

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

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MATTHEW D. RENNER,

Plaintiff,

v.

JAN COLE, JUDY SPAHN,  
JOHN DOES I – IV and  
THE UNITED STATES OF AMERICA,

Defendants.  
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ORDER

11-cv-419-slc<sup>1</sup>

In this proposed civil action for monetary relief brought under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, plaintiff Matthew Renner contends that defendants Jan Cole, Judy Spahn and several members of the nursing staff at the Federal Correctional Institution in Oxford, Wisconsin, violated his rights under the Eighth Amendment and FTCA by failing to provide him adequate medical treatment. Plaintiff has paid the \$350 filing fee and is represented by counsel.

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<sup>1</sup> For the purpose of issuing this order, I am assuming jurisdiction over this case.

Because plaintiff 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.

After reviewing the complaint, I conclude that plaintiff may proceed on his claims against defendants under the Eighth Amendment and FTCA.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

In February and March 2009, plaintiff Matthew Renner was confined at the Federal Correctional Institution in Oxford, Wisconsin. On February 26, 2009, he started experiencing symptoms of illness, including loss of appetite, lethargy and sharp pain in his lower abdomen. The symptoms continued and worsened over the course of the following day, and on the afternoon of February 27, plaintiff went to the “pill line.” He spoke to a member of the prison’s medical staff, defendant John Doe I, who was handing out medications to inmates. Plaintiff told John Doe I of his symptoms and John Doe I told plaintiff to attend “sick call.” Plaintiff responded that he could not wait three days until the next sick call was scheduled, but John Doe I told plaintiff there was nothing he could do. He did not take any vital signs from plaintiff or conduct any examination.

Plaintiff returned to his cell. He suffered the entire night from abdominal pain, vomiting and diarrhea and could not sleep. On the morning of Saturday, February 28, plaintiff could not eat. He went to the pill line and spoke to defendant Jan Cole, a registered nurse in the health services unit, about his symptoms. Cole did not conduct any examination of plaintiff and did not take his vital signs. She gave plaintiff Maalox and told him to come back if he did not feel better. The Maalox did not help, and plaintiff returned to the pill line later that day. He told defendant Cole that the pain in his lower abdomen was worse. Cole gave plaintiff more Maalox and told him to go to sick call on Monday morning.

On the evening of February 28, plaintiff returned to the pill line. He told a different member of the prison medical staff, defendant John Doe II, about his symptoms, including his inability to eat, stabbing pain in his right lower abdomen, nausea, vomiting and diarrhea. John Doe II did not take plaintiff's vital signs or conduct any examination of plaintiff. He told plaintiff to attend sick call on Monday.

On Sunday, March 1, 2009, plaintiff went to the morning, afternoon and evening pill lines. He told members of the prison medical staff, defendants John Doe III and John Doe IV, of his symptoms and severe pain. They did not take plaintiff's vital signs, conduct any examination of plaintiff or provide him any treatment. They told plaintiff to attend sick call on Monday.

On Monday, March 2, 2009 at approximately 7:53 a.m., plaintiff went to sick call in the health services unit. He was seen by defendant Judy Spahn, an advanced nurse practitioner. He complained of pain on the right side of his abdomen, nausea, vomiting, diarrhea, fever and chills. He told Spahn that he had been experiencing abdominal pain for six days. Spahn took plaintiff's temperature and conducted a physical examination, noting that he had a temperature of 101.9 degrees and tenderness in the right lower quadrant. Spahn gave plaintiff acetaminophen.

A couple of hours later, plaintiff returned to the health services unit because his symptoms continued. Defendant Spahn took an abdominal x-ray and conducted lab tests. The lab results showed large amounts of nitrates and traces of blood in plaintiff's urine. Spahn prescribed an antibiotic to plaintiff.

On March 3, 2009, at 9:08 a.m., plaintiff returned to the health services unit and told the staff that he was experiencing pain, nausea and vomiting. His vitals were taken and he had a temperature of 96.9 degrees. He was referred to a physician, Dr. James Reed. When Reed saw plaintiff, he transferred plaintiff immediately to the emergency room at Divine Savior Hospital in Portage, Wisconsin. The emergency room doctor determined that plaintiff had appendicitis, that his appendix had ruptured and that he needed surgery. Plaintiff underwent surgery later that day. The procedure began as a laparoscopy but was converted to an open appendectomy for a perforated appendix.

Plaintiff's condition deteriorated overnight while he was in the hospital. He was "hemodynamically unstable," in septic shock and had a temperature of 103.6 degrees. On March 4, he was transported by helicopter to the University of Wisconsin Hospital in Madison, Wisconsin. Plaintiff was taken into surgery, where approximately half of his colon and part of his small intestine were removed. He underwent additional surgery on March 12, 2009. He was released from the hospital on March 14, 2009 and was transferred to the Federal Medical Center in Rochester, Minnesota.

## DISCUSSION

Plaintiff contends that defendants' failure to properly diagnose and treat plaintiff's serious medical needs violated his rights under the Federal Tort Claims Act and the constitution.

### A. Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) provides a remedy for an individual seeking recovery for damages caused by the negligent or wrongful act of an employee of the federal government. 28 U.S.C. §§ 2671-2680. The coverage of the Act extends to federal prisoners, who may sue for injuries caused by the negligence of prison employees. United States v. Muniz, 374 U.S. 150, 150 (1963). The United States is the proper defendant in a claim

brought under the FTCA, 28 U.S.C. § 2679(b)(1); Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008).

Because a claim brought under the FTCA is governed by “the law of the place where the act or omission occurred,” the substantive law of Wisconsin governs plaintiff’s claim for medical negligence. 28 U.S.C. § 1346(b); Gil v. Reed, 381 F.3d 649, 658 (7th Cir. 2004); Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). To prevail on a claim for medical negligence in Wisconsin, plaintiff must prove that defendants breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865.

Plaintiff’s allegations are sufficient to state a claim for medical negligence against all defendants. He alleges that defendants, members of the medical staff at the Federal Correctional Institution in Oxford, Wisconsin, failed to recognize his serious medical needs and provide proper treatment for those needs. He alleges that defendants were aware that he was suffering severe abdominal pain, nausea, diarrhea and other symptoms, yet failed to conduct any examination or test, consult any doctor or provide him any effective treatment for his condition. Plaintiff alleges that defendants’ negligence caused his appendicitis to go undiagnosed and untreated, resulting in serious pain, permanent injury and disability. From these allegations, it can be inferred that defendants breached the applicable standard of care and caused plaintiff to suffer injuries. Therefore, he may proceed on his claims under the

Federal Tort Claims Act against all defendants.

B. Eighth Amendment Claim

Plaintiff also contends that defendants violated his rights under the Eighth Amendment by exhibiting deliberate indifference to his serious medical needs. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996); Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner 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; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Plaintiff alleges that he had severe pain, nausea and diarrhea, among other symptoms, and ultimately was diagnosed with appendicitis and a ruptured appendix. This is sufficient to allege a serious medical need. In addition, plaintiff alleges that he told all defendants about his severe pain and other symptoms but that they failed to take reasonable measures to help him. Thus, plaintiff has stated claims under the Eighth Amendment against all defendants and may proceed on those claims.

However, I caution plaintiff to think carefully about the possible consequences of pursuing both his FTCA and his Eighth Amendment claims. In particular, plaintiff should be aware that a judgment in the FTCA action would act as a complete bar to any action by plaintiff concerning the same subject matter against the employee of the government whose

actions gave rise to the FTCA claim. 28 U.S.C. § 2676. In other words, if judgment is entered on plaintiff's FTCA claim concerning defendants' failure to diagnose and treat plaintiff's medical needs, he may not pursue a constitutional tort claim under the Eighth Amendment against defendants arising from the same set of facts. Manning v. United States, 546 F.3d 430, 431 (7th Cir. 2008). Moreover, even if plaintiff wins his Eighth Amendment claim against defendants and judgment is entered in plaintiff's favor, the judgment would be vacated if plaintiff lost his FTCA claim later. For example, in Manning, 546 F.3d 430, the plaintiff pursued a Bivens claim against federal agents and an FTCA claim against the United States for malicious prosecution and intentional infliction of emotional distress. Id. at 431-32. After a jury entered a verdict for \$6.5 million in the plaintiff's favor on his Eighth Amendment claims, the court entered judgment for the United States on the FTCA claim. Id. at 432. The Court of Appeals for the Seventh Circuit held that the court's judgment in the FTCA claim triggered the FTCA bar under § 2676 and required that the Eighth Amendment judgment be vacated. Id. at 438. Thus, plaintiff should keep these rules in mind when deciding whether he wishes to pursue both an FTCA claim against the United States and an Eighth Amendment claim against one or all defendants. He should also know that it is usually easier to prove an FTCA claims against defendants because he need show only negligence, that is, the medical personnel who saw him and prescribed medication for him failed to meet the standard of care required of persons in their profession. To state an



Eighth Amendment claim, plaintiff will have to prove that each defendant was deliberately indifferent to his serious medical needs.

ORDER

IT IS ORDERED that plaintiff Matthew Renner is GRANTED leave to proceed on his claims that defendants Jan Cole, Judy Spahn and John Does I – IV failed to provide him adequate medical treatment in violation of the Federal Tort Claims Act and the Eighth Amendment.

Entered this 5th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge