

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

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BOOKER T. SHIPP,

Plaintiff,

v.

ROBERT HOBDDAY,

Defendant.

OPINION & ORDER

17-cv-955-jdp

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Plaintiff Booker T. Shipp, appearing pro se, is an inmate at the New Lisbon Correctional Institution. Shipp has filed this civil lawsuit under 42 U.S.C. § 1983, alleging that defendant dentist Robert Hobdday failed to fully extract one of Shipp's teeth and then delayed in correcting the mistake by extracting the rest of the tooth. Shipp seeks leave to proceed *in forma pauperis* and he has made an initial partial payment of the filing fee as previously directed by the court.

The next step is for me to screen Shipp's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for monetary damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. I must read Shipp's pro se complaint generously. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam). With these principles in mind, I conclude that Shipp may proceed on claims against Hobdday under both the Eighth Amendment and Wisconsin negligence law.

## ALLEGATIONS OF FACT

At the screening stage, I accept Shipp's allegations as true. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010).

Shipp is an inmate at the New Lisbon Correctional Institution (NLCI). Defendant Robert Hobday was a dentist at NLCI. On December 29, 2016, Hobday extracted one of Shipp's lower-left molar teeth. But Hobday did not remove the whole tooth. Shipp filed dental service requests about continuing pain and a severe infection at the site of the extraction. Hobday examined Shipp on March 27, 2017, and wrote in Shipp's file that it "feels like something is in [the extraction site]." Dkt. 1, at 2. But Hobday did not immediately do anything to fix the problem.

Shipp continued to send dental service requests, at one point stating that he had discovered a tooth fragment embedded in his gumline. On April 20, 2017, Hobday performed a second surgery to remove the rest of the tooth. I take Shipp to be saying that the second surgery was successful.

## ANALYSIS

Shipp brings claims against Hobday under the Eighth Amendment and Wisconsin negligence law.

The Eighth Amendment prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). A "serious medical need" is a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584–85 (7th Cir. 2006). A medical need is serious if it is life-threatening, carries

risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371–73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). I will assume that the Shipp's condition following his first surgery was a serious medical need.

To be considered “deliberately indifferent,” an official must know of and disregard “an excessive risk to an inmate's health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Snipes v. Detella*, 95 F.3d 586, 590 (7th Cir. 1996). However, inadvertent error, negligence, gross negligence, and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

Shipp contends that Hobday was deliberately indifferent to his needs by failing to take action after noticing that some of his tooth remained after the first extraction and that he suffered from a severe infection. Delay in medical treatment can violate the Eighth Amendment, *see, e.g., McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010), so I will allow Shipp to proceed on an Eighth Amendment claim against Hobday.

Shipp also brings a claim under Wisconsin negligence law. Under Wisconsin law, a negligence or medical malpractice claim requires the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages.” *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Shipp contends that Hobday was negligent both in failing to adequately perform the first tooth extraction, and in waiting to perform the second. I will allow Shipp to proceed on both of these claims.

ORDER

IT IS ORDERED that:

1. Plaintiff Booker T. Shipp is GRANTED leave to proceed on Eighth Amendment and Wisconsin medical negligence claims against defendant Robert Hobday.
2. 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 defendant. Plaintiff should not attempt to serve defendant on his own at this time. Under the agreement, the Department of Justice will have 60 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.
3. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.
4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.
5. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered July 30, 2018.

BY THE COURT:

/s/

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JAMES D. PETERSON  
District Judge