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

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CHRISTOPHER M. SANDERS,

Plaintiff,

v.

JEFF PUGH and DR. SEARS,

Defendants.

OPINION AND ORDER

11-cv-202-slc

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In this prisoner civil rights action brought pursuant to 42 U.S.C. § 1983, *pro se* plaintiff Christopher Sanders has been granted leave to proceed on claims that defendants Dr. Sears and Jeff Pugh violated his Eighth Amendment rights by failing to provide him adequate dental care and that Dr. Sears violated his First Amendment rights by retaliating against him after Sanders filed a grievance against Dr. Sears on June 7, 2010. Specifically, Sanders alleges the following:

1. After Sanders complained about pain from his impacted wisdom teeth on May 24, 2010, Dr. Sears acted with deliberate indifference by failing to examine him until June 4, 2010 and failing to prescribe pain medication for him between May 24 and August 2, 2010.

2. On June 4, 2010, Dr. Sears acted with deliberate indifference in refusing to order the removal of Sanders's impacted wisdom teeth.

3. After Sanders returned from oral surgery (recommended by another dentist) on August 2, 2010, Dr. Sears acted with deliberate indifference and retaliated against Sanders by acting rudely, leaving Sanders bleeding and in pain in the waiting room and packing Sanders's open sockets with horse hair.

4. Dr. Sears acted with deliberate indifference and retaliated against Sanders by refusing to prescribe him stronger pain medication between August 2 and 7, 2010 and stronger medication and greater quantities of soft food between August 10 and 13, 2010.

5. Dr. Sears acted with deliberate indifference and retaliated against Sanders by refusing to respond to Sanders's requests for pain medication and medical attention between August 7 and 10, 2010 and after August 13, 2010.

6. Pugh acted with deliberate indifference in failing to act on Sanders's requests for medical assistance.

Now before the court is defendants' motion for summary judgment on all of Sanders's claims. Dkt. 49. Sanders opposes the motion, moves to suppress defendants' use of some of his medical records (dkt. 45) and objects to Dr. Sears testifying as an expert witness (dkt. 46).

Because I conclude that genuine issues of material fact remain as to claims 1, 3 and 5, I will deny defendants' motion for summary judgment with respect to those claims. However, I find that Sanders has failed to come forth with admissible evidence from which a jury could conclude that defendants Sears and Pugh acted with deliberate indifference in the instances described in claims 2, 4 and 6, and that defendants are entitled to summary judgment with respect to those claims. Finally, I agree with defendants that there is no basis on which to exclude Sanders's medical records or the expert testimony of Dr. Sears. Therefore, Sanders's motion to suppress and objection to expert testimony will be denied. I will address these last two issues first:

## PRELIMINARY MATTERS

### I. Sanders' Medical Records

Sanders has moved to suppress his medical records that are not directly related to his dental treatment at the Stanley Correctional Institution (SCI), arguing that the Attorney General's Office tricked him into signing the medical release form in order to obtain them. He seems particularly concerned with the records associated with alcohol, drug and mental health treatment. Defendants respond that the records were not obtained inappropriately and are relevant to Sanders's claims for mental and emotional injuries. Although I understand that Sanders may not wish to have his private information become public, his treatment records are directly related to his claim for damages. Therefore, the motion to suppress will be denied.

I note, however, that because the summary judgment motion relates solely to the issue of liability, the court did not need to discuss the content of those records in this opinion.

Further, because it is clear that Sanders is concerned about the privacy of specific medical information referred to in his medical records, I will place the medical records filed along with Dr. Sears's expert disclosures (dkt. 44) under seal. If Sanders does *not* wish to have this information sealed, he may so inform the court. Next, I note that if this case makes it to the damages phase at trial and Sanders attempts to prove to the jury that he suffered mental or emotional injury as a result of Dr. Sears's treatment, then the State may, within appropriate evidentiary limits, present to the jury relevant evidence of any pre-existing conditions that might account for the injuries that Sanders is claiming arose from Dr. Sears' acts and omissions. Where to draw the line is an issue that the parties can address in their motions in limine to the court. Finally, if Sanders simply does not want any disclosure whatsoever of his alcohol, drug and mental health treatment, then he has the option of dropping his claim for damages resulting from emotional and mental distress. That would take the issue off of the table.

**II. Dr. Sears as an Expert Witness**

Sanders next argues that Dr. Sears should not be allowed to testify as an expert witness in this lawsuit because he is one of the defendants. However, as defendants point out, nothing in the Federal Rules of Evidence prohibits a party from serving as an expert witness as long as he is qualified to do so. *Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996) (neither litigant nor anyone else is disqualified as expert witness solely by reason of his or her relation to litigant); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1019 (5th Cir. 1993); *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988). The fact that the witness is a party is properly considered when the court assesses the witness's credibility. *Tagatz*, 861 F.2d at 1042. Sanders's objection to defendants' expert witness will be denied.

## FACTS

From the parties' proposed findings of fact and granting all inferences in favor of Sanders, I find the following to be undisputed for the purpose of deciding the motion for summary judgment:

### I. The Parties

From May 13, 2010 until November 3, 2010, plaintiff Christopher Sanders was confined at the Stanley Correctional Institution (SCI), a medium-security institution located in Stanley, Wisconsin. He then transferred to the Chippewa Valley Correctional Treatment Facility where he remained until his release on March 30, 2011.

Defendant Jeffrey A. Pugh is currently employed by the Wisconsin Department of Corrections (DOC) as the warden of SCI.

Defendant John Sears, D.D.S., is licensed as a dentist in the State of Wisconsin and has been so licensed from July 2005 until the present. Dr. Sears was employed by DOC as a dentist at SCI from July 25, 2005 until approximately August 26, 2011. Dr. Sears also provided dental care for the inmates at the Chippewa Valley Correctional Treatment Facility when needed.

### II. Dental Problems Prior to SCI

During 2009, Sanders was a patient at Marquette University School of Dentistry. The clinic was planning to schedule an appointment in the spring of 2010 to remove Sanders's wisdom teeth because his bottom wisdom teeth were impacted and lying sideways, pressing on the roots of his other molars. The surgery never occurred because Sanders's probation was revoked on November 14, 2009. Sanders was initially held at the Waukesha County Jail and then transferred to the Dodge Correctional Institution (DCI) in March 2010.

On March 25, 2010, DCI staff completed Intake Screening/Medical History and Health Transfer Summary forms on Sanders. The intake form indicated that Sanders weighed 145 pounds. On April 7, 2010, DCI staff completed a physical examination form, which indicated that Sanders weighed 162 pounds. Neither the intake nor examination form indicated that Sanders asked to see a dentist, had urgent dental problems or stated that he was in great pain from his wisdom teeth. Although Sanders told the DCI staff in March and April that he was in pain, they told him it was not life threatening or urgent and to tell the dentist at the dental evaluation. On April 8, 2010, DCI staff completed a Dental Classification Report form on Sanders. Although Sanders told the dentist about his problems with his wisdom teeth, he was classified as a "10," indicating that there were no dental constraints and that active dental treatment had been completed.

**III. Transfer to SCI**

Inmates at SCI have access to medical and dental professionals for appropriate services where the inmates may feel they require attention. As the warden, Pugh relies on health care professionals at SCI to provide such services. Pugh is not licensed as any sort of health care provider and does not personally provide medical or dental services to inmates. He also has not participated in, approved of or otherwise authorized any medical or dental diagnoses or treatment for Sanders.

When Sanders got to SCI, he told staff about his wisdom teeth and was told to submit a dental service request (DSR). On May 13, 2010, SCI completed a Transfer Screening form on Sanders. On May 14, 2010, the health services unit reviewed Sanders's medical chart. Neither the form nor the records in Sanders' medical chart indicated that Sanders had asked to see a dentist, had urgent dental problems or had stated that he was in great pain from his wisdom teeth.

## IV. Wisdom Teeth Extraction

On May 24, 2010, Sanders submitted a DSR that stated:

> All 4 of my wisdom teeth are compacted and causing me pain. My county jail would not help me. Now, one is poking out of my gums, and they all hurt when I eat. Please take out my wisdom teeth, because they are causing me GREAT PAIN!!

On May 25, Dr. Sears placed Sanders on the "essential wait list," which means that a patient has a dental condition which is chronic, asymptomatic, and, if not completed within two to three months, could result in an acute episode. Examples of qualifying conditions include advanced cavities, teeth with hopeless prognosis, infected teeth, and care for patients which is relevant to their chronic medical conditions. When Dr. Sears placed a patient on the essential wait list, it usually meant that he wanted to see that individual within the month, if not sooner. This was the case with Sanders.

On May 31, 2010, Sanders submitted a DSR form that stated:

> I was put on an "Essential Wait List" for my wisdom teeth. I am in pain. Since you have me waiting, can you give me meds for my pain?

On June 1, Dr. Sears responded to Sanders's DSR, stating that he was on the essential wait list.

On June 4, Dr. Sears examined Sanders. The exam revealed one erupted wisdom tooth (Tooth #1) and three impacted wisdom teeth (Teeth #16, #17 and #32). No pericoronitis (swollen and infected gum tissue around molar teeth) was noted. Pericoronitis usually occurs as a result of impacted wisdom teeth. Because the tissue over Sanders's teeth was normal, Dr. Sears noted that no immediate treatment was indicated. Sanders wanted Dr. Sears to treat him immediately.

Sanders filed an inmate complaint that was received on June 7, alleging that Dr. Sears was deliberately indifferent to his medical needs when he refused to treat him. On June 15, 2010, Sanders wrote an interview/information request to Warden Pugh about his wisdom teeth:

> I recently had to put in an ICI for your dentist here not giving me treatment. My wisdom teeth are compacted and causing me great pain. They were scheduled to come out in Nov '09 but I was arrested. I'm still in pain, and waiting for the ICI. Numerous requests to the dentist have been ignored. Please help me so I don't have to write to the courts and file a 1983.

Pugh wrote back on June 16, stating that he was not going to get involved.

Sanders's pain kept him from sleeping some nights, and at times, he could not chew his food or open his mouth. On June 28, 2010, Dr. Turon examined Sanders at the request of the inmate complaint examiner (ICE) and completed a class III authorization to refer Sanders to an oral surgeon. On exam, Dr. Turon noted that Teeth #16, #17 and #32 were impacted, but the tissue looked healthy. Dr. Turon also noted that Tooth #1 was erupted. Sanders reported strong pain and difficulty opening his mouth during the previous week.

On July 4, 2010, Sanders wrote a letter to Pugh regarding problems with a cell mate. He also noted the dental issues he was having:

> Recently, I was pulling my hair out in frustration with the Dentist at HSU. I wrote to you, and instantly I was accomadated [*sic*]. Thank you if you helped. I am hoping you can write me back and tell me what advise you have for me.

Pugh did not respond.

On July 14, 2010, Sanders submitted a DSR that stated:

> I am in pain with my wisdom teeth. Please help me. If you insist on keeping me in pain for this long, why aren't you giving me prescription pain killers. I'm in pain. Please help me.

On July 15, 2010, Dr. Turon responded:

> Approval came in today, the nurses will schedule you with oral surgeon for extraction" of the third molars, Teeth #1, #16, #17 and #32, under sedation.

On August 2, 2010, Sanders was taken to Chippewa Falls where a private oral surgeon extracted his wisdom teeth. The oral surgeon ordered that Sanders was to bite on gauze for one hour and eat a soft diet for two to three days. The surgeon prescribed 600 mg ibuprofen, one tablet every four to six hours as needed for pain. Thirty tablets were dispensed. The surgeon also prescribed 500 mg penicillin, one tablet four times daily until gone. Twenty tablets were dispensed. Finally, the surgeon prescribed Vicodin 5/500 mg,[1] one tablet up to four times daily as needed for pain. Eighteen tablets were dispensed.[2] The stop date on the Vicodin was August 8, 2010. The oral surgeon ordered that Sanders use ice on his face for twenty minutes on and twenty minutes off.

On his way back to SCI, Sanders bled all over his arms, hands and face. (The parties dispute what happened after Sanders returned to SCI: Sanders avers that at intake, he was made to clean up his own blood with a rag and was left unconscious and bleeding in the chairs in health services. When Dr. Sears saw Sanders later that day for a follow up, Sanders avers that Dr. Sears was "rude, abrasive, and angry" and said, "Well, maybe you'll get dry socket! Then you'll really be in pain." According to Sanders, Dr. Sears packed the holes in his mouth with horse hair. Dr. Sears denies this and avers that upon Sanders's return to the institution, he replaced Sanders's gauze pack and gave Sanders oral and written plans of treatment. Dr. Sears also avers that Sanders had normal oozing.)

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[1] "5/500" indicates that each tablet contains 5 mg hydrocodone and 500 mg acetaminophen.

[2] I infer that the HSU filled all of these prescriptions for Sanders upon his return to SCI on August 2, 2010 after the extractions.

## V. Post-Operative Care

During the days following the surgery, Sanders could not sleep, eat, drink, brush his teeth or lie on a pillow because of the pain. He was hemorrhaging out of his mouth at night. On August 2, 2010, Sanders submitted a DSR form that stated as follows:

> I waited in agonizing pain for over 2 months to get treatment for my wisdom teeth. I had to write to the Warden, and ICI. For one, I had expected Dental to be angry with me, and perhaps that's why I was left in pain for so long.
>
> Now, I just underwent serious oral surgery this morning. I followed up with THE SAME DENTIST at SCI's HSU, and he did not treat me courteously (not surprisingly). He prescribed me something for the pain, which is not helping enough.
>
> I don't know if he intentionally gave me too little of pain meds or not, but I need a better medication, or at least a better dosage of what I'm getting. Please help me.

On August 3, 2010, Dr. Sears responded:

> The medications you received were prescribed by the Oral Surgeon who removed your wisdom teeth, we did not alter them.

Five days later, on August 8, 2010 (a Sunday), Sanders submitted a DSR form that stated:

> I received oral surgery on 8-2-10. Since then, I've been in agonizing pain. I have not been able to eat solid food since my surgery. I've lost weight, and my health is ailing. Please get me medication for the pain I'm feeling. Also, please get me an order for "Ensure", or some kind of soft food.
>
> I put in a request for treatment last week, for my pain, and Dr. Sears denied me treatment. Now, after almost a week, I'm still unable to eat because of my pain. Please help me. This is my second request for treatment.

(Sanders states that he submitted a DSR every day in an attempt to get treatment for his pain because the pain medications were not working. Defendants point out that Sanders admitted in his August 8 DSR that this was only his second request for treatment.)

On Monday, August 9, 2010, Dr. Sears responded by indicating "Oral Surgery post-op," which meant that Dr. Sears wanted Sanders to come in to check the progress of the healing. (The parties dispute whether Sanders was cut off from his pain medications and not given soft food or Ensure at this point.) Sanders submitted another DSR on August 9. Dr. Sears placed Sanders on the routine wait list because his dental condition was asymptomatic and a delay of up to one year would not result in serious risk.

On August 10, 2010, Dr. Sears examined Sanders. According to Dr. Sears, scheduling a post-operative appointment eight days after the extraction of wisdom teeth is within the standard of care. This exam revealed open sockets, which indicated that the extraction site was delayed in healing. Dr. Sears irrigated the area and packed it lightly with gauze. Dr. Sears noted that Sanders had anxiety over "dry sockets." (The parties dispute whether Dr. Sears told Sanders that he had exposed bone from his dry sockets.) Dr. Sears prescribed twelve 5/500 tablets of Vicodin, one tablet up to four times daily as needed for pain. Dr. Sears indicated that the stop date on Vicodin was August 15, 2010. Dr. Sears also prescribed 600 mg ibuprofen, one tablet every four to six hours as needed for pain. Thirty tablets were dispensed. Lastly, Dr. Sears ordered Ensure for plaintiff to take with his medication three times a day for four days. In Dr. Sears's expert opinion, the care that he provided was within the standard of care in all respects. (Sanders claims the medications did nothing for his pain.)

On August 13, 2010, Dr. Sears examined Sanders after irrigating and packing Tooth #17 and Tooth #32 with gauze. Dr. Sears removed the gauze. (The parties dispute Sanders's self reports of his condition. Dr. Sears avers that Sanders reported that everything was "ok," he did not have pain and he was eating "like horse [*sic*]." Sanders avers that he could not eat or drink,

the pain medications were not working, and that he had lost weight and was seeing "green spots" since the surgery.)

On August 18, 2010, Sanders submitted an Interview/Information Request form to Pugh with a letter attached. The letter is dated August 17, 2010. Sanders complained about several issues, including his dental treatment:

> . . . On 8-2-10, I was taken to have surgery on my mouth. I remember bleeding all over my face, and onto my hands and arms. A female officer in intake shoved a spray bottle and rag at me, and forced me to scrub the holding cell, and clean up all my blood as I continued to fall over and bleed on myself more. I also remember regaining consciousness in HSU, having been laying on the chairs, bleeding, while no one helped. Some days later, while still unable to eat, or even drink, I wrote to HSU-Dental pleading for help and describing my agony. The same Dentist that I I.C.I.'d for trying to refuse me treatment initially, wrote back saying he wasn't getting involved. I continued hemmoraging out of my mouth, writing in pain and agony, and only sipping little bits of water when I could not bear the thirst. This form of torture continued until 8-10-10, when the Dentist finally agreed to help me. I told him that I last weighed 178 lbs prior to surgery, and that on 8-9-10, in the gym, I weighed 164 lbs. I told him about the green spots I was seeing everywhere, and I was quite delirious. He tried to say I weighed 145 lbs, looking at my unhealthy condition recorded at Dodge in March.

Pugh did not respond to Sanders' August 18, 2010 Interview/Information Request or the August 17, 2010 letter.

(The parties dispute whether Sanders complained to dental services about his wisdom teeth after August 13, 2010. Sanders avers that he continued to submit DSRs about his teeth pain but received no response. Dr. Sears avers that it was his practice to review all dental service request forms that he received and respond to the inmate's concerns, even if he did so only by checking a box on the form.)

Sanders complained about other medical and dental issues, but none of these complaints indicated that Sanders needed to see a dentist, that he had urgent dental problems or that he was

in great pain from his wisdom teeth. On October 4, 2010, Sanders submitted a DSR asking for help with the veneers on his front teeth, which he stated were chipping and causing him pain. On October 7, 2010 Dr. Turon placed Sanders on the essential wait list. Also on October 7, 2010, Sanders submitted an Interview/Information Request asking to see a dentist for his "painful dental condition" and to see a doctor for a painful growth on his foot.

Sanders submitted a health service request (HSR) form dated October 6, 2010. He did not show up for his HSU appointment the next day, stating that his name was not on the HSU list posted in the wing. The procedure was reviewed with Sanders. Sanders' appointment was rescheduled to October 8, 2010, but he did not show up for that appointment either, stating that he had filed an inmate complaint and was scared to show up.

On October 12, 2010, Sanders submitted an Interview/Information Request form to Pugh with a letter dated October 12, 2010. Sanders complained about several issues, including Sanders's claim that Pugh had ignored his correspondence from June, July and mid-August. On October 20, 2010, Pugh responded to Sanders' October 12, 2010 letter as follows:

> I am in receipt of your correspondence dated October 12, 2010, in which you state you are being neglected and your issues are not being ignored. The issues you have previously raised have been addressed as far as the Warden's Office is concerned. If you have new issues to be addressed, please refer to the chain of command chart in your handbook and direct future correspondence to the appropriate department.
>
> I trust this addresses your concerns and consider the matter to be closed.

Sanders submitted an inmate complaint dated October 23, 2010 in which he alleged that HSU was retaliating against him. The complaint was rejected as untimely.

On November 3, 2010, the day that he was transferred to the Chippewa Valley Correctional Treatment Facility, Sanders submitted a DSR form stating that he had a "painful dental condition that was not addressed at Stanley." On November 11, 2010, Dr. Turon placed

Sanders on the essential wait list because he was indicating pain. Dr. Turon scheduled Sanders for a November 15 appointment. (The parties dispute whether Sanders discussed his wisdom teeth at this appointment.)

Sanders was seen by HSU on November 4, 24 and 26, 2010 and December 14, 2010 and January 24, 2011 for growths on his foot. He was seen on November 16, 2010 for a paternity test. Records from these visits do not indicate that Sanders discussed his wisdom teeth.

## OPINION

### I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

## II. Deliberate Indifference

Prison officials violate the Eighth Amendment if they are "deliberately indifferent to prisoners' serious medical needs." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011) (citing *Estelle v. Gamble*, 429 U.S.97, 104 (1976)). This deliberate indifference standard has both an objective and subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Therefore, to survive summary judgment on his Eighth Amendment claim, Sanders must submit evidence showing: (1) that he had an objectively serious medical condition; and (2) that defendants were subjectively "aware of the condition and knowingly disregarded it." *Ortiz v. Webster*, 655 F.3d 731, 734 (7th Cir. 2011) (citing *Farmer*, 511 U.S. at 837; *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)).

Defendants do not deny that Sanders's impacted wisdom teeth and associated pain constituted a serious medical need. *See Gonzalez v. Feinerman*, 553 F.3d 311, 314 (7th Cir. 2011) (citations omitted) (finding chronic pain presents an objectively serious medical condition); *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) (tooth pain and decay is objectively serious medical condition). Defendants do not deny that they were aware of Sanders' dental needs. Defendants *do* deny that they were deliberately indifferent to these needs.

To prevail, Sanders must show that defendants "'acted with a sufficiently culpable state of mind,' something akin to recklessness." *Arnett*, 648 F.3d at 751 (quoting *Johnson v. Snyder*, 444 F.3d 579,584 (7th Cir. 2006)). "A prison official acts with a sufficiently culpable state of mind when he either knows of a substantial risk of harm to an inmate and either acts or fails to act in disregard of that risk." *Id.* (citing *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011)). Allegations of negligence or medical malpractice are not enough: "deliberate indifference 'is more than negligence and approaches intentional wrongdoing.'" *Id.* (quoting *Collignon v. Milwaukee County*, 163 F.3d 982, 988 (7th Cir. 1998)). "A jury can infer deliberate indifference on the basis of a physician's treatment decision [when] the decision [is] so far afield of accepted professional

standards as to raise the inference that it was not actually based on a medical judgment." *Id.* (quoting *Duckworth*, 532 F.3d at 679) (alterations in original). A plaintiff satisfies this showing if he establishes that a physician's response was "so inadequate that it demonstrated an absence of professional judgment, that is, that 'no minimally competent professional would have so responded under those circumstances.'" *Id.* (quoting *Roe*, 631 F.3d at 857).

**A. Initial Delay and Denial of Treatment by Dr. Sears (Claims 1 and 2)**

Sanders alleges that after he filed a request for dental treatment on May 24, 2010, Dr. Sears made him wait 11 days for an examination, then failed to prescribe pain medication or order the removal of Sanders's wisdom teeth. Defendants counter that Dr. Sears saw Sanders as quickly as possible and determined that no treatment was needed because the tissue over Sanders's teeth appeared normal. Defendants are half right: Sanders has not adduced any evidence–apart from his own lay opinion–that Dr. Sears's decision not to recommend oral surgery was so far afield of accepted medical standards as to constitute a complete lack of medical judgment.

True, the dentists at Marquette were planning to remove Sanders's wisdom teeth by the Spring of 2010, and Dr. Turon later decided to refer Sanders to an oral surgeon, but a difference of opinion between physicians is not enough to establish deliberate indifference. *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (at worst, difference of opinion suggests negligence). Similarly, neither medical malpractice nor a plaintiff's mere disagreement with a doctor's medical judgment is enough to prove deliberate indifference in violation of the Eighth Amendment. *See Estelle*, 429 U.S. at 106; *Estate of Cole v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996). Without more than his own subjective belief, Sanders cannot show that Dr. Sears acted with deliberate indifference by deciding not to order the removal of Sanders's wisdom teeth (claim 2). *McSwain v. Schrubbe*, 2009 WL 728453, *4 (E.D. Wis. Mar. 17, 2009) (citing *Greeno v. Daley*, 414 F.3d

645, 653 (7th Cir. 2005)) (inmate's subjective belief that different course of action would have been preferable not sufficient to survive summary judgment).

That said, defendants have not explained why Dr. Sears chose not to evaluate Sanders's pain sooner or to palliate this pain with at least an over-the-counter painkiller. The Court of Appeals for the Seventh Circuit has explained that "[a] significant delay in effective medical treatment . . . may support a claim of deliberate indifference, especially where the result is prolonged and unnecessary pain." *Berry*, 604 F.3d at 441 (citing *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008)) (reversing summary judgment for defendants who did not treat plaintiff's painful broken nose for nearly two days). This is true even without expert medical testimony showing that the delay aggravated the underlying condition. *Id.* "[M]edical personnel cannot simply resort to an easier course of treatment that they know is ineffective." *Id.* (quoting *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006)).

Although the evidence is not overwhelming, a jury could reasonably conclude that when Sanders complained of pain, Dr. Sears either ignored Sanders's pain or knowingly chose an easier method to treat Sanders's pain that he knew would be ineffective. There may be a logical, innocuous explanation for why Dr. Sears did not prescribe Sanders any pain medication and that explanation may be persuasive. For example, Dr. Sears may not have believed that Sanders was in pain or may have concluded that Sanders would be able to endure his pain until he was able to get his teeth removed upon release from prison. However, "[o]n summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). Therefore, defendants' motion will be denied with respect to Sanders's claim that Dr. Sears failed to treat Sanders's tooth pain between May 24 and August 2, 2010, when Sanders underwent oral surgery (claim 1).

**B. Post-Surgery Treatment by Dr. Sears (Claims 3,4 and 5)**

Sanders alleges that Dr. Sears was deliberately indifferent to his medical needs after Sanders returned from oral surgery on August 2, 2010 because Dr. Sears left Sanders in pain and failed to prescribe stronger pain medication and greater quantities of soft food thereafter. The parties dispute what happened on August 2, 2010, the day that Sanders returned from oral surgery: Sanders avers that Dr. Sears intentionally left him bleeding and in pain in the health services unit, filled his open sockets with horse hair and then refused to provide Sanders with adequate pain medication and soft food; Dr. Sears denies ignoring Sanders on August 2 and denies filling his open sockets with horse hair.

If a jury were to find Sanders's version of events credible, then it reasonably could find that Dr. Sears acted with deliberate indifference. Because the parties have provided competing versions of the material facts, I must deny defendants' motion for summary judgment with respect to Sanders's claim that Dr. Sears ignored him while he was bleeding and in pain in the waiting room and packed Sanders's open sockets with horse hair when he returned from oral surgery on August 2, 2010 (*see* claim 3).

Next, Sanders complains that despite Sanders's requests for help, Dr. Sears did not see him again until August 10, 2010, refused to prescribe stronger pain medication during this period and did not provide adequate amounts of soft food. Defendants argue that the oral surgeon had ordered ibuprofen, penicillin and Vicodin for Sanders and that Dr. Sears simply followed these recommendations after Sanders returned from surgery after determining there was no need for greater intervention. Although the parties dispute how many times Sanders complained after August 2, it is undisputed that on August 8, 2010 he filed a DSR asking for Ensure or soft food and reporting severe pain.

As explained above, without more than his own subjective belief that the narcotic pain medication was insufficient, Sanders cannot show that Dr. Sears acted with deliberate

indifference when he chose not to order a stronger dose (*see* claim 4). There is no evidence that Dr. Sears's decision to follow the recommendations of the oral surgeon fell outside the realm of acceptable medical care. After all, the oral surgeon had prescribed two robust prescription painkillers and had provided an amount of pills that implied that Sanders's pain might last for almost a week (recall that the oral surgeon's "stop date" for the Vicodin was August 8, six days after Sanders's extractions). When Sanders filed his first complaint of pain on the very day that his four wisdom teeth had been surgically extracted, it was not deliberately indifferent for Dr. Sears to respond, the next day, that he was sticking with what the oral surgeon had recommended. When Sanders complained again on Sunday, August 8, 2010, Dr. Sears saw the complaint on Monday, August 9 and set Sanders for an appointment on Tuesday, August 10, 2010.

Does this delay from August 8 to August 10 raise a triable dispute whether Dr. Sears was deliberately indifferent to Sanders pain? Sanders claims that Dr. Sears intentionally allowed him to run out of painkillers. The timeline allows the inference that Sanders may have run out of pain medication sometime between August 7 (a Saturday) and August 10.[3] But Sanders did not report in his August 8, 2012 complaint that he had used up all his painkillers, and it is unlikely that Dr. Sears would have remembered how many painkilling tablets Sanders had received on August 2, 2010, let alone done the arithmetic to project the date Sanders would run out. Further, when Dr. Sears *did* examine Sanders on August 10, he renewed Sanders's prescriptions for Vicodin and 600 mg ibuprofen tablets; why would he do this if his intent was to inflict suffering on Sanders? All this being so, as noted above, this court does not have the authority

[3]. SCI's HSU had dispensed 30 prescription strength ibuprofen tablets and 18 Vicodin tablets to Sanders after he returned from Chippewa Falls on August 2. If Sanders had taken the maximum recommended dosage of both tablets every day, then he could have run out of both medications on August 7. If he exceeded the maximum dosage, he would have run out sooner; if he took them more sparingly, perhaps they lasted longer.

at the summary judgment stage to pick the more logical of two competing inferences allowed by the evidence. *Payne*, 337 F.3d at 770. Sanders might have been without painkillers for 60+ hours stretched over four days. It is up to the jury to determine whether any lengthy gap constituted deliberate indifference to Sanders's pain between August 7 and 10, 2010 (*see* claim 5). Therefore, Sanders will be allowed to proceed to trial on this specific claim.

On August 10, Dr. Sears examined Sanders, filled his open sockets with gauze and prescribed an additional three days of Vicodin and Ensure dietary supplement. Sanders claims that the Vicodin did not alleviate his pain and that the Ensure did not provide sufficient calories; as a result, he lost significant weight. The parties dispute whether Sanders had recovered and was pain free at his August 13 followup exam by Dr. Sears. Sanders claims that his pain continued for months, in part because he had "dry sockets" with exposed bone. Dr. Sears admits that Sanders had open sockets that he packed with gauze on August 10 and 13, but defendants contend that there is no evidence of exposed bone.

There is no evidence that the amount and type of pain medication and soft food prescribed by Dr. Sears constituted deliberate indifference to Sanders' ongoing pain and weight loss (*see* claim 4). Dr. Sears took Sanders's complaints seriously and avers that he acted within the acceptable standard of care. Although there is some dispute over whether Sanders lost weight during this period from lack of eating, he was given soft food and has not adduced evidence that it was so lacking in nutrition as to constitute deliberate indifference.

However, because there is a genuine dispute as to whether Sanders remained in pain after August 13 when his pain medication ran out a second time, a jury that accepted Sanders's version of events as true then could find that Dr. Sears acted with deliberate indifference by failing to ameliorate Sanders's pain after August 13, 2010 (*see* claim 5). Defendants' motion will be denied with respect to that claim.

**III. First Amendment Retaliation (Claims 3, 4 and 5)**

"An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). To prevail on a First Amendment retaliation claim, Sanders must show that: (1) he engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in the defendant's decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)). A prisoner's right to file a grievance has been recognized as a constitutionally protected activity, *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005), so the only issue is whether Dr. Sears took retaliatory action against Sanders and whether he did so at least in part because Sanders filed a grievance. *See Mays v. Springborn*, 575 F.3d 643, 650 (7th Cir. 2009); *Johnson v. Kingston*, 292 F. Supp. 2d 1146, 1153-54 (W.D. Wis. 2003).

Sanders has a high burden because he must show that his protected conduct was a motivating factor for the retaliation. *See Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996). If he adduces sufficient evidence of a motivating factor, then the burden shifts to defendants to show that they would have made the same decision in the absence of an unconstitutional motive. *Hasan v. U.S. Dept. of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005). Moreover, "the ultimate question is whether events would have transpired differently absent the retaliatory motive." *Babcock*, 102 F.3d at 275. If the same action would have occurred regardless of the retaliatory motive, then the claim fails. *See Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004).

Sanders alleges that in response to the inmate complaint that he filed against Dr. Sears on June 7, 2010, Dr. Sears retaliated against him by refusing to provide him with medical treatment and effective pain management after Sanders underwent oral surgery on August 2, 2010. Specifically, Sanders claims that Dr. Sears refused to see him when he returned from

surgery, cut off his pain medication for a few days, refused to prescribe stronger pain medication when Sanders came for his required post-op appointment and only gave him three "tiny cans" of Ensure even though Sanders had complained that he was "starved." As explained above, Sanders has not shown that the stronger pain medication and greater quantities of soft food he wanted should have been given to him. As a result, Sanders cannot show that Dr. Sears would have made different decisions in the absence of an unconstitutional motive.

However, given the disputed facts, it is possible that a finder of fact could choose to believe that Dr. Sears committed the following actions because Sanders had filed a grievance against him: leaving Sanders bleeding and in pain and filling his open sockets with horse hair on August 2 and failing to prescribe any pain medication for Sanders between August 7 and 10, 2010 and after August 13, 2010. Although the evidence is not overwhelming and might not persuade a jury, it suffices to allow these aspects of Sanders's retaliation claim to survive summary judgment. *See Washington v. Haupert*, 481 F.3d 543, 550 (7th Cir. 2007) ("However implausible [plaintiff's] account might seem, it is not [the court's] place to decide who is telling the truth.").

## IV. Claims Against Pugh

### A. Failure to Intervene (Claim 6)

Sanders's deliberate indifference claim against Pugh boils down to his frustration with Pugh's failure to step in after receiving letters from Sanders in June, August and October 2010 claiming inadequate dental care. In other words, Sanders seeks to hold Pugh liable for not interceding in dental treatment decisions within the expertise of, and delegated to, SCI's dentist. As the Court of Appeals for the Seventh Circuit has explained, "[p]ublic officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is

entitled to insist that one employee do another's job." *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009).

Even though Pugh is the warden, he was not required to ensure that the dental services unit did what it was supposed to do. As an administrator with no dental expertise or training, Pugh was entitled to defer to the judgment of dental professionals like Dr. Sears so long as Pugh did not ignore Sanders or create problems for him. *Berry*, 604 F.3d at 440 ("As . . . a host of . . . cases make clear, the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so.") (citing *Hayes v. Snyder*, 546 F.3d 516, 527-28 (7th Cir. 2008)); *Johnson v. Doughty*, 433 F.3d 1001, 1010-11 (7th Cir. 2006); *Greeno v. Daley*, 414 F.3d 645, 655-56 (7th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004)). *Cf. Richman v. Sheahan*, 512 F.3d 876, 885 (7th Cir. 2008) ("there is an exception for the case in which [a public employee] is responsible for creating the peril that creates an occasion for rescue). The undisputed facts show that Pugh met this standard.

Pugh reviewed the June 15, 2010 information request filed by Sanders and timely responded by referring Sanders to the inmate complaint process that Sanders already had invoked. Pugh made it clear that Sanders should file any further complaints regarding the issue with the ICE department. Although Pugh did not respond to correspondence from Sanders in August 2010, he had advised Sanders that he could not get involved until Sanders had exhausted his other administrative remedies. Pugh did respond to Sanders's October 12, 2010 complaint that Pugh was ignoring his correspondence. Pugh timely responded on October 20 that he considered Sanders's concerns to have been addressed by the inmate complaint process and again told Sanders to file any new grievances in accordance with the prison's chain of command. The fact that Pugh took no further action in response to Sanders's letters cannot be seen as deliberate indifference. *See Berry*, 604 F.3d at 440. Pugh did not create the problem that Sanders faced

and did not possess the requisite knowledge or expertise necessary to override Dr. Sears's professional judgment. As a result, Pugh's failure to intervene in Sanders's dental care does not rise to the level of deliberate indifference as a matter of law, entitling him to summary judgment on Sanders's claims against him.

**B. Retaliation**

Although Sanders argues in his response brief that Pugh also retaliated against him by failing to intervene in Sanders's dental care, he did not raise these allegations in his complaint and was not granted leave to proceed on a retaliation claim against Pugh. In any event, even if Sanders had made these allegations against Pugh, he would not have a claim because his grievances were about Dr. Sears and not Pugh, and as explained above, Pugh did not have duty to intervene to force Dr. Sears to provide different medical care.

ORDER

IT IS ORDERED that:

(1) The motion for summary judgment (dkt. 49) filed by defendants Jeff Pugh and Dr. Sears is GRANTED as to the following claims, which are DISMISSED:

(a) Dr. Sears acted with deliberate indifference when he refused to order the removal of Sanders's impacted wisdom teeth on June 4, 2010.

(b) Dr. Sears acted with deliberate indifference and retaliated against Sanders by refusing to prescribe him stronger pain medication between August 2 and 7, 2010 and stronger medication and greater quantities of soft food between August 10 and 13, 2010.

(c) Pugh acted with deliberate indifference in failing to act on Sanders's requests for medical assistance.

(2) Defendants' motion is DENIED as to the following claims, which will proceed to trial:

(a) After Sanders complained about pain from his impacted wisdom teeth on May 24, 2010, Dr. Sears acted with deliberate indifference in failing to examine Sanders until June 4, 2010 and prescribe pain medication for Sanders between May 24 and August 2, 2010.

(b) Dr. Sears acted with deliberate indifference and retaliated against Sanders by acting rudely, leaving Sanders bleeding and in pain and packing Sanders's open sockets with horse hair on August 2, 2010.

(c) Dr. Sears acted with deliberate indifference and retaliated against Sanders by failing to respond to Sanders's requests for pain medication and medical attention between August 7 and 10, 2010 and after August 13, 2010.

(3) Plaintiff Christopher Sanders's motion to suppress defendants' use of his medical records (dkt. 45) is DENIED. Plaintiff's request to keep certain medical information private, which I construe as a motion to seal the records in dkt. 44, is GRANTED.

(4) Plaintiff's motion to exclude defendant Dr. Sears from testifying as an expert witness (dkt. 46) is DENIED.

Entered this 18th day of May, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge