IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DIEGO GIL,

OPINION AND ORDER

Plaintiff,

00-C-0724-C

v.

JAMES REED; JAMIE PENAFLOR and UNITED STATES OF AMERICA,

Defendants.

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This is a civil action for monetary relief brought pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. §§ 2671 – 2860. Plaintiff Diego Gil is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He is proceeding in forma pauperis in this action on his claims that between March 6, 1998 and August 7, 2000, defendant United States of America negligently breached a duty to provide him with adequate medical care and that defendants Reed and Penaflor were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.

With regard to the Eighth Amendment claims, plaintiff specifically alleges that

defendant Penaflor refused to give him a prescribed antibiotic when plaintiff tried to pick up the drug at the appointed medication line, even though the prescription was ready; and that defendant Reed revised a prescription from plaintiff's surgeon and made plaintiff wait an hour in great pain to be seen for treatment. With regard to the negligence claim, plaintiff contends that defendant United States negligently breached its duty of care to provide him with adequate medical care when: (1) he was denied emergency medical care at 11:30 pm on March 19, 1998; (2) physician assistant Kedrow failed to address his infection on March 20, 1998; (3) he was not allowed to see a doctor on March 21 and 22, 1998; (4) physician assistant Penaflor failed to give him his antibiotic on March 23, 1998; (5) he was not allowed to see a second colorectal specialist between August and December 1999; (6) he was not given his second colorectal surgery until May 2000; (7) defendant Reed altered the surgeon's recommended post-operative prescriptions between May 1 and May 9, 2000; and (8) he was made to wait an hour in the waiting area of the prison hospital on May 9, 2000.

Plaintiff filed his complaint in this court on December 21, 2000. Defendants moved for summary judgment. On January 28, 2002, I granted defendants' motion for summary judgment. Plaintiff appealed, and the Court of Appeals for the Seventh Circuit vacated the judgment and remanded the case to this court with instructions to appoint counsel. Counsel having been appointed and the case further developed, the merits of plaintiff's claims are once again before this court on defendants' motion for summary judgment. Defendants'

motion will be granted as to plaintiff's Eighth Amendment claim because plaintiff has not adduced evidence from which a reasonable jury could infer that defendants were deliberately indifferent to his serious medical needs. Also, defendants' motion will be granted as to plaintiff's negligence claims because plaintiff failed to adduce evidence from which a reasonable jury could infer that defendant United States was negligent.

In determining the material and undisputed facts, I disregarded those proposed findings of fact and responses that constituted legal conclusions, were argumentive or irrelevant, were not supported by the cited evidence or were not supported by citations specific enough to alert the court to the source for the proposal. From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Diego Gil is an inmate at the Federal Correctional Institution at Oxford, Wisconsin. He has been incarcerated at the Oxford facility since 1994. Defendants Reed and Penaflor are employed by the United States Department of Justice, Federal Bureau of Prisons, and assigned to the Federal Correctional Institution at Oxford. Defendant James Reed is the prison's clinical director and oversees the administration of clinical care to the prison's inmates. Defendant Jamie Penaflor is a physician assistant at the prison.

B. March 1998 Surgery

On March 4, 1998, plaintiff went to the Mercy Medical Center in Oshkosh, Wisconsin, for a hemorrhoid operation. Surgeons at Mercy performed a pre-operation physical examination and advised plaintiff that his problem was not hemorrhoids but a rectal prolapse. The hemorrhoid operation was cancelled and plaintiff returned to Oxford. The following day, the medical staff at Oxford approved plaintiff's rectal prolapse surgery. On March 6, 1998, plaintiff had rectal prolapse surgery at Mercy Medical Center. The operation was performed through plaintiff's abdomen. On March 11, 1998, after five days of post-operation recuperation at Mercy, plaintiff was discharged and returned to Oxford.

At about 11:30 pm on March 19, 1998, plaintiff told the officer on duty in his housing unit that he was experiencing severe pain in the area of his recent surgery. The officer called the lieutenant's office and discovered that there was no 24-hour emergency medical service so plaintiff would have to wait until the following day to be seen.

At approximately 7 pm on March 20, plaintiff was seen by physician assistant Kedrow at the institution hospital. Plaintiff showed Kedrow his surgical wound and told Kedrow he was feeling pain. From plaintiff's perspective, he had a noticeable, infected bulge at the site of his surgical incision. Kedrow's notes in plaintiff's medical chart show the following: "plaintiff c/o lower back pain for two days, & radiation into legs," "recent mid-line surgical scar, soft- non-tender," "non-urgent back care," "misuse of emergency care," "make S/C [sick

call] [the following morning]."

Plaintiff spent the next two days, Saturday March 21 and Sunday March 22, in his cell, feeling ill and experiencing chills, a fever and significant pain.

On March 23 plaintiff requested an appointment with prison medical staff. By that time, the bulge at the site of his incision had grown to the size of a golf ball. Dr. Aslam and physician assistant Au-Lay examined plaintiff and wrote in their medical notes that plaintiff's surgical site presented "localized erythema [redness], swelling distally with subjective tenderness." Aslam and Au-Lay diagnosed plaintiff with "infection/cellulitus/abscess formation at surgical site." Aslam and Au-Lay drained plaintiff's abscess and prescribed him an antibiotic and Tylenol. At around noon, Au-Lay asked a Dr. Aslam whether plaintiff could take Cephalexin given his allergy to penicillin and Dr. Aslam said that he could. The medical staff gave plaintiff written authorization to pick up the Cephalexin and Tylenol at that evening's 8:30 pm medication line.

C. Defendant Penaflor

When plaintiff arrived at the 8:30 pm medication line on March 23, 1998, defendant Penaflor was the staff member dispensing inmate medication. Plaintiff gave defendant Penaflor the note authorizing him to pick up his prescription for Cephalexin and Tylenol III and plaintiff asked for both medications.

Defendant Penaflor picked up a clear bag that contained two pill bottles, took the bottles out of the bag, glanced at the labels and handed plaintiff the bottle with the Tylenol. Defendant Penaflor held on to the second bottle and told plaintiff in a hostile tone that he could not have it. When plaintiff asked Penaflor why he could not have the antibiotic, Penaflor refused to provide a reason and ordered plaintiff back to his unit, threatening that if plaintiff failed to leave he would be placed in the segregation unit.

When plaintiff returned to his unit he related the events that took place at the medication line to the duty officer. The duty officer called defendant Penaflor to investigate, but Penaflor told the officer he was too busy to talk and hung up. Plaintiff returned to the medication line the following morning and received the Cephalexin from physician assistant Steiner. The label on the bottle of Cephalexin carried the date of March 23, 1998.

D. Second Surgery

On June 14, 1999, plaintiff had an appointment with Dr. Heise, an outside surgeon who consults with the Oxford facility. Dr. Heise advised plaintiff that he needed another rectal surgery and an operation to repair his ventral hernia.

On August 4, 1999, plaintiff had an appointment with Dr. McDonald, who had performed his rectal prolapse surgery in 1998. Dr. McDonald observed that plaintiff had a "small but clearly present rectal prolapse." Dr. McDonald advised plaintiff he needed

surgery to repair the rectal prolapse. He explained to plaintiff that surgery would be performed through the abdomen and could result in sympathetic nerve damage and failure to achieve erection. Dr. McDonald wrote in plaintiff's medical record that "the patient understands and will let us know whether he wants surgery or not."

From August through December 1999 plaintiff repeatedly asked the medical staff at Oxford to refer him to another colorectal specialist so he could obtain a second opinion regarding the appropriate surgical treatment for his rectal prolapse because he was concerned about the side effects of the type of surgery he discussed with Dr. McDonald. Throughout this time, plaintiff's rectum came out with each bowel movement. When this occurred, plaintiff had to push his rectum back inside his body, which was a very painful process.

Plaintiff had an appointment with defendant Reed on September 14, 1999. Plaintiff told defendant Reed about having to push his rectum back into his body after bowel movements. Plaintiff told defendant Reed he was hesitant to undergo the operation Dr. McDonald suggested because of the possible side effects.

On November 19, 1999, plaintiff had an appointment with Dr. Aslam, who recorded in his notes that plaintiff "was seen on chronic care clinic for general medicine clinic. He stated that he has been feeling fine. . . . He stated that he still has his rectal prolapse and his hernia. He did not complain of any pains or any rectal bleeding or any problem with his bowels."

Plaintiff had an appointment with defendant Reed on December 15, 1999. At that appointment defendant Reed agreed to refer plaintiff to Dr. Kim, a colorectal specialist in Oshkosh, Wisconsin, who was not employed by the Bureau of Prisons.

On January 6, 2000, plaintiff had an appointment with Dr. Kim, who recommended surgery for plaintiff's rectal prolapse and hernia. Dr. Kim did not believe plaintiff's condition required immediate surgery. According to Dr. Kim, the only urgency in performing rectal prolapse surgery for patients such as plaintiff is to relieve pain. On January 10, 2000, plaintiff had an appointment with defendant Reed to discuss the surgery. From January through May 2000 plaintiff's rectum continued to come out with each bowel movement and plaintiff experienced pain in pushing his rectum back inside his body.

E. Defendant Reed

On May 1, 2000, plaintiff underwent a second surgical procedure to correct his rectal prolapse. Dr. Kim performed the surgery. Plaintiff returned to the prison the same day. Dr. Kim recommended that plaintiff take Metamucil, Milk of Magnesia as needed (both laxatives), Colace (a stool softener) and Vicodin (a narcotic pain killer).

On May 2, 2002, plaintiff had an appointment with defendant Reed. Defendant Reed did not prescribe plaintiff Metamucil and Milk of Magnesia even though he knew plaintiff was experiencing constipation. Defendant Reed believed Metamucil and Milk of

Magnesia increased the possibility of severe dehydration caused by the increased frequency of loose stools. Defendant Reed prescribed plaintiff Colace to prevent fecal impaction. Instead of Vicodin, defendant Reed prescribed plaintiff Tylenol III. Vicodin is not included in the national formulary of drugs utilized by the Bureau of Prisons.

On May 5, 2000, plaintiff had another appointment with defendant Reed. Plaintiff complained about severe pain because he had not had a bowel movement since the operation four days earlier and was having difficulty urinating. At that time, defendant Reed prescribed plaintiff Metamucil and Milk of Magnesia and continued plaintiff's prescriptions for Colace and Tylenol III.

On May 9, 2000, plaintiff was scheduled to see defendant Reed again because he had not had a bowel movement since his operation on May 1, was in pain and was having difficulty urinating. Plaintiff was bleeding from the rectum and was in severe pain as he waited his turn at the institution hospital. After waiting for an hour, plaintiff returned to his unit to change his clothes and lie down. On May 11, 2000, plaintiff saw Dr. Kim and told him about the severe constipation he had experienced since the operation and that defendant Reed had not prescribed him Metamucil and Milk of Magnesia prior to May 5 and had prescribed Tylenol III instead of Vicodin[1]. Dr. Kim re-wrote his post-operative

[1]Although plaintiff avers that Dr. Kim warned him against taking Tylenol III because it caused constipation, there is no evidence that Dr. Kim warned the prison medical staff to avoid the use of Tylenol III.

recommendations so that they could be delivered to defendant Reed, writing "please obey these orders." Plaintiff returned to the prison and saw defendant Reed, who again prescribed Metamucil and another week of Tylenol III.

According to Dr. Kim, there is no therapeutic difference between Tylenol III and Vicodin. However, it is Kim's opinion that Tylenol III tends to result in more constipation than Vicodin. In addition, although Kim prefers to treat postoperative patients who experience constipation with Milk of Magnesia, he acknowledges that there are other ways of treating this condition. He does not believe that plaintiff's post-operative care was substandard or deficient in any way. Finally, according to Dr. Kim, Cephalexin has no pain relieving effect. In Kim's view, delaying a dose of Cephalexin for twelve hours would not "make a difference" to a patient who does not have a pre-existing severe soft tissue infection and who is being treated for an abscess infection as an outpatient not needing hospitalization for intravenous antibiotic treatment.

Also according to Dr. Harms, Vicodin and Tylenol III are interchangeable as pain medications to treat post-colorectal surgical pain and have similar therapeutic effects and risks. He believes that the post-operative care provided to plaintiff complied with the generally accepted standard of care. Finally, according to Dr. Harms, a twelve-hour delay in the delivery of Cephalexin would not significantly affect or delay the healing of an abscess.

OPINION

A. Eighth Amendment

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 prove a claim of cruel and unusual punishment, a prisoner must put in evidence to show acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Estelle, 429 U.S. at 106. Therefore, plaintiff must prove that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). 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.

The Supreme Court has held that deliberate indifference 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 readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

1. Defendant Reed

Plaintiff was granted leave to proceed on his Eighth Amendment claim that defendant Reed altered certain prescriptions that Dr. Kim recommended for plaintiff following his second rectal prolapse operation. Plaintiff also challenges as a violation of the Eighth Amendment the fact that he was made to wait for an hour in great pain after arriving for his scheduled appointment with Dr. Reed.

a. Post-operative prescriptions

After Dr. Kim performed plaintiff's rectal prolapse operation on May 1, 2000, he recommended that the prison medical staff give plaintiff Colace, Metamucil, Milk of Magnesia and Vicodin. The facts reveal that defendant Reed did not prescribe Metamucil and Milk of Magnesia for plaintiff because he feared that they might cause plaintiff to

become dehydrated as a result of increased loose stools. Instead, defendant Reed prescribed the stool softener Colace. Defendant Reed concedes that he did not prescribe Vicodin for plaintiff, but that he did prescribe Tylenol III, which has the same effect. Defendant Reed argues that his decisions to depart from Dr. Kim's recommendations were not inappropriate and amount to nothing more than a difference of opinion about plaintiff's post-operative treatment. Plaintiff argues, however, that the facts support an inference that defendant Reed knew plaintiff was constipated and caused him to remain so by not prescribing Milk of Magnesia and Metamucil while prescribing pain medication (Tylenol III) that could cause constipation.

On January 28, 2002, when I granted defendants' first motion for summary judgment, I concluded that defendant Reed's deviation from Dr. Kim's post-operative recommendations constituted a difference of medical opinion that did not make out an Eighth Amendment claim. Gil v. Reed, 2002 U.S. Dist. LEXIS 27128 (W.D. Wis., Jan. 28, 2002). The Court of Appeals for the Seventh Circuit believed this ruling premature, holding instead that plaintiff had presented sufficient facts to create a genuine issue as to defendant Reed's state of mind. The Court of Appeals stated:

> On summary judgment, we find that prescribing on three occasions the very medication the specialist [Dr. Kim] warned against because of its constipating effect (when a non-constipating alternative was available) while simultaneously cancelling two of the three prescribed laxatives gives rise to a genuine issue of material fact about Reed's state of mind. *See Estate of Cole*, 94 F.3d at 259 (a plaintiff may establish subjective awareness of the risk by proof

> of the risk's obviousness). *See also Snipes v. Detella*, 95 F.3d 586, 592 (7th Cir. 1996), *cert. denied*, 519 U.S. 1126, 136 L. Ed. 2d 863, 117 S. Ct. 980 (1997) (medical treatment may give rise to Eighth Amendment claim when it's so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition). Gil had demonstrated a genuine issue of material fact regarding whether Reed was deliberately indifferent to his serious medical needs.

Gil v. Reed, 381 F.3d 649, 664 (7th Cir. 2004).

The factual record presently before the court differs from the record the court of appeals relied on in at least one significant way. It includes the deposition testimony of Dr. Kim, the colorectal specialist who performed plaintiff's surgery in May 2000. Dr. Kim testified that he does not believe plaintiff's post-operative treatment was medically improper. Dr. Harms, defendant's medical expert, also believes that plaintiff's post-operative treatment met the standard of care. Therefore, a reasonable trier of fact could not infer from defendant Reed's failure to follow Kim's recommendations that defendant Reed acted with deliberate indifference when he prescribed Tylenol III instead of Vicodin and did not prescribe Metamucil and Milk of Magnesia on plaintiff's first day back in the institution.

In vacating this court's judgment for defendants, the court of appeals focused on the fact that defendant Reed prescribed plaintiff Tylenol III even though he could have prescribed Motrin instead and despite "the express warning provided by the specialist to avoid [Tylenol III]." Id. at 663. The court of appeals likened the present case to Jones v. Simek, 193 F.3d 485 (7th Cir. 1999), where the court had "cited the refusal to provide the

treatment ordered by the specialist as facts sufficient to survive a motion for summary judgment." Id. (citing Jones, 193 F.3d at 491).

There are no facts in this expanded record suggesting that Dr. Kim provided an "express warning" to defendant Reed that he was not to prescribe Tylenol III when plaintiff returned to the prison after his surgery on May 1, 2000. Instead, the facts show that although Kim believes Tylenol III may cause constipation in some patients, its use would not be substandard or deficient in any way.

Moreover, the facts reveal that although defendant Reed withheld Metamucil and Milk of Magnesia from plaintiff at first because of his belief that they might cause plaintiff dehydration, when plaintiff complained that he had gone four days without a bowel movement, Reed prescribed both to plaintiff. In light of these facts and Dr. Kim's and Dr. Harms' opinions that plaintiff's post-operative care was not inappropriate, there is no basis for a finding that defendant Reed was deliberately indifferent to plaintiff's serious medical needs when he altered plaintiff's post-operative care.

The Court of Appeals for the Seventh Circuit has stated that "Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Further, "deliberate indifference may be inferred based upon 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 judgment." Id. at 261-62 (emphasis added).

Because plaintiff has not presented facts that create a genuine issue as to Reed's state of mind in not following Dr. Kim's recommendations, defendant's motion for summary judgment on plaintiff's claim that defendant Reed violated plaintiff's rights under the Eighth Amendment will be granted.

b. Medical appointment

In his complaint, plaintiff also challenged as a violation of the Eighth Amendment the fact that defendant Reed made him wait for an hour in great pain after arriving for his scheduled appointment on May 9, 2000. On January 28, 2002, I granted defendants' motion for summary judgment on this claim. On remand, plaintiff did not pursue this claim. I conclude from his failure to do so that he has abandoned this portion of his Eighth Amendment claim against defendant Reed.

2. Defendant Penaflor

Plaintiff was granted leave to proceed on his claim that defendant Penaflor refused "in a hostile tone" to give plaintiff his prescribed antibiotic to treat his abscess, even though

the antibiotic had been made available for him to pick up at the medication line. On January 28, 2002, I granted defendants' motion for summary judgment on this claim, finding that plaintiff had provided no evidence that he was harmed by being forced to wait overnight for his antibiotics. The court of appeals vacated the judgment because it found that plaintiff had shown enough to survive summary judgment on (1) defendant Penaflor's state of mind and (2) whether plaintiff was harmed as a result of defendant Penaflor's actions. Gil, 381 F.3d at 662.

Plaintiff maintains that he saw defendant Penaflor grab two bottles, inspect them, then hand plaintiff only one bottle that contained Tylenol. Plaintiff never alleges that he saw the label on the second bottle or could otherwise deduce with certainty that the second bottle contained his antibiotics. Rather, plaintiff simply goes on to state that "Penaflor held on to the antibiotic, however, and told [plaintiff] in a hostile tone that he could not have it." Plt.'s Add. PFOF., dkt #80, ¶ 32. For his part, defendant Penaflor suggests that the second bottle he grabbed may not have been plaintiff's prescription or that like the physician assistant who wrote the prescription, he might have had second thoughts about providing the antibiotic Cephalexin to plaintiff, who is allergic to penicillin. Nevertheless, because defendant Penaflor admits he has no specific recollection of the encounter and because I must examine the facts in the light most favorable to the plaintiff, I will assume for the purpose of deciding this motion that the second bottle defendant Penaflor grabbed contained

plaintiff's antibiotic prescription. I conclude, as the court of appeals did, that "Penaflor's angry and unexplained refusal to give Gil his prescribed medication is sufficient to create a genuine issue of fact regarding his state of mind" and that "a jury could infer from his angry tone and from his action in hanging up on the guard that his refusal to give Gil his medication was malicious." Id. at 661-662.

However, to prevail on his Eighth Amendment claim, plaintiff must also show that he suffered harm as a result of defendant Penaflor's failure to give him his antibiotic on the evening of March 23. A plaintiff who "cannot show injury . . . cannot make out a claim of deliberate indifference relating to his treatment." Walker v. Peters, 233 F.3d 494, 502 (7th Cir. 2000). Since this case was before the court of appeals, the parties have introduced additional evidence that would allow judgment to be entered in defendant Penaflor's favor. In light of Dr. Kim's opinion that Cephalexin has no pain killing effect and Dr. Harms's opinion that a twelve-hour delay in the delivery of an antibiotic would not significantly affect or delay the healing of the abscess, there is no basis for a finding that plaintiff suffered injury as a result of defendant Penaflor's actions. Plaintiff attempts to show injury by introducing Dr. Kim's testimony that delaying Cephalexin by twelve hours might have a negative effect on a patient who has a preexisting severe infection and is "really sick" and has to be hospitalized for treatment. Dr. Kim explicitly differentiated an outpatient being treated for an infected abscess with draining at office visits and oral antibiotics from a

patient who has a preexisting severe soft tissue infection of a magnitude that requires hospitalization and intravenous antibiotics. There is no evidence that plaintiff's infection rose to the level of requiring hospitalization and intravenous antibiotic treatment. Plaintiff has not raised a genuine issue of material fact as to whether defendant Penaflor's failure to give him the Cephalexin at the evening medication line on March 23 caused him injury. Accordingly, summary judgment is warranted in defendant's favor.

B. Federal Tort Claims Act

On December 21, 2000, I granted petitioner leave to proceed on his Federal Tort Claims Act claim pertaining to events that occurred from March 1998 onwards. The parties now dispute whether the precise date is March 6 or March 23. In the December 21 order I noted that plaintiff had already brought a lawsuit raising a FTCA claim regarding alleged acts of negligence that occurred between May 1997 and March 6, 1998. Accordingly, in the present lawsuit, plaintiff is entitled to raise claims pertaining to events that occurred on March 6, 1998 and after that date.

The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, 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 FTCA is governed by "the law of the

place where the act or omission occurred," 28 U.S.C. § 1346(b), the substantive law of Wisconsin governs plaintiff's claim that defendant United States of America negligently or recklessly breached a duty of care to provide him with adequate medical care for his rectal prolapse and associated symptoms. Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990).

Plaintiff contends that the actions of health professionals at the Oxford Correctional Institution constitute both medical malpractice and common law negligence. In Wisconsin, to make out a claim for medical malpractice or negligence, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. Paul v. Skemp, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (Wis. 2001) (citing Nieuwendorp v. American Family Ins. Co., 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). "To survive summary judgment, Gil need not prove his claim; he need only show that there is a genuine issue of material fact as to each of these elements." Gil, 381 F.3d at 659.

The Bureau of Prisons owes a duty to provide federal prisoners with "safekeeping, care, and subsistence" independent of any inconsistent state rule governing the duty of care owed by state correctional officials to state prisoners. 18 U.S.C. § 4042(2); see also United States v. Muniz, 374 U.S. 150, 164-65 (1963). This duty requires Bureau of Prisons employees to exercise "'ordinary diligence to keep prisoners safe and free from harm.'"

Castor v. United States, 883 F. Supp. 344, 350 (S.D. Ind. 1995) (quoting Cowart v. United States, 617 F.2d 112, 116 (5th Cir. 1980)).

In its opinion in this case, the Court of Appeals for the Seventh Circuit explained how a plaintiff establishes negligence under Wisconsin law:

> In the medical malpractice setting, Wisconsin requires expert testimony to establish medical negligence except in situations where the errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care. *Christianson v. Downs*, 90 Wis. 2d 332, 279 N.W.2d 918, 921 (Wis. 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 a physician); *Fehrman v. Smirl*, 20 Wis. 2d 1, 121 N.W.2d 255, 266 (Wis. 1963); *Kasbaum v. Lucia*, 127 Wis. 2d 15, 377 N.W.2d 183, 185 (Wis. Ct. App. 1985) (testimony from medical experts is essential to establish a cause of action for medical malpractice except when the doctrine of res ipsa loquitur applies). Wisconsin allows application of res ipsa loquitur as a substitute for expert testimony in extreme cases where the physician's negligence is obvious such as when a surgeon leaves a sponge or other foreign object inside a patient during surgery or removes the wrong organ or body part. *Richards v. Mendivil*, 200 Wis. 2d 665, 548 N.W.2d 85, 89 (Wis. Ct. App. 1996); *Christianson*, 279 N.W.2d at 921.

Gil, 381 F.3d at 659.

In Gil, the court of appeals characterized Wisconsin's expertise rule as a rule of evidence and questioned whether it must be applied in federal court, where the Federal Rules of Evidence apply. Id. The court did not answer this question. It found that even if it

applied Wisconsin's expertise rule, plaintiff had shown "enough to create a genuine issue on whether [prison health officials] were meeting the standard of care required under the law." Id. Without express direction from the court of appeals to do otherwise, I will apply the Wisconsin expertise rule to each of plaintiff's negligence claims to determine whether in each instance plaintiff has shown that there is a genuine issue of material fact about the propriety of defendant's actions. In each instance, plaintiff will either have to show that the doctrine of res ipsa loquitur applies because a layperson would be able "to say as a matter of common knowledge that the consequences of the professional treatment are not those which ordinarily result if due care is exercised," Burnside v. Evangelical Deaconess Hospital, 46 Wis. 2d 519, 523, 175 N.W.2d 230, 232 (Ct. App. 1970), or provide expert medical testimony suggesting that the standard of care was not met. I note that if the court of appeals had instructed this court not to apply the Wisconsin expertise rule and instead use the Federal Rules of Evidence, the resolution of each of plaintiff's negligence claims at the summary judgement stage would likely be the same, because the federal expertise rule articulated by the court of appeals appears to be identical to the Wisconsin doctrine of res ipsa loquitur. Id.

1. Negligence claim #1 - Plaintiff was denied emergency medical care at 11:30 pm on March 19, 1998

At about 11:30 pm on March 19, 1998, plaintiff told the officer on duty in his housing unit that he was experiencing severe pain in the area of his recent surgery. Plaintiff contends that defendant was negligent because the prison was not staffed with medical personnel 24 hours a day and therefore plaintiff could not be seen at 11:30 pm when he was complaining of pain.

A prison's failure to staff prison doctors around the clock is not an obviously negligent act. Presumably, if an inmate presented a medical emergency when there were no prison doctors on duty, the inmate would be sent to an outside hospital. If defendant failed to send an inmate who was experiencing a medical emergency to the hospital, that could amount to negligence. In this case, plaintiff has adduced no evidence from which a layperson could conclude that the pain he was experiencing amounted to a medical emergency that warranted the immediate medical attention of a prison doctor or an outside hospital. Because plaintiff has not made out a case of res ipsa loquitur and because he has failed to introduce expert testimony to show that the prison health officials' actions failed to meet the required standard of care, summary judgment is warranted in defendant's favor.

2. Negligence claim #2 - Physician assistant Kedrow failed to treat plaintiff's infection on March 20, 1998

Because plaintiff has not offered expert testimony to show that physician assistant Kedrow's failure to diagnose plaintiff's incisional abcess, drain it and place plaintiff on antibiotics on the night of March 20, 1998, fell below the degree of care and skill required of a physician, plaintiff was required to supply facts suggesting that Kedrow's error was of such a nature that a layperson could conclude from common experience that his failure to act immediately was a mistake. Plaintiff has not met this burden. The undisputed facts reveal that at the time plaintiff saw Kedrow, plaintiff had detected a bulge in the area of his incision that he believed was infected. However, plaintiff has proposed no facts suggesting that his physical condition was so obviously serious that even a layperson would know that Kedrow's failure to take immediate action was wrong. For example, plaintiff has not produced any evidence suggesting that his wound was openly draining pus or that the area of the incision was red and hot or that the bulge was so large that it could not have been mistaken for ordinary swelling in the area of an incision, or that Kedrow knew plaintiff was suffering from a fever so high that a layperson would know Kedrow's response was inappropriate.

Moreover, plaintiff appears to have carefully worded his proposed findings of fact regarding this incident. Plaintiff maintains that he told Kedrow he was in pain, but he does

not specify what pain he described to Kedrow. Kedrow's notes reflect nothing more than that plaintiff complained of lower back pain which radiated into his legs.

It is true that three days after Kedrow saw plaintiff, on March 23, prison medical staff diagnosed plaintiff with an infection at the site of his incision that needed to be drained and medicated, but this fact does not help plaintiff. Taking as true that by March 23 the bulge had grown to the size of a golf ball, it does not follow automatically that the symptoms plaintiff displayed three days earlier, on March 20, were such that a layperson would conclude that Kedrow was obviously wrong in not taking immediate action.

Because Kedrow's act was not an obviously negligent act that invokes the doctrine of res ipsa loquitur, and because plaintiff did not adduce expert medical testimony to establish that Kedrow's act failed to meet the required standard of care, summary judgment is warranted in defendant's favor.

3. Negligence claim #3 - Plaintiff was not allowed to see a doctor on March 21 and 22, 1998

Plaintiff spent Saturday March 21 and Sunday March 22 in his cell, with chills and a fever and in significant pain. Plaintiff did not adduce any evidence that he attempted to obtain medical care during those two days and was denied it. Without showing that defendant knew he was ill on March 21 and 22 but failed to do anything about it, plaintiff

cannot show that defendant was negligent. Accordingly, summary judgment for defendant is warranted.

4. Negligence claim #4 - Physician Assistant Penaflor refused to give plaintiff his antibiotic on March 23, 1998

Although plaintiff may be able to show that defendant Penaflor's alleged refusal to give him his antibiotic did not meet the standard of care (the court of appeals stated: "No doubt any physician would testify that delaying antibiotics for a serious infection for no reason other than spite does not meet the standard of care for a physician's assistant." Gil, 381 F.3d at 661), summary judgment is warranted on this claim because plaintiff cannot show that defendant's alleged negligence caused him injury. In light of Dr. Kim's opinion that Cephalexin has no pain killing effect and Dr. Harms's opinion that a twelve-hour delay in the delivery of an antibiotic would not significantly affect or delay the healing of the abscess, there is no basis for a finding that plaintiff suffered injury as a result of defendant Penaflor's actions.

5. Negligence claim #5 - Plaintiff was not allowed to see a second colorectal specialist between August and December 1999

When plaintiff met with Dr. McDonald on August 4, 1999, Dr. McDonald

recommended that plaintiff undergo a second surgery to correct his rectal prolapse. Plaintiff had concerns about the possible side effects of such an operation and wanted the opinion of a second colorectal specialist. The medical staff at Oxford did not refer plaintiff to a second colorectal specialist until December 1999. Plaintiff contends that defendant was negligent in delaying four months before sending him to a second specialist.

Despite plaintiff's assertions that between August and December 1999 his rectum came out with each bowel movement and he experienced great pain in pushing his rectum back inside his body, Dr. Aslam noted during a November 19, 1999 appointment that plaintiff did not complain of pain or bleeding. Even assuming that plaintiff experienced pain throughout this period, it does not follow that the medical staff was negligent in not procuring plaintiff a second opinion prior to December 1999.

A four-month delay in arranging an appointment so plaintiff could obtain a second opinion regarding alternate surgical procedures is not an act that invokes the doctrine of res ipsa. Plaintiff failed to adduce expert medical testimony that defendant was negligent. Therefore, summary judgment is warranted.

6. Negligence claim #6 - Dr. Kim recommended surgery when he examined plaintiff in January 2000 but plaintiff did not have the surgery until May 2000

Four months elapsed between the time Dr. Kim recommended surgery and the day

plaintiff underwent the surgery. Plaintiff contends that defendant was negligent in making him wait four months to have surgery. These facts do not raise an instance of res ipsa loquitur; it is commonplace for patients to wait several months before surgery can be scheduled.

Dr. Kim testified that when he examined plaintiff in January 2000 and recommended surgery he did not think plaintiff's condition was medically urgent. According to Dr. Kim, the only urgency in correcting a rectal prolapse would be to alleviate the patient's pain. Although plaintiff contends that he was in pain during the four months while he waited for his surgery, Dr. Kim did not testify that defendant was negligent in keeping plaintiff waiting for four months for his scheduled surgery date. In the absence of expert medical testimony that defendant's actions failed to meet the required standard of care, summary judgment is warranted in defendant's favor.

7. Negligence claim #7 - Dr. Reed altered Dr. Kim's post-operative prescriptions in May 2000

In light of Dr. Kim's and Dr. Harms's opinions that plaintiff's post-operative care was not inappropriate, there is no basis for a finding that defendant was negligent. Therefore, summary judgment is warranted in defendant's favor.

8. Negligence claim #8 - Dr. Reed made plaintiff wait an hour in the waiting area of the prison hospital on May 9, 2000

Plaintiff contends that defendant was negligent because defendant Reed made him wait an hour in the waiting area of the prison hospital. Plaintiff was bleeding from the rectum and was in severe pain as he waited his turn. After waiting for an hour, plaintiff returned to his unit.

Keeping a patient in the waiting area for an hour is commonplace in medical offices and is not an act of obvious negligence that invokes the doctrine of res ipsa loquitur. I could draw a different conclusion if plaintiff had adduced evidence that during his hour-long wait he communicated to the medical staff that he was bleeding and was in severe pain and that there was something the medical staff could have done to alleviate these symptoms. Plaintiff has adduced no such evidence. Moreover, plaintiff has not provided expert testimony to show that defendant's action fell below the minimum standard of care. Therefore, summary judgment for defendant is warranted.

ORDER

IT IS ORDERED that the motion of defendants United States of America, Jamie Penaflor and James Reed for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 6th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge