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

RALPH H. JURJENS,

OPINION AND ORDER

Plaintiff,

v.

13-cv-455-wmc

COUNTY OF LA CROSSE, WISCONSIN, *et al.*,

Defendants.

Plaintiff Ralph H. Jurjens alleges that he was denied adequate, timely medical care for a broken ankle sustained while in custody at the La Crosse County Jail. Jurjens is eligible to proceed *in forma pauperis* and has made an initial partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because Jurjens is incarcerated, the court is also required by the Prison Litigation Reform Act ("PLRA") to screen the complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). For reasons set forth below, the court will grant Jurjens leave to proceed under 42 U.S.C. § 1983 with claims that adequate medical care was denied or delayed by defendants with deliberate indifference to his serious medical needs.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the

court accepts the plaintiff's well-pleaded allegations as true and assumes the following probative facts:

Jurjens is currently confined by the Wisconsin Department of Corrections at the Columbia Correctional Institution. At all times relevant to this complaint, however, Jurjens was in the custody of defendant La Crosse County, Wisconsin, as a result of his March 9, 2011 guilty plea in La Crosse County Case No. 2010CF188. The other defendants are La Crosse County Sheriff Steve Helgeson, Sergeant Lee Schmitz, Jailer Mary Griffin, Jailer Mitch Johnson, Nurse Supervisor Nikki Bunke, "Nurse Liz Doe," and three "John Doe" jail officers. Jurjens also sues Health Professional Ltd., a private contractor at the La Crosse County Jail.

On April 9, 2011, Jurjens was given "100 mg of Trazadone" to help him sleep. Sometime during the night, he woke to use the bathroom in his cell. Having never taken Trazadone before, Jurjens "felt extremely dizzy, groggy, and light-headed." Jurjens tripped over a property bin and fell, "twisting [his] ankle in an odd way [and] smashing his face and head into [a] concrete wall[.]" Jurjens then crawled back to his bed and "passed out."

On the morning of April 10, 2011, Jailer Mary Griffin noticed that Jurjens had a hard time standing up to accept his morning snack and had a cut under his eye. Jurjens limped as Griffin escorted him to the infirmary, where they were met by Nurse Liz Doe, Sergeant Lee Schmitz and Jailer Mitch Johnson. Nurse Liz Doe examined Jurjens's ankle and observed "severe swelling and ecchymosis" from his toes to his knee. Jurjens told Nurse Liz Doe and Sergeant Schmitz that he was in "a great deal of pain" and needed to

go to the hospital. Nurse Doe gave Jurjens some Ibuprofen and ice, while Sergeant Schmitz ordered Jurjens to be placed in a "medical cell." Jurjens spent the day going "in and out of consciousness" while his complaints of agonizing pain were ignored.

Nurse Supervisor Nikki Bunke eventually examined Jurjens, asking him if he thought his ankle was broken. Jurjens replied that he believed it was. Jurjens asked to see a medical doctor and to be taken to the hospital for x-rays. Bunke told him that x-rays would have to wait until the swelling in his ankle decreased, to which Jurjens replied that he was in "agonizing pain." On a scale from one to ten, with one being most tolerable and ten being the most intolerable, he rated his pain as a "TEN out of ten." Still, Jurjens received nothing more than Ibuprofen that day.

On April 11, 2011, Jurjens was examined at the jail by Dr. Allen, who ordered x-rays. Two days later, he was taken to a local hospital ("Franciscan Healthcare") for x-rays, which showed that his ankle was broken. The following day, Jurjens met with Bunke, who told him that the x-rays were "positive," but that "surgery was not required." No steps were taken to immobilize the fracture.

On April 19, Jurjens returned to Franciscan Healthcare, where he was examined by Dr. Anthony Villare. Dr. Villare ordered more x-rays and informed him that surgery would be required to stabilize the fracture. Dr. Villare wanted to perform the surgery as soon as possible, but had to wait for swelling to abate. Dr. Villare was "visibly vexed" about the delay in initiating treatment and the fact that Jurjens's ankle had not been immobilized. Dr. Villare gave Jurjens a "fracture boot" to immobilize the ankle until surgery could be performed. He saw Jurjens saw again on April 22, noting that his ankle

was "significantly less" swollen. On April 25, 2011, Dr. Villare performed surgery to install a plate and several screws to stabilize Jurjens's broken right ankle.

After the surgery, Dr. Villare prescribed Oxycodone (Percocet) every four hours for pain. Because Oxycodone was not on Health Professional's formulary at the jail infirmary, Jurjens was given Tylenol 3 instead and then only twice a day, once in the morning and once in the afternoon. This dosage was not strong enough to alleviate Jurjens's "significant excruciating pain," which made sleep impossible. Jurjens "begged" three John Doe jailers assigned to third shift for Percocet, but they said they could not give him any. At some point, jail officials allowed Jurjens's mother to purchase Percocet on her son's behalf. He was given Percocet the next morning, April 26th.

On April 29th, Jurjens received a lengthy term of imprisonment, followed by a term of extended supervision, in La Crosse County Case No. 2010CF188. On May 5th, he was transferred to the Dodge Correctional Institution, which is the intake facility for the Wisconsin Department of Corrections.

Fifteen months after his surgery, Jurjens's ankle remained swollen and painful. On November 8, 2012, he had additional surgery at Waupun Memorial Hospital to remove the hardware installed by Dr. Villare in an "attempt to reduce pain and edema."

Jurgens contends that the defendants are liable under 42 U.S.C. § 1983 because he was denied prompt access to adequate medical care for his broken ankle in a "cruel and unusual" manner. Jurjens contends further that he was denied adequate pain medication before and after his surgery. He seeks compensatory, punitive and "emotional damages."

OPINION

Section 1983 provides a remedy or private right of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

Here, Jurjens alleges that he was denied access to adequate treatment and pain medication for a serious medical condition -- a broken ankle. Because Jurjens had pled guilty but had not been sentenced at the time of his injury, his complaint implicates the Fourteenth Amendment's Due Process Clause, which dictates that "a pretrial detainee may not be punished," *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), and/or the Eighth Amendment's prohibition against "cruel and unusual punishment," which protects the rights of convicted state prisoners. *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005) (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 259, n.1 (7th Cir. 1996)). Since the Seventh Circuit has recognized that the due process rights of a pre-trial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *Brown*, 398 F.3d at 909 (internal citation and quotation omitted), "§ 1983 claims brought under the Fourteenth Amendment are analyzed under the Eighth Amendment

test." *Id.; see also Smego v. Mitchell*, — F.3d —, 2013 WL 3765295 (7th Cir. July 19, 2013) (describing the right to adequate medical care under the Fourteenth Amendment as "functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners").

To state an Eighth Amendment violation for the denial of medical care, a prisoner must allege facts from which it can be inferred that prison officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011). A prison official acts with deliberate indifference if he intentionally disregards a known, objectively serious medical condition that poses an excessive risk to an inmate's health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Serious medical conditions include: (1) those that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and/or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997).

Allegations of delayed care may violate the Eighth Amendment if the delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *Estelle*, 429 U.S. at 104-05; *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.") (citations omitted). Even a delay of a few days in addressing a severely painful, but readily treatable, condition suffices to state a claim for purposes of the

Eighth Amendment. *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011).

Even so, a defendant's liability under § 1983 must be based on that individual's personal involvement in the constitutional violation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). "[A]n official meets the 'personal involvement' requirement when 'she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.'" *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994) (quoting *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985)).

Accepting all of Jurjens's allegations as true, he has adequately stated an Eighth Amendment claim for the denial of or delay in medical care when defendants Nurse Liz Doe, Sergeant Schmitz and Nursing Supervisor Bunke each refused his request to be taken to the hospital on April 10, 2011. Jurjens also has stated a claim that Bunke denied him adequate pain medication after he broke his ankle and that three John Doe jailers assigned to third shift denied him pain medication following his surgery on April 25, 2011.

Jurjens does not state a viable claim against Jailer Mary Griffin and Jailer Mitch Johnson because he does not allege that either defendant refused his request for medical care. Jurjens's complaint against these defendants will, therefore, be dismissed without prejudice pursuant to 28 U.S.C. § 1915A.

Jurjens also fails to state a claim upon which liability could be premised against La

Crosse County, its contractor, Health Professional Ltd., or La Crosse County Sheriff Steve Helgeson. Neither the La Crosse County Sheriff nor La Crosse County can be held liable under § 1983 on a theory of *respondeat superior*. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Section 1983 claims may be brought against municipalities and other local governmental units for actions by its employees only if those actions were taken pursuant to an unconstitutional policy or custom. *See id*. at 694. As a private company under contract to perform the public function of providing medical or other health services to inmates, Health Professional, Ltd., is subject to the same standard as municipalities in a § 1983 action. *See Woodward v. Corr. Med. Servs.*, 368 F.3d 917, 927 n. 1 (7th Cir. 2004). Accordingly, the court will authorize service of process on these defendants solely for purposes of obtaining the identity of the John Doe and Liz Doe defendants.

To the extent that Jurjens's allegations pass muster under the court's lower standard for screening, he will still have to come forward with *admissible* evidence permitting a reasonable trier of fact to conclude that defendants acted with deliberate indifference to his serious medical need in order to ultimately be successful on his claim. This is a much higher standard. A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment *only* when his conduct demonstrates "deliberate indifference" to a prisoner's serious medical needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104). Inadvertent error, negligence and gross negligence are insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

In particular, it will be plaintiff's burden going forward to prove his condition constituted a serious medical need. More daunting still, he must prove that each defendant (1) *knew* his condition was serious and required treatment or caused serious pain and suffering that could have been relieved by prescription medication or other medical treatment and (2) deliberately ignored his need for this medication or treatment. Both elements may well require plaintiff to provide credible, expert testimony from a physician in the face of medical evidence to the contrary.

Noting that this case will likely involve conflicting testimony, plaintiff has requested the appointment of counsel. (Dkt. # 5). While the court cannot appoint counsel in a civil case, *see Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866-67 (7th Cir. 2013), it can recruit counsel *pro bono* to assist an eligible plaintiff who proceeds under the federal *in forma pauperis* statute. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."); *Pruitt v. Mote*, 503 F.3d 647, 653-54 (7th Cir. 2007) (en banc) (noting that, at most, the federal IFP statute confers discretion "to recruit a lawyer to represent an indigent civil litigant *pro bono publico*"). Plaintiff is eligible to proceed *in forma pauperis* and he has presented several rejection letters, showing that his own efforts to locate counsel have been unsuccessful. Because this case will necessarily entail discovery to determine the identity of Nurse Liz Doe and the other John Doe defendants listed above, the court will grant plaintiff's motion and will begin the process of recruiting a volunteer attorney.

ORDER

IT IS ORDERED that:

1) Plaintiff Ralph H. Jurjens's request for leave to proceed against Nurse Liz Doe, Sergeant Lee Schmitz, Nursing Supervisor Nikki Bunke and three John Doe jailers is GRANTED.

2) The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon La Crosse County, La Crosse County Sheriff Steve Helgeson, Sergeant Lee Schmitz, and Health Professional, Ltd., consistent with this opinion, although summons will not issue against John and Jane Doe defendants until plaintiff discovers the real names of these parties from nominal defendants La Crosse County and Health Professional, Ltd. and amends his complaint accordingly.

3) Plaintiff's request to proceed with claims against defendants Jailer Mary Griffin and Jailer Mitch Johnson is DENIED.

4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6) Plaintiff's motion for *pro bono* counsel, dkt. # 5, is GRANTED. The court will enter a separate order once it has located a volunteer who is willing to take this case.

Entered this 5th day of September, 2013.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge