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

RONNIE FAMOUS,

Plaintiff,

v.

DOE ZOHIA, RICHARD HEIDORN, DOE WATERFORD, JANE DOE NURSE, DOE WONG, ANDREW KESSLER, DOE BRESTS BURSE, MICHAEL BAENEN, JEANANNE ZWIERS, DAVE BURNETT, and JAMES RICHARDS[1],

Defendants.

OPINION AND ORDER

12-cv-144-slc

In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Ronnie Famous, a prisoner at the Green Bay Correctional Institution, contends that the defendants, who are nurses, doctors and health care administrators for the Wisconsin Department of Corrections and correctional institutions where Famous has been incarcerated, violated his rights under the Eighth Amendment and state law by failing to provide adequate medical treatment for a serious, long-lasting eye infection.

Famous is proceeding under the *in forma pauperis* statute, 28 U.S.C. § 1915, and has made an initial partial payment. Because Famous is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. Famous also has asked for appointment of a pro bono attorney and a guardian ad litem.

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[1] The complaint did not list James Richards as a defendant in its caption, though plaintiff did include allegations specific to him. (Compl., dkt. 1 at 6.) In a letter to the court, plaintiff requested that Richards be added to the caption. (Dkt. 6.) The court will treat the letter as a motion to amend the complaint, which it will grant. The caption has been changed to reflect the addition of James Richards as a defendant.

As discussed below, I am allowing Famous to proceed on his claims against all of the defendants, but I am denying without prejudice his motion for appointment of counsel and denying his motion for appointment of a guardian.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this screening order, the court assumes these facts that Famous alleges in his complaint:

Plaintiff Ronnie Famous currently is an inmate at Green Bay Correctional Institution ("GBCI") and was incarcerated for some time in 2010 and perhaps 2011 at the Wisconsin Resource Center ("WRC").

Defendants Zohia, Waterford and Richards are eye doctors employed by the Wisconsin Department of Corrections ("DOC") who appear to have previously treated Famous at GBCI. Defendants Heidorn and Wong are medical doctors employed by the DOC who also treated Famous at GBCI. Defendant Kessler is a psychiatrist employed by Department of Health Service who treated Famous during his incarceration at WRC. Defendant Brests is a nurse employed at WRC. Defendant Baenen is the warden at GBCI. Defendant Zwiers is the Health Services Unit ("HSU") supervisor at GBCI. Defendant Burnett is employed by the DOC as the Medical Administrator, for the Bureau of Health Services. Famous is suing Baenen and Burnett in their official capacities; he is suing the other defendants are sued in their individual capacity.

Famous alleges that he suffers from a chronic bacterial infectious eye disease and that he has a tiny solid foreign object trapped in his eyes. Famous alleges that in 1999, he was seen

by Jane Doe Nurse concerning yellow pus in his eyes. Famous alleges that the nurse refused to acknowledge the pus and failed to provide any treatment for it. In 2000, an eye culture submitted by defendant Dr. Wong came back positive for three different types of infectious bacteria. Famous contends that Wong never told him about these test results, nor was he treated for the infection until 2003. In 2003, Famous saw an unidentified eye doctor who prescribed an antibiotic for Famous's infection.

In 2006, Famous saw Dr. Zohia for "a discharge of yellow pus in his top and bottom eye lids, surrounding his eyes, which drains through the corners of both of Famous's eyes [and] for a tiny solid foreign object lodged in his eyes." (Compl., ¶15.) Dr. Zohia prescribed Johnson & Johnson baby shampoo for Famous's eye infection and scheduled a referral to a University of Wisconsin eye clinic for further tests. Famous alleges that Dr. Zohia failed to conduct certain tests, failed to inquire into facts essential to an informed diagnosis, misdiagnosed his condition, prescribed inappropriate medication, failed to order and review his medical records, failed to conduct an examination, and failed to keep accurate and complete medical records.

After many months had passed without being seen at the U.W. eye clinic, Famous submitted a request to GBCI's HSU requesting information about Dr. Zohia's referral. Famous was told by an HSU nurse that his appointment had been cancelled by defendant Heidorn and that he would have to see Heidorn before any appointment could be rescheduled. Dr. Heidorn examined Famous's eye but "deliberately, intentionally pretended" that he did not see pus or a foreign object in Famous's eyes. While Dr. Heidorn was examining Famous, GBCI's HSU manager defendant Zwiers came by and also examined Famous's eyes, after which she stated "negligently with deliberate indifference . . . , 'there is nothing in your eyes.'" (Compl., ¶ 25.)

Famous alleges that defendant Waterford also did not address Famous's eye infection. Instead, Waterford raised a concern about a vein in Famous's eye, and wanted Famous to be seen by an eye clinic in Madison for a glaucoma test. Dr. Waterford also gave Famous eye drops to relieve dryness. Famous also was seen by Dr. James Richards who prescribed an antibiotic medication for his eyes but did nothing to remove the foreign object.

In January 2010, Famous was transferred to the Wisconsin Resource Center. There, Famous alleges that he saw defendant Kessler and showed him the yellow pus and told him about the foreign object in his eyes. Famous alleges that Kessler ignored him and refused to acknowledge his medical condition. On March 2, 2010, Famous again sought treatment for his infection from defendant Jane Doe Nurse Brests. Famous alleges that Brests similarly ignored Famous and refused to acknowledge the pus in his eyes.

Famous alleges that defendants continue to refuse to treat his infection until this day.

Lastly, Famous alleges that defendant Baenen, the warden of GBCI, and defendant Burnett, the medical administrator for the Bureau of Health Services at the DOC, "refused to rectify these deprivations through grievances, letters and other means." (Compl. (dkt. #1) ¶ 42.)

Famous alleges that he had filed grievances, and has exhausted administrative remedies. Famous also alleges that he has filed a notice of claim, presumably with the state attorney general, of his medical malpractice claim.

DISCUSSION

I. Deliberate Indifference

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it "significantly affects an individual's daily activities," *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825 (1994).

"Deliberate indifference" means that prison officials know of yet disregard an excessive risk to inmate health and safety. *Farmer*, 511 U.S. at 837. Under this standard, Famous's deliberate indifference claim has three elements:[2]

(1) Did Famous have a serious medical need that required treatment?

(2) Did the defendants know that Famous needed this medical treatment?

(3) Despite defendants' awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

[2] When the court talks about the "elements" of a deliberate indifference claim, this means that Fountain has the burden to present evidence that proves by a preponderance (namely, that it is more likely than not) that the answer to all three of these questions is "yes." Famous will have an opportunity to gather evidence relevant to his claims during the "discovery" phase of this lawsuit. I will discuss this with Famous at a telephonic preliminary pretrial conference that the court will be setting up in the near future.

Famous asserts that he has had a chronic eye infection and a tiny foreign object in his eyes at least since 1999 and that defendants have intentionally failed to treat it properly. As a result, claims Famous, he has suffered humiliation, emotional distress, mental anguish, discomfort and nightmares. These allegations pass muster under the required low standard for screening. Reading Famous's allegations liberally, the court is able to infer that his problems are serious medical needs that require treatment. Even so, Famous should be aware that deliberate indifference is a high standard. In particular, it will be his burden to prove that his medical conditions constituted serious medical needs, which may well require expert testimony rebutting medical evidence to the contrary.

Famous should be aware that in order to prevail on his Eighth Amendment claims against defendants at summary judgment or trial, it will not be enough for him to show that he disagrees with defendants' conclusions about the appropriate treatment for his problems, such as whether an antibiotic should have been prescribed or a referral to an eye specialist should have been ordered. *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006). What Famous will have to show is that any medical decisions or treatment (or failure to treat) by a particular defendant was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). In an Eighth Amendment lawsuit, "mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996); *Snipes*, 95 F.3d at 591 (holding that "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview").

Instead,

> deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.
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> *Estate of Cole*, 94 F.3d at 261-62.

To prevail against any specific defendant, Famous will have to show that this defendant had both the ability and the authority to grant his request for medical care. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job.").

II. State Law Negligence

Famous also brings state law medical negligence claims against defendants. Federal courts may exercise supplemental jurisdiction over a state law claim that is "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Famous's medical negligence claims are part of the same case or controversy as his federal claims for violation of his Eighth Amendment rights.

To prevail on a claim for medical negligence in Wisconsin, Famous must prove that defendants breached their duty of care and that he suffered injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. Considering defendants'

actions as described in detail above, it is possible to infer at this stage that defendants' actions were negligent. Therefore, Famous may proceed on his state medical negligence claims as well.

To establish the elements of a medical negligence claim against a defendant physician under state law, Famous will have the burden to present evidence proving by a preponderance that this physician failed to use the required degree of skill exercised by an average physician. Wis J-I Civil 1023. Under state law, this often requires testimony from an expert witness, but sometimes a patient's narration about what the doctor did and didn't do is enough.

III. Motions for Appointment of Counsel and Guardian Ad Litem

At the same time Famous filed his complaint, he also filed a motion for appointment of counsel (dkt. 2) and a motion for appointment of a guardian ad litem (dkt. 3). Although Famous signed them, these motions as well as the complaint itself were all prepared by Randall Blue, a fellow inmate at GBCI. These motions proffer that Famous is indigent, he has little educational experience and no legal education, he operates at a third-grade level, and he suffers from a serious mental illness disorder. (dkt. 2 at ¶¶ 1-5.) Famous also contends that he is "incompetent," specifically that he is "unable to sufficient[ly] comprehend and retain my [*meaning Randall Blue's*] explanation to him of the judicial process [and] court proceeding to participate effectively in litigation." (*Id.* at ¶ 4.) Famous includes three letters purportedly sent to attorneys seeking representation, all signed by Famous. (Mot. To Appoint Counsel, Exs. 3-5 (dkt. #2-2).)

Federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. If this court had enough attorneys willing and able to take pro

bono cases like this one, then I would appoint an attorney to almost every prisoner plaintiff. This would make everything about the lawsuit easier, not just for the plaintiff, but also the court and the lawyer for the defendants. But we only have about 10 or 15 attorneys who will agree to take even one pro bono pro se case in a year, and this court gets about 300 new pro se cases every year. This means that we have no choice but to limit the appointment of counsel to the few cases that require appointment of counsel under the law of this federal circuit. We don't like this situation, but it's the best we can do with the resources we've got. As a result, we have to limit appointment of counsel to the handful of cases each year in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007).

The fact that Famous is not well-versed in the law is not a reason to appoint counsel. This handicap is universal among pro se litigants. While Randall Blue prepared the complaint and motions, Famous has written letters to the court, which suggest a basic understanding of the court and his claims. Moreover, Famous proceeded pro se in a lawsuit in the Eastern District of Wisconsin, and while Famous did not win, there is nothing in the court's opinion suggesting that Famous was unable to prosecute his case. *Famous v. Pollard*, No. 07-cv-847 (E.D. Wis. Mar. 30, 2011).

To help Famous proceed without counsel, I will hold a telephonic preliminary pretrial conference during which I will set the schedule for the case, then explain generally the way we handle prisoner lawsuits in this court, and answer any procedural questions from Famous. As part of this conversation, I will explain to Famous how to use the federal discovery rules to help gather evidence to try to prove his claims. When talking to Famous I will be better able to

assess his abilities to prosecute this case. After the conference, the court will mail to Famous a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

With respect to the complexity of the case, nothing in the record suggests that it is factually or legally difficult. The court has explained the law concerning Famous's claims in this order. Famous has personal knowledge of the circumstances surrounding his lawsuit. If he does not have copies of documents he needs to prove his claim, he can use discovery to obtain any additional information he needs to make his case. At this early stage of the lawsuit Famous appears capable of litigating the case himself. However, things can change. As this case moves forward, it may become clear that Famous meets the requirements for the appointment of a pro bono attorney.

Finally, Famous fails to explain what role a guardian ad litem would play separate from counsel, so I am denying this motion as well.

ORDER

IT IS ORDERED that:

(1) Plaintiff Ronnie Famous is GRANTED leave to proceed on his Eighth Amendment deliberate indifference and state law negligence claims against defendants.

(2) Famous's request to add James Richard as a defendant (dkt. 6) is GRANTED.

(3) Famous's motions for appointment of counsel and appointment of a guardian ad litem (dkts. 2 & 3) are DENIED without prejudice to reconsideration later in this lawsuit.

(4) Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of Famous's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to Famous's complaint if it accepts service for defendants.

(5) For the remainder of this lawsuit, Famous must send defendants a copy of every paper or document he files with the court. Once Famous has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by Famous unless he shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

(6) Famous should keep a copy of all documents for his own files. If Famous does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(7) Famous is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 6th day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge