

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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TIMOTHY J. NOVAK, K.N., S.N. and  
M.N. by their mother LISA NOVAK  
and LISA NOVAK,

Plaintiffs,

v.

SAWYER COUNTY, SAWYER COUNTY  
JAIL OFFICER JOHN DOE #1,  
SAWYER COUNTY JAIL NURSE  
HENRIETTA WATSON, DUNN  
COUNTY, DUNN COUNTY JAIL  
NURSE LINDA SHINDLER, DUNN  
COUNTY PHYSICIAN TERRANCE J.  
WITT, M.D., DUNN COUNTY  
PHYSICIAN JOSEPH W. HEIMLER,  
M.D., DUNN COUNTY PHYSICIAN  
MICHAEL D. FEIGAL, M.D., ABC  
INSURANCE COMPANY AND DEF  
INSURANCE CO.,

Defendants.  
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OPINION AND ORDER

03-C-0093-C

This is a civil action for monetary relief brought pursuant to 42 U.S.C. §1983 in which plaintiffs allege that defendants (other than ABC and DEF Insurance Companies) violated the Eighth Amendment by failing to provide plaintiff Timothy Novak with adequate

medical care.

Presently before the court is the motion of defendants Terrance J. Witt, Joseph W. Heimler and Michael D. Feigal to dismiss for failure to state a claim upon which relief can be granted. The motion will be denied.

For the sole purpose of deciding the present motion, I accept as true plaintiffs' allegations in their complaint.

#### ALLEGATIONS OF FACT

At all relevant times, plaintiff Timothy Novak was an inmate at the Sawyer County and Dunn County jails, which are both located in Wisconsin. Plaintiff Lisa Novak is the wife of plaintiff Timothy Novak. Plaintiffs K.N., S.N. and M.N. are their minor children. Defendants Terrance J. Witt, Joseph W. Heimler and Michael D. Feigal are physicians employed at the Dunn County jail. (For the purposes of the present motion only, I will refer to plaintiff Timothy Novak as plaintiff Novak and will recount only those allegations relevant to the moving defendants.)

On October 21, 1999, plaintiff Novak injured his right leg while working at a job site in Florida. On November 3, 1999, plaintiff Novak was convicted of felony charges and was detained in the Sawyer County jail while awaiting sentencing. Plaintiff Novak was transferred between the Sawyer County jail and the Dunn County jail several times because

of overcrowding at the Sawyer County facility.

When plaintiff Novak arrived at the Sawyer County jail, defendant John Doe interviewed him about his medical status. At that time, plaintiff disclosed the injury to his right leg, the fact that medication had been prescribed for it and his need for follow-up medical care. Plaintiff Novak's injury to his right leg was noticeable and serious. He walked with a limp, wore a brace, suffered swelling and complained frequently of pain.

Plaintiff Novak received medical attention from defendants Witt, Heimler and Feigal. (It is unclear whether each defendant treated plaintiff more than once.) These defendants were responsible for plaintiff's medical care from November 29, 1999, to February 22, 2000. Plaintiff Novak informed each of these defendants of the injury to his right leg, the pain he was suffering, the need for prescribed medication and the need for appropriate medical treatment. Each of these defendants was aware of plaintiff's medical needs and failed to provide adequate medical care. Plaintiff Novak's leg injury worsened and became either infected or more infected. Plaintiff Novak's right leg was amputated below the knee. (It is unclear when his leg was amputated.)

#### OPINION

A claim will not be dismissed under Fed. R. Civ. P. 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the

allegations.” Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The standard is based on the concept of notice pleading, which requires that every complaint contain only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Notice pleading does not require a plaintiff to plead facts supporting each element of a cause of action. See Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (“At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.”).

Defendants Witt, Heimler and Feigal contend that plaintiffs pleaded too much in their complaint and, thus, “plead[ed] themselves out of court by alleging facts that establish a defendant’s entitlement to prevail.” Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998). I disagree. Nothing in plaintiffs’ complaint shows that the moving defendants are entitled to victory. Viewing the allegations in a light most favorable to plaintiffs, as I must at this stage of the proceedings, plaintiffs alleged facts in their complaint sufficient to sustain an Eighth Amendment claim against defendants Witt, Heimler and Feigal. (Although it is unclear whether plaintiff Timothy Novak’s children and wife are proper plaintiffs or whether some of the non-moving defendants are proper defendants, these questions are not before the court.)

To prevail on an Eighth Amendment claim, a plaintiff must prove that a defendant acted with deliberate indifference to a serious medical need. Estelle v. Gamble, 429 U.S.

97, 103 (1976). The Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.” Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106. Therefore, plaintiff must allege facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to this need. Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define “serious medical needs,” the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

Defendants argue in their reply brief that “[o]ther than plaintiffs’ use of the word ‘serious’ in the complaint, there is nothing in the pleadings which would lead one to conclude that was the case.” Dfts.’ Reply, dkt. #14, at 5. First, because defendants did not raise this argument until their reply brief, it has been waived. United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments raised for first time in reply brief are waived); James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 1998) (same). Second, even if defendants

had raised this argument in their brief in support, plaintiffs alleged that plaintiff Novak had his leg amputated below the knee because of deliberate inadequate medical care. Specifically, plaintiffs alleged that defendant doctors knew that plaintiff Novak walked with a limp, wore a brace on his right leg, suffered swelling and complained of pain frequently. In addition, plaintiffs alleged that because plaintiff Novak's leg was left untreated, it became infected or more infected, resulting ultimately in amputation. Considering that plaintiff Novak had to have his leg amputated, it is incomprehensible to me why defendants would argue that there is "nothing in the pleadings" that would lead one to conclude that plaintiff had a serious medical need. In any event, at this stage of the proceedings, plaintiffs have alleged a serious medical need.

As to deliberate indifference, the Supreme Court has held that it requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F. 3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard "is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is

apparent.” Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). However, courts must “examine the totality of an inmate’s medical care when considering whether that care evidences deliberate indifference to his serious medical needs.” Gutierrez, 111 F.3d at 1375.

Defendants Witt, Heimler, and Feigal argue that plaintiffs pleaded that defendant doctors treated plaintiff Novak over a three-month period and that this demonstrates a lack of deliberate indifference in and of itself. I disagree. Although this argument might well carry the day on a motion for summary judgment, at this stage of the proceedings, it does not. Plaintiffs alleged that defendants Witt, Heimler and Feigal failed to provide adequate medical care and asserted deliberate indifference to a serious medical need in violation of the Eighth Amendment. Although plaintiffs alleged that defendant doctors treated plaintiff Novak, they never alleged the specific number of times that the doctors saw him. For some reason, defendant doctors rely on this lack of specificity to suggest that because there was some treatment, it was adequate. However, accepting this argument would mean that I was viewing the evidence in a light most favorable to defendants, which is impermissible.

Defendants Witt, Heimler and Feigal argue next that plaintiffs failed to allege there was either a delay in medical treatment and a refusal to provide treatment. However, plaintiffs are not required to plead facts, they are required only to put defendants on notice of their claim. See Bennett, 153 F.3d at 518 (“a complaint is not required to allege all, *or any*, of the facts logically entailed by the claim. . . . A plaintiff does not have to plead

evidence. . . . [A] complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.”) (emphasis in original). Moreover, a delay in medical treatment and a denial of adequate treatment can be inferred from plaintiffs’ allegation that the injury became infected or more infected and from the fact that plaintiff Novak’s leg had to be amputated.

In sum, at this stage of the proceeding, plaintiffs’ allegations are sufficient to sustain an Eighth Amendment claim of deliberate indifference to a serious medical need. Plaintiffs have not pleaded themselves out of court by alleging too much. The motion to dismiss will be denied.

#### ORDER

IT IS ORDERED that the motion by defendants Terrance J. Witt, Joseph W. Heimler and Michael D. Feigal to dismiss for failure to state a claim upon which relief can be granted is DENIED.

Entered this 6th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge