COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP501 **Cir. Ct. No. 2010CV715**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES J. KAUFMAN,

PLAINTIFF-APPELLANT,

V.

DR. THOMAS BOSTON, CYNTHIA THORPE, R.N., MARY MILLER, RICHARD RAEMISCH AND PETER HUIBREGTSE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. James Kaufman appeals an order denying his motion for summary judgment and granting summary judgment in favor of several dental staff and administrative personnel of the Department of Corrections ("DOC"). Kaufman alleged that while an inmate at the Wisconsin Secure

Program Facility ("WSPF"), he received delayed treatment for dental pain. Kaufman sought recovery under both state law and 42 U.S.C. § 1983, claiming an Eighth Amendment violation.

¶2 Kaufman argues that venue of the underlying action was improperly transferred from Grant County to Dane County. Kaufman also contends that the circuit court erred by dismissing his state law claim and concluding there was no violation of his Eighth Amendment rights. We reject Kaufman's arguments and affirm the order.

BACKGROUND

¶3 Kaufman was incarcerated at WSPF from September 6, 2006, until March 20, 2007. During that time period, Dr. Thomas Boston was the dentist at WSPF; Mary Miller was the Health Services Unit Manager at WSPF; Peter Huibregtse was the Deputy Warden of WSPF; Cynthia Thorpe was the Health Services Nursing Coordinator for DOC; and Richard Raemisch was the Deputy Secretary of DOC.

¶4 On October 3, 2006, dental staff received a dental service request ("DSR") from Kaufman dated September 29, 2006. In the DSR, Kaufman stated:

> I have periodic pains (very sharp but brief) throughout both my upper and lower jaw, right where the teeth enter the bone (that's where it feels like it is), and my teeth are sensitive to cold, especially on the right side. At your convenience, I'd like to be examined and have any necessary work done. (If I thought you'd do it, I'd have all my teeth pulled and get dentures, as I have the same gradual deterioration of teeth as both parents had.)
>
> No hurry, it's <u>not</u> an emergency.

Kaufman checked a box on the DSR requesting an annual exam and he was placed on a routine waiting list. On December 12, 2006, Kaufman submitted a second DSR indicating that the pain was gradually worsening and asking where he was on the waiting list. Boston was informed on January 3, 2007, that he was in the "same place as before" on the list.

¶5 On January 12, 2007,[1] Kaufman submitted a third DSR, seeking an exam, extraction and dentures. The form indicated that Kaufman's pain was gradually growing worse and one of his back teeth was causing a painful sore to develop on the left side of his tongue, making it difficult to eat. Kaufman further indicated he thought his best option would be to have the dentist pull his remaining teeth and to receive full dentures. Additional DSRs followed on January 17 and January 24. On February 6, 2007, Boston extracted two of Kaufman's teeth and prescribed both Vicodin and ibuprofen for any resultant pain. Progress notes indicate that although Kaufman asked Boston to remove all of his teeth, Boston explained that such action was not warranted.

¶6 On February 12, 2007, Kaufman submitted an additional DSR, questioning whether his mouth was healing properly because there was a foul-smelling discharge. Kaufman was evaluated on February 14, at which time Boston determined that Kaufman was healing within the normal limits and had no swelling or pus at the site. Boston noted that Kaufman still had sufficient pain medication remaining, and determined that no further treatment was necessary.

[1] Although the circuit court noted, on the undisputed facts, that Kaufman's third DSR was submitted on January 12, 2007, its decision later discusses that DSR as if it had been submitted on January 14, 2007. Any confusion likely arises from the form itself, as it appears that an original written date of January 14 was changed to January 12. Our discussion will proceed using the date noted by the circuit court—January 12, 2007.

¶7 In a February 20, 2007 DSR, Kaufman inquired why he was unable to get a full set of dentures and Boston reiterated that Kaufman did not need full dentures. In a DSR dated March 6, 2007, Kaufman indicated that he was experiencing significant pain in his teeth and gums, but did not request to be seen, nor did he request pain medications. Rather, he indicated the DSR was submitted in the hopes that he could receive treatment from the institution where he would soon be transferred.

¶8 On January 11, 2007, Kaufman submitted the first of five administrative grievances challenging what he deemed to be inadequate dental care. All were either dismissed or rejected, and any administrative appeals were likewise dismissed. Kaufman initiated the underlying suit in Grant County Circuit Court. Venue was transferred to Dane County over Kaufman's objection. The parties filed competing motions for summary judgment and the circuit court granted summary judgment in favor of the defendants. This appeal follows.

DISCUSSION

¶9 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶10 As an initial matter, Kaufman argues the circuit court erred by transferring venue of the underlying matter from Grant County to Dane County. We are not persuaded. WISCONSIN STAT. § 801.50(3) provides: "[A]ll actions in which the sole defendant is the state, any state board or commission or any state

officer, employee or agent in an official capacity shall be venued in [Dane County] unless another venue is specifically authorized by law." Kaufman asserts that the matter was properly venued in Grant County because he named the defendants in their individual capacities. It is clear from Kaufman's complaint, however, that the defendants were sued for actions in their work as state employees. In any event, a defect in venue does not affect the validity of an order or judgment. WIS. STAT. § 801.50(1).

¶11 Kaufman also contends that the circuit court erred by dismissing his state law claim because "notice of claim is not required in § 1983 actions." Kaufman is mistaken. Even though Kaufman also alleged a claim under 42 U.S.C. § 1983, his state law claim is subject to the notice of claim requirement. Prior to filing suit against a state employee alleging a state law claim, a claimant must serve a written notice of the claim upon the attorney general's office within 120 days of the incident from which the claim arises. *See* WIS. STAT. § 893.82(3). Failure to comply with the requirements of § 893.82(3) is fatal to any claim because its requirements are jurisdictional. ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 116, 595 N.W.2d 392 (1999). Further, timely and proper compliance with § 893.82 must be alleged in the complaint, and failure to do so is grounds for dismissal. *See* ***Elm Park Iowa, Inc. v. Denniston***, 92 Wis. 2d 723, 728, 286 N.W.2d 5 (Ct. App. 1979) (analyzing predecessor statute). Here, as the circuit court noted, Kaufman's complaint failed to allege that he complied with the notice requirements of § 893.82. Accordingly, the circuit court properly dismissed Kaufman's state law claim.

¶12 Turning to Kaufman's remaining claim, the Eighth Amendment proscribes "the unnecessary and wanton infliction of pain"; the conduct necessary to fulfill this standard depends on the nature of the alleged constitutional

violations. ***Hudson v. McMillian***, 503 U.S. 1, 5 (1992). In the context of an inmate's medical needs, "deliberate indifference to serious medical needs … constitutes the unnecessary and wanton infliction of pain." ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976) (citation omitted). The test for an Eighth Amendment violation, therefore, has both an objective and subjective component. ***Farmer v. Brennan***, 511 U.S. 825, 834 (1994). Kaufman must show that he had an objectively serious medical need, and that the named defendants were deliberately indifferent to it. ***Grieveson v. Anderson***, 538 F.3d 763, 779 (7th Cir. 2008).

¶13 "In cases where prison officials delayed rather than denied medical assistance to an inmate, courts have required the plaintiff to offer 'verifying medical evidence' that the delay (rather than the inmate's underlying condition) caused some degree of harm." ***Williams v. Liefer***, 491 F.3d 710, 714-15 (7th Cir. 2007); *see also* ***Martin v. Tyson***, 845 F.2d 1451, 1458 (7th Cir. 1988) (rejecting Eighth Amendment claim for delay in treatment in part because prisoner failed to produce any evidence of injury caused by the delay). Expert testimony would clearly satisfy this requirement. ***Williams***, 491 F.3d at 715.

¶14 Kaufman argues that the circuit court erred by requiring Kaufman to submit verifying medical evidence in the form of expert testimony. Kaufman contends that his DSRs, beginning in September 2006, as well as his eventual diagnosis and treatment, satisfy the requirement for verifying medical evidence. Although Kaufman correctly asserts that expert testimony is not required in every delayed treatment case, we conclude that Kaufman's proffered evidence, standing alone, is not sufficient to establish that the delay exacerbated Kaufman's condition or otherwise harmed him. *See* ***id.*** The circuit court, therefore, properly determined that under the facts of this case, expert opinion was necessary to establish causation.

¶15 Despite Kaufman's emphasis on the delay in treatment from his September 2006 DSR until the February 2007 extractions, it was not until the January 12, 2007 DSR that Kaufman asked for an extraction and complained of pain that would have warranted a departure from the waiting list. Kaufman, however, submitted no expert opinion that the delay from January 12 to February 6 was unreasonable; that his teeth would not have needed extraction had he been seen earlier; or that any delay caused him harm beyond his temporary pain.[2] In addition, it is undisputed that at no time between January 12 and February 6 did Kaufman request any pain medication from the dental staff.

¶16 Because Kaufman has failed to produce verifying medical evidence of injury caused by the twenty-five day delay, the dental staff is entitled to summary judgment on Kaufman's Eighth Amendment claim. It follows that in the absence of verifying medical evidence of causation, Kaufman's Eighth Amendment claim against the administrative personnel likewise fails.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] In his reply brief, Kaufman argues that his request for the appointment of a medical expert was denied by the circuit court. The record shows that Kaufman moved the court for appointment of a medical expert, but that request was denied after a hearing. Kaufman has failed to provide this court with a transcript from that hearing. Therefore, we must assume that the missing transcript supports the trial court's decision. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.). In any event, Kaufman provides no authority holding that the court was required to appoint a medical expert for Kaufman to assist him in proving his Eighth Amendment claim.