

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
SEP 09 2021
JEFFREY P. COLWELL
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-01340-GPG
(To be supplied by the court)

TRACY ALAN BARNETT, Plaintiff

v.

UNITED STATES OF AMERICA / Fed. BOP, et al,
(Federal Bureau of Prisons - BOP)

DR. GEORGE SANTINI - Clinical Director,
(BOP - FCI Englewood)

HECTOR LOZANO - Asst. Hlth. Svc. Admin.,
(BOP - FCI Englewood)

LARRY HUDSON - Health Svc. Admin., Defendant(s).
(BOP - FCI Englewood)

(List each named defendant on a separate line. If you cannot fit the names of all defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Section B. Do not include addresses here.)

**** AMENDED ****

PRISONER COMPLAINT

NOTICE

Federal Rule of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number.

Plaintiff need not send exhibits, affidavits, grievances, witness statements, or any other materials to the Clerk's Office with this complaint.

A. PLAINTIFF INFORMATION

You must notify the court of any changes to your address where case-related papers may be served by filing a notice of change of address. Failure to keep a current address on file with the court may result in dismissal of your case.

Tracy Alan Barnett, BOP #08201-030
FCI Elkton - Unit AB, P.O. Box 10, Lisbon, OH. 44432

(Name, prisoner identification number, and complete mailing address)

N/A

(Other names by which you have been known)

Indicate whether you are a prisoner or other confined person as follows: (check one)

- Pretrial detainee
- Civilly committed detainee
- Immigration detainee
- Convicted and sentenced state prisoner
- Convicted and sentenced federal prisoner
- Other: *(Please explain)* _____

B. DEFENDANT(S) INFORMATION

Please list the following information for each defendant listed in the caption of the complaint. If more space is needed, use extra paper to provide the information requested. The additional pages regarding defendants should be labeled "B. DEFENDANT(S) INFORMATION."

Defendant 1: United States of America - Fed. Bureau of Prisons
(Name, job title, and complete mailing address)
North Central Region, 400 State Ave., Gateway Twr.
Tower II, 8th Floor, Kansas City, KS. 66101-2492

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes No *(check one)*. Briefly explain:

Failed to provide timely cancer diagnosis/treatment
which allowed prisoner's cancer to grow and spread.

Defendant 1 is being sued in his/her individual and/or official capacity.

Defendant 2: Dr. George Santini - Clinical Director
(Name, job title, and complete mailing address)
FCI Englewood,
9595 W. Quincy Ave., Littleton, CO. 80123

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes ___ No (*check one*). Briefly explain:

Failed to provide timely cancer diagnosis/treatment
which caused months of needless pain and suffering.

Defendant 2 is being sued in his/her individual and/or ___ official capacity.

Defendant 3: Hector Lozano - Asst. Health Services Administrator
(Name, job title, and complete mailing address)
FCI Englewood,
9595 W. Quincy Ave., Littleton, CO. 80123

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes ___ No (*check one*). Briefly explain:

Failed to provide timely cancer diagnosis/treatment
which caused months of needless pain and suffering.

Defendant 3 is being sued in his/her individual and/or ___ official capacity.

Defendant 4: See attachment "B. DEFENDANT(S) INFORMATION."

C. JURISDICTION

Indicate the federal legal basis for your claim(s): (check all that apply)

42 U.S.C. § 1983 (state, county, and municipal defendants)

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)
(federal defendants)

Other: (*please identify*) Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq.
28 C.F.R. § 543 - Sub. Pt. C.

SECTION B - DEFENDANT(S) INFORMATION - Attachment

Defendant 1: United States of America - Fed. Bureau of Prisons

*(See pg. 2)

Defendant 2: Dr. George Santini - Clinical Director

*(See pg. 3)

Defendant 3: Hector Lozano - Asst. Health Services Administrator

*(See pg. 3)

(Cont. from Pg. 3)

Defendant 4: Larry Hudson - Health Services Administrator

(Name, job title, and complete mailing address)

FCI Englewood,
9595 W. Quincy Ave., Littleton, CO. 80123

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes No (check one). Briefly explain:

Failed to provide timely cancer diagnosis/treatment
which caused months of needless pain and suffering.

Defendant 4 is being sued in his/her individual and/or official capacity.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM ONE: Federal Tort Claim for Money Damages: Personal Injury
 caused by medical neglect of Government employee(s).
 Supporting facts: wrongful act/omission (FTCA) 28 U.S.C. §§ 2671-2680

On June 13, 2019, Plaintiff had to have emergency surgery to remove an "advanced ileocolic neoplasm (large cancerous mass)" from his ascending colon, as it was "completely obstructing" his large intestine. On June 18, 2019, biopsy of the mass revealed that the cancer [adenocarcinoma] was in an advanced state (8cm/baseball-sized) and had metastasized by spreading to the lymph nodes, thereby, being classified as Stage III Colon Cancer.

Between January 2019, and June 2019, Plaintiff repeatedly sought medical treatment from BOP staff for severe gut pain, chronic vomiting, and rapid weight loss (55+ lbs/5 months). - However, FCI Englewood staff repeatedly cancelled doctor visits and neglected/ignored the medical complaints from the plaintiff.

Throughout the above time period, FCI Englewood medical staff acted with deliberate indifference to Plaintiff's serious medical needs where medical care was merely cursory and insufficient, staff did nothing to alleviate Plaintiff's gut pain or to meaningfully further medical diagnosis in a timely manner even as Plaintiff was visually deteriorating (rapid weight loss/increasing severe gut pain).

-- Rather, Plaintiff was left to languish and wither in extreme pain for more than four (4) months as an alien tumor grew/spread in his gut.

But for FCI Englewood medical staff's 1/2 year delay of a timely cancer diagnosis, the cancer would not have had an opportunity to become so "advanced" and would not have been allowed to metastasize and spread to Plaintiff's lymphatic system, which would have negated the need for the chemotherapy treatments. - The resulting chemo treatments have also caused chronic neuropathy in Plaintiff's hands and feet.

(It should be noted that Plaintiff was allowed to physically deteriorate to the point that FCI Englewood MLP, Birgit Dyer, had to send Plaintiff to a local hospital Emergency Room [Swedish Medical Center] for emergency care (June 11, 2019). - At that time, Plaintiff was accurately diagnosed with "obvious bowel obstruction" within three (3) hours of arrival.

*Additional paper attached

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM ONE (Cont.)

Federal Tort Claim for Money Damages: Personal Injury
caused by neglect/wrongful act/omission of Government
employee(s) acting within the scope of their office.
(FTCA) 28 U.S.C. §§ 2671-2680

Supporting facts:

*Please Note:

On 7/15/21 the Court granted Plaintiff an extension of time in which to file an Amended Prisoner Complaint [Doc. 10]. The order states that Plaintiff has until August 30, 2021, to file the Complaint.

However, as FCI Elkton is still operating under very strict COVID protocols, Plaintiff has less than three (3) actual hours per week to research/draft/prepare/type his pro se pleadings.

Wherefore, as today is 8-16-21, and Plaintiff is feeling rushed and panicked to complete the instant Amended Prisoner Complaint on time, Plaintiff, again, requests that the Court construe this pro se legal pleading under a liberal standard and grant Plaintiff leave to make any future amendments or corrections the Court may find necessary.

For the sake of brevity, and to comply with the Court's 7/15/21 order, Plaintiff asserts that he has a legal right under law to receive adequate health care, even if minimal, while in custody of the Federal Bureau of Prisons. Here, where his cancer diagnosis was unreasonably (and unnecessarily) delayed for several months until the point that he had to be sent out to a local hospital for Emergency tumor removal surgery, Plaintiff was left to whither down to 152 lbs., was forced to endure MONTHS of pain and suffering, and the cancer was allowed to metastasize to spread to Plaintiff's local lymphatic system, thereby, becoming Stage III cancer requiring the additional treatment of chemotherapy.

While a Medical Doctor employed by the BOP to care for inmates would be expected to accurately and timely diagnose/treat cancer-related medical issues, even an ordinary, average layperson knows that early cancer detection will offer patients the best opportunity for cancer treatment. - In April 2019, even an FCI Englewood guard told the Plaintiff that he looked like he had "got 'the cancer!'"

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM ONE (Cont.)

18 U.S.C. § 4042 provides that the Federal Bureau of Prisons (BOP) has a duty to provide for the housing, security, and care of all inmates in their custody. Where BOP medical staff fail to provide adequate medical care for inmates held in their custody, and that failure to provide the required care in a timely manner ends up resulting in "substantial harm caused by [the] delay in treatment (metastasis of cancer// resulting pain)," the United States is liable for related damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680.

Under the FTCA, a tort action "shall not be instituted upon a claim against the United States... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing... " 28 U.S.C. §2675(a). A claim is "deemed to have been presented when a Federal agency receives from a claimant...an executed Standard Form 95 (SF-95) or other written notification of the incident, accompanied by a claim for money damages in a sum certain ..." 28 C.F.R. § 14.2(a).

"[T]he FTCA constitutes a waiver of the government's sovereign immunity, [so] the notice requirements established by the FTCA must be strictly construed. The requirements are jurisdictional and cannot be waived." Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 852 (10th Cir. 2005).

Here, in the instant pleading, Plaintiff has already fully exhausted his available administrative remedies where the BOP denied his Administrative tort claim [TRT-NCR-2021-01790] on July 06, 2021. (See enclosed documentation).

Plaintiff, therefore, now brings this FTCA action against the United States to the Court as it now has proper jurisdiction.

Additionally, while Colorado State Law may require that a plaintiff in a medical-related action shall also file a "certificate of review," Kikumura v. Osagie, 461 F.3d 1269 (CA10-Colo, 2006); Colo. Rev. Stat. §13-20-602(1)(a), here, Plaintiff brings this action in the Federal Court under provisions in Federal law. As such, the Federal Rules of Civil Procedure apply, not Colorado State laws.

The Federal Rules do not require an affidavit to state a medical negligence claim. Rule 8(a) of the Fed. R. Civ. P. sets out the pleading requirements, which only include a short and plain jurisdictional statement, a short and plain statement of the claim, and an explanation of the relief sought. Gallivan v. United States, 943 F.3d 244 (6th Cir. 2019): Cited in Prison Legal News, April 2020, pg. 47.

****Note:** Had plaintiff been a horse or dog and been allowed to wither down 25% of his body weight as plaintiff did in this case, criminal charges could have been brought under animal cruelty laws. See: Herbert v. Peresic, 1990 U.S. Dist. LEXIS 13090 (10th Cir., KS.).

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM TWOViolation of Eighth Amendment of U.S. Constitution
-Deliberate indifference to serious medical needs-

Supporting facts:

Plaintiff first started noticing abnormal health symptoms in November/December 2018. - However, Plaintiff waited until January 2019 to seek medical care, as he wanted to make sure that the symptoms were not merely caused by minor or temporary health issues (cold/flu/food poisoning/etc.). - In late January 2018, 2019 (Plaintiff saw FCI Englewood medical staff, [Hector L6zano/Larry Hudson] (at the institution "mainline", (M-F 10:30am-12:00pm / food service dining hall entry) to discuss his recent health issue symptoms (vomiting after eating, increasing stomach/gut pain, night chills/sweating, not being able to sleep because of abdominal pain, etc.). - At that time, Plaintiff was advised to go to health care services to sign up for "sick-call."

(On February 01, 2019, Plaintiff was seen by institution MLP/FNP, Birgit Dyer, for above medical complaints, and assessment of health issues. - At that time, Plaintiff was told that an appointment would be made for Plaintiff to see the institution doctor, Dr. George Santini, for follow-up review of the symptoms.

(However, over the next following weeks, several doctor appointment dates were cancelled and re-scheduled. On February 21, 2019, Plaintiff was seen again by MLP/FNP Dyer, where Plaintiff then complained of increasing pain in lower rt. side of abdomen (approx. in area of the intestinal appendix). - The doctor appointment was again re-scheduled, and Plaintiff was advised to "drink water, take Ibuprofen, and walk the track." - (No medication was proscribed for the increasing pain-related issues; and where Plaintiff was indigent, he could not buy Ibuprofen from the institution commissary. (*Weight drop from 208, to 189lbs

On March 14, 2019, Plaintiff saw institution DO/NCR, Dr. Robert King, who was acting as temporary doctor for FCI Englewood, as the regular institution Clinical Director/doctor, Dr. George Santini, had been on leave. - This was the first time that Plaintiff was finally able to speak to a professional MD about his ongoing serious medical issues/needs. - At that time, Plaintiff also requested to be put on a special diet of soft/bland food as he was unable to keep down food served on the regular inmate menu. - No diet change ordered, rather, added "antacid" to med order where Plaintiff was indigent, however, Plaintiff never received meds ("Mylanta") **See 03-21-19 Health svc. report. (*Weight drop to 173lbs.

On March 22, 2019, Plaintiff's first scheduled "Appt/Trip" to see outside Gastrointestinal professional was cancelled by FCI Englewood Health Services.

(On April 05, 2019, Plaintiff finally saw FCI Englewood Clinical Director, Dr. George Santini, to speak about the above ongoing health issues, after several weeks of canceled appointments. - Plaintiff, again, requested special diet so that he could get some nutrition, and also requested treatment for ongoing abdominal pain. - No diet change ordered, and no pain relief provided. (*Weight drop to 168lbs.

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM TWO (Cont.) Violation of Eighth Amendment of U.S. Constitution
-Deliberate indifference to serious medical needs-

Supporting facts:

(At the April 05, 2019, "Clinical Encounter," Plaintiff also told Dr. Santini that, based on the cumulative and increasing symptoms, that he was very highly concerned that he may have developed serious health issues such as "stomach or bowel cancer." - At that time, Plaintiff's (accurate) quasi self-diagnosis was merely discounted and ignored by Dr. Santini.

On April 30, 2019, Plaintiff was, again, seen by institution MLP/FNP, B. Dyer, for the same ongoing symptoms listed above. Within this three (3) month time period [Feb./Mar./Apr.], no meaningful diagnosis had been accomplished, and Plaintiff was left to continue languishing in pain on a daily basis as no pain medication was provided to Plaintiff despite the ongoing growth of the cancerous tumor growing in his small/large intestine (at the intestinal appendix).
(*Weight drop to 163lbs.

**"Urgent GI consult" was submitted by institution MLP/FNP, B. Dyer, on March 28, 2019. - However, no consults were ever conducted for medical diagnosis.

On May 01, 2019, FCI Clinical Director, Dr. George Santini, finally requested a CT Scan of Plaintiff's "Abd/Pelvis" for diagnosis of ongoing symptoms.
- However, Plaintiff's outside appointments were repeatedly cancelled.

At the April 30, 2019, "Clinical Encounter," Plaintiff was, again, scheduled for follow-up with the institution Clinical Director, Dr. George Santini.
- However, Plaintiff's doctor visits were all cancelled throughout the month of May 2019.

(On several occasions during April 2019, and May 2019, Plaintiff spoke with FCI Englewood Health Services Administration staff, Hector Lozano and Larry Hudson during institution "mainline," and asked why he was not receiving adequate health service care/treatment for his ongoing symptoms, was not given proper medication to alleviate, and was being allowed to wither and deteriorate by FCI Englewood medical staff.) - During those "mainline" conversations, both Mr. Lozano, and Mr. Hudson would write down notes on their notepads, then would tell Plaintiff that they would "look into it." - (On one occasion in late May 2019, a correctional officer (guard) standing close at "mainline" asked "Jesus, Barnett, what's wrong with you? You look like you've got 'the cancer'.")

While both Mr. Lozano's and Mr. Hudson's experience and training in the Health Service Administration should have clearly alerted them to Plaintiff's serious medical deterioration and medical needs, neither Mr. Lozano, nor Mr. Hudson did anything to further Plaintiff's medical treatment. -- (It is very sad to note that, while an average layperson (the guard standing at mainline) could [correctly] guess Plaintiff's affliction, FCI Englewood medical staff were deliberately indifferent to Plaintiff's serious medical needs.)

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM TWO (Cont.) Violation of Eighth Amendment of U.S. Constitution
 -Deliberate indifference to serious medical needs-

Supporting facts:

(On May 16, 2019, Plaintiff began the BOP Administrative Remedy process where he filed an Informal Resolution Attempt (BP-08) with Housing Unit Manager, Greg Stout. In the BP-08, Plaintiff requested "to be sent out for immediate professional medical treatment, as (Plaintiff) ha(d) not even had (his) medical issue (s) diagnosed, and which the(se) issue(s) may be very serious demanding immediate medical treatment *[stomach cancer / bowel cancer / etc.???]." - The BP-08 further stated that "(Plaintiff's) medical issue(s) have been going on since early January 2019. - In the last 4+ months (Plaintiff) ha(s) not been diagnosed, nor treated, and (Plaintiff) (was) forced to live in near constant stomach/gut pain every day!!!"

The BP-08 response stated that Plaintiff had an "appointment scheduled" for a CT Scan and a gastroenterologist, while it ignored that prior appointments had been cancelled, and that Plaintiff had requested emergent care for his ongoing health issues and related deteriorating physical health.

(On May 17, 2019, Plaintiff filed a Formal Request For Administrative Remedy (BP-09) with FCI Englewood Warden, R. Hudgens. In the BP-09, Plaintiff, again, requested "to be sent out for immediate professional medical/health care treatment, so that (he) c(ould) have current medical issues properly diagnosed and treated." - The BP-09 further stated that Plaintiff had repeatedly sought health care since January 2019 for these issues, but that his medical condition had not even been diagnosed and had lost over 1/4 of his body weight (50 lbs.). -- "Regardless, if my health issue(s) turn out to be serious *[stomach/bowel cancer ?], I need to be diagnosed in a timely manner, as to avoid early death. - This cannot be dragged out."

The BP-09 response from Warden Hudgens was not even signed/dated until June 19, 2019, - The very day Plaintiff was released from the Hospital following the emergency cancer surgery, - The response stated that Plaintiff was "currently scheduled with the outside consultant in the very near future," despite that Plaintiff had to have part of his small/large intestine removed due to the much-delayed cancer diagnosis.

(On June 07, 2019, Plaintiff was, again, seen by institution MLP/FNP, B. Dyer for the same ongoing symptoms listed above. (At that time, Ms. Dyer had just returned from a multi-week leave from FCI Englewood and seemed shocked that Plaintiff had still not been sent out for professional medical consultation or testing. (*Weight drop to 152lbs.)

(On June 11, 2019, Institution MLP/FNP, B. Dyer, had Plaintiff sent to a local emergency room, [Swedish Medical Center] for emergency health care after another appointment for that day had, AGAIN, been cancelled. - Plaintiff had lost 56 lbs. since December 2018. --- Seriously delayed cancer diagnosis carries very negative consequences. --- Early/reasonably timely diagnosis is essential.

SECTION D - STATEMENT OF CLAIMS - Attachment

CLAIM TWO (Cont.) Violation of Eighth Amendment of U.S. Constitution
 -Deliberate indifference to serious medical needs-

Based on the above, Plaintiff asserts that he has a right to bring a claim for damages for deliberate indifference to a serious medical need against the above named Defendants in their individual capacity based on the delayed diagnosis of cancer which resulted in serious substantial harm (metastasis/chemo-related neuropathy/etc.). - See: DeWBrow v. Kalu, 705 F.3d 765 (7th Cir. 2013).

Plaintiff now brings these claims under Federal Law, 42 U.S.C. §1983, ~~(and/or)~~ in a "Bivins" claim.

It should be additionally noted that Plaintiff raises both objective and subjective components of the "deliberate indifference" claims in this action, where BOP staff knew, or reasonably should have known, that Plaintiff was in serious need of immediate medical treatment, the unreasonable delay in medical care caused the unnecessary and wanton infliction of ongoing severe abdominal pain, and that the continued disregard to Plaintiff's medical complaints ultimately resulted in further substantial harm to Plaintiff ~~(~~*(Emergency surgery, need for additional/further medical treatment, neuropathy, etc.)).

42 U.S.C. § 1983 was intended to provide Federal remedy independantly enforcable whether or not it duplicates paralell state remedy; U.S.: Congress did not impose any procedural requisite for filing a § 1983 action; To impose state procedural requirements on a § 1983 claim would diminish broad remedial purpose intended by Congress. *See: Craig v. Witucki, 624 F. Supp. 558 (ND-Ind. 1986); Also: McElligott v. Foley, 182 F.3d 1248 (11th Cir. 1999).

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? Yes ___ No (*check one*).

If your answer is "Yes," complete this section of the form. If you have filed more than one previous lawsuit, use additional paper to provide the requested information for each previous lawsuit. Please indicate that additional paper is attached and label the additional pages regarding previous lawsuits as "E. PREVIOUS LAWSUITS."

Name(s) of defendant(s): United States of America
Federal Bureau of Prisons (BOP)

Docket number and court: Case No. 18-cv-3219
U.S. District Court - Colorado

Claims raised: Personal Injury - BOP negligence

Disposition: (is the case still pending?
has it been dismissed?; was relief granted?) Plaintiff accepted settlement
offer from U.S./BOP

Reasons for dismissal, if dismissed: - Settlement agreement -

Result on appeal, if appealed: N/A

F. ADMINISTRATIVE REMEDIES

WARNING: Prisoners must exhaust administrative remedies before filing an action in federal court regarding prison conditions. See 42 U.S.C. § 1997e(a). Your case may be dismissed or judgment entered against you if you have not exhausted administrative remedies.

Is there a formal grievance procedure at the institution in which you are confined?

Yes ___ No (*check one*)

Did you exhaust administrative remedies?

Yes ___ No (*check one*)

G. REQUEST FOR RELIEF

State the relief you are requesting or what you want the court to do. If additional space is needed to identify the relief you are requesting, use extra paper to request relief. Please indicate that additional paper is attached and label the additional pages regarding relief as "G. REQUEST FOR RELIEF."

Plaintiff seeks money damages from the United States/Fed. BOP in the amount of \$1,000,000.00 (one million dollars) to cover future medical costs related to his much-delayed cancer diagnosis, and for associated physical damages (neuropathy/pain).

Alternatively, Plaintiff seeks money damages for "substantial harm" caused by FCI Englewood staff in the following amounts:

- Dr. George Santini: \$2,000,000.00 (two million dollars);
- Hector Lozano: \$1,000,000.00 (one million dollars);
- Larry Hudson \$1,000,000.00 (one million dollars);

as associated with the delay in cancer diagnosis/treatment.

H. PLAINTIFF'S SIGNATURE

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

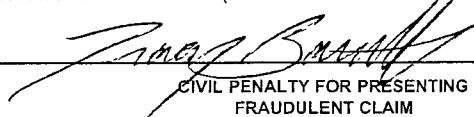
Under Federal Rule of Civil Procedure 11, by signing below, I also certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending or modifying existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.



(Plaintiff's signature)

8-30-21

(Date)

CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form Use additional sheet(s) if necessary See reverse side for additional instructions.		FORM APPROVED OMB NO 1105-0008	
1. Submit to Appropriate Federal Agency: Federal Bureau of Prisons North Central Region 400 State Ave., Gateway Tower Complex Tower II, 8th Floor Kansas City, KS. 66101 - 2492			2 Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Tracy A. Barnett / #08201-030 Federal Medical Center Butner P.O. Box 1600 Butner, N.C. 27509		
3 TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN	4. DATE OF BIRTH 03-16-67	5. MARITAL STATUS Single	6. DATE AND DAY OF ACCIDENT June 11-19, 2019	7. TIME (A.M OR P.M) Hospital stay	
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof Use additional pages if necessary) . On June 13, 2019, I had to have emergency surgery to remove a "large (cancerous) mass" in my ascending colon, which was "completely obstructing" my large intestine. On June 18, 2019, biopsy of the mass revealed that the cancer [adenocarcinoma] had metastasized to become stage 3 cancer. - While it has not been determined that BOP custody had caused the cancer, a six (6) month delay of proper medical diagnosis allowed the tumor to grow to the size of a baseball [8cm.], and further, spreading to the local lymph nodes.					
9 PROPERTY DAMAGE					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code). N/A					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side). N/A					
10. PERSONAL INJURY/WRONGFUL DEATH					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT. Between January 2019, and June 2019, claimant repeatedly sought medical treatment for severe gut pain, chronic vomiting, and 50lb. weight loss. However, FCI Englewood medical staff repeatedly cancelled doctor visits and neglected the medical complaints. The resulting stage 3 cancer diagnosis mandated surgery <u>and</u> chemotherapy which has caused neuropathy, and likely ongoing/life-long future chemotherapy treatments.					
11. WITNESSES					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
George James Santini, MD			FCI Englewood, 9595 W. Quincy Ave., Littleton, CO. 80123		
Birgit Dyer, MLP / FNP			FCI Englewood, 9595 W. Quincy Ave., Littleton, CO. 80123		
Charles Eldon Koftan, MD (phy)			Swedish Med Ctr, 501 E. Hampden Ave. Englewood, CO. 80113		
Santosh S. Nandi, MD (surgeon)			Swedish Med Ctr, 501 E. Hampden Ave. Englewood, CO. 80113		
12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)					
12a. PROPERTY DAMAGE D-N-A	12b. PERSONAL INJURY \$1,000,000.00	12c. WRONGFUL DEATH D-N-A	12d. TOTAL (Failure to specify may cause forfeiture of your rights). \$1,000,000.00		
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM N/A	14. DATE OF SIGNATURE [12-03-20]	
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS		
The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

INSURANCE COVERAGE.

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15 Do you carry accident insurance? Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. No

N/A

16 Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible? Yes No 17 If deductible, state amount

N/A

N/A

18 If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts)

N/A

19 Do you carry public liability and property damage insurance? Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code) No

N/A

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES

The amount claimed should be substantiated by competent evidence as follows:

- (a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.
- (b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.
- (c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.
- (d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

- B. *Principal Purpose:* The information requested is to be used in evaluating claims.
- C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.
- D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Paperwork Reduction Project (0182-0047), Washington, DC 20503 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

Certificate of Service

I hereby certify that on this 03rd day of December, 2020, a true and accurate copy of the foregoing was mailed, first class postage pre-paid, addressed as follows:

FROM/BY

Tracy A Barnett
#08201-030
Butner Federal Medical Center
P.O. Box 1600 / Floor 4B
Butner, NC 27509
United States

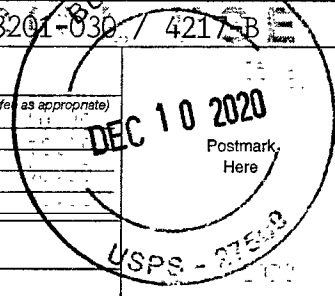
TO

*U.S. Postal Service Tracking No.
7019 1640 0000 8321 3508

Federal Bureau of Prisons
North Central Region
400 State Ave., Gateway Twr.
Tower II, 8th Floor
Kansas City, KS. 66101-2492

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DECLARATION

Under Penalty of Perjury

The undersigned declares under penalty of perjury that he is the movant in the above action, that he has read the above pleading and that the information contained therein is true and correct. Pursuant to 28 U.S.C. § 1746; and 18 U.S.C. § 1621.

Executed at FMC Butner on 12-03-20
(Date)


(Movant's Original Signature)



**U.S. Department of Justice
Federal Bureau of Prisons**

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

12-30-2020

TRACY BARNETT, #08201-030
FMC BUTNER
P.O. BOX 1600
BUTNER, NC 27509

Re: Administrative Claim for Damages

Claim #: TRT-NCR-2021-01790 \$ 1,000,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your claim was received on 12-14-2020. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 06-13-2021.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard M. Winter
Regional Counsel



**U.S. Department of Justice
Federal Bureau of Prisons**

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

JUL 06 2021

Tracy A. Barnett
Register No. 08201-030
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

Re: Administrative Claim Number TRT-NCR-2021-01790
Personal Injury: \$1,000,000.00

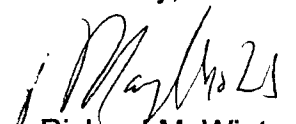
CERTIFIED NUMBER 7018 3090 0002 2628 2817

Dear Mr. Barnett:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. (Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.)

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

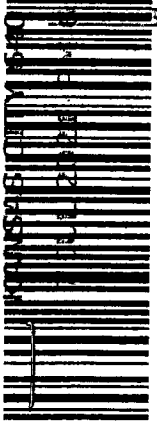

Richard M. Winter
Regional Counsel

U.S. Department of Justice
Federal Bureau of Prisons
North Central Regional Office
400 State Ave, Gateway Tower II, 8th Floor
Kansas City, Kansas 66101-2421
Official Business

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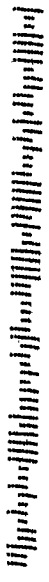


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Certificate of Service

I hereby certify that on this 30th day of August, 2021, a true and accurate copy of the foregoing was mailed, first class postage pre-paid, addressed as follows:

FROM/BY

Tracy A. Barnett
#08201-030
Tracy A Barnett
#08201-030
F.C.I. Elkton / RDAP
P.O. Box 10
Lisbon, OH 44432

TO

U.S. Postal Service - Certified Mail

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United States District Court
for the District of Colorado
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901 19th Street, Rm. A105
Denver, CO. 80294-3589

U.S. Federal Bureau of Prisons
North Central Region
400 State Ave., Gateway Twr.
Tower II, 8th Floor
Kansas City, KS. 66101-2492

FCI Englewood - Health Admin. Staff
•Mr. Hudson - Health Srvc. Admin.
•Mr. Lozano - Asst Hlth. Svc. Adm.
•Dr. Santini - Clinical Director
9595 W. Quincy Ave.
Littleton, CO. 80123

DECLARATION

Under Penalty of Perjury

The undersigned declares under penalty of perjury that he is the movant in the above action, that he has read the above pleading and that the information contained therein is true and correct. Pursuant to 28 U.S.C. § 1746; and 18 U.S.C. § 1621.

Executed at F.C.I. Elkton on 8-30-21
(Date)



(Movant's Original Signature)

Date: 04/23/2021
Time: 12:38:23 PM

Location: BUX

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

Request for Withdrawal of Inmate's Personal Funds

BUH-B-D, 08201030 - BARNETT, TRACY

Encumbrance No.: 7958

Please charge to my account the sum of \$402.00 and authorize the same to be paid to:

Contact/FMIS Certification Address

c/o Cashier

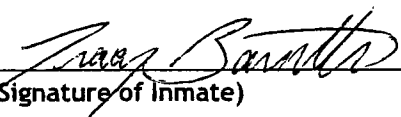
FMIS Certification Address

U S District Court, Clerk -
United States Courthouse
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DENVER
CO 80294-3589
United States

C/O Butner FCC, Cashier
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Butner
North Carolina 27509-0000
United States

Purpose: Subscriptions

Check Memo: Filing/Admin. Fees



(Signature of Inmate)

08201030 - BARNETT, TRACY

(Inmate Register No./Name)

(Signature of Approving Official)

(Signature of Deposit Fund Tech)

(Payment #)

The inmate's personal account has been charged in the amount indicated above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

TRACY ALAN BARNETT,	)	ACTION FOR MONEY DAMAGES
Plaintiff, pro se,	)	IN SUM CERTAIN
	)	FOR PERSONAL INJURY
v.	)	[28 C.F.R. 14.2(a)]
)	
UNITED STATES OF AMERICA, et al,	)	Case No. _____
Respondent.)	

RELIEF SOUGHT

COMES NOW, the plaintiff, Tracy A. Barnett, pro se, who seeks to claim money damages for personal injury received while in custody of the United States Federal Bureau of Prisons (BOP).

BASIS OF CLAIM

On June 13, 2019, Plaintiff had to have emergency surgery to remove an "advanced ileocolic neoplasm (large cancerous mass)" from his ascending colon, as it was "completely obstructing" his large intestine. On June 18, 2019, biopsy of the mass revealed that the cancer [adenocarcinoma] was in an advanced state and had metastasized by spreading to the lymph nodes, thereby, being classified as Stage 3 colon cancer.

Between January 2019, and June 2019, plaintiff repeatedly sought medical treatment for severe gut pain, chronic vomiting, and 50+ lb. weight loss. - However, FCI Englewood medical staff had repeatedly cancelled doctor visits and neglected the medical complaints from the plaintiff. The resulting Stage 3 cancer diagnosis mandated the need for follow-up chemotherapy in addition to the emergency surgery. - As the cancer diagnosis was delayed for almost half a year, and allowed the cancer to spread, the resulting chemo treatments have also caused neuropathy and likely ongoing/life-long need for future chemotherapy.

Action for Money Damages in Sum Certain for Personal Injury

CLAIM AMOUNT

Plaintiff is currently incarcerated at the BOP Federal Medical Center in Butner, North Carolina (FMC Butner). As such, he is unable to freely seek outside medical treatment, or to even see an outside medical professional for treatment advise/counseling.

However, where Plaintiff has subsequently developed neuropathy due to the chemo treatments, and will also likely need future chemo treatments because of the much-delayed cancer diagnosis, Plaintiff seeks damages from the United States in the amount of \$1,000,000.00.

BOP LIABILITY

The United States/Federal Bureau of Prisons has responsibility to provide for the safety and health care of all inmates in its custody. Under Estelle v. Gamble, 429 U.S. 97 (1976), the U.S. Supreme Court found that the elementary principles of the 8th Amendment establish government's obligation to provide medical care for prisoners.

Here, where FCI Englewood medical staff neglected/delayed proper medical care for severe abdominal pain, chronic vomiting, and rapid weight loss ("obvious bowel obstruction symptoms" - S. Nandi, MD, 06-13-19) for almost 6 months, the cancerous tumor in Plaintiff's intestine was allowed to grow to 8cm. [approx. baseball-sized] and become an "advanced ileocolic neoplasm" with metastatic spread to the lymph nodes, thus requiring the need for chemotherapy in addition to emergency surgery to remove the cancerous mass.

But for FCI Englewood medical staff's 1/2 year delay of a timely cancer diagnosis, the cancer would not have become so "advanced" and would not have been allowed to spread to the lymphatic system, which would have negated the need for chemotherapy. - Where Plaintiff's health symptoms were so obvious that even a lay person would have easily recognized the necessity for a doctor's attention, BOP staff were clearly "deliberately indifferent" to Plaintiff's health care.

Action for Money Damages in Sum Certain for Personal Injury

CONCLUSION

Where Plaintiff's need for chemotherapy (and also the resulting neuropathy) were directly caused by FCI Englewood medical staff's failure to timely diagnose his health issues, Plaintiff seeks money damages from the United States/Federal Bureau of Prisons.

As stated previously, where Plaintiff is currently unable to seek professional outside medical advise, Plaintiff can only estimate a "sum certain" cost for medical damages and need for future medical treatment related to the allowed spread of cancer. As such, Plaintiff reasonably believes that damages should be granted in the amount of \$1,000,000.00.

Wherefore, Plaintiff claims, in "sum certain," that he should be awarded one million dollars (\$1,000,000.00) to cover the damages and costs of future medical treatment related to the metastasized cancer, of which, resulted from the negligence and deliberate indifference of BOP officials, and which treatment was delayed for almost 1/2 a year by FCI Englewood medical staff.

Respectfully submitted,

6-11-21

Date



Tracy A. Barnett
Plaintiff / pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

TRACY ALAN BARNETT,	)	ACTION FOR MONEY DAMAGES
Plaintiff, pro se,	)	IN SUM CERTAIN
	)	FOR PERSONAL INJURY
v.	)	[28 C.F.R. 14.2(a)]
)	
UNITED STATES OF AMERICA, et al,	)	Case No. _____
Respondent.)	

**** DISCLAIMER ****

Where Plaintiff is unable to afford representation by professional counsel and must, therefore, proceed pro se, Plaintiff respectfully requests that his pro se pleadings be liberally construed, and/or allowed to be given leave to adequately amend his pleadings if it is found to be necessary.

** See: Todd v. United States, 2017 U.S. App. LEXIS 16253 (10th Cir.) at fn.1, citing Erickson v. Pardus, 551 U.S. 89, 94 (2007), which held that pro se pleadings are to be liberally construed.

Plaintiff / pro se

Tracy A. Barnett
#08201-030
FMC Butner / Unit 4B
P.O. Box 1600
Butner, N.C. 27509

years unsuccessfully fighting the state for compensation.

Obie Anthony was freed in 2011 and used his compensation to start a foundation to help exonerees. As of May 2019, the foundation was paying for Caldwell's hotel, giving him a place to stay while he fights the state. Anthony said such exonerees are

stuck in a gray zone between the presumption of innocence accorded to those not yet convicted, and a presumption of guilt they must overcome after having their convictions reversed.

Paula Mitchell of Loyola Law School's Project for the Innocent said, "It's not fair to leave these people in legal limbo, living

in this nether region between guilt and innocence. Quite simply, if the conviction has been overturned and the prosecution cannot retry the person, then they should be entitled to compensation." ■

Sources: *latimes.com*, *sfbchronicle.com*, *WTVR.com*, <https://victims.ca.gov>

Sixth Circuit Holds Ohio Rule Requiring Merit Affidavit Inapplicable in BOP Prisoner's Tort Action

by Matt Clarke

ON NOVEMBER 7, 2019, THE SIXTH Circuit Court of Appeals held that an Ohio rule requiring a person alleging medical negligence to include a medical professional's affidavit stating the claim has merit cannot be applied to a federal prisoner's legal action against the federal Bureau of Prisons (BOP) under the Federal Tort Claims Act (FTCA).

(While incarcerated at a BOP prison in Ohio, Dennis Gallivan had surgery. It did not go well, and he filed a lawsuit in federal court under the FTCA claiming medical negligence. He did not include a medical professional's affidavit – a so-called merit affidavit – stating that the claim had merit. Citing Ohio Civil Rule 10(D)(2), which requires a merit affidavit, the district court dismissed the case.)

Aided by Washington, D.C., attorneys William T. Marks, Melina M, Meneguini

Layerenza, and Aaron J. Marks, Gallivan appealed. The Sixth Circuit noted that, if the Federal Rules of Civil Procedure do not require such a merit affidavit and those rules are valid under the Constitution and Rules Enabling Act, then federal rules, not Ohio Rule 10(D)(2), must be applied.

The Federal Rules do not require an affidavit to state a medical negligence claim. Rule 8(a) sets out the pleading requirements, which only include a short and plain jurisdictional statement, a short and plain statement of the claim, and an explanation of the relief sought. "By listing these elements, Rule 8 implicitly excludes other requirements that must be satisfied for a complaint to state a claim for relief." Likewise, Rule 12 requires only an allegation of facts "sufficient to state a claim to relief that is plausible on its face." The few

instances when heightened pleading is required are listed in Rule 9, but medical negligence is not among them.

The Federal rules are presumptively valid under the Constitution and Rules Enabling Act. There is no challenge to their validity in this case.

In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), the U.S. Supreme Court held that the key issue when state and federal rules conflict is whether the federal rule answers the question in dispute. In this case it did, setting out precise pleading requirements. Therefore, the district court erred when it dismissed the complaint for failing to include the merits affidavit. The district court's judgment was vacated and the case remanded for further proceedings. See: *Gallivan v. United States*, 943 F.3d 214 (6th Cir. 2019). ■

ONE GOD – ONE MESSAGE

ISLAM - The way of Noah, Abraham, Moses, Jesus and Mohammed

Peace be upon them

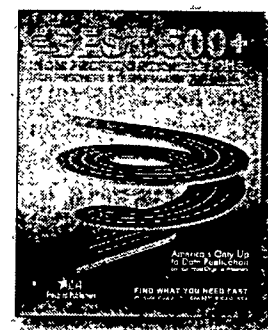
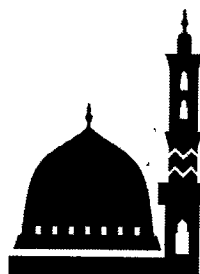
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rel. Veterans Admin., 951 F.2d 268, 270 (10th Cir. 1991)). See also *McNeil v. United States*, 508 U.S. 106, 113 (1993) (holding that the “FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies”).

Plaintiff is reminded that “the FTCA and a *Bivens* claim are alternative remedies.” *Robbins v. Wilke*, 300 F.3d 1208, 1213 (10th Cir. 2002). “When a federal law enforcement officer commits an intentional tort, the victim has two avenues of redress: 1) he may bring a *Bivens* claim against the individual officer based on the constitutional violation, or 2) he may bring a common law tort action against the United States pursuant to the FTCA.” *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir.1994) (citations omitted). Accordingly, a plaintiff can pursue a *Bivens* action against a federal official in his individual capacity and an FTCA claim against the United States arising out of the same subject matter; but a judgment against the United States under the FTCA precludes recovery against the federal employee under *Bivens*. *Id.* at 135 (“Although the plaintiff may elect initially to bring his action against either defendant, a judgment against the United States under the FTCA constitutes a complete bar to any action by the claimant, by reason of the same subject matter, against the employee . . . whose act or omission gave rise to the claim.”) (quoting § 2676); see also *Trentadue*, 397 F.3d at 858-59 (concluding that district court was required to vacate *Bivens* judgment where court later entered judgment on FTCA claims arising out of the same subject matter, pursuant to § 2676).

III. Orders

For the reasons discussed above, it is

ORDERED that Plaintiff shall file, **within thirty (30) days from the date of this**

» Kikumura v. Osagie, 461 F.3d 1269 (10th Cir. 2006) [*[Headnotes]

Civil Rights Law > Prisoner Rights > Medical Treatment

Prison officials violate the Eighth Amendment if their deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care. At the same time, however, medical malpractice does not become a constitutional violation merely because the victim is a prisoner. A complaint about an inadvertent failure to provide adequate medical care or that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Rather, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.

Civil Rights Law > Immunity From Liability > Executive Officials
Civil Rights Law > Prisoner Rights > Medical Treatment

The test for a "deliberate indifference" claim under the Eighth Amendment has both an objective and a subjective component. The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause. The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety. Moreover, to overcome the qualified immunity defense, the prisoner must demonstrate that the defendant's actions violated a specific constitutional right, and then show that the constitutional right was clearly established prior to the challenged official action.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Parties > Self-Representation > Pleading Standards

Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend. In addition to construing a pro se complaint liberally, a court must accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff.

Civil Rights Law > Prisoner Rights > Medical Treatment

To satisfy the objective component of a deliberate indifference claim arising under the Eighth Amendment, the alleged deprivation must be "sufficiently serious" to constitute a deprivation of constitutional dimension. The purpose for this requirement is to limit claims to significant, as opposed to trivial, suffering. Consequently, a court looks to the alleged injury claimed by the prisoner, and asks whether that harm is sufficiently serious.

Civil Rights Law > Prisoner Rights > Medical Treatment

When the prisoner's Eighth Amendment claim is premised on an alleged delay in medical care, the prisoner must show that the delay resulted in substantial harm. That "substantial harm" can be the ultimate physical injury caused by the prisoner's illness, so long as the prisoner can show that the more timely receipt of medical treatment would have minimized or prevented the harm. The "substantial harm" can also be an intermediate injury, such as the pain experienced while waiting for treatment and analgesics. Although not every twinge of pain suffered as a result of delay in medical care is actionable, when the pain experienced during the delay is substantial, the prisoner sufficiently establishes the

objective element of the deliberate indifference test.

Civil Rights Law > Prisoner Rights > Medical Treatment

The subjective component of a deliberate indifference claim requires an inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment. It is not enough to allege that prison officials failed to alleviate a significant risk that they should have perceived, but did not. To show the requisite deliberate indifference, an inmate must establish that defendant(s) knew he faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it.

**Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Rights Law > Prisoner Rights > Medical Treatment**

An inmate is merely required to provide "a short and plain statement" of his Eighth Amendment claims; Fed. R. Civ. P. 8(a), and malice, intent, knowledge, and other condition of mind of a person may be averred generally in the complaint, Fed. R. Civ. P. 9(b).

**Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Rights Law > Prisoner Rights > Medical Treatment**

Even when Eighth Amendment claims meet the pleading requirements of Fed. R. Civ. P. 8(a), those claims should still be dismissed when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Since the subjective component of deliberate indifference is based on the prison officials' state of mind, it is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. Although plaintiffs are not required to plead specific facts demonstrating defendants' culpable state of mind, they can still undermine their own case by asserting facts incompatible with a deliberate indifference claim.

Civil Rights Law > Prisoner Rights > Medical Treatment

A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. A jury may infer conscious disregard when a prison doctor responds to an obvious risk with a treatment that is patently unreasonable.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements

The Federal Rules allow litigants to plead in the alternative. Fed. R. Civ. P. 8(e)(2).

Civil Rights Law > Prisoner Rights > Medical Treatment

Even a brief delay may be unconstitutional.

Civil Rights Law > Immunity From Liability > General Overview

When a defendant invokes qualified immunity, the plaintiff must demonstrate not only that the defendant's actions violated a specific constitutional right, but also that the constitutional right was

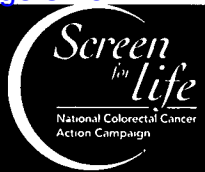
"clearly established" at the time the actions took place.

Torts > Malpractice & Professional Liability > General Overview

Torts > Public Entity Liability > Liability > Federal Tort Claims Act > General Overview

Under Colorado law, litigants who bring a claim based upon the alleged professional negligence of a licensed professional must file with the court a certificate of review within 60 days after the service of the complaint unless the court determines that a longer period is necessary for good cause shown. Colo. Rev. Stat. § 13-20-602(1)(a). This certificate of review must declare that the plaintiff's attorney, or the plaintiff himself in a pro se action, has consulted a person who has expertise in the area of the alleged negligent conduct, and that the professional who has been consulted has concluded that the filing of the claim does not lack substantial justification. Col. Rev. Stat. § 13-20-602(3)(a). Colorado's certificate of review requirement is a substantive rule of law, and is therefore applicable to professional negligence claims brought against the United States under the Federal Tort Claims Act, 28 U.S.C.S. § 1346(b).

COLORECTAL CANCER SCREENING



What Is Colorectal Cancer?

Colorectal cancer is cancer that occurs in the colon or rectum. Sometimes it is called colon cancer. The colon is the large intestine or large bowel. The rectum is the passageway that connects the colon to the anus.

Screening Saves Lives

Colorectal cancer is the second leading cancer killer in the United States, but it doesn't have to be. If you are 50 or older, getting a colorectal cancer screening test could save your life. Here's how:

- Colorectal cancer usually starts from precancerous polyps in the colon or rectum. A polyp is a growth that shouldn't be there.
- Over time, some polyps can turn into cancer.
- Screening tests can find precancerous polyps, so they can be removed before they turn into cancer.
- Screening tests also can find colorectal cancer early, when treatment works best.

Who Gets Colorectal Cancer?

- Both men and women can get it.
- It is most often found in people 50 or older.
- The risk increases with age.

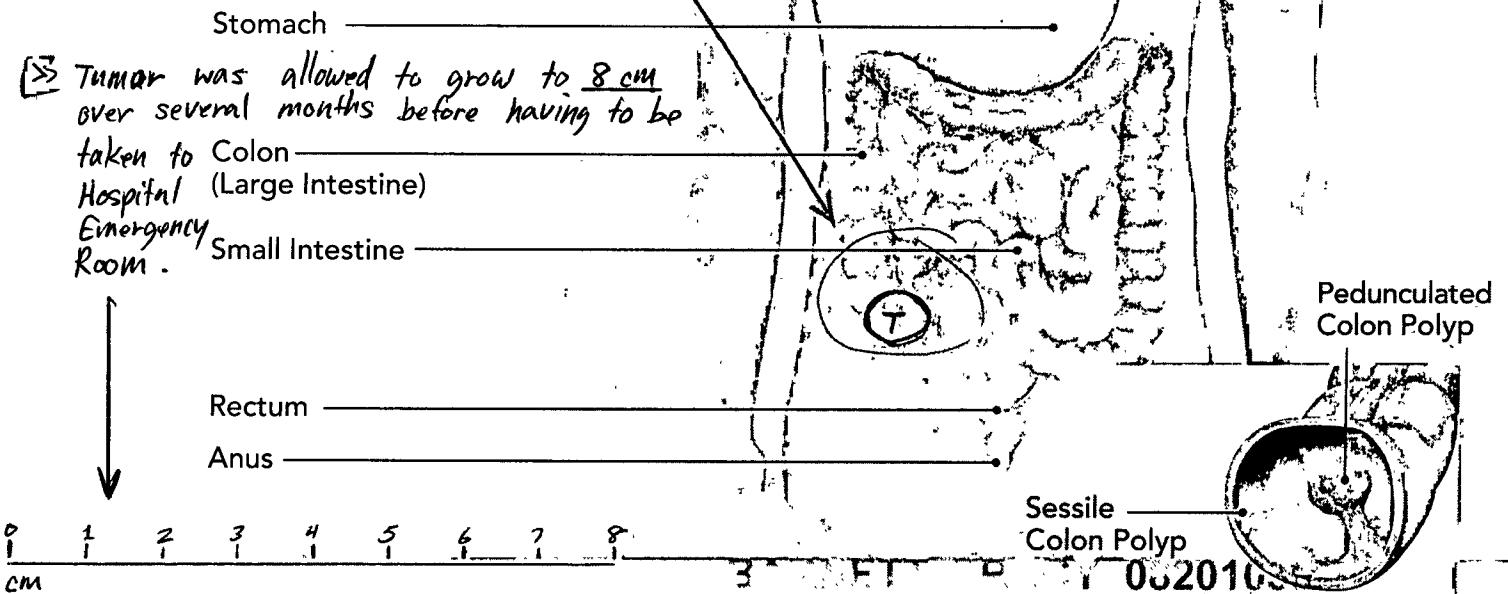
Are You at Increased Risk?

Your risk for colorectal cancer may be higher than average if:

- You or a close relative have had colorectal polyps or colorectal cancer.
- You have inflammatory bowel disease, Crohn's disease, or ulcerative colitis.
- You have a genetic syndrome such as familial adenomatous polyposis (FAP) or hereditary nonpolyposis colorectal cancer.

People at increased risk for colorectal cancer may need earlier or more frequent tests than other people. Talk to your doctor about when to begin screening, which test is right for you, and how often you should be tested.

** - Plaintiff had to have circled section of intestine removed due to delay in medical treatment for months.*



↳ Tumor was allowed to grow to 8 cm over several months before having to be taken to Hospital Emergency Room.

Colorectal Cancer Can Start With No Symptoms

Precancerous polyps and early-stage colorectal cancer don't always cause symptoms, especially at first. This means that someone could have polyps or colorectal cancer and not know it. That is why having a screening test is so important.

What Are the Symptoms?

Some people with colorectal polyps or colorectal cancer do have symptoms. They may include:

- Blood in or on your stool (bowel movement).
- Stomach pain, aches, or cramps that don't go away.
- Losing weight and you don't know why.

If you have any of these symptoms, talk to your doctor. They may be caused by something other than cancer. However, the only way to know is to see your doctor.

Types of Screening Tests

The U.S. Preventive Services Task Force recommends that adults aged 50–75 be screened for colorectal cancer. The decision to be screened after age 75 should be made on an individual basis. If you are aged 76–85, ask your doctor if you should be screened.

Several different screening tests can be used to find polyps or colorectal cancer. They include:

Stool Tests

Guaic-based Fecal Occult Blood Test (gFOBT): uses the chemical guaiac to detect blood in stool. At home you use a stick or brush to obtain a small amount of stool. You return the test to the doctor or a lab, where stool samples are checked for blood.

Fecal Immunochemical Test (FIT): uses antibodies to detect blood in the stool. You receive a test kit from your health care provider. This test is done the same way as gFOBT.

FIT-DNA Test (or Stool DNA test): combines the FIT with a test to detect altered DNA in stool. You collect an entire bowel movement and send it to a lab to be checked for cancer cells.

How Often: gFOBT Once a year. FIT Once a year.

FIT-DNA once every one or three years.

Flexible Sigmoidoscopy

For this test, the doctor puts a short, thin, flexible, lighted tube into your rectum. The doctor checks for polyps or cancer inside the rectum and lower third of the colon.

How Often: Every five years, or every 10 years with a FIT every year.

Colonoscopy

Similar to flexible sigmoidoscopy, except the doctor uses a longer, thin, flexible, lighted tube to check for polyps or cancer inside the rectum and the entire colon. During the test, the doctor can find and remove most polyps and some cancers. Colonoscopy also is used as a follow-up test if anything unusual is found during one of the other screening tests.

How Often: Every 10 years.

CT Colonography (Virtual Colonoscopy)

Computed tomography (CT) colonography, also called a virtual colonoscopy, uses X-rays and computers to produce images of the entire colon. The images are displayed on a computer screen for the doctor to analyze.

How Often: Every five years.

Which Test is Right for You?

There is no single "best test" for any person. Each test has advantages and disadvantages. Talk to your doctor about which test or tests are right for you and how often you should be screened.

Free or Low-Cost Screening

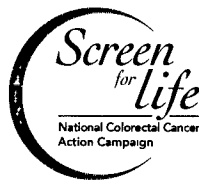
Colorectal cancer screening tests may be covered by your health insurance policy without a deductible or co-pay. Where feasible, CDC's Colorectal Cancer Control Program grantees provides free or low-cost screenings to eligible men and women. To find out more visit www.cdc.gov/cancer/crccp/contact.htm.

The Bottom Line

If you're 50 or older, talk with your doctor about getting screened. For more information, visit www.cdc.gov/screenforlife or call 1-800-CDC-INFO (1-800-232-4636). For TTY, call 1-888-232-6348.



U.S. Department of
Health and Human Services
Centers for Disease
Control and Prevention



www.cdc.gov/screenforlife
1-800-CDC-INFO





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COLORECTAL CANCER: THE IMPORTANCE OF SCREENING AND EARLY DETECTION

Colorectal cancer is cancer that begins in the colon or the rectum. It is the third most common cancer among both men and women in the United States, and it occurs most often in people over the age of 50. This fact sheet answers some commonly asked questions about colorectal cancer screening.



WHY IS SCREENING FOR COLORECTAL CANCER SO IMPORTANT?

Many colorectal cancers can be prevented through regular screening. Screening can find precancerous polyps—abnormal growths in the colon or rectum—so that they can be removed before they turn into cancer. Screening is crucial because when found early, colorectal cancer is highly treatable. Early stages of colorectal cancer usually present no symptoms, which tend to appear as the cancer progresses.

WHAT IS A COLONOSCOPY?

A colonoscopy is the best screening test available for colorectal cancer. It is the only screening test that also prevents many colorectal cancers. Here are a few things you should know about this test:

- During a colonoscopy, your doctor examines the lining of your entire colon to check for polyps or tumors. If any polyps are found, they can be removed immediately.
- On the day of the colonoscopy, you will receive medication to help you relax. Most people fall asleep and do not remember much about the test when they wake up.
- Your doctor performs a colonoscopy by inserting a long, thin, flexible tube called a colonoscope into your colon through the rectum. The tube has a tiny video camera and light at the end that sends images to a video monitor.
- Before the procedure, you will receive instructions from your doctor on what to eat and how to empty your bowel.
- Both men and women should have a colonoscopy starting at age 50. People at increased risk of colorectal cancer may start earlier, depending on your doctor's instructions. Also, your doctor will tell you in how many years you will need another colonoscopy.

BENEFIT TO PEOPLE

(over)

fact sheet

ARE OTHER SCREENING TESTS AVAILABLE?

If you are unable to have a colonoscopy, your doctor can give you information about the following tests and how often they should be performed:

- Sigmoidoscopy
- Double contrast barium enema
- Virtual colonoscopy (CT colonoscopy)
- Fecal occult blood test
- DNA stool tests

You should note that these tests are not as thorough as a colonoscopy. If polyps or tumors are suspected based on these tests, you will still need to have a colonoscopy.

WHAT ARE SOME OF THE RISK FACTORS FOR COLORECTAL CANCER?

A risk factor is anything that raises your chances of developing cancer. The following are some of the known risk factors for colorectal cancer. Talk with your doctor about your personal risk and how often you should be screened.

Age. Colorectal cancer is more common in people over the age of 50.

Personal and family history. People who have a parent, sibling or child with colorectal cancer are at a higher risk of developing it themselves, especially if the family member was diagnosed before the age of 60. People who have had colorectal cancer are at higher risk of recurrence.

Race. African-American men and women are at higher risk. The reasons for this are not fully understood.

Jews of eastern European descent. About 6% of American Jews who are of eastern European descent have DNA changes that increase their risk of colorectal cancer.

Inflammatory bowel disease (IBD). IBD, which includes ulcerative colitis and Crohn's disease, puts you at a higher risk of developing colorectal cancer.

Lifestyle. Being overweight, having an inactive lifestyle, a diet high in red meat and processed meat, smoking, and heavy alcohol use can increase your risk of colorectal cancer.

POSSIBLE SYMPTOMS OF COLORECTAL CANCER

Any of the following symptoms should be checked out by your doctor. Although they occur in people who have colorectal cancer, they can also be caused by a number of other treatable conditions.

- ⦿ A change in bowel habits that lasts more than a few weeks
- ⦿ A feeling of having to have a bowel movement that doesn't go away even after doing so
 - Rectal bleeding, dark stools, or blood in the stool
- ⦿ Stomach discomfort, including bloating or steady abdominal pain
- ⦿ Unexplained weakness or fatigue
- ⦿ Unexplained weight loss

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[*] Plaintiff had 5 of the above 6 symptoms associated with colon cancer except blood in stool for several months after he sought health care from BOP.



CANCERCARE BARNETT, TRACY 08201030

Estate of Harlan I. Rosenberg, by its Executor, Max Rosenberg, Appellants, v. Charles Crandell, Rick Stiff, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, and Various Other John Does to be Named When Identified, Appellees.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

56 F.3d 35, 1995 U.S. App. LEXIS 12944

No. 94-3574SD

May 19, 1995, Submitted

May 30, 1995, Filed

Editorial Information: Prior History

{1995 U.S. App. LEXIS 1} On Appeal from the United States District Court for the District of South Dakota. District No. CIV 93-4131. Honorable John B. Jones, District Judge.

Counsel Counsel who presented argument on behalf of the appellant was Richard Henry Doyle of Des Moines, Iowa. Appearing on the cover of the brief were Michael J. Galligan, Robert J. Burns, and Bruce M. Ford.

Counsel who presented argument on behalf of the appellee was Bonnie P. Ulrich, AUSA, of Sioux Falls, South Dakota.

Judges: Before RICHARD S. ARNOLD, Chief Judge, FAGG and WOLLMAN, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: The United States District Court for the District of South Dakota dismissed the complaint filed by plaintiffs, estate of the prisoner and its executor, against defendants, warden, assistant warden, John Does one through seven, and various other unidentified individuals. The estate of the prisoner and its executor appealed. A complaint against certain prison employees for violation of a prisoner's Eighth Amendment rights should not have been dismissed where the complaint alleged facts that, if true, would have established a deliberate indifference to medical needs.

OVERVIEW: The estate of the prisoner and its executor brought suit against the warden, assistant warden, John Does one through seven, and various other unidentified individuals for violation of the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. The court found that the complaint against the warden, assistant warden, and John Doe seven should have been dismissed because there were no allegations that they knew of or participated in any constitutional violations and respondeat superior did not apply to this constitutional-tort action. The court found that the complaint against John Does one through three should not have been dismissed because they allegedly knew that the prisoner was suffering from serious medical difficulties, but failed to secure him treatment until two months later. If proved, those allegations were sufficient to establish deliberate indifference to serious medical needs. The court also found that the complaint against John Does four through six should not have been dismissed because they were alleged to have known about the prisoner's serious medical difficulties, but failed to make allowances for him in his prison duties.

OUTCOME: The court affirmed the dismissal of the complaint against the warden, assistant warden, John Doe seven, and the various other unidentified individuals. The court reversed the dismissal as to

A08CASES

John Does one through six.

LexisNexis Headnotes

***Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
Civil Procedure > Appeals > Standards of Review > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims***

In deciding a motion to dismiss for failure to state a claim, both the district court and the appellate court must assume as true all facts well pleaded in the complaint.

***Governments > Federal Government > Employees & Officials
Civil Rights Law > Implied Causes of Action
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
Governments > Federal Government > Claims By & Against***

A constitutional-tort action against federal officials and employees is allowed to be brought directly under the U.S. Constitution.

***Governments > Federal Government > Employees & Officials
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
Civil Rights Law > Prisoner Rights > Medical Treatment***

To show deliberate indifference to serious medical needs of a prisoner, the prisoner must show more than negligence, more even than gross negligence. Mere disagreement with treatment decisions does not rise to the level of a constitutional violation.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

Fed. R. Civ. P. 12(b)(6) motions are to be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. The allegations of the complaint should be construed favorably to the pleader.

Civil Procedure > Parties > Capacity of Parties > General Overview

An action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery.

***Torts > Vicarious Liability > Employers > General Overview
Governments > Federal Government > Employees & Officials
Civil Rights Law > Prisoner Rights > Medical Treatment
Healthcare Law > Actions Against Facilities > Apparent Agency & Respondeat Superior > General Overview
Healthcare Law > Actions Against Facilities > Apparent Agency & Respondeat Superior > Respondeat Superior***

A08CASES

As is the case with actions under 42 U.S.C.S. § 1983, there is no respondeat superior liability under constitutional-tort claims. Defendants are liable for their personal acts only. The general responsibility of a warden for supervising the operation of a prison is not sufficient to establish personal liability. A bare allegation that someone in supervisory authority has been deliberately indifferent, without any specification of that person's contact in fact with the plaintiff, nor even an explicit charge of inadequate training or supervision of subordinates, is insufficient to state a constitutional-tort claim.

Opinion

Opinion by: RICHARD S. ARNOLD

Opinion

{56 F.3d 36} RICHARD S. ARNOLD, Chief Judge.

This is a *Bivens* action brought by the estate of a federal prison inmate claiming damages for deliberate indifference to serious medical needs. There are two named defendants: Charles Crandell, who was at all relevant times Warden of the federal prison in Yankton, South Dakota, and Rick Stiff, the Associate Warden. In addition, there are seven other defendants whose names the plaintiff does not yet know and seeks to determine on discovery. The complaint also named "various other John Does to be named when identified." The District Court granted defendants' motion to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). We affirm in part and reverse in part.

In deciding a motion to dismiss for failure to state a claim, both the District Court and this Court must assume as true all facts well pleaded in the complaint. These facts may be summarized as follows:

{Harlan I. Rosenberg was serving a sentence of 23 months at the federal prison {1995 U.S. App. LEXIS 2} in Yankton, South Dakota. Beginning in March 1991, Harlan (as appellant's brief refers to him) began having a sore throat. The next month, he reported feeling tired and worn down. In June, food began lodging in his throat. He could keep nothing down. Although he reported these symptoms to physicians' assistants at the prison infirmary, (John Does 1, 2, and 3 are physicians' assistants), they refused to provide him with any appropriate care other than to schedule an appointment for a barium swallow. After that appointment, Harlan was given Tagamet, medicine for an upset stomach. When he indicated that the Tagamet was not working, his request for further medical attention was ignored.

{On August 9, 1991, Harlan was finally scheduled for a consultation with an internal-medicine specialist. The physician decided that a test needed to be performed to get a look at the junction between Harlan's esophagus and his stomach. This test, called an esophagogastroduodenoscopy, was not scheduled until 20 days later. Harlan could still neither swallow nor keep food down and was becoming weaker. He asked the defendant physicians' assistants to have the test done earlier by another doctor, but they refused. {1995 U.S. App. LEXIS 3} They also would give him no liquid diet supplements, though he was unable to eat solid food. Defendants told him he could live on four teaspoons of sugar a day.

The test was performed on August 29, and on September 4, 1991, Harlan was diagnosed with adenocarcinoma of the esophagus and stomach, an extremely serious and painful form of cancer. Nonetheless, no further treatment was given, and defendants (here the reference is to John Does 4,

5, and 6) refused to give Harlan a shake, forced him to walk to the mess hall, would not release him from work duty, and made him sleep in a top bunk. In addition, one of the defendants gave him solid food to eat during the drive to the Federal Medical Center at Rochester, to which Harlan was finally transferred on September 10, and this same correctional officer also smoked in the car during this trip. Even after Harlan arrived in Rochester, he was not seen by physicians at the Mayo Clinic until nearly four weeks later. Surgery took place on October 10, 1991, but the cancer was terminal, and Harlan was released to the care of his parents. He died on May 6, 1992.

As noted, this is a constitutional-tort action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), which allows actions against federal officials and employees directly under the Constitution. The claim is that the defendants inflicted cruel and unusual punishment on Harlan in violation of the Eighth Amendment. The standard is well settled and has been for some time. Under *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 {56 F.3d 37} (1976), the question is whether defendants were deliberately indifferent to serious medical needs of the plaintiff. The prisoner must show more than negligence, more even than gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation.

It is well to recall the nature of a motion to dismiss under Rule 12(b)(6): Such motions are to be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims: . . . The allegations of the complaint should be construed favorably to the pleader." {1995 U.S. App. LEXIS 5} *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

As to John Does 1, 2, and 3, we have no hesitation in holding that the complaint should not have been dismissed. The facts recited above are clearly sufficient (if proved) to establish deliberate indifference to serious medical needs. It may well be that upon trial, or even on motion for summary judgment, defendants can sufficiently explain their actions. But we are not yet at that point. Taking the allegations of the complaint as true, and that is the only record we have before us, John Does 1, 2, and 3 were inexcusably slow in reacting to complaints of serious medical difficulty. By June of 1991, Harlan was unable to keep food down and would vomit when he tried to eat. Yet, he was not scheduled to see an internal-medicine specialist for two months. Thereafter, the defendants allegedly refused to give him liquid food and told him to survive on four teaspoons of sugar a day. It seems to us that this is a classic case of deliberate indifference. By contrast, cases like *Givens v. Jones*, 900 F.2d 1229, 1233 (8th Cir. 1990), where a motion to dismiss was granted, involve only arguably incorrect treatment decisions.

The matter is perhaps {1995 U.S. App. LEXIS 6} less clear as to John Does 4, 5, and 6, correctional officers, but we think the solicitude due to a complaint at this early stage of the case leads to the same result with respect to these defendants. Though they knew that Harlan had serious medical difficulties, they refused to make any allowances for him. They required him to work, refused to give him liquid food, and made him walk to the mess hall and to the vehicle which was to take him back to Yankton after his test on August 29. These allegations, though less serious than those against John Does 1, 2, and 3, deserve further examination in the context of this case.

The defendants suggest, citing *Phelps v. United States*, 15 F.3d 735 (8th Cir.), cert. denied, 128 L. Ed. 2d 676, 114 S. Ct. 2118 (1994), that it is impermissible to name fictitious parties as defendants. In general, this is true, but, as we held in *Munz v. Parr*, 758 F.2d 1254 (8th Cir. 1985), an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough

to permit the identity of the party to be ascertained after reasonable discovery. This is certainly true of John Does 1, 2, and 3, and, we believe, is not clearly untrue of {1995 U.S. App. LEXIS 7} John Does 4, 5, and 6. We agree with defendants, however, that dismissal was proper as to "various other John Does to be named when identified." If discovery identifies other persons who should be named as defendants, it will be simple enough for plaintiff to add them by amendment, after properly securing leave of court.

It remains to consider the two named defendants, Crandell and Stiff. As to them, nothing is alleged except the conclusory charge that they were deliberately indifferent to plaintiff's serious medical needs. The complaint does not say that either Crandell or Stiff had anything to do with the decisions affecting plaintiff's medical care, or even that they knew that plaintiff was ultimately diagnosed with cancer and transferred to Rochester. As is the case with actions under 42 U.S.C. § 1983, there is no respondeat superior liability under *Bivens*. Defendants are liable for their personal acts only. The general responsibility of a warden for supervising the operation of a prison is not sufficient to establish personal liability. *Ouzts v. Cummins*, 825 F.2d 1276, 1277 (8th {56 F.3d 38} Cir. 1987). We do not think that a bare allegation that someone in supervisory authority {1995 U.S. App. LEXIS 8} has been deliberately indifferent, without any specification of that person's contact in fact with the plaintiff, nor even an explicit charge of inadequate training or supervision of subordinates, is sufficient to state a *Bivens* claim.

Accordingly, so much of the judgment of the District Court as dismissed the complaint against defendants Crandell and Stiff, and the group of defendants referred to generally as "various John Does," is affirmed. We also affirm as to John Doe 7, because the complaint alleges nothing that he did. In all other respects, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

Tracy A Barnett
#08201-030
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