

APPENDIX A

(Opinion from United States Court of Appeals Fifth Circuit)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

April 5, 2019

Lyle W. Cayce
Clerk

GEORGE EDWARD TUSTIN, JR.,

Plaintiff - Appellant

v.

BRAD LIVINGSTON; BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; FRANKIE REESCANO; PATRICIA LECUYER; EUGENE G. MAINOUS; NICHOLAS RUSSO; STEPHEN HAMILTON, Doctor of Dental Surgery; PAUL E. STRUNK, University of Texas Medical Branch Stringfellow R-2 Unit; ELGENE G. MAINOUS, Doctor of Dental Surgery,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:12-CV-0022

Before JOLLY and ENGELHARDT, Circuit Judges.*

PER CURIAM:**

George Edward Tustin, Jr., Texas prisoner #443411, filed this pro se § 1983 civil rights lawsuit alleging that prison officials and healthcare

* This matter is being decided by a quorum. *See* 28 U.S.C. § 46(d).

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

providers refused to extract his abscessed tooth. He claims that the extreme pain he suffered during the four years he awaited surgery constituted cruel and unusual punishment in violation of the Eighth Amendment. The district court dismissed Tustin's complaint for failure to state a claim, reasoning that the allegations did not amount to deliberate indifference. We previously granted Tustin leave to proceed in forma pauperis on appeal. We now affirm the district court.

I.

Tustin, who is incarcerated in the Texas Department of Criminal Justice (TDCJ), suffers from numerous medical conditions.¹ In 1994, he was diagnosed as having an arachnoid cyst on his brain. In 1998, he was diagnosed as suffering from widespread cerebral dysfunction following an abnormal EEG. In March 2009, he began experiencing dental problems. On March 4, Tustin saw a prison dentist due to swelling and pain on his #20 tooth. Tustin is allergic to the local anesthetic used in dental procedures, and therefore, the dentist performed the filling without anesthetic to avoid a possible allergic reaction.

Eight days later, on March 12, Tustin returned to the dentist about an abscess and pain on his #20 tooth. The tooth needed to be removed, but the prison dentist could not perform the procedure because of Tustin's allergies to local anesthetics. Instead, the dentist prescribed Tustin antibiotics and ibuprofen for the pain and referred him to an oral surgeon at the University of Texas Medical Branch (UTMB) in Galveston. Tustin was scheduled to have the tooth extracted at UTMB Galveston on July 20, 2009. On the bus en route to UTMB Galveston, however, Tustin suffered a seizure. Tustin was diverted

¹ The following facts are drawn from Tustin's live complaint, filed on February 18, 2016, and the medical records that Tustin has attached to and incorporated into his complaint.

to the Byrd Unit in Huntsville where he was treated and prescribed anti-seizure medicine. Due to his cyst, dentists refused to extract Tustin's #20 tooth.

Tustin saw the prison dentist again in February 2010. The dentist stated that he would refer Tustin back to UTMB Galveston to have the #20 tooth removed. During another appointment with the prison dentist in April 2010, Tustin was again told that he would be sent back to UTMB Galveston to have the tooth extracted.

Tustin saw two other prison dentists in 2010. In September 2010, Tustin saw a prison dentist for teeth cleaning. The dentist noted defects on the #5 and #31 tooth and stated that he would see if Tustin needed to be sent to UTMB for surgery. In December 2010, Tustin saw Dr. Nicholas Russo, who noted that Tustin complained of problems with his #5, #17, and #31 teeth. Dr. Russo asked Tustin if he would like to have his #5 tooth restored without local anesthetics and Tustin agreed. Dr. Russo also referred Tustin to UTMB Galveston to have his #17 tooth extracted.

In March 2011, Dr. Russo attempted to perform a restoration on tooth #20 without local anesthetic due to Tustin's allergy. During the procedure, however, Tustin became unresponsive and he was moved to the emergency room for treatment. The prison dentist followed up with Tustin in the emergency room. Tustin informed the dentist that he suffered from daily blackouts due to the cyst on his brain. The dentist rescheduled the restoration procedure.

On April 4, 2011, Tustin saw Dr. Elgene Mainous at UTMB Galveston. Dr. Mainous told Tustin that he would not allow UTMB dentists to put Tustin under general anesthesia for tooth extractions until his cyst was treated or removed. Tustin, however, was still able to receive unanesthetized treatment and, on April 5, Dr. Russo completed a filling on his #5 tooth. Tustin continued

to visit prison dentists throughout 2011. Those dentists noted that Tustin's #20 tooth extraction was delayed due to complications caused by his cyst and that he was awaiting a neurological assessment. But Tustin had trouble getting clearance from neurologists to undergo general anesthesia. At a neurological consultation in November 2011, Tustin reported that he was suffering from worsening headaches and seizure-like muscle spasms multiple times a day despite his anti-seizure medication. This was confusing to the doctors who examined him because his "symptoms are not [consistent with] typical seizure descriptions" and "arachnoid cysts do[] not often present with headaches." Tustin was scheduled to undergo an EEG to determine if he was suffering from seizures and the neurosurgeon suggested the possibility of surgery to decompress the arachnoid cyst.

Tustin also suffered from intermittent chest pain. When this condition began worsening in 2011, his unit doctors required him to undergo a stress test to be cleared for surgery. Tustin was unable to complete at least one stress test due to a vasovagal response.

Despite these hurdles, prison dentists still attempted to treat Tustin's dental problems. According to Tustin, Dr. Russo prescribed him over 450 doses of pain medication and 40 doses of antibiotics from September 2011 through January 2013; Dr. Stephen Hamilton prescribed Tustin over 200 doses of pain medication; Patricia LeCuyer, NP, prescribed Tustin over 200 doses of pain medication and 50 doses of antibiotics. One UTMB dentist even referred Tustin for a dermatology consultation to determine whether he was allergic to lidocaine or certain preservatives within the anesthetics in hope that they could "do these extractions in clinic with local anesthetics." On February 6, 2013, Dr. Mainous cleared Tustin for surgery and extracted his #17, #19, #20, and #31 teeth.

II.

Tustin, proceeding pro se and in forma pauperis filed a claim for damages and injunctive relief in federal district court, arguing that the delay in removing his #20 tooth violated the Eighth and Fourteenth Amendments. Tustin also alleged a violation of Texas state law. The defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6). The district court dismissed Tustin's federal claims with prejudice under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim and declined to exercise supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1337(c)(3). The district court determined that Tustin's allegations did not amount to deliberate indifference because they did not establish that anyone who treated him refused to help or treat Tustin. We granted Tustin leave to proceed in forma pauperis on whether the district court erred in determining that the delay in treatment was not caused by deliberate indifference.²

III.

We review de novo a dismissal pursuant to § 1915(e)(2)(B)(ii), which is the same standard applied to dismissals under Fed. R. Civ. P. 12(b)(6). *See Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). Under that standard, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We accept as true all well-pleaded facts, “viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th

² Tustin did not appeal the denial of injunctive relief or dismissal of his Fourteenth Amendment claim and therefore he has abandoned them. *See Youhey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993); *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Cir. 2007). We hold allegations of pro se complaints “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

IV.

To state a claim under 42 U.S.C. § 1983 for violation of the Eighth Amendment, a prisoner must allege that prison officials showed “deliberate indifference to a prisoner’s serious illness or injury.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The standard for deliberate indifference is “subjective recklessness.” *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994). For a prison official to be liable, he must “know[] of and disregard[] an excessive risk to inmate health or safety.” *Id.* at 837.

To establish deliberate indifference, Tustin must show “that a prison official ‘refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.’” *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006) (quoting *Domino v. Tex. Dep’t of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)). Delay in medical care, however, “can only constitute an Eighth Amendment violation if there has been deliberate indifference [that] results in substantial harm.” *Id.* (alteration in original) (quoting *Mendoza v. Lynaugh*, 989 F.2d 191, 193 (5th Cir. 1993)). An allegation of “[u]nsucessful medical treatment does not give rise to a § 1983 cause of action. Nor does mere negligence, neglect or medical malpractice.” *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (citations and internal quotation marks omitted).

Tustin has failed to state a claim for deliberate indifference. In response to Tustin’s complaint that his #20 tooth was abscessed, he was referred to UTMB Galveston to have it removed in July 2009. This surgery was only delayed because Tustin suffered a seizure while being transported to the

hospital. Tustin, however, continued to receive treatment from prison dentists, although they could not fill or remove the tooth at the prison hospital because he was allergic to local anesthetics. By his own estimate, Tustin had at least six appointments with prison or UTMB dentists in 2010. And he admits that he was prescribed pain medication and antibiotics to treat his condition. During this period, from 2009 until 2011, Tustin received ongoing dental treatment. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995) (“Medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate’s allegations of deliberate indifference.” (citing *Mendoza*, 989 F.2d at 193–95)). In 2011, Dr. Russo attempted to perform a root canal on tooth #20 without local anesthesia but was unable to complete the procedure because of Tustin’s neurological problems. Further delay in Tustin’s treatment was caused by Dr. Mainous’s decision that Tustin receive treatment for his cyst before being placed under general anesthesia. Prison officials, therefore did not “refuse[] to treat him, ignore[] his complaints, intentionally treat[] him incorrectly, or engage[] in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Domino*, 239 F.3d at 756 (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)). To the contrary, the decision was “a classic example of a matter for medical judgment.” *Id.* (quoting *Estelle*, 429 U.S. at 107). Ultimately, Tustin’s allegations are simply disagreements with the treatment decisions made by his dentists. That is insufficient to state a claim of deliberate indifference.

V.

In short, Tustin received ongoing treatment for his dental problems. The decision not to remove Tustin’s tooth was a matter of medical judgment, not deliberate indifference. The judgment of the district court is

AFFIRMED.

ENTERED

September 29, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GEORGE EDWARD TUSTIN, JR.,
TDCJ #00443411,

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Plaintiff,

§

VS.

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CIVIL ACTION NO. 3:12-CV-22

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§

BRAD LIVINGSTON, *et al.*,

§

§

Defendants.

§

FINAL JUDGMENT

For the reasons set forth in the Court's simultaneously issued *Memorandum Opinion and Order*, the Plaintiff's claims under federal law are **DISMISSED WITH PREJUDICE**. The Plaintiff's claims under Texas state law are **DISMISSED WITHOUT PREJUDICE**. Any pending motions are **DENIED** as moot.

This is a **FINAL JUDGMENT**.

The Clerk will provide a copy of this order to the parties.

SIGNED at Galveston, Texas, on September 29, 2016.



GEORGE C. HANKS, JR.

UNITED STATES DISTRICT JUDGE

APPENDIX B

(Opinion from United States District Court, Galveston Division)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MEMORANDUM OPINION AND ORDER

Plaintiff George Edward Tustin, Jr. (TDCJ #00443411), an inmate in the custody of the Texas Department of Criminal Justice - Correctional Institutions Division ("TDCJ"), has filed a *pro se* civil rights complaint under 42 U.S.C. § 1983 and is proceeding *in forma pauperis* (Dkt. 1 and Dkt. 46). He has filed several amended complaints (Dkt. 24, Dkt. 48, Dkt. 76) and a more definite statement of his allegations (Dkt. 64).

The defendants have filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. 78 and Dkt. 79). The motions attack the allegations contained in Tustin's live complaint (Dkt. 77-1) and accompanying memorandum (Dkt. 77-2). Tustin has responded to the motions (Dkt. 81 and Dkt. 82) and submitted a substantial portion of his medical records (Dkt. 84). Because Tustin has quite effectively

summarized his proffered records in his pleadings, the Court will consider the records to be attached to and incorporated into Tustin's live complaint.

Having considered Tustin's factual allegations, the records attached to his pleadings, and the applicable law, the Court will dismiss the federal claims in Tustin's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim on which relief may be granted. Tustin's claims under Texas state law will be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

I. BACKGROUND

Tustin claims that his serious medical needs have been ignored while he has been in TDCJ custody. Tustin's pleadings are voluminous and scattershot—he originally sued 43 defendants, seven of whom remain in the case—but he makes a comprehensible complaint that, when he developed painful dental problems, the defendants ignored his complaints and refused for four years to perform a necessary tooth extraction (Dkt. 77-2 at pp. 6–7). The defendants argue in response that Tustin received attentive care during the four-year period and that the tooth extraction was delayed because Tustin suffers from a complex and worrisome combination of medical conditions that repeatedly thwarted the efforts of dentists and oral surgeons to treat him.

A. Tustin's cyst and heart condition

Although he is not an old man (according to the TDCJ website, he is now 55), Tustin does indeed have a troublesome medical history dating back to the early 1990s. In either 1992 or 1994, a routine magnetic resonance imaging scan (“MRI”) found an arachnoid cyst in Tustin's brain (Dkt. 77-1 at p. 5; Dkt. 84-1 at p. 111).

Electroencephalograms (“EEG”) conducted on Tustin in 1994 and 1998 were “abnormal” and detected electrical activity consistent with cerebral dysfunction; the 1998 EEG report described the cerebral dysfunction as “widespread” (Dkt. 77-2 at p. 5; Dkt. 84-2 at pp. 1–2). Another MRI conducted in 2012 found that the arachnoid cyst had grown and was “most likely” forcing Tustin’s left middle cerebral artery to take an “oblique course” (Dkt. 77-2 at p. 6; Dkt. 84-1 at p. 38).

Tustin has long suffered from chronic headaches, seizures (for which he has been prescribed Dilantin), blackouts, and strokes (Dkt. 84 at pp. 25, 42, 47, 48; Dkt. 84-1 at pp. 4, 36, 39, 81, 82, 90, 111). These symptoms may be related to the cyst, but it does not appear that a definitive link has been established (Dkt. 84-1 at pp. 113–14). Neurosurgical consultations have noted that Tustin’s descriptions of his seizures “are not [consistent with] typical seizure descriptions” and that arachnoid cysts “do[] not often present with headaches” (Dkt. 84-1 at pp. 113–14). Whatever the effects of the cyst and the nature and origin of Tustin’s symptoms, the medical records send mixed messages regarding the advisability of surgical intervention. An operative note from Tustin’s tooth extraction indicates that neurosurgeons deemed the cyst inoperable (Dkt. 84 at p. 47), but records from a neurosurgical consultation contain speculation that surgical decompression of the cyst could alleviate some of Tustin’s symptoms (Dkt. 84-1 at p. 113). Records from another examination propose possible excision if the cyst grows (Dkt. 84-1 at p. 63).

During the early nineties, Tustin also began experiencing intermittent chest pain (Dkt. 84-1 at p. 4). That chest pain, which worsened with exertion, began increasing in frequency and severity in approximately 2011, and cardiologists eventually diagnosed Tustin with “significant” myocardial bridging of the left anterior descending coronary artery (Dkt. 84 at pp. 15, 18; Dkt. 84-1 at pp. 3–4, 41). Tustin underwent coronary artery bypass graft surgery in September of 2013 (Dkt. 77-1 at p. 13; Dkt. 84 at p. 15).

B. Tustin’s dental problems

1. Seizures during initial visits

On March 4, 2009, Tustin saw a prison dentist, Dr. James Manker, for a filling in the #20 tooth (Dkt. 77-1 at p. 5; Dkt. 84-1 at pp. 136–37). Tustin is allergic to several local anesthetics commonly used in dental procedures, and apparently severely so—he told one dentist that, in 1995, he “became comatose after a reaction to Lidocaine” (Dkt. 84-1 at p. 122). Many of Tustin’s medical and dental providers have noted these allergies (Dkt. 84 at pp. 16, 23, 26, 48; Dkt. 84-1 at pp. 8, 81, 86, 94, 100, 102, 109, 115, 120, 122, 123, 125, 126, 127, 129, 130, 133, 134, 136, 138, 139, 140). Dr. Manker, fearing an adverse reaction, accordingly performed the procedure without a local anesthetic (Dkt. 84-1 at p. 136).

Tustin returned to Dr. Manker eight days later, on March 12, 2009, after an abscess developed at the #20 tooth (Dkt. 77-1 at p. 5; Dkt. 84-1 at p. 138). The tooth needed to be extracted (Dkt. 77-1 at p. 5; Dkt. 84-1 at p. 138). Dr. Manker referred Tustin to an oral surgeon for the extraction “due to [Tustin’s] medical allergies to anesthetic”

(Dkt. 77-1 at p. 5; Dkt. 84-1 at p. 138). The extraction was scheduled for July 20, 2009 at the University of Texas Medical Branch in Galveston (“UTMB”) (Dkt. 77-1 at p. 6). On the scheduled date, while he was on the chain bus en route to UTMB for the tooth extraction, Tustin suffered a seizure and a stroke and was diverted as an emergent patient to the Byrd Unit in Huntsville, where Dr. Hung Dao placed him on Dilantin, an anti-seizure medication (Dkt. 77-1 at p. 6; Dkt. 84-1 at pp. 117, 123, 139–44). Because Tustin did not make it to UTMB for the scheduled extraction, Dr. Manker said at a February 5, 2010 appointment that he would refer Tustin to UTMB again (Dkt. 84-1 at pp. 123–24). At another appointment, this one on April 28, 2010, Dr. Manker further consulted with Tustin about the referral to UTMB, telling Tustin that he would need “to ask about any other problem teeth while [at UTMB], since we cannot do any invasive dental care for him here at the unit, due to his allergies to dental anesthetic” (Dkt. 77-1 at p. 6; Dkt. 84-1 at p. 125).

Tustin made several other dental appointments at his prison unit in 2010, including two in July, one in September, one in October, and one in December (Dkt. 77-1 at p. 36; Dkt. 84-1 at pp. 126–30). At the December appointment, Tustin complained specifically about three more teeth (#5, #17, and #31) (Dkt. 84-1 at pp. 129–30). Dr. Nicholas Russo concluded that one of the newly complained-of teeth (#17) needed to be extracted under intravenous sedation and referred Tustin to UTMB (Dkt. 84-1 at pp. 129–30). Another of those teeth (#5), Dr. Russo concluded, could be restored on-site, but only if Tustin was willing to forgo local anesthetic (Dkt. 84-1 at pp. 129–30).

Tustin apparently agreed to the on-site restoration of tooth #5 with no anesthetic; the records indicate that Dr. Russo attempted to perform the procedure on March 29, 2011 (although there is a discrepancy in the records—the March 29, 2011 record indicates that the tooth to be restored was tooth #20, not tooth #5) (Dkt. 84-1 at pp. 89–90). However, Tustin “became unresponsive” during the restoration (Dkt. 84-1 at p. 89). Dr. Russo stopped the procedure, and nurses “placed [Tustin] on a gurney and moved [him] to the facility E.R.” (Dkt. 84-1 at p. 89). When Dr. Russo checked on Tustin in the emergency room, Tustin told Dr. Russo “that he has a cyst in his brain and it causes him to black out frequently” (Dkt. 84-1 at p. 90). According to Dr. Russo’s notes, Tustin said that the blackouts “happen[ed] on a daily basis” (Dkt. 84-1 at p. 90). Noting that Tustin “does have a diagnosis of [left] sylvian fissure arachnoid cyst[,]” Dr. Russo rescheduled the procedure (Dkt. 84-1 at p. 90).

2. Neurological clearance and stress test requirements

Tustin consulted with Dr. Elgene Mainous of the UTMB dental department on April 4, 2011 about possible tooth extractions. Dr. Mainous was clearly concerned that Tustin’s neurological condition could cause surgical complications—Tustin, after all, had been rushed to the emergency room during two very recent attempts to provide him with dental care—and he told Tustin that the UTMB dental department would not place Tustin under general anesthesia until a neurological assessment cleared him for surgery (Dkt. 77-1 at pp. 9, 14). Other providers noted Dr. Mainous’s recommendation and the reasons for it. A prison unit dentist noted in October of 2011 that Tustin was “waiting for

[extractions] at UTMB [oral surgery] but due to complications with brain lesions, [he was] waiting for [a] neurology assessment" (Dkt. 84-1 at p. 68). A note from a November 9, 2011 neurosurgical consultation reads, "[Patient] needs tooth extraction but is unable to have general anesthesia [due to] cysts" (Dkt. 84-1 at p. 114).

The neurological clearance proved hard to come by, apparently because Tustin's neurological symptoms defied easy diagnosis. At a neurological consultation in November of 2011, Tustin told the neurosurgeons that he was suffering "almost muscle spasm-like" seizures multiple times a day, even while taking Dilantin, and that the seizures "[were] different each time" (Dkt. 84-1 at pp. 111–13). Tustin also said that his headaches had, over the past year, become worse and grown to affect a larger portion of his skull (Dkt. 84-1 at p. 111). The neurosurgeons noted that the symptoms described by Tustin were "not [consistent with] typical seizure descriptions" and that arachnoid cysts "do[] not often present with headaches" (Dkt. 84-1 at p. 113). They recommended EEGs to "clarify" the exact nature and origin of Tustin's symptoms and tentatively suggested that surgical decompression of the cyst could alleviate some of those symptoms (Dkt. 84-1 at p. 113). They did not clear Tustin for general anesthesia.

It became even more difficult to assure Tustin's safety under general anesthesia when the intermittent chest pain from which Tustin had long suffered increased in severity and frequency.¹ The worsening chest pain led to another pre-surgery requirement, this time imposed by the unit doctors: that Tustin successfully complete a

¹ As mentioned above, cardiologists eventually diagnosed Tustin with "significant" myocardial bridging of the left anterior descending coronary artery, and Tustin underwent coronary artery bypass graft surgery in September of 2013.

cardiac stress test, in addition to receiving clearance from neurologists, before undergoing general anesthesia (Dkt. 84-1 at pp. 39–41; Dkt. 77-2 at p. 33). Tustin failed to complete at least one attempted stress test “due to vasovagal response” (Dkt. 84-1 at p. 66).

It is evident that Tustin’s allergies to local anesthetics combined with doctors’ concerns about his suitability for general anesthesia to frustrate efforts to treat his dental problems. But Tustin received extensive treatment for the symptoms of those problems—the dentists, particularly Dr. Russo, prescribed a great deal of pain medication and antibiotic treatment while Tustin was consulting with neurosurgeons and cardiologists (Dkt. 77-1 at pp. 9–10, 16, 18). By his own count, Tustin received at least 450 doses of pain medication and 40 doses of antibiotics from Dr. Russo; at least 200 doses of pain medication from Dr. Stephen Hamilton, another prison unit dentist; and at least 200 doses of pain medication and 50 doses of antibiotics from Patricia LeCuyer, NP, a unit nurse (Dkt. 77-1 at pp. 9–10, 16, 18). Moreover, Tustin has provided a chart listing the dates of his appointments with various doctors, dentists, and nurses during the four-year period of which he complains (Dkt. 77-1 at p. 36). The chart contains more than 80 entries, and Tustin says that it is “not a complete record” (Dkt. 77-1 at p. 36).

It is further evident that the unit and UTMB dentists tried to find ways to go beyond merely treating Tustin’s symptoms while his neurological and cardiovascular conditions were being evaluated—in November of 2011, for instance, a UTMB dentist requested a dermatological consultation to determine whether Tustin was allergic to local

anesthetics themselves or simply allergic to certain preservatives within them (Dkt. 84-1 at pp. 118, 122). The dentist wrote in his request that he was trying to find a way to use local anesthetic for the tooth extractions so that Tustin would not have to undergo general anesthesia:

[Patient] presents to [oral and maxillofacial surgery] clinics for extractions of teeth; however, [patient] states that he has a [history of] allergies to Novocaine and Lidocaine, of which in 1995 [patient] complains that he became comatose after a reaction to Lidocaine, although we cannot find record of this [reaction.] *We would like to do these extractions in clinic with local anesthetics as the [patient] is in pain.* Please test Mr. Tustin for allergies to Lidocaine vs. the preservatives Methylparaben or sodium metabisulfide with further recommendations. Thank you.

Dkt. 84-1 at p. 122 (emphasis added).

After Tustin received the necessary surgical clearances, Dr. Mainous operated on him on February 6, 2013, extracting his #17, #19, #20, and #31 teeth (Dkt. 84 at pp. 45–49).

II. THE PLRA

The complaint in this case is governed by the Prison Litigation Reform Act (the “PLRA”). Upon initial screening of a prisoner civil rights complaint, the PLRA requires a district court to scrutinize the claims and dismiss the complaint, in whole or in part, if it determines that the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted;” or “seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b). A reviewing court may dismiss a complaint for these same reasons “at any time” where a party, like Tustin, proceeds *in forma pauperis*. 28 U.S.C. § 1915(e)(2)(B) (mandating dismissal where the complaint is “frivolous or

malicious,” “fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief”). The PLRA also provides that the court “shall on its own motion or on the motion of a party dismiss an action” if it is satisfied that the complaint is “frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.” 42 U.S.C. § 1997e(c).

Tustin proceeds *pro se* in this case. Courts construe pleadings filed by *pro se* litigants under a less stringent standard of review. *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). Under this standard, “[a] document filed *pro se* is ‘to be liberally construed,’ *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)], and ‘a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Nevertheless, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (observing that courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). The Supreme Court has clarified that “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

III. PRISONERS AND MEDICAL CARE

A prisoner may succeed on a claim for damages under 42 U.S.C. § 1983 for inadequate medical care only if he demonstrates “deliberate indifference to serious medical needs” on the part of prison officials or other state actors. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The conduct alleged must “constitute an unnecessary and wanton infliction of pain” or “be repugnant to the conscience of mankind.” *Id.* at 104–06 (quotation marks omitted). A prison official acts with the requisite deliberate indifference “only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

The deliberate-indifference test has both an objective prong and a subjective one. The prisoner must first prove objective exposure to a substantial risk of serious harm. *Gobert v. Caldwell*, 463 F.3d 339, 345–46 (5th Cir. 2006). To then prove subjective deliberate indifference to that risk, the prisoner must show both: (1) that the defendant was aware of facts from which the inference of an excessive risk to the prisoner’s health or safety could be drawn; and (2) that the defendant actually drew the inference that such potential for harm existed. *Farmer*, 511 U.S. at 837; *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). This is an “extremely high standard to meet”—*Domino v. Texas Dep’t of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)—and, absent exceptional circumstances, it is not met by an incorrect diagnosis, unsuccessful medical treatment, acts of negligence, medical malpractice, or a prisoner’s disagreement with his medical

treatment. *Id.*; *Gobert*, 463 F.3d at 346. Even gross negligence does not establish deliberate indifference. *Hernandez v. Tex. Dep't of Prot. and Reg. Servs.*, 380 F.3d 872, 882 (5th Cir. 2004). Rather, the prisoner must show that the defendant “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Brewster v. Dretke*, 587 F.3d 764, 770 (5th Cir. 2009) (quotation marks omitted).

“Deliberate indifference is not established when medical records indicate that the plaintiff was afforded extensive medical care by prison officials.” *Brauner v. Coody*, 793 F.3d 493, 500 (5th Cir. 2015) (quotation marks and brackets omitted). The Constitution does not require that prisoners receive optimal care, and the fact that a prisoner’s medical treatment “may not have been the best that money could buy” is insufficient to establish a Constitutional claim. *Mayweather v. Foti*, 958 F.2d 91 (5th Cir. 1992); *see also Gobert*, 463 F.3d at 349 (“[D]eliberate indifference exists wholly independent of an optimal standard of care.”); *McMahon v. Beard*, 583 F.2d 172, 174 (5th Cir. 1978) (“[The] plaintiff stated that he had not received ‘optimum’ or ‘best’ medical treatment. Were this the legal standard, a trial of the issues might be required.”).

At bottom, the deliberate-indifference standard “permits courts to separate omissions that amount to an intentional choice from those that are merely unintentionally negligent oversights.” *Southard v. Tex. Bd. Of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997) (quotation marks and brackets removed). Indeed, it is identical to the test for “subjective recklessness” used in criminal law, which “generally permits a finding of

recklessness only when a person disregards a risk of harm of which he is aware" and does not permit such a finding based on mere "failure to alleviate a significant risk that [the person] should have perceived but did not[.]" *Farmer*, 511 U.S. at 836–40.

IV. TUSTIN'S ALLEGATIONS DO NOT RISE TO THE LEVEL OF DELIBERATE INDIFFERENCE.

There are seven defendants left in this case (36 have been dismissed): Dr. Mainous; Dr. Russo; Dr. Hamilton; Nurse LeCuyer; Paul Strunk, an administrator in the prison unit infirmary; Warden Frankie Reescano; and Brad Livingston, former Executive Director of the TDCJ. The Court doubts that Tustin has sufficiently alleged that Strunk, Reescano, or Livingston had any involvement in the purported Eighth Amendment violation; but that question is immaterial because Tustin's factual allegations do not state a claim under the Eighth Amendment. Tustin generally claims that, when he developed painful dental problems, the defendants ignored his complaints and refused for four years to perform a necessary tooth extraction (Dkt. 77-2 at pp. 6–7). The delay of medical care can constitute an Eighth Amendment violation, "but only if there has been deliberate indifference that results in substantial harm." *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (quotation marks and brackets omitted). The Court sympathizes with Tustin; but his allegations, and the medical records that he himself has attached and summarized, do not establish that anyone who treated him acted with deliberate indifference to his pain.

The Court disagrees that anyone “refused” to help or treat Tustin. As discussed above, Tustin had a complicated, problematic medical history even before he started experiencing the dental problems that formed the basis of this lawsuit. In fact, the remarkable constellation of risk factors presented by Tustin’s physical constitution evidently made standard treatment of his dental problems nearly impossible in the prison setting. The unit dentists wanted to extract Tustin’s teeth on-site, but Tustin is allergic to so many local anesthetics that his options were limited to surgery under general anesthesia (which the unit dentists could not do) or surgery with no anesthesia. The latter seemed to be off the table: when Tustin tried to endure a tooth restoration without anesthetic, he became nonresponsive, blacked out, and had to be taken to the emergency room—and one would imagine that a tooth extraction is every bit as painful, and likely more. To further complicate the circumstances, Tustin’s physical condition also made transporting him to UTMB, which was necessary if general anesthesia was the only choice, a gamble. When Tustin was put on a bus to Galveston for a scheduled tooth extraction appointment at UTMB, he had a seizure and a stroke and had to be diverted to another prison unit’s emergency room. Even if Tustin could get to UTMB, the UTMB dentists, understandably, refused to put him under general anesthesia until a neurosurgeon said that it was safe; and his frequent seizures and other neurological symptoms, judging from the medical records, befuddled the UTMB neurology department. Exacerbating matters were Tustin’s cardiovascular problems, which caused him to fail at least one cardiac stress test and eventually required surgery. In light of the

heart problems, unit doctors sought assurance from cardiovascular specialists that Tustin could handle general anesthesia. Looking at the medical records and Tustin's own descriptions of his interactions with the doctors and dentists, it is apparent that the delay in Tustin's dental care resulted from concern for his welfare, not indifference to it. It would have been more reckless of the medical providers *not* to wait to put Tustin under general anesthesia.

Tustin acknowledges that he was seen by many doctors and dentists on many occasions but complains that his referrals to and between specialists were not expedited and were instead characterized as "routine" referrals (Dkt. 77-1 at p. 12). He further argues that he could have been transferred to a different unit or to a free-world hospital with access to better pain medication until he was cleared for oral surgery (Dkt. 77-2 at pp. 6-7). These allegations "suggest[] nothing more than a difference in opinion as to the appropriate method of treatment under the circumstances" and are inadequate to state a claim of deliberate indifference. *Stewart v. Murphy*, 174 F.3d 530, 535 (5th Cir. 1999) (holding that a prison doctor was not deliberately indifferent to an inmate's serious medical needs when she exercised her medical judgment and decided to treat the inmate, who ultimately died, at the prison hospital rather than transferring him to an outside hospital). Again, the medical providers showed clear concern for Tustin; during the time that his various disorders were impeding attempts to treat his underlying dental problems, they attentively treated the symptoms of those problems. Cf. *Mendoza v. Lynaugh*, 989 F.2d 191, 193 (5th Cir. 1993) (holding that a delay in an inmate's transfer to a unit where

physical therapy was available for his fractured spine did not state a claim when the inmate's allegations and medical records established that unit doctors provided treatment for his back problems, including a more comfortable brace, during the delay). Even assuming that the providers were negligent (or even grossly negligent) in handling referrals and transfers, Tustin still has not stated a claim against them. *See Whitley v. Hanna*, 726 F.3d 631, 641 (5th Cir. 2013) (clarifying that gross negligence is "a heightened degree of negligence," while deliberate indifference is "a lesser form of intent") (quotation marks omitted).

Tustin further attempts to state a cause of action against Livingston under Texas state law by citing to Section 493.006 of the Texas Government Code (Dkt. 77-1 at p. 26). The cited provision simply lists the minimum qualifications required for a person to serve as Executive Director of TDCJ. This is not sufficient to state a cause of action; construed as charitably as possible, the citation to the Government Code constitutes a threadbare recital of elements. *See Iqbal*, 556 U.S. at 678. It is not even clear that the cited provision creates a cause of action under Texas state law. *See Million v. Grounds*, No. 5:14-CV-11, 2015 WL 5521989, at *7 (E.D. Tex. Sep. 17, 2015) ("Neither Administrative Directive 10.20 nor Texas Government Code art. 493.006 establish private causes of action in federal court for state prisoners."). In any event, the Court has dismissed Tustin's federal claims and declines to exercise supplemental jurisdiction over his state-law claims. *See* 28 U.S.C. § 1337(c)(3).

The actions of the medical providers in this case did not evince the requisite wanton disregard for Tustin's dental needs. Tustin has not stated a viable claim under Section 1983.

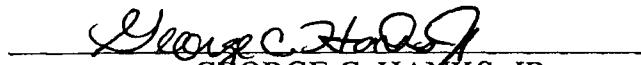
V. CONCLUSION

Based on the foregoing, the Court **ORDERS** as follows:

1. Tustin's federal claims are **DISMISSED WITH PREJUDICE** under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim on which relief may be granted.
2. Tustin's claims under Texas state law are **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 1367(c)(3).
3. All pending motions are **DENIED** as moot.

The Clerk is directed to provide a copy of this order to the parties. The Clerk will also provide a copy of this order by regular mail, facsimile transmission, or e-mail to the District Clerk for the Eastern District of Texas, Tyler Division, 211 West Ferguson, Tyler, Texas, 75702, Attention: Manager of the Three-Strikes List.

SIGNED at Galveston, Texas on September 29, 2016.


GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**