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

MUSTAFA-EL K.A. AJALA,
formerly known as DENNIS E. JONES-EL,

Plaintiff,

v.

OPINION & ORDER

UW HOSPITAL AND CLINICS, SUTCHIN PATEL, BURTON COX, SRIHARAN SIVALINGAM, and INJURED PATIENTS AND FAMILY COMPENSATION FUND,

16-cv-639-bbc[1]

Defendants.

Pro se prisoner and plaintiff Mustafa-El Ajala is proceeding on the following claims:

> (1) defendants Burton Cox, Sutchin Patel and Sriharan Sivalingam consciously failed to diagnose Ajala's hypercalcemia and hyperparathyroidism and make reasonable efforts to cure his conditions before 2013, in violation of the Eighth Amendment and the common law of negligence;
>
> (2) defendant Cox refused to prescribe citrate for Ajala for more than two years, in violation of the Eighth Amendment and the common law of negligence;
>
> (3) after Ajala had surgery in 2013 to remove a kidney stone, Cox refused to give him adequate pain medication, in violation of the Eighth Amendment and the common law of negligence;
>
> (4) defendant University of Wisconsin Hospital and Clinics may be held liable for the negligence of defendants Patel and Sivalingam under the doctrine of respondent superior; and
>
> (5) if defendants Patel, Sivalingam or University of Wisconsin Hospital and Clinics is found liable on one or more of plaintiff's state law claims, Injured Patients and Family Compensation Fund may be required to pay all or a portion of the judgment pursuant to Wis. Stat. §§ 632.24 and 655.27.

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[1] Because Judge Crabb is on medical leave, I am issuing this order to prevent an undue delay in the progress of this case.

In an order dated January 23, 2017, Dkt. 29, I denied Ajala's motion for leave to file an amended complaint on the ground that none of his new allegations stated a claim upon which relief may be granted. Now Ajala has filed a motion for leave to file a second amended complaint in which he asks to make some of the same changes, but further clarifies his new allegations. Dkt. 35 and 36. In particular, Ajala wants to bring the following claims: (1) defendants Cox, Patel, Sivalingam, and University of Wisconsin Hospital and Clinics failed to treat the symptoms of Ajala's hypercalcemia, in violation of the Eighth Amendment and the common law of negligence; (2) the same defendants failed to give Ajala "the information necessary to enable him to make informed decisions about" his medical conditions, in violation of the Fourteenth Amendment and the common law of negligence; and (3) UW Hospital and Clinics may be held liable under the doctrine of "apparent authority." Also, Ajala wishes to clarify his request for injunctive relief and he asks the court to issue a ruling that his new claims "relate back" to the date of his original complaint. I address each of Ajala's requests below.

ANALYSIS

A. Failure to treat symptoms

In his original complaint, Ajala alleged generally that doctors at the prison and UW Hospital and Clinics failed to provide treatment of the symptoms of his medical conditions, but the only example he gave of that failure was that defendant Cox (a doctor at the prison) refused for two years to prescribe citrate for Ajala, which he said could have prevented or treated kidney stones that developed because of his hypercalcemia. Accordingly, in her

screening order, Judge Crabb limited Ajala's "failure to treat" claim to defendant Cox's alleged failure to prescribe citrate.

Now Ajala has added paragraphs 49 to 53 to his complaint, in which he alleges that defendants Cox, Patel, Sivalingam, and UW Hospital and Clinics refused to prescribe various known medications that could have been used to slow the progress of his hypercalcemia. I will allow Ajala to add these allegations. At this stage of the proceedings, I can infer that each of the individual defendants knew that the medications could help Ajala but refused to prescribe them without a medical basis for doing so, in violation of the Eighth Amendment and the common law of negligence, and that UW Hospital and Clinics can be held liable for the conduct of the individuals under agency principles. Of course, at summary judgment or trial, Ajala will have to come forward with specific evidence proving these claims.

B. Informed consent

In the January 23, 2017 order, I rejected Ajala's proposed claim regarding informed consent because he did not identify any treatment that defendants provided that he would have refused had defendants given more information to him. *Hannemann v. Boyson,* 2005 WI 94, ¶ 50, 282 Wis. 2d 664, 698 N.W.2d 714 (elements of claim for denial of informed consent include: (1) patient was not informed of risks in proposed treatment or procedure of which reasonable person in patient's position would wish to be made aware; and (2) reasonable person in the patient's position presented with such information would not have chosen to submit to treatment or procedure). In his motion for leave to amend, Ajala cites *Jandre v. Wisconsin Injured Patients & Families Comp. Fund*, 2012 WI 39, 340 Wis. 2d 31, 813 N.W.2d 627, for the proposition that a plaintiff may bring a claim for denial of informed consent when the "correct test or treatment was not provided timely." Dkt. 35, at 3. He says

that he should be allowed to proceed under the theory articulated in *Jandre* because "he would not have consented to going 10 years(+) without the parathyroidectomy he did consent to in 2013." *Id.*

I adhere to my conclusion that Ajala has not stated a claim under an informed consent theory. In *Jandre*, 2012 WI 39, at ¶ 2, a physician had diagnosed a patient with a condition called Bell's palsy, but had not informed the patient of a test that could be performed to rule out the possibility of a stroke. The question was whether the physician had breached his duty under Wis. Stat. § 448.30 to "inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments."

In this case, the problem alleged is not that defendants refused to *inform* Ajala about particular tests. Rather, the alleged problem is that defendants refused to *perform* tests that would diagnose his condition. In fact, Ajala alleges throughout his complaint that he repeatedly asked defendants to perform tests regarding the cause of his symptoms, but they refused to do so. Thus, informing Ajala about the existence of particular tests would have made no difference. As I noted in the January 23 order, Ajala is already proceeding on a claim under both the Eighth Amendment and the common law of negligence that defendants failed to diagnose and treat his conditions. The informed consent theory does fit the facts that he has alleged.

C. Apparent authority theory

In the original screening order, Judge Crabb allowed Ajala to proceed against UW Hospital and Clinics under the doctrine of respondeat superior for the negligence of defendants Patel and Sivalingam, who Ajala alleges are employees of the hospital. Now Ajala says that he wants to include a theory under the doctrine of apparent authority because he is

concerned that the hospital may take the position that Patel and Sivalingam are not employees. He cites *Pamperin v. Trinity Mem'l Hosp.*, 144 Wis. 2d 188, 202, 423 N.W.2d 848, 853 (1988), in which the court held that a hospital could be held liable for the negligence of independent contractors under the doctrine of apparent authority. Although it seems unlikely that Ajala needs to provide that level of legal specificity in his complaint, I will amend the screening order to state that Ajala may proceed on a more general claim that UW Hospital and Clinics may be held liable under Wisconsin agency principles, which would encompass both respondeat superior and apparent authority. To be clear: these agency principles apply only to Ajala's negligence claim; they do not provide a basis for liability on his constitutional claims.

D. Relation back

Ajala asks for a ruling from the court the amendments to his complaint "relate back" to the date of his original complaint under Rule 15(c) of the Federal Rules of Civil Procedure. Ajala's request is premature because the issue whether an amended complaint relates back matters only if the defendants seek to dismiss the claim on the ground that it is untimely. *E.g.*, *Neita v. City of Chicago*, 830 F.3d 494, 498 (7th Cir. 2016); *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 515 (7th Cir. 2011); *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 852 (7th Cir. 2008). Federal courts may not issue advisory rulings, *Wisconsin's Envtl. Decade, Inc. v. State Bar of Wisconsin*, 747 F.2d 407, 410 (7th Cir. 1984), so I decline to decide this issue now.

E. Injunctive relief

In his original complaint, Ajala included a request for injunctive relief regarding dental care for correcting damage that he says was caused by his hypercalcemia and

hyperparathyroidism. Because Ajala had not alleged that he requested such care from any of the defendants or any other prison official, Judge Crabb concluded that the request was premature. Dkt. 9, at 7 ("[A] request for injunctive relief is premature if the plaintiff has not given the appropriate official an opportunity to provide the relief before filing the lawsuit.").

In his motion for leave to amend, Ajala asks the court to reconsider that conclusion, pointing to a new allegation that a policy of the Wisconsin Department of Corrections prohibits dental staff from providing the services he is requesting, including dental implants and teeth whitening. Dkt. 36, at 20. Ajala has not filed a motion for a preliminary injunction, which means that the time for considering any appropriate relief is after Ajala proves his claim. If he does prove his claim, he will then have to show that the law allows the relief he is requesting. *E.g.*, 18 U.S.C. § 3626(a).

ORDER

IT IS ORDERED that:

1. The motion for leave to file an amended complaint filed by Mustafa-El Ajala, formerly known as Dennis Jones-El, Dkt. 35, is GRANTED IN PART. The screening order is AMENDED to state that Ajala is now proceeding on the following claims:

   (1) defendants Burton Cox, Sutchin Patel, and Sriharan Sivalingam consciously failed to diagnose Ajala's hypercalcemia and hyperparathyroidism and make reasonable efforts to cure his conditions before 2013, in violation of the Eighth Amendment and the common law of negligence;

   (2) defendant Cox refused to prescribe citrate for Ajala for more than two years, in violation of the Eighth Amendment and the common law of negligence;

   (3) defendants Cox, Patel, and Sivalingam refused to prescribe medications to treat Ajala's hypercalcemia, in violation of the Eighth Amendment and the common law of negligence;

(4) after Ajala had surgery in 2013 to remove a kidney stone, Cox refused to give him adequate pain medication, in violation of the Eighth Amendment and the common law of negligence;

(5) defendant University of Wisconsin Hospital and Clinics may be held liable for the negligence of defendants Patel and Sivalingam under principles of Wisconsin agency law; and

(6) if defendants Patel, Sivalingam or University of Wisconsin Hospital and Clinics is found liable on one or more of plaintiff's state law claims, Injured Patients and Family Compensation Fund may be required to pay all or a portion of the judgment pursuant to Wis. Stat. §§ 632.24 and 655.27.

2. Ajala's claim that defendants Cox, Patel, Sivalingam and University of Wisconsin Hospitals and Clinics violated the law of informed consent is DISMISSED for failure to state a claim upon which relief may be granted.

Entered February 27, 2017.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge