

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

REGINALD DURR,)	
#M-38216,)	
)	
Plaintiff,)	
)	Case No. 17-cv-00554-JPG
vs.)	
)	
DAVID LARSON)	
and GARY GERST,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff Reginald Durr, an inmate who is currently incarcerated at Big Muddy River Correctional Center (“Big Muddy”), brings this civil rights action *pro se* pursuant to 42 U.S.C. § 1983. (Doc. 1). This case was originally filed in the United States District Court for the Northern District of Illinois. *See Durr v. Larson*, No. 17-cv-03206 (N.D. Ill. filed April 27, 2017). The Northern District transferred the case to this District on May 26, 2017. (Doc. 6).

In the Complaint, Plaintiff claims that two medical providers at Big Muddy, named David Larson (doctor) and Gary Gerst (physician’s assistant), failed to properly diagnose and treat his chronic neck pain. (Doc. 1, p. 4). As time passed, he also began to experience progressive loss of use of his left arm and hand. *Id.* An outside specialist recommended surgery in February 2017 but warned Plaintiff that he may not recover full use of his arm or hand. *Id.* Plaintiff now sues both defendants for medical negligence. (Doc. 1, p. 5). He requests monetary relief and “laser surgery.” (Doc. 1, p. 6).

At the time he filed this action, Plaintiff did not pay a filing fee or seek leave to proceed *in forma pauperis*. When the case was transferred to this District on May 26, 2017, the Clerk of

this Court sent Plaintiff a letter instructing him to pay the \$400.00 filing fee or file a Motion for Leave to Proceed *in forma pauperis* (“IFP Motion”) within thirty days. He missed this deadline, and the Court entered a Notice of Impending Dismissal granting him an additional twenty-one days to pay the filing fee or file an IFP Motion. (Doc. 8). Plaintiff paid his \$400.00 filing fee on June 30, 2017.

The Complaint is now subject to preliminary review under 28 U.S.C. § 1915A, which provides:

(a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–

- (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The claim of entitlement to relief must cross “the line between possibility and plausibility.” *Id.* at 557. At this juncture, the factual allegations of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009). The Complaint does not survive screening under this standard and shall be dismissed.

Complaint

Sometime after Plaintiff arrived at Big Muddy in 2013, he met with a doctor and physician's assistant to discuss his neck pain. (Doc. 1, p. 4). Plaintiff was told to rotate his neck and wrap a hot towel around it to relieve the pain. *Id.* In 2015, Plaintiff again complained of neck pain and was told that x-rays showed "no issues" with his neck. *Id.* He asked whether an MRI would help identify the source of the pain. *Id.* It is not clear whether he received a response to this question. *Id.* Plaintiff attributed the pain to aging and did not file a grievance to complain about the denial of medical care at that time. *Id.*

In September 2016, Plaintiff began having problems raising his left arm and holding items in his left hand. (Doc. 1, p. 4). He underwent an MRI in December 2016. *Id.* The MRI revealed "[m]arked degenerative change[s] in [Plaintiff's] cervical spine including areas of very severe central canal spinal stenosis and neural foraminal encroachment," along with "[c]ervical myelopathy . . . in [his] mid to lower cervical spine." (Doc. 1, p. 8). In February 2017, a specialist recommended surgery to address Plaintiff's neck pain. (Doc. 1, p. 4). However, the specialist warned Plaintiff that he might not regain full use of his left arm or hand. *Id.*

Plaintiff now claims that both defendants were negligent in their care and treatment of him. (Doc. 1, pp. 4-5). He seeks monetary relief against them. (Doc. 1, p. 6). He also seeks "laser surgery."¹ *Id.*

Discussion

Plaintiff asserts a single claim against the defendants for negligence. However, he cannot proceed with a single claim of medical negligence under 42 U.S.C. § 1983. A defendant can

¹ No allegations in the Complaint suggest that laser surgery was actually recommended or that it was deemed to be urgent. Plaintiff also did not file a motion seeking any sort of emergency injunctive relief, such as a temporary restraining order or a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. If he seeks emergency relief, Plaintiff should file a separate motion pursuant to Rule 65 on or after the date he files his First Amended Complaint.

never be held liable under § 1983 for negligence or even gross negligence.² *Gomez v. Randle*, 680 F.3d 859, 864 (7th Cir. 2012).

Section 1983 instead creates a cause of action against an individual who causes or participates in a constitutional deprivation while acting under the color of state law. *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1248 (7th Cir. 1994) (citing *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)); *see also Pepper v. Village of Oak Park*, 430 F.3d 809, 810 (7th Cir. 2005). Claims brought by prisoners for the denial of medical care are governed by the Eighth Amendment, which protects prisoners from cruel and unusual punishment. U.S. CONST., amend. VIII. Deliberate indifference to serious medical needs of prisoners constitutes cruel and unusual punishment. *Berry v. Peterman*, 604 F.3d 435 (7th Cir. 2010); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Erickson v. Pardus*, 551 U.S. 89, 94 (2006) (*per curiam*).

A medical need is objectively serious where it has either “been diagnosed by a physician as mandating treatment” or where the need is “so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997). The Complaint suggests that Plaintiff’s medical condition was serious enough to support an Eighth Amendment claim. (Doc. 1, pp. 4-5). Plaintiff suffered from chronic neck pain and progressive loss of use of his left arm and hand. *Id.* The condition was eventually diagnosed as requiring surgery. *Id.*

However, the Complaint is devoid of allegations suggesting that either defendant responded to Plaintiff’s serious medical condition with deliberate indifference. A prison official

² With that said, Plaintiff may bring his state claims in the same action as a federal constitutional claim, if the state claims “are so related to [the federal claims] that they form part of the same case or controversy under Article III of the United States Constitution.” *See* 28 U.S.C. § 1367(a). But where a state law claim “substantially predominates over the claim . . . over which the district court has original jurisdiction” or where the district court dismisses all claims over which it has original jurisdiction, the district court may decline to exercise supplement jurisdiction over the state law claim(s). *See* 28 U.S.C. § 1367(c)(2), (3).

acts with deliberate indifference when he “know[s] of and disregard[s] an excessive risk to inmate health.” *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). “Mere negligence or even gross negligence does not constitute deliberate indifference.” *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). Plaintiff sues both defendants for negligence, which does not support an Eighth Amendment claim.

Moreover, the allegations do not suggest that the defendants exhibited deliberate indifference toward Plaintiff. The statement of claim mentions the “doctor and PA” only once. (Doc. 1, p. 4). Plaintiff states, “During my visits to health care I told the doctor and PA about the pain in my neck.” *Id.* This allegation does not suggest that either defendant exhibited deliberate indifference toward Plaintiff.

In fact, Plaintiff does not mention Doctor Larson or P.A. Gerst by name anywhere in the statement of his claim. Because most of the allegations are written in the passive voice (*i.e.*, Plaintiff “was told”) without reference to the speaker, it is unclear who responded to Plaintiff’s requests for medical care. Certainly, no allegations suggest that Doctor Larson or P.A. Gerst showed reckless disregard to an excessive risk to inmate health. *Greeno*, 414 F.3d at 653.

Plaintiff’s Complaint does not survive preliminary review and shall be dismissed. However, the dismissal is without prejudice, and Plaintiff shall be granted leave to re-plead the Eighth Amendment claim and Illinois medical negligence claim against both defendants in an amended complaint. If he chooses to do so, Plaintiff must comply with the deadline and instructions for filing his First Amended Complaint set forth in the below disposition.

Disposition

IT IS HEREBY ORDERED that the Complaint is **DISMISSED** without prejudice for failure to state a claim upon which relief may be granted. This includes dismissal of the Illinois

medical negligence claim and Eighth Amendment deliberate indifference to medical needs claim against Defendants David Larson and Gary Gerst.

IT IS FURTHER ORDERED that Plaintiff is **GRANTED** leave to file a “First Amended Complaint” in this case **on or before August 17, 2017**. Should Plaintiff fail to file his First Amended Complaint within the allotted time, dismissal of this action will become with prejudice. FED. R. CIV. P. 41(b). *See generally Ladien v. Astrachan*, 128 F.3d 1051 (7th Cir. 1997); *Johnson v. Kamminga*, 34 F.3d 466 (7th Cir. 1994). Further, a “strike” will be assessed. *See* 28 U.S.C. § 1915(g).

Should Plaintiff decide to file an amended complaint, it is strongly recommended that he use the forms designed for use in this District for such actions. He should be careful to label the pleading, “First Amended Complaint,” and he must list *this* case number (Case No. 17-554-JPG) on the first page. To enable Plaintiff to comply with this Order, the Clerk is **DIRECTED** to mail Plaintiff a blank civil rights complaint form.

In the amended complaint, Plaintiff must, at a minimum, describe the actions taken by each defendant that resulted in the deprivation of his federal constitutional rights. He should attempt to include the facts of his case in chronological order, inserting each defendant’s name where necessary to identify the actors. Plaintiff should refrain from filing unnecessary exhibits or including any other unrelated claims in his amended complaint. **Claims found to be unrelated will be further severed into new cases, new case numbers will be assigned, and additional filing fees will be assessed.**

Plaintiff is **ADVISED** that *this* dismissal shall not count as one of his allotted “strikes” under the provisions of 28 U.S.C. § 1915(g).

An amended complaint supersedes and replaces the original Complaint, rendering the original void. *See Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 n. 1 (7th Cir. 2004). The Court will not accept piecemeal amendments to the original Complaint. Thus, the First Amended Complaint must stand on its own, without reference to any previous pleading, and Plaintiff must re-file any exhibits he wishes the Court to consider along with the First Amended Complaint. Finally, the First Amended Complaint is subject to review pursuant to 28 U.S.C. § 1915A.

Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

IT IS SO ORDERED.

DATED: July 19, 2017

s/J. Phil Gilbert
District Judge,
United States District Court