five occasions in 1995, plaintiff had to be assisted out of bed to the clinic to receive shots for pain. Plaintiff urinated blood because of bruises from the movement of the stone. He informed clinic personnel that he was vomiting and that the pain extended on both sides and in his stomach. Plaintiff was taken to the University of Wisconsin Hospital where doctors recommended a lithotripsy (a procedure for crushing and flushing kidney stones). The lithotripsy was performed on July 7,

[1] In plaintiff's proposed findings of fact, he asserts that he was confined at the Federal Correctional Facility in Perkins, Illinois "at all time[s] pertinent to [the] allegations of the complaint." If this statement were true, plaintiff's claim would not be within the jurisdiction of this court. However, because plaintiff alleged in his complaint and defendant admitted in both its answer and its proposed findings of fact that plaintiff was an inmate at FCI-Oxford, Wisconsin, when the events that gave rise to this cause of action occurred, I will construe plaintiff's proposed fact as only asserting where he is presently incarcerated.

1995. Plaintiff was given a device in which to urinate so that evidence of the breakup of the stone could be gathered. No parts of the stone came out. On February 13, 1996, plaintiff was returned to the hospital for a second lithotripsy. Approximately five weeks later, x-rays performed both at the prison and at the University of Wisconsin Hospital revealed that plaintiff still had a kidney stone problem. Plaintiff's pain following both lithotripsies was treated with shots. Plaintiff filed a tort claim for administrative review which was denied by the Bureau of Prisons, exhausting his administrative remedies.

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 324 (1986).

The Federal Tort Claims Act provides in part that 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." 28 U.S.C. § 2674. Because a claim

brought under the Federal Tort Claims Act is governed by "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), this negligence claim is controlled by the substantive law of Wisconsin. See Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). Wisconsin recognizes the tort of medical malpractice. The elements of a medical malpractice claim in Wisconsin are that the care provider failed to use the required degree of skill, that plaintiff was harmed and that there is a causal connection between the provider's failure and the harm plaintiff suffered. See Wis J-I Civil 1023. "The question is not whether the physician made a mistake in diagnosis, but rather whether he failed to conform to the accepted standard of care." Christianson v. Downs, 90 Wis. 2d 332, 338, 279 N.W.2d 918, 921 (1979).

"Unless the situation is one where the common knowledge of laymen affords a basis for finding negligence, expert medical testimony is required to establish the degree of care and skill required of the physician." Id. Examples of situations where common knowledge affords a basis for finding negligence include leaving a sponge or surgical instrument inside a body or removing the wrong organ or other body part. See id. at 339, 279 N.W.2d at 922. Plaintiff's situation is not the type in which the common knowledge of laypersons affords a basis for finding negligence; it is possible that lithotripsies and pain medication were reasonable treatments for plaintiff's kidney stones given the current state of medical knowledge and that they were

administered in a timely fashion. It is also possible that those treatments were inappropriate and untimely. Therefore, the determination whether defendant's treatment of plaintiff's kidney stones and pain was negligent requires the testimony of experts.

Plaintiff has not offered any expert evidence regarding whether the pain he suffered was the result of defendant's failure to use "proper skill and care." Id. at 338, 279 N.W.2d at 921. Although it appears in the affidavit plaintiff attached to his proposed findings of fact that plaintiff may have been attempting to name "Dr. James Reed" and "Dr. Johnston" as his experts, plaintiff's efforts are far from sufficient. As I noted in my order dated July 28, 2000, the deadline for naming experts was June 16, 2000. This deadline has long since passed. Furthermore, even if plaintiff was acting in a timely manner, his disclosure does not meet the requirements of Fed.R.Civ.P 26(a)(2), because his disclosure of expert testimony was not accompanied by a written report from the expert stating the opinions the expert will express at trial and the bases for these opinions. This requirement was noted in the Preliminary Pre-Trial Conference Order and cannot be excused.

Lacking expert evidence, a trier of fact would have "no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required," Froh v. Milwaukee Med. Clinic, 85 Wis. 2d 308, 317, 270 N.W.2d 83, 87 (Ct. App. 1978), and thus could not reasonably conclude that defendant was negligent in its care of plaintiff. Because a trier of fact could not reasonably conclude that defendant was negligent, defendant's

motion for summary judgment must be granted. See Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 503-04 (7th Cir. 1999) (at summary judgment stage, "'a party must show what evidence it has that would convince a trier of fact to accept its version of events.'"); see also Hutchinson v. United States, 838 F.2d 390, 393 (9th Cir. 1988) (summary judgment appropriate where medical negligence plaintiff in Federal Tort Claims Act case does not provide expert evidence and controlling state law requires it); Sitts v. United States, 811 F.2d 739-41 (2d Cir. 1986) (same).

Plaintiff tries to evade the requirement for expert testimony by relying on 18 U.S.C. § 4042--Duties of Bureau of Prisons. Plaintiff argues that both defendant and the court have mischaracterized his claim as one for medical malpractice when the claim is actually based on the "failure to provide care" and, therefore, section 4042 should govern the case. Section 4042 imposes on the United States of America, through the Bureau of Prisons, the duties to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons . . . convicted of offenses against the United States" and to "provide for the protection . . . of all persons . . . convicted" of such offenses. 18 U.S.C. § 4042(a)(2) and (3).

Plaintiff is correct in asserting that the duty of care owed to federal prisoners by the United States is fixed by 18 U.S.C. § 4042 and is "independent of an inconsistent state rule." United States v. Muniz, 374 U.S. 150, 165 (1963). Furthermore, a prison inmate need not produce any evidence to show that this duty exists. See Jones v. United States, 91 F.3d 623,

625 (3d. Cir. 1996).

Although Muniz acknowledged a duty, it did not purport to establish new standards for suits brought under the FTCA. Rather, that case dealt with the issue whether prison inmates could bring negligence suits against the United States under the FTCA *at all.* See Muniz, 374 U.S at 150. In holding that they could, the Supreme Court noted that its decision would not be influenced by the fact that jailers in some states cannot be held liable to their inmates. See id. at 164. Therefore, Muniz does not help plaintiff. The issue here is not whether there is an "inconsistent state rule" or whether defendant had a duty to provide plaintiff with safekeeping, care and protection. Rather, the issue is whether defendant breached this duty.

Although 18 U.S.C. § 4042 establishes a federal duty of care, I must still look to state law to determine whether that duty was breached. As the Court of Appeals for the Sixth Circuit stated: "Th[e] duty of care is set by section 4042. In order to determine liability, the elements of state tort law must be applied." Friedman v. United States, 2000 WL 87639, at *3 (6th Cir. 2000) (quoting Flechsig v. United States, 991 F.2d 300, 303-04 (6th Cir. 1993)). Regardless how the claim is characterized, plaintiff is still required to support his claim with expert testimony.

In his brief in support of his motion for summary judgment, it appears that plaintiff may be attempting to characterize his claims as arising under the Eighth and Fourteenth Amendments by making reference to a "liberty interest" and contending that defendant

"deliberately withheld" medical treatment from him. Plaintiff was granted leave to proceed only on a negligence claim under the Federal Tort Claims Act. Although plaintiff's complaint does not explicitly make reference to the Federal Tort Claims Act, plaintiff titled his complaint "TORT CLAIMS" and described his cause of action as the failure of defendant to comply with its "duty of reasonable care to make sure that the plaintiff is receiving proper medical care." There is no indication in the complaint that plaintiff intended to bring a constitutional claim in addition to his tort claim. Furthermore, although it is true that when I granted plaintiff leave to proceed in this case, I construed plaintiff's complaint as a tort claim and amended the caption to name the United States as defendant, plaintiff has never objected to the court's decision to construe the complaint in this manner.

If plaintiff wishes to proceed on claims under the Eighth and Fourteenth Amendments, he may file a new complaint under 42 U.S.C. § 1331. However, any such complaint would likely be dismissed promptly if plaintiff were to make the same allegations he made in his complaint in this case. Under the Eighth and Fourteenth Amendments mere negligence is not actionable as a violation of the Constitution. In addition, plaintiff attempts to re-characterize his claim as one for failure to properly train and supervise medical employees. Even if such a claim were separate from a medical negligence claim and therefore did not require the testimony of experts under Wisconsin law, plaintiff has proposed no facts to support his claim that defendant failed to properly train and supervise its medical employees and the evidence

suggests none.

Finally, plaintiff attached a document to his proposed findings of fact titled "Motion to Correct Judicial Oversight and Objection Not to Consider Plaintiff's Cross-Move [for] Summary Judgment Filed Under Rule 56(c) F.R.C.P.," which again asks the court to consider the documents plaintiff filed on July 19, 2000, as a cross-motion for summary judgment rather than a response to defendant's summary judgment motion. As already noted, plaintiff's documents could not be considered a cross-motion for summary judgment both because the time for filing dispositive motions had passed and because the documents were not in compliance with this court's summary judgment procedures. Even if these documents were construed as plaintiff wished, however, it would not change the outcome of this case; plaintiff is no more able to prevail on his own motion for summary judgment than he can survive defendant's summary judgment motion. The fact remains that plaintiff has failed to produce evidence that would allow a factfinder to conclude that defendant did not treat him with due care. Accordingly, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that:

1. The motion for summary judgment of defendant United States of America is GRANTED; and

2. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 18th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge