

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

ELBERT R. COMPTON,

Plaintiff,

v.

NURSE SEQUIN *et al.*,

Defendants.

OPINION AND ORDER

12-cv-837-wmc

Plaintiff Elbert R. Compton, an inmate in the custody of the Wisconsin Department of Corrections (“DOC”), filed this proposed civil action pursuant to 42 U.S.C. § 1983, alleging that various staff members at Green Bay Correctional Institution, Wisconsin Secure Program Facility and Waupun Correctional Institution were deliberately indifferent to his medical needs after he allegedly broke his right pinkie finger during a basketball game. Compton has been granted leave to proceed *in forma pauperis* and paid his initial partial filing fee, and the next step is for the court to screen Compton’s complaint as required by the Prison Litigation Reform Act to determine whether it: (1) is legally frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) asks for money damages from a defendant who by law cannot be sued for monetary relief. 28 U.S.C. § 1915A. Although the complaint borders on the frivolous, the court concludes that Compton has stated a claim for relief against certain defendants and will allow him to proceed past the screening process while acknowledging that his claims are unlikely to survive summary judgment against any defendant.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pled allegations as true and assumes the following probative facts:

- Plaintiff Elbert R. Compton is presently confined at the Waupun Correctional Institution ("WCI"). Previously, Compton was assigned to the Green Bay Correctional Institution ("GBCI") and the Wisconsin Secure Program Facility ("WSPF"), which is where the incidents forming the basis for Compton's complaint occurred.
- Compton sues the following defendants, who are employed by the Wisconsin Department of Corrections: Nurse Sequin; Nurse Miller; Dr. R. Heidorn; Douglas Armato; Health Services Manager Jeananne Greenwood; Warden William Pollard; Nurse Campbell; Dr. Burton Cox; Nurse J. Waterman; Warden Richard Schreiber; Nurse Mary Gorske; Nurse Ann Tabb; Nurse J.K. Lettke; Nurse Mary Slinger; Nurse Amy Schraufnagel; Nurse D. Larson; Dr. Paul Sumnicht; and Health Services Manager Belinda Schrubbe.¹ Compton also sues Sean Anderson, who is an "x-ray technologist" employed at a WDOC subcontractor, Accurate Image.
- On April 24, 2007, Compton severely injured his right hand when he slipped and fell while playing basketball at GBCI on an allegedly wet and slippery floor. Compton then went to the Health Services Unit, where he reported experiencing "an extremely agonizing pain in his right hand," but Nurse Sequin merely gave him some ibuprofen and refused to do anything else. (Compl. (dkt. #1) 5.)
- Seeing Compton's discomfort, Nurse Miller determined Compton had "possibly broken his right pinkie finger." Nurse Miller stabilized his finger with "buddy tape" and scheduled him to see a physician, noting falsely in Compton's chart that he hurt his pinkie playing basketball "approx. 1½ wks ago but continued playing basketball." (*Id.*)
- On April 26, 2007, Compton was examined by Dr. Heidorn, who increased the dosage of ibuprofen to treat Compton's pain and scheduled him for an x-ray.

¹ Compton's complaint contains a single reference to defendant "Sue," apparently a registered nurse at WCI. (*See* Compl. (dkt. #1) 3, ¶ 18.) Since "Sue" is not named in the caption or mentioned anywhere else in the complaint, however, Compton will not be permitted to bring claims against her.

- On May 3, 2007, Compton was seen for an x-ray by defendant Douglas Armato. After reviewing the film with Dr. Heidorn, Armato allegedly informed Compton that his right pinkie finger was “broken,” although Armato’s report of diagnosis notes “no fracture.” As a result, Compton claims further that he was “misdiagnosed” and received no “treatment” for his broken pinkie at GBCI.
- Sometime after he injured his right pinkie, Compton was transferred from GBCI to WSPF. On May 18, 2008, Compton told the Health Services Unit (“HSU”) that he was “experiencing sharp[,] throbbing pain and numbness in [his] pinkie finger.” Nurse Campbell scheduled a doctor appointment for Compton, who saw Dr. Cox on June 23, 2008. Dr. Cox advised Compton that there was nothing he could do for him. In response to a request for help from Compton, Nurse Waterman also advised that Compton would receive no intervention other than “buddy taping during activity.”
- On July 2, 2008, Compton submitted another request for treatment from HSU, advising that he had been experiencing “excruciating pain” on a continuing basis and that it was preventing him from writing. Nurse Waterman again pointed to Dr. Cox’s diagnosis and repeated that they would not be doing anything.
- On July 5, 2008, Compton wrote WSPF’s warden concerning his injury and the lack of proper treatment but did not receive a reply.
- On December 2, 2008, Nurse Slinger saw Compton after he was transferred to WCI. She told him the x-rays were negative for fracture and that she would schedule him to see the doctor for further evaluation and possible treatment.
- On March 20, 2009, Nurse Gorske saw Compton for a follow-up for his asthma and injured finger. Gorske noted that Compton’s finger was deformed, and Compton informed Gorske that he was still experiencing pain and numbness. Nevertheless, Gorske discontinued Compton’s prescription for ibuprofen, telling him to buy them from the canteen if he was “hurting that bad,” and then scheduled Compton for a follow-up in three to six months.
- Compton was not seen again until March 16, 2010, where Gorske informed him that she wasn’t going to fix his finger because the injury did not happen at WCI.
- On June 2, 2011, Compton was seen by Registered Nurse J.K. Lettke. Compton became frustrated while trying to explain to Lettke the lack of proper treatment he had received, and Lettke finally scheduled Compton to be seen by the doctor.
- On June 8, 2011, Compton was seen by Dr. Sumnicht, who noted his deformity and described the injury as an “old tendon rupture.” Sumnicht scheduled Compton to be x-rayed again.

- On June 20, 2011, Compton was seen by x-ray technologist Dr. Sean Anderson and had his injury x-rayed.
- On July 20, 2011, Compton submitted another request to HSU to inform staff of his continuing discomfort and pain. On July 22, 2011, he received a response from R.N. Ann Tabb saying that he had never been referred to a specialist.
- On August 8, 2011, Compton was again seen by Sumnicht. He was prescribed 600mg of Gabapentin for temporary relief, which did nothing for his pain. That same day, Sumnicht dictated in Compton's progress report that he had "a functional healing of a chronic right finger extensor tendon rupture."
- On September 13, 2011, Compton wrote Sumnicht complaining about the side effects of the Gabapentin and reporting upset stomach, double vision and continued pain. Sumnicht referred Compton to Registered Nurse Amy Schraufnagel, who prescribed him 325mg acetaminophen to be taken four times a day in conjunction with 800mg ibuprofen.
- On September 26, 2011, Compton submitted another health service request complaining about continued pain and throbbing in his finger. Sumnicht responded that it had "healed in a functional position" and there was "no medical necessity to see a bone specialist."
- On September 29, 2011, Compton submitted a health service request to Health Service Manager Belinda Schrubbe regarding the possibility of seeing a bone specialist to remedy the pain and throbbing in his finger. He was never seen by a specialist.
- Schrubbe also allegedly falsified reports when contacted by an Inmate Complaint Examiner, claiming that Compton had never contacted her claiming to be in unbearable pain.
- On October 20, 2011, Compton informed Sumnicht that he was still in pain and the muscle relaxant was doing nothing to ease the pain. He received a response from Tabb, saying he would see the doctor soon. As of October 2012, Compton had still not seen the doctor.
- On January 5, 2012, Compton wrote the Department of Safety and Professional Services but received no reply.
- On April 17, 2012, Compton wrote Schrubbe to receive reimbursement for all the medical co-pays he had been charged. Schrubbe refused this request, but informed Compton that he had a one-year follow-up scheduled in November.

- On June 27, 2012, Compton wrote another health service request complaining about the continued numbness and throbbing, as well as the side effects of the Gabapentin.
- He again saw R.N. Tabb on June 29, 2012, who allegedly did nothing but make a note that Compton's pain intensity was an "8" on a scale of 1 through 10.
- On August 8, 2012, Compton complained that Dr. Cox had done nothing for his broken finger or for the pain and numbness.
- More generally, Compton now alleges that defendants behaved with deliberate indifference to his serious medical needs, in violation of the Eighth Amendment. He seeks injunctive relief and compensatory and punitive damages for these civil rights violations pursuant to 42 U.S.C. § 1983. Compton also alleges a state common law claim for medical malpractice.

OPINION

I. Compton's Eighth Amendment Claims

To establish liability under § 1983, a plaintiff must prove 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).

The Eighth Amendment affords prisoners a constitutional right to medical care. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Accordingly, courts hold that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment. *Id.* at 590. A medical need may be serious (1) if it is life-threatening, carries risks of permanent serious impairment if left untreated, or results in needless pain and suffering when treatment is withheld, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997); (2) if it is "sufficiently serious or

painful to make the refusal of assistance uncivilized,” *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996); or (3) when it otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

In addition to showing a serious medical need, a prisoner must also show that defendants were “deliberately indifferent” to that need. “Deliberate indifference” means: (1) that defendants must have been aware that plaintiff would be at a substantial risk of serious harm; but (2) that they disregarded the risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 847. Deliberate indifference is a high standard. 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). “Nor does mere disagreement as to the proper medical treatment support a claim of an [E]ighth [A]mendment violation.” *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987). “[D]eliberate indifference may be inferred based upon a medical professional’s erroneous treatment decision only when the medical professional’s decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.” *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996).

A. Serious Medical Need

Consistent with this standard, the court first considers whether Compton has alleged a serious medical need. Compton alleges that: (1) his finger is seriously injured and deformed; and (2) has caused him throbbing, constant pain and numbness, such that it impedes his ability to perform tasks like writing. As noted above, a medical need may

be “serious” if it causes needless pain and suffering or if it is sufficiently painful to make the refusal of treatment uncivilized. *See Gutierrez*, 111 F.3d at 1371-73; *Cooper*, 97 F.3d at 916-17. Certainly, a basketball injury to a pinkie, even if deformed by tendon damage, is neither “life-threatening” nor likely to “result in serious impairment if left untreated,” but perhaps it could “result in needless pain and suffering when treatment is withheld.” Even so, the court is skeptical that a refusal to treat an injured pinkie could be reasonably characterized as “uncivilized,” at least not in a society like ours, where sports leave broken, sprained and deformed digits untreated every day. Nor is there any reasonable claim that untreated, such an injury exposed Compton to “substantial risk of serious harm.”

Still, inferring a truly catastrophic break, the court will assume for screening purposes only that Compton has alleged a serious medical need. Compton should be aware that to survive summary judgment, he will likely need to present expert medical testimony to prove that his need was objectively “serious.” *See King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012) (noting that “an objectively serious medical need is ‘one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention’”) (quoting *Zentmyer v. Kendall Cnty.*, 220 F.3d 805, 810 (7th Cir. 2000)). This may prove particularly difficult for a broken bone or ruptured tendon in a finger, since such injuries frequently go untreated in many walks of life.

B. Deliberate Indifference

Next, the court considers whether Compton has alleged that each of the nineteen defendants he names behaved with deliberate indifference toward his claimed serious medical need. With respect to most of those defendants, the answer is no. Crediting the allegations in Compton's own pleadings, defendants for the most part *did* provide him with treatment for his injured finger, in the form of x-rays, taping, pain medication and continued doctor appointments. Those defendants include: Nurse Miller, who is alleged to have taped Compton's finger, given him ibuprofen and scheduled him to see the doctor; Dr. Heidorn, who is alleged to have increased his ibuprofen dosage and scheduled him for an x-ray; technologist Armato, who performed the x-ray; Nurse Campbell, who is alleged to have scheduled Compton for a doctor's appointment; Nurse Slinger, who is alleged to have told Compton the x-rays were "negative" for fracture but scheduled him for further evaluation and treatment; Nurse Lettke, who is alleged to have scheduled Compton to see a doctor; Nurse Tabb, who is alleged to have told Compton he was not down to see a specialist but that he was scheduled to see a doctor "soon"; Nurse Schraufnagel, who is alleged to have prescribed Compton acetaminophen and ibuprofen; technologist Anderson, who performed Compton's x-ray; and Nurse Larson, whose alleged misdeed is not even mentioned in Compton's pleadings.

To the extent that Compton alleges that certain of these defendants, like Armato and Heidorn, "misdiagnosed" his injury, that, too, is insufficient to support a claim of deliberate indifference. To the contrary, given that Compton appears to be alleging that defendants were mistaken in their diagnosis, he has again pled himself out of any

deliberate indifference claim. *See Farmer*, 511 U.S. at 837 (prison officials cannot be liable for deliberate indifference unless they both know of and disregard an excessive risk to inmate health or safety). Furthermore, Compton alleges no facts suggesting that those defendants' diagnosis and subsequent treatment decisions were entirely removed from professional judgment, as would be required to support a claim for deliberate indifference based on inappropriate treatment decisions.

To the extent Compton merely alleges that the treatment chosen was neither adequate nor ultimately successful, he again fails to allege a viable claim for deliberate indifference since “[a] prisoner’s dissatisfaction with a doctor’s prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is ‘so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner’s condition.’” *Snipes*, 95 F.3d at 592 (quoting *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974)). Given this high standard and the dearth of allegations suggesting how the standard might be met here, Compton’s complaint in large part fails to state a claim on which relief can be granted and he will not be allowed to proceed against most of the named defendants.

There are, however, several arguable exceptions to these marked deficiencies in Compton’s pleadings. First, Compton appears to plead an actual *refusal* to provide *any* treatment against certain defendants, rather than alleging they provided a course of treatment that he contends was inadequate. Second, Compton pleads a failure to intervene by other defendants in the course of treatment despite an obvious need to alleviate severe pain. The court considers each of these defendants in turn to determine

whether Compton has alleged enough to state a plausible claim of deliberate indifference against them.

1. Nurse Sequin

Against Nurse Sequin, Compton alleges that immediately following his injury, he reported an agonizing pain in his hand, but that Sequin gave him ibuprofen and refused to do anything more to help him. He also alleges that his severe pain was obvious and that his suffering was so apparent that a different nurse, Miller, took over his care upon seeing that he was not being treated properly by Sequin. Although Compton does not explicitly allege that Sequin's decision to prescribe nothing more than ibuprofen was such a departure from accepted professional judgment as to constitute deliberate indifference, the court infers as much for screening purposes only, on the assumption that his injury was severe and his continued suffering obvious enough for another nurse to take over his care. Therefore, Compton has plausibly alleged that Sequin knew of his serious, immediate medical need but failed to take *reasonable* measures to alleviate the harm to him. To prevail on his claim, Compton will need to prove that his pain was manifestly severe and Sequin was not just negligent in denying further care, but deliberately indifferent. Given the apparent findings and limited additional care Compton received later that day, this seems highly unlikely, but the court will allow Compton to proceed against defendant Sequin.

2. Dr. Burton Cox and Nurse Waterman

Compton alleges that he was scheduled to see Dr. Cox regarding his painful injury but that after examining the injury, Cox simply advised Compton that nothing could be done for him and that his finger “would have to remain in its deformed state.” (Compl. 6, ¶ 12.) From these facts, the court will infer for screening purposes only that Cox knew Compton had a serious medical need, but that Cox failed to take reasonable steps (or, indeed, *any* steps) to alleviate his severe pain and address his “deformed” finger. This suffices, if barely, to state a deliberate indifference claim at the screening stage for reasons already discussed. To prevail on this claim, or even to survive summary judgment, Compton will again need to show that Cox was actually aware that Compton had a serious medical need *and* that his decision not to provide treatment was so far removed from standards of professional judgment that it was not based on such judgment at all.

In contrast, Compton asserts that Nurse Waterman relied on Dr. Cox’s diagnosis in determining that (1) Compton would receive no treatment for his finger, other than buddy taping during activities, and (2) when Compton specifically told Waterman that he continued to suffer excruciating pain and that he was unable to write, Waterman responded, “What did Dr. Cox tell you? That we’re not doing anything about your finger!” (Compl. 6, ¶ 14.) As to the first assertion, Compton may not proceed, as Nurse Waterman cannot be faulted for following the express directions of Compton’s treating physician, Dr. Cox, unless that decision was truly outrageous. *See Johnson v. Snyder*, 444 F.3d 579, (7th Cir. 2006), overruled on other grounds by *Hill v. Tangerlini*, 724 F.3d 965

(7th Cir. 2013) (Health Care Unit Administrator, who was a registered nurse, was entitled to reasonably rely on doctor's diagnosis).

The second assertion arguably presents a closer question, but only because it could be read to suggest a substantial lapse in time from Dr. Cox's original diagnosis and Compton's later complaint of "excruciating pain." The court will, therefore, allow Compton to proceed against Waterman on the theory that Waterman knew of Compton's prolonged pain and suffering but failed to take reasonable action to alleviate the pain, including contacting Cox or another physician for follow up. It is certainly possible that Waterman lacked the culpable state of mind necessary for Compton to prevail on this claim, since based on the facts alleged, Waterman may simply have continued to rely on Cox's diagnosis and instructions. Nevertheless, for screening purposes, Compton has alleged enough to make plausible his deliberate indifference claim against Waterman.

3. Nurse Gorske

Compton alleges that Nurse Gorske saw him twice, on March 20, 2009, and March 16, 2010. During their first appointment, Gorske apparently noted that Compton's finger was "deformed." Compton also alleges having informed Gorske of his continued pain and numbness. Even assuming this is enough by itself to find that Compton had a serious medical need, it is not at all clear that Gorske actually *knew* how serious the injury was. On the contrary, Compton alleges that Gorske was presented with a deformed pinkie finger from an injury almost two years old and was experiencing some pain and numbness. This is simply not enough to proceed even assuming, as Compton

alleges, that Gorske: (1) discontinued his ibuprofen in 2009, telling him to buy ibuprofen himself from the canteen if the pain got worse; and (2) later told him she would not “fix his finger” injured some three years earlier at a different facility.

4. Dr. Paul Sumnicht

With respect to Dr. Sumnicht, Compton’s allegations are more detailed than against other defendants. He alleges that Sumnicht noted his “deformity,” diagnosed it as an “old tendon rupture” (actually then more than four years old) and scheduled Compton for another x-ray. When Compton complained of continued pain, Sumnicht prescribed him Gabapentin, which apparently did not help and caused problematic side effects, including upset stomach and blurred vision. When Compton complained about the side effects, Sumnicht referred him to Schraufnagel, who prescribed him additional painkillers. Finally, Sumnicht responded to Compton’s reports of continued pain by refusing to let him see a bone specialist, saying that Compton’s injury had “healed in a functional position.”

If anything, Compton’s allegations establish that Sumnicht *did* treat his injury, although Compton apparently did not approve of the course of treatment. This cannot support a constitutional claim for deliberate indifference since Compton does not allege that Sumnicht’s treatment decisions were so blatantly inappropriate as to demonstrate a failure to use professional judgment, nor does he allege facts from which the requisite state of mind (deliberate indifference) can be inferred. *See Estate of Cole*, 94 F.3d at 261-62.

Compton *does* allege that almost four months later, on September 26, 2011, he submitted another health service request complaining about continued pain and “constant throbbing” in his injured finger. He also alleges that Sunnicht, beyond concluding that there was no need to see a bone specialist, failed to address the throbbing and pain of which Compton complained. When Compton raised the issue again, he alleges that Tabb assured him that he would see the doctor soon, but that a year later, he still had not been seen. Even reading Compton’s allegations generously, this does not state a claim for deliberate indifference. As a preliminary matter, the court has doubts that a pinkie injury more than four years old can constitute an objectively serious medical need. Even assuming that it *did*, however, the facts simply cannot support deliberate indifference on Sunnicht’s part. According to Compton’s pleading, Sunnicht prescribed Compton various forms of pain medication throughout his course of treatment in an attempt to alleviate his pain, but ultimately concluded that Compton’s finger had healed in a “functional position,” obviating the need for a specialist. At most, Sunnicht was mistaken in concluding as such, but that simply cannot rise to the level of deliberate indifference. Based on Compton’s complaint, Sunnicht provided Compton with extensive treatment based on his diagnosis. Compton does not have a constitutional right to any treatment he requests, only to *reasonable* treatment. *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). Accordingly, he has failed to state a claim against Sunnicht.

5. Wardens William Pollard and Richard Schneiter

As wardens of GBCI and WSPF, respectively, Compton also alleges that Pollard and Schneiter had the authority to intervene and provide relief to Compton, but failed to

do so. Compton alleges that he wrote about his injury and his disagreement with the treatment he was receiving to Pollard on April 29, 2007, and to Schneiter on July 5, 2008, which allows the court to infer that they knew of his medical need. The problem with his claims is that “non-medical prison official[s] . . . cannot be held ‘deliberately indifferent simply because [they] failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.’” *Johnson v. Doughty*, 433 F.3d 1001, 1012 (7th Cir. 2006). Compton’s own allegations indicate that he *was* being treated by medical staff, however inadequate he believes that treatment was. Pollard and Schneiter cannot be held liable for failing to intervene in Compton’s course of treatment in light of these facts. Therefore, the court will not permit Compton to proceed on Eighth Amendment claims against Pollard or Schneiter either.

6. Health Services Managers Greenwood and Schrubbe

Defendant Greenwood is the Health Services Manager and is responsible for the overall operation of health services at GBCI; Schrubbe holds the same position at WCI. Compton alleges that both defendants knew of the inadequate treatment to which he was being subjected but failed to act to remedy that treatment. Specifically, he alleges that he submitted a complaint through the Inmate Complaint Review System on April 27, 2007, to which Greenwood responded that “patients are told that if they don’t hear anything, it means their x-ray is normal.” (Compl. 6, ¶ 9.) He also alleges having written to Schrubbe on September 29, 2011, while at WCI, asking about the possibility of seeing a bone specialist to address his injury, but that the request was returned unanswered. Further, he alleges that Schrubbe falsified reports when she was contacted by the

Institution Complaint Examiner in untruthfully stating that Compton had never told her that he was in unbearable pain.

With respect to his allegations against Greenwood, Compton has not stated a claim for deliberate indifference. He alleges only that he submitted a complaint to Greenwood “about the incident.” This does not allow for a reasonable inference that Greenwood actually knew Compton was at substantial risk of serious harm but failed to take reasonable steps to intervene. At most, it shows she was aware that Compton had suffered an injury, but that alone is not enough to support a claim for deliberate indifference.

As for Schrubbe, even if Compton informed her of continued “unbearable” pain and throbbing in requesting to see a bone specialist, that request also came almost four and one-half years after his injury *and* after Dr. Sumnicht found his finger had healed in a “functional position” with “no medical necessity” to see a bone specialist. With these alleged facts, Schrubbe’s deference to the doctor is not actionable under the Eighth Amendment. *Cf. Johnson*, 444 F.3d at 586. Nor does Schrubbe’s alleged later misstatement to a complaint examiner regarding Compton’s use of the word “unbearable” somehow convert her reliance on Dr. Sumnicht’s opinion actionable as “deliberate indifference to a serious medical need.” Accordingly, Compton may not proceed with a deliberate indifference claim against Schrubbe.

II. Medical Malpractice Claims²

Compton also raises claims under state law for medical malpractice against Drs. Cox and Sumnicht. Generally, courts may exercise supplemental jurisdiction over state law causes of action “that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). Here, the court has granted Compton leave to proceed on Eighth Amendment deliberate indifference claim against Dr. Cox over which it has original jurisdiction, and which arises from Compton’s injured finger and subsequent course of treatment. His claims for medical malpractice arise from that same factual nucleus. Therefore, the court will also exercise supplemental jurisdiction over Compton’s malpractice claim against Cox for now.³

Compton also alleges a violation of Wis. Stat. § 940.29, which states: “Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill-treats any person confined in or a resident of any

² Compton alleges he sent a Notice of Injury and Claim to the Attorney General by mail pursuant to Wis. Stat. § 893.82. (Compl. 9, ¶ 31.)

³ To state a claim for medical malpractice, Compton must allege: (1) a breach of (2) a duty owed (3) which breach results in (4) injury or injuries, or damages. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Against many of the defendants, Compton has failed to make such a claim plausible, because he has not alleged any actions that suggest those defendants breached their duty to him. Besides Dr. Cox, the arguable exceptions are:

- Drs. Heidorn and Armato, who allegedly interpreted the x-ray incorrectly and thereby misdiagnosed his injury; and
- Dr. Sumnicht, who refused to refer Compton to a bone specialist, refused to address side effects Compton claimed to be having with his medications and refused to address Compton’s continued complaints of pain and numbness.

Given that none of this conduct rises to the level of an Eighth Amendment violation, the court declines to exercise supplemental jurisdiction over them. Compton may, of course, proceed with these medical malpractice claims in state court should he so choose. He should recognize, however, that he will likely need to present expert medical testimony in order to prevail on these claims, just as he will against Dr. Cox in this court.

such institution or place or who knowingly permits another person to do so is guilty of a Class I felony.” This is a state criminal statute, however, and does not create a civil cause of action. See, e.g., *Ludke v. Kettle Moraine Corr. Inst.*, No. 11-cv-00506, 2011 WL 5125923, at *5 (denying leave to proceed under § 940.29 because it is “under the state criminal code”); *Irby v. Sumnicht*, No. 09-cv-136-bbc. 2009 WL 803307, at *4 (W.D. Wis. Mar. 20, 2009); *Howard v. Terry*, No. 05-C-635, 2005 WL 2347295, at *4 (E.D. Wis. Sept. 23, 2005) (holding plaintiff could not proceed under § 940.29 “since that statute ‘does no more than criminalize abuse of persons in an incarcerated facility’”) (citing *Lindell v. Litscher*, 260 Wis. 2d 454, 464, 659 N.W.2d 413 (2003)). Compton argues without support that § 940.29 is a “safety statute” that creates a civil cause of action, but the court has found no authority for that proposition, nor has it found any cases in which the statute has been applied in that manner. The same is true of Wis. Stat. §§ 939.05 (party to a crime) and 946.12 (misconduct in public office). Both are criminal statutes and Compton may not bring a civil action under those provisions.

ORDER

IT IS ORDERED that:

1. Plaintiff Elbert Compton is GRANTED leave to proceed on the following claims:
 - a. his Eighth Amendment deliberate indifference claim against Sequin, Cox and Waterman.
 - b. his state law medical malpractice claim against Cox.
2. Plaintiff is DENIED leave to proceed in all other respects.
3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the

Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

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 defendant's 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.

Entered this 23rd day of April, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge