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

GREGORY SCOTT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17−cv–0638−JPG**
	)	
WEXFORD HEALTH SOURCES,INC., DAVID, and BLAKE	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff Gregory Scott, an inmate in Shawnee Correctional Center, brings this action for deprivations of his constitutional rights pursuant to 42 U.S.C. § 1983. Plaintiff requests compensatory and punitive damages. This case is now before the Court for a preliminary review of the Complaint pursuant to 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–
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> (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

Plaintiff arrived at Shawnee Correctional Center on July 18, 2013. (Doc. 1, p. 7). As part of intake, Plaintiff was sent to the health care unit for screening. *Id.* Five days later on July 23, 2013, Plaintiff had a doctor visit with Dr. David. *Id.* David diagnosed Plaintiff with high cholesterol and prescribed medication. *Id.* After being on the medication for several days, Plaintiff began feeling unwell and so signed up for sick call again. *Id*. That time, Plaintiff saw Blake, a nurse practitioner, instead. *Id.* In response to Plaintiff's complaints, Blake increased the dosage of Plaintiff's cholesterol medication. *Id.* Plaintiff alleges that he continued to feel discomfort and every time he reported such symptoms to the health care unit, his dosage was increased. *Id.*

On December 5, 2015, Plaintiff awoke in pain; he could not see out of his left eye or move his left arm. *Id.* He was admitted to the health care unit for observation and given pain medication. (Doc. 1, p. 8). Plaintiff saw the eye doctor, who referred him to an outside specialist. *Id*. On January 6, 2016, Plaintiff was taken to the Marion Eye Center. Plaintiff was told that the artery behind his left eye was completely blocked, which caused his blindness. *Id*. Plaintiff is unlikely to regain the vision in his left eye. *Id.* Furthermore, damage was found in his right eye as well. *Id*.

When Plaintiff returned to Shawnee, David ran a diagnostic test which revealed that Plaintiff was allergic to his cholesterol medication. *Id*. In addition to his vision problems, Plaintiff has experienced damage to his right arm, including his fingers, arm, and shoulder, and all the way up into his neck. *Id*.

Discussion

Based on the allegations of the Complaint, the Court finds it convenient to divide the pro se action into 2 counts. The parties and the Court will use these designations in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. The following claim survives threshold review:

> **Count 1 –** David and Blake were deliberately indifferent to Plaintiff's serious medical need in violation of the Eight Amendment when they persisted in prescribing the same cholesterol medication despite Plaintiff's repeated claims of discomfort, leading to permanent and lasting damage;

Plaintiff has also attempted to bring another Count, but for the reasons elucidated below, this claim does not survive threshold review.

> **Count 2 –** David and Blake were negligent when they continued Plaintiff on a prescription despite his repeated complaints in violation of Illinois state law.

As to Plaintiff's **Count 1**, prison officials impose cruel and unusual punishment in violation of the Eighth Amendment when they are deliberately indifferent to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Chatham v. Davis*, 839 F.3d 679, 684 (7th Cir. 2016). In order to state a claim for deliberate indifference to a serious medical need, an inmate must show that he 1) suffered from an objectively serious medical condition; and 2) that the defendant was deliberately indifferent to a risk of serious harm from that condition. *Petties v. Carter*, 836 F.3d 722, 727 (7th Cir. 2016). An objectively serious condition includes an ailment that has been "diagnosed by a physician as mandating treatment," one that significantly affects

an individual's daily activities, or which involves chronic and substantial pain. *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997). The subjective element requires proof that the defendant knew of facts from which he could infer that a substantial risk of serious harm exists, and he must actually draw the inference. *Zaya v. Sood*, 836 F.3d 800, 804 (7th Cir. 2016) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

"Delaying treatment may constitute deliberate indifference if such delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012) (internal citations and quotations omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994). The Eight Amendment does not give prisoners entitlement to "demand specific care" or "the best care possible," but only requires "reasonable measures to meet a substantial risk of serious harm." *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). Deliberate indifference may also be shown where medical providers persist in a course of treatment known to be ineffective. *Berry v. Peterman*, 604 F.3d 435, 441-42 (7th Cir. 2010); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005).

Plaintiff has alleged that he suffered from high cholesterol. High cholesterol can be a serious medical need, *McDonald v. Hardy*, 821 F.3d 882, 889 (7th Cir 2016), and here Plaintiff has alleged that he actually suffered from some severe side effects that can be caused by that disease. Specifically, he has alleged that he experienced blocked arteries, and as a result of the blocked arteries, he has lost function in two of his fingers, vision in one eye, and that he is at risk for further harm. Plaintiff has adequately alleged that he suffered from a serious medical need. Additionally, Plaintiff has alleged that he continued to complain to Blake and David about how he felt on the medication. Despite his complaints, Blake and David persisted in treating Plaintiff's condition only with the medication. Plaintiff further alleges that testing after his

injuries revealed that he was allergic to his medication. On these facts, Plaintiff has made a plausible allegation of deliberate indifference as to Blake and David. **Count 1** survives threshold review.

But Plaintiff's **Count 2** must be dismissed. Plaintiff has attempted to bring a claim for medical malpractice pursuant to Illinois state law on the same facts discussed above. Where a district court has original jurisdiction over a civil action such as a § 1983 claim, it also has supplemental jurisdiction over related state law claims pursuant to 28 U.S.C. § 1367(a), so long as the state claims "derive from a common nucleus of operative fact" with the original federal claims. *Wisconsin v. Ho-Chunk Nation,* 512 F.3d 921, 936 (7th Cir. 2008). "A loose factual connection is generally sufficient." *Houskins v. Sheahan,* 549 F.3d 480, 495 (7th Cir. 2008) (citing *Baer v. First Options of Chicago, Inc.,* 72 F.3d 1294, 1299 (7th Cir. 1995)). While this Court has supplemental jurisdiction over these state-law claims pursuant to 28 U.S.C. § 1367, this is not the end of the matter.

Under Illinois law, a plaintiff "[i]n any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice," must file an affidavit along with the complaint, declaring one of the following: 1) that the affiant has consulted and reviewed the facts of the case with a qualified health professional who has reviewed the claim and made a written report that the claim is reasonable and meritorious (and the written report must be attached to the affidavit); 2) that the affiant was unable to obtain such a consultation before the expiration of the statute of limitations, and affiant has not previously voluntarily dismissed an action based on the same claim (and in this case, the required written report shall be filed within 90 days after the filing of the complaint); or 3) that the plaintiff has made a request for records but the respondent has not

complied within 60 days of receipt of the request (and in this case the written report shall be filed within 90 days of receipt of the records). *See* 735 ILL. COMP. STAT. §5/2-622(a) (West 2017). A separate affidavit and report shall be filed as to each defendant. *See* 735 ILL. COMP. STAT. §5/2-622(b).

Failure to file the required certificate is grounds for dismissal of the claim. *See* 735 ILL. COMP. STAT. § 5/2-622(g); *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000). However, whether such dismissal should be with or without prejudice is up to the sound discretion of the court. *Sherrod*, 223 F.3d at 614. "Illinois courts have held that when a plaintiff fails to attach a certificate and report, then 'a sound exercise of discretion mandates that [the plaintiff] be at least afforded an opportunity to amend her complaint to comply with section 2-622 before her action is dismissed with prejudice.'" *Id.*; *see also Chapman v. Chandra*, Case No. 06-cv-651-MJR, 2007 WL 1655799, at *4-5 (S.D. Ill. June 5, 2007).

In the instant case, Plaintiff has failed to file the necessary affidavits or reports. Therefore, the claim in **Count 2** shall be dismissed. However, the dismissal shall be without prejudice at this time, and Plaintiff shall be allowed 35 days to file the required affidavits, if he desires to seek reinstatement of this claim. The certificates of merit must also be filed, in accordance with the applicable section of §5/2-622(a). Should Plaintiff fail to timely file the required affidavits/certificates, the dismissal of **Count 2** may become a dismissal with prejudice. *See* Fed. R. Civ. P. 41(b).

Finally, Plaintiff has named Wexford Health Sources as a defendant in this action, but Wexford is not mentioned once in Plaintiff's statement of claim. Plaintiffs, even those proceeding pro se, for whom the Court is required to liberally construe their complaints, *see Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), are required to associate specific defendants

with specific claims so these defendants are put on notice of the claims brought against them and so they can properly answer the complaint. *See Hoskins v. Poelstra,* 320 F.3d 761, 764 (7th Cir.2003) (a "short and plain" statement of the claim suffices under Federal Rule of Civil Procedure 8 if it notifies the defendant of the principal events upon which the claims are based); *Brokaw v. Mercer County,* 235 F.3d 1000, 1024 (7th Cir.2000) ("notice pleading requires the plaintiff to allege just enough to put the defendant on notice of facts providing a right to recovery"). Plaintiff has not ascribed to Wexford any of the conduct that he complains about.

Plaintiff does allege that Wexford employed the other Defendants and is responsible for overseeing their work. (Doc. 1, p. 5). But this is a respondeat superior theory of liability—Plaintiff is alleging that Wexford is responsible for Blake and David's action because they worked for Wexford. There is no respondeat superior liability under § 1983. *Shields v. Illinois Department of Corrections*, 746 F.3d 782, 795-96 (7th Cir. 2014); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (1982). Any potential claims against Wexford on the theory that they employed the defendants is foreclosed by the relevant case law; Wexford will be dismissed from this action without prejudice.

Pending Motions

Plaintiff's Motion for Appointment of Counsel is referred to a United States Magistrate Judge for disposition. (Doc. 3).

Disposition

IT IS HEREBY ORDERED that **Count 1** survives threshold review against David and Blake. Wexford Health Sources is **DISMISSED without prejudice**.

IT IS FURTHER ORDERED that if Plaintiff wishes to move the Court to reinstate the medical malpractice/negligence claim(s) in **Count 2** against Defendants **Blake and David**,

Plaintiff shall file the required affidavit(s) pursuant to 735 Ill. Comp. Stat. §5/2-622, within 35 days of the date of this order (on or before **August 31, 2017**). Further, Plaintiff shall timely file the required written report(s)/certificate(s) of merit from a qualified health professional, in compliance with §5/2-622. Should Plaintiff fail to timely file the required affidavits or reports, the dismissal of **Count 2** may become a dismissal **with prejudice**.

IT IS ORDERED that the Clerk of Court shall prepare for Defendants Blake and David: (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the complaint, and this Memorandum and Order to each Defendant's place of employment as identified by Plaintiff. If a Defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect formal service on that Defendant, and the Court will require that Defendant to pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that, with respect to a Defendant who no longer can be found at the work address provided by Plaintiff, the employer shall furnish the Clerk with the Defendant's current work address, or, if not known, the Defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file or disclosed by the Clerk.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to a United States Magistrate Judge for further pre-trial proceedings.

Further, this entire matter is **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

IT IS FURTHER ORDERED that if judgment is rendered against Plaintiff, and the judgment includes the payment of costs under Section 1915, Plaintiff will be required to pay the full amount of the costs, notwithstanding that his application to proceed *in forma pauperis* has been granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Plaintiff is **ADVISED** that at the time application was made under 28 U.S.C. § 1915 for leave to commence this civil action without being required to prepay fees and costs or give security for the same, the applicant and his or her attorney were deemed to have entered into a stipulation that the recovery, if any, secured in the action shall be paid to the Clerk of the Court, who shall pay therefrom all unpaid costs taxed against plaintiff and remit the balance to plaintiff. Local Rule 3.1(c)(1)

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 26, 2017

s/J. Phil Gilbert
U.S. District Judge