

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

JOSE R. PADILLA,

Plaintiff,

v.

DR. DALIA SULIENE

Defendants.

OPINION and ORDER

11-cv-425-bbc

In this civil action for monetary relief brought under 42 U.S.C. § 1983, plaintiff Jose Padilla is proceeding on claims that defendant Dalia Suliene violated the United States Constitution and state law by failing to remove a staple that plaintiff had inserted into his leg while he was incarcerated at the Columbia Correctional Institution. Defendant has filed a motion for summary judgment. Dkt. #66. Plaintiff's response to the motion and to defendant's proposed facts was due on March 29, 2012. On April 17, 2012, I gave plaintiff until April 30, 2012 to file materials in opposition to defendant's motion and directed him to explain whether he was unable to respond because he could not obtain writing materials. In particular, I told plaintiff that if he believed he could not file opposition materials by April 30, he should file an affidavit with the court explaining specifically whether he has paper, an envelope and postage or money in his trust fund account with which he can purchase those supplies and whether his lack of supplies had prevented him from filing opposition

materials. In addition, I told plaintiff to explain whether he has had any money in his trust fund account during the pendency of this lawsuit with which he could have purchased supplies. On May 1, 2012, plaintiff filed an affidavit, stating the following:

1. Writing supply is need[ed].
2. Postages is need[ed].
3. Copy is need[ed] to[o].
4. I got move from W.R.C. to C.C.I.

I Plaintiff write this facts when I was in W.R.C. I receive two envelope with stamp. Now I am in C.C.I. I only receive 1 envelope [each] week. I do not receive money from no one or family. . . .

Dkt. #76.

Plaintiff does not explain in his affidavit why he has failed to file opposition materials in response to defendant's motion for summary judgment. Although he says he needs writing supplies, postage and copies, he does not say that his lack of supplies has prevented him from filing his opposition materials. His ability to write letters to the court and file motions suggests that he has at least some writing supplies and postage with which he could have prepared opposition materials. E.g., dkt. ##73, 74, 76, 77. However, plaintiff does not say whether he has even tried to prepare summary judgment materials and does not say what he would need to do so.

Plaintiff's failure to respond to defendant's summary judgment materials or to provide any justification for his failure requires the court to accept all of defendant's proposed findings of fact as undisputed. Procedure to Be Followed on Motions for Summary

Judgment, II.A, II.B and II.C and Memorandum to Pro Se Litigants Regarding Summary Judgment Motions, attached to Preliminary Pretrial Conference Order, dkt. #21.

After reviewing the facts and defendant's arguments, I conclude that defendant has shown that she is entitled to summary judgment on plaintiff's claims. Therefore, I will grant defendant's motion.

From defendant's proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Jose Padilla is a prisoner at the Columbia Correctional Institution, located in Portage, Wisconsin. Defendant Dalia Suliene is a physician there. On October 8, 2010, plaintiff cut his leg. When staff at the emergency room stapled the cut closed, plaintiff pushed a staple deep into the tissue of his calf. He was seen by health service unit staff on that same day and made no complaints about leg pain or the staple in his leg.

On October 14, 2012, defendant saw plaintiff to check the wound on his leg, which he said was not healing. Defendant examined the leg and concluded that the wound had healed, that there was no discharge and that no further treatment was needed. Plaintiff did not tell defendant that he had pushed the staple into his leg.

On October 30, 2010, plaintiff was seen by the health services unit after he complained about staples in his right forearm and left lower leg. Staff examined him and noted no red streaks or visible foreign bodies. They consulted the on-call physician, who

prescribed antibiotic topical ointment and Tylenol for pain. An appointment with the physician was scheduled.

On November 3, 2010, plaintiff was seen again at the health services unit. Staff removed staples from his scalp and right hand. Staff did not see the staple in plaintiff's leg and did not remove it.

On November 10, 2010, defendant saw plaintiff to check his left leg. She noted a small, healed scar on his calf, with no sign of infection. An x-ray showed a small linear density in the soft tissues consistent with the presence of a staple. She concluded that no therapy was needed for the staple because plaintiff's body was not reacting negatively to it, it was not tender and it was not infected. She prescribed a topical antibiotic.

On December 14, 2010, plaintiff submitted a health services request asking for the name of the nurse who he said told him the pain in his leg could not be treated. He was scheduled for an appointment and seen on December 17 to evaluate his complaints of pain in his calf. Staff noted that he described the pain as constant and an 8 on a 10-point pain scale. They did not see signs of infection and prescribed Tylenol for the pain.

On December 23, plaintiff submitted a health services request asking to have the staple removed. He was scheduled to be seen at sick call on December 27, but he refused to be seen. On December 28, he submitted two more health services requests complaining about the staple in his leg.

Defendant saw plaintiff on January 6, 2011. She noted that the x-ray showed the shadow of a staple but that plaintiff was complaining of pain in a different area. She

submitted a class III request for an orthopedic consultation. The class III request was approved on January 11. Plaintiff was scheduled for the orthopedic appointment on January 14, but he was not able to go because of administrative problems.

On February 18, plaintiff was seen for the orthopedic appointment. The orthopedist recommended an ultrasound, which defendant ordered. Six days later, plaintiff was transferred to the Wisconsin Resource Center and defendant had no further involvement with his care. (Plaintiff was transferred back to the Columbia Correctional Institution sometime in April 2012).

OPINION

A. Eighth Amendment

Defendant does not deny that plaintiff had a staple in his leg or that she declined to remove the staple. She does deny that the staple caused plaintiff a serious medical need to which she was indifferent. Plaintiff did not propose any facts to the contrary.

A “serious medical need” is one that is life-threatening or carries a risk of permanent serious impairment if it is left untreated or one that results in needless pain and suffering when treatment is withheld. Gutierrez v. Peters, 111 F.3d 1364, 1371–73 (7th Cir. 1997). Plaintiff has adduced no evidence to support his claim that the staple in his leg was a serious medical need. It was not infected, and his body was not reacting to it in any other way. The area where the staple was located was not red or tender to the touch. Although plaintiff complained of pain at a level of 8 on a 10-point scale, the pain about which he complained

was not in the area where the staple was.

Moreover, even if the staple did constitute a serious medical need, plaintiff has not shown that defendant was deliberately indifferent to it. “Deliberate indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Because defendant provided some treatment to plaintiff, plaintiff must show that the medical treatment 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).

Plaintiff has not shown that defendant’s treatment was “blatantly inappropriate.” When defendant saw plaintiff on November 10, 2010, she concluded that he did not need treatment for his leg because there was no infection or other reaction. When plaintiff complained of pain on December 14, he was seen almost immediately by health services unit staff, who prescribed Tylenol for pain. When plaintiff complained again, defendant examined him and saw no signs of infection. Later, defendant requested a consult from orthopedics and scheduled an ultrasound for plaintiff. These facts do not imply that defendant was deliberately indifferent to any serious medical need allegedly posed by the presence of the staple. Defendant is entitled to summary judgment on this claim.

B. State Law Medical Negligence

The next question is what to do with plaintiff’s state law claim, in which he alleges

that defendant's failure to remove the staple constituted medical negligence under Wisconsin law. Under 28 U.S.C. § 1367(c)(3), a federal district court may decline to exercise supplemental jurisdiction over state law claims once federal claims have been dismissed. Indeed, the "general rule" is that state law claims should be dismissed when all federal law claims are dismissed before trial. Wright v. Associated Insurance Companies, Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). However, it may be proper to retain jurisdiction over state law claims under § 1367 when, for example, the statute of limitations has run on a state law claim, substantial judicial resources have been expended on the claims or resolution of the claims is clear. Id.

I conclude that retaining jurisdiction is appropriate in this case because the resolution of plaintiff's state law claim is clear. A claim for medical negligence, as with all claims for negligence, includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Thus, to establish a prima facie medical negligence claim, plaintiff must show that defendant failed to use the required degree of skill exercised by an average physician, plaintiff was harmed and there is a causal connection between defendant's failure and plaintiff's harm. Wis J-I Civil 1023. In this case, plaintiff has presented no evidence that would allow a finder of fact to conclude that defendant breached the relevant standard of care, or even what that standard of care is. Thus, he cannot prove his medical negligence claim. Defendant is entitled to summary judgment on this claim as well.

ORDER

IT IS ORDERED that defendant Dalia Suliene's motion for summary judgment, dkt. #66, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 25th day of May, 2012.

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