

App'x A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 22 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THEODORE CABANISS, Guardian ad
Litem to Minor Child T.C.,

Plaintiff-Appellant,

v.

PFIZER, INC.,

Defendant-Appellee.

No. 23-55297

D.C. No.

3:22-cv-01242-WQH-AHG

Southern District of California,
San Diego

ORDER

Before: BENNETT, BADE, and COLLINS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

The petition for panel rehearing is DENIED.

App'x B

NOT FOR PUBLICATION

FILED

FEB 9 2024

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3:22-cv-01242-WQH-AHG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted February 9, 2024**

Before: BENNETT, BADE, and COLLINS, Circuit Judges.

Theodore Cabaniss, guardian ad litem to minor child T.C., appeals from the district court's order granting Pfizer, Inc.'s motion to dismiss. *T.C. v. Pfizer, Inc.*, No. 22-cv-01242-WQH-AHG, 2022 WL 17578871 (S.D. Cal. Nov. 9, 2022). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Cabaniss does not challenge the district court’s conclusion that the Public Readiness and Emergency Preparedness Act (the “PREP Act”) immunized Pfizer from the claim asserted in the complaint.¹ *See id.* at *2; *see also* 42 U.S.C. § 247d-6d(a)(1). On appeal, he fails to make any distinct arguments concerning the merits of this determination. Cabaniss has never disputed that the PREP Act applies. For example, he has never disputed that Pfizer is a “[c]overed person” under the PREP Act, 42 U.S.C. § 247d-6d(i)(2), that the Pfizer COVID-19 vaccine allegedly administered to T.C. is a “[c]overed countermeasure” under the PREP Act, *id.* at § 247d-6d(i)(1), or that the administration of Pfizer’s COVID-19 vaccine to T.C. “played some role in bringing about or contributing to [T.C.’s injury].” *Hampton v. California*, 83 F.4th 754, 763–64 (9th Cir. 2023); *see* 42 U.S.C. § 247d-6d(a)(1).

¹ The district court granted Pfizer’s motion to dismiss because it found that the PREP Act conferred immunity on Pfizer. *T.C.*, 2022 WL 17578871, at *1–2. While we agree with the district court that Pfizer enjoys PREP Act immunity, we disagree that it lacked subject matter jurisdiction. Title 42 U.S.C. § 247d-6d(d)(1) states: “Subject to subsection (f), the sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct, as defined pursuant to subsection (c), by such covered person.” Section 247d-6d(e)(1) also provides that “[a]ny action under subsection (d) shall be filed and maintained only in the United States District Court for the District of Columbia.” But Cabaniss did not bring a claim under § 247d-6d(d)—he brought a medical malpractice claim and did not dispute Pfizer’s assertion that he “d[id] not assert a willful misconduct claim.” As we have held, “the PREP Act is not a complete preemption statute” and thus does not “displace the non-willful misconduct claims” brought under state law. *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 688 (9th Cir. 2022).

Cabaniss's failure to dispute the district court's determination on these issues results in a forfeiture of any related arguments. *See United States v. Turchin*, 21 F.4th 1192, 1198–99 (9th Cir. 2022).

On appeal, Cabaniss presents several arguments that were not adequately presented to the district court. He argues that the PREP Act violates the Fourteenth Amendment and asserts that Pfizer is “guilty [under] criminal law, consumer protection law and tort law,” and “that Pfizer is also guilty of reckless homicide because [it] did not educate the public o[n] the dangers of the vaccine.” Cabaniss forfeited these arguments by failing adequately to present them to the district court. *See Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004); *see also AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–15 (9th Cir. 2020) (explaining that “[a]bsent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal” and that “[a] party’s unexplained failure to raise an argument that was indisputably available below is perhaps the least ‘exceptional’ circumstance” (citations omitted)).

Furthermore, in addition to failing to present any arguments based on the Fourteenth Amendment in the district court, Cabaniss forfeited this argument on appeal by failing to sufficiently develop it. *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993) (stating that issues not supported by argument in a pro se brief are abandoned).

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App'x C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

T.C., minor by and through his
Guardian Ad Litem, THEODORE
CABANISS,

v.
Plaintiff,

PFIZER, INC.,

Defendants.

Case No.: 22-cv-01242-WQH-AHG

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss the Complaint filed by Defendant Pfizer, Inc. (ECF No. 4.)

I. BACKGROUND

One June 28, 2022, Plaintiff initiated this action by filing a Complaint in state court. (See ECF No. 1-2.) The Complaint alleges that Plaintiff received a COVID-19 vaccine developed by Defendant on June 7, 2021. The Complaint alleges that “soon after” receiving the vaccine, Plaintiff “developed ITP” (Immune Thrombocytopenia), which causes him to “no longer produce[] platelets,” and has suffered other serious negative health consequences “as a result of the shot.” *Id.* at 3. The Complaint brings a claim for medical malpractice against Defendant and requests compensatory and punitive damages.

On August 23, 2022, Defendant removed the action to this Court. (ECF No. 1.)

1 On August 30, 2022, Defendant filed the Motion to Dismiss the Complaint. (ECF
 2 No. 4.) Defendant contends that the Court lacks subject matter jurisdiction over Plaintiff's
 3 claim because the Public Readiness and Emergency Preparedness Act ("PREP Act"), 42
 4 U.S.C. §§ 247d-6d, 247d-6e, provides Defendant immunity from Plaintiff's claim.
 5 Defendant contends in the alternative that the Complaint should be dismissed because it
 6 does not satisfy the procedural requirements of the PREP Act or Rule 8 of the Federal
 7 Rules of Civil Procedure.

8 On September 1, 2022, and September 6, 2022, the Court received two Letters from
 9 Plaintiff. (ECF Nos. 5, 7.) The first Letter describes Plaintiff's alleged injuries, their effect
 10 on Plaintiff and his family, and the basis for Plaintiff's requested relief. The second Letter
 11 attaches a copy of a bill summary of the National Childhood Vaccine Injury Act of 1986
 12 ("NCVIA"), 42 U.S.C. § 300aa-1, *et seq.* and states that Plaintiff "hope[s] this act of 1986
 13 allows [Plaintiff] ... a fair hearing on his injury." (ECF No. 7 at 3.)

14 On September 20, 2022, Defendant, construing Plaintiff's Letters as an opposition,
 15 filed a Reply. (ECF No. 9.) Defendant contends that Plaintiff failed to address Defendant's
 16 asserted bases for dismissal. Defendant further contends that the provisions of the NCVIA
 17 are inapplicable to this action.

18 On October 7, 2022, Plaintiff filed a Response in opposition to the Motion to Dismiss
 19 the Complaint. (ECF No. 13.) The Response discusses the merits of Plaintiff's underlying
 20 claims and contends that the PREP Act is unconstitutional.¹

21 **II. DISCUSSION**

22 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move
 23 for dismissal on the basis that the court lacks jurisdiction over the subject matter of the
 24 action. *See Fed. R. Civ. P. 12(b)(1).* The burden is on the plaintiff to establish that the court
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 27
 28 ¹ Although Plaintiff's Response is untimely, the Court considers all the filings in the record in ruling on
 Defendant's Motion to Dismiss the Complaint.

1 has subject matter jurisdiction over the action. *See Assoc. of Med. Colls. v. United States*,
 2 217 F.3d 770, 778–79 (9th Cir. 2000).

3 Defendant contends that the Court lacks jurisdiction over Plaintiff's claim pursuant
 4 to the PREP Act. The PREP Act provides:

5 Subject to the other provisions of this section, a covered person shall be
 6 immune from suit and liability under Federal and State law with respect to all
 7 claims for loss caused by, arising out of, relating to, or resulting from the
 8 administration to or the use by an individual of a covered countermeasure if a
 9 declaration under subsection (b) has been issued with respect to such
 10 countermeasure.

11 42 U.S.C. § 247d-6d(a)(1). “Covered countermeasures” includes products used to mitigate,
 12 prevent, or limit the harm of a pandemic or epidemic. *See id.* §§ 247d-6d(i)(1), (7).
 13 “Covered persons” includes entities that are manufacturers or distributors of covered
 14 countermeasures. *See id.* § 247d-6d(i)(2). The “sole exception” to immunity is for an
 15 exclusive federal cause of action for injury “caused by willful misconduct” brought in the
 16 United States District Court for the District of Columbia. *Id.* §§ 247d-6d(d), (e).²

17 On March 17, 2020, the Department of Health and Human Services issued a
 18 declaration that designated COVID-19 vaccines as covered countermeasures under the
 19 PREP Act. *See* 85 Fed. Reg. 15198-01, 15202. Plaintiff's Complaint alleges that his injury
 20 resulted from his use of a COVID-19 vaccine manufactured by Defendant. The Court
 21 concludes that Defendant is facially immune from suit in this Court under the PREP Act.

22 Notwithstanding the foregoing, Plaintiff contends that he is entitled to proceed
 23 because the PREP Act is unconstitutional. However, Plaintiff does not identify the
 24 provision of the Constitution violated by the PREP Act or explain why he believes the
 25 PREP Act is unconstitutional. While pro se filings are liberally construed, the Court is
 26 unable to address Plaintiff's constitutionality argument on the present record.

27
 28 ² The PREP Act further provides for a no-fault compensation program for eligible individuals. *See id.* §
 247d-6e.

1 Plaintiff alternatively contends that he is entitled to proceed pursuant to the NCVIA.
2 However, Plaintiff's citation to the NCVIA is unavailing because the NCVIA does not
3 cover COVID-19 vaccines. *See* 42 U.S.C. § 300aa-14(a). Defendant's Motion to Dismiss
4 the Complaint is granted because the Court lacks subject matter jurisdiction over Plaintiff's
5 claim.³

6 **III. CONCLUSION**

7 IT IS HEREBY ORDERED that the Motion to Dismiss the Complaint (ECF No. 4)
8 is granted. The action is dismissed without prejudice. The Clerk of the Court shall close
9 the case.

10 Dated: November 9, 2022


11 Hon. William Q. Hayes
12 United States District Court

27 _____
28 ³ The Court does not reach Defendant's alternative arguments for dismissal.