IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LENROY BROWN,

Plaintiff,

ORDER

v.

99-C-400-C

UNITED STATES OF AMERICA,

Defendant.

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Plaintiff has been granted leave to proceed in forma pauperis in this case on a claim under the Federal Tort Claims Act that federal employees were negligent in treating his kidney stones. In a preliminary pretrial conference order dated March 9, 2000, United States Magistrate Judge Stephen Crocker set a deadline of July 7, 2000 for filing dispositive motions. Defendant moved for summary judgment on June 30, 2000. As part of its motion, defendant proposes as facts that

1) the claim in plaintiff's complaint is based on allegations of medical negligence by employees of the United States;

2) the magistrate judge's preliminary pretrial conference order set the date of June 16,

2000 as the date for disclosure of plaintiff's expert witnesses;

3) plaintiff has not identified any expert witnesses who would testify that the medical care provided to him was not within the degree of care and skill used by average physicians acting in the same or similar circumstances; and

4) plaintiff has failed to identify an expert willing to testify that the treatments he received were improperly administered or fell below the degree of care and skill used by average physicians acting in the same or similar circumstances.

Defendant argues correctly that in deciding plaintiff's medical negligence claim, this court must apply Wisconsin law. Under Wisconsin law, plaintiff has no chance of succeeding on his tort claim unless he were to have found a medical expert willing to testify that the treatment he received was either inappropriate for his kidney stone condition given the current state of medical knowledge or that the treatment was administered improperly, and that he was harmed as a result. As defendant points out, plaintiff's failure to identify an expert in the medical field willing to give such testimony on plaintiff's behalf may well doom plaintiff's negligence claim.

Now plaintiff has filed a document titled "Plaintiff's Cross-Move [for] Summary Judgment and Pursuant to Rule 56, F.R.C.P." [sic], together with a brief and two affidavits in support of his motion and in opposition to defendant's motion for summary judgment.

Plaintiff's motion cannot be considered as a cross motion for summary judgment for two reasons. First, from the cover letter accompanying the documents, it appears that plaintiff did not finish drafting his motion or turn it over to prison officials to mail to the court until at least July 11, 2000, the date the letter is signed. This is four days after the July 7, 2000 deadline for filing dispositive motions had passed. Second, even if plaintiff's motion had been timely filed, the submission is not in compliance with this court's summary judgment procedures, a copy of which was attached to the magistrate judge's March 9, 2000, preliminary pretrial conference order. Specifically, plaintiff did not submit proposed findings of fact in support of his motion in a separate document titled such as required by the procedures.

That plaintiff's submission cannot be considered as a cross motion for summary judgment does not prejudice plaintiff. He is required under the court's summary judgment procedures to respond to defendant's motion for summary judgment and that is what his submission does, although the response is not in strict compliance with the court's summary judgment procedures. According to Procedure III.C.3.b, plaintiff is required to respond to each numbered paragraph of the defendant's proposed findings of fact, stating clearly whether there is a genuine issue as to the whole or a part of the factual proposition. If plaintiff believes there is a genuine issue as to part of the factual proposition, he is to identify precisely that part of the numbered paragraph with which he takes issue. In addition, he should state his own version

of the fact, and cite to the specific evidence in the record that would support his version of the fact. Procedure III.C.3.c. and d. Because plaintiff's response to defendant's motion for summary judgment is not in compliance with this court's summary judgment procedures, I will grant him a short extension of time in which to submit a response to defendant's proposed findings of fact.

I note that in his brief in opposition to the motion for summary judgment, plaintiff argues that he asked the defendants to provide him "with a list of medical physicians and physician assistances that [he] will call as experts . . . ," but that he has not received a response to his request. The record reflects that on July 5, 2000, two days before the deadline for filing motions for summary judgment was to end, plaintiff mailed a request for production of documents to defendant's counsel in which he asks for the names of the Bureau of Prisons and civilian doctors who treated him for his kidney stone condition. The court's copy of the request was not received until July 13, 2000. Presumably, defendant's counsel received the request on that same date, making defendant's response due on August 13, 2000.

Plaintiff acknowledges that at the preliminary pretrial conference, the magistrate judge instructed the parties to undertake discovery in a manner that would allow them to make or respond to dispositive motions within the scheduled deadlines. In addition, plaintiff concedes that the deadline for naming experts passed on June 16, 2000, and that he did not begin his

attempts to find an expert until at least July 5. He offers no excuse for his languor. In any event, it is curious why plaintiff would want to seek out an expert among the doctors he alleges were negligent in treating him. Ordinarily, a plaintiff claiming negligent medical care steers far clear of his treating physicians to find a doctor willing to say under oath that the treatment given fell below the degree of skill required given current medical knowledge. In summary, I am not persuaded that plaintiff's late attempts to learn the names of the doctors who treated him justifies an extension of the deadline for opposing defendant's motion for summary judgment beyond the time necessary to allow plaintiff to conform his response to this court's summary judgment procedures.

ORDER

IT IS ORDERED that plaintiff's "Cross-Move [for] Summary Judgment . . . " is construed as a response to defendant's motion for summary judgment.

Further, IT IS ORDERED that the schedule for briefing defendant's motion for summary judgment is modified as follows:

1. Plaintiff may have until August 14, 2000, in which to serve and file a response to

defendant's proposed findings of fact that complies with this court's summary judgment procedures.

2. Defendant may have until August 24, 2000, in which to serve and file a reply.

Entered this 28th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge